NEW YORK COURT OF APPEALS ROUNDUP

COURT RESOLVES ISSUES ARISING OUT OF 'BATSON' CHALLENGES

ROY L. REARDON AND MARY ELIZABETH MCGARRY*
SIMPSON THACHER & BARTLETT LLP

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The Court of Appeals decided four cases arising out of "Batson" or "reverse Batson" challenges in an opinion that discussed in detail the Batson protocol for trial courts and standard of review. One of those cases also raised the issue of whether improper denial of a peremptory challenge automatically constitutes reversible error. The Court held that it does. In another decision, the Court answered questions certified to it by the U.S. Court of Appeals for the Second Circuit concerning CPLR 214-c, which addresses statutes of limitations in the circumstances of a latent disease.

Finally, the Court addressed the admissibility of patient statements reflected in medical records, finding them admissible under the business records exception to the hearsay rule if the statements are relevant to the diagnosis or treatment of the patient.

Peremptory Challenge

Criminal lawyers are very familiar with the U.S. Supreme Court's decision in *Batson v. Kentucky*,[1] which established that exclusion of a potential juror on the basis of race violates the constitution. That holding was later extended to gender-based exclusion.[2]

In a recent decision, the Court of Appeals resolved issues arising out of *Batson* or reverse-*Batson* challenges in four criminal cases consolidated under *People v. Joseph Hecker*.

The *Hecker* case raised an additional issue that we address first: whether incorrect denial of a defense peremptory challenge in a criminal action is subject to the harmless error

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* **Roy L. Reardon** *and* **Mary Elizabeth McGarry** *are partners at Simpson Thacher & Bartlett LLP.*

standard of review or automatically results in a reversal. The Court previously had ruled that such an error is always reversible, but revisited the issue following the U.S. Supreme Court's decision in *Rivera v. Illinois*.[3] There, the Supreme Court held that erroneous denial of a peremptory challenge was not a violation of a defendant's right to due process under the Fourteenth Amendment. It stated, however, that nothing in its decision prevented a state court from deciding that such an error is reversible, as a matter of state law.

The Court of Appeals (4-3) reaffirmed its determination that erroneous denial of a peremptory challenge requires reversal. Judge Carmen Beauchamp Ciparick's majority opinion did not find that the state constitution mandated its decision. Rather, the Court's holding was based upon the long history of granting defendants the right to assert peremptory challenges, which right has been incorporated into by the Criminal Procedure Law.

Judge Robert S. Smith authored a dissent from this ruling, joined by Judge Susan Phillips Read and, with respect to this point, Judge Victoria A. Graffeo in a separate opinion. In the post-*Batson* world, a rule that any incorrect denial of a peremptory challenge results in automatic reversal "loads the dice against the People," Judge Smith argued, because it will encourage the defense to vigorously contest any exercise by the prosecution of its right to assert peremptory challenges, but make the prosecution reluctant to exercise that right for fear an error will upset a conviction.

Although not referred to in any of the opinions, we note that in criminal cases, New York grants the parties far more peremptory challenges than are provided in most states and in federal court, or are suggested by the guidelines for peremptory challenges in the ABA Standards Relating to Juror Use and Management.[4]

The balance of the opinion in the consolidated cases reviewed the *Batson*/reverse-*Batson* rulings in each. We commend to criminal lawyers the thorough discussion of the facts and holding in each of the four matters, but discuss here only the principles set forth in the opinion.[5] The Court made clear that trial judges must strictly adhere to a now well-established three-step protocol, and its shifting burdens of proof, if their *Batson* decisions are to be upheld.

The steps are as follows. First, based upon "facts and other relevant circumstances" supporting an inference of improper motive for striking jurors, the moving party must establish a prima facie case that its opponent used peremptory challenges to

discriminate against a cognizable group. Purely numerical and statistical arguments regarding the number of potential jurors in a suspect group in the pool and the challenges made, are "rarely" sufficient to establish a prima facie case.

If a prima facie case of discrimination is established, however, the court proceeds to the second step, in which the non-moving party must offer a "facially neutral" explanation for each suspect challenge. After an explanation for the challenges is put forward, any error of the trial court in finding that the moving party had made a prima facie showing of discrimination becomes moot and, therefore, is not subject to appeal.

Third, once neutral reasons for a challenge are given, the burden again shifts to the moving party to prove "purposeful discrimination," and the trial court must determine whether the proffered reasons are "pretextual." Such a determination is based in large part on the credibility of the lawyers. If a meaningful record is established by the trial judge, his or her third-step ruling must be accorded "great deference" on appeal.

