COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00144-CV

THE STATE OF TEXAS	APPELLANT
V.	
SPEEDWAY GRAPEVINE I, LLC, A TEXAS LIMITED LIABILITY COMPANY, AND FIRST COMMERCIAL BANK, N.A.	APPELLEES

FROM COUNTY COURT AT LAW NO. 1 OF TARRANT COUNTY
TRIAL COURT NO. 2014-000122-1

OPINION

I. INTRODUCTION

Appellant The State of Texas appeals from a judgment rendered on a jury verdict in this cause to statutorily condemn a strip of land owned by Appellee

Speedway Grapevine I, LLC, a Texas Limited Liability Company.[1] In addition to challenging the jury's finding of damages to the remainder property, the State contests the trial court's rulings admitting the valuation opinion of the property owner's representative and the damage opinions of the property owner's appraisal expert. Because the evidence is legally and factually sufficient to support the jury's finding, and because the trial court acted within its discretion by admitting the challenged testimony, we will affirm.

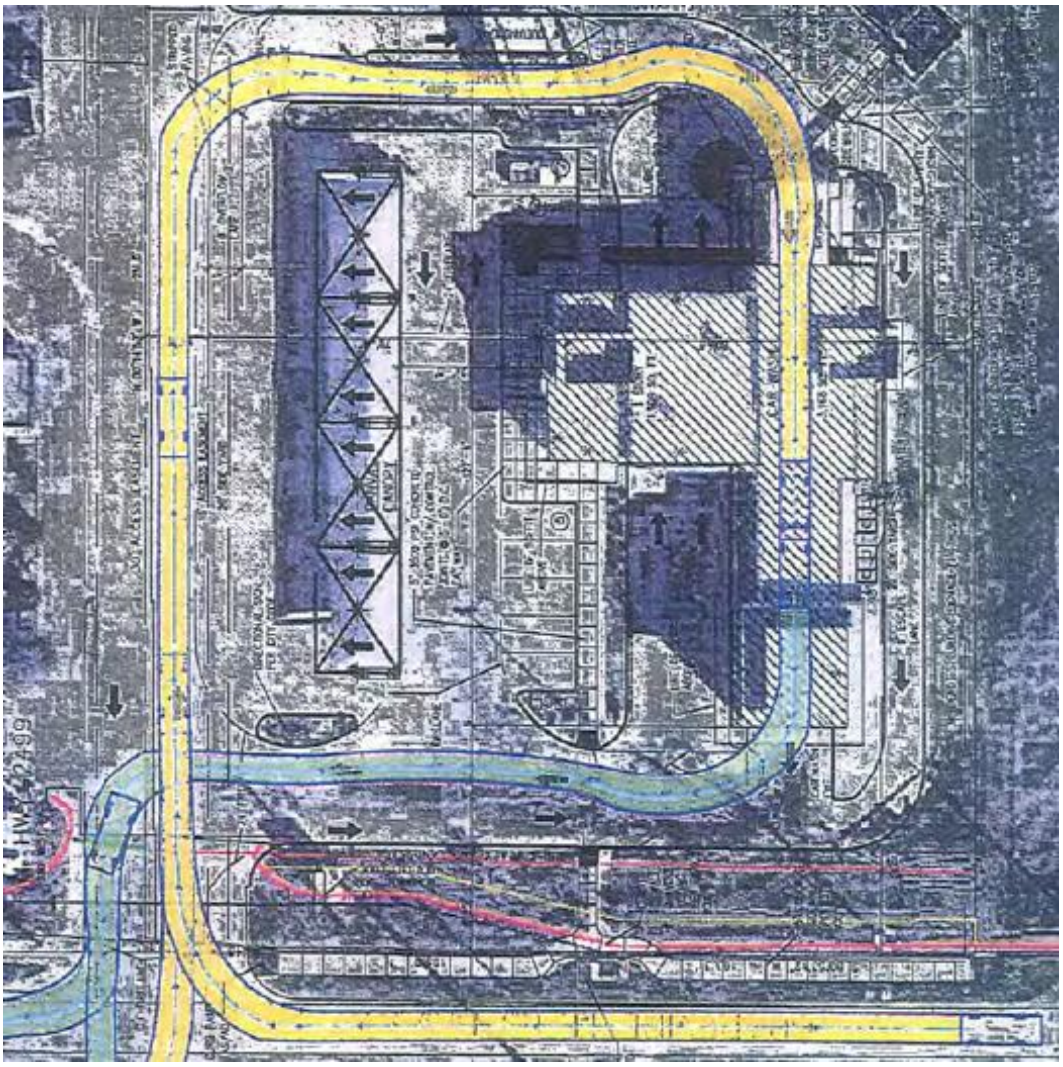
II. BACKGROUND

A. Speedway's Property

Speedway owned a 1.123-acre tract (measuring 48,916 square feet) located on the north side of Grapevine Mills Boulevard, just east of FM 2499 in Grapevine. The property is improved with a tunnel-style car wash and an express lube. The west side of the property contains a row of five vacuum islands covered by a canopy (positioned north to south) and an access driveway that Speedway shares with a fast-food restaurant next door. As the following image demonstrates, to access the car wash, a vehicle heads north along the shared-access driveway, then east along the north side of the property, then

