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General and Specific Objections on Appeal: Part I

This article reviews the tight rules that govern the appealability of general and specific objections, sustained and overruled, which are anchored in the foundational principle of preservation.

By **Elliott Scheinberg** | November 30, 2021

Elliott Scheinberg. Courtesy photo

"The office of an objection is to stop an answer." *Platner v. Platner*, 78 NY 90, 102 (1879). However, while "a rose is a rose is a rose" (Gertrude Stein, "Sacred Emily," 1913), "an objection is not an objection is not an objection" when it arrives for appellate review. This article reviews the tight rules that govern the appealability of general and specific objections, sustained and overruled, which are anchored in the foundational principle of preservation.

CPLR 4017 states: "Formal exceptions to rulings of the court are unnecessary. At the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court. Failure to so make known objections, as prescribed in this section or in section 4110-b, may restrict review upon appeal in accordance with paragraphs three and four of subdivision (a) of section 5501."

CPLR 4110-b states: "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court, out of the hearing of the jury, shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict stating the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

Timely objections. "The rule, that a party seeking to avail himself of an exception to the admission of improper evidence must point out the particular ground of his objection, is a salutary one ... A party ought not to be allowed to remain silent and conceal the real objections which he may have to the admissibility of evidence, and then, after misleading his adversary by frivolous objections, for the first time reveal his real complaint in the appellate court." *Mead v. Shea*, 92 N.Y. 122 (1883). "A party, against whom a witness is called and examined, cannot lie by and speculate on the chances, first learning what the witness testifies and then, when he finds the testimony unsatisfactory, objecting either to the competency of the witness or to the form or substance of the testimony." *Quin v. Lloyd*, 41 N.Y. 349 (1869).

"[A] timely objection alerts all parties to alleged deficiencies in the evidence and advances the truth-seeking purpose of the trial. [T]he timely objection advances the goal of swift and final determinations ..." *People v. Gray*, 86 N.Y.2d 10, 21 (1995). "When a timely objection is not made, the testimony offered is presumed to have been unobjectionable and any alleged error considered waived." *Horton v. Smith*, 51 N.Y.2d 798, 799 (1980); *Andresen v. Kirschner*, 297 AD2d 235, 236 (1st Dept. 2002); *Koplick v. Lieberman*, 270 AD2d 460 (2d Dept. 2000); *Matter of Estate of Ingber*, 189 A.D.3d 1933 (3d Dept. 2020).

The sole issue on appeal, in *Isaacson v. Karpe*, 84 A.D.2d 868 (3d Dept. 1981), was whether any error by the referee in accepting plaintiff's unsupported testimony as to the unpaid principal balance was preserved for appellate review: "Defendant made neither objection thereto nor motion to strike plaintiff's testimony. Rather, defendant raised the sufficiency of such proof for the first time in her opposition to plaintiff's motion to confirm the referee's report. Her failure to timely object, or move to strike otherwise inadmissible evidence placed such error beyond the scope of review upon appeal [CPLR 4017]."

Unobjected-to inadmissible evidence may be given probative value. "Evidence, though not competent, received without objection may be relied upon to establish a fact in controversy." *Kellogg v. Kellogg*, 300 A.D.2d 996, 996-97 (4th Dept. 2002). "Indeed in civil cases, inadmissible hearsay admitted without objection may be considered and given such probative value as, under the circumstances, it may possess (*Rosenblatt v. St. George Health & Racquetball Assoc.*, 119 A.D.3d at 54-55 ...)." *Costor v. AT & T Services*, 187 A.D.3d 1135 (2d Dept. 2020); *Bank of New York Mellon v. Gordon*, 171 A.D.3d 197 (2d Dept. 2019); *Matter of Estate of MacDonald*, 40 N.Y.2d 995, 996 (1976) ("Although the hearsay testimony of the attorney-draftsman would, under usual circumstances, be inadmissible ... the same might be received in the absence of objection.")

