No. 12-10-00021-CV and 12-10-00050-CV

In the Court of Appeals
for the Twelfth District of Texas
at Tyler

THOMAS D. SELGAS AND MICHELLE L. SELGAS

Appellants

v.

THE HENDERSON COUNTY APPRAISAL DISTRICT
Appelleee

Brief of Appellants

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ORAL ARGUMENT REQUESTED

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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TABLE OF CONTENTS

LIST OF PARTIES **1**

TABLE OF CONTENTS **2**

INDEX OF AUTHORITIES **3**

STATEMENT OF THE CASE **1**

ISSUES PRESENTED **2**

STATEMENT OF FACTS **3**

SUMMARY OF THE ARGUMENT **7**

I. NO EVIDENCE SUMMARY JUDGMENT STANDARD 7

II. MOTION FOR SUMMARY JUDGMENT STANDARD 8

ARGUMENT AND AUTHORITIES **10**

I. DID THE TRIAL COURT ERR IN GRANTING APPELLEE'S NO EVIDENCE MOTION FOR SUMMARY JUDGMENT? 11

a. Was Appellants' summary judgment evidence, the affidavits of property owner, Thomas Selgas, and the Seller, JoAnn Bryant, some evidence of the market value of the property? *12*

b. Did the trial court abuse its discretion by striking the affidavit testimony of Appellants' expert witness, Dr. Edwin Vieira, Jr., as his qualifications as an expert were established by Appellants and were not properly challenged by Appellee? *14*

II. DID THE TRIAL COURT ERR BY GRANTING THE APPELLEE'S MOTION FOR SUMMARY JUDGMENT? 16

a. The sales contract for the real property is an enforceable contract *17*

CONCLUSION **18**

PRAYER **19**

APPENDIX

Tab 1 – Texas Constitution at Article 8 Sec. 20
Tab 2 – Texas Property Tax Code §§1.04(7), 23.01(b), 42.24, 42.25
Tab 3 – Tex. R. Civ. P. 166a
Tab 4 – Excerpt of Title 31 United States Code §5112(a)(9)
Tab 5 – Tex. Bus. & Comm. Code Ann. §26.01
Tab 6 – Summary Judgement Order[s]
Tab 7 – Order granting Defendant's Objection to Summary Judgment Evidence

INDEX OF AUTHORITIES

Cases

AMS Constr. Co. v. Warm Springs Rehab. Found., Inc., 94 S.W.3d 152, 157 (Tex. 2002, no pet.) 12

Arguelles v. Kellogg Brown & Root, Inc., 222 S.W.3d 714, 723 (Tex. 2007) 7

Bailey County Appraisal Dist. v. Smallwood, 848 S.W.2d 822 (Tex. 1993) 1, 9, 10, 16

Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995) 11

City of Keller v. Wilson, 168 S.W.3d 802, 822 (Tex. 2005) 12

Delgada v. Burns, 656 S.W.2d 428, 429 (Tex. 1983) 9

Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 241–42 (Tex. 1985) 15

Exxon Corp. v. Middleton, 613 S.W.2d 240, 246 (Tex. 1981) 13

Fears v. Texas Bank, 247 S.W. 3d 729, 735-736 (Tex. 2008, pet. denied) 18

FM Props. Operating Co. v. City of Austin, 22 S.W.3d 868, 872-73 (Tex. 2000) 11

Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 600 (Tex. 2004) 11

Gibbs v. General Motors Corp., 450 S.W.2d 827, 828 (Tex. 1970) 9

Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754,755–56 (Tex. 2007) 7

Gosami v. Metropolitan Sav. & Loan Ass'n, 751 S.W.2d 487, 491 (Tex. 1988) 8

Hamilton v. Wilson, 249 S.W.3d 425, 426 (Tex. 2008) 12

IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason, 143 S.W.3d 794, 803 (Tex. 2004) 12

