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BY HAND DELIVERY

The Honorable Trish Harrington, Clerk
Supreme Court of Virginia
100 North Ninth Street, 5th Floor
Richmond, Virginia 23219

**Re: *Scott Allen Roberts v. CSX Transportation, Inc.*
Record No. 090194**

Dear Ms. Harrington:

Enclosed please find the required copies of Appellee CSX Transportation, Inc.'s, brief in reference to the above styled matter. Also enclosed is a copy to be date-stamped and returned with the courier.

The brief has also been filed via electronic mail to scvbriefs@courts.state.va.us.

Thank you for your assistance. If you have any questions, please do not hesitate to call me.

Very truly yours,



Erin M. Sine

EMS:rab

Enclosures

cc: William P. Hanson, Jr., Esq. (Via Hand Delivery)
Philip S. Marsteller, Jr., Esp. (Via Hand Delivery)

IN THE

Supreme Court of Virginia

RECORD NO. 090194

SCOTT ALLEN ROBERTS,

Appellant,

v.

CSX TRANSPORTATION, INC.,

Appellee.

BRIEF OF APPELLEE

From the Circuit Court
For the City of Richmond

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether in this FELA action the failure to strike prospective juror Donald Kemp for cause was *per se* prejudicial error requiring reversal? (Assignment of Error No. 1).
2. Whether a discriminatory intent was inherent in the explanation given by counsel for defendant in response to a *Batson* motion? (Assignment of Error No. 2).

NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This is a Federal Employer's Liability Act (FELA) action, tried before a jury in the Circuit Court of the City of Richmond, in which plaintiff Scott A. Roberts ("Roberts"), an employee of CSXT Transportation, Inc. (CSXT), received an award of \$280,000.00, reduced by 95% for comparative fault. (J.A. 43-44.) The injuries consisted of a cut on his right index finger, requiring six stitches, and occasioning a five-day absence from work. There was also a claim, supported by evidence, of some permanent disability: 30% impairment of his index finger, 6-7% impairment of his hand, 5-6% impairment of the upper extremity, and 3% impairment of the whole person. (Tr. 89-90.)

Appealing against his own verdict and judgment, Roberts has challenged two incidents of jury selection. First, he complains that when

the venire panel was asked whether “any of you [are] officers, directors, stockholders, agents or employees of CSX Transportation, Inc.,” the trial court failed to strike Donald Kemp for cause even though he identified himself as the owner of an unstated quantity of CSXT stock held over a period of thirty years.¹ (J.A. 24.) In response to his answer, the trial court questioned Kemp for interest and bias:

THE COURT: Do you feel that—well, would your being a stockholder with the corporation have a bearing on your ability to be fair and impartial?

JURY PANEL: No.

THE COURT: Do you actively participate in annual meetings at all?

JURY PANEL: No.

(J.A. 24.)

The trial court overruled Roberts’ motion to strike for cause based upon a finding that Kemp had “answer[ed] very adamantly that he had no problems with being able to listen to facts and make a fair and impartial

¹ This Court may take judicial notice of the fact that CSXT is not publicly traded but is wholly owned by CSX Corporation which is publicly traded. See 2009 Form 10Q for the Quarterly Period Ending March 27, 2009, available at:

http://library.corporate-ir.net/library/92/929/92932/Items/328423/FEC6A56F-9CF9-47FC-90BD-B29F31CEE92D_Q10910_Q4_15_09.pdf

decision in this case.” (J.A. 24-25.) Thereafter Kemp was removed from the jury panel by one of Roberts’ peremptory strikes. (J.A. 60.)

The second ground of appeal is based upon a *Batson* challenge. When counsel for CSXT struck Paula Cousins and Geneva Mann, counsel for Roberts requested an explanation: “I don’t believe Ms. Mann answered any questions and I’m not sure what questions Ms. Cousins answered that he believes forms the basis of his strike.” These exchanges then ensued:

MR. SETLIFF: They’re both cashiers for Aramark, lower wage paying job. It’s my personal belief that based on the kind of job that they otherwise may be more sympathetic to the type of job that Mr. Roberts was otherwise doing and they’re both females that may or may not have any particular experience in regards to the railroad. The biggest thing is they’re both cashiers and I believe Ms. Cousins also had brought a lawsuit as well.

MR. HANSON: Your honor, I don’t know, I just don’t think that’s sufficient. I don’t think he can say they’re women. That’s not a gender based reason that he’s articulated.

