IN THE COURT OF APPEALS 12/03/96

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00552 COA

IRENE FLEMING

APPELLANT

v.

CITY OF YAZOO CITY, PUBLIC SERVICE COMMISSION

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ROBERT LEWIS GIBBS

COURT FROM WHICH APPEALED: YAZOO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JOHN S. KNOWLES

ATTORNEY FOR APPELLEE:

JOSEPH L. MCCOY

NATURE OF THE CASE: CIVIL- TORT - JURY SELECTION - *BATSON*

TRIAL COURT DISPOSITION: JUDGMENT FOR PLAINTIFF/APPELLANT

BEFORE BRIDGES, P.J., BARBER, AND MCMILLIN, JJ.

BARBER, J., FOR THE COURT:

Irene Fleming brought suit against Yazoo City, a Mississippi municipality, alleging that the city was

negligent in failing to install or maintain a water meter box causing a dangerous condition which resulted in Fleming falling and injuring herself. Fleming prevailed in the Circuit Court of Yazoo County and was awarded damages for her injuries. Fleming now appeals to this Court asserting that the trial court's denial of two of her peremptory challenges to jurors constitutes reversible error. Yazoo City argues on cross appeal that the trial court was in error in awarding Fleming pre-judgment interest against a political subdivision of the State of Mississippi.

FACTS

During voir dire, Fleming exercised several peremptory challenges to remove jurors from the panel. Two of these peremptory challenges were denied by the trial court concluding that Fleming failed to articulate a race-neutral reason for the challenges and that the reasons offered were merely pretextual. Fleming had exercised the peremptory challenges in an attempt to remove Dudley Pillow and William Perry, Jr. from the jury. Fleming is black, and both Pillow and Perry are white.

Fleming's objection to Dudley Pillow was based on the fact that he was a self-employed farmer. Regarding Pillow, Fleming's counsel stated that "he sat there and wouldn't look at me when I did the voir dire with his arms crossed the whole time." Furthermore, Fleming's counsel stated that he did not believe that Pillow would be "a very receptive juror in this case." After hearing Fleming's arguments for a race-neutral reason to justify her peremptory challenge of Pillow and Yazoo City's counter arguments, the trial court reinstated Pillow to the jury. The trial court concluded that the reasons offered by Fleming for the peremptory challenge to Pillow were not legitimate nondiscriminatory reasons.

Regarding the peremptory challenge to Perry, Fleming's counsel complained that Perry was an insurance agent who "works for a local company here in town that may have some sort of insurance dealings with these people." Additionally, counsel stated that Perry's age was a factor of concern. Again, after giving Yazoo City an opportunity to respond to the reasons offered by Fleming, the trial court concluded that Perry would be restored to a position on the jury. In neither of these challenges did the trial court make an on-the-record finding detailing its analysis of the merits of the parties' arguments.

ISSUES

I. WHETHER THE CIRCUIT COURT ERRED IN DISALLOWING FLEMING'S PEREMPTORY CHALLENGES TO JURORS DUDLEY PILLOW AND WILLIAM PERRY JR.

II. WHETHER THE CIRCUIT COURT ERRED IN IMPOSING PRE-JUDGMENT INTEREST ON A POLITICAL SUBDIVISION OF THE STATE OF MISSISSIPPI IN ITS APPLICATION OF SECTION 75-17-7 OF THE MISSISSIPPI CODE.

ANALYSIS

Irene Fleming argues that the trial court acted erroneously in disallowing her peremptory challenges of two of the jurors in her civil case against Yazoo City. The trial court scrutinized Fleming's challenges under a *Batson* analysis, requiring that she provide race-neutral reasons for the peremptory challenges of these jurors. *See Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (holding peremptory challenges of jurors based solely on racial considerations to be violative of Equal Protection Clause of the Fourteenth Amendment to the United States Constitution). In order to understand the issues raised by Fleming, a short review of *Batson* is necessary. Although *Batson* was originally designed to protect criminal defendants, the Supreme Court subsequently held that it also applies to civil cases. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 630 (1991); *see Dedeaux v. J.I. Case Co*., 611 So. 2d 880, 883 (Miss. 1992) (acknowledging applicability of *Batson* to civil cases). The United States Supreme Court also extended *Batson* to allow either party to raise the issue of racial discrimination in the jury selection process. *Edmonson*, 500 U.S. at 630. Additionally, the more recent Supreme Court opinions hold that the Equal Protection right being protected by *Batson* and its progeny is that of the jury member "not to be excluded from [the jury] on account of race." *Powers v. Ohio*, 499 U.S. 400, 409 (1991). This is therefore a right no longer unique to the criminal defendant.