In re J.P.B., 180 S.W.3d 570, 575 (Tex. 2005) 15

Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 206–08 (Tex. 2002) 7

Mack Trucks, Inc. v. Tames, 206 S.W.3d 572, 582 (Tex. 2006) 7

McIntyre v. Ramirez, 109 S.W.3d 741, 749-50 (Tex. 2003) 12

Mercer v. Daoran Corp., 676 S.W.2d 580, 583 (Tex. 1984) 12

Moore v. K Mart Corp., 981 S.W.2d 266, 269 (Tex. 1998, pet. denied) 12

Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 548-49 (Tex. 1985) 8, 9

Pick v. Bartel, 659 S.W. 2d 636, 637 (Tex. 1983) 18

Porras v. Craig, 675 S.W.2d 503, 504-05 (Tex. 1984) 13

Redman Homes, Inc. v. Ivy, 920 S.W.2d 664, 669 (Tex. 1996) 13

Star-Telegram, Inc. v. Doe, 915 S.W.2d 471, 473 (Tex. 1995) 11
State v. Berger, 430 S.W.2d 557, 559 (Tex. 1968) 13
Sudan v. Sudan, 199 S.W.3d 291, 292 (Tex. 2006) 11
Williams v. Glash, 789 S.W.2d 261, 264 (Tex. 1990) 8
Windsor v. Maxwell, 121 S.W.3d 42, 49 (Tex. 2003, pet. denied) 12

Statutes

Tex. Bus. & Comm. Code Ann. §26.01 (Vernon Supp. 2008) 18
Texas Property Tax Code §1.04(7) 1, 10, 16, 18
Texas Property Tax Code §23.01(b) 1
Texas Property Tax Code §42.24 10
Texas Property Tax Code §42.25 ..... 1, 10
Title 31 U.S.C §5112(a)(9) 3

Rules

Tex. R. Civ. P. 166a(c) 11
Tex. R. Civ. P. 166a(i) 11

Constitutional Provisions

Texas Constitution at Article 8 Sec. 20 ..... 1, 10

STATEMENT OF THE CASE

Nature of the Case	This is a case brought to construe whether the price paid for a piece of real-property in an arms-length transaction is the "Market Value", as that term is defined in the Texas Property Tax Code §1.04(7), and thus its appraised value as required by law pursuant to the Texas Constitution at Article 8 Sec. 20, the Texas Property Tax Code §23.01(b), and *Bailey County Appraisal Dist. v. Smallwood*, 848 S.W.2d 822. (C.R. 20)
Course of Proceedings	The Appellants timely protested the Henderson County Appraisal Districts property appraisal and petitioned the 173rd Judicial District Court of Henderson County, under §42.25 – Remedy for Excessive Appraisal – of the Texas Property Tax Code, to determine whether the appraised value of property according to the appraisal roll exceeds the appraised value required by law - the purchase price paid. Testimony from both sides was elicited. The testimony elicited from the Appellee – the Henderson County Appraisal District – contradicts itself; whereas the Testimony and supporting affidavits of the Appellants and the third-party property Seller are consistent with the sales contract and the recorded deed. The Appellee filed a motion titled "Appellee's Motion for Summary Judgment and for No-Evidence Summary Judgment (C.R. 200-201, 215, 31; 36, 301, 304 and 22-30).
Trial Court Disposition	The 173rd Judicial District Court of Henderson County, the Hon. Dan Moore presiding, granted Appellee's Motion For Summary Judgment and For No-Evidence Summary Judgment. Judge Moore's order states: "the Appellee's Motion for Summary Judgment and for No-Evidence Summary Judgment is in all respects GRANTED. And further granted the Appellee's Objection to Plaintiffs' Summary Judgment Evidence [excluding Dr. Edwin Vieira's deposition] (C.R. 321 and 323).
Party References	The Henderson County Appraisal District, Appellee, will generally be referred to as "Appellee". JoAnn Bryant, the seller of the property, will generally be referred to as "Seller". Thomas D. and/or Michelle L. Selgas, Appellants, will generally be referred to as "Appellants". Dr. Edwin Vieira Jr., expert witness, will generally be referred to as "Dr. Vieira" Bill Jackson, Appellee's witness, will generally be referred to as "Jackson"

ISSUES PRESENTED

I. Did the trial court err in granting Appellee's no evidence motion for summary judgment?

   a. Was Appellants' summary judgment evidence, the affidavits of the property owner, Thomas Selgas, and the Seller, JoAnn Bryant, some evidence of the market value of the property?

   b. Did the trial court abuse its discretion by striking the affidavit testimony of Appellants' expert witness, Dr. Edwin Vera, as his qualifications as an expert were established by Appellant and were not properly challenged by Appellee?