MR. SETLIFF: I’m articulating their occupation.

THE COURT: Well, so you’re saying that because of their occupation of being cashiers, let me make sure that I understand what you’re saying about that again.

[MR. SETLIFF misidentified as] MR. HANSON: They’re cashiers. They work at Aramark. Both of them work at Aramark as cashiers and line servers. Ms. Mann, cashier and line server which is a probably a lower paying wage type job which I don’t believe would necessarily lend itself to a juror who may be able to listen to the arguments of CSX with respect to liability and damages. It’s an occupation issue.

THE COURT: Ms. Setliff has been able to articulate a reason that's not based upon race and the fact that he did mention the fact about them being female, but he has been able to articulate another reason. So on that basis we'll deny the motion.

MR. HANSON: I don't know if I stated it but they're both black females.

(J.A. 35-37.) Roberts made no record of the characteristics either of other venire persons stricken or retained on the jury. On appeal Roberts acknowledges that occupation is a race and gender neutral basis for exercising a peremptory strike. (Opening Br. at 11.)

After receiving the verdict, Roberts filed a motion for a new trial. The first ground for the motion was that seating a stockholder of a corporate party "is *per se* reversible error under Virginia law." (Mot. for New Trial at 1.) The second ground was based upon the *Batson* ruling. (*Id.*) The motion for a new trial was overruled and this appeal followed. (J.A. 42.)

STATEMENT OF FACTS

This case arises out of an accident that occurred when Roberts, a CSXT machinist of 12 years, attempted to use a truck-mounted boom crane to unload a 500-pound engine ("the engine") from the back of a closed-top van at CSXT's Danville, West Virginia yard. (See Compl. ¶¶ 7, 9.) While using the remote control to operate the crane, he placed his right hand on the engine to steady it. (Tr. 159.) As he was pulling the engine

from the back of the van, it became unstable and fell, cutting his right index finger. (Tr. 159.) He received 6 stitches for his injured finger and missed 5 days from work. (Tr. 202-03). He also claimed a degree of permanency from his injury (J.A. 3), which was supported with evidence and argued at trial as 30% impairment of the hand, 5% upper extremity impairment, and a 3% whole person impairment. (Tr. 133) (closing argument of plaintiff).

ARGUMENT

A. Under the Federal Law, which Provides the Rule of Decision in this FELA Action, the Failure to Excuse Prospective Juror Kemp for Cause Is not Deemed to Be Reversible, Prejudicial Error Because he Was Removed by Peremptory Strike. (Relates to Assignment of Error No. 1).

“As a general matter, FELA cases adjudicated in state court are subject to state procedural rules, but the substantive law governing them is federal.” *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985).

“To what extent rules of practice and procedure may themselves dig into ‘substantive rights’ is a troublesome question at best...”, and a number of United States Supreme Court cases “...point up the impossibility of laying down a precise rule to distinguish ‘substance’ from ‘procedure.’” *Brown v. W. Ry. of Al.*, 338 U.S. 294, 296 (1950) (internal quotations omitted). What we do know is that “[s]tate laws are not controlling in determining what the incidents of...federal right shall be” under FELA. *Id.* Moreover, we also

know that “only if federal law controls can the federal act be given that uniform application throughout the country essential to effectuate its purposes.” *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361 (1952) (citing *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 244 (1942)). Finally, it is well-established that certain incidents of a jury trial may be controlled by federal law under FELA. *Dice*, 342 U.S. at 363.

In this case the differences between the application of state and federal law is outcome determinative if the Virginia state law is as Roberts describes it. Under Virginia law extending back to 1852, the use of peremptory strike to remove a prospective juror who should have been excused for cause results in automatic reversal if *Breeden v.*

Commonwealth, 217 Va. 297, 298, 227 S.E.2d 734, 735 (1976) (citing *Dowdy v. Commonwealth*, 50 Va. (9 Gratt.) 727, 737 (1852)) is followed. *But see Cudjoe v. Commonwealth*, 23 Va. App. 193, 202-06, 475 S.E.2d 821, 825-26 (1996) (holding that after adoption of the harmless error statute, Va. Code § 8.01-678, the use of a peremptory strike to remove a venire person subject to removal for cause is subject to harmless error analysis).

