Affirmed and Opinion Filed June 22, 2021

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-19-00568-CV

BANK OF TEXAS NA, Appellant
V.
COLLIN CENTRAL APPRAISAL DISTRICT, Appellee

On Appeal from the 199th Judicial District Court
Collin County, Texas
Trial Court Cause No. 199-03397-2016

MEMORANDUM OPINION

Before Justices Myers, Nowell, and Goldstein[1]
Opinion by Justice Nowell

Bank of Texas NA (Bank) appeals from a judgment in favor of Collin Central Appraisal District (CCAD) that denied Bank's challenge to the appraised value of two properties for the tax years 2016 and 2017. In four issues, Bank argues the trial court abused its discretion by granting CCAD's motion to strike its experts, refusing to permit an offer of proof in question-and-answer form at trial, rendering judgment based on the striking of Bank's experts, and failing to file additional findings of fact

[1] The Honorable Justice Bonnie Goldstein succeeded the Honorable Justice David Evans, a member of the original panel. Justice Goldstein has reviewed the briefs and the record before the Court.

and conclusions of law. For the reasons explained below, we overrule Bank's issues and affirm the trial court's judgment.

Background

Bank challenged the appraisal of two branch bank properties for 2016 and 2017. After completing the administrative process, Bank filed this suit alleging the appraised value was more than the true market value of the properties and the appraisals were unequal compared to values of comparable properties. *See* TEX. TAX CODE §§ 42.25, 42.26(a)(3). Bank relied on two appraisal experts, Stephen Bach and George Naeter, to support its valuation. Shortly before trial, CCAD filed a motion to strike both experts because they did not properly apply any of the three methods of appraisal approved by the tax code. *See* TAX § 23.0101.

The trial court granted the motion and struck the experts. At trial, Bank requested to make an offer of proof in question-and-answer form. After some discussion, the court stated it was not reconsidering its ruling on the motion to strike. Bank then made its offer of proof in summary form and offered the experts' curriculum vitae and reports for record purposes. Afterwards, Bank rested without calling a witness or producing other evidence. CCAD moved for judgment as a matter of law because Bank failed to offer any evidence to support its claim. The trial court granted the motion and rendered judgment that Bank take nothing on its claim. The trial court signed findings of fact and conclusions of law in response to

Bank's request, but did not file additional findings of fact and conclusions of law. *See* TEX. R. CIV. P. 296–298.

Standard of Review

We review rulings on the admissibility of expert testimony for an abuse of discretion. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009). An expert witness may testify regarding scientific, technical, or other specialized matters if the expert is qualified, the expert's opinion is relevant, the opinion is reliable, and the opinion is based on a reliable foundation. *See* TEX. R. EVID. 702; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 578 (Tex. 2006); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 726 (Tex. 1998). A real estate appraiser's opinion must meet these standards. *See Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002) (holding appraisal experts are subject to *Gammill*'s relevance and reliability requirements).[2]

Expert testimony is unreliable "if there is too great an analytical gap between the data on which the expert relies and the opinion offered." *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 904–05 (citation omitted). Whether an analytical gap exists is largely determined by comparing the facts the expert relied on, the facts in

[2] CCAD does not challenge the qualifications of the experts and the opinions, if reliable, would be relevant to the issue in this case, which is the market value of the properties. Therefore, we do not discuss the qualifications of the experts or the relevance of their opinions.

the record, and the expert's ultimate opinion. *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 348-49 (Tex. 2015).

Courts rigorously examine the validity of the facts and assumptions on which expert testimony is based, as well as the principles, research, and methodology underlying the expert's conclusions and the manner in which the principles and methodologies are applied by the expert to reach the conclusions. *Whirlpool Corp.*, 298 S.W.3d at 637. Trial courts act as gatekeepers, screening out irrelevant and unreliable expert opinions. *See Gen. Motors Corp. v. Sanchez*, 997 S.W.2d 584, 590 (Tex. 1999) (noting "the trial court is the evidentiary gatekeeper with the primary responsibility to screen out unreliable expert evidence"). An expert's "bald assurance" that they used an approved methodology is insufficient to show their opinion is reliable; the court must independently evaluate the underlying data in determining whether the opinion is reliable. *Kraft*, 77 S.W.3d at 808.

