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THE RECORDER

'Reid' gets it right on appellate review

Don Willenburg

Much of the press and Internet chatter about the California Supreme Court's decision Aug. 9 in *Reid v. Google* has centered on the age discrimination and evidentiary portions of the decision. That, and the involvement of a popular, otherwise-admired technology company, are maybe the sexiest parts of the story. But far more significant, to a far broader range of cases, is the court's decision regarding appellate review of objections to evidence in summary judgment cases.

Few cases are substantively like *Reid*: employment cases involving age discrimination claims and an employer motion for summary judgment where the employee's only evidence is comments made outside the "decisional process," such as by employees who were not involved in the decision to terminate. Only those cases, and maybe some others involving circumstantial evidence, will be affected by *Reid*'s holding on the "stray remarks" doctrine.

But summary judgment practice in every civil case — employment, commercial, personal injury, real estate, malpractice, insurance coverage, you name it — will be affected, and for the better, by *Reid*'s "other" holding. Given the prevalence of summary judgment motions, and the ubiquity of evidentiary objections in summary judgment motion practice, that means almost every case filed other than small claims.

At its most basic, the "other" holding seems so simple it should be self-evident: "If you make evidentiary objections in writing, they are not waived." Well yes, you say, that must always have been the law. How can you be waiving objections by making them? And making them in writing, no less, just as Rule of Court 3.1354 specifically authorizes?

But in fact that has not always been the law, at least not as interpreted by courts of appeal or by the California Supreme Court itself before *Reid v. Google*.

Reid will not limit how many evidentiary objections get filed, but it should help counsel and courts focus oral argument on the most important, or those likeliest to be changed at the hearing, rather than taking scarce courtroom time to "make a record' of objections as to which there is already a perfectly good written record.

In two summary judgment cases, both times in footnotes, the state Supreme Court found that where "the trial court did not rule on the objections. ... [and] counsel failed to obtain rulings, the objections are waived and are not preserved for appeal." (*Ann M. v. Pacific Plaza Shopping Center*, 6 Cal.4th 666, 670 n.1 (1993); see *Sharon P. v. Arman*, Ltd, 21 Cal.4th 1181, 1186-1187, n.1 (1999), disapproved on other grounds in *Aguilar v. Atlantic Richfield Co.*, 25 Cal.4th 826, 853, n. 19 (2001).)

Courts of appeal had varying responses to this waiver rule. Some found waiver. Others addressed objections on the merits despite the lack of a trial court ruling. One issued a writ of mandate compelling a trial court to rule on all evidentiary objections and then reconsider its summary judgment ruling. Yet others, as *Reid* recounted, "applied what trial attorneys jocularly refer to as a 'stamp-and-scream' rule" whereby if counsel specifically asked for rulings at oral argument but was denied, the objections were not waived.

The problem stems from the language of two different subdivisions of the summary judgment statute. "Evidentiary objections not made at the hearing shall be deemed waived." (Code Civ. Proc., §437c, subd. (b)(5).) "Any objections [to supporting or opposing affidavits or declarations] shall be made at the hearing or shall be deemed waived." (*Id.*, subd. (d).)

What does "made at the hearing" mean? Some courts held that "made at the hearing" meant "a ruling is orally requested at the hearing itself." But the statute refers to objections, not rulings. Some courts held that "made at the hearing" included "as part of the papers filed and considered at the hearing." The Supreme Court found this statutory language ambiguous, and therefore engaged in a lengthy analysis of legislative history before reaching what is thankfully the practical, most sensible approach:

"Therefore, written evidentiary objections made *before* the hearing, as well as oral objections made at the hearing are deemed made 'at the hearing' under section 437c, subdivisions (b)(5) and (d), so that either method of objection avoids waiver. The trial court must rule expressly on those objections. [Citation omitted.] If the trial court fails to rule, the objections are preserved on appeal." (emphasis in original.)

The result: In *Reid v. Google*, the California Supreme Court took the unusual step of disapproving two of its prior holdings. The footnotes in *Ann M.* and *Sharon P.* were both disapproved — in a footnote, of course (5). *Reid* also disapproved of a passel of related court of appeal decisions, including the much-maligned *Biljac Associates v. First Interstate Bank*, 218 Cal.App.3d 1410 (1990), which allowed trial courts to avoid rulings on specific objections so long as the trial court stated generally that it relied only on admissible evidence. But while rejecting *Biljac*, Reid was also a future *Biljac*-enabler: If a trial court follows the rejected *Biljac* procedure, there is no reversible error because the court of appeal gets to review all evidentiary objections made anyway.

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Nothing, it seems, will drive a stake through *Biljac's* heart.

The *Reid* court also took lawyers to task for filing and arguing too many evidentiary objections. *Reid* will not limit how many get filed, but it should help counsel and courts focus oral argument on the most important, or those likeliest to be changed at the hearing, rather than taking scarce courtroom time to "make a record" of objections as to which there is already a perfectly good written record.

Some might think the decision did not need the pages of legislative history and statutory construction to get to this common-sense result. But this court properly sees its role as interpreting and applying statutes, even where a different result might be more logical or productive. (*Le Francois v. Goel*, 35 Cal.4th 1094, 1101-1108 (2005) [separation principles require courts to adhere to statutory language; thus, time limits on a party's motion to reconsider are enforceable, even if court could reconsider on its own motion at any time].) "What makes sense?" is not the same question as "what is the law?" But in this case, fortunately, the answers are the same.

There are other interesting but less broadly significant points about the appellate review part of this decision:

1. The difference between waiver and forfeiture, which is acknowledged, articulated and then purposely ignored.

2. Whether objections to which no ruling is made should be deemed sustained or deemed overruled, and whether it matters if they are all reviewable on appeal.

3. *Amicus curiae* briefs are not only noted but quoted, including two from one firm (Greines, Martin, Stein & Richland) for two different clients.

4. The fact that Reid did not argue that Google's objections were waived, only that they were properly overruled, but the Supreme Court engaged in the waiver analysis anyway. (Maybe the court wanted to make sure all the footnotes were right this time.)

The stray remarks doctrine got all the press, but it is the tail wagging this dog. Tongues should be wagging about the appellate review issue, not the narrow evidentiary issue. Employment law will not be significantly different after *Reid v. Google*, but summary judgment practice will be, and for the better.