Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-15-00575-CV

B&P DEVELOPMENT, LLC and Chad H. Foster, Jr.,
Appellants

v.

KNIGHTHAWK, LLC, SERIES G,
Appellee

From the 83rd Judicial District Court, Val Verde County, Texas
Trial Court No. 29842
Honorable Stephen B. Ables, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Rebeca C. Martinez, Justice

Delivered and Filed: March 29, 2017

AFFIRMED

Appellants B&P Development, LLC and Chad H. Foster, Jr. appeal the trial court's judgment rendered in favor of Knighthawk, LLC, Series G. We affirm the judgment of the trial court.

BACKGROUND

This boundary dispute concerns two adjoining tracts of land located in Del Rio, Texas. One tract is owned by B&P and the other is owned by Knighthawk; both tracts were part of a larger unified tract until 1966. In 1966, a surveyor named David Trent completed a survey marking a

boundary line between the two tracts. Trent's boundary line is memorialized in a 1966 legal description of the B&P property and in a 1973 legal description of the Knighthawk property. The B&P property sits north of the boundary line and is located at the corner of Avenue I and Gibbs Street, which is also known as U.S. Highway 90. The Knighthawk property is located south of the boundary line at the corner of Avenue I and Converse Street. It is undisputed that the boundary line Trent drew stretches in a shallow "V" shape from Avenue I on the eastern side of both properties to a city alley on the western side of the Knighthawk property.

When Trent surveyed the land in 1966, no fence existed between the two tracts. B&P's predecessor in interest, H. Doak Neal, built a wood fence between the tracts in 1976. The fence did not stretch all the way across the southern end of the B&P property; instead, it went from east to west, with a slight dip to the south, before it met up with the southern wall of Neal's building. There was a second wood fence on the far western side of Neal's building, but there was no fencing directly behind the building. Neal's fence was approximately eight to ten inches wide.

In 1990, after Neal erected his building and fence, Trent returned to the B&P property to survey the land for Neal. Trent created a survey showing that Neal's fence sat 1.1 feet north of the boundary line and Neal's building sat 0.6 feet north of the boundary line. The field notes accompanying the 1990 survey refer to the existence of the fence and its location "in relation to the south line of said tract."

In 2007, Knighthawk purchased the southern portion of the property, which was then home to a six-family apartment complex and two separate mobile homes. Neal still owned the B&P property at that time, and the fence and building he had erected in 1976 were still in place just north of the boundary line. Knighthawk's predecessors in interest told Knighthawk that Neal's 1976 fence and building marked the northern boundary line of the tract. Knighthawk's director, A. Rodell Severson, therefore began personally maintaining the fence after Knighthawk purchased

the property. Nevertheless, Knighthawk decided to obtain its own survey of the property, and hired Abner Martinez to perform that work.

Martinez was unable to reconcile the legal descriptions on the 1966 parent deed for the B&P property and the 1973 parent deed for the Knighthawk property with each other to find the boundary line. Martinez found some overlap between the two legal descriptions and "couldn't make any of this fit." Martinez was unable to find any pins of record in the ground for either the Knighthawk property or the B&P property. Specifically, Martinez was unable to locate "a stake" in the northeastern corner of the Knighthawk property to mark the boundary with the B&P property as described in Trent's notes from the 1966 survey. However, using Trent's 1990 survey of the B&P property, Martinez knew that Neal's fence was roughly a foot from the boundary line, and that Neal's building was a mere 0.6 feet from the boundary line. After conducting an on-the-ground survey, Martinez observed that the fence was "eight to ten inches wide." Thus, Martinez placed a 5/8-inch pin a little behind the fence to mark the beginning point for his survey of the Knighthawk property.

In 2011, B&P was formed to build a Wing Stop and a Little Caesar's in Del Rio. B&P hired an architect to ensure the proposed building would fit on the site. B&P entered into a sales contract with Neal to purchase the lot north of the Knighthawk property. B&P closed on the property on June 28, 2011. In September 2011, B&P hired surveyor Charles Rothe. Rothe used a different origination pin than Trent and Martinez and placed the 1976 Neal fence 3.46 feet north of the boundary line. Rothe thus concluded that Knighthawk's existing buildings encroached on B&P's land. The survey was delivered to B&P on January 12, 2012.

In October 2011, B&P hired a contractor to remove the 1976 Neal fence and trees from Knighthawk's property. B&P, in need of more space to accommodate its building, constructed its building and the replacement fence on Knighthawk's property. It built its new fence on top of an

existing concrete patio on Knighthawk's property, depriving Knighthawk's tenants of use of the patio, and removed shade trees from Knighthawk's property. The utilities in one mobile home stopped working after B&P used heavy machinery on the site, and Knighthawk was unable to repair the broken utility lines without digging up B&P's fence and the concrete pad on which its building sits. As a result, the mobile home closest to the fence no longer has working water, gas, or sewer lines, and is unsuitable for tenants.

