Practice and Procedure–Discovery–Answers to Interrogatories As Limiting Proof at Trial

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the individual claimant without legislative help, nor will anyone doubt that the present court has the power to open their doors once again. The sea of confusion the courts have promulgated in this area can best be corrected by judicial decree and not legislative enactment that is beset with powerful opposition from the municipalities to any lifting of their halo of immunity.

It is clear from the cases presented that the present condition of municipal tort liability in Missouri promotes confusion and often injustice. The general philosophy current in the United States today is that risks and losses should be distributed over as wide an area as possible. To this, the losses, injuries and deaths caused by the everyday operation of Missouri municipalities should be no exception. The basic tenets of our society abhor the taking of one’s property without just compensation, and it would seem that it should be the same for the citizen’s personal injuries and losses inflicted upon him by his own municipality. Missouri should join the beginning trend in this country in righting an age-old wrong.

JAMES N. FOLEY

PRACTICE AND PROCEDURE—DISCOVERY—ANSWERS TO INTERROGATORIES AS LIMITING PROOF AT TRIAL

INTRODUCTION

To what extent do answers to written interrogatories limit proof at trial? The question has arisen in several cases, and seems to be one of growing importance. This topic, however, should not be confused with the situation where a party refuses to allow discovery, e.g., where one refuses to answer, or to produce documents, records, or other material. The scope of this discussion will be limited to those situations where a party gives erroneous or otherwise incomplete information in his answers.

The Missouri and New Jersey courts have considered the problem several times, whereas cases from other jurisdictions are either scattered or nonexistent. This discussion will, therefore, be largely limited to Missouri and New Jersey cases, with an effort to point out the similarities and differences between the two jurisdictions.

I. ANSWERING PARTY PRECLUDED FROM OFFERING EVIDENCE CONTRARY TO ANSWERS TO INTERROGATORIES

A. Central & So. Truck Lines v. Westfall GMC Truck, Inc.1

In the Central case plaintiff was suing the defendant for the negligent repair of plaintiff’s truck. Plaintiff’s interrogatories requested the names of all employees

1. 104. Muskopf v. Corning Hospital, 55 Cal. 2d 211, 11 Cal. Rptr. 89, 359 P.2d 457 (1961); Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957); Kamau & Cushnie v. Hawaii County, 41 Hawaii 527 (1957); Molitor v. Kaneland Community Unit Dist., 18 Ill. 2d 11, 163 N.E.2d 89 (1959); Williams v. City of Detroit, 364 Mich. 231, 111 N.W.2d 1 (1961).

of defendant who had worked on the truck, and asked what inspections had been made. Five individuals were named in the answers, and plaintiff took their depositions. The case was given special setting so that plaintiff could have all of his witnesses present. On the Friday before trial (trial being scheduled on a Monday) defendant’s counsel discovered that two additional employees had worked on the truck, and a third had inspected it. On the day of trial defendant’s counsel requested leave to amend the interrogatory answers. Plaintiff’s counsel objected on grounds that plaintiff would be prejudiced by allowing new witnesses to testify. Defendant’s counsel offered to have the case continued at its cost so that plaintiff could take depositions of the additional witnesses whom defendant intended to call. The trial judge refused to grant leave to file the amended answers. In a memorandum opinion he said that defendant did not produce any evidence to account for the long delay between the time the interrogatories were answered and the date on which the names of the additional witnesses were secured; that the parties had at least two weeks notice of the trial setting; that amended answers should not be allowed to be filed on the date of trial unless there was a strong showing made by the party seeking to file them, and that there was no such showing in this case. The appellate court affirmed, stating that an amendment would prejudice plaintiff in his preparation for trial, and that a continuance would be of little avail to plaintiff in light of his difficulty in assembling his witnesses. In further explanation of the refusal the Kansas City Court of Appeals said:

The primary purpose of interrogatories is to aid the litigants to find out prior to the trial what the facts are, so that controversial issues can be ascertained and the preparation for trial and the trial limited to them all to the end of obtaining substantial justice between the parties litigant. . . . It is possible for this purpose to be just as completely circumvented by a failure to fully answer a proper interrogatory as by a failure or refusal to answer.2

A reading of the facts clearly shows that plaintiff would have been prejudiced by a continuance. The twenty-two month lapse between the time the action was commenced and the date for trial would have been prolonged, and plaintiff would still have faced the problem of assembling his witnesses. Without even considering defendant’s lengthy delay, it may be that fairness alone justifies the refusal to allow amendment. However, it is difficult to deduce from this holding a general proposition such as: having failed to amend his answers to interrogatories within reasonable or statutory time limits, a party will be precluded from introducing evidence contrary to his answers when such contradiction will prejudice the propounding party. The language of both the trial court and the appellate court indicates that an amendment might have been granted if defendant had presented justifiable reasons for the delay. An unexplained failure to answer correctly, or possibly inequitable conduct, may be required before the court will exclude the contradictory evidence. It is difficult to determine from this holding whether the