Under *Batson*, the party raising an objection to his opponent's exercise of a peremptory challenge must present matters to the court that would suggest a prima facie case that racial discrimination was the sole motivation for the challenge in question. *Batson*, 476 U.S. at 95-96; *see also Lockett v. State*, 517 So. 2d 1346, 1348-49 (Miss. 1987) (holding that opponent of peremptory challenge must establish prima facie showing of discrimination). It is only after the objecting party has made a prima facie case of racial discrimination that the burden shifts to the opposing party to come forward with race-neutral reasons to support its peremptory challenge. *Batson*, 476 U.S. at 97. However, some trial courts ignore the prima facie case inquiry and require the opposing party to state race-neutral reasons to support the peremptory challenge, merely upon the objecting party's assertion that racial discrimination motivated the challenge. The Supreme Court has stated that if the trial court ignores the prima facie case inquiry, and "rule[s] on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." *Hernandez v. New York*, 500 U.S. 352, 359 (1991). Thus, the trial court is allowed to proceed directly into an inquiry as to the existence of race-neutral reasons supporting the peremptory challenge at issue.

In determining if a race-neutral reason exists, the trial court's findings are reviewed with great deference "and will not be overturned unless there appears an error that is against the overwhelming weight of the evidence." *Harper v. State*, 635 So. 2d 864, 868 (Miss. 1994); *see also Hatten v. State*, 628 So. 2d 294, 299 (Miss. 1993) (holding that only clearly erroneous findings will be overturned on appeal). In analyzing a party's reason offered to support a peremptory challenge objected to on *Batson* grounds, the proper inquiry is not whether the reason offered is reasonable, but whether or not it is genuine. *Purkett v. Elem*, 115 S. Ct. 1769, 1771 (1995). Perfectly sound reasons may be rejected by the trial court if found to be pretextual, and even "silly or superstitious" reasons, if honestly advanced, do not automatically fall before a *Batson* challenge. *Purkett*, 115 S. Ct. at 1771. Of paramount consideration is that the reasons offered need not "rise to the level justifying exercise of a challenge for cause." *Batson*, 476 U.S. at 97. Again, the Supreme Court has stated that "[u]nless a discriminatory intent is inherent in the [party's] explanation, the reason offered will be deemed race-neutral." *Hernandez*, 500 U.S. at 360. This is a factual determination within the sound discretion of

the trial court. *See Lockett v. State*, 517 So. 2d 1346, 1350 (Miss. 1987) (stating that trial court is "proper forum for resolution of factual controversies").

To assist an appellate court in its review of a trial court's analysis of the arguments made during a *Batson* inquiry, the Mississippi Supreme Court requires that the trial court make an on-the-record factual determination of the merits of the reasons offered by the proponent of the peremptory challenge at issue. *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993); *see also Henderson v. State*, 641 So. 2d 1184, 1185 (Miss. 1994) (noting importance of requiring trial court to make on-the-record determination in order to assist appellate court in effectively reviewing trial court's ruling). The *Hatten* requirement of an on-the-record finding dictates that the trial court may not simply consider the arguments and rule on the *Batson* issue, without explaining the basis of its ruling. Pursuant to *Hatten*, the trial court is bound to conduct an on-the-record review of the allegedly race-neutral reasons, including an explanation of the court's assessment of the merit (or lack thereof) of the reasons offered. *Hatten* clearly requires the trial court to dictate into the record a factual determination of the merits of the reasons cited by a party as the basis for its peremptory challenges. By creating a record of the trial court's analysis, the appellate court is freed from having to speculate as to which of the reasons offered was determinative in the trial court's decision. *Hatten*, 628 So. 2d at 298; *see also Henderson*, 641 So. 2d at 1185 (stating that it is "nearly impossible" to review whether prospective juror was deprived of right to serve on jury because of race, in absence of on-the-record determination by trial court).