An objection is not necessary where the court could not have corrected its error. *Brown v. Moodie*, 116 A.D.2d 980 (4th Dept. 1986):

"In this action for damages sustained by plaintiffs in attempting to escape from a fire in apartments owned by defendant, a reversal and new trial are made necessary by the court's in camera discussion with the forewoman of the jury (juror), without the presence or knowledge of counsel. After the jury had deliberated for a few hours, it directed a note of inquiry to the court. In response the Trial Judge invited the juror into chambers and held an extensive discussion which was transcribed by the court reporter. The juror indicated that the jury was confused and did not know how to answer the questions on the verdict sheet with respect to comparative negligence. At that point the jury had apparently concluded that defendant was not negligent but the juror indicated that, although they did not want to award damages to two of the plaintiffs, they felt one plaintiff was entitled to a monetary award. The court explained that, if they found that defendant was not negligent, plaintiffs would get nothing. The court then proceeded to go through the verdict sheet with the juror explaining principles of comparative negligence and apportionment of liability during the course of which he used as an example an apportionment of 70%/30%.

After a discussion which lasted approximately 15 minutes, during which the juror was obviously confused about the principles to be applied, she returned to the jury room. Approximately one hour later the jury returned with a verdict apportioning 70% liability to plaintiffs and 30% to defendant. The court then informed the attorneys of his discussion with the juror in camera. After denying a request for a transcript of that conversation and after some discussion as to whether there were grounds for an exception, the court granted each attorney an exception.

[W]e note that although plaintiffs' attorney did not formally record an objection, he could have reasonably believed that it was not necessary to do so in light of the fact that the court had given counsel an exception. In any event, a waiver analysis is inapplicable in this situation because, even if counsel had asserted an objection, the court could not have corrected the error. At any rate, this issue presents a question of such fundamental impropriety and unfairness that we may reach it in the interests of justice.

It was clearly improper for the court to communicate with the juror in absence of the parties ... This case "illustrates the importance of having all instructions to the jury given in open court, where each party knows exactly what is being communicated to the jury and has an opportunity to note any objections, exceptions or further request, unless consent is given." ... Although the court certainly did not intend to influence the verdict, by inquiring into the jury's inclinations, helping the juror to answer the questions on the verdict sheet and in actually doing the arithmetic, the court may have inadvertently placed its imprimatur on certain possible factual determinations before the jurors had reached a consensus."

Montour v. Uris Builders, 42 A.D.2d 788, 789 (2d Dept. 1973):

"In an action to recover damages for wrongful death and conscious pain and suffering, plaintiff appeals from a judgment of the Supreme Court [] in favor of defendant Arc Electric Construction [] upon a jury verdict after trial on the issue of liability alone. * * *

Reversible error was committed by allowing evidence of a conversation between the defense witness Kalbacher and plaintiff's witness Zachary, which evidence impeached the direct testimony previously given by Zachary. No foundation was laid for the reception of this impeachment testimony by Kalbacher ... While ordinarily such error is not preserved for appellate review by general objection, upon the theory that it could have been corrected if specifically called to the attention of the court ... the error could not have been cured since Zachary had left the jurisdiction to return to his home in Canada at the time Kalbacher was called to testify."

Cf., *Garritano v. Garritano*, 62 AD3d 657, 658-59 (2d Dept. 2009):

"[S]upreme Court did not err when it gave further requested instructions to the deliberating jury in the defendant's absence. 'The proper practice, and it is wise and salutary, is that further instructions requested by a jury after it has retired should be given by the justice presiding to the jury in open court when counsel for both sides are present or have been afforded the opportunity of being present, unless counsel on both sides consent to written instructions or to the requested reading of the record or parts thereof by the stenographer in the jury room' ... That way, 'each party knows exactly what is being communicated to the jury and has an opportunity to note any objections, exceptions or further request, unless consent is given' (*Brown v. Moodie*, 116 A.D.2d 980, 982 ... quoting *Jones v. S.T. Palay Textile*, 279 App.Div. 337, 339 ...). Nonetheless, "such an improper communication in a civil case does not require a new trial 'unless prejudice to either party's case resulted therefrom.'"