Knighthawk sued B&P for trespass. The case was tried to a jury. After seven days of evidence, the jury found that Martinez's survey depicted the boundary line more accurately than Rothe's survey did and that B&P trespassed on Knighthawk's property. The trial court awarded Knighthawk $120,000 in past damages, $130,000 in future damages, and reasonable and necessary attorneys' fees. Although the jury's verdict confirmed Knighthawk's ownership of the disputed property, the trial court's judgment allows B&P to continue using the land.[1] B&P filed several post-trial motions before filing its notice of appeal.

On appeal, B&P argues the trial court erred in admitting Martinez's testimony into evidence and in asking the jury to determine which of the two surveys was more accurate.[2] In addition, B&P contends the trial court adopted an improper measure of damages.

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[1] In its judgment, the trial court provided that:

> [A]ny current encroachments on the Knighthawk Property as constructed by B&P are permissive encroachments and shall remain in place until such time as they are removed or the parties-in-interest thereto agree otherwise, and any subsequent owners of the Knighthawk tract shall take title in that tract subject to the same.

[2] Question No. 1 asked the jury:

> Following all applicable laws and rules of construction, which of the following two surveys more accurately shows the location of the Boundary Line?
>
> "Boundary Line" refers to the boundary line between the Knighthawk Property and the B&P Development Property as described in the 1966 David Trent Survey.

RELIABILITY OF MARTINEZ'S SURVEY AND TESTIMONY

In its first issue, B&P argues the trial court erred in permitting the jury to determine which survey was more accurate because Martinez's survey was based upon flawed methodology and was unreliable. In its second issue, B&P contends the trial court incorrectly permitted Martinez to testify because his testimony was unreliable as a matter of law. Because both issues concern the reliability of Martinez's testimony, we jointly address the two issues.

Standard of Review

"We review a trial court's rulings on the admissibility of evidence for an abuse of discretion, including rulings on the reliability of expert testimony." *Gharda USA, Inc. v. Control Sols., Inc.*, 464 S.W.3d 338, 347 (Tex. 2015) (citing *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009); *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727 (Tex. 1998)). "Admission of expert testimony that does not meet the reliability requirement is an abuse of discretion." *Gharda*, 464 S.W.3d at 347 (citation omitted).

"Qualified experts may offer opinion testimony if that testimony is both relevant and based on a reliable foundation." *Id.* at 348. "Expert opinion testimony is relevant when it is 'sufficiently tied to the facts of the case [so] that it will aid the jury in resolving a factual dispute.'" *Id.* (quoting *E.I. du Pont de Nemours & Co., Inc. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995)). "Courts generally determine the reliability of an expert's chosen methodology by applying the *Robinson* factors."[3] *Gharda*, 464 S.W.3d at 348. While the six *Robinson* factors may be considered in

[3] The *Robinson* factors include, but are not limited to:

> (1) the extent to which the theory has been or can be tested;
> (2) the extent to which the technique relies upon the subjective interpretation of the expert;
> (3) whether the theory has been subjected to peer review and/or publication;
> (4) the technique's potential rate of error;
> (5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community; and
> (6) the non-judicial uses which have been made of the theory or technique.

determining whether an expert's methodology is reliable, the factors will differ in each particular case. *Robinson*, 923 S.W.2d at 557. "Reliable expert testimony must be based on a probability standard, rather than on mere possibility. Expert testimony is unreliable 'if there is too great an analytical gap between the data on which the expert relies and the opinion offered.'" *Gharda*, 464 S.W.3d at 349 (citations omitted). "The court's ultimate task, however, is not to determine whether the expert's conclusions are correct, but rather whether the analysis the expert used to reach those conclusions is reliable and therefore admissible." *TXI Transp. Co. v. Hughes*, 306 S.W.3d 230, 239 (Tex. 2010).

