**Affirmed and Memorandum Opinion filed February 15, 2011.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-09-00786-CV**

**HARRIS COUNTY APPRAISAL DISTRICT, Appellant**

**V.**

**RIVERWAY HOLDINGS, L.P., SOUTH POST OAK HOLDINGS, L.P. AND OVERLAND RIVERWAY, L.P., Appellees**

**On Appeal from the 281st District Court**
**Harris County, Texas**
**Trial Court Cause No. 2008-52869**

## M E M O R A N D U M  O P I N I O N

The Harris County Appraisal District ("HCAD") appeals from an order granting a traditional summary judgment in favor of Riverway Holdings, L.P., South Post Oak Holdings, L.P., and Overland Riverway, L.P. (collectively, "Riverway"). HCAD contends that the trial court erred because Riverway (1) failed to establish its entitlement to judgment as a matter of law; and (2) is not entitled to attorney's fees. We affirm.

## Background

Riverway owns real property in the Galleria area identified as the One Riverway Office Building. The property encompasses 481,222 total net rentable square feet and a land area of 207,106 square feet or 4.7545 acres; it also includes a 1,843-space parking garage. This property sold for $67 million in February 2005.

The present appeal arises in connection with HCAD's appraisal of the property's value for the 2008 tax year. Riverway protested HCAD's appraisal with the Appraisal Review Board. The record does not establish HCAD's appraised value or the value determined by the Appraisal Review Board. *See* Tex. Tax Code Ann. § 41.01 (Vernon 2008). After exhausting its administrative remedies, Riverway filed a petition in district court on September 2, 2008 to obtain *de novo* review of the valuation for property tax purposes. *See id.* §§ 42.01, 42.23 (Vernon 2008).

Property generally is appraised for ad valorem taxes at its market value as of January 1 of the tax year. *Id.* § 23.01(a) (Vernon 2008). In its petition, Riverway alleged that the property's appraised market value for the 2008 tax year substantially exceeded its actual taxable value. Riverway alleged that, although it "attempted to obtain a lower valuation through the administrative remedies prescribed in the Texas Tax Code," HCAD and the Appraisal Review Board failed to reduce the property's valuation to reflect its actual taxable value. "If the court determines that the appraised value of the property according to the appraisal roll exceeds the appraised value required by law, the property owner is entitled to a reduction of the appraised value on the appraisal roll to the appraised value determined by the court." *Id.* § 42.25 (Vernon 2008).

Riverway filed a combined traditional and no-evidence motion for summary judgment on May 4, 2009. In support of its motion, Riverway attached appraisal expert Stevan N. Bach's two-page affidavit and supporting expert report. Riverway argued that it was entitled to a no-evidence summary judgment because HCAD (1) was required to designate its experts by April 2, 2009, but failed to do so; and (2) bore the burden of proving the building's appropriate valuation, but failed "to produce timely and admissible

expert information on the valuation issue."

Riverway also asserted its entitlement to a traditional summary judgment under Rule 166a(c) because its expert "conducted a comprehensive analysis of [Riverway's property] under Section 42.25 of the Texas Tax Code" and determined that the property's assessed value as of January 1, 2008 exceeded the property's market value as of that date. Bach's affidavit and his supporting 40-page expert report concluded that the property's market value as of January 1, 2008 was $55 million. Riverway also argued that it was entitled to attorney's fees under the Texas Tax Code. *See* Tex. Tax Code Ann. § 42.29 (Vernon Supp. 2009).

HCAD filed its summary judgment response on May 26, 2009. It did not proffer a controverting affidavit. HCAD argued that Riverway could not obtain a no-evidence summary judgment because HCAD did not plead a counterclaim and had no burden of proof at trial. HCAD contended that Riverway could not obtain a traditional summary judgment because such a judgment would be "the procedural equivalent of a directed verdict without even giving HCAD the opportunity to cross-examine Bach." HCAD also argued that the absence of a controverting valuation opinion did not "force[] the Court to accept at face value Bach's final number." HCAD did not assert in its summary judgment response that Bach's affidavit and report were conclusory, or that the value Bach computed rested on a deficient methodology. HCAD did not challenge Bach's qualifications to opine as an appraisal expert. Riverway filed a reply to HCAD's summary judgment response on June 4, 2009.

