

# IN THE SUPREME COURT OF TEXAS

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No. 97-0536  
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STATE FARM FIRE & CASUALTY COMPANY, PETITIONER

v.

FRANCISCO MORUA, INDIVIDUALLY AND BY HIS GUARDIAN, VIRGINIA MORUA,  
RESPONDENT

=====  
ON APPLICATION FOR WRIT OF ERROR TO THE  
COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS  
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JUSTICE ABBOTT delivered the opinion of the Court, in which JUSTICE ENOCH, JUSTICE SPECTOR and JUSTICE HANKINSON join.

JUSTICE HECHT filed an opinion concurring in Parts I and III and dissenting in part, and concurring in the judgment, in which CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ and JUSTICE OWEN join.

JUSTICE BAKER filed an opinion concurring in Parts I and II and dissenting in part, and dissenting from the judgment.

The issue in this case is whether supplemental interrogatory answers must be verified. We resolve a conflict in the courts of appeals and hold that they must be verified. However, because we hold that any objection to the lack of verification was waived, we reverse the court of appeals' judgment and remand the case to that court for further proceedings.

## I

Francisco Morua sued State Farm Fire and Casualty Company for lifetime workers'

compensation benefits. Morua served interrogatories on State Farm inquiring about various matters, including the identity of State Farm's expert witnesses, the subject of their testimony, and any reports or other documents prepared by them. State Farm did not identify any expert witnesses in its verified response, but in supplemental *unverified* responses it identified an expert, Jeffrey C. Siegel, described the subject matter of his testimony, and provided Morua with a copy of his report. State Farm and Morua then deposed Siegel on written questions. At trial, Morua objected to Siegel's testimony on the ground that he had not been identified in a verified response to interrogatories. The district court overruled the objection and permitted the expert to testify. The court rendered judgment on a verdict for State Farm.

The court of appeals, following its decisions in *Ramirez v. Ramirez*, 873 S.W.2d 735, 740 (Tex. App.—El Paso 1994, no writ), and *Varner v. Howe*, 860 S.W.2d 458, 462 (Tex. App.—El Paso 1993, no writ), and a recent decision by the Fifth Court of Appeals in *Dawson-Austin v. Austin*, 920 S.W.2d 776, 792-93 (Tex. App.—Dallas 1996), *rev'd and remanded on other grounds*, 968 S.W.2d 319 (Tex. 1998), held that Siegel had not been properly identified because State Farm's supplemental interrogatory answers were not verified, and that the expert's testimony should therefore have been excluded under Texas Rule of Civil Procedure 215(5). 960 S.W.2d 659, 660-62. The court reversed and remanded for a new trial. The court noted that its conclusion conflicts with decisions of the

Courts of Appeals for the Second,<sup>1</sup> Third,<sup>2</sup> Fourth,<sup>3</sup> Sixth,<sup>4</sup> and Seventh<sup>5</sup> Districts holding that supplemental responses to interrogatories need not be verified. The court's holding also conflicts with decisions of the Court of Appeals for the First District.<sup>6</sup>

## II

Rule 168(5) of the Texas Rules of Civil Procedure requires that interrogatory answers be verified by the person making them. The obligation to supplement discovery responses is found in Rule 166b(6), which states:

6. Duty to Supplement. A party who has responded to a request for discovery that was correct and complete when made is under no duty to supplement his response to include information thereafter acquired, except the following shall be supplemented not less than thirty days prior to the beginning of trial unless the court finds that a good cause exists for permitting or requiring later supplementation.

a. A party is under a duty to reasonably supplement his response if he obtains information upon the basis of which:

(1) he knows that the response was incorrect or incomplete when made;

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<sup>1</sup> *Kramer v. Lewisville Mem'l Hosp.*, 831 S.W.2d 46 (Tex. App.—Fort Worth 1992), *aff'd on other grounds*, 858 S.W.2d 397 (Tex. 1993).

<sup>2</sup> *State v. Munday Enters.*, 824 S.W.2d 643 (Tex. App.—Austin 1992), *rev'd and remanded on other grounds*, 868 S.W.2d 319 (Tex. 1993).

<sup>3</sup> *Soeffje v. Stewart*, 847 S.W.2d 311 (Tex. App.—San Antonio 1992, writ denied); *Browning-Ferris, Inc. v. Reyna*, 852 S.W.2d 540, 543 (Tex. App.—San Antonio 1992), *rev'd on other grounds*, 865 S.W.2d 925 (Tex. 1993).