2. Id. at 847.
presence of either of these elements (prejudice or lack of explanation) alone would have given rise to the same result.3

B. The New Jersey Decisions

In Burke v. Central R.R., plaintiff, as administratrix ad prosequendum, brought action under the Federal Employers’ Liability Act seeking damages for the accidental death of her decedent, an employee of the railroad. Defendant’s interrogatories to plaintiff asked the names of persons having knowledge of relevant facts. Plaintiff’s original attorney filed answers but failed to include the names of two witnesses he intended to call at trial. At trial defendant objected to the testimony of both of these witnesses and the objections were sustained. Counsel for plaintiff pleaded that he could not proceed because of the deficiency in the answers to interrogatories, and moved for a mistrial which the court denied. Plaintiff then moved for a voluntary dismissal without prejudice which the court granted. In affirming the trial court’s action the New Jersey appellate court said: “Plaintiff having failed to supply the names requested in the interrogatories, or to amend her answers prior to trial, the court properly denied her the right to produce any witnesses on her behalf.25

The appellate court cited the New Jersey procedural rules.6 The holding of the case can easily rest upon the authority conferred by this rule.7 Although the trial court did allow a voluntary dismissal, there was a strict enforcement of its sanction. This holding appears to have done “substantial justice” for both parties. Failure to have imposed the sanction would have prejudiced defendant, and failure to have granted a dismissal without prejudice would have injured plaintiff. This case demonstrates that evidence can be limited to interrogatory answers in such a manner that “substantial justice” will be accomplished, and yet not too harsh a result is visited upon any one party.

3. In light of cases yet to be discussed, the tendency seems to favor admission of the evidence if prejudice to the propounding party is lacking. This is especially true if the exclusion would defeat a cause of action. However, this must be taken with some reservation due to the attitude of some courts concerning the seriousness of the discovery process.

5. Id. at 395, 126 A.2d at 907.
6. N.J. Rules 4:23-12:
   If the party furnishing answers to interrogatories shall obtain information subsequent to the pretrial conference which renders such answers incomplete, amended answers shall be served not later than 10 days prior to the day fixed for trial. Thereafter amendments may be allowed only for extraordinary or compelling reasons and to prevent manifest injustice, and upon such terms as the court may direct. In no case shall amendments be allowed at trial where it appears that evidence sought to be introduced was known to the party seeking such leave, more than 10 days prior to trial.

7. See also, Lang v. Morgan’s Home Equip. Corp., 6 N.J. 333, 338, 78 A.2d 705, 707 (1951), saying: “As with all rules it is necessary that there be adequate provisions for the enforcement of the rules as to discovery against those who fail or refuse to comply. Sanctions are peculiarly necessary in matters of discovery and the power to invoke them is inherent in our courts.”
In *D'Agostino v. Schaffer*, another New Jersey case, plaintiffs, Robert and Salvatore D'Agostino, brought action on a contract allegedly made with defendant. Defendant's interrogatories requested the names of the parties to the contract, those present at its making, and the names of all persons having knowledge relevant to plaintiffs' claim. The individuals named in the answer were not presented as witnesses at trial. Salvatore was not named in the interrogatory answers, but he was the only witness produced to prove plaintiffs' case. Counsel for defendant strenuously objected to testimony by Salvatore concerning the contract because he had not been named in the interrogatory answers. The objection was overruled.

On appeal, the defendant contended that the trial court erred in allowing Salvatore to testify seeking to establish a verbal agreement with defendant. In sustaining this contention the appellate court said:

The answers to interrogatories in this action were either knowingly false or their preparation attended by gross carelessness or disregard of accuracy. . . . When defendant's counsel objected to Salvatore's testimony seeking to establish a verbal agreement with defendant, the trial court should have refused to hear it.⁹

After noting the requirements of New Jersey Rule 4:23-12, the court said: "The penalty for failure to correct, amend or supplement incomplete answers to interrogatories is the exclusion of such omitted data at the trial."¹⁰

The appellate court also set forth circumstances in which the sanction of exclusion might be withheld:¹¹

It has been said that the factors which weigh heavily in cancelling the sanction of the exclusion of testimony at the trial for failure to comply with the rules are (1) absence of a design to mislead or conceal—as, for example, mistake, inadvertence, excusable neglect, or honest misunderstanding; (2) absence of the element of surprise if the evidence is admitted; and (3) absence of prejudice which would result from the admission of the evidence. . . . We find none of these factors present in the record before us.¹²

The appellate court reversed judgment and remanded the cause for a new trial without considering the other points raised by defendant.

If the factors set out in the quotation above are present, one might have considerable difficulty in justifying exclusion of the evidence; in such a case the obvious purpose of imposing exclusion would be to punish the answering party. Imposing it in such a situation, merely for the sake of doing so, would probably exclude evidence that might be of some value in making a fair determination of the case.

