

It Can Be Easy to Fail to Preserve, Or Even to Waive, Jury Instruction Error

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A recent Pennsylvania Supreme Court decision demonstrates how easy it can be not to preserve, or even waive, error in a trial court's jury instructions.

Prior to trial, the plaintiff in *Jones v. Ott*, Case No. 12 WAP 2017, 2018 WL 3977960 (Pa. Aug. 21, 2018), filed proposed jury instructions on negligence per se. At trial, those requested instructions were not given to the jury, but the charge conference was not recorded and no mention of the requests was made on the record. When the trial court finished instructing the jury and asked if any party wanted to put something on the record, the plaintiff's counsel responded, "I have no issues with the charge, Your

Honor."

After the jury returned a defense verdict, the plaintiff moved for a new trial based on the trial court's failure to give the requested instructions. The plaintiff relied on case law seeming to permit a jury instruction challenge where a requested instruction was filed with the trial court and the issue was raised in a post-trial motion.

The trial court ruled that the challenge was not preserved. The intermediate appellate court held that any challenge was waived.

A divided state supreme court agreed with both of those decisions.

The state supreme court traced some uncertainties in the case law and clarified Pennsylvania's requirements for preserving jury instruction error. The court held that to preserve a jury instruction challenge under Pennsylvania law, a party must either make a contemporaneous objection on the record or make requested points for charge part of the record, obtain an explicit ruling, **and** raise the issue in a post-trial motion. The high court also ruled that, apart from preservation, trial counsel's post-charge statement in open court constituted an express waiver of any jury instruction challenge.

Tips

Two basic concerns tend to dominate any preservation analysis: whether the party asserting error gave the trial court a timely and meaningful opportunity to rule on the issue, and whether the record reflects the party's preservation steps and the trial court's adverse ruling. If either of those concerns is not met, then preservation may be in doubt.

Of course, more may be necessary, as demonstrated by Pennsylvania's requirement that a challenge to overruled jury instruction requests be raised again in a post-trial motion.

Ultimately, it is important that trial counsel — or better, appellate counsel, present at trial to provide trial support — be aware of ambiguities in a jurisdiction's preservation law, and then follow the most cautious approach.

Additionally, avoid saying anything at trial that arguably waives a previously asserted position. If a jurisdiction's preservation requirements call for a party to stand on a previously overruled objection in open court, then consider making arrangements with the court and opposing counsel before that moment arrives, such as with a stipulation that the party maintains the objection and need not announce disagreement with the judge in front of the jury. Or, reference a previously stated objection without details, such as by saying, "Your Honor, we believe the instructions as read reflect the Court's prior rulings, and we maintain our previously asserted positions."