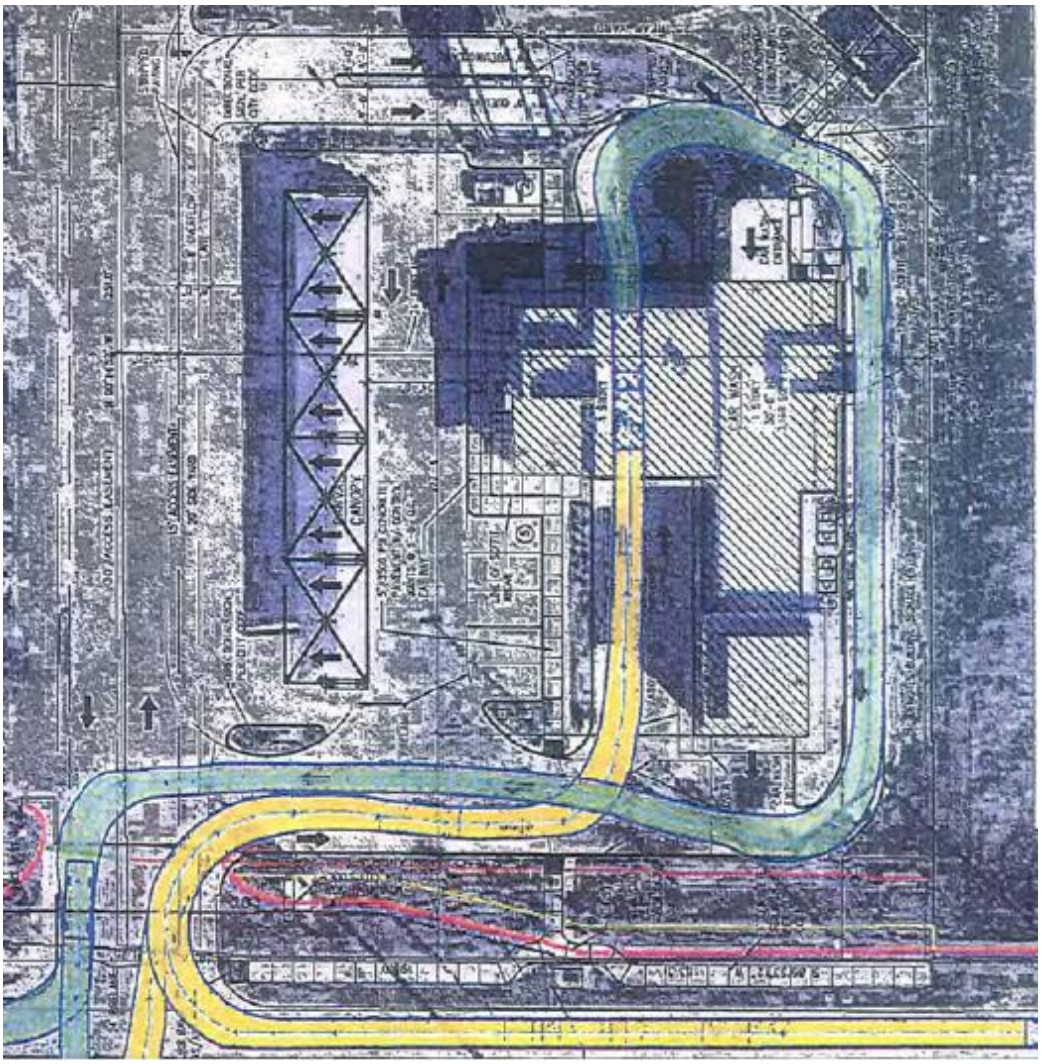
[1]Appellee First Commercial Bank, Speedway's mortgagee, provided a notice disclaiming any interest in this proceeding, including any award of damages.

south through the car wash, and then west along a two-way driveway after exiting the car wash:



To access the express lube, alternatively, the following image shows that a vehicle immediately turns right onto the two-way driveway heading east, then north into the lube center, then south after exiting the express lube either through

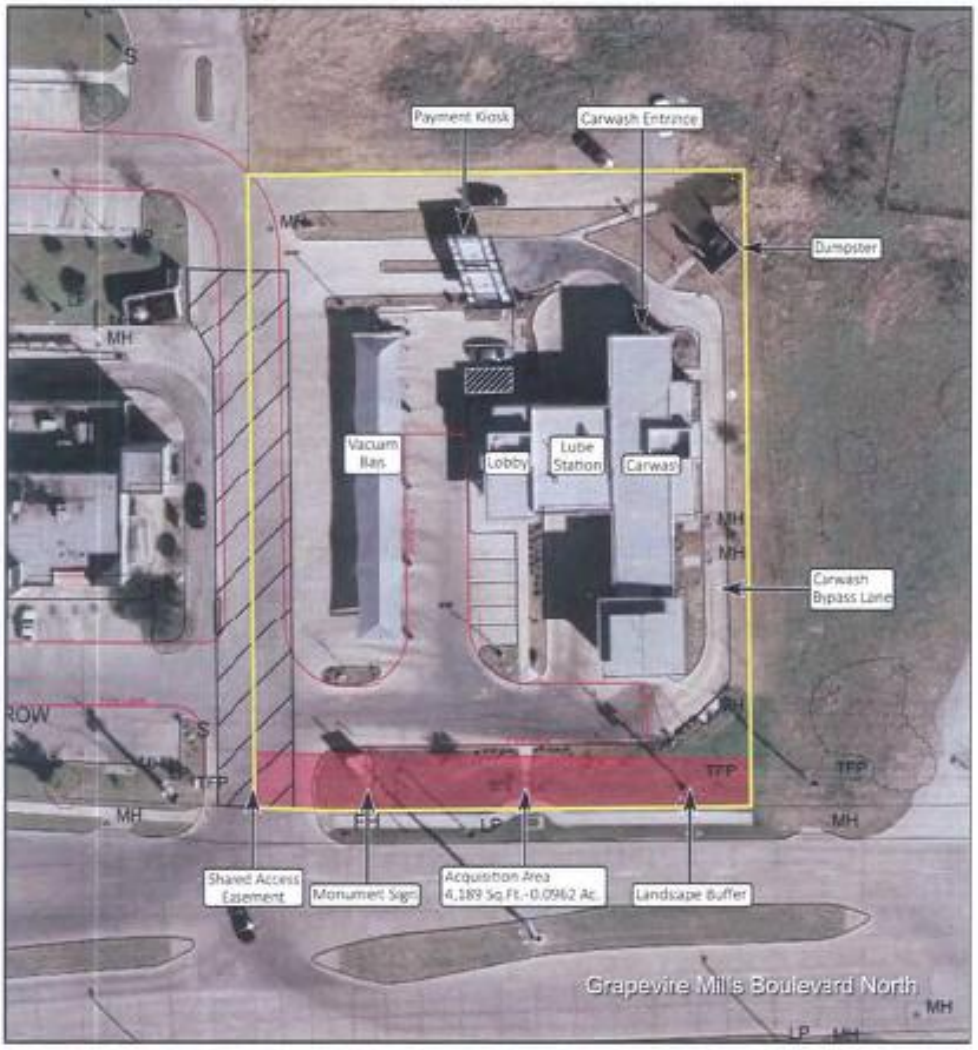
the car wash or around it via an escape lane, and then west along the same two-way driveway used to access the lube station from the opposite direction:



Speedway's property complied with the City of Grapevine's zoning regulations, including a twenty-five foot landscaping buffer zone at the front of the property and a fifty-foot building setback line.