The trial court signed a final order granting summary judgment in favor of Riverway on June 22, 2009. The trial court's order did not specify whether it granted a traditional or a no-evidence summary judgment.

HCAD filed a motion for new trial on July 21, 2009. In this motion, HCAD argued that a no-evidence summary judgment was improper because Riverway bore the burden of establishing that the property's market value differed from the appraised value. As it did in its summary judgment response, HCAD asserted that the grant of summary

judgment denied it an opportunity to cross-examine Bach. HCAD also argued for the first time that (1) Bach's affidavit was conclusory; and (2) Bach used a deficient valuation methodology.

With respect to Bach's methodology, HCAD's motion for new trial (1) asserted that the property's $67 million sales price in 2005 indicated a market value higher than Bach's $55 million valuation for 2008; (2) questioned why "the market value of [Bach's] sales [comparables] located in the sales analysis of his report are roughly 60% of their sales price;" (3) pointed out that Bach "used a capitalization rate different than that indicated by his sales;" (4) questioned why Riverway's property — with a net operating income of $14.29 per square foot — yields a lesser per square foot market value than Bach's sales comparables when the comparables have a lower net operating income per square foot; and (5) challenged certain sales adjustments Bach relied upon to compute the property's appraised market value as of January 1, 2008. Riverway filed a response to HCAD's motion for new trial on August 20, 2009.

On August 31, 2009, the trial court vacated its June 22, 2009 summary judgment order and signed a modified summary judgment order in which it expressly (1) granted Riverway's traditional summary judgment motion; and (2) denied Riverway's no-evidence summary judgment motion. The trial court did not expressly rule on the motion for new trial or on the objections to Bach's opinion testimony raised for the first time in the motion for new trial.

HCAD now appeals the trial court's August 31, 2009 order granting a traditional summary judgment in favor of Riverway.

## Analysis

As the appellate record stands, Riverway obtained a traditional summary judgment in its favor determining the property's value to be $55 million as of January 1, 2008. Riverway proffered an affidavit and a 40-page report from appraisal expert Bach in support of its request for a traditional summary judgment.

HCAD filed a summary judgment response, but did not file a controverting affidavit or any other evidence addressing the property's value. HCAD's summary judgment response did not challenge Bach's methodology. After the trial court signed an order granting summary judgment in favor of Riverway, HCAD filed a motion for new trial in which it challenged certain aspects of Bach's methodology for the first time.

The trial court did not expressly rule on HCAD's motion for new trial, or on HCAD's specific challenges to the expert's valuation methodology. The trial court signed a modified summary judgment order granting only a traditional summary judgment under Rule 166a(c); that is the order HCAD now appeals. Therefore, the propriety of a no-evidence summary judgment under Rule 166a(i) is not at issue in this appeal.

### A. Propriety of Granting a Traditional Summary Judgment

In its first appellate issue, HCAD contends that the trial court erred by granting a traditional summary judgment in Riverway's favor because (1) Riverway bore the burden to prove that the property's market value differed from its appraised value; (2) Bach's uncontroverted affidavit and supporting report do not establish the property's market value as a matter of law; (3) Rule 166a(c)'s reference to summary judgment based on uncontroverted expert testimony is inapplicable here because the fact finder need not be guided solely by expert opinion testimony in this context; (4) Bach's expert opinion was conclusory and used deficient methodology; and (5) the grant of summary judgment impermissibly deprived HCAD of the opportunity to cross-examine Bach. HCAD does not challenge Bach's qualifications.