<sup>4</sup> *Circle Y of Yoakum v. Blevins*, 826 S.W.2d 753 (Tex. App.—Texarkana 1992, writ denied).

<sup>5</sup> *Jones v. Kinder*, 807 S.W.2d 868 (Tex. App.—Amarillo 1991, no writ).

<sup>6</sup> *Melendez v. State*, 902 S.W.2d 132, 136 (Tex. App.—Houston [1st Dist.] 1995, no writ); *Weaver v. United States Testing Co.*, 886 S.W.2d 488, 491 (Tex. App.—Houston [1st Dist.] 1994, writ denied); *Gober v. Wright*, 838 S.W.2d 794, 799 (Tex. App.—Houston [1st Dist.] 1992, writ denied).

(2) he knows that the response though correct and complete when made is no longer true and complete and the circumstances are such that failure to amend the answer is in substance misleading; or

b. If the party expects to call an expert witness when the identity or the subject matter of such expert witness' testimony has not been previously disclosed in response to an appropriate inquiry directly addressed to these matters, such response must be supplemented to include the name, address and telephone number of the expert witness and the substance of the testimony concerning which the expert witness is expected to testify, as soon as is practical, but in no event less than thirty (30) days prior to the beginning of trial except on leave of court.

TEX. R. CIV. P. 166b(6). Rule 166b(6) does not address whether supplemental discovery responses must be verified. Nevertheless, there are several reasons why a party should be required to verify supplemental interrogatory answers despite the lack of an express requirement in Rule 166b(6).

Rule 168's command that "interrogatories shall be answered . . . fully in writing under oath" applies to *all* interrogatory answers, initially and whenever supplemented. TEX. R. CIV. P. 168(5); *see also Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669, 671 (Tex. 1990) (per curiam) (holding that supplemental answers must be in writing as required by Rule 168(5), despite the lack of an explicit writing requirement in Rule 166b(6)). The rule does not distinguish between original interrogatory answers and supplemental interrogatory answers, and no such distinction can be divined from Rule 166b(6).<sup>7</sup>

Moreover, Rule 166's supplementation requirement applies generally to responses to different kinds of discovery requests and does not attempt to prescribe the form, method, or

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<sup>7</sup> Justice Hecht's reliance on Federal Rule 26 is misplaced. Federal Rule 26(e)(2) expressly provides that parties must amend their interrogatory answers "if the additional or corrective information *has not otherwise been made known* to the other parties during the discovery process or in writing." FED. R. CIV. P. 26(e)(2) (emphasis added). Thus, unlike Texas Rule 166, Federal Rule 26 plainly allows alternative methods of supplementation that do not necessarily require verification.

requirements for each of them. This suggests that a supplemental response should be made in the same form and manner — including verification — as required for the original response. *See, e.g., Dawson-Austin*, 920 S.W.2d at 792-93. This is especially true when, as here, the original interrogatory answers did not specifically provide the requested information.<sup>8</sup>

Interrogatories serve to flesh out the facts of the case and to prevent trial by ambush. *See Alvarado v. Farah Mfg. Co.*, 830 S.W.2d 911, 914 (Tex. 1992). Interrogatory answers may be used at trial against the party providing them. TEX. R. CIV. P. 168(2). Given the fact-intensive nature of interrogatories, requiring verification promotes the purpose of discovery and “avoids the inevitable disputes over who said what when.” *See Sharp*, 784 S.W.2d at 671. These principles are not eviscerated simply because the interrogatory answers are supplemental as opposed to original.<sup>9</sup> A party should be able to rely on an opponent’s supplemental interrogatory answers to develop the case before and at trial. *See Ticor Title Ins. Co. v. Lacy*, 803 S.W.2d 265, 266 (Tex. 1991). Requiring verification throughout discourages pretrial gamesmanship and helps facilitate full examination at

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<sup>8</sup> State Farm’s interrogatory answer stated: “Defendant has not designated any expert witnesses at this time. Defendant, however, would show that it may call any and/or all physicians and healthcare providers identified in his answer and any supplemental answer(s) to Interrogatory No. 3. herein [requesting the names of persons with knowledge of relevant facts].”