B. The Condemnation

In connection with an improvement project on FM 2499, and in order to widen Grapevine Mills Boulevard, the State sought to acquire a twenty-foot wide strip of land (measuring 4,189 square feet) along the front of Speedway's property. The following image depicts Speedway's property (outlined in yellow) and the part that the State sought to acquire (highlighted in red):



Unable to reach an agreement with Speedway on the value of the part to be acquired, in January 2014, the State filed a petition to condemn the strip of land. The trial court then appointed special commissioners, who awarded damages in the amount of $954,285.00. The State filed an objection to the special commissioners' award, deposited the funds into the registry of the court, took possession of the property, and proceeded with its construction plans. Speedway withdrew the funds several months later.

C. Motions to Exclude Testimony

Both sides filed pretrial motions to exclude certain testimony. Regarding Grant Wall, the State's appraisal expert, Speedway sought to exclude his opinion testimony about the sales-comparison approach that he performed because he did not include the value of Speedway's equipment when appraising the market value of Speedway's property. The trial court agreed and excluded Wall's sales-comparison approach but not his cost approach.

Andrew McRoberts was Speedway's appraisal expert. The State argued that he had speculatively opined about how the City of Grapevine would treat Speedway's post-condemnation nonconforming property, that Texas law did not recognize his income approach, and that he had improperly relied upon noncompensable impairment of access in forming his opinions. The trial court

excluded McRoberts's income approach but not his cost approach. It also confirmed that McRoberts could testify about several post-condemnation issues affecting Speedway's property, including internal circulation difficulties, unsafe access, and nonconformance with zoning regulations. Speedway, for its part, stipulated that it would not elicit testimony about increased circuity, elimination of a median cut turn lane, or denial or impairment of access.

The State additionally sought to exclude the valuation opinion of Gerald "Skipper" High, Speedway's representative. It argued that he lacked relevant underlying data about two purported comparable sales that he had relied upon to value Speedway's property. The trial court denied the State's motion.

D. Trial

1. Speedway's Witnesses

a. John DeShazo

Speedway hired John DeShazo, a traffic engineer, to assess the impact of the State's condemnation on vehicles entering and exiting the car wash and express lube. He identified two post-condemnation issues that, in his opinion, affected the safety of the drivers on the property. The first involved a reduction in the shared-access driveway's throat depth—the area between the curb line and the first cross drive. Before the condemnation, the throat depth measured thirty-

seven feet; after the condemnation, it measures thirteen feet. According to DeShazo, the reduction means that when a car turns left from the two-way driveway located along the southern side of the property onto the shared-access driveway, insufficient space exists for the vehicle to position itself perpendicular to Grapevine Mills Boulevard, causing the angled vehicle attempting to exit the property to block vehicles attempting to enter.

The other post-condemnation safety issue that DeShazo identified concerned vehicles that utilize the two-way driveway on the southern part of the property. He explained that before the taking, when a vehicle heading to the express lube turned right onto the two-way driveway, sufficient space existed for each vehicle to remain on its side of the driveway. However, after the condemnation, when a vehicle turns right onto the two-way driveway, it will necessarily sweep over into the outbound side's lane.

b. Robert Baldwin

Robert Baldwin, an urban planning and zoning consultant, testified that Speedway's property complied with the City of Grapevine's zoning regulations before the condemnation but that afterwards, it neither meets the requirement for a twenty-five foot landscaping buffer zone nor contains the required minimum percentage of open space; the condemnation, in his words, caused a "tumbling

effect and move[d] everything north." Baldwin also opined that an exemption for property that becomes nonconforming as a result of a government's right-of-way acquisition would not apply to Speedway's property. Ultimately, Baldwin thought that Speedway had four options: (1) seek a variance from the City of Grapevine's Board of Adjustment, (2) seek to amend the site plan attached to Speedway's conditional-use permit, (3) reconfigure the site by removing part of the car wash building, or (4) do something completely different with the property.

c. High

High, Speedway's representative, testified about his experience in the car wash industry, the reasons why Speedway located the car wash where it did, the market value of the whole property, problems with a cure plan devised for the State, and the viability of the car wash after the condemnation. High opined that the market value of Speedway's property before the State's condemnation was "[j]ust over [$]5.4 million." He based his opinion, in part, on two car wash sales that occurred six and nine months after the State acquired Speedway's property—one that sold for $4.9 million and the other that sold for $5.25 million.

High opined that Speedway's property was no longer viable as a car wash because the condemnation had altered the site's ability to function as such.[2]

d. McRoberts

McRoberts, Speedway's appraisal expert, utilized the cost approach to value Speedway's property. Relying on four land sales, and after making adjustments, he valued the land at $24.75 per square foot for a pre-condemnation value of $1,200,000.00 (rounded). For the improvements to the property, including the car wash and express lube buildings, he calculated a depreciated value of $2,008,070.00. Those figures taken together, and rounded, McRoberts opined that before the condemnation, Speedway's entire property had a market value of $3,200,000.00.

For the value of the part condemned, McRoberts again valued the land at $24.75 per square foot, for a value of $103,678.00. For the value of the site improvements within the part condemned, McRoberts calculated a depreciated value of $35,724.00. McRoberts thus opined that the condemned part had a total value of $139,402.00. Considering his calculations for the value of the entire

[2]High did not offer any other opinions about the value of Speedway's property, including the value of the part condemned, the value of the remainder property after condemnation, or the amount of any damages sustained by the remainder property.

property before the condemnation ($3,200,000.00) and the value of the part condemned ($139,402.00), McRoberts opined that before the condemnation, the remainder property had a market value of $3,060,598.00.