See also *Maione v. Pindyck*, 32 A.D.3d 827, 828-29 (2d Dept. 2006) ("[W]hile it was "clearly improper for the court to communicate with the juror[s] in the absence of the parties" ... such an improper communication in a civil case does not require a new trial "unless prejudice to either party's case resulted therefrom.")

General objections: sustained, overruled; Specific objections: sustained, overruled; The purpose of the specific objection. "The therapeutic purpose of the requirement that a protest be registered [is] to call the court's attention to and permit it to correct what counsel believes is an erroneous ruling." *People v. Narayan*, 54 N.Y.2d 106, 112 (1981). In *People v. Gray*, 86 N.Y.2d 10, 20 (1995), the Court of Appeals explained "the chief purpose of demanding notice through objection or motion in a trial court": "[A]s with any specific objection, [it] is to bring the claim to the trial court's attention. A general motion fails at this task ... As a practical matter, a general motion to dismiss is often no more helpful to the Trial Judge than would be a motion predicated on an erroneous ground. A sufficiently specific motion might provide the opportunity for cure before a verdict is reached and a cure is no longer possible."

In *People v. Vidal*, 26 N.Y.2d 249 (1970), the Court of Appeals stated: "The function of the specific objection is not only to cure formal defects. The requirement of the specific objection is also intended to serve and serves judicial economy by eliminating the need for new trials

where a proper objection would have alerted the Judge or even elicited a concession from opposing counsel by withdrawal of the offending matter ... Hence, the additional factor required to support a general objection without a following specification, is that it appear from the record that the offending material is inadmissible and that nothing could cure the inadmissibility."

An objection must be specific to preserve a question of law; the word 'objection' or its equivalent standing alone fails to preserve the issue for appeal—a specific objection must follow. "The word "objection" alone was insufficient to preserve the issue for our review." *People v. Fleming*, 70 N.Y.2d 947 (1988); *People v. Tevaha*, 84 N.Y.2d 879 (1994); *People v. Everson*, 100 N.Y.2d 609 (2003). "A party generally must specify the basis for an objection to preserve a question of law for this Court's review. [D]efense counsel made only a general objection to the court's multiple rulings regarding the proposed testimony of a witness. Accordingly, defendant's present contention that the testimony constituted hearsay and improperly bolstered another prosecution witness was not preserved for our review." *People v. Clarke*, 81 N.Y.2d 777, 778 (1993). *People v. Britt*, 34 N.Y.3d 607 (2019):

"During the agent's testimony, defense counsel issued only one-word objections, without any elaboration. "The word 'objection' alone was insufficient to preserve the issue for our review"... because it did not specify the basis for the general objection. Subsequently, in the discussion of the jury charge, defense counsel contended that the agent had not been qualified as an expert witness, and added that this was "part of the reason why" he had objected to the agent's testimony about separation of counterfeit from genuine currency in a different pocket. Notably, defendant did not move to strike the agent's testimony. Defense counsel's remarks targeted portions of the jury instruction and did not function to specify the basis of the earlier general objection at a time when the trial court could still 'effectively chang[e]' its prior ruling allowing the testimony."

The defendant's contention, in *Wolf v. Persaud*, 130 A.D.3d 1523 (4th Dept. 2015), that the court erred in permitting the use of a publication from the American College of Obstetricians and Gynecologists to be used during cross-examination because he did not recognize it as "authoritative" was not preserved for appellate review because the defendant did not object to the publication on that specific ground.

In *Gonzalez v. State Liquor Authority*, 30 N.Y.2d 108 (1972), no specific objection was taken on constitutional grounds to the introduction of the illegally obtained evidence:

"The rule is, that in order to preserve on appeal '[t]he constitutional and legal issue on admissibility of evidence', a specific objection on constitutional and legal grounds must be made during the trial or hearing. (*Leogrande v. State Liq. Authority*, 19 N.Y.2d 418, 425 ...)