*Branch v. Emery Transp. Co.*¹³ was a personal injury action in which the de-

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9. *Id.* at 401, 133 A.2d at 49.
10. *Id.* at 402, 133 A.2d at 49.
fendants admitted liability and plaintiffs' damages were the sole issue at trial. On
appeal the defendant argued that the trial court committed prejudicial error in
permitting plaintiffs to testify concerning injuries not set forth in their answers to
interrogatories. Plaintiffs answered that the conflicts between the testimony and
the answers resulted from a clerical mistake in the preparation of answers. Thus,
it was argued, there was absent a design to mislead or conceal. Secondly, plaintiffs
argued, if prejudice resulted to defendants the fault should not have been placed
on the plaintiffs because defendants did not avail themselves of the opportunity to
have a physical examination of parties made which would have made the dis-
crepancies apparent.

After recognizing that the trial court had power to impose sanctions under rule
4:23-12, the New Jersey court held that the trial judge had erred in admitting the
evidence. The court said:

Nor should a party ordinarily be permitted the luxury of liberal amend-
ment because his lawyer was dilatory, solely on a general plea of sub-
stantial justice. The court should not permit itself to be imposed upon. A
party seeking leave to effect a tardy amendment must show circumstances
which will bring him within the scope of certain recognized factors, thus
establishing a basis for the proper exercise of judicial discretion. The court
has and should, in proper cases, impose drastic sanctions.14

The court then noted the mitigating factors set out in the D'Agostino15 case. In
addition to this the court enunciated another guide:

The polestar which should guide the trial court in the exercise of its
discretion is the just and expeditious disposition of the litigation on its
merits. If possible, the issue should be resolved in such a manner that no
injustice is visited upon any of the parties litigant. Doubts should be re-
solved against the offending party. In no case, however, where the proffered
proofs show a material variance upon the written answers which results
in surprise and prejudice to the interrogator's cause, should the court ad-
mit the variant testimony into evidence and compel the interrogator to
try out the cause under that evidence without affording him a reasonable
opportunity to meet that new evidence.16

The court answered plaintiffs' argument that defendants had other discovery devices
available by saying:

That defendants did not avail themselves of a pretrial physical exa-
nination of the parties cannot operate to bar their claim of surprise and
prejudice or reduce the effect of the prejudice. . . . Defendants are under
no duty to ascertain before trial whether the answers are in fact true.17

14. Id. at 375, 147 A.2d at 561.
15. D'Agostino v. Schaffer, supra note 8, at 402, 133 A.2d at 49:
(1) [A]bsence of a design to mislead or conceal—as, for example, mis-
take, inadvertence, excusable neglect, or honest misunderstanding; (2)
absence of the element of surprise if the evidence is admitted; and (3)
absence of prejudice which would result from the admission of the
evidence. . . .
17. Id. at 377, 147 A.2d at 562.
Also, the court felt that although plaintiffs did not intend to mislead, this fact did not mitigate the prejudice.

The discrepancies were so great that the trial court should have sustained defendant's objection and have limited the proof to facts disclosed by the interrogatories, or have permitted an amendment thereof on terms which would have afforded defendants a reasonable opportunity to meet the new evidence. 18

One of the more interesting guides set forth by the court was: "If possible, the issue should be resolved in such a manner that no injustice is visited upon any of the parties litigant. 19 20 This is entirely consistent with the conclusion drawn from Abbate marco v. Colton; 20 namely, that the court would rather overlook the offense if the choice narrows down to destroying a party's cause of action or letting the matter go by, especially if the prejudice is not too great or if it can be repaired. It would seem that a continuance would almost always compensate for the prejudice. 21 However, the Central 22 case is an exception. In that case a continuance would have been an inadequate consolation due to plaintiff's difficulty in assembling his witnesses. The court in the principal case made provision for situations similar to the Central case: "Doubts should be resolved against the offending party." 23 Thus, if the prejudice is too great and cannot be repaired by a continuance, the offending party should bear the hardship. Also, the absence of an intent to mislead does not reduce the prejudice if prejudice actually exists.

II. CASES SUGGESTING THAT ANSWERS TO INTERROGATORIES CAN LIMIT EVIDENCE AT TRIAL

The following cases recognize or suggest that a party may be precluded from offering evidence contrary to his answers to interrogatories, but in each case the sanction was withheld for some particular reason.

A. MISSOURI CASES

Fitzpatrick v. St. Louis-S.F. Ry. 24 involved a defendant who contended that the trial court erred in permitting plaintiff to introduce evidence and submit his case on events which transpired at a location different from that named in the answer to the interrogatory. Defendant cited cases 25 holding that the purpose of the discovery device was to narrow the issues and to limit preparation and the

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18. Id. at 378, 147 A.2d at 562.
19. Id. at 376, 147 A.2d at 561.
21. See also Meszaros v. Gransamer, 23 N.J. 179, 128 A.2d 449 (1956), holding, that an instruction to the jury to disregard that testimony conflicting with the interrogatory answers remedied the situation.
24. 300 S.W.2d 490 (Mo. 1957).
trial to controverted issues. The Missouri Supreme Court agreed that such was the purpose, but held that the trial court should be given wide discretion in admitting evidence conflicting with the interrogatory answer: "Under the facts of this case defendant has not shown itself to be prejudiced by the ruling and we hold that the trial court did not err in admitting the evidence."26 This suggests, though it does not expressly hold, that it might have been error to admit the evidence if defendant had shown itself to be prejudiced by the admission of the evidence.