However, in the federal system the failure to remove a juror for cause is rendered harmless if the objecting party exercises a peremptory

challenge against that prospective juror, and as a consequence no biased juror is seated. See *United States v. Martinez-Salazar*, 528 U.S. 304, 314-15 (2000). Under the Supreme Court's analysis in *Martinez-Salazar*, the appellant here has not lost a peremptory strike; instead, he has simply exercised it. And, as Justices Scalia and Kennedy, concurring in the judgment, point out, one of the historic purposes of peremptory challenges must have been to give self-help relief from judicial error in not granting for cause challenges, because when peremptory challenges first arose, there were no criminal appeals, "so that if the defendant did not correct the error by using one of his peremptories, the error would not be corrected at all." *Id.*, 528 U.S. at 319. See also *United States v. Sanchez-Hernandez*, 507 F.3d 826, 829-31 (5th Cir. 2007) (applying *Martinez-Salazar*); *United States v. Polichemi*, 219 F.3d 698, 705-06 (7th Cir. 2000) (same).

Martinez-Salazar has three consequences for this appeal. First, it deprives *Chestnut v. Ford Motor Co.*, 445 F.2d 967, 971-72 (4th Cir. 1971) of its rationale, taking from it any persuasive force it might otherwise have. See, e.g., *Thompson v. Altheimer & Gray*, 248 F.3d 621, 623-24 (7th Cir. 2001) (holding *Martinez-Salazar* applicable to 28 U.S.C. § 1870 governing peremptory challenges in civil cases); *Walzer v. St. Joseph State Hosp.*, 231 F.3d 1108, 1111 (11th Cir. 2000) (holding *Martinez-Salazar* applicable

to peremptory challenges in 42 U.S.C. § 2000e-2(a)(1) gender discrimination claim).

Second, it provides a basis for distinguishing *Chesapeake & Ohio Ry. Co. v. Carnahan*, 118 Va. 46, 86 S.E. 863 (1915), *aff'd sub nom*, *Chesapeake & Ohio Ry. Co.*, 241 U.S. 241 (1916) (use of seven-person jury in accordance with state procedure acceptable under FEHA). See also *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916) (providing analysis). In *Carnahan* the difference between state and federal procedure could not be shown to be outcome determinative, contrary to the situation here if *Breeden* is followed. Here, if federal law is applied, CSXT is not at hazard of another trial whereas if *Breeden* is applied, CSXT must submit to another trial.

Third, where the difference between federal and state procedure is outcome determinative, a state court in a FEHA action is required to follow the federal procedural rule. See, e.g., *Ill. Cent. Gulf R.R Co. v. Price*, 539 So.2d 202, 205-06 (Ala. 1988). ("In a case such as this, where Congress has given a state court concurrent jurisdiction to adjudicate a federally created cause of action, a state court should not afford, deny, or curtail recovery by an overly protective insistence upon its dominance in matters procedural."). See also *Larsen v. Sittmar Cruises*, 602 N.Y.S. 2d 981, 983

(N.Y. Civ. Ct. 1993) (under general maritime law, “[s]tate substantive law cannot be applied, nor can state procedural or evidentiary rules if they ‘significantly affect the result of the litigation, *i.e.*, would be outcome determinative”) (citing *In re A/S-Ludwig Mowinckels Rederi v. Dow Chem. Co.*, 307 N.Y. S.2d 660, 663, 255 N.E.2d 774, 776 (N.Y. 1970)); accord *Haggerty v. Moran Towing & Transp. Co., Inc.*, 162 A.D.2d 189, 190-91, 556 N.Y.S.2d 314, 316 (N.Y. App. Div., 1st Dept. 1990)).

Both the Court of Appeals of New York and the Appellate Division, First Department, have applied the rule that federal procedural rules must govern where they are outcome determinative. *Lerner v. Karageorgis Lines, Inc.*, 66 N.Y. 2d 479, 484-85, 488 N.E. 2d 824, 825-26 (N.Y. 1985); see also *Haggerty, supra*. The latter case is particularly informative because in it the Appellate Division, First Department, applied the rule to an action arising under the Jones Act, (see *Haggerty*, 162 A.D. at 189, 556 N.Y.S.2d at 314), a close cousin of FELA. See *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 546-47 (1960) (“...with the passage of the Jones Act in 1920, ... Congress effectively obliterated all distinctions between the kinds of negligence for which the shop owner is liable, as well as limitations imposed by the fellow servant doctrine, by extending to seamen the remedies made available to railroad workers under FELA”). Because there

is no principled basis for distinguishing between application of the outcome determinative rule under FELA and under the Jones Act, the outcome determinative rule should be applied here, and the failure to strike prospective juror Kemp for cause should be deemed harmless error.