In the case at issue, the trial court failed to make on-the-record findings to explain its analysis of the reasons offered by Fleming in support of her peremptory challenges to jurors Pillow and Perry. Accordingly, we must remand this matter to the trial court for on-the-record findings stating the court's reasons for rejecting the challenges at issue. The trial court may base its findings solely by examining the transcript of the hearing on the challenges or by conducting such other proceedings as it believes are justified.

Regarding Yazoo City's assignment of error on cross appeal, we hold that the trial court acted erroneously in assessing pre-judgment interest against Yazoo City, a political subdivision of the State of Mississippi. As the Mississippi Supreme Court stated in *City of Jackson v. Reed*, 103 So. 2d 6, 8 (Miss. 1958), it is well established in Mississippi jurisprudence that a political subdivision of the state is not liable for interest on a judgment, in the absence of a contract or statute which specifically provides for such interest. *Reed*, 103 So. 2d at 8; *see also City of Mound Bayou v. Roy Collins Constr. Co.*, 457 So. 2d 337, 340 (Miss. 1984) (holding political subdivision not liable for interest on judgment). The provisions of section 75-17-1 of the Mississippi Code do not specifically make political subdivisions liable for interest. Accordingly, interest should not have been taxed against the Defendant/Cross Appellant City of Yazoo City. Therefore, we reverse the order of the circuit court on this issue.

THIS CAUSE IS REMANDED TO THE CIRCUIT COURT OF YAZOO COUNTY FOR A MAXIMUM PERIOD OF FORTY-FIVE (45) DAYS WITHIN WHICH THE COURT IS DIRECTED TO CONDUCT A *BATSON/McCOLLUM* REVIEW OF FLEMING'S CHALLENGES IT DENIED. THE CIRCUIT COURT SHALL INCLUDE A TRANSCRIPT OF THE REASONS FOR ITS REJECTING THE TWO CHALLENGES, STATED ON THE RECORD OF ANY HEARING OR SEPARATELY ENTERED IN WRITING, IN

ACCORDANCE WITH THE PRINCIPLES ANNOUNCED IN *HATTEN*. UPON OUR RECEIPT, THIS COURT WILL RESUME PROCEEDINGS ON APPEAL.

COLEMAN, DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY FRAISER, C.J., BRIDGES, P.J., AND PAYNE, J.

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THOMAS, J., CONCURRING IN PART, DISSENTING IN PART:

I concur with the majority's disposition of Yazoo City's assignment of error on cross appeal. I part company with my colleagues on remanding this case to the trial court for it to make on-the-record findings to explain its analysis in refusing peremptory challenges to jurors Pillow and Perry. Since the trial court made sufficient on-the-record factual findings to allow this Court to review the ruling on appeal, there is no need to remand this case for further proceedings. The trial court properly ruled that Fleming's reasons for these two peremptory challenges were not race neutral and seated the jurors. Since this ruling is entitled to great deference and is not clearly erroneous, I would affirm.

The following exchange took place during jury selection:

> BY MR. KNOWLES: Your Honor, it seems to me like what he's done is just went through and struck all the black people, and I would like to hear some--race neutral reasons for doing that.

BY THE COURT: All right, Mr. McCoy, I need you to raise a nondiscriminatory reason for your strikes.

BY MR McCOY: Your honor, we'd be happy to, but we'd like to hear Mr. Knowles' race neutral reasons because he went through and struck all the white people.

BY MR. KNOWLES: I've still got a strike left.

BY THE COURT: Let's do it with all the jurors. Let's start with you, Mr. Knowles. Your first strike was Dudley Pillow.

> BY MR. KNOWLES: Yes, sir. He is a self-employed farmer. He sat there and wouldn't look at me when I did the voir dire with his arms crossed the whole time. I don't believe he is a very receptive juror in this case.