We review the trial court's grant of summary judgment *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). Under Texas law, the party moving for a traditional summary judgment carries the burden of establishing that no material fact issue exists and that it is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000). The nonmovant has no burden to respond to a summary judgment motion unless

the movant conclusively establishes its cause of action or defense. *M.D. Anderson Hosp. & Tumor Inst.*, 28 S.W.3d at 23.

Once the movant produces sufficient evidence conclusively establishing his right to summary judgment, the burden of proof shifts to the nonmovant to present evidence sufficient to raise a fact issue. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). In reviewing a traditional summary judgment, we examine the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 782 (Tex. 2007).

**1. Availability of traditional summary judgment**

As a threshold matter, we agree with HCAD that Riverway bore the burden of establishing its entitlement to judgment as a matter of law under Rule 166a(c). We reject HCAD's accompanying contention that a trial court cannot grant a traditional summary judgment in favor of the property-owner movant on the basis of uncontroverted and unchallenged expert opinion evidence addressing property valuation.

Citing *2218 Bryan St., Ltd. v. City of Dallas*, 175 S.W.3d 58, 67 (Tex. App.—Dallas 2005, pet. denied), HCAD asserts that (1) the trial court was not obligated to accept Bach's opinion regarding the property's valuation; and (2) therefore, Bach's opinion could not establish Riverway's entitlement to judgment in its favor as a matter of law. In *2218 Bryan Street*, the trial court heard appellant's expert's valuation opinion at trial and made a specific finding of fact that the expert's opinion was not credible; the trial court listed 31 reasons to support its credibility determination. *Id*. at 66. Appellant contended on appeal that, because it provided the only valuation evidence proffered below, the trial court was obligated as a matter of law to accept this evidence and incorporate it into its findings of fact without regard to credibility. *Id*. at 67. The Dallas Court of Appeals rejected appellant's argument and stated: "To accept appellant's argument would usurp the trial court's role as the sole judge of the credibility of the witnesses and the weight to give their testimony. We may not impose our own opinions

about the credibility of witnesses to the contrary." *Id*.

The present case is distinguishable from *2218 Bryan Street* because the trial court here did not make express findings determining that the expert opinion at issue lacked credibility. Rather, the trial court granted summary judgment in Riverway's favor based upon uncontroverted opinion testimony from an expert whose methodology was not challenged until after summary judgment already had been granted.

It is one thing to say that a trial court is not compelled to accept expert testimony when it has determined that the proffered testimony lacks credibility or probative force — even in the absence of controverting testimony. It is quite another to argue, as HCAD does here, that a trial court cannot grant summary judgment on the basis of uncontroverted and unchallenged expert testimony in the absence of such a determination.

HCAD's argument contravenes Rule 166a(c), which recognizes that a movant can establish its right to summary judgment based solely on the uncontroverted testimony of an expert witness if (1) the subject matter is such that a trier of fact would be guided solely by the opinion testimony of an expert; (2) the evidence is clear, positive and direct, otherwise credible and free from contradictions and inconsistencies; and (3) the evidence could have been readily controverted. *See* Tex. R. Civ. P. 166a(c); *Anderson v. Snider*, 808 S.W.2d 54, 55 (Tex. 1991). These criteria are satisfied here. *Cf. McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986) (Trial court was not compelled to accept expert testimony in bench trial to determine cost to repair and prevent water leakage in home; "[t]he trial judge can form his own opinion from other evidence and by utilizing his own experience and common knowledge."); *Gregory v. Tex. Emp't Ins. Assoc*., 530 S.W.2d 105, 107-08 (Tex. 1975) (Jury could rely on other evidence to determine that employee's death in fall from roof was not suicide, contrary to expert's opinion that building dimensions and position of employee's body indicated that he had run to edge of roof and jumped).

HCAD tries to neutralize this provision of Rule 166a(c) by arguing that the property owner rule recognized in *Porras v. Craig*, 675 S.W.2d 503 (Tex. 1984), forecloses exclusive reliance on expert appraisal testimony to obtain summary judgment as to valuation for ad valorem tax purposes.

