CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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GONSALVES v. LI 1/13/15

Requests for Admissions; Denials of RFA's; Trial Impeachment Evidence

Undisputed Facts

On December 28, 2008, Plaintiff Gonsalves assisted potential customers, defendants Xiaoming and Li at a BMW dealership in Concord. Gonsalves accompanied them on test drives of a BMW 335 and of a more powerful car, a BMW M3. Xiaoming drove the first half of the M3 test drive and Li drove the second half. During the M3 test drive, Li exited the highway to return to the dealership, but then pressed an "M button" in the car and returned to the highway. He lost control of the vehicle in the curve of the on-ramp. The car's rear wheels lost traction and the car hit the guardrail, turning to face oncoming traffic. None of the airbags deployed and there were no skid marks. Accident reconstruction experts for both parties agreed that the M3 was traveling at about 25 miles an hour when it entered the curve of the on-ramp, and then accelerated. California Highway Patrol officers interviewed the parties shortly after the accident. Gonsalves reported that the driver had accelerated in a turn, spun the vehicle out, and hit the guardrail. Li reported that, after he exited the highway, Gonsalves told him about the functions of the M button; Li pushed the M button

and returned to the highway; and the accident occurred as he accelerated in the curve of the on-ramp.

Plaintiff's trial testimony

Gonsalves testified that when Li and Xiaoming arrived at the dealership they expressed interest in test driving both the 335 and M3, but Gonsalves persuaded them to test drive the less-powerful 335. Only Xiaoming drove the 335. When Xiaoming asked if he could test drive the M3, Gonsalves told him the dealership typically only allows "confirmation test drives" of the M3—i.e., test drives after an agreement on price and confirmation of a customer's ability to pay—because purchasers want to buy those cars with no mileage on them. Xiaoming told Gonsalves he lived in Orinda, was wealthy enough to pay cash for the car, and was very interested in buying the car. Because Gonsalves was concerned that he had insulted Xiaoming, he let Xiaoming test drive the M3 without the usual confirmatory paperwork.

Xiaoming initially drove the M3 and then asked Gonsalves if his son could drive the car. Gonsalves initially said no, but relented after Xiaoming told him Li was a very safe driver who had never received any tickets. When Li got on the highway, he accelerated to 120 miles per hour and began to weave dangerously between cars. Gonsalves repeatedly told Li to slow down. As Li was returning to the dealership, he asked Gonsalves about various buttons on the dashboard, including the M button. Gonsalves told him not to press the M button. Li

accelerated to 60 to 80 miles per hour and headed toward the highway on-ramp—both Xiaoming and Gonsalves told him to slow down—and sometime before he got on the highway on-ramp, he pressed the M button. He told Gonsalves, "I'm just going to get on the freeway and I'll get right back off." As he accelerated into the curve of the on-ramp, he lost control of the vehicle.

According to medical reports, Gonsalves told doctors that he was injured when a test driver accelerated to 120 miles per hour and ran into a wall. In response to an interrogatory, Gonsalves wrote that the car was going about 80 miles an hour on the on-ramp. In a deposition, Gonsalves had said the car was going 50 to 60 miles an hour at the time of the crash. At trial, Gonsalves said he could not estimate the car's speed in the curve of the on-ramp, but he was sure it was traveling faster than 25 miles an hour. He admitted it was not traveling 80 to 85 miles per hour on the on-ramp. Gonsalves testified that he tried to tell the CHP officers about Li's dangerous driving on the highway, but the police directed him to describe only what happened during the accident itself.

