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Evidentiary Objections in Motions: Law of the Case?

By Jeffrey K. Levine

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Preserving or failing to preserve objections at the time of trial can impact its outcome as well as the post-trial motion practice and appeal.

Of course, this basic concept was disseminated to us during our formative years in various subjects at law school. When, for example, an uncertified police report is tendered to the trial court for admission into evidence, the opposing party can properly object and keep that inadmissible report out of evidence and, thus, avoid its consideration by a jury.

On the other hand, a prepared adversary might reconsider such a knee-jerk reaction of objecting to the otherwise inadmissible report as there might be valuable information that can be used to a client's benefit regardless of not being in evidentiary form.

By not preserving an objection at trial the uncertified police report would be admitted into evidence and could be fully used throughout the course of the trial and in any post-trial motion and appeal. Conversely, if the same uncertified police report was objected to, the court's ruling on admissibility and any jury consideration given may be scrutinized later on and result in a possible reversal on appeal depending on the foundation or lack thereof established at the time of its introduction.

Law of the Case

The court's allowance or consideration of evidence at trial creates law of the case for that particular evidence. Thus, preserving or failing to preserve an objection to the admissibility of evidence should establish the parameters within which all counsel operate throughout the remainder of the case at the trial level.

Absent "countervailing public policy" parties may waive their objections thereby consenting or acquiescing to an application of law or direction that a trial may follow, see *Martin, v. City of Cohoes*, 37 NY2d 162, 165 (1975). The *Martin* court reversed the Third Department where defense counsel never argued at trial that the city of Cohoes required prior written notice for trip and fall accidents and instead represented the city needed actual notice. Proceeding at trial under those auspices, plaintiff's counsel presented his case accordingly and a jury found for plaintiff.

Post-trial, defense counsel established the city's ordinance had been amended prior to the accident, thus, requiring prior written notice. The court denied defendant's post-motion to set aside the verdict. Defense counsel was deemed to have acquiesced when he failed to object and move for dismissal after plaintiff rested and failed to establish the city was served with prior written notice.

Interestingly, on appeal the court accepted judicial notice of the ordinance, reversed the jury determination and dismissed the complaint. The Court of Appeals, however, reversed the Third Department and ruled that although law of the case was not binding on an appeal but only to courts of coordinate jurisdiction, that by acquiescing to the law and facts, or in other words by not preserving an objection to the admission of actual notice versus prior written notice, counsel had consented and that consent was binding upon the parties, absent countervailing public policy.

Uncertified Police Report

So, back to our example of the uncertified police report, if counsel acquiesces or fails to object to its admissibility, that report becomes inextricably part of the case and may be considered and given



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whatever weight chosen by the court and jury. Consequently, by failing to object to the admissibility of the proposed and otherwise inadmissible evidence and either actively or passively acquiescing, that evidence becomes law of the case which is binding on the parties and the court.

These concepts were also present in the Fourth Department's *Schwartz v. Aetna*, 214 AD2d 975 (1995). There, defendant moved for summary judgment relying upon "unsworn medical records." Responsively, plaintiff opposed the motion by also submitting unsworn medical records. Neither side objected to these otherwise inadmissible records. Consequently, the court accepted all of the records and ultimately sua sponte granted summary judgment but in favor of the non-moving plaintiff, which award was upheld on appeal. The Appellate Division specifically ruled that the trial court properly considered these otherwise inadmissible records because no party preserved any objection.

In *Hartford v. Transamerica*, 141 AD2d 423, 425 (1988), the First Department reached a similar outcome where the court cited *Borchardt v. New York Life Ins. Co.*, 102 AD2d 465, 468, aff'd for the reasons stated, 63 NY2d 1000 in reminding the Bar that "The lack of a foundation does not render * * * evidence inadmissible where no objection on that ground is raised."

And simply to round off and make a full representation of all departments, in multiple rounds of labor law summary judgment motions that denied defendant's motion, the Second Department recently discussed the importance of preserving and refuting evidence in a previously submitted summary judgment opposition.