II. Did the trial court err in granting Appellee's Motion for Summary Judgment?

STATEMENT OF FACTS

The real property owned by Appellants that is the subject of this cause is described in AB 538 R V MORRELL SUR, TR 3F 23.059 (hereafter Parcel A) and AB 538 R V MORRELL SUR, TR 3F 23.369 save and except for a 10 acre lot (hereafter Parcel B). A true and correct copy of the warranty deed vesting property to the Appellants can be found at C.R. 145-150 and incorporated herein as if set forth at length.

Appellants purchased the property that is the subject of this suit for $16,670.00 legal tender lawful money dollars, pursuant to Title 31 U.S.C §5112(a)(9), after it had been exposed for sale in the open market with a reasonable time for the seller to find a purchaser. A true and correct copy of the FARM AND RANCH Contract can be found at C.R. 151-169 and incorporated herein as set forth at length.

At the time of the purchase of the property by Appellants, both the seller and the Appellants knew of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and both the seller and Appellants sought to maximize their gains and neither was in a position to take advantage of the exigencies of the other. Therefore, at the time of purchase, and based on the facts delineated above, the market value of Appellants' property, that is the subject of this suit, is $16,670.00 legal tender lawful money dollars.

However, on May 22, 2008, Appellee notified Appellants that the valuation of the above-described property would be 251,630 for Parcel A and 40,420 for Parcel B for a total proposed valuation of 292,050 [*please note that the numbers indicated here are as they appeared on the Appellee's notice without any designated unit of measure*].

On May 28, 2008, Appellants timely filed a notice of protest of the valuation given the property by the appraiser. A true copy of the notice of protest, board determination and taxable valuation notice can be found at C.R. 170-179 and incorporated by reference. Thereafter, on June 16, 2008 the board made its order in which the value of Appellants' property was determined to be $251,630.00 for Parcel A and $40,420.00 for Parcel B for a total valuation of $292,050.00. The board mailed its determination to Appellants on June 18, 2008, and at this point, all conditions precedent to the Appellants' right of judicial review of the board's decision had been performed or had occurred.

Thereafter, in 2009, a similar pattern occurred: on May 1, 2009, Appellants were notified that the valuation of the above-described property would be 354,040 for Parcel A and 53,480 for Parcel B for a total proposed valuation of 407,520 by Appellee.

Accordingly, Appellants again timely filed a notice of protest of the valuation given the property by the appraiser on May 22, 2009. A true copy of the notice of protest, board determination and taxable valuation notice can be found at C.R. 180-190 and incorporated by reference. Thereafter, on July 10, 2009 the board made its order in which the value of Appellants' property was determined to be $354,040 for Parcel A and $53,480 for Parcel B for a total valuation of $407,520. The board mailed its determination to Appellants on July 17, 2009. Therefore, all conditions precedent to the Appellants' right of judicial review of the board's decision having been performed or having occurred, Appellants were again entitled to a trial de novo review of the board's order.

On August 1, 2008, Appellants petitioned the 173rd Judicial District Court in Henderson County, Texas for a redetermination of the Henderson County Appraisal District's overvaluation of the property set forth above as Parcels A & B (C.R. 1-4). On September 24, 2008, the Appellee filed its original answer.

On January 5, 2009 the Appellants served the Appellee with a request for Admissions. On January 22, 2009 the Appellee answered the Appellants' request for Admission (C.R. 214-233).

On January 9, 2009 the Appellee served the Appellants with a first set of interrogatories, first request for production of documents, and request for disclosure. On February 6, 2009, the Appellants answered and/or fulfilled the Appellee's request for interrogatories, production of documents, and disclosure.

