

# PRESERVATION OF ISSUES: THE PRICE OF ADMISSION TO AN APPEAL

Date: 24 August 2018

## U.S. Appellate Litigation Alert

By: David R. Fine

In the midst of trial, lawyers have a great many immediate tasks — questioning witnesses, presenting documentary evidence, arguing evidentiary points, persuading jurors, and much more — but they must also keep an eye on the horizon and the possibility that they will need to ask an appellate court to reverse an adverse result. In its splintered decision in *Jones v. Ott*, [1] the Pennsylvania Supreme Court reminded lawyers that the rules for preserving appellate issues can be strict and the penalties for failure to know the rules can be harsh.

Helen Jones sued a company and its employee for injuries she allegedly suffered in a traffic accident with the employee. The case went to trial, and Ms. Jones' counsel submitted written proposed jury instructions that requested a charge on negligence per se. The trial judge did not include that instruction when he charged the jury. When he concluded the charge, he asked counsel if they had anything to note on the record regarding the instructions. Ms. Jones' lawyer responded, "I have no issues with the charge, Your Honor." The jury returned a defense verdict, and Ms. Jones filed a post-trial motion complaining that, among other things, the judge failed to give the instruction on negligence per se. Both the trial judge and, on appeal, the Superior Court held that Ms. Jones had waived any objection to the omission of the instruction.

The Pennsylvania Supreme Court granted review to decide whether counsel properly preserved his objection by filing written proposed instructions and then raising the issue in his post-trial motion. In an opinion by Justice David Wecht, a majority of justices held that counsel expressly waived any objection to the charge when he responded to the trial judge's inquiry with "I have no issues with the charge ..."

Three justices would have found waiver even without that express statement because, they explained, it was insufficient for counsel just to file written proposed instructions and then later to file a post-trial motion challenging the omission from the charge. To preserve an objection to the omission of negligence per se from the instructions, counsel had to (1) be sure the proposed instructions were made part of the trial court record, (2) obtain an explicit ruling from the trial judge on the challenge to the instructions and (3) again raise the issue in a timely post-trial motion.

A fourth member of the court, Chief Justice Thomas Saylor, agreed with the majority's description of what would be required to preserve the challenge but would have applied the rule only prospectively because the existing case law was insufficiently clear. Nonetheless, Chief Justice Saylor concurred in the result because he agreed there had been an express waiver.

While technically the majority opinion's discussion of the proper steps to preserve challenges to instructions could be viewed as dictum since it was not necessary to the holding that garnered the votes of a majority of the court, lawyers heading into trial would do well to follow Justice Wecht's guidance since it's clear his analysis has the

prospective support of a majority of the justices. Thus, if a lawyer takes issue with any part of the jury instructions the judge offers, including omissions, the lawyer should make a specific, contemporaneous objection and then follow up with a timely post-trial motion.

*Jones* provides lessons both specific and general. Specifically, it provides a road map for trial counsel in Pennsylvania to preserve challenges to a judge's jury instructions. Generally, *Jones* serves as a reminder that appellate courts in Pennsylvania and elsewhere continue to demand careful attention to issue preservation and will not hesitate to find waiver.

---

[1] No. 12 WAP 2017 (Aug. 21, 2018).

## KEY CONTACTS



**DAVID R. FINE**  
PARTNER

HARRISBURG  
+1.717.231.5820  
DAVID.FINE@KLGATES.COM

---

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.