B. Even if Virginia, Rather than Federal Law Is Deemed to Supply the Rule of Decision in this Appeal, this Court Should not Use this Case as a Vehicle to Extend the *Per Se* Disqualification Rule for Stockholders to Civil Cases and/or Should Find any Error to Be Harmless. (Relates to Assignment of Error No. 1).

Ordinarily under Virginia law, “whether a prospective juror should be excluded for cause is a matter within the sound discretion of the trial court, and its action in refusing to exclude a particular venireman is entitled to great weight on appeal.” *Martin v. Commonwealth*, 221 Va. 436, 445, 271 S.E.2d 123, 129 (1980). Under this standard, a trial court’s refusal to strike a juror for cause should not be overturned unless the trial court abused its discretion. *See Teleguz v. Commonwealth*, 273 Va. 458, 475-76, 643 S.E.2d 708, 719 (2007). And in making that determination, “a trial judge who personally observes a juror, including the juror’s tenor, tone and general demeanor, is in a better position than an appellate court to determine whether a particular juror should be stricken.” *Id.* at 476, 643 S.E.2d at 719. In Virginia “[p]er se disqualification of veniremen is not favored,” and “[m]ere interest in the subject matter of a prosecution does

not, *per se*, require that a venireman be set aside for cause.” *Webb v. Commonwealth*, 11 Va. App. 220, 222, 397 S.E.2d 539, 540 (1990).

Roberts, of course, contends that *Salina v. Commonwealth*, 217 Va. 92, 225 S.E.2d 199 (1976), is controlling on the issue of *per se* disqualification of stockholders. In that case this Court adopted, in a criminal context, a *per se* rule that “a stockholder, regardless of the size of his holdings” cannot “be said to stand indifferent in the cause” when the corporation was an intended victim of the crime. Roberts also relies upon *Chestnut v. Ford Motor Co.*, 445 F.2d at 971-72; the only civil case directly cited in *Salina*. *Chestnut*, however, has been superseded by *Martinez-Salazar* and the remaining Virginia law is not as clear and as firmly established as Roberts would have it.

It is true that there is strong dicta in *Salina* that “a stockholder, regardless of the size of his holdings,” is subject to a rule of *per se* disqualification in a civil case. Indeed, the Court in *Salina* noted that “[w]hile the Attorney General appears to concede that the stockholder of a corporation is disqualified to serve as a juror in civil litigation in which that corporation is a party or has a pecuniary interest, he argues that the same rule does not apply to a criminal prosecution where the corporation is the victim of the crime.” 217 Va. at 93, 225 S.E.2d at 200. But the actual

holding in *Salina* depended upon and turned on its criminal character. In reliance on *Jaques v. Commonwealth*, 51 Va. (10 Grat.) 690 (1853), the *Salina* court held that “[t]he reasons underpinning the disqualification of prospective jurors within the prohibited degree of consanguinity or affinity to the victim set forth in *Jaques*, *i.e.*, ‘that the feelings of the party injured and of his relations, are generally more excited by a personal wrong or an injury to property resulting in prosecution for felony than in ordinary controversies involving mere questions of property’, apply with even greater force where, as here, the criminal act suffered by the corporation has the direct effect of diminishing the assets of the corporation held for the benefit of its stockholders.” 217 Va. at 94, 225 S.E.2d at 200-01. The basis of the holding in *Salina* was not simply financial interest, which “was not ‘substantial,’” 217 Va. at 92, 225 S.E.2d at 200, but also depended upon the natural indignation arising from the criminal act. Here, by contrast, we have a case falling within the range of “ordinary controversies involving mere questions of property...” referred to in *Salina*. 217 Va. at 94, 225 S.E.2d at 201.

It should also be noted that *Salina* would have turned out the same way even if an abuse of discretion standard had been applied, instead of a *per se* rule. In *Salina* there were three stockholders who actually sat on the

jury, at least one of whom had been equivocal about whether he could be fair. 217 Va. at 93, 225 S.E.2d at 200 (“... venireman Belchic answered: ‘Yes. No. I doubt it would affect my judgment.’”). In contrast, the trial court in this case noted that prospective juror Kemp was adamant in his position that he could be fair. (J.A. 24-25.)

