

***Plascencia v. Deese* (Jan. 20, 2021, Nos. B299142, B299925) __Cal.App.5th__**

1. In discovery, a propounding party has a duty to pursue a court order compelling an answer if the responding party either fails to answer or gives an evasive answer – otherwise the right to an answer and sanction is waived.
2. The use of the Golden Rule argument and ad hominem attacks against opposing counsel is serious attorney misconduct which may require action by the trial court, even without objection.

FACTS/PROCEDURE

On April 19, 2014, Respondent-Plaintiffs’ daughter, Jocelyn Plascencia, died after she swerved to avoid a driver making an illegal U-turn on a four-lane highway and crashed into the back of an 80,000-pound diesel tractor-trailer that was unlawfully parked on the highway shoulder. The trailer driver had stopped to buy strawberries at a fruit stand. Respondents sued for wrongful death damages under negligence, negligence per se, and dangerous condition of public and private property. Before trial, the County of Ventura was dismissed, and the following defendants settled: the State of California, the U-turn driver, the owner of the U-turn driver’s vehicle, the fruit stand, and the owner of the parking lot where the fruit stand was located. The remaining defendants, including the trailer driver Charles Deese, proceeded to trial.

On the first day of trial, Respondents filed motions in limine to exclude evidence of comparative fault with respect to the settling defendants. Respondents argued Appellants were estopped from asserting this defense because Appellants, in responding to contention interrogatories claimed the U-turn driver was the sole cause of the accident and did not mention the State of California, the fruit stand, or the parking lot owner. Respondents claimed Appellants had a duty to supplement their responses to rectify this omission and the failure to do so over the five years of discovery was tantamount to fraud. The trial court granted Respondent’s motion in limine and only allowed the jury to consider the comparative fault of Appellants and the U-turn driver. The jury returned a verdict for \$30 million, which Appellants appealed.

HOLDING/DISCUSSION

The Court of Appeal for the Second District reversed as to damages. “Under Proposition 51 (Civ. Code, §§ 1431-1431.5), appellants are ‘only responsible for [their] comparative percentage of fault for the noneconomic damages.’” “Likewise, it is an error to exclude evidence of the culpability of defendants who settled before trial to allow the jury to make that assessment.” The court held that it is a misconception that a party has a duty to “amend or supplement his or her interrogatory responses.” Unless there is bad faith or a willful violation of a discovery order, the failure to answer or the giving of an evasive, terse answer is not itself sanctionable. Here, Respondents never filed a motion to compel further discovery responses or a motion for an issue-evidence sanction, even though they knew the comparative fault of the settling defendants “was the elephant in the room.” Since Respondents failed to take advantage of these protections, the trial court erred in granting Respondents’ motion in limines.

The second important issue the appellate court considered was Respondent’s prejudicial misconduct at trial. During closing arguments, “Respondents’ counsel, referring to Appellant Deese, told the jury: ‘You can’t stone him to death’ but you can ‘make him pay.’” Counsel asked the jury to “‘imagine’ it was ‘your daughter’ and ‘some guy broke a rule that he knew he couldn’t break...and your daughter is taken away.’” Counsel also claimed Appellants were being tactfully evasive throughout the trial to “‘cheat [their] way to justice.’” Although Appellants did not object to these statements, the court found that the trial court had an affirmative duty to act when confronted with “flagrant and repeated instances of misconduct.” Therefore, for both reasons laid out above, the court reversed and remanded for a new trial to determine the amount in damages and the comparative fault of all the tortfeasors.