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Does a Party Have an Obligation to Supplement Answers to Interrogatories?

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The Court of Appeal in *Ronald Biles v. Exxon Mobil Corporation (12/04/04)* 2004 *Daily Journal D.A.R.* 14850 deconstructed a civil discovery urban legend -- that a responding party has an affirmative duty to supplement responses to interrogatories if and when new information comes into that party's possession. The *Biles* court found that failing to identify a witness in an interrogatory answer, and to supplement that answer before submitting a witness declaration, was not grounds for excluding the declaration, meaning that a party does **not** have an obligation to amend or supplement discovery responses.

In this case, the plaintiff sued the defendant in an asbestos personal injury matter on a premises liability theory. The defendant moved for summary judgment, contending that the plaintiff could not show that he had been exposed to asbestos on the defendant's premises. The plaintiff countered with a declaration from one of his former co-workers, which stated they were both working for a contractor on the defendant's premises, and that the defendant's employees used air hoses to blow asbestos dust in their direction.

The defendant objected to the declaration on the ground that the co-worker had not been identified in an answer to earlier interrogatories seeking the names of persons who had knowledge of the plaintiff's exposure to asbestos on the defendant's premises, and that the plaintiff had failed to supplement his answer to include the name. Although the trial court excluded the declaration and granted summary judgment for the defendant, the Court of Appeal reversed stating that the failure to identify the witness in its interrogatory answer, and to supplement the answer before submitting the witness declaration, was not grounds for excluding the declaration from evidence in connection with the summary judgment motion.

The traditional rule concerning admissibility of witness testimony for failure to identify the person in interrogatory responses is found in *Thoren v. Johnson & Washer* (1972) 29 Cal.App.3d 270 (hereinafter referred to as *"Thoren"*). In *Thoren,* an injured construction worker sued a defendant alleging a dangerous condition on the job site. In answer to an interrogatory asking for the identity of witnesses who had arrived at the accident scene shortly after the plaintiff was injured, the plaintiff named only one person. The interrogatory answer did not by

its terms anticipate continuing discovery or further responses and it was not supplemented any time before the case was called for jury trial some 2 ½ years later.

When the trial began, plaintiff's attorney indicated in his opening statement that he expected to call a witness (which nobody had known and which had not been identified in the interrogatory response) to testify about the condition of the job site shortly after the accident. Defendant moved to exclude that witness's testimony on the ground that he had not been named in the interrogatory answer. Outside of the presence of the jury, the trial judge learned that this witness was a representative of the plaintiff's union, that he had gone to the job site and taken photographs soon after he heard about the accident, and that he had sent the photographs to the plaintiff's attorney. Based upon these facts, the trial judge excluded that witness's testimony. The Court of Appeal in *Thoren* agreed and found:

> **The power of the trial court to bar the testimony of a witness <u>wilfully</u> excluded from an answer to interrogatory seeking the names of witnesses to an occurrence is found in the express language of the Discovery Act and is an inherently necessary one if the purposes of the Act are to be achieved.**

Thoren, supra, 29 Cal.App.3d at 273. The court went on to opine that:

> **A <u>wilfully</u> false answer to an interrogatory must be treated as equivalent of no answer at all . . . and that where . . . that falsity lies in the deliberate omission of the names of a witness to the occurrence, an order barring the testimony of the witness must be sustained as a sanction . . . which the trial court properly deemed just.**

Id. at p. 274.

In distinguishing the general rule articulated in *Thoren*, the Court of Appeal in *Biles v. Exxon, supra,* found that the *Thoren* case involved a "wilfully false" answer to interrogatory since the *Thoren* attorney knew of this witness soon after retention. In *Biles v. Exxon, supra,* there was no evidence that plaintiff's attorney knew of the relevant witness **before** the answer to the interrogatory was served, but more likely, discovered the witness **after** the interrogatory was answered; therefore, the court found that Biles' initial responses could not have been wilfully false when made. *Thoren* provides for authority excluding evidence based on **wilfully false** discovery responses. *Biles v. Exxon* stands for the proposition that evidence may not be excluded based on a mere failure to supplement or amend an interrogatory answer that was truthful when originally served. The court in *Biles v. Exxon* also found that the exclusion of a witness's testimony cannot be justified as a discovery sanction under Code of Civil Procedure §§2030 and 2023.

Most importantly, the *Biles* court found that the plaintiff has no duty to amend or supplement interrogatory responses. The law is clear in this regard that there is no such duty under California discovery statutes. This is true even when the response reserves the right to serve amended or supplemental answers -- a right that is, in any event, expressly granted by statute. See Code of Civil Procedure §2030(m).

CONCLUSION

The *Biles v. Exxon* case brings up two very important points. First, if a party wilfully fails to provide certain information to the opposing party as required by the discovery rules at the time the answers to interrogatories are prepared, witness testimony may be excluded. However, if the party discloses all witness information known at the time the answers to interrogatories were prepared (and did not wilfully omit witnesses' names), and there is no subsequent service of a request to supplement or amend interrogatory answers, there are no grounds for excluding witness testimony which is discovered after the original interrogatories are answered. **One important practical tip: 30 to 60 days before trial, always serve an interrogatory which asks the party to amend or supplement its previous interrogatory responses.**