Analysis

A. Motion to Strike

Bank argues in its first issue that the trial court abused its discretion by granting the motion to strike the appraiser experts. It argues that CCAD's complaints about the opinions go to the weight of the evidence, not its admissibility.

Under the tax code, the market value of property must be determined by the application of generally accepted appraisal methods and techniques. TAX § 23.01(b). The tax code and caselaw recognize three methods of determining market value:

cost, income, and market data comparison. TAX § 23.0101; *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001).

In its motion to strike, CCAD argued that Naeter and Bach "did not apply, or incorrectly applied, each of the methods for appraisal in determining their values for the Properties." CCAD argued that Naeter and Bach did not consider the cost method and, although they had sales data for branch banks, did not use the sales comparison method. Lastly, CCAD argued the only method used by the experts, the income method, was improperly applied because the experts did not use data based on the highest and best use of the properties.

Bank contends that CCAD's motion was based on the premise that an appraiser must use all three methods of determining market value. While some statements in the motion to strike indicate an appraiser should consider all three methods, CCAD argued in the motion that the experts here failed to use or properly apply any of the methods. At the hearing on the motion, counsel for CCAD specifically stated that CCAD's complaint was not that the experts failed to use all three methods, but that the method used did not comply with generally accepted appraisal methods. CCAD argued the experts determined the highest and best use was as a branch bank, but did not use data from branch banks as their comparables. We agree with CCAD that the issue is whether the appraisers properly applied any of the three methods of appraisal in reaching their conclusions. Since the experts did not use either the cost or the sales comparison methods of valuation, those methods

cannot support the reliability of the experts' opinions. Therefore, we consider only whether the opinions are reliable based on the income method used by the appraisers.

Under the income method, the property's net operating income is divided by an appropriate market capitalization rate to arrive at the property's market value. *See Cent. Appraisal Dist. of Taylor County v. W. AH 406, Ltd.*, 372 S.W.3d 672, 677 (Tex. App.—Eastland 2012, pet. denied). To calculate the property's net operating income, the appraiser determines the estimated gross income based on comparable rent data in the market area then subtracts estimated operating expenses derived from comparable data on expenses. *See id*.; TAX § 23.012(a). Then the appraiser analyzes comparable data to find an appropriate capitalization rate. *See* TAX § 23.012(a).

The appraisers and the parties agree that the highest and best use of the properties is the existing use, as branch bank buildings. "Highest and best use" is "the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible and that results in the highest value." *City of Sugar Land v. Home & Hearth Sugarland, L.P.*, 215 S.W.3d 503, 511 (Tex. App.—Eastland 2007, pet. denied). Naeter testified in his deposition that the highest and best use of the property dictates the types of comparable properties an appraiser looks for in appraising the property.

However, in performing their income analysis, the experts used income data from office buildings—properties with a different highest and best use than the subject properties. They identified six properties in their reports as comparable

properties in analyzing the gross income of the subject properties. The properties were office buildings or buildings that had been converted from a branch bank to retail. Naeter testified that none of the six properties came from his list of fifteen branch bank lease comparables.

Bank argues that use of office rents rather than data from branch banks merely goes to the weight of the evidence and the appraisers could use their experience and discretion to decide to use office rents rather than bank rents. The problem with this is argument is there is no explanation in the record of how the experts reached an opinion on the rental income of branch banks from rental data of office buildings. There was nothing on which the trial court could determine the reliability of the experts' decision to rely on office rent data when appraising branch banks. While experience alone may be sufficient in some cases to show the reliability of an expert's opinion, *see Gammill*, 972 S.W.2d at 726, absent an explanation of how the expert's experience shows that the data reliably supports the conclusion, the court has nothing more than the *ipse dixit* of the expert to support the opinion, *see Burrow v. Arce*, 997 S.W.2d 229, 235 (Tex. 1999) ("[A] claim will not stand or fall on the mere *ipse dixit* of a credentialed witness.") (citation omitted).