Applicable Law

The question of where boundaries are on the ground is a question of fact to be determined from the evidence. *Silver Oil & Gas, Inc. v. EOG Res., Inc.*, 246 S.W.3d 197, 202-03 (Tex. App.—San Antonio 2007, no pet.). This is equally true where the dispute involves two competing surveys, each purportedly showing the same line in different locations. *Id.* at 203. "When finding the lines of a survey, the cardinal rule is that the footsteps of the original surveyor, if they can be ascertained, should be followed." *Id. at* 204. "If the actual lines and corners run by the original surveyor can be found, they are controlling, even if they are inconsistent with the calls and references in that surveyor's field notes." *Id.* "When one can locate on the ground with certainty and without inconsistency the objects or monuments designated by the original surveyor as marking the lines he actually traced, the survey must be laid out from those points." *Id.* "However, if the location of the actual footsteps of the surveyor cannot be established with reasonable certainty, all the surrounding facts and circumstances should be considered in order to arrive at the purpose and intent of the surveyor who made the original survey." *Id.* "When trying to re-establish a boundary,

Robinson, 923 S.W.2d at 557.

the law of legal preferences gives dignity to calls in the following order: (1) natural objects; (2) artificial objects; (3) course; and (4) distance." *Id.*

Analysis

B&P contends that Martinez failed to follow Trent's beginning point and instead erroneously relied on the 1976 Neal fence in plotting the boundary line, thus rendering his survey and his testimony unreliable as a matter of law. At the outset, we note that B&P does not challenge Martinez's expert qualifications. At the time of trial, Martinez was the county surveyor for Val Verde County and had served in that capacity for eight years. He has been a licensed surveyor since 1992 and has performed thousands of surveys over his career. He is familiar with the Del Rio area and very familiar with the original surveyor, Trent. Martinez helped Trent with surveys in the past and bought Trent's former office space and most of his files after Trent passed away.

Martinez testified that he, like Rothe, used the applicable surveying principles promulgated by the Texas Board of Professional Land Surveying and contained in the Texas Administrative Code. *See* 22 TEX. ADMIN. CODE § 663.16 (Boundary Construction). Martinez testified that in preparing his survey of the Knighthawk property, he began by examining the record title and survey history of the Knighthawk property, including the legal description from Trent's 1966 survey. Martinez testified that he could not find any of the 1966 pins of record on the ground for the Knighthawk property or the B&P property. Under those circumstances, Martinez was required to locate the lines and corners by course and distance from the nearest recognized and established corner or artificial object with which the field notes are connected. *See Silver Oil & Gas*, 246 S.W.3d at 204. When Martinez surveyed the Knighthawk property, the nearest recognized and established corner or artificial object with which the field notes are connected that he could find was the 1976 Neal fence, which Trent, the original surveyor, marked on his 1990 survey of the B&P property. Martinez thus followed the right-of-way of Avenue I and the adjoiner points he

found across from Avenue I. He then set his 5/8-inch pin marking the boundary line based in part on Trent's 1990 notation that the boundary line was located 1.1 feet from Neal's 1976 fence.

Although B&P criticizes Martinez's use of the fence in plotting the boundary line, its own expert, Rothe, admitted that a surveyor may look at a fence to determine where boundaries are when there is nothing else to use. In fact, Rothe himself relied on a fence post in creating his survey; he testified that his Point Number 16 was a fence corner located on the Knighthawk tract. Although the original surveyor's marks and calls are generally controlling, when the surveyor's marks have disappeared over time, the lines and corners of the survey may be established using any evidence tending to show their location that is "the best evidence of which the case is susceptible." *TH Investments, Inc. v. Kirby Inland Marine, L.P.*, 218 S.W.3d 173, 204–05 (Tex. App.—Houston [14th Dist.] 2007, pet. denied). Martinez testified that Trent's 1990 survey showing the fence was the best proof to locate the common property line between the two tracts. The fence was directly connected to the original 1966 surveyor, Trent. Trent's 1990 survey and field notes includes the Neal fence. Martinez's testimony shows that he used Trent's 1990 survey and field notes, in combination with his own research and observations of the Knighthawk tract and adjoining properties, to decide where to place his 5/8-inch pin marking the northeastern corner of the Knighthawk tract.

Martinez's testimony was neither conclusory nor subjective. He explained why he chose to begin his survey with the "5/8-th iron rod set on the southwest line on Avenue I." He also explained why there was a discrepancy between his survey and Trent's 1996 measurements. He testified that based on his personal knowledge of Del Rio over the last twenty years, Gibbs Street has increased in width. Thus, his observations, measurements, and calculations were tied to the physical evidence in the case, which likewise provided support for his conclusions and theory. Martinez's expert testimony therefore meets the standard for reliability, and we cannot conclude

that the trial court abused its discretion by admitting his survey and testimony. *See Caffe Ribs, Inc. v. State*, 487 S.W.3d 137, 144 (Tex. 2016) ("An expert's opinion is only unreliable if it is contrary to actual, undisputed facts."); *TXI Transp. Co.*, 306 S.W.3d at 239-40. We thus overrule B&P's first and second issues.