Under *Porras*, property owners are deemed to have sufficient expertise to opine about their own property's value. *Id*. at 504 ("[T]he owner of the property can testify to its market value, even if he could not qualify to testify about the value of like property belonging to someone else."). The property owner's valuation testimony must be based on market value "rather than intrinsic or some other value of the property." *Id*. at 505. The supreme court rejected Porras's testimony because he "referred to personal rather than market value." The court held that the property owner was qualified to give opinion testimony about the market value of his property; he simply failed to do so. *Id.*

Because a property owner can opine about valuation under *Porras*, HCAD argues that this case is not one in which the trier of fact would be guided solely by expert opinion testimony under Rule 166a(c).

It is not clear that Riverway, as an entity other than a natural person, can invoke the property owner rule. Courts have split on whether an entity other than a natural person can avail itself of the property owner rule. *See Speedy Stop Food Stores, Ltd. v. Reid Road Mun. Util. Dist. No. 2*, 282 S.W.3d 652 (Tex. App.—Houston [14th Dist] 2009, pet. granted) (collecting cases). The Texas Supreme Court has granted a petition for review on this issue in *Speedy Stop*. *See id.*

Even if the supreme court decides that the rule applies to a property owner other than a natural person, the property owner rule does not foreclose application here of Rule 166a(c)'s provision concerning expert testimony. The rule treats valuation testimony from a property owner as the functional equivalent of expert valuation testimony insofar as the owner's own property is concerned. *See id.* at 657 ("The Property Owner Rule is based on the premise that property owners ordinarily know the market value of their property and therefore have a sound basis for testifying as to its value."); *see also id.* at

659 n.1 ("The Property Owner Rule is predicated entirely on ownership. It rests on the fact that an owner ordinarily knows the value of his property.") (Seymore, J., dissenting). Because property owners are treated as having expertise regarding the value of their own property, a valuation dispute like the one at issue here is a "subject matter" on which the trier of fact is guided by "the opinion testimony of experts" under Rule 166a(c) regardless of whether such testimony comes from (1) a designated appraisal expert with expertise to opine about properties he does not own; or (2) an individual property owner with sufficient expertise to opine only about his own property.

Barring some cognizable infirmity in Bach's opinion or methodology, the trial court was entitled to rely upon Bach's uncontroverted expert valuation. HCAD argues on appeal that two such infirmities exist: (1) Bach's affidavit and supporting report are conclusory; and (2) his methodology is flawed. We address each in turn.

**2. Conclusory affidavit**

"An expert opinion is considered conclusory if it is essentially a 'conclusion without any explanation.'" *Pink v. Goodyear Tire & Rubber Co.*, 324 S.W.3d 290, 296-97 (Tex. App.—Beaumont 2010, no pet.) (quoting *Arkoma Basin Exploration Co. v. FMF Assocs. 1990-A, Ltd.*, 249 S.W.3d 380, 389 (Tex. 2008)). Relying on *Amidei v. Harris Cnty. Appraisal Dist.*, No. 01-08-00833-CV, 2009 WL 2050974, at *9 (Tex. App.—Houston [1st Dist.] 2009, no pet.) (mem. op.). HCAD argues that Bach's opinion is purely conclusory. We disagree.

In *Amidei*, the court held that the property owners' affidavit was conclusory and, thus, incompetent summary judgment evidence. The affidavit at issue stated that the property owners "are qualified and authorized to make this affidavit. They [sic] have personal knowledge of the facts stated herein which are true and correct. That their [sic] property at [address], the subject of this suit, had in their [sic] opinion the market value of $96,900 on January 1, 2007." *Amidei*, 2009 WL 2050974, at *9.