On July 21, 2009 the Appellee served the Appellants notice of the depositions of: Thomas D. Selgas, Michelle L. Selgas, Richard Bryant, JoAnn Bryant and Judith Street. On August 20, 2009 the Appellee took oral depositions from Thomas D. Selgas, Michelle L. Selgas, JoAnn Bryant and Judith Street. On August 11, 2009, the Appellants served the Appellee notice of deposition of Bill Jackson. On August 21, 2009, the Appellants took the oral deposition of Bill Jackson. On September 29, 2009, the Appellants gave notice to Appellee that it would be calling Dr. Edwin Vieira, Jr. as an Expert Witness and that they would be taking his oral deposition on November 11, 2009. On November 11, 2009, the Appellants took the Oral Deposition of the Dr. Edwin Vieira at which time Appellee attended the deposition and was given the opportunity to cross examine this witness as to his qualifications and his testimony.

On August 31, 2009, Appellants filed an Amended Petition with the 173rd Judicial District Court in Henderson County, Texas, for a redetermination of the Henderson County Appraisal District's overvaluation of the property set forth above as Parcels A & B for years 2008 and 2009 (C.R. 17-21). And the Appellants paid the jury fee for a jury trial.

On September 23, 2009, the Appellee filed its Motion for Summary Judgment and for No-Evidence Summary Judgment (C.R. 22-30). On December 7, 2009 the Appellants filed their Response to the Appellee's Motion for Summary Judgment and for No-Evidence Summary Judgment (C.R. 130-144). On December 9, 2009, the Appellee filed Defendant's Objection to Summary Judgment Evidence [Defendant objects to the testimony of Dr. Edwin Vieira, Jr. only]. On December 14, 2009, the court held a hearing on the Appellee's Motions for Summary Judgment and for No-Evidence Summary Judgment. On January 4, 2010, the Court granted the Appellee's Motion for Summary Judgment and for No-Evidence Summary Judgment related to Parcel A, and its Objection to Summary Judgment Evidence. On January 25, 2010, the Court granted the Appellee's Motion for Summary Judgment and for No-Evidence Summary Judgment related to Parcel B.

SUMMARY OF THE ARGUMENT

I. No Evidence Summary Judgment Standard

In reviewing a no-evidence summary judgment, the court of appeals in its de novo review must ascertain whether the non-Movant pointed out summary judgment evidence of probative force to raise a genuine issue of fact as to the essential elements attacked in the no-evidence grounds. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206–08 (Tex. 2002). A no-evidence summary judgment must be granted only if the party opposing the motion does not respond with summary judgment evidence that raises a genuine issue of material fact. *See Arguelles v. Kellogg Brown & Root, Inc.,* 222 S.W.3d 714, 723 (Tex. App. – Houston [14th Dist.] 2007, no pet.). In a de novo review of a trial court's granting of a no evidence summary judgment, the appellate court must consider all the evidence in the light most favorable to the non-Movant, crediting evidence favorable to the non-Movant if reasonable jurors could; and, disregarding contrary evidence unless reasonable jurors could not. *Mack Trucks, Inc. v. Tames*, 206 S.W.3d 572, 582 (Tex. 2006). Therefore, the evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754,755–56 (Tex. 2007).

Applying this standard to the instant case, the trial court erred in granting Appellee's No-Evidence Motion for Summary Judgment because Appellants did provide sufficient credible evidence to show that there is a triable genuine issue of material fact

regarding the determination of market value as evidenced by the affidavits of Thomas D. Selgas (Appellant) and JoAnn L. Bryant (Seller), which can be found at C.R. 300-305.

In order to defeat a no-evidence motion for summary judgment, Appellants are not required to marshal all of the evidence that will be introduced at trial, but simply to provide more than a scintilla of evidence regarding disputed issues of material facts upon which reasonable triers of facts can differ. The trial court cannot substitute its judgment for the trier of fact, but instead must allow that evidence to be presented to the jury so that justice may be done. Appellants have met this standard and far exceeded it with the evidence in the record.

II. Motion For Summary Judgment Standard

On a motion for summary judgment, the moving party bears the burden of proving that there exists no genuine issue of material fact and that they are entitled to judgment as a matter of law. *Gossamer v. Metropolitan Sav. & Loan Ass'n,* 751 S.W.2d 487, 491 (Tex. 1988); *Nixon v. Mr. Property Management Co.*, 690 S.W.2d 546, 548-49 (Tex. 1985). In making this proof, the evidence must be viewed in the light most favorable to the non-Movant, with all conflicts in evidence disregarded and evidence supporting the position of non-Movant accepted as true. *Gosami*, 751 S.W.2d at 491; *Nixon*, 690 S.W.2d at 548-49. All doubts as to the existence of a genuine issue of material fact are resolved against the non-Movant and every reasonable inference must be indulged in favor of the non-Movant. *Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); *Nixon*, 690 S.W.2d at

548-49). To be entitled to summary judgment, Appellee has the burden of conclusively negating each and every element of Appellant cause of action.

