

No. 1-09-0841

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

DAISY MCGEE and ROBERT MCGEE, as Co-Special)	Appeal from the
Administrators of the Estate of TIWANDA GORDON,)	Circuit Court of
deceased,)	Cook County
Plaintiffs-Appellants,)	
)	No. 02 L 323
v.)	
)	
VALERIE NEYLAN, M.D., JAMES AUSMAN, M.D.,)	Honorable
MARY ANN COOPER, M.D., DANIEL HIER, M.D.,)	Irwin J. Solganick,
LYDIA HAILE, M.D., CHRISTINA BELMONTE, M.D.)	Judge Presiding.
f/k/a CHRISTINA HURLBERT, M.D., and LUKE)	
CORSTEN, M.D.,)	
Defendants-Appellees.)	
)	

PRESIDING JUSTICE GALLAGHER delivered the judgment of the court.
JUSTICES LAVIN and PUCINSKI concurred in the judgment.

ORDER

HELD: Plaintiffs' *Batson* objection was untimely where they did not raise it until after the jury had been sworn in, instructed, and sent home for the day. Defendants did not waive their objection to the timeliness of plaintiffs' *Batson* challenge where the circuit court determined that challenge was untimely before defendants had an opportunity to object and they asserted that the claim was untimely in their responses to plaintiffs' posttrial motion.

Plaintiffs Daisy and Robert McGee, as Co-Special Administrators of the estate of the

1-09-0841

decendent, Tiwanda Gordon, appeal from orders of the circuit court of Cook County entering judgment on the jury verdict in favor of defendants, Drs. Neylan, Ausman, Cooper, Hier, Haile, Belmonte, and Corsten, and denying their posttrial motion. On appeal, plaintiffs contend that defendants' exercise of peremptory challenges against four African-American venirepersons violated the equal protection clause of the fourteenth amendment of the United States Constitution and the United States Supreme Court's holding in *Batson v. Kentucky*, 476 U.S. 79 (1986). We affirm.

BACKGROUND

On January 29, 2002, plaintiffs filed an amended complaint against defendants pursuant to the Wrongful Death Act (740 ILCS 180/1 *et seq.* (West 2000)) in connection with events that took place after the decedent arrived at the emergency room at the UIC Medical Center on January 7, 2000. Plaintiffs alleged that defendants provided the decedent with negligent and careless medical care resulting in severe and permanent injuries that caused or contributed to her death on January 9, 2000, and requested a sum in excess of \$50,000 in damages. Plaintiffs also alleged that the decedent suffered personal and pecuniary injuries as a result of defendants' negligence and carelessness for which she would have been entitled to receive compensation had she survived, and requested damages in excess of \$50,000.

Jury selection began at 9:30 a.m. on September 16, 2008, and the circuit court asked general questions of the entire venire. One venireperson was excused during questioning and another six were excused after questioning was completed. That afternoon, the court conducted a *voir dire* examination of all 35 remaining venirepersons in groups of 14, 14, and 7. Each group

1-09-0841

of venirepersons was first questioned by the court, and then by counsel for each party. The court met with the parties outside the presence of the venire and selected the jury, and the court then swore in the jury, provided them with a number of instructions, and excused them.

After the jurors had exited the courtroom, plaintiffs' counsel asserted that defendants had committed a *Batson* violation by exercising four of their peremptory challenges to excuse African-American venirepersons. The court responded that "I wish you would have made any objections you had during the time we were doing jury selection so that the Court could have made rulings that might have preserved some of the jurors had the Court thought there was exclusion for racial reasons." The court further noted that plaintiffs' counsel first objected to defendants' use of their peremptory challenges after the jury had been sworn in, impaneled, and given some instruction, and stated that "[w]e've established it on the record that I said I don't believe your motion is timely." The jury trial began the next morning, and on October 2, 2008, the jury reached a verdict in favor of all defendants and the court entered judgment on that verdict.

On October 31, 2008, plaintiffs filed a posttrial motion in which they asserted, *inter alia*, that the jury's verdict must be reversed because defendants used their peremptory challenges to exclude African-Americans from the jury in a systematic fashion. Plaintiffs maintained that they and the decedent were African-American, that four of the peremptory challenges exercised by defendants were used to remove African-Americans from the jury, and that the court's refusal to conduct a *Batson*-type hearing required that the verdict be reversed.

On December 19, 2008, defendants Cooper, Neylan, and Haile filed a response to

1-09-0841

plaintiffs' posttrial motion, in which they asserted that plaintiffs had waived their *Batson* claim by failing to assert it until after the jury had been sworn in and that plaintiffs had not established a *prima facie* case of purposeful discrimination. Defendants Heir, Corsten, and Belmonte also filed a response to plaintiffs' posttrial motion on December 19, 2008, in which they asserted that plaintiffs waived their right to request a *Batson* hearing by failing to raise the issue until after the jurors had been sworn in and dismissed for the day and that plaintiffs did not make a *prima facie* showing that defendants' use of their peremptory challenges was racially motivated. Plaintiffs subsequently filed a reply, and a hearing was held on March 5, 2009, at which the court denied plaintiffs' motion, noting that it believed that plaintiffs had waived their *Batson* challenge by making it after the jury had been sworn.

ANALYSIS

Plaintiffs contend on appeal that defendants violated the equal protection clause of the fourteenth amendment by exercising peremptory challenges against four African-American venirepersons. In *Batson*, 476 U.S. at 96-98, the United States Supreme Court held that the equal protection clause prohibited a prosecutor from using his or her peremptory challenges to exclude venirepersons on the basis of race and provided a three-step process by which a defendant could establish such a violation. Since *Batson*, the prohibition on the use of peremptory challenges to purposefully exclude venirepersons based on their race has been held to apply in civil cases as well as criminal. *McDonnell v. McPartlin*, 192 Ill. 2d 505, 526 (2000) (citing *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991)).

Generally, a reviewing court will not overturn a circuit court's ruling on a *Batson* claim

1-09-0841

unless it is clearly erroneous because of the circuit court's pivotal role in the evaluation process. *People v. Davis*, 233 Ill. 2d 244, 261 (2009). In this case, however, the circuit court determined that plaintiffs' claim was untimely before plaintiffs were able to make all arguments in support of their objection. As such, we review the circuit court's factual findings under the manifest weight of the evidence standard and review its ultimate legal determination based upon those findings *de novo*. *People v. Rivera*, 227 Ill. 2d 1, 11-12 (2007); see also *People v. Davis*, 233 Ill. 2d 244, 262 n.2 (2009).

Defendants assert that plaintiffs waived their *Batson* challenge by failing to raise it until after the jury had been sworn. A party that fails to raise a *Batson* objection before the jury is sworn in waives the issue. *People v. Richardson*, 189 Ill. 2d 401, 409-10 (2000). A party is required to raise a *Batson* objection before the jury has been sworn in and the venire has been dismissed so the circuit court can conduct a hearing while the chosen and stricken venirepersons are still present. *People v. Andrews*, 132 Ill. 2d 451, 457-58 (1989).

Although the record shows that plaintiffs' counsel did not assert that defendants had committed a *Batson* violation until after the jury had been sworn in, impaneled, instructed, and sent home for the day, plaintiffs maintain that defendants have waived their right to object to the timeliness of plaintiffs' *Batson* claim by failing to object to its timeliness when the claim was made and by addressing the merits of that claim in their responses to plaintiffs' posttrial motion. In *Andrews*, 132 Ill. 2d at 458, cited by plaintiffs, our supreme court held that the State waived its objection to the timeliness of the defendant's motion for mistrial based on the State's alleged *Batson* violation because the State did not object to the timeliness of the defendant's motion and

1-09-0841

instead addressed the merits of the motion.

In this case, however, the circuit court addressed the timeliness of plaintiffs' *Batson* challenge immediately after it had been raised and determined that it was untimely. In addition, all defendants asserted in their responses to plaintiffs' posttrial motion that plaintiffs' *Batson* challenge was untimely because they did not raise it until after the jury had been sworn. The record thus shows that this case is distinguishable from *Andrews* because defendants here did not have an opportunity to object to the timeliness of plaintiffs' *Batson* claim until after the court had already determined that it was untimely and did challenge the timeliness of plaintiffs' *Batson* objection when they addressed that issue in their responses to plaintiffs' posttrial motion. As such, we conclude that defendants have not waived their objection to the timeliness of plaintiffs' *Batson* challenge and that the circuit court did not err in dismissing plaintiffs' challenge because it was untimely.

Plaintiffs also assert in their reply brief that the plain error doctrine allows this court to review the merits of their *Batson* challenge. However, plaintiffs have waived this argument by failing to raise it in their appellants' brief. "Points not argued [in the appellant's brief] are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). The sole argument presented by plaintiffs in their appellants' brief on the timeliness of their *Batson* challenge was that defendants had waived their right to object to its timeliness by failing to do so when the claim was first raised and addressing the merits of the claim in their responses to plaintiffs' posttrial motion. By failing to argue that the circuit court committed plain error in their appellants' brief, plaintiffs have denied defendants

1-09-0841

the opportunity to respond to that argument in their appellees' brief. We thus conclude that plaintiffs have waived their plain error argument by failing to raise it in their appellants' brief.

Burlington Northern and Santa Fe Ry. Co. v. ABC-NACO, 389 Ill. App. 3d 691, 717 (2009).

Accordingly, we affirm the judgment of the circuit court of Cook County.

Affirmed.