Circuit Court Anne Arundel County
Case No. C-02-CV-21-001587

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1298

September Term, 2023

KIM SHARPS

v.

JANE DOE

Beachley,
Kehoe, S.,
Wright, Alexander Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: May 9, 2025

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for persuasive value only if the citation conforms to Maryland Rule 1-104(a)(2)(B)

A jury in Anne Arundel County found Appellant, Kim Sharps, liable to Appellee, Jane Doe, for damages arising out of his transmitting HSV-2 (herpes virus) to her. Appellant filed a timely motion for JNOV, which was denied. The Appellant filed a motion for remittitur which was also denied. The Court reduced the amount of the judgment to $890,000.

Factual Background

Appellant and Appellee met in August 2020. In September, they began to date and in October, the relationship became sexual. At the outset of their romantic relationship, Appellee insisted that Appellant use a condom. Over time, Appellant communicated that he would be more comfortable if he did not have to use a condom. To accommodate Appellant's desire to forego using condoms, Appellee insisted that they be tested for sexually transmitted diseases (STDs). To her knowledge, Appellee never had sexual relations with someone who had an STD. Appellee stated that Appellant told her that the last time that he was tested for STDs was in early 2021 and that he had never tested positive for STDs. He did state that he tested positive for the strain of herpes that gives one cold sores (HSV-1). Appellant denied that Appellee had asked him to get tested. He did acknowledge that he had breakouts that were symptomatic of herpes prior to beginning the relationship with Appellee. Appellee felt that she had developed a sufficient level of trust with Appellant to rely on his statements that he did not have herpes.

Appellee stated that she and Appellant had a monogamous relationship with each other. Nevertheless, in December 2020, Appellee began to suspect that Appellant was

having relations with other women. In January 2021, Appellee began to experience vaginal irritation. In early February, she asked her gynecologist to test her for HSV-2. Appellee became concerned about the irritation because it appeared to be forming an ulcer.

When Appellee learned that she tested positive for herpes, she insisted that Appellant get tested. Appellant kept putting off his appointments to be tested. Eventually, Appellant allowed Appellee to access his medical portal to show her his positive results. She noticed that he was not positive for HSV-1, from which he claimed to have suffered, but was positive for HSV-2.

Appellee holds a Ph.D. from Howard University in microbiology. Her training in microbiology required her to understand virology and the life cycle of viral infections. Accordingly, Appellee was qualified to understand and interpret the antibody measurement of a virology test result. Appellee also had training as to how the herpes virus (HSV-2) is transferred from one person to another.

Appellee, over the objection of Appellant, was qualified as an expert witness in the field of microbiology, including recognition, diagnosis and transmission of HSV-2 genital herpes and other sexually transmitted diseases. Appellee testified that Appellant's test results indicated an antibody load of 16.82. An antibody level greater than 1.1 indicates an infection. The antibody level of 16.82 indicates that a person is suffering from an active infection or has recently had an active infection. That antibody level can also mean that the person has a chronic long-term infection. It is impossible to confuse HSV-2 genital herpes with HSV-1 which causes cold sores. Appellee believed that Appellant had been

willfully deceptive with her. Appellee confronted Appellant about his results, and he admitted that two of his former partners had tested positive for genital herpes.

Appellant objected to Appellee's testifying as an expert. Specifically, when the Appellee was offered as an expert, Appellant's counsel explained his objection:

> Too many hats, failure to designate her as an expert, failure to disclose any of this testimony during her deposition. When asked what opinions she might be offering, she offered none of these opinions. This is what I would call an unfair surprise. This is a backdoor expert. This is someone whose bias is through the roof. Certainly, I'm entitled to argue yeah, if you had another expert, you have them here, I certainly can make that argument. I've been given an opportunity to voir dire her. But the fact of the matter is, if you even look at the pretrial statement, she's listed under fact witnesses….
>
> At no point in time was she ever being offered as an expert witness. This is nothing more than an unfair surprise, Your Honor. . . . Yes, you can come back at us with you didn't send any discovery requests. Well, I deposed her, I asked her what opinions she would have, she had none. . . .
>
> We have scheduling orders in this courthouse where you have to designate an expert, and that was not done.

Appellee countered that during her deposition, Appellant asked whether she would be giving an opinion, and she responded, "Yeah, I expect if I need to I will." Appellee pointed out that, during her deposition, she was questioned extensively about aspects of HSV-2 and its transmission.

