NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

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OPINION LETTER

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Re: *RBD of Virginia, LLC, et. al. v. Donald B. Bavely*, Case No. CL–2018–11424[1]

Dear Counsel:

The issue before the Court is whether a party must make all trial objections during a deposition to preserve them if the transcript is ever used at trial.

In looking both at the plain language of Virginia Supreme Court Rules 4:5 and 4:7, and at the federal case law that has interpreted and analyzed Federal Rule of Civil Procedure 32, this Court concludes that there are some objections that must be made during a deposition, or the objections are deemed waived. There are other objections that a party can never waive, and parties may properly raise them for the first time at trial. Thus, the Court holds a party need only object to the few matters specifically enumerated in the Rules of the Supreme Court of Virginia to preserve them. A deposed party need not make all his or her trial objections during the deposition for preservation purposes.

Most experienced litigators expect this holding despite the lack of any case law interpreting this part of the Rules. However, anyone deeply reading the Rules can initially reach a different conclusion. In the present case, the Rules initially puzzled the parties counsel, the Commissioner in Chancery, and the Court. One part of the Rules reads that "[a]n objection at the time of the examination . . . to evidence . . . must be noted on the record." Va. Sup. Ct. R. 4:5(c)(2). Out of context this seems to direct trial objections during depositions. This Opinion Letter highlights the context.

[1] The Court consolidated this case for trial along with the following cases: *Donald Bavely v. Geneva Enterprises, Inc., et. al.*, CL-2018-13979; *Geneva Enterprises, Inc. et. al. v. Donald B. Bavely*, CL-2018-18124, *AV Automotive, .L.LC., et. al. v. Donald B. Bavely, et. al.*, CL-2019-2804; *Donald Bavely v. Jaguar Land Rover of Chantilly, LLC, et. al.*, CL-2019-13200; *Donald Bavely v. DealerPPC, LLC*, CL-2020-7497; *Donald Bavely v. Fairfax Imports, Inc, et. al.*, CL-2020-18740.

I. OVERVIEW.

Before the Court are seven cases consolidated for trial relating to employment and ownership disputes between various individuals and entities within the Rosenthal Automotive dealership empire.

Prior to trial, during discovery proceedings, the parties took the deposition of Jeffrey Cappo. RBD of Virginia, Inc. ("RBD") wishes to use the deposition at trial. *See* VA. SUP. CT. R. 4:7(a). It asks the Court to treat as waived any objections opponent Donald Bavely could have made, but did not make, during the deposition.

Mr. Bavely responds that he was not obligated to make his trial objections during the deposition, and that his failure to do so has no effect on his right to object to portions of the deposition transcript at trial.

RBD complains that the Commissioner in Chancery in this case held that its own failure to make trial objections during a different deposition—of Marc Dickler—waived those objections. It claims the Court should, for consistency, apply the same waiver rule to the Cappo deposition as the Commissioner in Chancery applied to the Dickler deposition.

II. ANALYSIS.

The Supreme Court of Virginia addresses the taking of depositions and the use of them at trial in two separate rules. VA. SUP. CT. R. 4:5, 4:7. However, no Virginia case law interprets these rules regarding the preservation or wavier of objections during a deposition. Federal Rule of Civil Procedure 32 is the corresponding federal rule relating to the use of depositions, and objections to depositions, and uses similar language to Virginia Rules 4:5 and 4:7.

The rules expressly require that "[a]n objection at the time of the examination . . . to evidence . . . must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objections." VA. SUP. CT. R. 4:5(c)(2). If the rules stopped here, one would have to conclude that one must make all evidentiary trial objections during the deposition to avoid waiving them. However, the rules do not stop there. Rule 4:5 qualifies this absolute statement by reading: "[t]he preservation or waiver of objections during the deposition is governed by the provisions of Rule 4:7." VA. SUP. CT. R. 4:5(c)(1). Therefore, the Court must look to Rule 4:7 to determine preservation or wavier of deposition objections.

Rule 4:7 itself reads: "any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then present and testifying" may be used at trial. VA. SUP. CT. R. 4:7(a). The Rule follows consistently: "objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying." VA. SUP. CT. R. 4:7(b). Logically, this means one may wait for trial to raise trial objections; one need not raise them first in the deposition to preserve them for trial.

Thus, Rule 4:5(c)(2), in context, means that only objections that *must* be made at the time of the examination per Rule 4:7 must be noted on the record—not all objections.

A. Objections a Party Must Make.

The Supreme Court enumerates some objections that must be first raised during the deposition to preserve them for trial.

"*Errors* and irregularities occurring at the oral examination in the manner of taking the deposition, *in the form of the questions or answers*, in the oath or affirmation, or in the conduct of parties, *and errors of any kind which might be obviated, removed, or cured* if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition." VA. SUP. CT. R. 4:7(d)(3)(B) (emphasis supplied). "This provision requires that during a deposition, when an error in the form of a question by counsel or of an answer given by a witness can be cured by a timely objection, the objection must be stated timely or will be deemed waived." *Graham v. Cook*, 278 Va. 233, 246-47 (2009).

Therefore, a party must object to the form of a question at the time of the deposition. For example, if an examiner asks a compound question and the deponent answers "yes," the deponent must object so that the examiner may break up the question. Similarly, a party must object to any other question the examiner could correct if told it was objectionable. A party cannot raise an objection as to the form of a question asked during the deposition for the first time at the trial.