In calculating the value of the remainder property after the condemnation, McRoberts opined that the property's functionality had been affected to such an extent that it had experienced a change in its highest and best use from a car wash to something else, like a small veterinary clinic or an office. McRoberts concluded, therefore, that the land had a reduced value of $14.00 per square foot, for a value of $626,178.00 (44,727 square feet); that the building and site improvements had no value, except for $15,000.00 in salvage value; and that after the condemnation, the remainder property had a market value of $641,178.00. Considering his calculations for the value of the remainder property before the condemnation ($3,060,598.00) and the value of the remainder property after the condemnation ($641,178.00), McRoberts opined that Speedway's remainder property had sustained damages in the amount of $2,419,420.00. McRoberts then added $190,000.00 to that figure for the cost to demolish the improvements, for a total damage opinion of $2,609,420.00. Adding the value of the part condemned to that figure, McRoberts opined that Speedway was entitled to compensation in the total amount of $2,748,822.00.

2. The State's Witnesses

a. Ronan O'Connor and Stan Himes

Ronan O'Connor, a land planner, evaluated Speedway's property both before and after the condemnation and devised a conceptual plan to address some of the internal circulation and nonconformance issues caused by the condemnation.[3] His cure plan proposed moving the western portion of the two-way driveway north by eliminating the southern-most vacuum island, shifting a nearby landscape island north, and adding a "bubble"-shaped area of landscaping to the southwest part of the property. According to O'Connor, the plan would restore the function of the throat depth and eliminate the conflict between vehicles entering and exiting the two-way driveway. He admitted, however, that the cure plan would not alleviate the property's post-condemnation failure to comply with the twenty-five foot landscaping buffer-zone requirement and the fifty-foot building setback-line requirement, but he figured that the exemption for properties that become nonconforming as a result of a

[3]O'Connor acknowledged that after the condemnation, when a vehicle turns right onto the two-way driveway heading east for the express lube, it will "run into," or come "nose to nose," with a vehicle attempting to exit the two-way driveway onto the shared-access driveway.

government's right-of-way acquisition would apply to Speedway's property. Stan Himes estimated the hard costs of O'Connor's cure plan to be $131,421.00.

b. Ron Stombaugh

Ron Stombaugh, Assistant Director of Development Services for the City of Grapevine, testified that a landowner whose property failed to comply with the City of Grapevine's landscaping buffer-zone requirement or building setback-line requirement could seek either a variance or to amend its conditional-use permit but that Speedway had done neither.[4] Stombaugh had several conversations with High about Speedway's property, but he never told High that he could not request a variance or attempt to amend Speedway's conditional-use permit. As for Speedway's post-condemnation property nonconformities, like O'Connor, Stombaugh opined that the property would be "grandfathered" under the exemption for properties that become nonconforming as a result of a government's right-of-way acquisition.

c. Wall

Using the cost approach to value Speedway's property, Wall, the State's appraisal expert, valued the land at $22.00 per square foot for a pre-

[4]In fact, Stombaugh recounted that several years ago, the City of Grapevine had approved changes to a different car wash that had been affected by a road-widening project.

condemnation value of $1,076,152.00. Wall valued the buildings at $897,325.00 and the site improvements at $548,326.00, for a combined depreciated value of $1,445,651.00. Those figures taken together, Wall opined that before the condemnation, Speedway's entire property had a market value of $2,521,803.00.

For the value of the part condemned, Wall again valued the land at $22.00 per square foot, for a value of $92,158.00. For the value of the site improvements within the part condemned, Wall calculated a depreciated value of $67,631.00. Wall thus opined that the condemned part had a total value of $159,789.00. Considering his calculations for the value of the entire property before the condemnation ($2,521,803.00) and the value of the part condemned ($159,789.00), Wall opined that before the condemnation, the remainder property had a market value of $2,362,014.00.

In calculating the value of the remainder property after the condemnation, Wall concluded that O'Connor's cure plan would resolve the post-condemnation internal circulation issues affecting the property, that removing a single vacuum island would not adversely affect the property's value, and that the property would be entitled to an exemption insofar as it was nonconforming. Wall therefore opined that the value of the remainder property had not changed after the condemnation—he valued the land at $22.00 per square foot for a value of

$983,994.00 (44,727 square feet) and the depreciated buildings and site improvements at $1,378,020.00 ($897,325.00 plus $548,326.00 less $67,631.00) for a total remainder value of $2,362,014.00. Considering his calculations for the value of the remainder property before the condemnation ($2,362,014.00) and the value of the remainder property after the condemnation ($2,362,014.00), Wall opined that Speedway's remainder property had sustained damages in the amount of $0, excluding a total cost to cure of $105,826.00.[5] Considering that figure and the value of the part condemned ($159,789.00), Wall opined that Speedway was entitled to total compensation in the amount of $265,615.00.

3. Verdict and Judgment

The jury found that the part condemned had a market value of $92,190.00 and that Speedway's remainder property had sustained damages in the amount of $4,401,028.00. Considering those findings, and the State's entitlement to a credit for the amount that it had deposited into the registry of the court ($954,285.00.), the trial court signed a final judgment in favor of Speedway for $3,538,933.00, plus prejudgment interest. The trial court denied the State's motion for new trial.

[5]High thought Wall's remainder-damages opinion was "ludicrous."

III. ADMISSIBILITY OF HIGH'S VALUATION OPINION

In its first issue, the State argues that the trial court erred by admitting High's opinion that the market value of Speedway's property before the State's condemnation was "[j]ust over [$]5.4 million." The State acknowledges that a property owner may testify to the value of his property, as High did here, but it stresses that the owner's valuation testimony must still meet the same requirements as any other opinion evidence and provide a valid factual basis to support the opinion. The State contends that the trial court should have excluded High's valuation opinion as irrelevant and unreliable, and also conclusory and speculative, because he based his opinion on two "allegedly comparable" sales—the $5.25 million sale of the Parkway Auto Spa in McKinney and the $4.9 million sale of the Auto Splash Car Wash in Frisco—but failed to provide a valid factual basis to show (1) that the sales were similar to Speedway's property and (2) that he had made adjustments to the sales to account for differences between those properties and Speedway's.[6]

[6]The State references some of High's pre-trial admissions, but it largely relies on his trial testimony. We will also consider High's trial testimony. *See, e.g.*, *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 629–31 (Tex. 2002) (considering expert's trial testimony in determining whether trial court erred by admitting expert's opinion).