The trial court, citing *Turgut v. Levine*, 79 Md. App. 279, 291 (1989), determined that the Appellee could testify as her own expert and overruled Appellant's objection to her testifying as an expert.

After the parties exercised their peremptory strikes, counsel for Appellant objected to the jury as seated because they were all women, and his client was male.

THE COURT: Is the plaintiff satisfied?
PLAINTIFF'S COUNSEL: We are.
THE COURT: Is defense satisfied?
DEFENDNANT'S COUNSEL: No.
THE COURT: Why?
DEFENDANT'S COUNSEL: I'm just wondering if they were all women sitting there, Your Honor.
THE COURT: I understand that. But you guys picked who you wanted. It wasn't my, it wasn't my issue.
DEFENDANT'S COUNSEL: I understand. I'm not satisfied with this jury, Your Honor.
THE COURT: And what's your basis -- what's your –
DEFENDANT'S COUNSEL: I don't think this is a jury of my client's peers.
THE COURT: Okay. Well, you had the opportunity to make that happen. You were satisfied with your (indiscernible) so I'm going to overrule your objection.
DEFENDANT'S COUNSEL: Okay. Thank you.
THE COURT: Counsel, approach. I will not[e] for the record in this case that every single juror in this case is a female.

The court overruled this objection and proceeded to have the seated jurors sworn and excused the remaining jurors. During a break, after the attorneys made their opening statements, the court revisited the issue of the composition of the seated jury. The court asked counsel for Appellee why he had struck male jurors. Appellee's counsel responded by saying that the time to have raised a *Batson* challenge was prior to the jury's having been seated. Appellee's counsel insisted that any *Batson* challenge had been waived because the jury had been seated. Appellee's counsel insisted that, since the jury had been seated, Appellee was entitled to the jury. Ultimately, on the second day of the trial, after Appellee began to testify, the trial court revisited the Appellant's *Batson* challenge. The trial court ruled that the challenge was insufficient and denied it.

Questions Presented

1. Did the Court err in finding that the Defendant/Appellant failed to raise a *Batson* Challenge?
2. Did the Court err in admitting Plaintiff/Appellee as her own expert witness?
3. Did the Court err in choosing to exclude the issue of causation on the verdict sheet?

Discussion

1.) The *Batson* Challenge

Appellant contends that he raised an appropriate *Batson* challenge when he objected to the all-female jury as seated. A *Batson* challenge arises when an adverse party exercises peremptory strikes for an impermissible discriminatory purpose, or it exercises its peremptory strikes under the assumption that a juror cannot be impartial. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *See also Edmonds v. State*, 372 Md. 314, 329 (2002). *Batson* challenges also apply to gender-based discrimination in the selection of a jury. *J.E.B. v. Alabama ex rel. T.B*, 511 U. S. 127, 131 (1994). *Batson* challenges are available in civil trials. *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 630 (1991).

The standard of review of a *Batson* challenge is whether the trial judge's decision was clearly erroneous. *Khan v. State*, 213 Md. App. 554, 568 (2013). Accordingly, we afford the trial court great deference in its findings. *Id.* at 571. The trial court is able to get the feel of opposing advocates, to watch their demeanor and hear their intonations. *Id.* The trial court is also in a position to discern counsels' unspoken purposes. *Id.*

The exercise of peremptory strikes with the intent to exclude members of a protected class violates the Equal Protection Clause of the Fourteenth Amendment of the United

States Constitution. *Batson*, 476 U.S. at 89. There is a three-factor test to determine whether the exercise of a peremptory challenge discriminates against a protected class. Under *Batson*, if a party makes a prima facie case of discriminatory exercise of peremptory challenges, the adverse party must produce neutral explanations as to why it exercised its peremptory challenges. *Id.* at 97. The adverse party must articulate a neutral explanation in the case to be tried. *Id.* at 98. After these steps, it is incumbent on the trial judge to determine whether the objecting party has established purposeful discrimination. *Id.*

First, a party asserting a *Batson* challenge must make a prima facie case using some evidence to show that the other party has exercised its peremptory strikes in a discriminatory manner. *Batson*, 476 U.S. at 96–97. To establish a prima facie case the moving party must show that they are a member of a cognizable group and that the adverse party exercised peremptory challenges to remove prospective members of the jury on the basis that they are of the same protected class as the objecting party. *Batson*, 476 U.S. at 96. A challenging party must make the case that the totality of the factual circumstances raises an inference that the adverse party used its peremptory challenges to exclude jurors for a discriminatory purpose. *Id.*