Further, an expert's mere assertion that he applied a valid methodology to reach his conclusions is insufficient to establish the opinion is reliable. *See Kraft*, 77 S.W.3d at 808. In *Kraft*, the expert claimed he used the approved sales comparison method of valuation, but the supreme court concluded this claim was insufficient to

show the expert's opinion was reliable. "While using comparable sales to find market value in condemnation proceedings is an approved methodology, [the expert's] 'bald assurance' that he was using that widely accepted approach was not sufficient to demonstrate that his opinion was reliable." *Id*. The court concluded the expert's opinion was not reliable because a review of his underlying data revealed that the local sales he relied on were not comparable to the condemned easement. *Id*. Despite the expert's claim of using a valid appraisal method, the court examined the comparable sales used by the expert and concluded the comparable sales "were similar not to the strip of land taken, but to a hypothetical tract reconfigured and relocated to a portion of Kraft's property with markedly different characteristics." *Id*. at 810. The expert's opinion on the value of the land taken was not reliable because it was based on this "comparison of incomparables." *Id*.

Here the trial court could reasonably conclude that the comparables relied upon by the appraisers, rents for office buildings and retail properties, were not comparable to the property being valued, branch banks.

Bank contends that real estate appraisers are unique and somehow different from other experts; that their testimony is for the jury and not subject to reliability requirements. We disagree. Appraisal expertise is a form of specialized knowledge that may be used to assist the trier of fact to determine facts and is "subject to *Gammill's* relevance and reliability requirements." *Kraft,* 77 S.W.3d at 807. Courts must act as gatekeepers of expert testimony; appraisers do not get a free pass.

Bank also contends that an expert's opinion testimony is not legally insufficient because it lacks market data to support the opinion. *See McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd.*, 222 S.W.3d 878, 882 (Tex. App.—Dallas 2007, pet. denied). But "whether an expert's appraisal is based on non-comparable sales is an issue for the trial court when determining *admissibility* of the expert's opinion concerning the market value of the property." *Id. at* 886 (emphasis added) (citing *City of Garland v. Joyce*, 462 S.W.2d 86, 88 (Tex. Civ. App.—Waco, 1970, writ ref'd n.r.e.) (holding opinion testimony of sales should have been excluded because opinion not based on comparable sales)). The issue here is whether the opinions were admissible, and it was within the trial court's discretion to determine that there was too great an analytical gap between the data relied upon by the experts and their opinions.

Next, Bank argues CCAD judicially admitted that Bach was substantially involved in the appraisal and waived its "sole" argument for excluding his testimony. The basis for the judicial admission argument is CCAD's response to Bank's motion for continuance. Bank filed a motion for continuance asserting that health issues prevented Naeter from testifying at trial. This motion was argued at the same hearing as the motion to strike the experts. During the hearing, CCAD argued the continuance should be denied because Bach worked with Naeter on the appraisals, signed the appraisal reports, and was available to testify.

We reject Bank's argument that CCAD waived its challenge to Bach's expert opinion. Bank characterizes CCAD's motion to strike Bach as based solely on the argument that Bach had no substantive involvement and did no substantive work on the appraisals. However, CCAD's motion to strike makes clear that its reason for challenging Bach was not solely that he did not participate in the appraisals. CCAD argued that Bach's testimony should be excluded because his opinions were based solely on Naeter's work and the appraisal reports; that his "opinions are no less flawed than Naeter's."