Plaintiff's expert testimony

Gonsalves's expert testified that the accident occurred because of driver error: the driver accelerated and turned the steering wheel in a manner that caused the car to exceed the maximum friction in the roadway. "This is clearly not a turn where 25 miles an hour is maintained constant through the turn. It's 20 or 25 miles an hour starting into the turn and then gunning it and turning the

steering wheel hard. That's what caused the accident." The expert acknowledged that the M button might have been programmable to disengage the car's dynamic stability control system, which was designed to automatically direct braking power to wheels that start to slip. He acknowledged that the car might have handled differently with the stability control disengaged and, because it was unknown how the M button was programmed, it would have been imprudent of Gonsalves to suggest that Li press the M button—such an act might have contributed to the accident. "If the driver thinks he's got more capability than he does, then he may exceed those capabilities." Gonsalves's expert nevertheless opined that the accident was caused by driver error regardless of whether the M button had disengaged the stability control system.

Defendants' testimony

Xiaoming testified that he went to the BMW dealership because he was interested in purchasing a new car that he would share with Li, who had just finished college and was working in San Francisco. Gonsalves suggested they test drive a 335. He collected driver's licenses from Xiaoming and Li and, per their agreement, Xiaoming drove the first half of the 335 test drive and Li drove the second half. After the 335 test drive, Gonsalves asked if there was anything they did not like about the car and they said they preferred a stick shift. He suggested they test drive a manual transmission M3. Again, per their agreement, Xiaoming drove the first half of the test drive and Li drove the second half. Xiaoming could tell immediately that the M3 was very different from the 335.

When Li took over, he drove about 85 miles per hour and passed some cars but he was not "weaving." Xiaoming told him to be careful; Gonsalves said nothing.

Li exited the highway and was about to return to the dealership when Gonsalves said, "Oh, do you want to see the full potential of the car? There's a button. If you press the button, it's going to change the behavior of the car." Gonsalves pointed out the M button and said it would cause the car to stiffen and release a lot of power. Because travel had to be at a sufficient speed to feel the difference, Gonsalves advised them to get back on the highway to try it out. Li rapidly accelerated in the curve of the on-ramp, and the car started moving sideways as well as forward. Xiaoming told Li to be careful, but Li "must have pressed on the brake so hard, [because] then the car was totally out of control. It spun a little bit and hit [the] guardrail." It happened very quickly. "[T]he car had indeed stiffened substantially . . . once the car was in motion with sufficient speed . . . ." Li similarly testified that pressing the M button somehow changed the car's performance "so when I made that turn, a turn that I would typically think was a safe speed, the car lost control." He had had no trouble driving the M3 before the button was pushed. Following the accident, Gonsalves calmly and cordially told Xiaoming that the accident occurred because Li was not used to driving a rear-wheel drive vehicle.

Defendant's expert testimony

The defense expert opined that pressing the M button affected the way the accident happened. "The Dynamic Stability Control on the vehicle was clearly

off when this accident occurred; otherwise, we wouldn't see the rear of the vehicle spinning out or coming out to the left as it did in this accident." When the wheels are spinning, the speed of the vehicle does not increase. Thus, the accident was not caused by excessive speed. Instead, "pressing the accelerator caused the rear wheels to spin, which is what caused the vehicle to lose control. That was all caused by the Dynamic Stability Control being turned off."

Damages testimony

Gonsalves testified that he was thrown around from side to side and back and forth as the car spun. For years after the accident, he suffered from neck and back pain, had a limited range of motion in his neck, and developed numbness and tingling in his upper extremities. When pain medication, physical therapy and epidurals failed to alleviate his symptoms, Gonsalves underwent artificial disk replacement surgery in May 2013, which provided substantial relief. He anticipated having further surgery on another disk in the future. It was disputed at trial whether Gonsalves's medical problems after the accident were caused by the accident or were normal degenerative problems typical of persons his age.

In closing argument, plaintiff's counsel asked the jury to award $118,643.86 in past medical expenses, $80,518.80 in future medical expenses, and between $744,993 and $1,495,986 in pain and suffering damages. Defense counsel argued Li had not been negligent and that Gonsalves's past medical expenses were overstated, future medical expenses were unproven, and noneconomic damages were in the range of $35,000 to $40,000.

Verdict

The jury found only Li negligent and awarded Gonsalves $118,642.86 for past medical expenses, $90,000 in future medical expenses, and $1,000,000 in noneconomic damages. The trial court denied Li's motion for a new trial, and entered judgment against Li for $1,208,642.86.

On appeal to the First District, Li argued the trial court made several errors in admitting evidence and allowing examination on certain subjects. With the exception of one issue of statutory interpretation, the Justices reviewed these issues for abuse of discretion. One issue, reviewed below, was approved for publication.

Requests for Admissions

Li argued the court erred in permitting plaintiff's counsel to examine Li about his negative responses to Gonsalves's requests for admission (RFA's) and admitting those responses in evidence.

a. *Background*

Plaintiff Gonsalves called Li as an adverse witness during his case in chief. Plaintiff's counsel had Li confirm that he prepared responses to Gonsalves's RFA's and swore under penalty of perjury that his responses were true. The court instructed the jury: "Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party admits those matters, you must accept them as true. No further evidence is required to

prove them. However, these matters must be considered true only as they apply to the party who admitted they were true. So prior to the trial during this discovery process, the plaintiff sent the defendant these Requests for Admissions. Plaintiff's counsel is now asking the witness about those requests. The other side can do the same."

Plaintiff's counsel then told the jury that Li was asked to admit that "at the time as you began your turn from Concord Avenue onto Highway 242 northbound on-ramp you were driving too fast for the conditions," and that Li replied, "Responding party has a lack of information and knowledge to admit this Request for Admission. A reasonable inquiry concerning this matter has been made, and the information known or readily obtainable is insufficient to enable responding party to admit this matter." Plaintiff's counsel then extensively examined Li on this and similar responses to RFA's over multiple defense objections. When Li testified in the defense case in chief, plaintiff's counsel again asked questions in cross-examination about Li's responses to the RFA's and elicited Li's statement, "I stand by my admissions that I signed."

Defense counsel made at least **nine objections** that questions about Li's denials of the RFA's were argumentative, that "these are not exhibits in the case," and that the questions called for legal opinions or were contention questions. All of the objections were overruled.

At the conclusion of Li's testimony, the court admitted in evidence the full sets of the RFA's and special interrogatories that asked Li to explain any denials to the RFA's, as well as Li's responses to both. Defense counsel initially objected to admitting the written responses to the RFA's in evidence. He contended that if responses were admitted, Li's explanations for those responses should also be admitted. Plaintiff's counsel suggested admitting all of the RFA's, responses and the corresponding special interrogatories and responses. Defense counsel asked the court to admit a single form interrogatory propounded by Li and Gonsalves's response, and plaintiff's counsel asked that it be presented in context with all of the other form interrogatories and responses. Defense counsel then said, "I could compromise, Your Honor. It looks like they are putting in all the admissions. If they put in all the admissions . . . and our explanation[s], I don't mind if they all come in. That's not really my biggest problem with the admissions. It was questioning [Li] on it." The court admitted the full set of RFA's, the redacted responses, the special interrogatories, and responses.

Defense counsel moved to strike and exclude all testimony regarding Li's responses to the RFA's and to admonish the jury to disregard the evidence. The motion was denied.

In closing argument, plaintiff's counsel urged the jury to consider Li's failure, in response to the RFA's, to admit that his pressure on the accelerator was a substantial factor in causing the accident, as evidence of his failure to take responsibility for Gonsalves's injuries. Counsel told the jury, "I encourage you to

look at . . . the Requests for Admissions that we sent to Ran Li asking him to admit some very basic facts about this crash. His responses are there as well. Let's just look at a few of them. . . . This is a simple question, ladies and gentlemen. 'How much did you push on the accelerator.' His response is a bunch of double speak . . . a bunch of 'I'm sorry I'm not taking responsibility and not only am I doing it, I'm doing it in a way that makes no sense.' . . . It's been more than four and a half years since this crash, and he will not in any way take any responsibility for it. . . . And that's why we need to impanel a jury like you."

Post-trial, Li renewed his argument that the examinations were improper in his motion for a new trial: "Such questions add no facts to the case, deny the defendant representation, and improperly inflame the jury." The court denied the motion.

b. *Analysis*

Li argued the discovery statutes do not authorize admission at trial of denials to RFA's and that the trial court erred in allowing plaintiff's counsel to examine him about his qualified denials and in admitting the written responses.

As a preliminary matter, Gonsalves argues defense counsel implicitly waived any objection to admission of Li's responses when he stipulated to admission of the written responses at trial. As set forth, however, the defense made this stipulation only after the court had overruled its objections to use of the responses during the examinations of Li and after the court appeared

unpersuaded by defense counsel's arguments that the written responses were not admissible evidence. In context, therefore, the stipulation cannot be deemed truly voluntary or an intentional waiver of the objection. (See *Boyle v. CertainTeed Corp.* (2006) 137 Cal.App.4th 645, 650 "no waiver may be implied where, as here, a party alleging error has made its objection and then acted defensively to lessen the impact of the error".)

i. CCP section 2025

Interpretation of the discovery statutes is subject to de novo review. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432.) Li notes that the discovery statutes expressly allow *any part of* a deposition or interrogatory to be introduced at trial (with certain restrictions not relevant here), whereas the statutes only provide that *admissions* in response to RFA's are binding on the party at trial. (Code Civ. Proc., §§ 2025.620 "any matter *admitted* in response to RFA's"; see also Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2013) ¶ 8:828, p. 8C-104.3 (Rev. #1, 2011) "*admissions* made in response to RFA's . . . may be received into evidence at trial".) Li further notes that the statutory scheme provides for monetary sanctions (i.e., reasonable expenses including attorney fees) when a party unreasonably fails to admit a matter in response to RFA's, but does not expressly permit a denial, objection or failure to respond to RFA's to be used against the party at trial. (Code Civ. Proc., § 2033.420, subd. (a).) He argues that the statutory scheme therefore implies that the only authorized sanction for an unreasonable failure to admit is a monetary award and a denial cannot be used to impeach a witness at trial. In this case, the

court actually *denied* sanctions for Li's failure to admit the RFA's, yet the court allowed Li to be impeached with that same conduct. Gonsalves argues that the statutes are essentially silent on the subject of whether denials or qualified denials are admissible at trial, leaving the admissibility subject to the trial court's discretion.

Neither Li nor Gonsalves cites authority that we find to be directly on point. The Justices noted a somewhat surprising paucity of relevant authority. In *Morris v. Frudenfeld* (1982) 135 Cal.App.3d 23 (*Morris*), the appellant asserted it was error to not permit impeachment of the respondent by showing certain denials to RFA's were inconsistent with respondent's admissions on the witness stand. Citing Evidence Code section 352, the trial court declined to permit reading of the denials to the jury on the basis of excessive time consumption. Noting that the record was unclear as to precisely what pretrial denials appellant was attempting to introduce, the reviewing court held that such a ruling was within the sound discretion of the trial judge. (*Morris,* at pp. 35–36.) While perhaps implicitly suggesting that admission at trial of denials to RFA's is committed to the trial court's discretion and not precluded by statute, the case does not so hold. The issue presented in *Morris* was whether the court could properly exclude an allegedly inconsistent prior statement. Gonsalves does not allege any inconsistency between the discovery responses and trial testimony. In fact, he argued to the jury that they should draw adverse inferences from the fact that Li *continued* to deny the request, consistent with his earlier responses.

ii. Rifkind

Li analogizes the examinations by plaintiff's counsel to asking a witness to explain the basis of his legal contentions, conduct condemned in *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255 (*Rifkind*). In *Rifkind*, the witness was asked at deposition to state with respect to each of his affirmative defenses: "all facts that support the affirmative defense"; "the identity of each witness who has knowledge of any facts supporting the affirmative defense"; and the identity of "any documents that pertain to the facts or witnesses." The Court of Appeal condemned the practice, which it referred to as asking "legal contention questions," but held the same questions could properly be asked in interrogatories. The distinction between these discovery devices is that " 'the client presumably knows the facts (although not always), but he can hardly be expected to know their legal consequences. This is what lawyers are for.' . . ." "Legal contention questions require the party interrogated to make a 'law-to-fact application that is beyond the competence of most lay persons.' Even if such questions may be characterized as not calling for a legal opinion [citation], or as presenting a mixed question of law and fact [citation], their basic vice when used at a deposition is that they are unfair. They call upon the deponent to sort out the factual material in the case according to specific legal contentions, and to do this by memory and on the spot." (*Rifkind* at p. 1262.)

While not directly on point, the First DCA agreed that the underlying concerns discussed in *Rifkind* apply to the use of qualified denials to RFA's in the examinations here. Li was asked to explain "by memory and on the spot" and

without the ability to consult with his attorney why he took the legal position that he could not admit or deny certain RFA's without further inquiry. And he was asked to do this not in a deposition, as in *Rifkind*, but in front of the jury.

iii. Foreign jurisdiction authority

The Justices also found that the weight of authority in other jurisdictions also favors Li's position. Massachusetts's highest court interpreted a statutory scheme similar to California's and concluded that denials to RFA's are not admissible evidence at trial: "The purpose of RFA's is to narrow the issues for trial by 'identifying those issues and facts as to which proof will be necessary.' A denial . . . is not a statement of fact; it simply indicates that the responding party is not willing to concede the issue and, as a result, the requesting party must prove the fact at trial. The sanction for improperly responding to RFA's is the shifting of the award of incurred expenses—see rule 36(a) of the Massachusetts Rules of Civil Procedure. Further, Massachusetts Rules of Civil Procedure, rule 36(b), which governs RFA's, does not specifically provide for the admission of denials in evidence. Although the rule states that admissions are conclusively binding on the responding party, it makes no parallel provision for the use of a denial. By contrast, Massachusetts Rules of Civil Procedure, rule 33(b), governing interrogatories, states that the answers to interrogatories 'may be used at trial to the extent permitted by the rules of evidence.' The omission of a similar provision in rule 36(b) indicates that, although admissions have binding effect, denials do not have such an effect and cannot be introduced in evidence." (*Gutierrez v. Mass. Bay Transp. Authority* (Mass. 2002) 772 N.E.2d 552, 567, final

brackets in original.) Therefore, the trial court "incorrectly concluded that a denial of a request for admission is admissible as a prior inconsistent statement" to impeach a witness at trial.

Intermediate courts in at least three states have similarly held that denials of RFA's are inadmissible at trial. (See *Winn Dixie Stores, Inc. v. Gerringer* (Fla.Dist.Ct.App. 1990) 563 So.2d 814, 817 [citing *Morris, supra,* 135 Cal.App.3d 23 for the proposition that "denials cannot be used for impeachment purposes"]; *Mahan v. Missouri Pacific R. Co.* (Mo.Ct.App. 1988) 760 S.W.2d 510, 515 ["the propriety of defendant's denials is for the court to decide, not the jury"]; *Amer. Communications v. Commerce North Bank* (Tex.Ct.App. 1985) 691 S.W.2d 44, 48 ["[w]hen an answering party denies or refuses to make an admission of fact, such refusal is nothing more than a refusal to admit a fact"].) In most cases the use of denials of RFA's to impeach a witness at trial "is nothing more than an attack on the 'character' of the defendant and that issue [i]s not before the jury." (*Mahan v. Missouri Pacific R. Co.*, at p. 515.)

iv. Evidence Code section 780

Perhaps recognizing the lack of any inconsistency between Li's responses to the RFA's and his trial testimony, Gonsalves suggests that the responses were admissible to impeach Li's credibility by showing "his attitude toward the action in which he testifies." (**Evid. Code, § 780**, subd. (j).) Gonsalves cites no cases that support his interpretation of this section of the Evidence Code. Section 780 has been held applicable to a witness's reluctance to testify or fear of retaliation for

testifying (*People v. Merriman* (2014) 60 Cal.4th 1, 84; *People v. Mendoza* (2011) 52 Cal.4th 1056, 1084) or a witness's desire for revenge against the defendant (*People v. Stewart* (1983) 145 Cal.App.3d 967, 976–977). As Li points out, courts have held in other contexts that litigation conduct is not relevant evidence at trial in the ordinary case. (*Palmer v. Ted Stevens Honda, Inc., supra,* 193 Cal.App.3d at p. 539 ["[o]ne significant defect in such evidence is that it holds the client responsible for the attorney's litigation strategy"].) The Justices concluded they could find no support for Gonsalves's attempt to make a party's litigation conduct a legitimate subject for inquiry under Evidence Code section 780, subdivision (j), absent truly exceptional circumstances.

c. Conclusion

The Appellate Court concluded that denials of RFA's are not admissible evidence in an ordinary case, i.e., a case where a party's litigation conduct is not directly in issue, such as a bad faith action. Thus, the Appellate Court found the trial court permitted examination of Li that was unfair and prejudicial to him, and erred in admitting those responses in evidence.

Cumulative Error

The opinion also discusses several other points contended by the defendant to have constituted error by the trial court. The Justices concluded that the trial court erred in admitting into evidence Li's denials of Gonsalves's RFA's and allowing plaintiff's counsel to question Li about those denials; allowing plaintiff's counsel to question Li about causation of the accident; and admitting evidence of Li's speeding tickets. They also concluded that plaintiff's counsel

committed misconduct by restating that he had represented a paralyzed child in prior litigation despite a prior ruling that the statement was inadmissible, and by referencing Gonsalves's supposed obligation to reimburse the workers' compensation system from his recovery at trial. They then turned to consider whether these cumulative errors warranted a reversal of the verdict.

All of the errors are subject to the reversible error standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. That is, reversal is required only if there is a reasonable probability that a result more favorable to Li would have been reached in the absence of the errors.

Prejudice caused by error

The Justices noted the case appeared to be a close one. The traffic reconstruction experts agreed that Li entered the curve of the on-ramp at approximately 25 miles per hour and accelerated into the curve. Because the on-ramp led to a freeway, with a speed limit of 65 miles per hour, the mere fact that Li accelerated on the on-ramp was not in itself evidence of driver error. There was evidence that the M button could affect the car's stability control and that Li pushed it before entering the on-ramp, although whether he did so on his own initiative or at Gonsalves's urging was disputed. Experts disagreed about whether Li's speed and manner of driving necessarily caused the accident, or whether pressing the M button disengaged the car's dynamic stability control, causing or contributing to the accident.

The sharpest disagreement at trial was about the parties' conduct and statements during the two test drives. On the evidence presented, the jury reasonably could have found that Li was not negligent or, alternatively, that Gonsalves was contributorily negligent—dependent upon which version of the facts the jury accepted. As the trial court wrote posttrial, "It was clear to the Court based on the testimony presented at trial that credibility of the witnesses (in particular Gonsalves and Li and Xiaoming) was a major deciding factor in evaluating what occurred during the test drive" and caused the accident.

The errors in admission of evidence and in permitting prejudicial questioning of Li, as well as the misconduct of plaintiff's counsel (in at least one instance apparently intentional), all tended to prejudice the jury against the defense in this credibility-determined case. The instance of attorney misconduct regarding Gonsalves's obligation to reimburse the workers' compensation system also potentially prejudiced Li regarding the size of the damages award. We therefore conclude that the errors were cumulatively prejudicial.

Because the case turned largely on the parties' credibility of the parties, and because of multiple evidentiary errors and instances of attorney misconduct, the Justices conclude a more favorable result to Li was reasonably probable had the errors not occurred.

Disposition

The judgment is vacated and the matter is remanded to the trial court for a new trial. Gonsalves shall bear Li's costs on appeal.