Where no specific objection on constitutional grounds to the receipt of the subsequently suppressed evidence was made during the hearing, the issue of admissibility of evidence is not available on judicial review. (*Sowa v. Looney*, 23 N.Y.2d 329, 333 ... ; cf. *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 111 ...).

Petitioner's general objection is, of course, to no avail since it was not followed by the requisite specific objection, nor does it appear from the record that the hearing officer could 'infer from anything said by licensee's counsel that there was any objection on constitutional grounds to the admission of this evidence.' (cf. *Finn's Liq. Shop v. State Liq. Authority*, 24 N.Y.2d, Supra, at p. 657, n.2 ...)"

General objections regarding summations. Defendant's claim on appeal, in *People v. Tonge*, 93 N.Y.2d 838 (1999), that he had been deprived of his right to a fair trial because the prosecutor stated in her summation that his conduct fit the "typical behavior of a sex offender" was unpreserved for review because defense counsel had made only a general objection. See also *People v. Dien*, 77 N.Y.2d 885 (1991).

A motion to set aside a verdict based on improper summation does not cure the failure to register a timely specific objection. In *People v. Harris*, 98 N.Y.2d 452 (2002), defendant argued on appeal that the prosecutor's summation concerning his court demeanor violated his constitutional rights against compelled self-incrimination, to due process, to a fair jury trial, and to confront those who testify against him (U.S. Const. 5th, 6th, 8th, 14th Amends; N.Y. Const., art. I, §§5, 6): "[Counsel's] single-word objections to the smile/smirk statements fell far short of apprising the court of the constitutional claims he now raises on appeal. Moreover, defendant's motion to set aside the verdict based on this conduct does not cure his failure to register a specific objection."

See also *People v. Green*, 46 A.D.3d 324 (1st Dept. 2007) ("Since defendant only made general objections during the prosecutor's summation, and since his CPL 330.30(1) motion to set aside the verdict could not preserve issues he failed to preserve during the trial, defendant did not preserve his present claims (*People v. Harris*, 98 N.Y.2d 452, 492 ... (2002)).

Part II addresses:

- A general objection is good only if it is sustained, it will be upheld if any ground existed for its exclusion as the ruling will be assumed to have been on the proper ground;

- A general objection has no value when overruled (the evidence is received) if not followed by a specific objection except if the evidence is inherently incompetent or unless there is some ground which could not have been obviated if it had been specified;

- An objection to the admissibility of evidence on one ground allows no new grounds to be considered on appeal, all other theories are waived unless there is no purpose for which the evidence was admissible;

- If a specific objection is sustained, the ruling must be sustained upon that ground unless the evidence excluded was in no aspect of the case competent or could not

be made so; and

- The Appellate Division may discretionarily order a new trial when an unpreserved error in a jury charge is fundamental—"so significant that the jury was prevented from fairly considering the issues at trial."

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General and Specific Objections on Appeal: Part II

This is the second part of a two-part article that reviews the tight rules governing the appealability of general and specific objections, sustained and overruled, which are anchored in the foundational principle of preservation.

By **Elliott Scheinberg** | December 01, 2021

Elliott Scheinberg. Courtesy photo

A general objection is good only if it is sustained, it will be upheld if any ground existed for its exclusion as the ruling will be assumed to have been on the proper ground.

Bloodgood v. Lynch, 293 NY 308, 312 (1944): "The leading case [] is *Tooley v. Bacon*, 70 N.Y. 34, 37, where the rule is stated as follows: 'When evidence is excluded upon a mere general objection, the ruling will be upheld, if any ground in fact existed for the exclusion. It will be assumed, in the absence of any request by the opposing party or the court to make the objection definite, that it was understood, and that the ruling was placed upon the right ground."

"[T]he opposite counsel has a right to have the objections stated, but if he does not call for them he is not misled, and may be supposed to understand them." *Height v. People*, 50 NY 392, 395 (1872).