A summary judgment for the Appellee disposing of the entire case is proper only if, as a matter of law, Appellants could not succeed upon any of the theories pled. *Delgada v. Burns*, 656 S.W.2d 428, 429 (Tex. 1983); *Gibbs v. General Motors Corp*., 450 S.W.2d 827, 828 (Tex. 1970). The Appellee's Motion for Summary Judgment and for No-Evidence Summary Judgment is evidence itself that an issue of material fact exists between the parties as it asserts a market value with a corresponding purchase price of the Appellants' property different than that of the Appellants' claim and supporting evidence. Further, the Appellee has produced no evidence to conclusively negate Appellants' evidence on an essential element of their cause of action, the proof of the market value of the property, i.e. that the purchase price of the Appellants' property as shown on the FARM AND RANCH Contract and recorded in the Warranty Deed is any different than the purchase price, which is its market value (see *Bailey County Appraisal Dist. V. Smallwood*, 848 S.W.2d 822, 824-25).

Instead, the controverting affidavit of Appellee's witness, Bill Jackson, on the issue of the value of Appellants' property simply creates a justiciable controversy on this element of Appellants' claim rather than conclusively negates it, thereby, foreclosing the applicability of summary judgment by the introduction of their own evidence in this matter. Accordingly, the trial court erred in granting Appellee's motion for summary judgment as Appellee did not meet their burden of proof to conclusively negate each and every element of Appellants' cause of action.

ARGUMENT AND AUTHORITIES

This Court has jurisdiction over this Cause by virtue of TEX. PROP. TAX CODE §§42.24, 42.25 (Vernon 2009). As is clearly stated in Appellant's First Amended Original Petition, Plaintiff's allege that their property as described above and as shown in Exhibits "A" and "B" attached hereto has been "over-valued" for 2008 and 2009.

Appellants as Buyers and Richard & JoAnn Bryant, as Sellers, entered into a written contract for sale of the subject property and the property described in Cause[s] 2008A-813 & 2008A-814 (see C.R. 151-169), wherein, Appellants agreed to buy, and Sellers agreed to sell, the subject properties for $16,670 "dollars".

The Texas Constitution provides that "No property of any kind in this State shall ever be assessed for ad valorem taxes at a greater value than its fair market value nor shall any Board of equalization of any governmental or political subdivision or taxing district within the State fix the value of any property for tax purposes at more than its fair market value …" **TEX. CONST. ART. VIII, §20.**

Market value is defined as the price at which a property would transfer for cash … under prevailing market conditions if (A) exposed for sale in the open market with a reasonable time for the seller to find a purchaser; (B) both the seller and the purchaser know of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and (C) both the seller and purchaser seek to maximize their gains and neither is in a position to take advantage of the exigencies of the other. **TEX. Property TAX CODE 1.04(7)§**; *see also Bailey County Appraisal Dist. V. Smallwood*, 848 S.W.2d 822, 824-25 (Tex. App. –

Amarillo 1993, no writ) (noting fair market value results from willing purchaser, willing seller, and no pressure to buy or sell property).

The Appellants bought and the sellers sold the property at issue in this matter for the fair market value of $16,670.00 "dollars" (see affidavits of Thomas D. Selgas and JoAnn Bryant at Exhibits I and J respectively).

The appellate court's standard of review of a summary judgment is de novo to determine whether a party's right to prevail is established as a matter of law. Tex. R. Civ. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When, as here, a trial court's order granting summary judgment does not specify the grounds relied upon, the reviewing court must affirm summary judgment if any of the summary judgment grounds are meritorious. *FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872-73 (Tex. 2000); *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995).