If the challenging party establishes a prima facie case, the second step shifts the burden to the proponent, requiring the adverse party to produce a neutral explanation for its peremptory strikes. *Id.* at 97. The party exercising the peremptory strikes cannot meet this burden by simply asserting that it did not discriminate. *Id.* at 94. The explanation need not be persuasive or plausible but must be neutral, related to the case to be tried, clear and

reasonably specific, and legitimate. *Spencer v. State*, 450 Md. 530, 552 (2016); *see Ray-Simmons v. State*, 446 Md. 429, 436 (2016). The explanation will be deemed neutral unless a discriminatory intent is inherent. *Edmonds*, 372 Md. at 332. If the court is satisfied that a neutral explanation has been provided, then the court can proceed to step three to determine if the opponent of the strike has proved purposeful racial discrimination. *Ray-Simmons*, 446 Md. at 437.

Upon provision of a neutral explanation, the court proceeds to step three to ascertain "whether the opponent of the strike has proved purposeful racial discrimination." *Id.* (quoting *Purkett v. Elem*, 514 U.S. 765, 767 (1995)). "[T]he decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Edmonds*, 372 Md. at 330–31 (quoting *Hernandez v. New York*, 500 U.S. 352, 365 (1991)). The answer "rests in large part on a credibility assessment of the attorney exercising the peremptory challenge." *Id.* at 331. The trial court considers "the disparate impact of the prima facie discriminatory strikes on any one race; the racial make-up of the jury; the persuasiveness of the explanations for the strikes; the demeanor of the attorney exercising the challenge; and the consistent application of any stated policy for peremptory challenges." *Edmonds*, 372 Md. at 330. The trial judge is best situated for such an assessment, and accordingly, "[a]n appellate court will not reverse a trial judge's determination as to the sufficiency of the reasons offered unless it is clearly erroneous." *Gilchrist v. State*, 340 Md. 606, 627 (1995).

Appellant objected to the jury as seated because he was a male and the seated jury was entirely female. Although there was a discussion of the juror numbers that Appellee's counsel peremptorily struck, there was no identification of those particular jurors prior to the jury's having been sworn. Appellee contends that once the jury had been sworn, the court could not revisit the *Batson* challenge. We agree.

Citing *Ball v. Martin*, Appellant contends that he made a prima facie case by objecting to the all-female jury. 108 Md. App. 435, 442 (1996). In *Ball*, however, the moving party objected to the adverse party's striking one particular juror on the basis of race. *Id.* at 441. In the instant case, Appellant made a general objection to Appellee's use of peremptory strikes but did not point to the individual jurors who were stricken. Appellant could have deduced these individual jurors by comparing who was available to be seated versus who was actually seated. Appellant did not take that step. In this regard, *Ball v. Martin* is inapposite.

The peremptory strikes were strikes from the list. Rule 2-512(e)(2). The trial judge made the jury list and the written strikes a part of the record. When Appellant made his challenge, he did not specify which, if any, males that Appellee struck. This information could have been easily deduced by examining the jury list and considering Appellant's own strikes. This process would inform of those jurors struck by Appellee. Appellant did not identify any jurors whom Appellee struck. Instead, he merely posited that Appellee had struck only males and that the jury as seated was not a jury of Appellant's peers. Appellant did not state that he was making a *Batson* challenge. This general allegation was

insufficient to make a prima facie case. Appellant was required to identify the stricken jurors and proffer that those jurors were stricken for a discriminatory purpose. The trial court recognized that it was within Appellant's grasp to identify the stricken jurors at the time that he made his objection, but he failed to do so. Without having identified the gender of stricken jurors whom Appellee struck, Appellant failed to meet this threshold.

Appellant's objection to the seated jury is distinct from the challenge made in *Ball*, where the appellant's attorney specifically objected to opposing counsel's striking the only African American juror. 108 Md. App. at 440. We held that the appellant's objection was sufficient to meet a party's burden of setting forth a prima facie case when making a *Batson* challenge. *Id*. at 442. The circuit court noted that, when stating his objection to the seated jury, Appellant's counsel did not state that he was making a *Batson* challenge. By failing to identify the specific jurors who were struck prior to the jury's being sworn, Appellant failed to make a prima facie case for a *Batson* challenge. Appellant did not preserve his *Batson* challenge. The trial court's decision to deny Appellant's *Batson* challenge was not clearly erroneous.