The question arises whether prejudice to the propounding party, irrespective of the answering party's reason for not giving correct answers, is a prerequisite to the sanction in Missouri? The Central case, and cases not yet discussed, indicate that prejudice is a prerequisite to exclusion.

In the Fitzpatrick case the court noted that plaintiff gave no explanation for his failure to answer fully the interrogatories. Nevertheless, this was not sufficient by itself to preclude the admission of the evidence. This holding seems entirely consistent with the conclusion drawn from the Central case, where it was concluded that thus far the Missouri courts have apparently required two elements before the evidence will be excluded, i.e., prejudice to the propounding party, and unexplained failure to answer correctly. The consistency between Fitzpatrick and Central is predicated upon the court's apparent refusal, in Fitzpatrick, to weigh the unexplained failure to answer in the absence of prejudice.

In Critcher v. Rudy Fick, Inc.27 plaintiff contended that the trial court erred in permitting defendant's general manager to contradict defendant's interrogatory answers. The general manager testified that under certain conditions, when selling a used automobile, defendant would give a service policy and a battery warranty. Defendant, by its answers to interrogatories, had stated that it had no custom or practice to do so. The Missouri Supreme Court said:

Answers to interrogatories are not pleadings, and while in some circumstances the answers should have a limiting effect on the scope of proof at trial, the trial court should be given a wide discretion to prevent the party propounding the interrogatories from being misled and prejudiced and to protect the answering party against his own mistake or inadvertence.28

Since plaintiff had not shown that she was prejudiced; the court found no reason to exclude the testimony. The opinion did not explain in what "circumstances" the testimony would be excluded. The court did mention prejudice, but this was not elaborated on.

There was also a conspicuous absence of any inquiry into defendant's reason for failing to answer correctly the interrogatory, again indicating that prejudice is the primary consideration of the Missouri courts; if prejudice is lacking no inquiry will be made of the answering party's failure to answer correctly. Whether the Missouri courts will exclude evidence solely because of failure properly to answer must await determination in a case where it is readily apparent that the answering party has negligently or willfully failed to answer properly.

27. 315 S.W.2d 421 (Mo. 1958).
28. Id., at 429.
Fraught v. St. Louis-S.F. Ry.²⁹ involved a personal injury action. In his answers to interrogatories plaintiff said that he did not remember the names and addresses of the men with whom he was working. He qualified this by saying that he remembered the first names of some of the men, but that he never did know their addresses. On direct examination plaintiff testified that among the men working with him was one Marbut. On cross-examination he again stated that Marbut was working with him when he was injured and that he knew Marbut’s name. Furthermore, the evidence showed that about a year before the trial, and prior to answering the interrogatories, plaintiff had gone with a lawyer to Marbut’s home and talked with him. When Marbut appeared at the trial as a witness for plaintiff, defense counsel objected to his testifying because he was not listed in the answers to the interrogatories. Defendant’s objection was overruled. The court said that there could have been no surprise that Marbut’s correct name was not given in plaintiff’s answer because defendant, in its answers to interrogatories, had listed Marbut as a member of plaintiff’s section gang. The Missouri Supreme Court rejected defendant’s contention that the witness should not be allowed to testify solely on grounds that his name was not in the answer.

B. The New Jersey Decisions

Evrush v. Hudson Bus Transp. Co.³⁰ involved an action for damages for the death of plaintiffs’ intestates arising out of a collision between a motorcycle and defendant’s bus. Attorneys for plaintiffs served the following interrogatory: “State the name or names and addresses of any witness to the accident in which defendants were involved and upon whom said defendants intend to rely.”³¹ Defendants George R. Meyer and James Haddon, bus drivers of defendant company, answered:

We are two of the defendants in the ... action ... [who] have personal knowledge of the facts to which said interrogatory relates, and are authorized to make and verify the answer thereto. We were eyewitnesses to the occurrence to which the interrogatory refers and we intend to rely upon our testimony on the trial of this case. We do not, however, know what, if any, other witnesses there were to the occurrence referred to, nor do we know upon whom if anyone, in addition to ourselves, our attorney intends to rely.³²

At trial one defendant, James Haddon, testified that he took the names and addresses of a few passengers in his bus at the time of the collision and turned them over to the corporate defendant who had possession of these names when the interrogatories were answered. At trial defendants called Howard Barker to testify. When plaintiffs’ attorney discovered that Barker had been a passenger he objected to his testimony on the grounds that his name had not been listed in the interrogatory answers. The trial court overruled this objection. Defendants then introduced another witness who had been on the bus at the time of the accident, and again