Arguing against strong *dicta* as CSXT is doing in this section of its brief is usually unprofitable. But that is because such *dicta* usually foreshadows where the law is trending. However, both in Virginia and nationally, the law has moved strongly against the use of any *per se* disqualification rule if that rule results in automatic reversal. In Virginia, for example, *Salina* cited 47 Am. Jur. 2d Jury § 325 (1969) for the existence of the *per se* rule disqualifying stockholders. However, the very next section in Am. Jur. 2d announced that the same rule applies to employment relations. But that is not how the law in Virginia has developed since *Salina*. Instead the abuse of discretion standard has been applied to challenges of employees for cause. See, e.g., *Barrette v. Commonwealth*, 11 Va. App. 357, 360, 398 S.E.2d 695, 697 (1990) (retired employee with benefits); *Scott v. Commonwealth*, 1 Va. App. 447, 452, 339 S.E.2d 899, 902 (1986) (prospective juror not subject to for cause challenge even though he was employed by robbery victim); *Green v. Commonwealth*,

Record No. 3064-03-4, 2005 Va. App. LEXIS 266 at * 11 (Va. Ct. App. July 12, 2005) (noting that a juror's "employment does not constitute *per se* the 'interest in the cause' prohibited by Code § 8.01-358"). Because there is no principled difference between the stockholder and employee relationships in a society in which stock ownership has grown ubiquitous since *Salina* was decided, and because other possible grounds of bias at least as serious as stock ownership are reviewed in Virginia under an abuse of discretion standard, see, e.g., *Stockton v. Commonwealth*, 241 Va. 192, 199-200, 402 S.E.2d 196, 200 (1991) (not error to refuse to strike in capital murder trial prospective juror whose grandson had been murdered where prospective juror was also a member of murder victims' rights organization founded by his wife and daughter); *Elan v. Commonwealth*, 229 Va. 113, 116, 326 S.E.2d 685, 687 (1985) (rejecting *per se* disqualification of sister of former Commonwealth's Attorney and former clients of incumbent Commonwealth's Attorney); *Melvin v. Commonwealth*, 202 Va. 511, 512-13, 118 S.E.2d 679, 680 (1961) (in trial for larceny, no error in refusing to question veniremen whether they owned, leased or operated oyster grounds); *Webb, supra* (not error to retain prospective juror in rape trial who had herself been raped within the year), this Court should not employ *Salina* to reverse this case.

If this Court does not extend *Salina*, Roberts must lose his appeal. Although he has framed his first assignment of error more broadly, his motion for a new trial on the issue of excluding prospective juror Kemp for cause was expressly limited to a claim that a *per se* rule applied. (Mot. for New Trial at 1.) No claim of abuse of discretion was advanced or preserved for appeal.

There is another reason why Roberts should lose his appeal even if Virginia law is deemed to apply instead of federal law. “Recently, there has been a movement away from an automatic reversal standard towards a requirement that there be a showing of prejudice before an otherwise valid conviction will be reversed.” *Klahn v. State*, 96 P.3d 472, 481 (Wyo. 2004). “[A] majority of state courts, both before and after *Martinez-Salazar*, hold that the curative use of a peremptory challenge violates neither a constitutional right, nor a rule-based or statute-based right.” *Id.* at 483. “These courts require a showing of prejudice before a case will be reversed when a defendant uses a peremptory challenge to remove a juror the trial court should have removed.” *Id.* (citing *State v. Hickman*, 205 Ariz. 192, 195-96, 68 P.3d 418, 421-22 (2003)); accord *Green v. Maynard*, 349 S.C. 535, 541-42, 564 S.E.2d 83, 86 (2002) (“since *Martinez-Salazar* was

decided, a majority of state courts considering the issue have interpreted their state constitutions to conform to its holdings.”).

Not only is the national trend towards a harmless error analysis when a peremptory strike is used to remove a juror challenged for cause, but Virginia’s own harmless error statute requires this approach as well.