CCAD never abandoned the argument that both experts' opinions, as reflected in the appraisal reports, were unreliable. CCAD repeatedly argued at the hearing that both experts were unreliable and should be stricken. It only argued that the continuance should be denied because Bach could testify if Naeter was unavailable.

Bach signed the appraisal reports indicating the analysis, opinions, and conclusions contained in the reports were his "personal, impartial, and unbiased professional analyses, opinions, and conclusions." Therefore, Bach's reliability was based on the analysis reflected in the appraisal reports. Because we conclude the opinions reflected in the appraisal reports are not reliable, Bach's opinion testimony based on those reports is also unreliable and the trial court did not abuse its discretion by striking Bach.

"Expert appraisal testimony must be reliable." *Kraft*, 77 S.W.3d at 809. Based on the record before us, we conclude the trial court did not abuse its discretion by

granting the motion to strike. We overrule Bank's first issue. Because the trial court did not err by granting the motion to strike, and Bank did not present any admissible evidence at trial, the court did not err by rendering judgment based on the absence of expert testimony. We overrule Bank's third issue.

B. Offer of Proof

Bank argues in its second issue that the trial court abused its discretion by not permitting an offer of proof in question-and-answer form.

To challenge the exclusion of evidence on appeal, the complaining party must present the excluded evidence to the trial court by an offer of proof or formal bill of exception and obtain a ruling. TEX. R. EVID. 103(a); TEX. R. APP. P. 33.2; *see In re Estate of Miller*, 243 S.W.3d 831, 837–38 (Tex. App.—Dallas 2008, no pet.). On a party's request, "the court must direct that an offer of proof be made in question-and-answer form." TEX. R. EVID. 103(c). However, any error in refusing to permit a question-and-answer form may be harmless. *See Andrade v. State*, 246 S.W.3d 217, 226 (Tex. App.—Houston [14th Dist.] 2007, pet. ref'd); *Chance v. Chance*, 911 S.W.2d 40, 51–52 (Tex. App.—Beaumont 1995, writ denied).

At trial, Bank requested to make an offer of proof as to Bach's testimony in question-and-answer form. The trial court stated she would not reconsider her ruling on the motion to strike experts. Afterwards, Bank presented its offer of proof in summary format and offered Bach's curriculum vitae and the appraisal reports in

support of the offer. Bank then rested its case. CCAD moved for directed verdict, which the trial court granted.

On appeal, Bank states it was harmed because it could not present the detail of Bach's testimony on appeal. However, Bank does not identify any additional information it would have presented through question and answer testimony of Bach that is not included in its summary of his testimony, the appraisal reports, or the response to the motion to strike. The experts' opinions and methodology are reflected in the appraisal reports, and the attachments to the motion to strike along with Bank's response are sufficient to permit Bank to present its case on appeal. Bank has not shown how a question-and-answer form would have been better. While Bank contends that a question-and-answer format would have allowed the trial court to fully hear the expert's testimony and explanation of his methodology, we cannot say on this record that refusing a question-and-answer format probably caused the rendition of an improper judgment or probably prevented appellant from properly presenting the case on appeal. TEX. R. APP. P. 44.1(a).

We conclude that any error in refusing to permit an offer of proof in question-and-answer form was harmless. We overrule Bank's second issue.

C. Additional Findings of Fact and Conclusions of Law

Bank argues in its fourth issue that the trial court abused its discretion by failing to file additional findings of fact and conclusions of law in response to Bank's request. In its argument under this issue, Bank repeats many of its previous

arguments surrounding the striking of the expert witnesses. As we have already addressed those arguments, we need not repeat them or our analysis here. In addition, Bank argues several findings and conclusions are not supported by the evidence or are irrelevant.