²⁹ 325 S.W.2d 776 (Mo. 1959).
³¹ Id. at 48, 76 A.2d at 264.
³² Ibid.
the plaintiffs' counsel objected. This objection was also overruled. On appeal the court said:

In failing to disclose the names and addresses of the witnesses to the accident which were known to them at the time of the answer to the interrogatory, the defendants not only failed to comply with the obligation imposed upon them by our Rules, but also deprived the plaintiffs of substantial rights.\footnote{33}

A trial court has a duty to protect the substantial rights of the parties, and although our new Rules provide no explicit penalty for an untrue answer to an interrogatory, we think the court has \textit{implicit power} to impose such penalty as the circumstances of the particular case warrant, in order to insure that substantial justice will done. ... [T]he plaintiffs were at least entitled to the declaring of a mistrial.\footnote{34} (Emphasis added.)

The judgments were reversed and a new trial granted.

The appellate court held that the trial court has a duty to protect the "substantial rights" of the parties. Thus, the trial court has a duty to grant a new trial if the testimony is erroneously admitted, or take some other protective measure if the propounding party's "substantial rights" would be impeded by the admission of the evidence. This power is implicit in the courts.

The appellate court did not expressly say that limiting evidence to the interrogatory answers was the proper remedy, but the above language would support such a sanction.

In \textit{Abbatemarco v. Colton},\footnote{35} plaintiff's attorney, in response to an interrogatory requesting the names of persons having knowledge of the accident failed to include the name of an eyewitness. Plaintiff had called upon and discussed the matter with the witness two or three days after the accident, but plaintiff's attorney testified that he was not informed of the witness until he was preparing the case for trial, and that he then orally imparted the name and address of the witness to one of defendant's attorneys.

Thereafter the witness suffered a heart attack and could not testify at the trial. Plaintiff's attorney notified defendant's attorney that he was going to take the witness' deposition. Defendant's attorney was present at the taking of the deposition, but objected to the procedure on the ground that the witness' name was not included in the interrogatory answers. At trial plaintiff's attorney offered to read to the jury the deposition of the witness, but defendant's objection was sustained. The plaintiff moved for a mistrial on the grounds that the ends of justice could not be served in accordance with the ruling excluding the only eyewitness to the accident. The motion was denied.

On appeal the superior court cited New Jersey Rule 4:23-12. The court noted that the plaintiff had failed to comply with the rule in several ways, and "in such a posture, the exclusion of the deposition was entirely proper."\footnote{36} However, the
court went on to say, "in this instance we believe substantial justice requires that the judgment for the defendant be reversed to the end that the plaintiff's motion for a mistrial be granted ..."\(^{37}\) Notwithstanding plaintiff's infraction of the rule the court did not want to impede "substantial justice" by imposing the sanction of excluding the witness' testimony.

The fact that defendant's attorney did receive the witness' name orally, and was present at the taking of the deposition and had a chance to cross-examine, undoubtedly helped alleviate any prejudice arising from plaintiff's failure to disclose. The decision may well have been different if these mitigating circumstances were not present. The holding of the court indicates a reluctance to impose the sanction of exclusion when the result will be the destruction of a party's cause of action.

In *Ross v. Ross*\(^{38}\) defendant counterclaimed for moneys expended by defendant in maintaining and improving certain property. In his interrogatories to defendant, plaintiff requested a list of all improvements made to the premises, and a list of all persons or agencies from whom money was borrowed to make these improvements. Defendant failed to list all of the moneys paid to repairmen and also failed to include certain Federal Housing Administration home improvement loans. Plaintiff contended that since the omitted items were not included in the answer, testimony relating to them could not properly be admitted into evidence.

In resolving this contention the court said:

> Answers to interrogatories are not pleadings; they are in the nature of evidence and do not alter the pleadings. ... It has been said that under ordinary circumstances they should not have the effect of limiting the parties' proofs in the way that pleadings do. ... However, the testimony which goes beyond the answers should be received with caution. It should clearly appear that the information called for by the interrogatories had not willfully been withheld, or omitted through sheer neglect and carelessness. It may be that the answering party—as here—failed to supply the requested information by inadvertence or because he found himself disadvantageously situated in producing it. The court should also consider whether the person serving the interrogatories might possibly have been misled, or deprived of an opportunity to investigate so as to ascertain where the truth lay.\(^{39}\)

The court concluded that the omitted information was not deliberately withheld, but rather inadvertently omitted. At the time, the defendant was having strained relations with her attorney. The bills and other records were scattered, and she was having trouble engaging another attorney. She finally completed and filed the answers herself. "Strictly to limit defendant's proofs to the answer to the interrogatories would not, in the circumstances of this case, work essential justice."\(^{40}\) The court also said that the plaintiff was not prejudiced under the circumstances of this case.