Roberts cites three cases in support of his supposed right to an automatic new trial if *Salina* is followed. *Webb* and *Scott* repeat the rule in the Court of Appeals but only as *dicta*. *Justus v. Commonwealth*, 220 Va. 971, 975, 266 S.E.2d 87, 90 (1980), does state that rule but relies on *Breeden* which in turn relies on a case from 1853 that was decided before the Virginia harmless error statute was amended in 1919. At that time the language “or for any error committed on the trial where it plainly appears from the record and the evidence given at trial that the parties have had a fair trial on the merits and substantial justice has been done,” was added to the list of circumstances where reversal is inappropriate. *Compare Va. Code § 8.01-678 with Va. Code 1919 Sec. 6331*. The fact that nineteenth century authority relied upon in *Breeden* had been abrogated by the harmless error statute went unnoticed until the Court of Appeals addressed it in *Cudjoe*, 23 Va. App. at 202-06, 475 S.E.2d at 825-26.

If, then, this Court does not find that federal law controls in its own right, it should agree with the Court of Appeals in *Cudjoe*, that matters involving peremptory strikes that do not involve constitutional violations require a harmless error analysis under Va. Code § 8.01-678. Because the use of a peremptory challenge to remove Kemp has no constitutional implications under *Martinez-Salazar*, the issue is subject to harmless error analysis. And if harmless error analysis has any meaning in this context, where a jury does not include any person objected to for cause, the record discloses no other biased juror, and the jury returns a verdict for the complaining party, there is simply no basis for concluding that a fair trial was not had or that substantial justice was not done.

C. The Trial Court's Ruling on Roberts' *Batson* Challenge Should Be Affirmed. (Relates to Assignment of Error No. 2).

The Equal Protection Clause forbids peremptory exclusion of potential jurors solely on account of their race, *Batson v. Kentucky*, 476 U.S. 79, 89 (1986), or gender, *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127, 146 (1994). Parties may still remove jurors who they feel might be less acceptable than others on the panel; race and gender simply may not serve as a proxy for bias. *Id.* at 143; see also *Powers v. Ohio*, 499 U.S. 400, 410 (1991).

The United States Supreme Court has set forth a three-step procedure for determining whether a litigant exercised a peremptory strike to remove a prospective juror solely on account of that juror's race or gender. In *J.E.B.*, the Court stated that “[a]s with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike.” *Id.* at 144-45 (citing *Batson*, 476 U.S. at 97). “When an explanation is required, it need not rise to the level of a ‘for cause’ challenge; rather, it must merely be based on a juror characteristic other than gender, and the proffered explanation may not be pretextual.” *Id.* at 145 (citing *Hernandez v. New York*, 500 U.S. 352 (1991)).

Once a non-discriminatory explanation is proffered, the party alleging discrimination can then argue that the explanation “was purely a pretext for unconstitutional discrimination.” *Jackson v. Commonwealth*, 266 Va. 423, 436, 587 S.E.2d 532, 542 (2003). On appellate review, the trial court's conclusion regarding whether the reasons given for the strikes are non-discriminatory “is entitled to great deference,” and “will not be reversed on appeal unless it is clearly erroneous. The trial court has the unique opportunity to observe the demeanor and credibility of potential jurors

during voir dire.” *Id.* at 437, 587 S.E.2d at 543; see also *Hernandez*, 500 U.S. at 364 (“[T]he trial court’s decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal.”).

In the instant case, Roberts raised a *Batson* challenge which did not state any basis, much less make out a *prima facie* case. However, because counsel for CSXT voluntarily stated his grounds, the first *Batson* element is moot. See *Barksdale v. Commonwealth*, 17 Va. App. 456, 459, 438 S.E.2d 761, 763 (1993). Because Roberts has not made or preserved a claim that the stated reason is pretextual, the third *Batson* element is not implicated either. The issue before the Court on this *Batson* appeal is whether discriminatory intent was inherent in the explanation. *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (“Unless a discriminatory intent is inherent in the ... explanation...”.); *Wright v. Commonwealth*, 245 Va. 177, 186, 427 S.E.2d 379, 387 (1993) (same).

CSXT’s counsel articulated his reasons for striking Ms. Mann and Ms. Cousins by stating:

They’re both cashiers for Aramark, lower wage paying job. It’s my personal belief that based on the kind of job that they otherwise may be more sympathetic to the type of job that Mr. Roberts was otherwise doing and they’re both females that may or may not have any particular experience in regards to the railroad. The biggest thing is

they're both cashiers and I believe Mrs. Cousins also had brought a lawsuit as well. (J.A. 35-36)

Stating on the record the gender of the venire persons subject to *Batson* challenge does not in and of itself show the necessary discriminatory intent because it is descriptive and not linked to any stereotypical trait supposedly associated with the immutable trait of gender. Instead, here the gender reference was couched in terms of a reference to their own work experience.

