Circuit Court for Baltimore City
Case No. 24-C-18-006652

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0375

September Term, 2020

LINKIT, LLC

v.

THE MIDTOWN GROUP PERSONNEL, INC.

Reed,
Wells,
Zic,

JJ.

Opinion by Zic, J.

Filed: September 13, 2021

LinkIT, LLC ("LinkIT") appeals from an adverse jury verdict and a denial of a motion for new trial regarding its claim for fraudulent misrepresentation against The Midtown Group, Inc. ("Midtown").[1] Prior to the jury being sworn in, the trial judge substituted the first alternate juror for a juror he permitted to leave to seek emergency medical attention. The court also declined to instruct the jury on benefit-of-the-bargain damages and denied a motion for new trial, which was based on LinkIT's representative's observation of a juror "dozing" and "nodding" during portions of the trial.

QUESTIONS PRESENTED

LinkIT presents three questions for review,[2] which we have rephrased as follows:

[1] In its brief, Midtown notes that LinkIT "erroneously named 'The Midtown Group Personnel, Inc.' as the defendant in the underlying action" instead of "The Midtown Group, Inc."

[2] LinkIT raised the following questions presented in its brief:

1. Whether the trial court erred in applying the holding of [*Batson v. Kentucky*], 476 U.S. 79 (1986) to deny the Appellant's request to withhold dismissing an ailing Black juror that left the Court for medical attention until after the juror had been seen by medical personnel to explore his rejoining the jury the next day as dismissal would eliminate the racial balance of the jury selected;
2. Whether the trial court erred in rejecting the Appellant's request for jury instructions on damages regarding the misrepresentation of the Appellee's intention to permit the Appellant to participate in the government procurement for the percentage required by the government offeror for a woman's owned enterprise to include payment of the required percentage of the government procurement; and

1. Did the circuit court err by substituting a juror experiencing a medical emergency with an alternate juror?

2. Did the circuit court err by denying LinkIT's request to instruct the jury as to benefit-of-the-bargain damages?

3. Did the circuit court err by denying LinkIT's Motion for New Trial in which LinkIT raised for the first time that a juror was allegedly dozing during trial?

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3. Whether the trial court erred in denying the Appellant a new trial when the jury foreperson was alleged to have been asleep during portions of the trial presentation.

Midtown phrased the questions as follows:

1. Whether the trial court committed reversible error by swearing in an alternate juror, who was neither challenged nor stricken by the Appellant during jury selection, to replace an unsworn juror who, prior to the jury being sworn in, was hospitalized and, thereafter, the trial court was unable to determine if the unsworn juror would be able to return.

2. Whether the trial court committed reversible error in denying Appellant's request for a jury instruction on its ability to elect to seek benefit-of-the-bargain damages in a claim alleging fraudulent misrepresentation when Appellant did not seek those damages in its Complaint; did not indicate that it was seeking those damages during discovery; admitted for the purposes of the action that it did not enter into a contract with Appellee; and where the jury unanimously found Appellee not liable to Appellant for any fraudulent misrepresentation – thereby not requiring it to address the issue of damages.

3. Whether the trial court committed reversible error in denying Appellant a new trial when Appellant alleged more than ten (10) days after the entry of judgment that a juror "appeared" to be dozing during certain parts of the trial but did not establish (1) that the juror was actually sleeping or (2) that the juror's alleged conduct caused it actual prejudice.

For the reasons set forth below, we answer these questions in the negative and shall affirm the judgment of the Circuit Court for Baltimore City.

FACTS AND PROCEEDINGS

In July 2016, Baltimore City Public Schools ("BCPS") issued an Invitation for Bids ("IFB") for information technology support services. The IFB stated that the "goal for the minority subcontractor participation for this contract is . . . 10% for Women Business Enterprises."[3] Midtown, a woman-owned staffing firm, submitted a bid for the BCPS contract as the prime contractor, identifying LinkIT as the Women's Business Enterprise ("WBE") subcontractor. Midtown was subsequently awarded the contract by BCPS. After Midtown was awarded the contract, Midtown sent LinkIT a draft subcontractor agreement. LinkIT took issue with some terms in Midtown's draft agreement, and negotiations broke down. Midtown removed LinkIT from the contract with BCPS.

LinkIT filed a complaint against Midtown alleging a single count of fraudulent misrepresentation and requested a jury trial. LinkIT alleged that Midtown fraudulently misrepresented its intentions to contract with LinkIT, the identified WBE. A jury trial was held from March 10 to 13, 2020. On the first day of trial, before the jury was sworn in, a juror informed the court that he felt he needed to go to the hospital because of leg pain. The trial judge allowed the juror to seek medical attention. After the court was

[3] The IFB also stated a goal of "27% for Minority Business Enterprises," but that goal did not involve LinkIT and is not pertinent to the issues in this appeal.

unable to contact the departed juror later that same day, the trial judge replaced that juror with the first alternate juror.