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39. *Id.* at 250, 113 A.2d at 704-05.
40. *Id.* at 251, 113 A.2d at 705.
In determining whether the evidence should be excluded the court said that it should clearly appear that the information called for by the interrogatory had not willfully been withheld, or omitted through sheer neglect and carelessness, and the court should also consider whether the person serving the interrogatories might possibly have been misled or deprived of an opportunity to investigate so as to ascertain where the truth lay. Although far from being an infallible test, the above considerations would appear to be valuable guides for a court to consider. The Missouri courts probably use some of the same criteria even though no attempt appears to have been made to formulate them into a general rule.

III. Cases Holding of Suggesting that Answers to Interrogatories Cannot Limit Evidence at Trial

The cases are in accord that answers to interrogatories are not pleadings in a strict sense, and will limit the evidence only in certain situations. The language of the Ross case is typical. In addition to this view, many of the courts are careful to point out that answers to interrogatories may be amended. Some courts, however, have taken a stronger stand on the issue. In John v. Tribune Co the defendant contended that plaintiff was bound by her answers to interrogatories. In dispensing with the contention the court said:

Answers to interrogatories are not pleadings. . . In Ross v. Ross . . . the court says that answers to interrogatories are not pleadings, and under ordinary circumstances they should not have the effect of limiting the party's proof in the way that pleadings do. See . . . Fitzpatrick v. St. Louis-San Francisco Co. . . . That being true the interrogatories, standing alone, could not be considered pleading, nor could they in any way limit the evidentiary proof in the trial.

Note that the court quoted the language from the Ross case, saying, "that under ordinary circumstances they [answers] should not have the effect of limiting the party's proof. . ." This language suggests that answers may limit proof in extraordinary circumstances. So, even here the holding may not be as strong as it first appears.

Smith v. Olsen and City of Prichard v. Hawkins held that a party is not precluded from contradicting his answers at trial. These decisions were based upon statutory construction.

In the Smith case the court placed considerable import upon the following

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41. See also Bauman v. Royal Indem. Co., 36 N.J. 12, 174 A.2d 585 (1961); holding, that an original interrogatory answer may be introduced in evidence, as an admission by a party, even though the original answer had been amended long before trial.

42. 28 Ill. App. 2d 300, 171 N.E.2d 433 (1960).

43. See Fitzpatrick v. St. Louis-S.F. Ry., supra note 24, and accompanying textual discussion.


45. Ibid. (Emphasis added.)

46. 92 Tex. 181, 46 S.W. 361 (1898).

47. 244 Ala. 676, 63 So. 2d 378 (1951).
words from the statute: "[The answering party's] . . . examination shall be conducted and his testimony received in the same manner and according to the same rules which apply in the case of other witnesses. . . . " That is, other testimony may be contradicted, therefore answers to interrogatories must be accorded the same treatment. The court felt that making the answers binding would be unjust, and would negate the benefits which might be expected to flow from this procedural device.

The court in the Prichard case noted that the statutes of Alabama contained no provision as that emphasized in the Olsen case. However, the court said that it was bound to be implied as part of its statute.

In the Prichard case the answering party attempted to amend his answers long after time had expired for answering. Whether amendment should have been allowed was a matter within the trial court's discretion (so said the Alabama Supreme Court). The Supreme Court did hold it error, though, for the trial court to assume that the original answers were conclusive judicial admissions on the answering party, which could not be explained or contradicted at trial.

The Olsen and Prichard cases did not involve situations of willful or negligent withholding of information, or a refusal to name parties having knowledge relevant to the issues of the case. At least the courts made no mention of such factors. Quaere, whether the holding in these cases would be applicable in that type of situation. It is submitted that these additional factors may well require a different evaluation, especially if the interrogating party has been prejudiced.

IV. Missouri Cases Suggesting That a Party May Contradict His Testimony Given on Deposition

The Missouri cases holding that pre-trial answers can have a limiting effect on the trial have mentioned interrogatories only; depositions were not included. The Missouri courts have also held that the scope of examination on interrogatories is coextensive with that permitted on depositions. However, no language was found which indicated that the use of the two is the same. In fact, there is some indication that the uses are not the same. In the Fitzpatrick case the court said:

Interrogatories have sometimes been referred to as the "poor man's deposition" but the use that can be made of them is more extensive than that of depositions. The questions which a party may be required to answer take a wider range and the answers may be offered in evidence as the admission of the party making them. While, under our practice, interrogatories do not actually alter or amend pleadings, situations may arise in which the trial court would be justified in treating them with similar effect.

Here the court suggests that this is an exclusive quality of interrogatories. Since this is a Missouri Supreme Court decision, interrogatories apparently have a somewhat broader utility value in Missouri.

50. Id. at 500.
The Missouri cases have answered negatively the question whether one is bound at trial by his answers to depositions. In Moore v. Ready Mixed Concrete Co., the court expressly rejected such a contention:

"Defendants seek to attribute to the deposition testimony the conclusive effect of a judicial admission. That position is not sound. Assuming that the testimony was contradictory, plaintiff was not bound by his deposition and it was for the jury to say which version of the facts was true."

