

## Court Urges Trial Courts to Stage Striking of Jury Panels

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The Indiana Court of Appeals today issued a decision in *Hatter v. Pierce Manufacturing, Inc.*, Case No. 49A02-0907-CV-659, which dealt with the jury selection process and how potential error is preserved for appeal. In that decision, the Court encouraged trial courts to make the entire jury panel available first for for-cause challenges and then for peremptory strikes.

In this case, the plaintiffs sued the defendant for product liability theories of defective design and failure to warn. The case proceeded to an eight-day jury trial. During voir dire by plaintiffs' counsel, prospective jurors stated they would have difficulty following an instruction requiring liability to be determined by a preponderance of the evidence rather than ninety-nine to one hundred percent certainty. A fourth prospective juror checked a box on his jury questionnaire stating he could not be a fair juror in a civil case, and during voir dire indicated a potential hardship due to his need to transport his father to the hospital for surgery. Plaintiffs moved to strike these jurors for cause and the trial court denied those challenges. Plaintiffs (who had 3 peremptory challenges) used those challenges of two of these prospective jurors and a fifth prospective juror whom the plaintiffs did not challenge for cause but deemed objectionable for other reasons. Plaintiffs appealed after an adverse judgment and challenged the trial court's refusal to strike the four prospective jurors for cause.

On appeal, the defendant argued that the plaintiffs had not preserved their ability to challenge the denial of the for-cause challenges because not all the peremptory challenges were used on those jurors. The Court noted that a proper analysis of this argument could "turn on the chronological order in which individual jurors happen to be available to be challenged for cause or peremptorily stricken."

In the hypothetical scenario where a highly objectionable juror, yet one not challengeable for cause, was preceded in such an order by a juror whom the party deemed less objectionable but nonetheless challengeable for cause, the party would have to, in order to preserve error in the denial of that challenge, use the peremptory strike that he or she otherwise would have used on the more highly objectionable juror. If the order were reversed, however, the party would be able to use that peremptory strike on the more highly objectionable juror, yet still, in the event of exhausting peremptory challenges before coming to the juror challengeable for cause, would be able to preserve error in the denial of that challenge.

In order to avoid this scenario, the Court "encourage[d] trial judges to employ the procedure the trial court apparently utilized here, by making the entire panel available first for for-cause challenges and then for peremptory strikes."

Litigants should endeavor to bring this "encouragement" to the attention of the trial courts in which you practice. This method of jury selection will make it easier for both parties to preserve their errors for appeal.

### **Lessons:**

1. It is easier to preserve error in the denial of for-cause challenges to a juror if the trial court makes the entire panel available first for for-cause challenges and then for peremptory strikes and the Court of Appeals has encouraged courts to adopt this method of selection.