Unlike the affidavit in *Amidei*, Bach's affidavit and 40-page report explained the computation of the proffered valuation. Bach's affidavit explained the approaches and methods he used in the valuation of Riverway's property and how the conclusions in his affidavit were supported by the report he attached as Exhibit F to his affidavit. Bach stated that his attached report reflects the analysis he performed under section 42.25 of the Texas Tax Code to value the property for the 2008 tax year. He also stated that the "information, methodology and data contained in Exhibit F is appropriate based on accepted appraisal standards, technical or other specialized knowledge that will assist in understanding and determining the market value of the [building], as of January 1, 2008." Bach then described the valuation approaches and what each approach considered:

> As shown in Exhibit F, the values set forth in my report were determined after application of, and analysis by, the Income and/or Sales Comparison Approaches to value.
>
> I first used the Income Approach. This approach is predicated on the assumption that there is a definite relationship between the amount of income a property is capable of producing and its value. This approach considers a property's ability to produce income and recognizes that value is the present worth of all future benefits relating from ownership. I set forth in detail the steps used in this Approach in the Valuation section of Exhibit F. In the analysis of the Property, I used the direct capitalization technique. I analyzed the Income Approach to value by researching current market rents, operating expenses, occupancies, and tenant improvements allowances of comparable properties. As set forth in detail in Exhibit F, under the Income Approach, the market value of the subject property as of January 1, 2008 is $55,000,000.
>
> I next considered the Sales Comparison Approach, which looks at sales of comparable properties. My analysis contained five (5) office-building sales in the Galleria/West Loop Area that occurred from January 2007 to April 2008 and in size from 196,217 square feet to about 567,396 square feet. A summary of these five sales is contained in the Valuation section of Exhibit F. The adjustments to these five sales are discussed in detail in the Valuation section of Exhibit F. Also factored in are net differences per square foot, deferred maintenance and capital expenditures, on-going tenant improvements, leasing commissions, etc. The resulting adjusted sales price is an indication of the subject's value for ad valorem tax purposes. I concluded that the market value of the Property using this approach is $57,500,000.

Bach explained that more weight is given to the income approach because it "reflects how buyers and sellers transact income-producing properties, and in the sales comparison approach for this property, large adjustments needed to be made." Bach stated that the difference between the two valuation approaches he used was less than five percent. At the end, Bach stated, "As set forth in detail in Exhibit F, I have concluded that the market value of the Property as of January 1, 2008 is $55,000,000."

The 40-page report Bach attached to his affidavit explained the methods and calculations he used to obtain the valuation figures for Riverway's property and for comparable buildings. In his report, Bach explained that he gave the most weight to the income approach because the "difficulty with the sales comparison approach is that large adjustments were needed to be made" for "leased fee to fee simple, for intangibles, NOI [net operating income] differences, age and size differences, and occupancy differences; also a major adjustment was made for rent loss costs and capital expenditures." Bach's valuation opinion is not conclusory.

**3. Challenge to methodology**

We likewise reject HCAD's argument that the summary judgment should be overturned because Bach relied on deficient methodology.

On appeal, HCAD challenges Bach's methodology on these grounds: (1) courts traditionally have favored the sales comparison approach in determining a property's market value, but Bach focused on the income approach to determine the Riverway property's market value; (2) Bach gave insufficient consideration to the property's 2005 sales price as an indicator of market value; (3) Bach recognized the property's 2005 sales price but discounted that sale price in computing value for ad valorem tax purposes; (4) Bach used five comparable office building sales and reduced all but one of the comparable sales prices for ad valorem tax purposes; (5) "Bach's five sales 'comparables' sold on 'capitalization' rates between 5.6% to 7.25%," but Bach used "a base cap rate of 9.0% and a tax loaded cap rate of 11.5237%;" and (6) Riverway's property — with a net operating income of $14.29 per square foot as calculated under the

income approach — yields a lesser per square foot market value than Bach's sales comparables even though the comparables have a lower net operating income per square foot as calculated under the sales comparison approach.

