

IN THE SUPREME COURT OF TEXAS

=====
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 HECHT, joined by CHIEF JUSTICE PHILLIPS, JUSTICE GONZALEZ, and JUSTICE OWEN, concurring in Parts I and III and dissenting in Part II, and concurring in the judgment.

If the Texas Rules of Civil Procedure required that supplemental interrogatory answers be verified, then I would agree with the Court, for the reasons it explains in Part III of its opinion, that by waiting thirteen months until the time of trial to complain that State Farm had not verified a supplemental interrogatory answer identifying its expert witness and describing his testimony, Morua waived error. But I do not agree that the rules require supplemental interrogatory answers to be made under oath, and thus, in my view, there was no error for Morua to waive. Accordingly, I concur in the Court's judgment but not in Part II of its opinion.

As the Court concedes, no rule expressly states that supplemental interrogatory answers must be made under oath. Rule 168,¹ pertaining to interrogatories, does not. Neither does Rule 166b(6), which requires supplementation of certain discovery responses. No other rule does. So it is hardly

¹ All references to rules are to the Texas Rules of Civil Procedure, except as otherwise noted.

surprising that six courts of appeals have held that no such requirement exists, while only two have reached the opposite conclusion.² Nevertheless, the Court implies a verification requirement in the rules and gives four reasons — two based on the text of the rules and two based on policy — for doing so. I address each in turn.

First, the Court states that the general requirement of Rule 168(5) that “interrogatories shall be answered separately and fully in writing under oath” applies to supplemental answers. But this simply begs the question. Rule 168 is completely silent on the subject of verifying supplemental answers. The Court seems to think that if initial answers should be verified, it follows only naturally that supplemental answers should be likewise verified. On the contrary, the Federal Rules of Civil Procedure, which are replicated in most states, do not require verification of supplemental answers. Federal Rule 33(b), like Texas Rule 168(5), states that “[e]ach interrogatory shall be answered separately and fully in writing under oath”. Federal Rule 26(e)(2) states:

A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

Under this rule, a party can satisfy the duty to supplement interrogatory answers simply by making the additional or corrective information known to the other parties during the discovery process or in writing. Not only is verification of the supplemental information not required, a formal response is not even required. As Professors Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, the leading commentators on federal procedure, explain:

² *Ante* at ____.

The 1993 amendment to Rule 26(e) requires that interrogatories be supplemented if the party learns after answering that the answer originally given “is in some material respect incomplete or incorrect.” This need not be done formally, however, where the additional or corrective information has been made known to the other parties through the discovery process in writing.³

There are good reasons for the federal rule, it should be needless to say, which I shall come to momentarily. The point here is that there is nothing odd about allowing interrogatory answers to be supplemented without verification. The rules are not silent on the subject because the need for verification is obvious. They may be silent because verification should not be required.

The Court responds to this argument by pointing out that I have not cited a federal case holding that supplemental interrogatory answers need not be verified. I concede I know of none, but the dearth of cases is easily attributable to the crystal clear language of federal Rule 26(e), supported by the most eminent commentary on the subject. Given the language of the federal rule, I should be a little surprised to learn that it had ever been disputed enough for a court to construe. To turn the tables: the Court cannot cite a federal case — or a case from any other American jurisdiction — that holds that supplemental interrogatory answers must be verified. And until today, the overwhelming authority in this State was that such answers need not be verified. Of the courts that speak to the subject before us, all appear to be in Texas, and most are contrary to the Court’s view. What is the Court’s explanation for that?

Next, the Court argues that because Rule 166b(6) covers supplementation of responses to different kinds of discovery requests, not just interrogatory answers, “[t]his suggests that a

³ A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2179 (1994). See 7 JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE § 33.106 (1998).

supplemental response should be made in the same form and manner — including verification — as required for the original response.”⁴ This argument ignores the history of Rule 166b(6).

The federal rules did not require supplementation of discovery until 1970, when federal Rule 26(e) was added, which provided in part:

A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

* * *

(2) A party is under a duty seasonably to amend a prior response if he obtains information on the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the prior response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.⁵

This rule is noticeably silent on whether supplemental interrogatory answers must be verified. Like the federal rules before this change was made, the Texas rules contained no requirement that discovery be supplemented, and this Court’s Advisory Committee did not recommend addition of such a requirement in its May 1972 report to the Court.⁶ But later that year the Court itself “decided to amend our discovery rules to incorporate certain ideas from the Federal Rules”.⁷ Using federal

⁴ *Ante* at ____.