In *Quinn v. Hillside*, 21 AD3d 406 (Aug. 8, 2005), the opposing party properly preserved objections in a prior summary judgment motion where facts were refuted and which decision was appealed. Those original objections and judicial findings of refuted facts carried forward to a subsequently filed summary judgment motion. This subsequent motion was denied, and upheld on appeal, based upon law of the case principles stemming from preserved objections contained in the prior motion practice and appeal. See also *Johnson v. Incorporated Village of Freeport*, 288 AD2d 269 (2001).

Having established the basic importance of either preserving an exception or conversely acquiescing to the admissibility of evidence at the trial level, we next move to other implications that objections or waivers have at the trial level.

Some of the principles reviewed above were discussed in an March 4, 1996 "Of Counsel" article for the New York Law Journal by Zachary Murdock entitled "Objecting to Admissibility of Summary Judgment Evidence."

Summary Judgment Motions

That article set forth the importance of preserving objections specifically during summary judgment motions, else they are waived and not preserved when reviewed at the appellate level.

Appellate review is not the only concern a litigator should have when considering whether to object or acquiesce to proposed evidence. Going back to the uncertified police report example, let's say that no party objected to admissibility of the hearsay police report during the summary judgment motion. Let's further assume that the summary judgment motion was denied because facts were in dispute and the case, consequently, required a jury trial. It seems clear that had there been an appeal from the denial, the waiver of objection regarding the uncertified police report would not have been preserved for appellate review and, thus, the report could be properly considered as accepted evidence.

Consequently, the report was not something in dispute between the parties. Let's say the appellate division upheld the denial and the case was then sent back for a plenary trial. This uncertified, although admitted report, was in front of two courts of competent jurisdiction . . . does the party seeking to use the report now need to obtain a certified copy of the report or can he instead literally point to the exhibit annexed to the summary judgment papers which was not objected to? It stands to reason that if waiver of objection in a summary judgment motion a/k/a paper trial is binding on the parties even at the appellate level that would by implication also cover all lower courts as well. Thus, said waiver, acquiescence, or lack of dispute allows for said evidence to be admitted and considered at all judicial levels.

Reversing a Choice

It would be inherently prejudicial and against basic procedural principles to allow a party to reverse their choice and later on dispute the previously acquiesced evidence. An adverse party is not permitted to object to evidence for the first time when arguing on appeal. Similarly that adverse party should not be permitted to object to evidence at a jury trial where the same evidence was waived at the paper trial.

So, in an instance where an objection to the uncertified police report was not preserved in a paper or even a jury trial, counsel would not be allowed to object to that same evidence at the appellate level. Logic dictates, although no case law can be found on this specific point, that once evidence was accepted

in a paper trial without objection by the adverse party, that same evidence and even the very exhibit itself should be admissible and may be used at the plenary trial by either side without the need to re-lay any further foundation. This acquiescence at the paper trial is binding on the parties and at all judicial levels, and specifically acts as law of the case for the jury trial because of the co-ordinate jurisdiction of the trial court.

Thus, assume the summary judgment motion was denied and the uncertified police report was used at the paper trial without objection, and because of the motion's denial a jury trial was need. Both sides should be able to use that very summary judgment motion exhibit at the time of the jury trial because it was already before the court in a practice where only admissible evidence may used.

Conversely, if the same uncertified police report were objected to at the paper trial and not considered by the court, then that paper trial exhibit would not be available to the parties due to it's refuted admissibility. Counsel who wishes to introduce that police report at the time of trial would then need to follow the rules of evidence, lay the proper foundation and use best evidence to establish the report is in evidentiary form (unless some subsequent stipulation to use the report was agreed upon).

Conclusion

Objecting to evidence is crucial to how any case unravels at the lower court and thereafter. Failing to preserve an objection at the time of its introduction to the lower court has consequences. If an adverse party fails to preserve an objection to evidence in a summary judgment motion, the failure to object acts as acquiescence and cannot be made for the first time on appeal.

Consequently, the waiver to object binds the parties to that evidence at the trial as well as appellate levels and acts as law of the case at the co-ordinate trial level. Either side can then use the unobjected to paper trial exhibit/evidence at the time of the plenary trial in the same way that it could otherwise be relied upon at the appellate level and without the need to re-establish any foundation for admissibility as that was waived in an earlier proceeding.

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