

A P P E L L A T E

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RECENT PENNSYLVANIA SUPERIOR COURT DECISION HIGHLIGHTS IMPORTANCE OF OBJECTIONS TO PRESERVING ISSUES FOR APPELLATE REVIEW

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Presenting Objections, Preserving Issues

The Superior Court recently held that an attorney's failure to make timely or effective objections to the composition of a jury prevented a trial court from vacating a judgment and granting a mistrial. The Superior Court's April 16, 2013 decision in *Webber v. Ford Motor Co.* is not precedential, but it bears attention because it demonstrates the need for trial counsel to be aware of potential appellate issues and to lodge proper objections in a timely fashion to preserve those issues for review.

The Asbestos Case that Became a Train Wreck

Plaintiff George Webber and his wife sued several automotive brake product manufacturers after Mr. Webber was diagnosed with peritoneal mesothelioma. At the end of a five-week trial before eight jurors and one alternate, defense counsel proposed that the alternate juror participate in deliberations as a ninth juror, and plaintiffs' counsel indicated that he did not object.

Under Pennsylvania law, a verdict rendered by at least five-sixths of a jury in a civil case has the same effect as a unanimous verdict. When the court inquired about how many of the nine jurors would have to agree to constitute a valid verdict, defense counsel said that the verdict of seven jurors would suffice and plaintiffs' counsel did not disagree. The court then instructed the jury that when at least seven of them agreed, they would have reached a verdict. By a vote of 7-2, the jury found in favor of the defendants, with the alternate juror acting as the foreperson and voting with the majority.

When the court prepared to record the verdict in open court, plaintiffs' counsel objected to the vote of the ninth juror. Over plaintiffs' objection, the court released the jury and docketed its verdict, effectively recording it. Plaintiffs' counsel did not file written objections to the docketing of the verdict, or request that the court enter an order specifying

ing that the verdict, while docketed, was not to be deemed recorded. Although the plaintiffs then filed a post-trial motion, they did not assert that the verdict was improperly recorded. In fact, they consistently referred to the jury's determination as a "verdict."

When the court did not take action on the plaintiffs' post-trial motion within 120 days of its filing, defense counsel praeciped the prothonotary to enter judgment in their favor pursuant to Pa. R. Civ. P. 227.4. The next day, the court entered two orders, one opening and vacating the judgment and the second declaring a mistrial. The defendants appealed those orders. The plaintiffs did not cross-appeal to challenge the verdict's alleged impropriety.

The Superior Court reversed. It held that the jury's decision was properly recorded as a verdict. Plaintiffs' counsel had not objected to the seating of the ninth juror, agreed to accept an agreement by seven jurors as a verdict, and did not object to the court's instruction that a vote by seven jurors would constitute a verdict. The Court therefore held that plaintiff's counsel's failure to act was "fatal to the [plaintiffs'] challenge to the jury's composition and decision."

Because the verdict was properly recorded, the trial court lacked authority to open and vacate the judgment. It could not grant a mistrial because the trial had ended months earlier. And it could not have granted a new trial because the jury's verdict was consistent and based on substantial evidence.

Lessons for the Practitioner

Plaintiffs' counsel's unhappy experience serves as a reminder not only that trial counsel must be sensitive to possible appellate issues, but also that it is of paramount importance to lodge proper, timely objections to ensure that those issues are preserved for appellate review. The panel's opinion suggests several means of avoiding a similar fate:

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1. ***If you have an objection, make sure you clearly state it as such.*** Here, plaintiffs' counsel failed to make a specific objection to the inclusion of the alternate juror as a ninth juror in the jury's deliberations or to the validity of a verdict of seven out of nine jurors.
2. ***If you have an objection, make it at the earliest opportunity.*** Plaintiffs' counsel did not object to the participation of the ninth juror until after the jury returned a verdict adverse to his clients and he saw that the ninth juror voted in favor of the defendants. By the time he voiced that objection, it was too late.
3. ***If you are going to take a position on appeal, make sure that your advocacy and actions in the trial court are consistent with your position.*** Plaintiffs' counsel failed to object to the docket entry recording the verdict, and failed to ask the court for an order preserving his objection that the verdict, while docketed, was not to be deemed recorded. In addition, plaintiffs' counsel did his clients no favors by repeatedly referring to the jury's determination as a "verdict" in his post-trial motion. Finally, plaintiffs' counsel did not file a cross-appeal to challenge the verdict.
4. ***Pay attention to the applicable procedural rules and the calendar.*** This case implicated Pa. R. Civ. P. 227.4(b)(1), which allows a party to praecipe the prothonotary to enter judgment after 120 days have passed since the filing of post-trial motions. Although it is not clear whether it would have made a difference, plaintiffs' counsel should have alerted the court to the imminent deadline to rule on his post-trial motion. The appeal might have taken a different shape if the defendants had been appealing from an order granting a post-trial motion, not one opening and vacating a judgment.

In sum, the misfortunes of plaintiffs' counsel serve as a reminder that the road to the appellate court is a treacherous one that requires diligent attention to numerous details. Trial counsel must be exceptionally careful to assess potential appellate issues and to take appropriate actions at all times to preserve them for review. In doubtful situations, it may be appropriate to retain appellate counsel to assist with this navigation. ♦

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