

APPELLANT WAIVES JURY INSTRUCTION ISSUES BECAUSE COURT ADOPTED IMPROPER PROCEDURE

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Yesterday, the Indiana Court of Appeals issued a decision in *Johnson v. Wait*, ___ N.E.2d ___ (Ind. Ct. App. 2011), Cause No. 82A01-0910-CV-49, that teaches a lesson about the procedure that litigators should use when tendering and objecting to jury instructions.

This case was a medical malpractice case that arose from injuries a woman allegedly sustained while she was in a hospital for the cesarean birth of her fourth child. While she was in the hospital, she was uncooperative when she complained of pain and didn't allow her doctor to perform a complete physical examination. This led to doctors missing the fact that she had bilateral shoulder dislocations and an avulsion fracture. These conditions were not diagnosed until a couple of weeks after she was released from the hospital.

The woman filed a complaint and the case was eventually tried to a jury. The jury entered a total defense verdict. The woman then appealed.

On appeal, the Court criticized the procedure that the trial court employed for hearing objections to the court's jury instructions. Rather than hearing those objections before giving them, the trial court heard objections after it had instructed the jury and the jury had retired to deliberate. The Court noted that this was contrary to the procedure set forth in Trial Rule 51(C), which states that an objection to a jury instruction must be made "before the jury retires to consider its verdict." However, this was not reversible error in this case because the parties acquiesced to this procedure.

This was a problem for the plaintiff because the jury instructions were legally incorrect. When instructing the jury on the issue of contributory negligence, the trial court did not inform the jury that the defendants had the burden of proving all of the elements of contributory negligence. However, the Court determined that the plaintiff had waived this issue. The plaintiff attempted to get around the waiver by invoking the concept of fundamental error. That doctrine provides that waiver cannot apply in certain situations. The Court held that this

doctrine should not be extended to civil cases that do not involve liberty interests or fundamental rights.

The Court never indicated what it would have done, had the issue not been waived. However, it is a distinct possibility that the plaintiff would have received a new trial had she preserved her objection to the contributory negligence instruction.

The plaintiff also argued that the trial court should have instructed the jury on the doctrine of *res ipsa loquitur*. However, the plaintiff was procedurally barred from making this argument, as well. Trial Rule 51(D) only allows parties to tender 10 jury instructions, unless the trial court allows the parties to tender more. The trial court did not grant that permission in this case and the plaintiff tendered 37 jury instructions. The *res ipsa loquitur* instruction was the 21st of those 37 instructions. Because the plaintiff did not demonstrate good cause for needing this 21st instruction, she was barred from challenging the trial court's refusal to give that instruction.

There are two takeaways from this case. First, never acquiesce to a judge who wants to hear objection to jury instructions only after the jury has retired. The judge may still follow that procedure, but make sure that this is done only over your objection. Second, only tender more than 10 jury instructions if you really need to do so. If you do, then make sure you tell why its necessary to do so in your case.

Lessons:

1. A litigant waives any objection to jury instructions if she either doesn't make those objections before the jury retires or fails to object to the trial court's refusal to allow her to make those objections in a timely manner.
2. You need to demonstrate good cause if you tender more than 10 jury instructions.
3. If you tender more than 10 instructions, always put the instructions you think are most likely to be controversial in the first ten.