A general objection has no value when overruled (the evidence is received) if not followed by a specific objection except if the evidence is inherently incompetent or unless there is some ground which could not have been obviated if it had been specified. *People v. Vidal*, 26 N.Y.2d 249 (1970): "A general objection, in the usual course, is to no avail when overruled if not followed by a specific objection directing the court, and the adversary, to the particular infirmity of the evidence ... To this there is the general exception, that if the proffered evidence is inherently incompetent, that is, there appears, without more, no purpose whatever for which it could have been admissible, then a general objection, though overruled, will be deemed to be sufficient."

Citing *People v. Vidal*, Michael M. Martin, et al., New York Evidence Handbook, 2d edition, §1.4.1, explain that the language, "no purpose for which the [evidence] could have been admissible," is "more precisely stated as applying when the evidence is not relevant for any purpose."

Crawford v. Metro. El. R. Co., 120 NY 624 (1890): "We are aware of the general rule to the effect that a general objection is good provided the evidence is incompetent, and the objections could not have been obviated, and that it is claimed that no evidence that could have been introduced would have made competent the opinions of these witnesses; but, had the objection been placed upon the specific ground that the opinions of these witnesses were not competent upon the question of rental value, the form of the question might have been so changed as to obviate the objection."

See also *Tooley v. Bacon*, 70 N.Y. 34 (1877); *Webb v. Yonkers R. Co.*, 51 AD 194, 196 (2d Dept. 1900); *Wightman v. Campbell*, 217 NY 479, 482-83 (1916).

An objection to the admissibility of evidence on one ground allows no new grounds to be considered on appeal; all other theories are waived unless there is no purpose for which the evidence was admissible. "Where a specific objection is made on one ground, other possible grounds cannot be considered on appeal." *Bloodgood v. Lynch*, 293 N.Y. 308 (1944). *People v. Ross*, 21 N.Y.2d 258 (1967) ("The defendant's other objection to the testimony was on the specific ground of hearsay, and only that ground can be considered on appeal unless there is no purpose for which the evidence was admissible; *People v. Regina*, 19 N.Y.2d 65 (1966). "Where a specific objection is made to evidence offered, every ground of objection not specified which is capable of being obviated by evidence is waived." *Marston v. Gould*, 69 N.Y. 220 (1877). "Since the ground urged on appeal is different than the one urged at trial, the issue is not preserved for appellate review." *Isler v. Sutter*, 198 A.D.2d 68, 69 (1st Dept. 1993).

In *In re New York City Asbestos Litigation*, 188 A.D.2d 214 (1st Dept. 1993), defendant argued at trial against the admission of a report on the ground of relevance. The Appellate Division rejected his hearsay argument on appeal.

In *People v. Liccione*, 50 N.Y.2d 850 (1980), the defendant was convicted of second degree murder relating to the killing of his wife. "The most substantial issue raised on this appeal is whether certain statements made by the individual who fatally assaulted defendant's wife, which were admitted as a part of the wife's dying declarations, constituted inadmissible

hearsay. The assailant's statements, as communicated by the victim before she died, implicated defendant in a plot to kill his wife, and were received in evidence on the theory that defendant and the assailant were coconspirators. Defendant now argues ... that the statements were not made in furtherance of the conspiracy and thus should not have been admitted under the coconspirator exception to the hearsay rule.

Whatever the merits of this contention, the issue is not preserved for review. [A]lthough defendant specifically objected to the admissibility of the dying declaration qua dying declaration, and also specifically objected to the alleged failure of the prosecution to establish a prima facie case of conspiracy, no question was raised as to whether the assailant's statements were made in furtherance of the conspiracy. These objections in this instance preserved only the grounds specified (generally, Richardson, Evidence (10th ed. Prince), s. 538) and thus the precise issue argued is beyond our power of review."

In *Feltus v. Staten Is. Univ. Hosp.*, 285 A.D.2d 445 (2d Dept. 2001), plaintiff contended that the Supreme Court erred in precluding her from offering testimony of statements made to her by the decedent. She argued that this testimony was admissible to establish the defendants' liability either as an excited utterance, an admission, or evidence of the decedent's state of mind. At trial, however, she had only introduced the evidence for the limited purpose of establishing the decedent's state of mind in order to demonstrate his pain and suffering. She thereby waived any other theories of admissibility.