When a party moves for summary judgment under both rules 166a(c) and 166a(i), the appellate court should first review the trial court's judgment under the standards of rule 166a(i) governing no evidence motions for summary judgment. *Ford Motor Co. v. Ridgway,* 135 S.W.3d 598, 600 (Tex. 2004).

I. Did the Trial Court err in granting Appellee's No Evidence Motion for Summary Judgment?

When reviewing a no-evidence summary judgment, the court examines the entire record in the light most favorable to the nonmovant, indulging every reasonable inference and resolving any doubts against the motion. *Sudan v. Sudan*, 199 S.W.3d 291, 292 (Tex. 2006). If the non-Movant brings forward more than a scintilla of probative evidence that

raises a genuine issue of material fact, then a no-evidence summary judgment is not proper. *Moore v. K Mart Corp.*, 981 S.W.2d 266, 269 (Tex. App. – San Antonio 1998, pet. denied). Therefore, the court should review a no-evidence summary judgment for evidence that would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 822 (Tex. 2005)).

a. Was Appellants' summary judgment evidence, the affidavits of property owner, Thomas Selgas, and the Seller, JoAnn Bryant, some evidence of the market value of the property?

Affidavits supporting and opposing a motion for summary judgment must set forth facts, not legal conclusions. *See Mercer v. Daoran Corp.,* 676 S.W.2d 580, 583 (Tex. 1984); *AMS Constr. Co. v. Warm Springs Rehab. Found., Inc.*, 94 S.W.3d 152, 157 (Tex. App. – Corpus Christi 2002, no pet.). A conclusory statement is one that does not provide the underlying facts to support the conclusion, and it is insufficient to create a question of material fact to defeat summary judgment. *IHS Cedars Treatment Ctr. of Desoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 803 (Tex. 2004); *McIntyre v. Ramirez*, 109 S.W.3d 741, 749-50 (Tex. 2003). To constitute competent summary judgment evidence, the testimony must provide an explanation linking the basis of the conclusion to the facts. *Windsor v. Maxwell*, 121 S.W.3d 42, 49 (Tex. App. – Fort Worth 2003, pet. denied).

In this case, Appellants provided factual affidavits, which state the market value of the property, providing adequate evidence or at least raising a triable issue of material fact. This testimony is factual, not conclusory, and is entitled to be given consideration

by the trier of fact, as it is well settled law in Texas that property owners may testify as to the market value of their property.

The Supreme Court of Texas has held that property owners who are familiar with the market value of their property, including real property, may testify as to their opinions regarding this value, even though they do not qualify as expert witnesses and even though they would not be allowed to testify regarding the market value of property they do not own. *See Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996); *Porras v. Craig*, 675 S.W.2d 503, 504-05 (Tex. 1984). 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 Porras*, 675 S.W.2d at 504; *State v. Berger*, 430 S.W.2d 557, 559 (Tex. Civ. App. – Waco 1968, writ ref'd n.r.e.). For a property owner to qualify as a witness, his testimony "must show that it refers to market, rather than intrinsic or some other value of the property." *Porras*, 675 S.W.2d at 504-05 (Tex. 1984). This requirement is usually met if the owner testifies that he is familiar with the market value of his property. "Market value" is the price property would bring if offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no obligation to buy. *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 246 (Tex. 1981). This well settled principle has become known as "The Property Owner's Rule."

In the instant case, Appellant introduced the affidavit testimony of the property owner, Thomas Selgas and the Seller, JoAnn Bryant, who testified that the market value of the property was $16,670. The property was purchased/sold on prevailing market conditions at the time of sale. The property was listed by the Seller on the open market

through a MLS listing by a licensed Texas Real Estate Broker. Seller and Appellant (buyer) were aware of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and by buying/selling the property both parties sought to maximize their gains. Neither party [Seller and Appellants (buyers)] was in a position to take advantage of the exigencies of the other party.

The Seller accepted cash from the Appellants (buyers) for the property in the amount of $16,670 dollars, in American Eagle Gold Coin, lawful money of the United States. Although the property is recorded as two parcels the sale of the property was treated as a single parcel of land and thus made no independent determination of the value of each parcel.