Speedway responds the trial court acted within its broad discretion by admitting High's $5.4 million valuation opinion. It argues that High had no obligation to offer evidence of comparable sales and that by offering evidence of other, unchallenged bases to support his opinion, he met his light burden under the Property Owner Rule to provide a sufficient foundation for his opinion. Alternatively, Speedway argues that High's testimony nevertheless satisfied the standards for comparable sales.

A. Expert Appraisal Testimony and the Property Owner Rule

When, as here, a condemnor takes only a portion of a landowner's property, the landowner is entitled to compensation in the amount of the market value of the part taken, plus the damage to the remainder caused by the condemnation, if any. *Zwahr*, 88 S.W.3d at 627. "Under a comparable sales analysis, the appraiser finds data for sales of similar property, then makes upward or downward adjustments to these sales prices based on differences in the subject property." *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001).

Ordinarily, market value is established through expert testimony. *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 851–52 (Tex. 2011). Like expert testimony on any other matter, an expert appraisal

witness in a condemnation action must not only be qualified, but his testimony must be relevant and based upon a reliable foundation. *Guadalupe-Blanco River Auth. v. Kraft*, 77 S.W.3d 805, 807 (Tex. 2002); *see E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995). Expert testimony is relevant when it is "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Robinson*, 923 S.W.2d at 556 (quoting *United States v. Downing*, 753 F.2d 1224, 1242 (3d Cir. 1985)). In assessing reliability, a court examines the principles, research, and methodology underlying the expert's conclusions. *Zwahr*, 88 S.W.3d at 629; *see Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 727–28 (Tex. 1998) (reasoning that expert testimony is also unreliable if there is too great an analytical gap between the data relied upon and the opinion). Once an opposing party objects to proffered expert testimony, the proponent of the witness's testimony bears the burden to demonstrate its admissibility. *Kraft*, 77 S.W.3d at 807.

The Property Owner Rule "is an exception to the requirement that a witness must otherwise establish his qualifications to express an opinion on land values." *Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 157 (Tex. 2012). Based on the presumptions that an owner is familiar with his property and will know its value, the Rule accepts that a property owner is qualified to testify

about the value of his property, even if he is not an expert. *Reid Rd. Mun. Util. Dist. No. 2*, 337 S.W.3d at 852–53. Thus, "[u]nder the Rule, an owner's valuation testimony fulfills the same role that expert testimony does." *Justiss*, 397 S.W.3d at 157.

But while a property owner is *qualified* to offer a valuation opinion, the testimony must nevertheless meet the "same requirements as any other opinion evidence." *Id.* at 156 (quoting *Porras v. Craig*, 675 S.W.2d 503, 504 (Tex. 1984)). The property owner "must provide the factual basis on which his opinion rests." *Id.* at 159. Bare conclusions and speculative testimony are not probative evidence in any context, including when an owner offers an opinion about the market value of his property. *See id.* ("An owner may not simply echo the phrase 'market value' and state a number to substantiate his diminished value claim."); *see also Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232 (Tex. 2004). The property owner's burden "is not onerous." *Justiss*, 397 S.W.3d at 159. "Evidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other relevant factors may be offered to support the claim." *Id.*; *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 669 (Tex. 1996) ("[E]vidence is probative if it is based on the owner's estimate of market value and not some intrinsic or other value such as replacement cost."). The trial court

has broad discretion to admit or exclude evidence, and we will reverse only if it abuses that discretion. *Zwahr*, 88 S.W.3d at 629.

B. High's Testimony, Considered in Its Entirety, Established a Valid Factual Basis for His Valuation Opinion

The State dissects High's testimony about the $5.25 million and $4.9 million comparable sales that he relied upon in forming his valuation opinion, as if it was the only source of evidence to support his opinion. But Speedway's attorney did not simply call High to the stand, elicit testimony about only the value of Speedway's property and the two comparable sales, and then pass High for cross-examination. High's testimony covered a range of topics that, taken together, provided some probative evidence to factually support his valuation opinion.

The first thing that is immediately apparent from High's testimony is his great level of experience in, and knowledge about, the car wash industry. High first became involved in the industry at the young age of thirteen. Still active in the business forty years later, he operates eight car washes located in multiple cities around the Metroplex and employs about 180 employees. When Speedway's attorney questioned High about the numerous car wash properties that Wall had examined to conclude that eliminating one of Speedway's vacuum islands would not adversely affect the value of Speedway's property, High

demonstrated familiarity with each of the other properties—he explained, "I've been in the business a long time. I'm very familiar with most car wash sites"—and even knew one of the owners on a first-name basis. *See Banker v. Banker*, 517 S.W.3d 863, 872–73 (Tex. App.—Corpus Christi 2017, pet. denied) (considering husband's "personal knowledge from a decade of ownership and a lifetime of experience and education in the livestock auction market" in concluding that husband met burden to invoke property owner rule).

Regarding Speedway's property, High testified that he chose the location for the car wash because it was "highly visible" to nearby FM 2499, there were no "developed car washes" in the area, and there was "good population, good demographics" in the area. High explained that in designing the property, they tried to optimize the site so that the car wash and express lube would work in harmony with one another. As for the quality of the buildings, he testified that "we wanted to build something that was complimentary to the neighborhood, high-grade construction material that would endure a long economic life." High implemented the same approach for the car wash's equipment, electing to use high quality, long lasting Hanna equipment and to implement an "environmentally friendly" "dual reclaim system" that is "a step above" the single-reclaim system

used by "a lot of" other car washes. High stated that he had invested approximately $3.3 million in the property.