<sup>9</sup> Justice Hecht argues that parties cannot realistically swear to information concerning testifying experts because these are “counsel’s decisions.” \_\_\_ S.W.2d at \_\_\_ (Hecht, J., dissenting). He reasons that, most of the time, a party may initially answer such interrogatories “I don’t know” because those decisions have not yet been made. *Id.* at \_\_\_ (Hecht, J., dissenting). Once such information is known, counsel can provide the supplemental responses without the necessity of the party’s verification. Accordingly, he concludes, it “makes sense to impose no verification requirement on supplemental interrogatory answers.” *Id.* at \_\_\_ (Hecht, J., dissenting).

In many cases, decisions concerning experts have in fact been made at the time initial responses to interrogatories are due, and Rule 168 clearly requires a party to provide the information under oath. Justice Hecht’s rationale is inconsistent with this unequivocal requirement. In addition, some supplemental answers (especially in complex cases) may involve fact-intensive information known by the party. For the reasons we articulate above, it makes sense to impose a verification requirement on these supplemental responses. The rules draw no distinction between these types of interrogatory responses and those concerning expert witnesses.

trial.<sup>10</sup> See TEX. R. EVID. 613 (impeachment concerning prior inconsistent statements whether oral or written); TEX. R. EVID. 801(e)(2) (admission by a party opponent). Accordingly, we conclude that supplemental answers to interrogatories must be verified.

### III

State Farm argues that, even if supplemental interrogatory responses must be verified, Morua waived the objection to the lack of verification by waiting thirteen months — until State Farm offered Siegel’s testimony at trial — before objecting to State Farm’s supplemental interrogatory answers. The trial court ruled that Morua waived the objection by failing to raise it before trial. The court of appeals, however, never expressly addressed this issue.

State Farm filed its first set of supplemental interrogatory answers naming Siegel as an expert witness in September 1994. These supplemental answers were not verified. Siegel’s deposition on written questions was taken in December 1994, and Morua’s attorney participated in the deposition by submitting questions. Morua did not object to the lack of verification until October 1995, when State Farm attempted to offer Siegel’s deposition testimony at trial.

State Farm relies on our decision in *Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 407 (Tex. 1993), to argue that Morua waived his objection by waiting until trial to object. In *Kramer*, we held that the Kramers waived any objection to the hospital’s failure to verify its

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<sup>10</sup> Justice Hecht attacks this rationale and suggests that requiring verification of supplemental responses will not discourage gamesmanship, but encourage it. \_\_\_ S.W.2d at \_\_\_ (Hecht, J., dissenting) (“If gamesmanship is not objecting at trial to calling the witness because of the lack of a jurat on an interrogatory answer, what is?”). This argument misses the mark. Requiring verification does discourage gamesmanship in responding to interrogatories by encouraging honest and complete answers. The fact that Morua may have waited thirteen months until trial to object to a lack of verification makes this no less true. Instead, this fact is relevant to whether Morua waived the objection, an issue that we address in Part III.

supplemental interrogatory answers identifying its expert by waiting two months — until trial — and by calling the expert themselves before objecting to the hospital’s attempt to offer the expert’s testimony.

Morua argues that *Kramer* is factually distinguishable and does not support a finding of waiver because Morua never called State Farm’s expert before objecting. Instead, Morua argues, the Seventh Court of Appeals in *Jones v. Kinder*, 807 S.W.2d 868, 872 (Tex. App.—Amarillo 1991, no writ), correctly concluded that waiting until trial to object to the lack of verification does not constitute waiver.

If a defect in verification is not objected to or otherwise brought to the responding party’s attention before trial, the objection may be waived. *See, e.g., Kramer*, 858 S.W.2d at 407; DORSANEO, TEXAS LITIGATION GUIDE § 91.06[3], at 91-16 to 91-17; *see also Ebeling v. Gawlik*, 487 S.W.2d 187, 189 (Tex. Civ. App.—Houston [1st Dist.] 1972, no writ) (trial court abused its discretion in striking plaintiff’s pleadings for failure to verify supplemental interrogatory answers where defendant did not raise defect earlier in proceedings). Although the Seventh Court of Appeals held in *Jones v. Kinder* that failure to object before trial does not result in waiver, at least one other court of appeals has concluded that objections to the lack of verification are waived by failure to make a timely objection. *See \$23,900 v. State*, 899 S.W.2d 314, 317 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1995, no writ). *Jones v. Kinder* was decided before this Court decided *Kramer*, and the Seventh Court of Appeals was therefore without the benefit of our opinion. The Fourteenth Court of Appeals, however, expressly relied on *Kramer* to conclude that the objection to the lack of verification had been waived:

If appellant was concerned about the reliability of the State's answers, the more appropriate procedure would have been for appellant to object before trial or file a pre-trial motion to compel under Rule 215(1)(b), or move for sanctions under Rule 215(2)(b). Prior to trial, appellant neither objected nor filed the appropriate motion under Rule 215. Thus, appellant cannot now complain. *Kramer v. Lewisville Memorial Hosp.*, 858 S.W.2d 397, 407 (Tex. 1993) (held that complaint that interrogatory answers were not verified was waived where objection was not raised until trial). Further, when the alleged defect was finally brought to the district attorney's attention at trial, he offered to cure the alleged defect and could have easily done so.

§23,900, 899 S.W.2d at 317. We agree with the reasoning of the Fourteenth Court of Appeals. As noted earlier, verification is intended to promote, among other things, meaningful cross-examination at trial; it is not intended to promote "gotcha" gamesmanship. Because Morua waited thirteen months and failed to object to the lack of verification before trial, we hold that the trial court properly concluded that Morua waived the objection.

Morua argues that our decision in *Sharp v. Broadway National Bank*, 784 S.W.2d 669 (Tex. 1990) (per curiam), precludes a finding of waiver. Specifically, Morua asserts that his attorney's participation in Siegel's deposition should not result in waiver of his objection to the missing verification. In *Sharp*, the Bank never identified its expert witness in any interrogatory response, but did notice the expert's deposition shortly before trial, and Sharp's counsel attended the deposition. The trial court allowed the expert to testify over Sharp's objection, and the court of appeals affirmed, finding that there was no unfairness or surprise in allowing the testimony of a witness who had been deposed. *Sharp*, 761 S.W.2d at 146. This Court reversed, concluding that "even the fact that a witness has been fully deposed, and only his or her deposition testimony will be offered at trial, is not enough to show good cause for admitting the evidence when the witness was not identified in

response to discovery.” *Sharp*, 784 S.W.2d at 671. In addition, we held that objection to the offer of the testimony of an unidentified witness at trial is sufficient to preserve error. *Id.*

*Sharp* is distinguishable from this and other cases involving the failure to verify interrogatory responses and is therefore not controlling. *Sharp* concerned a party’s *failure to identify* the expert witness in a written interrogatory response. The Court followed the plain language of Texas Rule of Civil Procedure 215(5): “A party who *fails to respond to or supplement* his response to a request for discovery shall not be entitled to . . . offer the testimony of an expert witness . . . unless the trial court finds that good cause sufficient to require admission exists.” TEX. R. CIV. P. 215(5)(emphasis added).

This case, unlike *Sharp*, does not involve a failure to respond to or supplement discovery. *See* §23,900, 899 S.W.2d at 317 (“The alleged defect in this case was failing to provide answers in proper form, not failing to respond.”). State Farm provided complete answers to Morua’s interrogatories. *Cf.* TEX. R. CIV. P. 215(1)(c) (“[A]n *evasive or incomplete answer* is to be treated as a failure to answer.”) (emphasis added). The only inadequacy was a missing verification. This defect is insufficient to trigger Rule 215(5) and its corresponding good cause inquiry. *See Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 628 (Tex. App.—Houston [14<sup>th</sup> Dist.] 1994, writ denied).<sup>11</sup>

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<sup>11</sup> Justice Baker argues that *Kramer* cannot be reconciled with our decisions in *Sharp* and *Clark v. Trailways, Inc.*, 774 S.W.2d 644, 647 (Tex. 1989). *Sharp* and *Clark* establish the rule that, when a witness has not been identified in any written interrogatory response, objection at trial is both sufficient (under *Sharp*) and necessary (under *Clark*) to preserve the complaint. *Sharp* and *Clark* involve a *failure to identify* the witness in *any* written interrogatory response. In that situation, Rule 215(5) clearly applies, and exclusion of the witness’s testimony is mandatory. In the case of a missing or defective verification, however, Rule 215(5) simply does not apply.

In sum, we hold that supplemental interrogatory responses must be verified. However, because Morua waited thirteen months before objecting to the defect at trial, we hold that Morua waived his objection. Accordingly, pursuant to Texas Rule of Appellate Procedure 59.1 and without hearing oral argument, we reverse the court of appeals' judgment and remand the case to that court for further proceedings.

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GREG ABBOTT  
JUSTICE

OPINION DELIVERED: November 12, 1998