The total amount tendered by the Appellants (buyers) and accepted by the Seller was the fair market value of the property sold. C.R. 300-305

Therefore, the trial court erred in granting the no evidence motion for summary judgment as Appellants provided more than a scintilla of evidence establishing the genuine issue of material fact regarding the market value of this property, and the court's decision should be reversed, with the case remanded to the trial court for trial on the merits.

b. Did the trial court abuse its discretion by striking the affidavit testimony of Appellants' expert witness, Dr. Edwin Vieira, Jr., as his qualifications as an expert were established by Appellants and were not properly challenged by Appellee?

The appropriate standard of review of a trial court's evidentiary rulings are for an abuse of discretion. *In re J.P.B.*, 180 S.W.3d 570, 575 (Tex. 2005) (per curiam). The trial court abuses its discretion if it acts without reference to guiding rules or principles, or in an arbitrary or unreasonable manner. *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238, 241–42 (Tex. 1985).

In this case, the trial court excluded the testimony of Appellants' expert witness, Dr. Edwin Vieira, although his qualifications were proven up by Appellants, and were not properly challenged by Appellees, as Appellees did not make a Daubert challenge as to Dr. Vieira's qualifications as an expert and likewise, the court issued its order striking Dr. Vieira's testimony without conducting an evaluation as to his qualifications as required by Daubert. Therefore, the court acted without reference to guiding rules or principles, or in an arbitrary or unreasonable manner, and Dr. Vieira's testimony should be allowed to be considered by a trier of fact, giving Appellants additional credible evidence in support of their position on the market value of their property.

Dr. Vieira's testimony is critical on the factual issue of the standard of measure used by Appellants in assessing the market value of their property and his opinions are not merely opinions of law, but rather of fact. Accordingly, his testimony should not have been stricken by the trial court.

Appellee's Objection to Appellants' Summary Judgment Evidence on the basis that Dr. Vieira's testimony was not factual, but was rather purely on the interpretation of the law ignores and/or misconstrues his testimony because Dr. Vieira did not testify on a pure question of law, but rather a mixed question of law and fact. At the very least, the

trial court should have required a hearing on a Daubert challenge before arbitrarily throwing out his testimony in its entirety which would have given Appellants the opportunity to respond to any challenge as to this expert's qualifications and the characterizations of his testimony, an opportunity the court's actions prevented Appellants from having. Therefore, the trial court abused its discretion, creating harmful error, which requires that this Court reverse the trial court's ruling on the admissibility of Dr. Vieira's testimony, and reversal of the trial court's granting of summary judgment.

II. Did the trial court err by granting the Appellee's Motion for Summary Judgment?

Appellee's did not present evidence that would negate the elements of Appellant's Cause of Action and did not introduce any competent evidence to satisfy its burden of proof that it did not inequitably value Appellants' property for tax purposes.

Any purchase of real property in an arms-length transaction, no matter how unreasonable it may seem on its face is its Market Value (see: Bailey County Appraisal Dist. v. Smallwood, 848 S.W.2d 822), as that term is defined in §1.04(7) of the Texas Property Tax Code to wit:

> ''Market value'' means the price at which a property would transfer for cash or its equivalent under prevailing market conditions if:
>
> (A) exposed for sale in the open market with a reasonable time for the seller to find a purchaser;

(B) both the seller and the purchaser know of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and

(C) both the seller and purchaser seek to maximize their gains and neither is in a position to take advantage of the exigencies of the other.

Further, Appellants have shown that the entire real estate transaction for the purchase and sale of this property met the requirements of contract and real estate law, making the underpinnings of the testimony Appellants provide on market value footed on a solid and uncontroverted base as delineated below:

a. The sales contract for the real property is an enforceable contract

The Seller and Appellants prior to engaging in the sales process of the subject property had never met, did not have any friends or acquaintances in common, nor were of any close or know familial relationship. Thus the sales transaction of the subject property was at arms-length.

1. There was an offer

As indicated on the FARM AND RANCH Contract, there was an offer to purchase the subject property for $16,670.00 by the Appellants.

2. There was acceptance

As indicated on the FARM AND RANCH Contract, there was acceptance of the Appellants' offer to purchase the subject property for $16,670.00 by the Seller.