And of course, High confirmed that he had relied on the $5.25 million and $4.9 million comparable car wash sales to inform his valuation opinion. The State complains that he did not show that the properties were appropriately comparable—he did not know the costs of construction, one property was "significantly larger" than Speedway's, and he did not "sit down at the computer and . . . review sales in the past three years or so" "like an appraiser"—but High did testify about (i) the size of the properties, (ii) the services they offered, (iii) the number of vacuum pumps they had, (iv) the type of equipment they used, and (v) when they were sold, and he confirmed that he had "used [Wall's] methodology for . . . [making his] adjustments." This is evidence of market value.

High did not pull his valuation opinion out of thin air, or otherwise support the opinion on *ipse dixit* testimony. The trial court could have reasonably concluded that in light of all of the above, High met his burden to establish a valid factual basis to support his opinion that the market value of Speedway's property

before the condemnation was "[j]ust over [$]5.4 million."[7] *See Justiss*, 397 S.W.3d at 159. The trial court did not abuse its discretion by denying the State's motion to exclude High's valuation opinion. We overrule the State's first issue.

IV. ADMISSIBILITY OF MCROBERTS'S DAMAGE OPINIONS

In its second issue, the State argues that the trial court erred by admitting McRoberts's damage opinions. McRoberts opined that the remainder property had a pre-condemnation market value of $3,060,598.00 but a post-condemnation market value of $641,178.00, meaning that Speedway's remainder property sustained damages in the amount of $2,419,420.00, excluding $190,000.00 for demolition. A portion of McRoberts's opinion can be attributed to his decision to lower the value of the land from $24.75 per square foot to $14.00 per square foot (approximately $475,000.00), but the bulk of the figure can be traced to his decision to devalue the buildings and site improvements from approximately $2 million to only $15,000.00 in salvage value. The State argues that the trial court should have excluded McRoberts's damage opinions because (1) they were

[7]The State additionally argues that High's opinion was conclusory and speculative, but only because he "failed to provide a valid factual basis to support his opinions." This argument is no different than the one we addressed above. Therefore, it too is unpersuasive.

conclusory and speculative and (2) they incorporated noncompensable impairment-of-access damages. Both arguments are unpersuasive.

A. McRoberts's Damage Opinions Were Neither Conclusory Nor Speculative

"Opinion testimony that is conclusory or speculative is not relevant evidence, because it does not tend to make the existence of a material fact 'more probable or less probable.'" *Coastal Transp. Co.*, 136 S.W.3d at 232. An expert's opinion is conclusory when it offers an opinion with no factual substantiation. *See id.*; *Burrow v. Arce*, 997 S.W.2d 229, 236 (Tex. 1999). "[T]estimony is speculative if it is based on guesswork or conjecture." *Justiss*, 397 S.W.3d at 156.

McRoberts made it abundantly clear—both before and during trial—that he based his opinions on a change in the highest and best use of Speedway's property. As Speedway observes, the supreme court has "long held that a change in a property's use due to condemnation is relevant to the fair market value of the property." *State v. Dawmar Partners, Ltd.*, 267 S.W.3d 875, 878 (Tex. 2008). This, no doubt, is because "[i]n Texas condemnation law, market value properly reflects all factors that buyers and sellers would consider in arriving at a sales price." *Estate of Sharboneau*, 48 S.W.3d at 185. Consequently, Speedway was "entitled to have its land valued using its highest

and best use." *Enbridge Pipelines (East Texas) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 263 (Tex. 2012).

As alluded to, McRoberts opined that before the condemnation, the highest and best use of the property was its existing use—a car wash—because the site was designed specifically for that very purpose. But he also opined that the condemnation had affected the property's functionality so greatly that the property had experienced a change in its highest and best use to something like a small veterinary clinic or an office. McRoberts did not base his opinions on only his word, or on mere conjecture; he based it on the issues that began affecting Speedway's property only after the condemnation—unsafe access, internal circulation, and zoning nonconformities—the very same matters that DeShazo, Baldwin, and High addressed in their testimony.[8] McRoberts thus provided a reasoned basis to support his damage opinions, reinforced by well-established caselaw, logic, and mathematics.

The State argues that McRoberts's opinion that Speedway's property experienced a change in its highest and best use was conclusory and

[8]Speedway does not argue that unsafe access, internal circulation, and nonconformance with zoning requirements are noncompensable injuries. *See Dawmar Partners, Ltd.*, 267 S.W.3d at 878 (explaining that diminished value must be derived from a constitutionally cognizable injury); *see also Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 224 (Tex. 2001) (unsafe access).

speculative because "[a] change in highest and best use and the demolition of improvements *simply did not follow* from the concerns about access, circulation and compliance with landscaping and setback requirements." [Emphasis added.] The State points out that McRoberts did not address the viability of O'Connor's cure plan or whether Speedway's property would be entitled to an exemption for its failure to conform with the landscaping and building setback requirements.

Boiled down, the State's argument is nothing more than an evidentiary-sufficiency challenge improperly masquerading as an expert opinion admissibility issue. When the highest and best use of property is disputed, *the jury* is responsible for deciding which use is appropriate when it determines market value. *State v. Windham*, 837 S.W.2d 73, 76–77 (Tex. 1992). Indeed, as Justice Cornyn explained in *Windham*,

> If [the landowner] is permitted to present evidence of the market value of the part taken utilizing a larger tract than that sought by the condemning authority based on its theory of the highest and best use of the property, then the State should be allowed to present evidence based on its competing theory of the highest and best use of the property. *It is then for the jury to decide which evidence to accept and which to reject in deciding the ultimate issue of market value.*

Id. at 77 (emphasis added). Of course, a party may alternatively argue that unreliable expert testimony rendered evidence legally insufficient, *see Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 (Tex. 2009), and while the State's third

issue does challenge the legal sufficiency of the evidence to support the jury's finding of remainder damages, no part of its argument is premised on the specific ground it raises here.