⁵ 48 F.R.D. 459, 463-464 (1970).

⁶ Memorandum from Hon. Ruel C. Walker to the other Justices of the Supreme Court of Texas (May 23, 1972) (in the Court’s public rules files).

⁷ Memorandum from Hon. Ruel C. Walker to the other Justices of the Supreme Court of Texas 2 (Aug. 30, 1972) (in the Court’s public rules files).

Rule 26(e) as a pattern, but altering a few words to limit its scope to interrogatory answers, the Court added the following paragraph to Rule 168:

A party whose answers to interrogatories were complete when made is under no duty to supplement his answers to include information thereafter acquired, except as follows: (1) a party is under a duty seasonably to amend his answer if he obtains information upon the basis of which (a) he knows that the answer was incorrect when made, or (b) he knows that the answer though correct when made is no longer true and the circumstances are such that a failure to amend the answer is in substance a knowing concealment; and (2) a duty to supplement answers may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior answers.⁸

The language of this amendment to Rule 168 was almost identical to the language of federal Rule 26(e), and since the federal rule did not require that supplemental interrogatory answers be verified, neither did the Texas rule.

In 1984, the supplementation requirement was removed from Rule 168 and a general requirement applying to all discovery responses was added as Rule 166b(5).⁹ This provision was renumbered Rule 166b(6) in 1988 without change in the text and is the current rule,¹⁰ which the Court quotes.¹¹ Because it is essentially identical to the 1970 amendment to federal Rule 26(e), what the genesis of Rule 166b(6) suggests is not that supplemental responses should be in the same form as the originals, but that no supplemental responses need be verified. Certainly, nothing in the derivation of the provision from the federal rule suggests the contrary.

⁸ 483-484 S.W.2d (Tex. Cases) xxxvi (1973, amended 1984).

⁹ 661-662 S.W.2d (Tex. Cases) l-li, liii-liv (1984, amended 1988).

¹⁰ 733-734 S.W.2d (Tex. Cases) liv (1988).

¹¹ *Ante* at ____.

Thus, I think the Court's attempts at textual support for its conclusion are rather plainly flawed. The rules simply do not, expressly or impliedly, require verification of supplemental interrogatory answers. Since the issue before us is what the rules *are* and not what they *could* or *should* be, that should be the end of the matter. But the Court makes two policy arguments for verification which I will address.

The Court says that verification of supplemental answers is necessary because interrogatories are "fact-intensive [by] nature".¹² This, of course, is certainly true of some interrogatories, but it is equally untrue of others. Indeed, the principal criticism of verification of all interrogatory answers is that interrogatories often inquire about matters of which no one but counsel has any idea, and yet counsel are expressly prohibited from signing the answers.¹³ Take this case for example. Morua's interrogatory asked who State Farm's expert witnesses would be, what their testimony would be, and what reports or other documents they had prepared. If any State Farm employee, other than its lawyer, had any notion what the answer to this interrogatory was, he or she could have gotten it only from State Farm's lawyer. What expert testimony would be offered was the lawyer's call, at least in the first instance. A party can swear to things like whether the traffic light was red or green and what kind of injuries he or she sustained, but it makes very little sense to require a party to swear to what legal contentions will be made, who may be potential parties, who will be called to testify, and who will be designated as experts. These are counsel's decisions. Most of the time a party can initially answer interrogatories about the latter matters, "I don't know," because those decisions have

¹² *Ante* at ____.

¹³ T EX. R. CIV. P. 168(5) ("The answers shall be signed and verified by the person making them and the provisions of Rule 14 ["Whenever it may be necessary or proper for any party to a civil suit or proceeding to make an affidavit, it may be made by either the party or his agent or his attorney."] shall not apply.").

not been made. Most supplemental answers are addressed to such interrogatories, just as in this case, and not to factual matters within the party's personal knowledge. It therefore makes sense to impose no verification requirement on supplemental interrogatory answers, since those are likely to be answers that a party is hard-pressed to swear to.

Moreover, allowing unverified interrogatory answers does not in the least impair the principal purposes of discovery, which are to provide information and to pin down the party. What party was ever accosted on the stand with an interrogatory answer naming, or failing to name, an expert witness? How can any party legitimately complain of uncertainty about whether an expert was designated because the expert was identified only by counsel and not by the party under oath? A party's only legitimate complaints concerning such matters are ignorance and reliability, and neither can be attributable to the absence of a jurat at the bottom of the answer.