The Court's resolution of the *Hecker* case is the only holding from which any Judge dissented. However, Judge Smith's opinion contained a discussion of another of the cases, *People v. Anthony Guardino*, in which Judge Eugene F. Pigott Jr. joined. In her separate dissent from *Hecker*, Judge Graffeo explicitly did not join the *Guardino* portion of Judge Smith's opinion. Defense counsel in *Guardino* asserted that the People had intentionally sought to eliminate African-American women from the jury. The People did not contest that African-American women (as opposed to only African-Americans or only women) constitute a cognizable group for *Batson* purposes. Judge Smith therefore accepted the premise in deciding that case, yet expressed the view that the proposition was "not obviously correct." He wrote:

> [i]t is widely believed, whether true or not, that certain kinds of jurors…bring predictable biases to jury service…As long as such beliefs are prevalent, lawyers exercising peremptory challenges will target the groups they think least favorable to their cause…. Whether a group defined by race *and* sex is within *Batson's* protections is an open question—one we do not decide today.
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> (Emphasis in original; citation omitted.)

Latent Injury

In *Giordano v. Market America Inc.*, the Court was once again asked by the Second Circuit to answer certified questions arising out of a personal injury action, in this case involving ephedra. The decision (4-3) of the Court turned on the interpretation of CPLR 214-c, which extends the three-year statute of limitations for personal injury caused by the latent effects of a disease-causing agent that may not clinically manifest itself for years after exposure. A detailed dissent was filed by Judge Read, joined by Judges Graffeo and Pigott.

By way of background, plaintiff John Giordano had used a dietary supplement containing ephedra for two years. On March 15, 1999, he ingested the dietary supplement and suffered a cerebral aneurysm. Following surgery, Mr. Giordano suffered two strokes on March 17, 1999, and was left with significant impairments. His doctors were unable to diagnose the cause of the aneurysm or the strokes.

Nearly four years later, Mr. Giordano became aware from news reports of the sudden death of a major-league baseball player that might have been linked to the player's use of an ephedra-based dietary product. Mr. Giordano claimed to have had no prior knowledge of a possible link between dietary supplements containing ephedra and his aneurysm and strokes. Within months Mr. Giordano filed a lawsuit in state court that was removed to federal court.

Defendants' summary judgment motion was granted and the complaint dismissed based upon the three-year statute of limitations (CPLR 214 (5)) for personal injury claims.

The essence of the certified questions posed by the Second Circuit were:

1. Is CPLR 214-c (4) limited to actions for latent injuries?

2. Can an injury that occurs within 24-48 hours of exposure be considered latent?

3. What standards should be applied to determine whether the CPLR 214-c (4) requirement, applicable in certain circumstances, that "technical, scientific or medical knowledge and information sufficient to ascertain the cause of [a plaintiff's] injury had not been discovered, identified or determined prior to the expiration of the three-year limitations period?

In giving a "yes" answer to Question 1, the Court, in an opinion by Judge Smith, ruled that because CPLR 214-c (2) and (3) are expressly limited to cases in which injury is caused by the latent effects of exposure to a substance, and because CPLR 214-c (4), while not containing the word "latent," requires the plaintiff to prove that "he has otherwise satisfied the requirements of subdivisions two and three of this section," subdivision (4) also imposes a latency requirement.

In answering "yes" to Question 2, the Court held that a "latent" injury can be one that manifests itself in a matter of "hours" of exposure because even a brief period of latency can be significant in determining the cause of an injury for purposes of CPLR 214-c.

The dissenters took issue with the majority's answer to Question 2. CPLR 214-c was adopted by the Legislature to address toxic substances that cause disease years after an individual's first exposure, Judge Read asserted, rather than a disease the symptoms of which manifest themselves within hours of the last exposure.

With respect to Question 3, the Court held that the CPLR 214-c (4) provision concerning the discovery of knowledge "sufficient to ascertain the cause" of a plaintiff's injury refers to the time when such knowledge is sufficient for the technical, medical or scientific community "to ascertain" the cause—not for a plaintiff-lay person or his lawyer to do so. The Court provided guidance as to the level of certainty required for such experts to "ascertain" the cause of injury, incorporating the test of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). That level is reached when there is "general acceptance" of the relationship between the substance and the injury in the relevant technical, scientific or medical community, such that expert testimony concerning the existence of the relationship would be admissible in New York court.

Business Records Exception

The Court's decisions on the evidentiary issues in *People v. Oldalys Ortega* and *People v. Maurice Benston* arose in the context of criminal trials. However, the Court's opinion should be equally applicable to civil proceedings in which a party seeks to introduce medical records into evidence without redaction of the patient statements they reflect.

There was no dispute in either case that the crime victims' hospital records constituted business records and therefore were admissible, at least in part, under the business records exception to the hearsay rule. Both defendants argued, however, that certain

portions of the hospital records that were based upon the victims' statements to medical personnel should have been excluded from evidence.