3. There was a meeting of the minds

As indicated on the FARM AND RANCH Contract, the recorded Warrant Deed, and as testified to by deposition and affidavits of the Appellants and Seller, there was a meeting of the minds as to the terms and performance of the contract.

4. Each party (the Seller and Appellant) consented to the terms

As indicated on the FARM AND RANCH Contract, the recorded Warrant Deed, and as testified to by deposition and affidavits of the Appellants and Seller each party consented to and fulfilled the term of the contract.

5. There was intent that the contract be mutual and binding

As indicated on the FARM AND RANCH Contract, the recorded Warrant Deed, and as testified to by deposition and affidavits of the Appellants and Seller, each party consented to and fulfilled the term of the contract; thus making it mutual and binding.

6. The contract does not fall within the Statute of Frauds

The FARM AND RANCH Contract signed by the Appellants and Seller is of the form promulgated by the Texas Real Estate Commission and does not violate the Statute of Frauds, which states that a "contract for the sale of real estate" is unenforceable unless it is in writing and "signed by the person to be charged with the promise or agreement …" Tex. Bus. & Comm. Code Ann. §26.01 (Vernon Supp. 2008). Further the FARM AND RANCH Contract does "furnish within itself or by reference to another existing writing the means or data to identify the particular land with reasonable certainty." *Fears v. Texas Bank*, 247 S.W. 3d 729, 735-736 (Tex. App. – Texarkana 2008, pet. denied), citing *Pick v. Bartel*, 659 S.W. 2d 636, 637 (Tex. 1983)

Accordingly, it was Appellee's burden to prove that the purchase price of the real property was not the purchase price shown on the real property sales contract, the recorded warranty deed, and attested to by both the Seller and Appellants, which it failed to do.

CONCLUSION

The Appellants, Thomas and Michelle Selgas, purchased property in Henderson County Texas for $16,670.00 from the Sellers, Richard and JoAnn Bryant, in February 2008. Appellants introduced competent evidence as to the market value of this property, and said sale and subsequent purchase met all the "Market Value" requirements defined in §1.04(7) of the Texas Property Tax Code to wit:

(A) exposed for sale in the open market with a reasonable time for the seller to find a purchaser;

(B) both the seller and the purchaser know of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and

(C) both the seller and purchaser seek to maximize their gains and neither is in a position to take advantage of the exigencies of the other.

Therefore the Market Value of the property was its purchase price of $16,670.00, Appellants introduced affidavit testimony to establish market value under the well settled principle of the Property Owners Rule, and also established through expert testimony the basis for their designation of said market value, which said expert testimony was stricken by the trial court's abuse of discretion. Accordingly, satisfactory evidence exists and was presented by Appellants sufficient to prevent summary judgment, and this Court should reverse the trial court's decision and remand this matter for a trial on the merits, as Appellants should be afforded the opportunity to have a trial on the merits of their cause of action, as there exists genuine issues of material fact required to be submitted to the trier of fact and not capable of being decided by summary judgment.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully request that this Court:

1) Reverse the judgment of the trial court that granted the Appellee's Motion For Summary Judgment and For No-Evidence Summary Judgment and remand this case back for trial with instructions,

2) Reverse the trial court's order to exclude the deposition testimony of Dr. Edwin Vieira, Jr., and

3) Appellants be provided any additional relief in law or equity to which they may be justly entitled.

Respectfully submitted,

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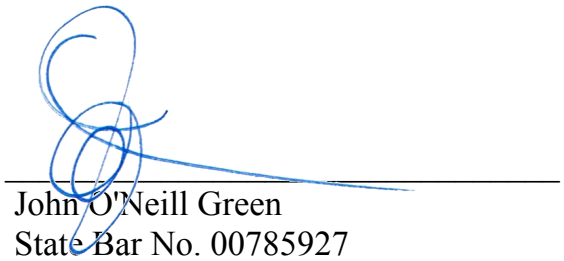
CERTIFICATE OF SERVICE

I certify that on April 9, 2010, a true and correct copy of Appellant's Appeal Brief with Appendix was served by USPS Delivery Confirmation Priority Mail on Kirk Swinney at McCREARY, VESELKA, BRAGG & ALLEN, P.C., 700 Jeffrey Way, Suite 100, Round Rock, TX 78665.



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