At least in the area of contradictory testimony, there seems little doubt but what one is not bound by his answers to depositions in Missouri. However, no Missouri cases were found where a deponent failed to disclose the identity of a witness and then later offered the witness' testimony at trial. If such a case arose the Missouri courts might reach a different result, but it is difficult to see how the court could distinguish, for the purposes of this discussion, between giving erroneous information on a deposition and failing to disclose a witness' name on a deposition. In both situations the result is to deprive the adverse party of information which may be relevant to his case.

51. Moore v. Ready Mixed Concrete Co., 329 S.W.2d 14 (Mo. 1959); Capra v. Phillips Inv. Co., 302 S.W.2d 924 (Mo. 1957); Parmley v. Henks, 285 S.W.2d 710 (Mo. 1956); Hamilton v. Patton Creamery Co., 359 Mo. 526, 222 S.W.2d 713 (1949); Schonlau v. Terminal R.R. Ass'n, 357 Mo. 1108, 212 S.W.2d 420 (1948).
52. 329 S.W.2d 14 (Mo. 1959).
53. Id. at 20.
54. Contra, Ward v. Ticknor, 49 Wash. 2d 493, 303 P.2d 998, 999 (1956), where deponent's (a party to the action) testimony at trial differed significantly from his testimony taken on deposition. No objection or claim for relief was made at trial concerning the variant testimony. On appeal a claim of "surprise" was made. The Washington Supreme Court held that the right to claim "surprise" had been waived since no objection had been made at trial.

By deciding that one may waive a right to object to variance between a deposition and trial testimony, the Washington Supreme Court has by implication decided that the right exists.

55. Contra, Sather v. Lindahl, 43 Wash. 2d 463, 261 P.2d 682 (1953), where the plaintiff in his deposition replied, "Not that I know of" in response to the question, "Do you know of any witnesses to this accident?" The plaintiff and his counsel did in fact know of four eyewitnesses. When these witnesses testified defendant made no objection or made no claim for relief until after the jury had been instructed and the plaintiff's counsel had made his opening argument to the jury. At this stage of the proceeding defendant's counsel moved for a mistrial on the grounds of "surprise." The mistrial was denied. After verdict, the same grounds (surprise) were made the basis for the granting of a new trial. On appeal the Washington Supreme Court said:

The trial judge can sustain ... an objection [to testimony from witnesses not named in response to an inquiry of their identity] and refuse to permit the witness to testify or can order his testimony stricken; or he can grant a continuance to give the surprised party an opportunity to investigate the witness and secure rebuttal testimony; and it is possible that, under circumstances in which no other relief or penalty could remedy the situation created by the deception, he could grant a mistrial.

43 Wash. 2d 463, 261 P.2d at 682-83. By deciding that one may waive a right to object to testimony from witnesses not named in a deposition, the Washington Supreme Court has by implication decided that the right exists.
Furthermore, as far as the present subject is concerned, there is no readily apparent reason why a deposition should be distinguished from answers to interrogatories. Precluding a party from contradicting his answers to interrogatories appears to stem from an effort to protect the interrogating party from prejudice and to help enforce the discovery process. These objectives should be no less important when depositions are involved, at least when the deponent is a party or a witness clearly favoring a particular litigant. The mere difference in form of the two discovery devices, if this is the basis of distinction, does not seem to provide a real substantive reason for distinguishing the two.

CONCLUSION

Several of the cases discussed hold that the trial judge should have wide discretion as to whether a party will be allowed to contradict his answers to interrogatories. Wide discretion in the trial judge is probably necessary since these cases turn largely upon the particular facts involved.

New Jersey has a statute dealing with the problem; Missouri does not. Notwithstanding this difference, the conclusions reached in the two jurisdictions are substantially the same. The similarity of results is obtainable if the court assumes an implicit power to deal with any variance between interrogatory answers and the evidence presented at trial.

Since Missouri does not have a statute governing the problem, one would expect the Missouri courts to endeavor a formulation of rules or guides for the courts to follow. Where there is a statute, as in New Jersey, the need for such rules and guides does not seem quite so compelling. Contrary to expectations, however, the New Jersey courts have enunciated more such guides.

The courts have presented several considerations for review when an answering party attempts to contradict his answers to interrogatories. Almost all of the cases mention prejudice to the propounding party. The Missouri courts, thus far, have indicated that prejudice is the primary consideration. In New Jersey the issue is not so clear. In the Branch case the court said that issues should be resolved, if possible, so that no injustice is done to either party. This rule does not seem consistent with the one laid down in the Ross case. For example, suppose that the answering party, through sheer neglect and carelessness, withholds information that is vital to his own case, but its withholding does not really prejudice the propounding party. According to Ross, this evidence should be excluded because it was omitted through "sheer neglect and carelessness," according to Branch, it should not be excluded because issues should be resolved so that no injustice is done to either party. Were the Ross case followed, as interpreted here,

the sanction would be imposed even though prejudice was lacking, thus indicating that prejudice is not a condition precedent to exclusion.

