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FAILURE TO SUPPLEMENT DISCOVERY PREVENTS ADMISSIBILITY OF EVIDENCE AT TRIAL

Working with your attorney to ensure complete and accurate responses to an adverse party's discovery requests can be an exhaustive process. It requires that you spend time and attention otherwise spent on a host of other job responsibilities. But, when it comes to answering discovery, it is vital that attorneys work closely with their clients to guarantee that their discovery responses are complete.

The Texas Rules of Civil Procedure provide that a party who fails to supplement a discovery response in a timely manner may not introduce into evidence the material or information that was not timely disclosed. Tex. R. Civ. P. 193.6(a).

The Texas Second Court of Appeals examined the issue of the admissibility of non-disclosed evidence its recent decision in *O'Dell v. Wright*, No. 02-09-00062-CV (Aug. 05, 2010), available at <http://www.2ndcoa.courts.state.tx.us/summaries/2010/080210.asp>.

THE FACTS OF THE CASE

Rebecca Wright ("Wright") sued Christopher O'Dell and Arlington Steakhouse, Inc. ("O'Dell") for sexual harassment, assault and battery, and constructive discharge. A jury found in favor of Wright, awarding a total of \$425,000.00 in past mental anguish damages based on its findings of sexual harassment and assault.

On appeal, O'Dell argued that the trial court erred by not allowing O'Dell to call a witness, Amanda Martinez, whose anticipated testimony would have contradicted Wright's allegations. The Court of Appeals affirmed the lower court's holding on the basis that O'Dell failed to identify Martinez as a person with knowledge of material facts in his responses to Wright's discovery requests and admitted that this failure was due to inadvertence.

TEST TO DETERMINE WHETHER NON-DISCLOSED EVIDENCE IS ADMISSIBLE

Citing the Texas Rules of Civil Procedure, the Court noted that a party who fails to make, amend, or supplement a discovery response in a timely manner may not introduce in evidence the material or

information that was not timely disclosed, unless the court finds that (1) there was good cause for the failure to timely disclose or (2) the failure will not unfairly surprise or prejudice the other parties. Tex. R. Civ. P. 193.6 (a).

The purpose of this rule, the Court stated, was to promote responsible assessment of settlement and prevent trial by ambush. The party seeking to offer the evidence at issue has the burden to establish good cause or lack of unfair surprise or prejudice. Tex. R. Civ. P. 193.6(b). Additionally, the trial court has discretion to determine whether the offering party has met its burden; however, a finding of good cause or the lack of unfair surprise or prejudice must be supported by the record. *Citing Tex. Mun. League Intergov'tal Risk Pool v. Burns*, 209 S.W.3d 806, 817(Tex. App.—Fort Worth 2006, no pet.). Importantly, inadvertence alone will not constitute good cause for the failure to timely make, amend, or supplement a discovery response.

The Court also pointed out that O'Dell admitted that he knew for months about Martinez's expected testimony and that despite having procured an affidavit from Martinez, her affidavit was never produced to Wright's attorneys. According to O'Dell, his failure to update his disclosure was "by mere oversight."

WHAT DOES THIS MEAN?

According to the Second Court of Appeal's ruling, inadvertently failing to amend or supplement a party's discovery responses may result in the exclusion of evidence unless the party offering such evidence can prove (1) there was good cause for the failure to timely disclose or (2) the failure will not unfairly surprise or prejudice the other parties.

This highlights the importance of working closely with your attorney to ensure that he or she has the information needed to timely respond to discovery requests and supplement the responses as necessary.

To assure timely and complete discovery responses, consider the following:

- (1) At the inception of the lawsuit, promptly provide your attorney with the documents he or she has requested and the names of potential witnesses.
- (2) Don't assume that because your attorney hasn't requested a document and/or the identity of a witness, that neither are relevant to the case. Your attorney may not be privy to the information you are aware of. Therefore, close communication with your attorney is important.
- (3) Closely review your discovery responses to ensure they are accurate and complete.
- (4) In situations in which you have questions about the accuracy or completeness of the discovery responses, consider scheduling a telephone conference or face-to-face meeting with your attorney to discuss and review the responses.



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