The State additionally argues that contrary to our opinion in *State v. Little Elm Plaza, Ltd.*, McRoberts, in forming his damage opinions, improperly presumed that if Speedway requested a variance or an amended site plan, the City of Grapevine would reject it. *See* No. 02-11-00037-CV, 2012 WL 5258695, at *12 (Tex. App.—Fort Worth Oct. 25, 2012, pet. dism'd) (mem. op.). In *Little Elm*, we explained that "an expert may testify about how an uncertainty with regard to a governmental action may have affected the market value . . . on the date of the taking, but an expert may not opine about how that uncertainty will actually be resolved in a date after the taking." *Id.* McRoberts certainly valued the remainder property after the condemnation lower than the value of the remainder property before the condemnation, but as explained, he did so based on a change in the property's highest and best use as of the date of the taking, not in connection with a prediction about how the City would treat any future regulatory requests made by Speedway. *Little Elm* is inapposite. We overrule this part of the State's second issue.

B. McRoberts's Reduction in Land Value is Not Attributable to Only Noncompensable Impairment of Access or Community Damages

In calculating the value of the remainder property after the condemnation, McRoberts devalued the land from $24.75 per square foot to $14.00 per square foot. The State argues that "McRoberts's reduction in land value can *only* be explained by his inclusion of compensation for noncompensable impairment of access" stemming from either the addition of a dedicated right turn lane on Grapevine Mills Boulevard, the loss of a median cut and pocket turn lane on the same street, or both—impaired-access matters that McRoberts included in his report but did not testify about at trial. [Emphasis added.]

Not all damages to remainder property are compensable. *Cty. of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004). Rather, "diminished value is compensable only when it derives from a constitutionally cognizable injury." *Dawmar Partners, Ltd.*, 267 S.W.3d at 878. Thus, "[w]hether damages can be recovered depends on what kind of damage is involved." *Santikos*, 144 S.W.3d at 459. Several aspects of our caselaw in this area are well developed.

One, "[t]hroughout its history, courts have construed Article I, Section 17 to allow recovery only if the injury is not one suffered by the community in general." *Felts v. Harris Cty.*, 915 S.W.2d 482, 484 (Tex. 1996). "Community damages are not connected with the landowner's use and enjoyment of property and give rise

to no compensation." *Id.* at 485; *Padilla v. Metro. Transit Auth. of Harris Cty.*, 497 S.W.3d 78, 84 (Tex. App.—Houston [14th Dist.] 2016, no pet.) (identifying community damages to include "noise, dust, increased traffic, diversion of traffic, circuity of travel, and other inconveniences incident to road or highway construction"). To be entitled to compensation, an injury must be "peculiar to a given property." *Gulf, Colo. & Santa Fe Ry. Co. v. Fuller*, 63 Tex. 467, 470 (1885).

Also, while not barred by the concept of community damages, diminished value resulting from impaired access is compensable only when a material and substantial impairment exists as a matter of law. *Dawmar Partners, Ltd.*, 267 S.W.3d at 878; *see* Tex. Prop. Code Ann. § 21.042(d) (West 2014). Diminution in the value of property due to diversion of traffic, diminished exposure to traffic, altered accessibility to the roadway, or circuity of travel does not amount to a material and substantial impairment of access. *State v. Petropoulos*, 346 S.W.3d 525, 532 (Tex. 2011); *State v. Schmidt*, 867 S.W.2d 769, 774 (Tex. 1993), *cert. denied*, 512 U.S. 1236 (1994).

The State's argument proceeds as follows:

> If the building is demolished, Speedway is left with a vacant tract of land. Speedway cannot claim that the vacant tract is damaged due to nonconformity, unsafe access, or internal circulation[] problems because a vacant tract of land offers a clean slate without

> nonconformities caused by the location of improvements, or access and circulation[] problems caused by the location of driveways and improvements. Yet, McRoberts damaged the vacant land itself, which can only be explained by his inclusion of noncompensable impairment of access damages.

The record shows otherwise.

In determining the value of the land before the condemnation ($24.75 per square foot), McRoberts identified four comparable land sales—one property that was developed with a car wash, one that was developed for a bank, one that planned to develop a fast-food restaurant, and another one that planned to develop a bank. After adjustment, the mean was $23.56 per square foot. But in determining the value of the land after the condemnation ($14.00 per square foot), McRoberts utilized three different comparable land sales—two of which he identified as office sites. After adjustment, the mean was $13.99 per square foot. McRoberts explained his reason for altering the comparables:

> Note the International Carwash Association reports carwash operators compete with fast food restaurants, banks, chain sit-down restaurants and brand name retailers. None of these uses is fitting for the site after the take. Hence, the land sales used before the take are not applicable. The following three land sales will be used to determine the market value of the land after the take in accordance with highest and best use.

Thus, McRoberts opined that the four sales he utilized to value the land before the condemnation—when the property's highest and best use was a car

wash—were valid comparables. But after the condemnation, and with a change in the property's highest and best use from a car wash to an office or a veterinary clinic, he opined that the four land sales were not valid comparables and instead utilized the three after-condemnation land sales, which had a lower after-adjustment median, accounting for the reduction in land value.[9] McRoberts plainly devalued the land in connection with a change in the property's highest and best use, not to compensate Speedway for noncompensable impairment of access. We overrule the remainder of the State's second issue.

V. DAMAGES TO THE REMAINDER PROPERTY

In its third issue, the State argues that the evidence is legally and factually insufficient to support the jury's finding that the remainder property sustained damages in the amount of $4,401,028.00.

A. Standards of Review

We may sustain a legal sufficiency challenge only when (1) the record discloses a complete absence of evidence of a vital fact, (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (3) the evidence offered to prove a vital fact is no more than a mere scintilla, or (4) the evidence establishes conclusively the opposite of a vital

[9]The State does not separately challenge McRoberts's comparables.

fact. *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 620 (Tex. 2014) (op. on reh'g); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 334 (Tex. 1998), *cert. denied*, 526 U.S. 1040 (1999). In determining whether there is legally sufficient evidence to support the finding under review, we must consider evidence favorable to the finding if a reasonable factfinder could and disregard evidence contrary to the finding unless a reasonable factfinder could not. *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007); *City of Keller v. Wilson*, 168 S.W.3d 802, 807, 827 (Tex. 2005). Anything more than a scintilla of evidence is legally sufficient to support the finding. *Cont'l Coffee Prods. Co. v. Cazarez*, 937 S.W.2d 444, 450 (Tex. 1996); *Leitch v. Hornsby*, 935 S.W.2d 114, 118 (Tex. 1996). More than a scintilla of evidence exists if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds about the existence of a vital fact. *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 262 (Tex. 2002).