Additionally, the court denied LinkIT's request to instruct the jury on benefit-of-the-bargain damages. The jury found Midtown not liable for fraudulent misrepresentation. After the filing deadline had already passed, LinkIT filed a Motion for New Trial based on LinkIT's representative's observation of a juror "dozing" and "nodding" during portions of the trial. The court denied the motion.

DISCUSSION

I. THE TRIAL JUDGE PROPERLY REPLACED A JUROR EXPERIENCING A MEDICAL EMERGENCY WITH AN ALTERNATE JUROR.

A. The Trial Judge Did Not Misapply the Holding in *Batson v. Kentucky* When He Substituted the Departed Juror With the First Alternate.

LinkIT argues that when the trial judge replaced juror two with the first alternate juror, the judge misapplied the holding in *Batson v. Kentucky*, 476 U.S. 79 (1986), which held that "[t]he Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or on the false assumption that members of his race as a group are not qualified to serve as jurors." *Id.* at 86 (footnote omitted) (citation omitted).[4] Midtown argues that the court did not apply the holding in *Batson* at all and properly seated the alternate juror. We agree with

[4] In *Batson*, the Supreme Court found that the use of a peremptory strike based on race is impermissible. 476 U.S. at 86, 89 (finding that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure").

Midtown. LinkIT's argument is not supported by the record.

After the jury was selected, but before the jurors were sworn in, the following exchange took place between the court and counsel:

> [THE COURT]: I mentioned to Counsel that a jury communication, our juror Number 2, spoke with Madam Clerk. Told her that he was having leg pain, was concerned that it might be a blood clot, and was -- felt that he should go to the emergency room.
>
> * * *
>
> Realizing the seriousness of a potential blood clot, I took the unusual step of dismissing the juror without being able to consult with Counsel. Didn't necessarily dismiss him.
>
> Told him to go to the hospital . . . .
>
> * * *
>
> [COUNSEL FOR LINKIT]: I would like to hold on to him because right now we have a perfectly balanced jury ratio. This changes that.
>
> * * *
>
> [THE COURT]: Well, here's my concern. My concern is that we did give this jury, I gave this jury, an outside limit. We have a couple jurors who said that it would be difficult for them to be here. So I'm really concerned if we go over the five days.
>
> * * *
>
> Right. We have -- we haven't sworn the jury. *I do understand the concern about the composition of the jury and the balance of the jury. And I understand that that can be taken into consideration when exercising strikes, peremptory strikes.*

* * *

I'm sorry, I misspoke. Under *Batson*, the consideration of race is not a legal consideration. *Therefore, the composition, racial composition, of the jury, can't be [the] basis for exercising a strike.* So I'm not sure where we go from there. If that's the concern.

[COUNSEL FOR LINKIT]: Well, I don't know that [*Batson*] says we can proceed and have a -- and not consider race in a way that affects race.

[THE COURT]: I'm sorry, I missed that. I just didn't hear.

[COUNSEL FOR LINKIT]: That in seeking to uphold [*Batson*], we basically changed the racial balance.

[THE COURT]: Yeah. But I think [*Batson*]'s concerned with strikes being exercised on the basis.

[COUNSEL FOR LINKIT]: Yeah, for reasons of race.

[THE COURT]: Right. Right.

[COUNSEL FOR LINKIT]: I don't know if for reasons of race you can, or at least try to avoid asserting a racial reason, you can change and alter the racial balance of the jury.

[COUNSEL FOR MIDTOWN]: The question before the [c]ourt isn't about whether there's a racially balanced jury. It's for when there's an injured juror who is being excused, and whether we can proceed with the alternate, which is what the purpose of the alternates to begin with.

And so I would say that if a juror has to be hospitalized --

[THE COURT]: Well, we don't know if he has to be hospitalized.

[COUNSEL FOR MIDTOWN]: But you said he's going to the hospital?

[THE COURT]: He went over to the emergency room.

[COUNSEL FOR MIDTOWN]: So if a juror is expressing a need to go to the hospital, I would view that as a valid reason to excuse the juror. And if we're still ready to proceed, there's a reason we have the two alternates.

* * *

[THE COURT]: I am -- if we had sworn the jury, I'd be inclined to see -- wait and see if we can get him back, even before we place an alternate there. But we have not sworn the jury.