2. Appellee's Expert Testimony

Appellant contends that the court abused its discretion in permitting the Appellee to testify as an expert witness. Appellant first contends that Appellee was not designated as an expert pursuant to the court's scheduling order. Rule 2-504(b)(1)(B). Appellant also posits that *Turgut v. Levine* is inapposite because, in that case, the Plaintiff, who designated

an additional expert, testified as an expert in rebuttal. 79 Md. App. at 283 (1989). In this case, Appellee was called as an expert in her case-in-chief.

Appellee counters that the pretrial order does not require the disclosure of experts because Rule 2-402(g)(1)(A) requires only disclosure of experts other than the party. Appellee, therefore, contends that there is no obligation of parties to disclose themselves as expert witnesses. Appellee notes that Appellant did not file interrogatories asking for the identification of expert witnesses. Further Appellee notes that during her deposition, she was asked questions about whether there needs to be an outbreak of herpes for there to be transmission; whether there needs to be shedding for there to be transmission; and whether visual lesions make transference more likely. Also, in her deposition, Appellee testified that Appellant's test results indicated that not only was he positive for HSV-2, but he had a high viral load. She also testified as to the significance of the high viral load.

Appellant's reliance on *Taliaferro v State*, 295 Md. 376 (1983) is misplaced. *Taliaferro* involved a defendant who notified the State of an alibi witness immediately before trial. Former Rule 741(d)(3)[1] provided that, if the State notified the defendant of the time, place and date of the alleged crime, and the defendant wished to produce an alibi witness, the defendant was required to notify the State of any witness who would testify that the defendant was not present at the time, place and date designated by the State. *Id.* at 378 n.1. On February 1, 1980, the State requested the defendant to identify any alibi witnesses, and the defendant's response was due on February 11, 1980. *Id.* at 379. Trial

[1] The current Rule for disclosure of alibi witnesses is Rule 4-263(e)(4).

was scheduled to begin on May 21, 1980. *Id.* at 380. The trial judge ruled that the defendant had not shown due diligence in procuring the alibi witness and denied the request to call him. *Id.* at 385. Our Supreme Court affirmed noting that there had been no attempt at compliance with the alibi rule and that the defendant failed to provide an excuse to justify the non-compliance. *Id.* at 391.

The trial court found that Appellee's education and knowledge of the subject matter qualified her to testify regarding the transmission of HSV-2. The court noted that there were no interrogatories nor any designation of an expert witness. The court further noted that the question came down to surprise that would be unduly prejudicial. On this point, the trial court found that there could be no surprise because of the line of inquiry in Appellee's deposition. Appellant had the opportunity to learn her opinions and, therefore, was not prejudiced by her testifying as an expert.

The trial judge did not abuse its discretion in permitting Appellee to testify as her own expert. The trial judge was not dismissive of Appellee's failure to name herself as an expert pursuant to the pre-trial scheduling order. He also noted that there were no interrogatories which might have identified the Appellee as an expert. It should be noted that Rule 2-402(g)(1)(A) allows for an inquiry about each expert, other than the party. Nevertheless, the trial court focused on the questions that Appellee was asked during her deposition and the information to which she testified. The trial court determined that this line of question and answer provided Appellant with notice that Appellee would be

testifying as an expert on her own behalf. We see no error in the trial court's decision to allow her to testify.

Appellant also contends that Appellee was not qualified as an expert witness. Rule 5-702 provides:

> Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine
>
> (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education,
>
> (2) the appropriateness of the expert testimony on the particular subject, and
>
> (3) whether a sufficient factual basis exists to support the expert testimony.

Appellant contends that, although Appellee testified as to her educational background, job history and familiarity with certain publications, her work did not include transmission of diseases, in particular HSV-2. Appellant contends Appellee's testimony relies on data models but does not connect the transmission of HSV-2 to him. Appellee contends that she relied on her own health status and the health status of former partners to conclude that Appellant was the source of her HSV-2 infection. Appellee explained that her low antibody level indicated that she was newly infected.

The standard of review of a decision to admit expert testimony is whether the trial court's decision was an abuse of discretion or founded upon an error of law. *Samsun Corp. v. Bennett*, 154 Md. App. 59, 68 (2003).

Relying on *Wood v. Toyota Motor Corp*., 134 Md. App. 315 (2000), Appellant contends that there was not a sufficient factual basis to qualify the Appellee as an expert

witness. In *Wood*, we affirmed a decision of the trial court denying an expert witness on airbag defects. *Id.* at 527. In that case, the trial court analyzed the proposed expert's qualifications. *Id.* at 521. However, the trial court concluded that the proposed expert's lack of familiarity with the airbag system of a 1993 Toyota Tercel and lack of testing prevented him from rendering an expert opinion. *Id.* at 522.

In the instant case, the trial court determined that the Appellee's doctorate in microbiology and understanding of the transmission of viral diseases was sufficient to qualify her as an expert witness. There was a sufficient factual basis to support Appellee's testimony regarding the transmission of HSV-2. There was no error in allowing her expert testimony.

3. Verdict Sheet

Appellant contends that the trial court erred by denying his request to include causation on the verdict sheet. We review the verdict sheet, as with jury instructions for abuse of discretion. *Applied Indus. Technologies v. Ludemann*, 148 Md. App. 272, 287 (2002). Appellant relies on *Hurt v. Chavis*, 128 Md. App. 626 (1999) to contend that causation should have been included in the verdict sheet. This reliance is misplaced. In *Hurt*, the defendant agreed that he caused a collision between his vehicle and the one in which the plaintiff was a passenger. *Id.* at 636. However, the defendant denied that he caused the injuries to the plaintiff. *Id.* We held that the inclusion of causation on the verdict sheet was proper because, although the defendant conceded that he caused the collision, he did not concede liability. *Id.* at 640. The case had been presented to the jury as though

damages were the only issue. *Id.* However, since liability was not conceded the inclusion of causation on the verdict sheet prevented the jury from being confused as to whether the defendant was liable to the plaintiff for her injuries. *Id.*

The circuit court noted that, for Appellee to recover, there had to be a nexus between Appellant's conduct and Appellee's injuries. The trial judge determined that the jury could consider this nexus through the court's instructions to the jury and not on the verdict sheet. The court gave this instruction on causation to the jury:

> [F]or a plaintiff to recover damage, the plaintiff's injuries must result from them being a reasonable foreseeable consequences of the defendant's actions. An important factor used to determine the existence of the duty is foreseeability. To recover damages for deceit, it must be shown . . . In order [f]or the plaintiff to recover damages, the plaintiff's injuries must result from it being the reasonable consequences of the defendant's actions. An important factor used, determining the existence of the duty is foreseeability. . . .
>
> For persons to recover damage, the plaintiff's injuries must result from, and be a reasonable foreseeable consequence of the defendant's act. In an action for damages, if any, under all four counts -- and the all four counts are battery, intentional infliction of emotional distress, negligence, and fraud or deceit.

In the instant case, Appellant did not concede liability to Appellee. The jury's job, in that regard, was to determine if Appellant was liable to Appellee. Liability necessarily included the issue of causation. *Id.* The trial court did not err in denying Appellant's request to include causation on the verdict sheet.

Appellant's argument that it was necessary to include causation on the verdict sheet assumes that there was evidence to indicate that there was another potential cause of Appellee's succumbing to HSV-2. This argument is not based on evidence in the record

but on the Appellant's own speculation that another person with whom Appellee had relations might have been the source. When a party offers nothing more than conclusory allegations that a verdict sheet is prejudicial, the court does not overstep its bounds in rejecting that argument. *Owens-Corning v. Garrett*, 343 Md. 500, 525 (1996). In this case, there was no abuse of discretion by the trial court in declining to include causation on the verdict sheet.

Conclusion

In conclusion, we find no error in the trial court's denial of Appellant's *Batson* challenge because, at the time that he objected to the jury, he did not specifically identify the jurors who had been stricken. The trial court did not abuse its discretion in permitting Appellee to testify as her own expert witness because Appellant was on notice of this possible testimony based on questions posed during her deposition. There was also a sufficient factual basis to support Appellee's expert testimony. The trial court's decision not to include causation in the verdict sheet was not an abuse of discretion because only conclusory suggestions as to another cause were offered at trial. For these reasons we affirm.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY IS AFFIRMED. APPELLANT TO PAY COSTS.