The underlying reasoning of the different treatment of objections relating to substantive issues, such as hearsay, and those relating to form, such as compound questions is to resolve curable objections. An examiner can immediately resolve objections to form during the deposition by restating a question. In contrast, hearsay testimony at a deposition remains hearsay at the ensuing trial. The examiner cannot resolve such an issue at the deposition, so there is no logical reason to require the deponent to lodge an objection. Such objections may be properly raised for the first time at trial for resolution.

There are a few other objections a party must make at the deposition to preserve the objection, such as to attorney-client privilege. VA. SUP. CT. R. 4:5(c)(2) (not only may a lawyer defending a deposition lodge an objection to preserve the attorney-client privilege, but the lawyer may also properly instruct the deponent not to answer).

B. Objections a Party Never Waives.

There are some objections a party never waives during a deposition—so he or she never has to assert them at the deposition. "Objections to the competency of a witness or to the *competency, relevancy, or materiality* of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time." VA. SUP. CT. R.4:7(d)(3)(A).

This makes sense when one considers that depositions are primarily discovery tools. One often may not know the relevancy of a deposition question until trial.

Therefore, under the plain reading of Rules 4:5 and 4:7, the Court finds that not all objections are required to be raised during the deposition to be preserved for trial. Rather, some objections, such as those relating to relevancy, materiality, and competency, cannot be waived, and even if not raised during a deposition can still be made for the first time at the trial during the introduction of the deposition testimony.

C. Comparison to the Federal Rules of Evidence.

Virginia courts look to federal case law when interpreting discovery rules closely resembling the Federal Rules of Civil Procedure. *See Transilift Equipment, Ltd. v. Cunningham*, 234 Va. 84 (1987); *Horne v. Milgrim*, 226 Va. 133, 137 (1983); *Rakes v. Fulcher*, 210 Va. 542 (1970). The corresponding federal rule to Rules 4:5 and 4:7 is Rule 32 of the Federal Rules of Civil Procedure.

FRCP 32 states, in relevant part, that "[a]n objection to a deponent's competence--or to the competence, relevance, or materiality of testimony--is not waived by a failure to make the objection before or during the deposition, unless the ground for it might have been corrected at that time," and that "[a]n objection to an error or irregularity at an oral examination is waived if: (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and (ii) it is not timely made during the deposition." FRCP 32(A), (B).

In interpreting FRCP 32, federal courts generally hold a deponent does not waive a deposition objection when the objectionable question could not have been obviated or removed at the time of the taking of the depositions. *See, e.g., Johnson v. Nationwide Mut. Ins. Co.*, 276 F.2d 574, 578-79 (4th Cir. 1960) (lack of a hearsay objection at a deposition did not waive the hearsay objection at trial).

Therefore, federal courts interpreting almost identical deposition rules as Virginia's hold that a party need not raise all his or her trial objections during the deposition to preserve them if the deposition is ever read at trial.

D. Effect of Commissioner in Chancery's Ruling in a Related Deposition.

After a deposition of a different deponent than the one currently at issue before the Court, the Court's Commissioner in Chancery held that a party who fails to make a trial objection during a deposition waives the objection if the deposition is later read into evidence at trial. Per the present Opinion Letter, the Court disavows that ruling—even though it emphasizes with the Commissioner's ruling; after all, the Court announced the same ruling before reconsidering it.

Commissioner reports must be presented to the Court for a hearing, if desired. VA. CODE ANN. § 8.01-615. Effectively, this is the procedure for appealing a Commissioner's ruling to the Court. It was not used in the present case. The Commissioner's report and any exceptions to it

were never presented to the Court for adjudication. Until the present objections to purportedly waived deposition objections, the Court was unaware the discovery matter was adjudicated. The Court could deem the issue waived.

However, the Court may reconsider almost any ruling while it has jurisdiction. VA. SUP. CT. R. 1:1(a); but see *McBride v. Commonwealth*, 2022 WL 4831303 (Va. Ct. App. Oct. 4, 2022) (a trial court may not reconsider an orally announced ruling granting a motion to strike in a criminal case). In the spirit of mutuality in the application of the Court's interpretation of the deposition rules, the Court grants RBD leave to raise objections the Commissioner in Chancery deemed waived to parts of the Marc Dickler deposition.

III. CONCLUSION.

A party at a deposition need not raise all his or her trial objections during a deposition to preserve the objections for trial should the deposition be offered into evidence. Rather, there are typically only a few objections one must raise at a deposition to preserve the objection, such as to the form of the question or answer or as to any other matter that can be cured at the time of the deposition, or to questions eliciting responses in violation of the attorney-client privilege. Some objections are never required to be raised at the deposition to be preserved, such as relevance. One need not (and should not) clutter a deposition with ordinary trial objections, such as to hearsay, that cannot be cured at the time of the deposition.

An appropriate Order is attached.

Kind regards,

[redacted]

David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

RBD OF VIRGINIA, *et. al.* Plaintiffs,	)	
v.	)	CL-2018-11424
DONALD B. BAVELY, Defendant.	)	

ORDER

THIS MATTER came before the Court on RBD of Virginia's Motion *in Limine* to bar Donald Bavely from raising trial objections he never raised during the deposition of Jeffrey Cappo at the reading of his deposition at trial; and for the reasons set forth in the Opinion Letter of October 7, 2022, which is incorporated herein by reference, it is

ORDERED Mr. Bavely may raise objections to deposition questions he did not raise during the Cappo deposition, unless the objections were required for preservation purposes under Virginia Rule 4:7(d) as explained in the Court's incorporated Opinion Letter.

THIS CAUSE CONTINUES.

OCT 0 7 2022

Entered

[redacted]

Judge David A. Oblon

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD FOR THE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA. OBJECTIONS MUST BE FILED WITHIN 10 DAYS.