So the objection is noted for the record. *But what we're going to do is place Alternate Number 1 in Seat Number 2*. Alternate Number 2 becomes --

[THE CLERK]: Alternate Number 1.

[THE COURT]: -- Alternate Number 1.

[THE CLERK]: Yes, Your Honor.

[THE COURT]: Did -- you didn't get in touch with him? Oh, let's just take a moment, see if he's available to come right back, or what the story is.

[THE CLERK]: Okay.

(Brief Pause.)

[THE COURT]: It went directly to voicemail? Okay. All right.

Okay. So [Counsel for LinkIT's] objection is -- I assume it's an objection; correct? [Counsel for LinkIT]?

[COUNSEL FOR LINKIT]: Yes.

> [THE COURT]: Okay. It's noted for the record so it's preserved.
>
> Is there anything else that we should talk about before we bring out the jury? All right. Then let's bring out our jury.
>
> [THE CLERK]: Yes, Your Honor.

(emphasis added).

As correctly pointed out by the trial judge, the issue in *Batson* involved the jury selection process, specifically counsel's exercise of preemptory strikes to inappropriately affect the racial makeup of the jury. 476 U.S. at 82-83. It is plain to us from this record that the trial judge discussed *Batson* but did not rely on it when he replaced juror two with the first alternate. The trial judge replaced the juror, who had left to seek medical attention. After the court could not reach the juror, the judge replaced him so as not to delay the trial.

LinkIT concedes in its principal and reply briefs, and again during oral argument, that *Batson* is inapplicable to this case. LinkIT argues, however, that:

> Nothing in the *Batson* holding in any way invalidates a lawyer's concern that the racial balance of a particular jury meets a concern that his client receive a consideration by the jury that might be biased by the absence of racial balance. Accordingly, the [c]ircuit [c]ourt's application of the holding in *Batson* goes well beyond any reasoning applied in that decision to justify denial of appellant's objection to the dismissal of Juror No. 2. The trial judge's reliance on that holding for that decision was error.

LinkIT cites to no authority for this argument and we find none.[5] The trial judge did not apply or misapply *Batson* when he replaced the juror.

B. The Trial Judge Did Not Abuse His Discretion in Replacing the Juror.

The Court of Appeals has held that a court's decision to remove a juror is reviewed for an abuse of discretion:

> [W]hen a judge determines to remove a juror and substitute an alternate juror for a reason particular to that juror, whether the juror is removed based on the trial judge's determination of the juror's unavailability or disqualification or based on the judge's determination of some other cause for the removal of the juror, the trial judge's decision is a discretionary one and will not be reversed on appeal absent a clear abuse of discretion or a showing of prejudice to the defendant.

State v. Cook, 338 Md. 598, 607 (1995).

[5] To the extent that LinkIT argues that it is entitled to a racially balanced jury, the Supreme Court has clearly stated that "[a] defendant has no right to a 'petit jury composed in whole or in part of persons of his own race.'" *Batson*, 476 U.S. at 85 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 305 (1879)). And that:

> Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination "in the selection of jurors on racial grounds."

Akins v. Texas, 325 U.S. 398, 403 (1945) (quoting *Hill v. Texas*, 316 U.S. 400, 404 (1942)); *see also Batson*, 476 U.S. at 85-86.

LinkIT's only argument regarding the replacement of the juror is in the context of *Batson*. LinkIT does not argue that the trial judge otherwise abused his discretion or make another argument on that issue. Midtown argues that the trial judge did not abuse his discretion. We agree with Midtown. The unavailability of a juror due to a medical emergency is the type of unforeseen circumstance that alternate jurors are meant to address. The trial judge did not err or abuse his discretion when he replaced the juror and seated the first alternate.

II. THE TRIAL JUDGE PROPERLY DENIED LINKIT'S REQUEST TO INSTRUCT THE JURY ON BENEFIT-OF-THE-BARGAIN DAMAGES.

LinkIT contends that the trial judge erred by declining to instruct the jury as to benefit-of-the-bargain damages. LinkIT argues that the "flexibility theory" discussed in *Goldstein v. Miles*, 159 Md. App. 403 (2004) and principles of public policy entitled it to such an instruction. Midtown argues that because LinkIT only sought out-of-pocket expenses as damages until shortly before trial and there was no contract between LinkIT and Midtown, the trial court properly excluded LinkIT from seeking benefit-of-the-bargain damages. Midtown also contends that because the jury found it not liable for fraudulent misrepresentation, any claimed error concerning the jury instruction on damages was harmless.

