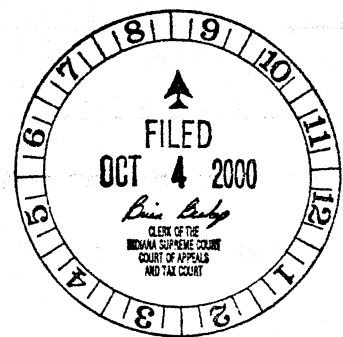


Pursuant to Ind.Appellate Rule 15(A)(3), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE  
COURT OF APPEALS OF INDIANA**

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CONSOLIDATED MEDICAL )  
TRANSPORT, INC., )

Appellant-Defendant, )

vs. )

No. 45A03-9910-CV-389 )

KRISTINE WILEY, Individually, and as the )  
Personal Representative of the Estate of )  
RONALD WILEY, Deceased, )

Appellee-Plaintiff. )

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APPEAL FROM THE LAKE SUPERIOR COURT  
The Honorable Lorenzo Arredondo, Judge  
Cause No. 45C01-9608-CT-1580

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October 10, 2000

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**KIRSCH, Judge**

Consolidated Medical Transport, Inc. (CoMed) appeals the jury's verdict in favor of Kristine Wiley in her suit for wrongful death, raising the following issues for review:

- I. Whether the trial court erred by requiring the jury to deliberate through the night.
- II. Whether the trial court erred in refusing to grant a new trial.
- III. Whether the trial court erred in instructing the jury regarding damages and life expectancy.

We affirm.

### **FACTS AND PROCEDURAL HISTORY**

On June 17, 1995, Ronald Scott Wiley (Scott) suffered an asthma attack which rendered him unconscious and unable to breathe. His wife, Kristine, called 911 and began CPR. Two ambulances responded to the call, including three EMTs and one paramedic, Jeff Marsack. As the person with the highest training, Marsack managed the scene and directed the actions of the other emergency personnel.

When Marsack and the others arrived, Scott was not breathing and was blue in color. Three minutes later, Scott's heart stopped. Marsack tried two times unsuccessfully to place an endotracheal tube into Scott's trachea to provide a means of artificially respirating Scott. On his third attempt to place the tube, he believed he was successful. He taped the tube into place and used the tube to attempt to force air into Scott's lungs. Meanwhile, he also started an IV line and administered medications intramuscularly and through the IV line while an EMT performed CPR. The ambulance left the Wileys' apartment en route to the hospital twenty-four minutes after the first ambulance arrived.

At the hospital, emergency room physician Dr. Shaheen Parvez assumed control over Scott's care. Scott had no heartbeat, and was still blue in color. Upon investigation, Dr. Parvez realized that the endotracheal tube was in Scott's esophagus, not his trachea. Thus, the artificial respiration had been ineffective. Dr. Parvez removed the tube and replaced it correctly in the trachea. Scott's color immediately began to change from blue to pink. Dr. Parvez defibrillated Scott's heart, and Scott's heart resumed beating. Unfortunately, by that time, Scott's brain had been deprived of oxygen for long enough to cause brain death. The following day, he was removed from the ventilator.

Kristine Wiley filed suit for wrongful death against CoMed alleging that Scott's death was caused by the negligent acts of its employees. At the conclusion of the six-day trial, the jury returned a verdict in Wiley's favor for \$933,525.00. CoMed filed a motion to correct errors seeking a new trial, which the trial court denied. CoMed now appeals.

### **DISCUSSION AND DECISION**

CoMed first argues that the trial court erred in requiring the jury to deliberate through the night. The jury retired to deliberate around 3:45 P.M. in the afternoon of May 25, 1999. At 5:15 A.M. the following morning, the jury returned a verdict for Wiley. CoMed argues that because of the overnight deliberations, the jury was sleep deprived, its ability to process information was therefore impaired, and its verdict should now be set aside.

We note, however, that despite CoMed's argument here that the jury's thought processes were compromised during deliberation, at the time, CoMed offered no objection to the jury's continued deliberation. A party may not fail to object to a court's action and then

raise the court's action as error on appeal unless the error is fundamental. *James v. State*, 613 N.E.2d 15, 25 (Ind. 1993). Thus, CoMed has waived this issue for appellate review. See *Eiland v. State*, 433 N.E.2d 400, 404 (Ind. Ct. App. 1982).

To avoid waiver, CoMed contends that these circumstances constitute fundamental error. In order to rise to the level of fundamental error, the error must constitute a clearly blatant violation of basic and elementary principles, and the harm or potential for harm therefrom must be substantial and apparent. *James*, 613 N.E.2d at 25. Fundamental error is an error that is such a substantial and blatant violation of basic principles that it renders the trial unfair. *Sturma v. State*, 683 N.E.2d 606, 610 (Ind. Ct. App. 1997). To fall within this exception, error must be such that if not rectified it would deny the defendant fundamental due process. *Id.*

The length of time a jury should be permitted to deliberate is within the sound discretion of the trial court. *Farrell v. State*, 622 N.E.2d 488, 492 (Ind. 1993); *Parrish v. State*, 515 N.E.2d 516, 520 (Ind. 1987). In order to secure a reversal on this basis, a complaining party must show a clear abuse of discretion coupled with prejudice. *King v. State*, 531 N.E.2d 1154, 1161 (Ind. 1988).

Here, the trial court did not abuse its discretion in not requiring jurors to stop deliberating and rest. The record shows no indication that the jurors felt fatigued or that they requested a break, nor does it disclose any compulsion on the part of the trial court. The trial court simply let the jurors continue deliberating through the night. We find no error of any kind here, fundamental or otherwise.