MEASURE OF DAMAGES

In its third and final issue, B&P argues the trial court submitted an improper measure of damages to the jury because the proper measure of damages for its encroachment is permanent damage to land or the reduction in market value immediately before and immediately after the encroachment. *See Marin Real Estate Partners, L.P. v. Vogt*, 373 S.W.3d 57, 81 (Tex. App.—San Antonio 2011, no pet.) ("case law holds that diminution in value is the proper measure of damages for permanent injury to land").

Rule 278 of the rules of civil procedure requires a court to submit questions, instructions, and definitions to the jury that are raised by the written pleadings and the evidence and necessary to enable the jury to render a verdict. TEX. R. CIV. P. 278. We review the trial court's submission of a particular instruction for an abuse of discretion. *Thota v. Young*, 366 S.W.3d 678, 687 (Tex. 2012); *In re V.L.K.*, 24 S.W.3d 338, 341 (Tex. 2000). In order to fairly submit the issue of damages, a question must enable a jury to determine the amount of damages on appropriate grounds and correct legal principles. *Jackson v. Fontaine's Clinics, Inc.*, 499 S.W.2d 87, 90 (Tex. 1973); *Toles v. Toles*, 45 S.W.3d 252, 263-64 (Tex. App.—Dallas 2001, pet. denied). To determine whether an alleged error in the jury charge is reversible, we must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety to determine if the trial court abused its discretion. *Island Rec. Dev. Corp. v. Republic of Tex. Sav. Ass'n*, 710 S.W.2d 551, 555 (Tex. 1986); *Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712, 722 (Tex. App.—Dallas 1997, no writ). We will not reverse a judgment for a charge error unless that error

was harmful because it "probably caused the rendition of an improper judgment" or "probably prevented the petitioner from properly presenting the case to the appellate courts." TEX. R. APP. P. 44.1(a).

In Question No. 2, the jury was asked:

> What sum of money, if any, if paid now in cash, would fairly and reasonably compensate Plaintiff for Defendants' use and occupancy, if any, of the Knighthawk property?

The jury answered $120,000 for past damages and $280,000 for future damages. The trial court reduced the amount of future damages to $130,000. Question No. 5 asked the jury "What amount of money, if paid now in cash, would fairly and reasonably compensate Plaintiff for its injury or injuries, if any, proximately caused by Defendants' trespass?" The jury answered "$0."

Knighthawk counters that B&P has waived its complaint on appeal by failing to submit a correctly worded instruction on the proper measure of damages and by failing to specifically and timely object to the measure of damages the trial court submitted. Rule 278 provides that "[f]ailure to submit a definition or instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or instruction has been requested in writing and tendered by the party complaining of the judgment." *See* TEX. R. CIV. P. 278. Rule 274 requires that "[a] party objecting to a jury charge must point out distinctly the objectionable matter and the grounds of the objection." *See* TEX. R. CIV. P. 274.

Knighthawk counters that B&P failed to plainly argue that the jury should only consider a permanent measure of damages and also failed to submit a "substantially correct" instruction on permanent damages. We agree. B&P filed written objections to Question No. 2, but none of the objections indicated to the trial court that the encroachment injury was permanent. *See id.*; *State Dep't of Highways & Pub. Transp. v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) (to preserve error in jury charge, party must make trial court aware of the complaint, timely and plainly, and obtain

a ruling); *contra Enbridge Pipelines (E. Tex.), L.P. v. Gilbert Wheeler, Inc.*, 393 S.W.3d 921, 924 (Tex. App.—Tyler 2013), *rev'd*, 449 S.W.3d 474 (Tex. 2014) (holding defendant preserved error for appeal on whether trial court was required to instruct jury to determine whether property owner's damages were temporary or permanent where pipeline company made a specific argument that jury was required to be instructed to determine whether owner's damages were permanent or temporary, and trial court declined to give the requested instruction). Further, B&P failed to tender a substantially correct definition or instruction in relation to Question No. 2. *See* TEX. R. CIV. P. 278; *Jim Howe Homes, Inc. v. Rogers*, 818 S.W.2d 901, 903 (Tex. App.—Austin 1991, no writ) (when court fails to include in charge a limiting instruction on damages, complaining party must object to charge *and* tender written instruction in substantially correct wording on proper measure of damages). Because B&P did not specifically make the trial court aware of the objection it now brings on appeal, we hold it has waived the objection.[4] *See* TEX. R. APP. P. 33.1. Accordingly, we overrule B&P's third issue.

CONCLUSION

Having overruled B&P's issues on appeal, we affirm the judgment of the trial court.

Rebeca C. Martinez, Justice

[4] We likewise hold that B&P has waived any complaint that the future damages must be reduced to present value because such argument was not raised below. *See* TEX. R. APP. P. 33.1.