An appellate court reviews a trial court's decision to grant or deny a particular jury instruction using an abuse of discretion standard. *Giant of Md., LLC v. Webb*, 249 Md. App. 545, 569 (2021) (citing *Steamfitters Loc. Union No. 602 v. Erie Ins. Exch.*, 241 Md. App. 94, 124-25 (2019)). "In deciding whether to grant a requested jury instruction, a

trial court must consider 'whether the requested instruction was a correct exposition of the law, whether that law was applicable in light of the evidence before the jury, and finally whether the substance of the requested instruction was fairly covered by the instruction actually given.'" *Giant of Md., LLC*, 249 Md. App. at 568-69 (quoting *Malik v. Tommy's Auto Serv., Inc.*, 199 Md. App. 610, 616 (2011)).

A. There Was No Enforceable Bargain.

LinkIT argues that principles of public policy support its position that the jury should have been instructed on benefit-of-the-bargain damages:

> In this case[,] LinkIT, as a woman business enterprise, enjoyed the benefit of public policy embodied by the laws relating to government set-asides in government procurement. That public policy promoted its participation in contracts awarded with government dollars to advance the growth of business opportunities for women and minority business enterprises. Accordingly, where prime contractors misrepresent their intent to allow such enterprises to participate in these subject government opportunities, [sic]. The outcome that public policy sports [sic], given the focus of these government programs, if [sic] for the protected enterprises to enjoy the full benefit of the bargain that the public policy operates to create.

LinkIT cites no authority in support of this argument. LinkIT does, however, cite *Adler v. American Standard Corp.*, 291 Md. 31 (1981) and *Maryland-National Capital Park & Planning Commission v. Washington National Arena*, 282 Md. 588 (1978) for what it describes as "explor[ing] the boundaries of public policy considerations to shape causes of action." LinkIT's reliance on these cases is misplaced. In *Adler*, the Court of Appeals discussed public policy considerations in the context of wrongful discharge

claims. *See* 291 Md. at 43-47. The Court in *Maryland-National Capital Park & Planning Commission* addressed, among other issues, a public policy argument with regard to a non-contestability term in a lease agreement. *See* 282 Md. at 604-13. Neither case supports LinkIT's argument that it was entitled to a benefit-of-the-bargain jury instruction.

LinkIT also argues:

> The "flexibility theory" that this Court recognized in *Goldstein v. Miles,* 159 Md. App. 403 [] (2004), extending to [a] party like [LinkIT] the election to elect either out of pocket losses or benefit of the bargain damages should have been applied in this case both given the circumstances of the evidenced representation and for reasons of public policy.

LinkIT's reliance on *Goldstein* is also misplaced. In *Goldstein*, "tort and contract law converge[d] to produce a tort claim for fraud and negligent misrepresentation coupled with a demand for contract damages." 159 Md. App. at 408. LinkIT fails to note, however, that we held:

> To assure that this hybrid is not used as a device to obtain contract damages where no enforceable promise or agreement exists or as a means to circumvent standard contract defenses, we join other jurisdictions . . . in holding that benefit-of-the-bargain damages are obtainable for such tortious conduct *but only where there is in fact an enforceable bargain.*

Id. (emphasis added). There was no enforceable bargain in this case.[6]

[6] Throughout the trial and pre-trial proceedings, LinkIT admitted that there was no enforceable contract between LinkIT and Midtown. In response to Midtown's request for admission of fact that "Plaintiff and Defendant have never entered into a contract," LinkIT responded that "Plaintiff admits to the above request for admission." At trial,

B. LinkIT Did Not Timely Request a Benefit-of-the-Bargain Jury Instruction.

After hearing arguments by both parties concerning LinkIT's request for a benefit-of-the-bargain jury instruction, the following discussion took place:

> [THE COURT]: But up until -- I believe up until today the answer of the plaintiff has been there is no contract. For that reason, and as far as the election of remedy, I'm not sure when that election -- when Counsel's position is that that election need be made. I mean, we are now standing at the morning of trial, the case has been called. And yesterday afternoon, I believe, is when notice was first given to the defense that the plaintiffs might be requesting anything other -- any additional remedies. So I'm going to grant that motion as well.
>
> [COUNSEL FOR LINKIT]: If I just clarify?
>
> [THE COURT]: Sure.
>
> [COUNSEL FOR LINKIT]: Actually, it was included with the submission of the -- sorry, the submission of the request for jury instructions, which was the first citation of the [*Goldstein*] case.
>
> [THE COURT]: Oh, and when was that? I'm sorry.

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counsel for Midtown requested that the trial judge enforce the above referenced request for admission so that "[LinkIT] cannot argue that there was an [sic] contract," to which the court responded, "[a]nd to be consistent, I'll grant that as well."