BY THE COURT: What do you say about that reason, Mr. McCoy?

BY MR. McCOY: Just sitting here and not looking at Mr. Knowles during voir dire is not a reason. The fact that he's self-employed is certainly not a reason.

BY THE COURT: I'm putting him back on.

BY MR. KNOWLES: Putting him back on?

BY THE COURT: Yes. That's not a legitimate nondiscriminatory reason. Mr. McCoy, let me just go down this list. Windy Wilson was your first strike.

BY MR. McCOY: Your Honor, I struck her because she has a son by the plaintiff's nephew. I felt like that was a strong relationship between the plaintiff and that potential juror.

BY THE COURT: What about that one, Mr. Knowles?

BY MR. KNOWLES: I can understand that.

BY THE COURT: All right, that strike will be allowed. Charlean Moton was the next strike by you, Mr. McCoy.

BY MR. McCOY: Your Honor, the reason for striking her is she lives out-of-town. She lives in Benton. She works for Home Health Care. I have had experience with juries that -- I've just experienced them to be more leaning toward the plaintiff in cases, plus my understanding is that she came up early during the Court's questioning of jurors and requested the Court to let her off. I felt like that she didn't want to be here. She would probably not be a fair juror to either side. Those were the reasons for striking her.

BY THE COURT: What about that?

BY MR. KNOWLES: That's the same thing my experience is, the self-employed farmer that won't look at me. They are not receptive jurors. That's the same thing there. I've had lots of experience with those kind of people, and I've never found them to be good jurors for the plaintiff.

BY MR. McCOY: No, your Honor, the main motivating reason there was she came up and asked the Court to get off.

BY THE COURT: I'm putting her back on. Tumlin was the plaintiff's challenge.

BY MR. KNOWLES: Right. Billy Tumlin?

BY THE COURT: Yes.

BY MR. KNOWLES: He's an insurance agent, and I've had a lot of experience with insurance agents that they don't award anybody any money either.

BY THE COURT: What about that?

BY MR. McCOY: Your Honor, there is no law or rule that I know of any where. This is not a suit that involves insurance. This is a suit against the Public Service Commission, and that is absolutely no qualification for disqualification.

BY MR. KNOWLES: And the other thing is he knows her from up there at the store. I don't know what the basis of all that experience is and don't want to take a risk on him.

BY MR. McCOY: But the Court asked him that question, and he said that would be absolutely no problem.

BY THE COURT: But that is a legitimate reason for the strike. I think the fact that he does know her would be a legitimate nondiscriminatory reason, so I'm going to allow that strike to remain.

BY MR. McCOY: So that will be P-1, your Honor?

BY THE COURT: Yes, that will be P-1 Barbara Mills will be next as to the defendant's challenge.

BY MR. McCOY: Barbara Mills lives out-of-town. Your Honor, I noticed her. She looked like a typical plaintiff's juror. She had on a lot of jewelry. She had on a lot of flashy looking clothes. When John talked to her, she seemed to agree with everything he said. And then when I talked to her, she looked down. Those were the reasons that I challenged her.

BY THE COURT: Mr. Knowles, what do you say to that?

BY MR. KNOWLES: That is exactly the same kind of thing I did with Mr. Pillow. He is a defense witness from the "git-go." He looks down. He won't look at me or anything else. It's the same -- those are the same reasons, and I don't believe that's a nondiscriminatory reason.

BY THE COURT: I'm going to put Ms. Mills back on. That brings us up to William Perry, the plaintiff's strike.

BY MR. KNOWLES: This is another insurance agent who works for a local company here in town that may have some sort of insurance dealings with these people. It's also because of his age. That's basically the reasons.

BY THE COURT: Mr. McCoy?

BY MR. McCOY: Your Honor, his age is listed as 63. That's not an age for disqualification. If it is, he didn't claim it. It also shows that he works as an agent for Barnwell and Barbour. Again, this is not a case that involves a suit against an insurance agency or even insurance. It's against the Public Service Commission. I submit that that is not grounds.

