

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

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ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE EIGHTH DISTRICT OF TEXAS
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JUSTICE BAKER files a concurring and dissenting opinion.

I agree with the Court's conclusion that a party must verify supplemental interrogatory answers. However, I disagree with the Court's conclusion that Morua waived any objection to the lack of verification because he did not object until the evidence was offered at trial. Accordingly, I concur in the Court's decision to require verified supplemental interrogatory answers but dissent to the Court's holding that Morua waived his objection to the lack of verification.

Here, State Farm argued that Morua waived any objection to the unverified supplemental answers by waiting thirteen months before he objected at trial when State Farm tendered its expert witness. State Farm relies on *Kramer v. Lewisville Mem'l Hosp.*, 858 S.W.2d 397, 407 (Tex. 1993) to support its waiver argument. On the other hand, Morua argues that *Sharp v. Broadway Nat'l Bank*, 784 S.W.2d 669 (Tex. 1990)(per curiam) precludes a waiver finding. The Court agrees with

State Farm and holds that because Morua waited thirteen months and did not object to the lack of verification before trial, Morua waived his objection to State Farm's failure to verify its supplemental answers.

Even if Rule 166b(6) does in fact require additional verification, the Kramers waived whatever complaint they might have had concerning the manner in which the supplemental answers were verified. The Hospital served its supplemental answers on the Kramers two months before trial, yet the Kramers waited until trial to raise their objections.

Kramer, 858 S.W.2d at 407.

Objection to the offer of the deposition [of an expert witness] at trial is sufficient to preserve error.

Sharp, 784 S.W.2d at 671.

. . . [W]e believe that the better-reasoned approach is to require a party opposing the admission of testimony or evidence under rule 215(5) to object when the testimony or evidence is offered at trial.

Clark v. Trailways Inc., 774 S.W.2d 644, 647 (Tex. 1989).

I do not believe that we can square *Kramer* with *Sharp* and *Clark*.¹ The Court's effort to distinguish *Sharp* and *Clark* does not persuade me. In footnote 11, the Court asserts that *Sharp* and *Clark* differ from the case at issue and from *Kramer* because in *Sharp* and *Clark* the witnesses were not identified in any written interrogatory responses and, therefore, rule 215(5) clearly applies in *Sharp* and *Clark*. Whether rule 215(5) applies here is immaterial to the question of whether Morua waived his objection. *Sharp* and *Clark* stand for the rule that a party's objection at trial to a

¹ The Court recently held that if a party wants to object to expert testimony on *Daubert/Robinson* grounds, the party has to make that objection either pretrial or at least when the testimony is offered at trial and not later. See *Maritime Overseas Corp. v. Ellis*, 971 S.W.2d 402, 409 (Tex. 1998); see also *E.I. du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995).

witness's testimony is timely. *Kramer* and the Court's holding here circumvent this rule.

Accordingly, although I agree with the Court's decision to require a party to verify supplemental interrogatory answers, I dissent from the Court's conclusion that Morua waived his objection to the lack of verification by waiting until trial to object. I would affirm the court of appeals' judgment.

James A. Baker
Justice

OPINION DELIVERED: November 12, 1998