Additionally, during trial, in response to Ms. Renee Alston (owner and founder of LinkIT) referring to a contract during her testimony, the court stated from the bench that "when she said contract, she's referring to the invitation to bid, not a contract. . . . The parties have stipulated there was no contract." The court then addressed the jury and stated that "[t]he parties have agreed -- well, the Court finds as a matter of law that there was no contract between the parties." Ms. Alston also admitted that LinkIT was not seeking a breach of contract claim. Finally, in its reply brief, LinkIT states that "[LinkIT] refused to accept the contract proposal."

> [COUNSEL FOR LINKIT]: Which would have been, I believe Saturday. Saturday.
>
> [THE COURT]: Saturday. All right. So that -- that's in the record, so that's preserved. But I'm granting the motion.

The judge granted Midtown's motion in limine to exclude the benefit-of-the-bargain instruction.

The above colloquy between the court and counsel for LinkIT brings us to Midtown's next argument, that LinkIT did not request a benefit-of-the-bargain instruction until shortly before trial. Midtown's argument is well taken. LinkIT's first mention of benefit-of-the-bargain damages was when it transmitted its request for jury instructions to Midtown's counsel on Friday, March 6, 2020 prior to the start of trial on Tuesday, March 10, 2020. Additionally, LinkIT's complaint, discovery responses, and pre-trial statement all indicate that it was seeking out-of-pocket expenses as compensatory damages.[7]

In its complaint, LinkIT stated that it was seeking $140,800.00 in compensatory damages. LinkIT stated that these damages were for "incurred expenses it has been unable to recover from any revenues from a subcontract with [Midtown]." Additionally, in response to Midtown's interrogatory, which asked for a detail of damages sought, LinkIT stated that it was seeking $85,200.00 in economic damages to compensate individuals who worked on the project but did not mention benefit-of-the-bargain damages. In LinkIT's pre-trial statement, it similarly maintained that it was seeking

[7] LinkIT also requested punitive damages in its complaint and pre-trial statement. Punitive damages, however, were not awarded and are not at issue in this appeal.

compensatory damages to pay staff for the work done on the project, this time in the amount of $24,563.67.

C. The Jury Found No Liability for Fraudulent Misrepresentation.

Finally, the jury found no liability for fraudulent misconduct on the part of Midtown, making the issue of jury instructions regarding damages a moot point.

In sum, there was no public policy basis for a benefit-of-the-bargain instruction. There was no contract between LinkIT and Midtown, LinkIT did not timely request a benefit-of-the-bargain damages instruction, and the jury found no liability for fraudulent misrepresentation. We hold that the trial court did not err in denying LinkIT's request to instruct the jury as to benefit-of-the-bargain damages.

III. THE TRIAL JUDGE PROPERLY DENIED LINKIT'S MOTION FOR A NEW TRIAL, WHICH CLAIMED THAT A JUROR WAS SEEN DOZING DURING TRIAL.

After the conclusion of trial, LinkIT filed a Motion for New Trial on the grounds that a juror was seen "dozing" and "nodding" during trial. LinkIT argues that one of the jurors "appeared to be dozing" during several points of the trial. LinkIT did not object or bring the dozing juror to the trial court's attention and only raised the issue after the jury reached its verdict. Additionally, as Midtown points out in its brief, LinkIT did not timely file its Motion for New Trial.

A motion for a new trial must be filed "within ten days after entry of judgment." Md. Rule 2-533(a). The judgment in this case was entered on March 18, 2020. LinkIT did not file its Motion for New Trial until April 1, 2020, over ten days after the entry of

judgment. Rule 8-131(a) states in part that "the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court." When discussing reviewability of an issue on appeal that was not objected to in the trial court, this Court has stated that "unless a [party] makes timely objections in the lower court or makes his feelings known to that court, he will be considered to have waived them and he can not now raise such objections on appeal." *Halloran v. Montgomery County Dep't of Pub. Works*, 185 Md. App. 171, 202 (2009) (alteration in original) (quoting *Caviness v. State*, 244 Md. 575, 578 (1966)).

If a party fails to object or raise the issue of a sleeping juror to the trial court, the issue is waived on appeal. *Cummings v. Dep't of Corrs.*, 757 F.3d 1228, 1234 (11th Cir. 2014) (finding that the appellant waived his right to appeal the lower court's handling of a sleeping juror because the issue was not raised during trial). In this case, LinkIT did not raise the issue of a dozing juror until after trial and when it did, the issue was raised in a late-filed motion. The issue was not preserved for appeal.

CONCLUSION

Accordingly, for the above reasons, we affirm the judgment of the circuit court.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFRIMED. COSTS TO BE PAID BY APPELLANT.