In *Benston*, the defendant and victim had been engaged in a long-term romantic relationship that had ended 15 years earlier. During an argument the defendant attacked the victim, who was treated at a hospital.

The trial court required the People to make certain redactions of the hospital records, but allowed into evidence over the defendant's objection the following statements within the records: the attending physician's diagnosis of "domestic violence," a reference to the defendant as the victim's "former boyfriend," a description of the weapon of asphyxiation as a "black belt," and a reference to a "safety plan" for the victim.

In *Ortega*, the complainant testified that he was taken at gunpoint to a building where the defendant and another man forced him to smoke crack cocaine, and was then forced to make withdrawals from his bank account. The complainant escaped, returned home and was taken to the hospital. The defendant was found with the complainant's identification, bank cards and cell phone. He maintained that the complainant was a willing participant in the activities and had voluntarily given his belongings to the defendant to hold. The trial court declined to direct the redaction from the hospital records of the complainant's statement that he had been "forced to smoke [a] white substance from [a] pipe."

Chief Judge Jonathan Lippman wrote the opinion of the Court. It focused on the specific issue of statements within medical records, and did not address other circumstances in which a business record reflects statements made by third parties to the person creating the record.[6] Hospital records come within the business records exception to the rule excluding hearsay from evidence when they "reflect[] acts, occurrences or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical…aspects of…[the patient's] hospitalization." Thus, a patient's statement about how an accident occurred is not admissible except in situations in which that information may be helpful to understanding the medical aspects of the matter.

Applying that standard to *Benston*, the Court held that statements relating to "domestic violence," identifying defendant as the victim's "old boyfriend," and mentioning a "safety plan" were relevant to the victim's diagnosis and treatment. It is now recognized that domestic violence differs from other types of assault both due to its effect on the

victim, including psychological trauma, and with respect to the appropriate treatment, which in some cases includes a safety plan. In contrast, while the hospital record's identification of the weapon as a belt may have been relevant to the victim's diagnosis and treatment, its reference to the color of the belt was not relevant, and should have been redacted. That error was harmless, however.

In *Ortega*, that the patient may have been "forced" to ingest the drug was admissible because that fact may also have been relevant to treatment, the Court found.

While concurring in the result, Judge Smith disagreed with the majority's analysis. According to Judge Smith, the business records exception applies to the hospital records themselves, which are created by medical personnel, but does not apply to hearsay within them, such as statements of a patient reflected therein. He characterized the Court's decision as creating a "medical diagnosis and treatment exception" to the hearsay rule (recognized by the Federal Rules of Evidence). This concurrence also raised the problem, not presented by these cases, of admitting statements of a person who is not testifying at trial and thus cannot be cross-examined. The problem was "best…le[ft]…for another day," Judge Smith wrote.

Judge Pigott alluded to that problem in his separate opinion, which stated that identification (or misidentification) of a perpetrator in hospital records may, in some circumstances, raise confrontation clause issues. He also agreed with Judge Smith that the statements raised an issue of hearsay-within-hearsay. In addition, Judge Pigott's concurring opinion cautioned against a blanket rule always allowing into evidence references to "domestic violence." Finally, Judge Pigott would have excluded the portions of the hospital records found admissible by the majority in both cases, but considered their admission to be harmless error.

Endnotes:

1. 476 U.S. 79 (1986).

2. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 128-129 (1994).

3. —U.S.—, 129 S. Ct. 1446 (2009).

4. See Colleen McMahon & David L. Komblau, Chief Judge Judith S. Kaye's Program of Jury Selection Reform in New York, 10 ST. JOHN'S J. LEGAL COMMENT. 263, 286 (1995) ("The number of peremptory challenges provided for by the CPL is among the highest in the United States, with a maximum of twenty peremptories for each side in some instances. The numbers stand in sharp contrast to ABA Standard 9, which sets a maximum of ten peremptories per side in capital cases. Rather, all of New York's felonies fall within Standard 9(d)(ii), which allows only five per side. The CPL provides for double to quadruple this number. New York also provides for far more peremptories in criminal cases than do the federal courts").

5. It is worth noting that the trial judge in *Hecker* was criticized by the Court for limiting each party to 10 minutes of voir dire for an 18-member panel. As a result of that limit, many venire persons were not questioned by either the prosecution or the defense before challenges had to be exercised, making it difficult for counsel to assess whether a challenge for cause might be warranted or to articulate why a peremptory challenge was exercised (for any reason other than that counsel lacked information about that potential juror).

6. See, e.g., *Johnson v. Lutz*, 253 N.Y. 124, 128 (1930) (The business records exception of the Civil Practice Act, the predecessor of the CPLR, "was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto").