

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

ERNEST A. LONG

Alternative Dispute Resolution

❖ Resolution Arts Building ❖

2630 J Street, Sacramento, CA 95816

ph: (916) 442-6739 • fx: (916) 442-4107

elong@ernestalongadr.com • www.ernestalongadr.com

Mitchell v Superior Court 12/22/15

Responses to Form Interrogatories; Witness Disclosure; Motions in Limini; Witness Exclusion

Plaintiff and petitioner sought to vacate the trial court's order of April 20, 2015, granting the motion in limine of defendant and real party in interest, Ernestine Lisa Johnson. The trial court's order excluded the testimony of three of plaintiff's proposed witnesses and was imposed as an evidence sanction for plaintiff's alleged failure to respond completely to an interrogatory.

Petitioner Karla Danette Mitchell was the plaintiff in an action filed against Johnson and Doe defendants, in which plaintiff sued for personal injury and property damage allegedly suffered in an automobile accident in 2012. Plaintiff asserted she incurred wage loss, loss of use of property, hospital and medical expenses, general damage, property damage, loss of earning capacity, and miscellaneous related damages.

Defendant propounded form interrogatories published by the Judicial Council. Interrogatory No. 12.1 relates to general investigation of an incident and provides: "State the name, ADDRESS, and telephone number of each

individual: (a) who witnessed the INCIDENT or the events occurring immediately before or after the INCIDENT; (b) who made any statement at the scene of the INCIDENT; (c) who heard any statements made about the INCIDENT by any individual at the scene; and (d) who YOU OR ANYONE ACTING ON YOUR BEHALF claim has knowledge of the INCIDENT (except for expert witnesses covered by Code of Civil Procedure section 2034).”

In response to interrogatory No. 12.1 and to defendant’s request for supplemental answers to interrogatories, plaintiff did not identify any witness to the “incident” except one of her children, Destin Shares, who was a passenger in the vehicle.

Subsequently, plaintiff identified several witnesses whom she intended to call at trial, including Steve Meier, Dante Shamburger and Khiana Ferguson.

The Second District Court of Appeal noted that defendant’s motion in limine failed to identify with particularity the witnesses or testimony defendant sought to exclude from trial; defendant merely objected to “any additional witnesses not previously disclosed in discovery” In reply papers filed in the trial court, defendant identified six witnesses whose testimony should be excluded because plaintiff did not identify them in response to discovery. Before the trial court and in the petition for writ of mandate, plaintiff addressed only proposed witnesses Meier, Shamburger, and Ferguson; the opinion likewise is limited to those three witnesses.

Each of the witnesses would testify to plaintiff's physical limitations allegedly resulting from the accident. In particular, these witnesses intended to describe how plaintiff's accident-related physical disabilities interfered with her care of her special-needs son, impact the performance of her job as a grocery store worker, and her related lost wage claim and dictate problems in her activities of daily living. None of the three witnessed the accident.

Defendant filed a motion in limine to exclude the testimony of any witnesses not previously disclosed in discovery, arguing that the testimony of such witnesses should be excluded as an evidence sanction for plaintiff's failure to divulge their identity in response to interrogatories, in particular, interrogatory No. 12.1

The trial court agreed with defendant and granted defendant's motion in limine, excluding the testimony of the three witnesses at trial.

The Justices state that **they read interrogatory No. 12.1 to seek the identities of percipient witnesses, witnesses who were at the scene immediately before or after the accident, those privy to statements by percipient witnesses to an accident and those who might have personal knowledge of the accident itself.** The interrogatory does not seek the identity of witnesses—such as those whose testimony was excluded by the trial court—who may testify to the physical injuries or physical disabilities suffered by a plaintiff as a result of the accident. Our view that interrogatory No. 12.1 should be

narrowly construed to refer to witnesses of the incident itself is bolstered by other form interrogatories, in particular, Nos. 12.4 and 16.1, which distinguish between an “incident” and a plaintiff’s “injuries.”

Moreover, **exclusion of a party’s witness for that party’s failure to identify the witness in discovery is appropriate only if the omission was willful or a violation of a court order compelling a response.** (See Code Civ. Proc., §§ 2023.030, 2030.290, subd. (c), 2030.300, subd. (e); see also *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 333-335; *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 273-275.) Even if interrogatory No. 12.1 could be construed as a request for the identity of witnesses who would testify to post-accident physical disabilities and difficulties, there was no evidence that plaintiff’s failure to identify the witnesses was willful or that plaintiff contravened a court order to provide discovery.

Accordingly, it was error to impose an evidence sanction based on plaintiff’s failure to divulge the names of the three witnesses in response to interrogatory No. 12.1 or to defendant’s general request for supplemental responses to interrogatories. The DCA determined that the trial court committed an abuse of discretion and that issuance of an alternative writ and oral argument would not measurably contribute to consideration of the issue and would cause undue delay. (*Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1222-1223; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.)

The Justices ordered that a peremptory writ of mandate be issued directing respondent court to vacate its order, and to issue a new order denying defendant's motion in limine No. 2 to the extent it excludes the testimony of Meier, Shamburger, and Ferguson. Pursuant to California Rules of Court, rule 8.493, costs were awarded to plaintiff.

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