Following a trial before the court, a party is entitled to written findings of fact and conclusions of law upon timely request. TEX. R. CIV. P. 296. A trial court should make findings as to ultimate issues, not evidentiary facts. *See Guillory v. Dietrich*, 598 S.W.3d 284, 290 (Tex. App.—Dallas 2020, pet. denied). A "trial court should not make findings on every disputed fact, but only those having some legal significance to an ultimate issue in the case" *Id*. (quoting *Watts v. Lawson*, No. 07-03-0485-CV, 2005 WL 1241122, at *3 (Tex. App.—Amarillo May 25, 2005, no pet.) (mem. op.)); *see also Stuckey Diamonds, Inc. v. Harris Cty. Appraisal Dist.*, 93 S.W.3d 212, 213 (Tex. App.—Houston [14th Dist.] 2002, no pet.). An ultimate or controlling fact issue is one that is essential to the cause of action and that would have a direct effect on the judgment. *Rich v. Olah*, 274 S.W.3d 878, 886 (Tex. App.—Dallas 2008, no pet.); *Buckeye Ret. Co., L.L.C. v. Bank of Am., N.A.*, 239 S.W.3d 394, 402 (Tex. App.—Dallas 2007, no pet.). Findings on evidentiary matters are unnecessary and we disregard such findings on appeal. *Guillory*, 598 S.W.3d at 290. We review the trial court's findings of fact under the same sufficiency-of-the-evidence standards as jury verdicts. *Rich*, 274 S.W.3d at 883.

We review the trial court's conclusions of law de novo. *See BMC Software Belgium, N.V. v. Marchand*, 83 S.W.3d 789, 794 (Tex. 2002). Incorrect conclusions of law do not require reversal if the controlling findings of fact will support a correct legal theory. *Rich*, 274 S.W.3d at 884.

We summarize the challenged findings of fact as follows:

> (9) Bach was under no disability and could have testified at the hearing on the motion to strike;
>
> (10) Bank called no witnesses at the hearing on the motion to strike;
>
> (11) Bank failed to produce credible evidence at the hearing that Bach's methods and conclusions were reliable;
>
> (13) At trial, the court cited its previous order and ruled that Bach's testimony was inadmissible;
>
> (14) Bank offered no credible evidence of market value at trial;
>
> (15) Bank offered no credible evidence at trial in support of an unequal appraisal theory; and
>
> (16) The appraised values of the properties for 2016 and 2017 remain at their current certified values.

Bank also challenges conclusions of law 3 through 7. In summary, they are:

> (3) Bank failed to meet its burden of proof to show that Bach's methods were reliable;
>
> (4) Bank failed to meet its burden of proof to show that Bach's conclusions were reliable;
>
> (5) Naeter and Bach's opinions were unreliable and irrelevant to the issue of market value of the properties;
>
> (6) Bank failed to carry its burden of proof on the issue of market value of the properties; and

> (7) Bank failed to carry its burden of proof on the issue of unequal appraisal of the properties.

Bank argues there is no evidence to support findings (9), (10), and (11). Finding (9) is correct that Bach did not testify at the hearing on the motion to strike. Bank has never claimed that he was not available to testify at the hearing. Finding (10) is accurate and finding (11) reflects the trial court's ruling granting the motion to strike. We conclude, however, that these findings are immaterial and not controlling. *See Guillory*, 598 S.W.3d at 290. Findings on immaterial facts are harmless and not grounds for reversal. *See Cooke Cty. Tax Appraisal Dist. v. Teel*, 129 S.W.3d 724, 731 (Tex. App.—Fort Worth 2004, no pet.) (holding erroneous finding of fact is harmless and not grounds for reversal if finding is immaterial); *see also Norred v. Hartsfield*, 360 S.W.3d 583, 587 (Tex. App.—Dallas 2011, no pet.) (citing *Teel*).

