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ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

KEVIN W. MARSHALL
Law Office of Smith & Marshall
Hammond, Indiana

MARK DINOS
Morse & Bolduc
Dyer, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DAVID E. BOILEK)

Appellant-Plaintiff,)

vs.)

No. 45A03-0706-CV-281

OLIN J. BARHAM and)
INDIANA INSURANCE CO.)

Appellees-Defendants.)

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Dianne Kavadias Schneider, Judge
Cause No. 45D01-0404-CT-89

January 3, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Following a jury trial, Appellant-Plaintiff David Boilek appeals the jury's verdict denying his claim of damages against Appellees-Defendants Olin Barham and Indiana Insurance Company for personal injuries arising out of a car accident. Upon appeal, Boilek claims the trial court erred in instructing the jury regarding his duty to mitigate. Concluding that Boilek has waived his claim of error, we affirm.

BACKGROUND FACTS AND PROCEEDINGS

The parties agree that on February 6, 2003, Barham crashed into the back of Boilek's car. On April 7, 2004, Boilek filed a complaint against Barham seeking damages for injuries arising out of and lost wages due to the car accident. Barham admitted negligence but denied Boilek was injured as a result of the negligence or to the nature and extent claimed. The case proceeded to jury trial on March 12-14, 2007.¹ At some point during the trial, Boilek's counsel objected to a jury instruction on mitigation, arguing "[t]here has been no evidence up to date that [Boilek] didn't follow the doctor's orders after the crash." Tr. p. 7. The trial court reserved its ruling on the mitigation instruction until the next day. The next day the trial court indicated that it would give the mitigation instruction, Final Jury Instruction No. 13, which stated the following:

The plaintiff must use reasonable care to minimize his damages. This [is] called mitigation of damages. If you find the plaintiff failed to use reasonable care to minimize any of the damages he alleges he has sustained and that failure was a proximate cause of any of the damages he claims, such conduct would constitute fault to be assessed against the plaintiff. The defendant has the burden of proving by a preponderance of the evidence that the plaintiff failed to use reasonable care to minimize his damages.

¹ The trial transcript was not included in the record.

App. p. 38. After the case was submitted to the jury on March 14, 2007, the jury returned a verdict in favor of Barham. On March 20, 2007, Boilek filed a motion to correct error, which the trial court denied on May 8, 2007. This appeal follows.

DISCUSSION AND DECISION

Upon appeal, Boilek claims that the trial court's mitigation instruction, which included mitigation as an element in the determination of fault, was an incorrect statement of law. As Boilek argues, the Indiana Supreme Court has held that mitigation of damages is not an affirmative defense to liability but rather an affirmative defense which may reduce the amount of damages a plaintiff is entitled to recover after liability has been found. *Willis v. Westerfield*, 839 N.E.2d 1179, 1187 (Ind. 2006). Consistent with Boilek's argument, *Willis* suggests that Final Instruction No. 13, which indicated mitigation was an analysis of fault rather than damages, may have been an erroneous statement of law.

However, as Barham argues, Boilek failed to object on this basis before the trial court and has therefore waived this claim on appeal. Boilek's only objection to the instruction at trial was on the grounds that there was not enough evidence to support such an instruction. Boilek made no argument at trial specifying that Final Instruction No. 13 was an erroneous statement of law. Indiana Trial Rule 51(C) states, "No party may claim as error the giving of an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Appellate review of a claim of error in the giving of a jury instruction requires a timely trial objection clearly identifying both the claimed objectionable matter

and the grounds for the objection. *Scisney v. State*, 701 N.E.2d 847, 849 (Ind. 1998) (finding appellate review waived when counsel objected to instruction on general ground that it was unclear statement of law and did not explain why instruction was unclear or what could be done to correct it).

The judgment of the trial court is affirmed.

BAKER, C. J., and DARDEN, J., concur.