Complaints about an expert's deficient, flawed, or unreliable valuation methodology must be asserted at the appropriate time in the trial court. *Graves v. Tomlinson,* 14-08-00654-CV, 2010 WL 4825624, at *6, *10 (Tex. App.—Houston [14th Dist.] Nov. 30, 2010, no pet. h.) (citing *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 233 (Tex. 2004), and *Nip v. Checkpoint Sys., Inc.*, 154 S.W.3d 767, 770-71 (Tex. App.—Houston [14th Dist.] 2004, no pet.)).

HCAD did not challenge Bach's valuation methodology in its summary judgment response or at any other time before the trial court signed an order granting summary judgment in Riverway's favor. Therefore, HCAD cannot now attack Bach's methodology on appeal. *See Pink,* 324 S.W.3d at 297, 299-300 (applying *Coastal Transp. Co. v. Crown Cent. Petroleum Corp.* principles in summary judgment context); *see also Coastal Transp. Co.*, 136 S.W.3d at 233; *Graves,* 2010 WL 4825624, at *6, *10; *Nip,* 154 S.W.3d at 770-71. Challenges to expert methodology raised for the first time in a motion for new trial will not be considered on appeal. *See Nip*, 154 S.W.3d at 771 (court refused to consider challenges to reliability of expert report raised for the first time in motion for new trial). Under these circumstances, the trial court was entitled to rely on Bach's unchallenged expert testimony to conclude that Riverway established the building's market value.

**4. Summary**

We hold as follows: A trial court properly may grant a property owner's traditional motion for summary judgment establishing valuation when that motion is supported by an appraisal expert's non-conclusory and uncontroverted valuation testimony. A contention that the supporting expert's testimony contains methodological deficiencies precluding summary judgment for the property owner must be raised before the trial court grants summary judgment and a ruling must be obtained. *See Pink*, 324

S.W.3d at 297, 299-300; *see also Coastal Transp. Co.*, 136 S.W.3d at 233; *Graves*, 2010 WL 4825624, at *6, *10; *Nip*, 154 S.W.3d at 770-71.

We do not hold that HCAD always must proffer a controverting expert opinion to preclude summary judgment when a property owner moves for a traditional summary judgment on valuation supported by an appraisal expert's affidavit and report. We also do not hold that a property owner may obtain a traditional summary judgment establishing property valuation when the only proffered expert testimony is conclusory, or when the trial court is presented with timely and valid challenges to the methodology relied upon by the property owner. But when the property owner proffers uncontroverted and non-conclusory expert valuation testimony in support of a traditional motion for summary judgment establishing valuation, the non-movant cannot eschew challenges to the expert's methodology; wait until summary judgment has been granted; and then belatedly attack the expert's methodology.

Here, the property owner supported its request for a traditional summary judgment establishing valuation with uncontroverted and non-conclusory expert testimony. HCAD did not timely challenge the expert's methodology before summary judgment was granted. Summary judgment was appropriate under these circumstances.

Finally, we reject HCAD's argument that the trial court's ruling in favor of Riverway deprived HCAD of an opportunity to cross-examine Bach regarding asserted "inconsistencies contained within the [expert] report." HCAD erroneously assumes that cross-examination can occur only at trial. On this record, nothing prevented HCAD from (1) deposing Bach in the course of pretrial discovery and questioning him about any alleged deficiencies in his methodology; and then (2) highlighting these alleged deficiencies in its summary judgment response.

Accordingly, we overrule HCAD's first issue.

### B. Attorney's Fees

In its second issue, HCAD contends that, "[i]n the event the summary judgment is reversed, Riverway is not entitled to attorney's fees" because section 42.29 of the Texas Tax Code is the only provision that allows a taxpayer who prevails in an appeal to the court to recover attorney's fees. Because we affirm the trial court's judgment, HCAD's second issue presents nothing for our review.

Accordingly, we overrule HCAD's second issue.

## Conclusion

We affirm the trial court's judgment.

/s/ William J. Boyce
Justice

Panel consists of Justices Seymore, Boyce, and Christopher.