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Waiver Is Alive and Well in Pa.: High Court Expands Scope

By **James M. Beck** | December 27, 2018 at 01:25 PM

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James Beck of Reed Smith.

In the past couple of months, the Pennsylvania Supreme Court has decided two waiver decisions of great interest to appellate practitioners. In both cases, the court expanded the scope of waiver.

In *Jones v. Ott*, 191 A.3d 782 (Pa. 2018), the court addressed the recurrent question of the steps necessary at trial to preserve objections to the trial court's jury instructions. The plaintiff had filed proposed points for charge, but the plaintiff neither objected following an untranscribed charging conference nor after the charge itself. On appeal, the plaintiff's position was that an objection to the charge was adequately preserved "by docketing written proposed points for charge and raising the issue in a post-trial motion." The plaintiff relied upon *Broxie v. Household Finance*, 372 A.2d 741 (Pa. 1977), which had held:

"It has long been the law in this commonwealth that in order to preserve for appellate review ... a trial court's charge to the jury, the complaining party must submit a specific point for charge or make a timely, specific objection to the charge as given."

The "disjunctive" language in *Broxie* had been widely interpreted as finding preservation based solely filing proposed points for charge, "notwithstanding a failure to lodge a specific objection at trial."

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Broxie is no longer the law. *Jones* rejected the disjunctive approach in favor of the procedure outlined in Pa. R. Civ. P. 227.1, which mandated both pretrial and post-trial preservation, upon express pain of waiver. Because the record in *Jones* “reflected no objection to the trial court’s jury instructions” and nonrecord proceedings could not be considered, the plaintiff failed to preserve an objection to the jury charge pretrial merely by the filing of proposed points for charge.

Further, to allow preservation by filing alone, absent further objection to the trial court’s decisions, was contrary to the purpose of the modern waiver rule—to afford the trial court a contemporaneous opportunity to correct error:

“The mere filing of a requested point for charge, standing alone, does not preserve an assertion of trial court error ... While inclusion of the proposed points in the record is necessary for preservation, it is not sufficient ... Preservation of a jury-charge challenge requires that the trial court has issued a ruling upon the matter ... Grounds for a new trial or JNOV “must be raised timely in pretrial proceedings or during the trial, thus affording the court the opportunity to correct the error,” *Jones*, 191 A.3d at 789 (quoting Explanatory Comment to Rule 227, other rule-related citations and quotation marks omitted).

“Grounds for post-trial relief predicated upon assertedly flawed jury instructions ripen only once the trial court rules upon the matter. The mere filing of proposed points for charge cannot assure a record sufficient to allow meaningful appellate review.”

Thus, both trial and appellate practitioners now have a definitive answer to what had been a perennially question of issue preservation—what sorts of trial level objections must be made to ensure the appealability of issues relating to the jury charge. Practitioners cannot rest on the mere filing of their points for charge. Rather, after *Jones v. Ott*, it is essential that all objections be pursued before the trial court to an on-the-record resolution.

The second recent Supreme Court waiver decision of note is *Stapas v. Giant Eagle*, ___ A.3d ___, 2018 WL 6070787 (Pa. Nov. 21, 2018), which dealt with a less common, but even more vexing problem—what to do about errors in a jury verdict that the jury might be able to correct. Like *Jones*, the court in *Stapas* opted in favor of requiring more, rather than fewer, trial objections to preserve such issues for appeal. At issue in *Stapas* was a grossly excessive jury award of future lost wages, on which the jury had not even been charged, and contrary to the judge’s instruction to return a single, lump sum verdict. However, the defendant did not object to the award before the jury was discharged. Instead, the defendant presented the issue as a post-trial “weight of the evidence” challenge to the verdict.

The court found waiver in *Stapas*. Invoking the “contemporaneous objection rule” first enunciated in *Dilliplaine v. Lehigh Valley Trust*, 322 A.2d 114 (Pa. 1974), the court decided that the issue presented was not a true weight of the evidence challenge.

[Defendant’s] challenge was not grounded in the weight of the evidence ... A weight of the evidence claim ripens after the verdict because it does not challenge the jury’s ability to render a verdict; instead, it contends the jury’s resolution of competing evidence was “a miscarriage of justice.”

Rather, the defendant was challenging the existence of any evidence to support the future damages portion of the verdict, (the defendant's "position is that the jury could not award damages for future lost wages as a matter of law").

The errors being asserted thus, in the opinion of the Pennsylvania Supreme Court, immediately obvious at the time the verdict was entered. The defendant "had multiple opportunities to preserve this ground for post-trial relief during the trial court proceedings but failed to do so."

When the trial court's tipstaff read the jury's itemized verdict, the defendant had a basis to object because the verdict did not conform to the trial court's instruction to return a single, lump-sum verdict and because the jury awarded damages for future lost wages, a category of damages that the plaintiff was not entitled to as a matter of law. By failing to raise an objection at any point during the trial before the jury was discharged, the defendant waived its challenge to the jury's verdict.

The same error-correcting purpose of Pennsylvania waiver rules that had been evident in *Jones* also surfaced in *Stapas*. "If the defendant had objected before the trial court dismissed the jury, it could have required the jury to clarify the verdict ... By not objecting to the verdict, defendant deprived the trial court of the opportunity to efficiently correct a trial error."

If *Jones* stands for the proposition that counsel must take care to make routine contemporaneous objections to preserve issues relating to jury instructions, *Stapas* presents an even more difficult lesson in the need to make contemporaneous objections in the more fluid circumstances attending the actual receipt of a jury's verdict. The Supreme Court, in both cases, has made its preference clear that counsel assert objections immediately, rather than withhold them. Counsel are thus twice warned that failure to object, in a situation where, with appellate hindsight, an objection is available to be made, is an invitation for a finding of waiver.

James M. Beck, a member of the Reed Smith life sciences health industry group, focuses his practice on complex personal injury and products liability litigation. He has experience in developing legal defenses, master briefs and dispositive motions in numerous mass torts, and has prepared amicus briefs on behalf of a variety of national organizations.

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Recently the Pennsylvania legislature addressed one of these situations—and made things right—with the passage of HB-983, which along with Pennsylvania Gov. Tom Wolf's signature on Oct. 24, became Act 102 of 2018.

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