When reviewing an assertion that the evidence is factually insufficient to support a finding, we set aside the finding only if, after considering and weighing all of the evidence in the record pertinent to that finding, we determine that the credible evidence supporting the finding is so weak, or so contrary to the overwhelming weight of all the evidence, that the answer should be set aside and

a new trial ordered. *Pool v. Ford Motor Co.*, 715 S.W.2d 629, 635 (Tex. 1986) (op. on reh'g); *Cain v. Bain*, 709 S.W.2d 175, 176 (Tex. 1986); *Garza v. Alviar*, 395 S.W.2d 821, 823 (Tex. 1965).

B. The Jury's Finding is Neither Legally Nor Factually Insufficient

The State argues that legally, and alternatively factually, insufficient evidence supports the jury's $4,401,028.00 finding because the figure fell well outside of the only two opinions of remainder damages in evidence—McRoberts's ($2,609,420.00) and Wall's ($105,826.00).

Generally, the jury has broad discretion to award damages within the range of evidence presented at trial. *Gulf States Utils. Co. v. Low*, 79 S.W.3d 561, 566 (Tex. 2002). Condemnation cases are no exception; the jury may set the value at any amount between the highest and lowest values testified to by the witnesses. *See State v. Huffstutler*, 871 S.W.2d 955, 959 (Tex. App.—Austin 1994, no writ); *Lin v. Houston Comm. Coll. Sys.*, 948 S.W.2d 328, 337 (Tex. App.—Amarillo 1997, writ denied). Damages must be established with reasonable certainty, not mathematical precision. *O & B Farms, Inc. v. Black*, 300 S.W.3d 418, 422 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

The State's assertion that "the only opinions of damage in evidence were the opinions of Wall and McRoberts" is imprecise. Certainly, Wall and

McRoberts were the only two witnesses who *expressly* identified a damages-to-the-remainder figure, but their testimony was not the only *evidence* of remainder damages before the jury. This is because, as the trial court instructed the jury, remainder damages are simply calculated by ascertaining "the difference between the Market Value of the landowner's Remainder Property immediately before the condemnation and the Market Value of the landowner's Remainder Property immediately after the condemnation, taking into consideration the nature of any improvements and the use of the part being acquired." *See Interstate Northborough P'ship*, 66 S.W.3d at 224. And integral to determining the market value of the remainder property before condemnation is the market value of the whole property before condemnation. Wall and McRoberts were not the only witnesses who valued the entire property before condemnation—High did too, and in determining the value of the remainder property before condemnation, the jury was just as free to consider High's $5.4 million valuation opinion as it was either Wall's or McRoberts's. *See Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 774–75 (Tex. 2003) (explaining that it is the province of the jury to "believe all or any part of the testimony of any witness and disregard all or any part of the testimony of any witness"); *McGalliard v. Kuhlmann*, 722 S.W.2d 694, 697 (Tex. 1986) (reasoning that the "trier of fact has

several alternatives available when presented with conflicting evidence"—it "may believe one witness and disbelieve others," it "may resolve inconsistencies in the testimony of any witness," and it "may accept lay testimony over that of experts").

Therefore, considering High's $5.4 million dollar valuation opinion, less McRoberts's opinion that the part condemned had a market value of $139,402.00, less McRoberts's opinion valuing the remainder property after condemnation at $641,178.00, plus McRoberts's $190,000.00 cost to demolish the improvements, the figure at one end of the damages spectrum was $4,809,420.00.[10] The figure at the other end was $105,826.00—Wall's opinion that the entire property before condemnation had a market value of $2,521,803.00, less his opinion that the part condemned had a market value of $159,789.00, less his opinion valuing the remainder property after the condemnation at $2,362,014.00, plus the figure representing the total cost to cure. The jury's finding permissibly fell within the range of evidence admitted at trial.[11]

[10]The $2.2 million difference between this figure and McRoberts's $2,609,420.00 damage opinion thus results from substituting High's $5.4 million entire property-valuation opinion for McRoberts's $3.2 million entire property-valuation opinion.

[11]Quite clearly, this is not an instance of improperly "blending" dissimilar value categories to establish support for the jury's finding. *See Callejo v. Brazos*

The State also argues that the evidence is legally insufficient to support the jury's finding of remainder damages because High's valuation opinion was unreliable, irrelevant, and conclusory, *see Whirlpool Corp.*, 298 S.W.3d at 638, but we resolved this same argument against the State above.

Finally, the State argues that if we do not sustain its second issue arguing that McRoberts's damage opinion should have been excluded, then there was no evidence of a difference in before- and after-condemnation values caused by the condemnation over $2,609,420.00—McRoberts's opinion of damage to the remainder. Our analysis immediately above applies equally here. The jury could have utilized High's entire-property valuation opinion but still adopted McRoberts's opinion devaluing the property after the condemnation as a result of a change in its highest and best use. *See Golden Eagle Archery, Inc.*, 116 S.W.3d at 774–75. The resulting figure necessarily would have been more than $2,609,420.00.

The evidence is legally and factually sufficient to support the jury's finding of damages to the remainder property. We overrule the State's third issue.

Elect. Power Coop., Inc., 755 S.W.2d 73, 74–76 (Tex. 1988) (holding that court of appeals erred by considering evidence establishing pre-taking value of easement strip in determining legal sufficiency of evidence to support jury's post-taking value of easement strip). Instead, we merely acknowledge the range of evidence within similar value categories.

VI. CONCLUSION

Having overruled the State's three issues, we affirm the trial court's judgment.

/s/ Bill Meier
BILL MEIER
JUSTICE

PANEL: SUDDERTH, C.J.; MEIER, J.; and KERRY FITZGERALD (Senior Justice, Retired, Sitting by Assignment).

DELIVERED: October 19, 2017