The "most important evidentiary ruling," in *Schiaroli v. Village of Ellenville*, 111 A.D.2d 947 (3d Dept. 1985), involved "a portion of testimony [] in which [a witness] told the jury of a conversation between [two people]":

"The trial court denied defendant's objection grounded on irrelevancy and admitted the testimony under the res gestae exception to the hearsay.

FN: [D]efendant contends that the evidence is inadmissible as hearsay. However, this new ground for objection cannot be offered for the first time upon appeal unless there is no viable purpose for which the evidence was admissible (... J. Prince, Richardson on Evidence § 538, at 531 (10th ed 1973))."

People v. Ross, 21 N.Y.2d 258 (1967):

"[D]efendant points to section 813-f of the Code of Criminal Procedure which provides: 'In a case where the people intend to offer a confession or admission in evidence upon a trial of a defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or to his counsel if he is represented by counsel.' He argues that the statements made to Patrolman Zilinske were admissions; therefore, reversible error was committed by allowing Zilinske to testify as to them since no notice of intention to offer such admissions was given to him by the District Attorney, pursuant to the mandate of the above statute.

[B]y failing to object to Zilinske's testimony on the ground that the [Code of Criminal Procedure §813-f] had not been complied with, the defendant waived his right. It is significant also that he did not object on the ground that the statements were involuntary, for the obvious purpose of the statute is to give a defendant adequate time to prepare his case for questioning the voluntariness of a confession or admission ... The defendant did not request a Huntley hearing, and in no way demonstrated that he was prejudiced by the failure to comply with the statute. Indeed, even on this appeal, the defendant does not seek to move this court by urging the involuntariness of his statements.

It would also seem that defendant has not saved the question for review. His first two objections to Zilinske's testimony were general objections 'to conversations'. It is well settled that, when a general objection is overruled, 'all grounds of objection which might have been obviated, if they had been specifically stated, must be deemed (on appeal) to have been waived' ... A specific objection addressed to the failure to comply with the statute might well have obviated the ground of objection. The court could have postponed the trial pending the outcome of a Huntley type hearing if the defendant intended to controvert the voluntariness of the 'admissions'."

If a specific objection is sustained, the ruling must be sustained upon that ground unless the evidence excluded was in no aspect of the case competent or could not be made so. "If [] a ground of objection be specified, the ruling must be sustained upon that ground unless the evidence excluded was in no aspect of the case competent, or could not be made so." *Tooley v. Bacon*, 70 N.Y. 34 (1877); *Bloodgood v. Lynch*, 293 NY 308, 312 (1944). In essence, if the ground at trial was improper, the challenger to the evidence loses on appeal even if there was another valid ground.

People v. Murphy, 135 N.Y. 450 (1892): "The genuine [writing] specimens were received in evidence, and the expert witnesses called and permitted to make the comparison and give their opinion upon the subject, without any intimation from the defendant that such proof was inadmissible. The defendant himself even called two expert witnesses, and had the benefit of an opinion from them, after a comparison of the letters with the genuine specimens, to the effect that at least one of the letters was not written by the same person as the concededly genuine exhibits.

When the letters were offered in evidence there was no objection to their reception, on the ground that the proof of their genuineness was insufficient, but they were objected to solely on the ground that the letters themselves were incompetent and improper as evidence—an objection which pertains to the subject-matter of the proof offered, and not to the method of its presentation, or to any of the preliminary steps to be observed in its introduction.