In spite of the seeming inconsistency, most of the New Jersey cases indicate that prejudice to the propounding party is one, if not the most important, consideration.60

The Central case,61 decided by the Kansas City Court of Appeals, also suggests that an unexplained failure to answer correctly will be taken into consideration. That is, if the party has a valid excuse for the inconsistency between his answers and the evidence to be introduced, the court should hear the excuse, otherwise it would be justified in concluding that he had none.

On the other hand, the remaining Missouri cases did not seem to place much weight on this consideration. The failure to do so may be attributable to the fact that prejudice was not found to exist in the other cases. Therefore, there was no reason to make inquiry concerning the unexplained failure to answer correctly.

In addition to these factors, the New Jersey courts have mentioned willfulness,62 material variance,63 needless imposition upon the court,64 resolving doubts against the offending party,65 the protection of substantial rights,66 inadvertence,67 absence of a design to mislead or conceal,68 excusable neglect or honest misunderstanding69 and absence of the element of surprise if the evidence is admitted.70 Some of these considerations are closely related or nearly repetitious. Summarized, they seem to spell out the intention of the courts to carry out a theme of fairness in these cases.

An effort on the part of the courts to achieve fairness between the parties is evidenced by the fact that the courts have rejected the proposal that answers should, as a matter of course, limit the evidence at trial. The trend seems to favor overlooking the offense or favor the taking of a less severe action, such as the granting of a continuance, if to limit the evidence to the interrogatory answers would deprive the answering party of introducing evidence essential to his case.71

60. See Camp Clearwater, Inc. v. Plock, 52 N.J. Super. 583, 592-93, 146 A.2d 527, 532-33 (1958), an action to enjoin use of owner’s land; plaintiff failed to include various documents in its answers to defendant’s interrogatory which requested that plaintiff set forth the chain of title of all documents under which it claimed ownership. The court held that the admission of the documents did not prejudice defendant since all of the documents were a matter of public record. Also, most if not all of the omitted documents were referred to in the various instruments which were included in the answer.


64. Ibid.

65. Ibid.


68. Ibid.

69. Ibid.

70. Ibid.

71. But see Ross v. Ross, supra note 37, at 250, 113 A.2d at 704-05, wherein it was said: “It should clearly appear that the information called for by the interrogatories had not willfully been withheld, or omitted through sheer neglect
This seems to be the almost unanimous holding\textsuperscript{72} in the absence of prejudice to the propounding party. There is merit in this view, since the introduction of the additional evidence may better serve the litigation on its merits. On the other hand, this view will remove some of the teeth from enforcement of the discovery process.

Even though the majority of the cases are basically in accord on the limiting effect of interrogatories, no court has attempted to determine the exact extent of this limiting effect. This may be due to the fact that Moore in his treatise on federal procedure never took a definite stand either. He summarized the problem as follows:

Answers to interrogatories are not pleadings, and under ordinary circumstances they do not have the effect of limiting the party's proof in the way pleadings do. It would not be accurate, however, to attempt to lay down any strict rule that answers to interrogatories cannot limit proof. We have seen that interrogatories do serve as adjuncts to the pleadings in limiting issues and defining the contentions of the parties, and to this extent answers should have a limiting effect on the scope of proof at the trial just as if the matters involved were stated in the pleadings or in a pre-trial order.\textsuperscript{73}

It should be noted that Moore did not explain in what situations the answers to interrogatories would have a limiting effect. He does mention that "interrogatories serve as adjuncts to the pleadings in limiting issues and defining the contentions of the parties, and to this extent answers should have a limiting effect."\textsuperscript{74} But this does little to explain just when they do have this effect. The language of the courts is often quite similar to that of Moore's.

Moore did not mention depositions while discussing the problem of whether interrogatories can limit evidence. Apparently he considered any limiting effect to be exclusive with interrogatories.

Even though the courts have refused to define the extent of the limiting effect of interrogatory answers, they have laid down a guide or standard, and all of the courts seem to be in agreement on the matter. In lieu of an exact definition, the courts say that the trial judge should have a great deal of discretion in determining when the scope of proof should be limited by such sworn answers. Almost all of the cited cases contain such language. The language of the \textit{Critcher} case\textsuperscript{75} is fairly representative.

There is also the possibility that the courts have completely answered the

\textsuperscript{72} But see \textit{ibid.} In the \textit{Central} case, \textit{supra} note 1, the court did not grant a continuance, but instead, strictly refused to allow amendment. Whether this holding goes against the grain of what has already been said is questionable since the court gave no indication that those additional witnesses were essential to defendant's case.

\textsuperscript{73} \textit{4 Moore, Federal Practice} \$ 33.29(2), at 2344 (2d ed. 1953).

\textsuperscript{74} \textit{Ibid.}

\textsuperscript{75} \textit{Critcher v. Rudy Fick, Inc.}, \textit{supra} note 27.

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