BY MR. KNOWLES: Judge, to deny this case involves insurance is just a farce. Everybody knows this case involves insurance, and I'm certain he does. He could probably even tell you what the limits are.

BY THE COURT: I'm going to put him on. That's 12.

BY MR. KNOWLES: On or off, sir?

BY THE COURT: On. That's 12 jurors. That's our 12. Annie Frances Johnson then will be tendered to the plaintiff as an alternate?

BY MR. KNOWLES: Annie Johnson is an acceptable alternate.

BY THE COURT: It is tendered to you, Mr. McCoy. You had struck her before. So if you are going to strike her as an alternate, I need a legitimate nondiscriminatory reason.

BY MR. McCOY: Yes, your Honor. She has known the plaintiff all of her life, she said. And her -- a relative of hers is married to relatives of the plaintiff. I wrote down here sister-in-law, but she corrected that. It is not that close, Also, she tore a knee ligament in similar circumstances, she said, and her uncle works for the Yazoo City Public Service

Commission. Those are the reasons.

BY THE COURT: What do you say to those reasons, Mr. Knowles?

BY MR. KNOWLES: The only one I think is legitimate is that she is somehow distantly related to this plaintiff, and she has answered all the questions concerning that, that it's not going to bother her. She was subjected to quite a bit of examination about that. The fact that she hurt her ankle before, I don’t see that that's a reason for disqualification. She told Mr. McCoy that she could put that out of her mind and not let that interfere with her at all.

BY THE COURT: That is a legitimate nondiscriminatory reason. So that challenge will be

allowed. That brings up Curtis Jones. He will be tendered to the plaintiff as an alternate.

BY MR. KNOWLES: As an alternate, right?

BY THE COURT: Yes.

BY MR. KNOWLES: I don’t have any problem with him being an alternate.

BY THE COURT: All right.

BY MR. McCOY: I don't have any problems with him.

BY THE COURT: Our jury then will consist of . . . Dudley Pillow . . . and William Perry. . . . Just so the record will be-clear, the jurors that I placed back in the box, it was my determination that the reason that was offered for the strikes were not legitimate nondiscriminatory reasons. And for those reasons, I put the jurors back in the box. All right, bring them in.

The Mississippi Supreme Court has required that a trial court make an on-the-record factual determination that each reason for a peremptory challenge is race neutral in order to (1) protect the rights of jurors and parties, and (2) "mak[e] clear the ruling of the trial judge for purposes of appellate review." *Hatten v. State*, 628 So. 2d 294, 295 (Miss. 1993). This on-the-record determination is required because such rulings are entitled to great deference and will not be overturned on appeal unless the rulings are clearly erroneous. *Id.* at 298 (citations omitted). Such rulings eliminate "the guesswork surrounding the trial court’s ruling." *Id*.

I do not think that the Mississippi Supreme Court intended for the rule established in *Hatten* to be construed to require remand in cases such as the instant case. The trial court conducted an extensive *Batson* hearing and seated four jurors whom the court found had been challenged for discriminatory reasons--two by the plaintiff and two by the defendant. The trial court excused three peremptorily challenged jurors--one challenged by the plaintiff and two by the defendant. If we require much more inquiry into the reasons for peremptory challenges and a trial court’s ruling on these reasons, we are in danger of completely destroying the entire system of peremptory challenges.

Additionally, the error, if any, was harmless since Fleming is appealing from a verdict in his favor. In fact, the jury verdict was unanimous, and the jury could have returned a verdict with only nine votes. Both jurors of which Fleming complains voted in his favor; Fleming appealed simply because he feels the jury should have awarded him more money than it did.

I think that the trial court, although perhaps not perfectly, at least adequately addressed the *Batson* issue. What else are we to require of trial courts--that they use some "magic words" in order to have a *Batson* ruling withstand appellate review? Because the record is sufficient to sustain the trial court’s determination that the reasons for the peremptory challenges of jurors Pillow and Perry were pretextual, I would affirm the ruling of the circuit court on this issue.

FRAISER, C.J., BRIDGES, P.J., AND PAYNE, J., JOIN THIS OPINION.