If the defendant had seasonably objected to the evidence of comparison of handwriting, and the objection had been sustained, the prosecution might have been able to have furnished sufficient common-law proof of the genuineness of the letters to have authorized their admission as evidence; for one of the expert witnesses was a bank officer, who had seen the defendant write, and who might have testified from his personal knowledge of the

defendant's handwriting that, in his opinion, he wrote the letters in question; and other like testimony might have been produced. *The evidence objected to was not in its essential nature incompetent, and therefore all grounds of objection which might have been obviated, if they had been specifically stated, must be deemed to have been waived.*"

In re Budziejko's Will, 277 A.D. 829 (4th Dept. 1950), a will contest, the attending physician was asked for his opinion as to whether the testatrix possessed sufficient mental capacity to make a will: "A mere objection without statement of grounds therefor was made. The Court asked upon what ground counsel objected and counsel said it was upon the ground that the witness was not competent to testify as a physician. He then conducted a preliminary examination as to the qualifications of the witness after which he renewed his objection stating no further ground. The objection was overruled and after the opinion was stated counsel proceeded to cross-examine upon it. There was no objection to the form of the question or as to the testimony itself being incompetent, nor was any exception taken nor motion to strike out made.

Having restricted the objection to the competency of the witness to testify as an expert and give an opinion, the appellant may not, on appeal, rely on the claimed incompetency of the testimony itself as no such objection was raised at the trial. Had such objection been made, the respondent would have had the opportunity to reframe the question so that it would not have been objectionable."

The Appellate Division may discretionarily order a new trial when an unpreserved error in a jury charge is fundamental—"so significant that the jury was prevented from fairly considering the issues at trial." In *Vallone v. Saratoga Hosp.*, 141 A.D.3d 886 (3d Dept. 2016), plaintiff sought treatment in the emergency room, complaining of a history of recurrent seizures. After being placed on an examination table, his father brought him a cup of coffee. Plaintiff had another seizure and spilled the hot coffee into his lap, burning him. The plastic surgeon recommended referral to a burn center, and plaintiff subsequently underwent debridement and skin grafting surgery. As a result of his burn injuries, plaintiff suffered permanent scarring, lost function, and continuing pain:

"[A]lthough there was evidence from which the jury could have found that plaintiff shared responsibility for the initial coffee spill, defendant made no claim at trial that plaintiff had any such shared responsibility for defendant's subsequent deviations from the accepted standard of care in treating plaintiff's injuries, nor was there any evidence adduced at trial from which the jury could have found that plaintiff shared such responsibility. Accordingly, plaintiff contends that Supreme Court should have instructed the jury to consider plaintiff's comparative negligence only if it found that defendant was negligent in allowing him to have hot coffee in the emergency room, and to exclude any consideration of comparative negligence from its findings on defendant's subsequent malpractice.

At trial, plaintiff made a general objection to the comparative negligence instruction on the ground that there was no evidentiary basis for the charge, but neither requested that the jury be charged to exclude comparative negligence from its consideration of the malpractice

claims nor objected to the proposed special verdict sheet. Thus, plaintiff failed to preserve this challenge to the instruction (CPLR 4017, 4110-b ...). However, this Court may exercise its discretion to order a new trial when an unpreserved error in a jury charge is fundamental—that is, "so significant that the jury was prevented from fairly considering the issues at trial" ... Here, the jury was neither instructed to limit its consideration of plaintiff's comparative negligence, nor that defendant's liability extended only to that portion of plaintiff's injuries attributable to its malpractice. The jury was thus prevented from fairly considering the central issue of damages.

The errors were further compounded by the failure to instruct the jury "to determine the total amount of damages sustained by plaintiff, undiminished by any percentage of fault" ... (... PJI 2:36.2). PJI 2:36 sets forth three essential steps to be followed by the jury in apportioning liability and calculating damages, and the third step, which instructs the jury to determine the total damage award without reference to any percentage of fault, is essential to avoid juror confusion and the risk of a double reduction of the plaintiff's recovery (...1A N.Y. PJI3d 2:36, Comment, Mode of Trial [Bifurcated or Full]).

Here, it is impossible to determine whether the jury intended the amount that it awarded to represent the total damage award or plaintiff's 10% share following the erroneous apportionment of fault. Accordingly, we find that the combined errors in the charge are fundamental, and that a new trial on the issue of plaintiff's damages is warranted in the interest of justice."

See "An objection is not necessary where the court could not have corrected its error," in Part I.

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