The Court's other policy argument is that "[r]equiring verification throughout discourages pretrial gamesmanship and helps facilitate full examination at trial."¹⁴ As in this case, for example? Morua knew thirteen months before trial who State Farm's expert would be. State Farm provided Morua a formal, written answer and furnished him a copy of the expert's report. Morua took the expert's deposition on written questions. If gamesmanship is not objecting at trial to calling the witness because of the lack of a jurat on an interrogatory answer, what is? Gamesmanship is taking the full and correct information fully and formally furnished, exploring it thoroughly by deposition, and then objecting to some inconsequential defect after the time for remedying that defect has passed. What possible advantage could Morua have gained from the verification of State Farm's supplemental answer? Nothing. Morua's objection was pure gamesmanship.

¹⁴ *Ante* at ____.

The Court requires verification of supplemental interrogatory answers, but then states that the lack of verification “is insufficient to trigger Rule 215(5) and its corresponding good cause inquiry.”¹⁵ In other words, the lack of verification is inconsequential, as well it should be. I cannot find a case in any jurisdiction that punishes a party for failing to verify a supplemental discovery response. But if verification is completely inconsequential, why require it at all? Back to the point of this case, which is not policy but text: why *imply* the requirement into rules that nowhere state it, especially when the federal model for those rules expressly does not require it? The Court’s argument encourages — it does not discourage — gamesmanship.

Here is the Court’s argument in a nutshell. Although the rules are deathly silent on the subject, they *necessarily* imply a requirement to verify supplemental interrogatory answers. This only makes sense, although it is not the federal rule and may not be the practice in any other state. The Texas rule was derived almost verbatim from the federal rule, which does not require verification, but the meaning of the Texas rule is plainly different, not in text but in implication, and the six Texas courts of appeals that have disagreed were simply wrong. Anyway, whatever the rules say or don’t say, verification is necessary to prevent gamesmanship, even though no other jurisdiction shares this view, because a party cannot be expected to be “honest and complete”¹⁶ in a discovery response (such as a response to a request for production or request for admission, neither of which must be verified) unless the response is under oath. This particular case, unfortunately, is not a very good example, since all the gamesmanship was on the other side. All the same, a party *could* play games by designating experts in an unequivocal statement not made under oath — it is

¹⁵ *Ante* at ____.

¹⁶ *Ante* at ____ n. ____.

unimportant to explain how — and if that were to happen, no sanction or other adverse consequence should ever be imposed. Verification is necessary to prevent abuse, but the lack of verification should be completely inconsequential, as it justly is in this case.

With all due respect to the Court, there is more than a little tension in its opinion.

It is true that in *Sharp v. Broadway National Bank*¹⁷ the Court held that Rule 168b(6) impliedly required that supplemental interrogatory answers be in writing. But its model, federal Rule 26(e), imposes the same requirement. What we said in *Sharp* was that “oral notice is not proper”, to avoid “the inevitable disputes over who said what when.”¹⁸ There, the Bank was asked who it would call as an expert witness on attorney fees, and it claimed that it had orally identified a certain lawyer, whom *it* then deposed *itself*, and the opposing party cross-examined. The problem with the Bank’s answer was that it was too indefinite. We explained:

The fact that a witness’ identity is known to all parties is not itself good cause for failing to supplement discovery [inquiring who will be called as witnesses]. A party is entitled to prepare for trial assured that a witness will not be called because opposing counsel has not identified him or her in response to a proper interrogatory. Thus, 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.¹⁹

Indeed, the opposing party in *Sharp* might have assumed from the Bank’s failure to formally designate the deponent as an expert that the Bank was dissatisfied with the witness’s testimony, and might have concluded that there was no necessity to obtain rebuttal evidence. The problem in *Sharp* was not so much that the Bank responded other than in writing, but that it never definitely responded

¹⁷ 784 S.W.2d 669, 671 (Tex. 1990) (per curiam).

¹⁸ *Id.*

¹⁹ *Id.*

at all. In any event, *Sharp*'s reading of Rule 166b(6) to require a written supplementation, which is consistent with federal Rule 26(e), does not support a reading of Rule 166b(6) to require verified supplemental answers, which is inconsistent with federal Rule 26(e).

I am unable to find support for the Court's conclusion either in the text of the rules or in their underlying policy. Today's decision creates an inconsistency between state and federal practice that is confusing, unnecessary, and — more importantly — unjustified, given that the Court itself copied the Texas rule from the federal rule. I agree that the trial court properly allowed State Farm's witness to testify, but I disagree that the witness was not properly identified in discovery.

Nathan L. Hecht
Justice

Opinion delivered: November 12, 1998