CSXT had the opportunity to underscore its non-discriminatory basis for striking Ms. Mann and Ms. Cousins when Roberts' counsel followed his first vague challenge with a second challenge, this time taking issue with CSXT's counsel's use of the term "female." In response, CSXT reaffirmed and rearticulated – not once, but twice – that Ms. Mann and Ms. Cousins were stricken from the jury panel solely on the basis of their occupations.

MR. HANSON: Your Honor, I don't know, I just don't think that's sufficient. I don't think he can say they're women. That's not a gender based reason that he's articulated.

MR. SETLIFF: I'm articulating their occupation.

THE COURT: Well, so you're saying that because of their occupation of being cashiers, let me make sure that I understand what you're saying about that again.

MR. [SETLIFF]²: They're cashiers. They work at Aramark. Both of them work at Aramark as cashiers and line servers. Ms. Mann, cashier and line server which is a probably a lower paying wage type job which I don't believe would necessarily lend itself to a juror who may be able to listen to the arguments of CSX with respect to liability and damages it's an occupation issue.

THE COURT: Mr. Setliff has been able to articulate a reason that's not based upon race and the fact that he did mention the fact about them being female, but he has been able to articulate another reason. So on that basis we'll deny the motion.

(J.A. 36-37) (emphasis added).

CSXT articulated that it used its peremptory strikes to remove Ms. Mann and Ms. Cousins from the jury panel because of their lower-wage paying jobs as cashiers. Once CSXT articulated its non-discriminatory rationale, Roberts was charged with the burden of proving that CSXT's rationale was pretextual. *Robinson v. Commonwealth*, Record No. 1011-01-2, 2002 Va. App. LEXIS 562 at *8-9 (Va. Ct. App. Sept. 24, 2002) (citing *Batson*, 476 U.S. at 96). Importantly, Roberts' counsel failed to raise any allegation and/or evidence of pretext, and the trial court, in a decision which would be entitled to great deference had it been appealed, concluded that CSXT's explanation was both race and gender neutral.

² The Trial Transcript erroneously attributes this explanation, proffered by Mr. Setliff, to Roberts' counsel, Mr. Hanson.

Roberts relies principally upon *Riley v. Commonwealth*, 21 Va. App. 330, 464 S.E.2d 508 (1995), claiming that it “is strikingly similar to the case at hand.” (Opening Br. at 11). On the contrary, in *Riley*, the Commonwealth admitted that it struck women *qua* women because of stereotypical beliefs about their attitudes. As the Court of Appeals noted:

such attempts to stereotype in the jury selection process are impermissible. Lying “at the very heart of the jury system” is the factual assumption that “jury competence is an individual rather than a group or class matter.”

21 Va. App. at 336, 464 S.E.2d at 510 (internal citations omitted).

Roberts also invokes the rule that if an inherently discriminatory reason is given, it cannot be cured by subsequent or contemporary gender neutral explanations. *Coleman v. Hogan*, 254 Va. 64, 66, 486 S.E.2d 548, 549 (1997) (Commonwealth admitted that it chose which students to strike based on gender on the acknowledged “supposition that [the women] may be more sympathetic to the female plaintiff.”). Roberts’ attempted use of that rule under the facts of this case is circular. It only applies if an inherently discriminatory explanation is given.

The second prong of *Batson* is not a question of fact, *Riley*, 21 Va. App. at 335, 464 S.E.2d at 510, nor is it satisfied on mere suspicion. For Roberts to prevail, he has to show an inherent statement of intentional bias as a matter of law. The statements here were just as likely, indeed were

more likely, given the earnest denials of trial counsel, to be merely descriptive rather than an inherent statement of bias, particularly as they lack all stereotypical content. Any argument that any reference to gender is proof of intentional discrimination is unwarranted and unsustainable.

CONCLUSION

WHEREFORE, CSXT prays that the judgment of the Circuit Court for the City of Richmond be affirmed.

Respectfully Submitted,

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CERTIFICATE

The undersigned counsel hereby certifies that the required copies of this Brief of Appellee have been filed with the Clerk of this Court via hand delivery; that a copy of this Brief of Appellee in PDF format has been electronically filed by email to scvbriefts@courts.state.va.us; and that the required copies have been served via hand delivery upon:

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