Bank argues findings (13) and (14) are erroneous because Bank presented the appraisal reports as part of its offer of proof at trial. However, an offer of proof preserves evidence that was excluded from trial. The trial court ruled that the expert opinions reflected in the appraisal reports were not reliable and we have concluded the trial court did not abuse its discretion by doing so. Finding (13) accurately reflects the trial court's ruling at trial that Bach's testimony was inadmissible. Regarding finding (14), it is undisputed that the trial court excluded the only

evidence Bank offered at trial on the market value of the properties. Thus, the court correctly found that Bank offered no credible evidence of market value at trial.

Finding (15) and conclusion of law (7) relate to the unequal appraisal claim raised in Bank's second amended petition. Bank argues it did not pursue an unequal appraisal claim at trial. The record reflects that Bank did not pursue this claim at trial. Therefore, the finding and conclusion are immaterial and not grounds for reversal of the judgment. *See Teel*, 129 S.W.3d at 731.

Bank argues CCAD presented no evidence at trial to support finding (16) regarding the current certified values of the properties. However, CCAD's certified values for the properties were not disputed. Bank included those values in its live pleading. Findings of fact are unnecessary when the matters in question are undisputed. *Barker v. Eckman*, 213 S.W.3d 306, 310 (Tex. 2006).

We have determined the trial court did not abuse its discretion by granting the motion to strike Bank's experts. Thus, conclusions of law (3), (4), and (5) are correct in that Bank failed to show the reliability of its experts' methods, conclusions, and opinions. Because the trial court correctly concluded the experts' opinions were unreliable, the conclusion they were also irrelevant is immaterial. Conclusion of law (6) is also correct because Bank offered no admissible evidence at trial to support its claim as to the market value of the properties.

We conclude Bank has failed to show reversible error in connection with the trial court's findings of fact and conclusions of law.

After the trial court signed its findings of fact and conclusions of law, Bank requested additional findings and conclusions. *See* TEX. R. CIV. P. 298. Rule 298 requires additional findings of fact and conclusions of law only if they relate to ultimate or controlling issues. *Rich*, 274 S.W.3d at 886.

Bank requested additional findings as to Naeter's methodology and conclusions and conclusions of law regarding the reasons Naeter's methodology and conclusions are unreliable. It also sought a finding and conclusion that Bach's opinions are unreliable because they are based solely on Naeter's work.

These requested additional findings of fact and conclusions of law are not material because Bank never attempted to call Naeter as a witness at trial and made no offer of proof as to his proposed testimony. Any findings as to him would not be material to the ultimate issue in the case. Additional findings and conclusions are not required if they are merely evidentiary or aimed at tying down the court's reasoning rather than its conclusions. *Stucky Diamonds*, 93 S.W.3d at 213–14 (holding trial Court did not err by refusing to make additional findings and conclusions that are merely evidentiary, nuances of facts already found, or otherwise unnecessary). We conclude the trial court did not err by refusing Bank's request for additional findings of fact and conclusions of law.

We overrule Bank's fourth issue.

Conclusion

We conclude the trial court did not abuse its discretion by granting the motion to strike Bank's expert witnesses. While the trial court should have allowed Bank to make its offer of proof in question-and-answer form, any error was harmless. Bank offered no other evidence in support of its claims at trial and the trial court did not err by granting CCAD's motion for judgment. We conclude the record supports the trial court's findings of fact and conclusions of law and that Bank was not entitled to the requested additional findings and conclusions. We overrule Bank's issues and affirm the trial court's judgment.

/Erin A. Nowell//
ERIN A. NOWELL
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

BANK OF TEXAS NA, Appellant	On Appeal from the 199th Judicial District Court, Collin County, Texas
No. 05-19-00568-CV V.	Trial Court Cause No. 199-03397-2016.
COLLIN CENTRAL APPRAISAL DISTRICT, Appellee	Opinion delivered by Justice Nowell. Justices Myers and Goldstein participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **AFFIRMED**.

It is **ORDERED** that appellee COLLIN CENTRAL APPRAISAL DISTRICT recover its costs of this appeal from appellant BANK OF TEXAS NA.

Judgment entered this 22nd day of June, 2021.