Opinion issued October 7, 2021

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00414-CV

ALFONSO OSORIO CASTELLANOS & JOANNE PEREZ CASTELLANOS, Appellants

V.

HARRIS COUNTY, TEXAS & THE CITY OF BAYTOWN, TEXAS, Appellees

On Appeal from the County Civil Court at Law No. 2
Harris County, Texas
Trial Court Case No. 1102125

MEMORANDUM OPINION

Appellants Alfonso Osorio Castellanos and his wife Joanne Perez Castellanos appeal from the trial court's judgment on the jury verdict in the underlying condemnation case. In accordance with the jury verdict, the trial court awarded a

total of $113,165, which represented just compensation of $85,000 for a permanent road easement, $1,695 for a water line easement, $5,470 for a temporary construction easement, and $21,000 for damages to the remainder of the property. On appeal, the homeowners argue that the evidence is legally insufficient to support the judgment and that the trial court erred by refusing their requested jury instruction regarding damage to the remainder.

We affirm.

Background

Alfonso and Joanne Castellanos owned a house on a 1.5-acre tract of land in Baytown, Texas. In 2017, in order to expand San Jacinto Boulevard, Harris County and the City of Baytown filed a petition in condemnation seeking to acquire from the homeowners a 0.7996-acre permanent road easement, a 0.0259-acre permanent water line easement, and a 0.2511-acre temporary construction easement. The trial court appointed special commissioners, who assessed the total amount of condemnation damages to be $103,912. The Castellanoses objected to the award, arguing that the condemnation award was too low because it did not account for damage to the remainder of the property or the livability of the home after the condemnation. Harris County deposited $103,912.00 into the court's registry, and in September 2018, the Castellanoses received the deposited funds plus accrued interest, for a total amount of $104,667.64.

At trial, Paul Hoag and Wayne Baer testified for the Castellanoses. Hoag, an architect of 46 years, testified that he was hired to determine the highest and best use of the property. Hoag testified that he believed the highest and best use of the property before the taking was for commercial development, such as self-storage or a discount store. He opined that the highest and best use of the property after the taking was as open space, which would yield no monetary return for the owners, because the remainder property was too small for commercial development.

Hoag did not believe that residential use with the existing house was the highest and best use of the remainder property after the taking due to issues with sewage disposal and the possibility of flooding. Hoag testified that the existing septic system had to be removed to accommodate the road extension. He assumed that the house would have no access to city sewer service, and he stated that the Castellanoses would not be able to replace the septic system because the remainder was too small. Hoag also opined that the remainder would flood because the newly constructed road would be five feet above the remainder. He testified that the existing house could be elevated at a cost of $300,000.

On cross examination, Hoag acknowledged that he was not a drainage or civil engineer, had done no analysis of flooding, and based his opinion that the property would flood on a conversation he had with a civil engineer, who also prepared no plans and did no technical analysis of the property. He also acknowledged that he

had relied on information from the Castellanoses' lawyer instead of contacting the city to inquire about the possibility of connecting to city sewer service.

Wayne Baer, a commercial real estate appraiser of 31 years, testified that the Castellanoses hired him to determine the value of the property before and after the taking and the amount of just compensation they were owed. Baer testified a property's highest and best use is determined by consideration of what use of the property is (1) physically possible, (2) legally permissible, (3) financially feasible, and (4) maximally productive. Baer opined that before the taking the highest and best use of the property is as a vacant redevelopment tract. He believed that the existing house had no "economic value in the marketplace."

Baer testified that he relied on eight comparable sales in the subject market area to arrive at a price of $3.75 per square foot for the entire tract before the taking, although he acknowledged that reasonable appraisers can differ in their opinions. He testified about the property sales he used for his analysis and why he considered them comparable. He made certain assumptions, including one that proved to be untrue—that the house would have no access to city sewage services after the taking. He valued the remainder property at $0.50 per square foot. Baer assumed that the water line easement resulted in a taking of 75% of that partial taking's value. He also assumed a 9% return on investment when calculating the value of the temporary

construction easement. Baer's appraisal was introduced into evidence, and it showed:

Value of the Whole Property	$ 245,025	
Value of the Part Taken (Permanent Road Easement (PRE) $130,620 + Water Line Easement (WLE) $3,175)		$133,795
Value of the Remainder Before the Taking	$ 111,230	
Value of the Remainder After the Taking	$ 15,395	
Damages		$ 95,835
Temporary Construction Easement (TCE)		$ 7,383
Total Compensation Due the Owner		$ 237,013

Baer opined that the just compensation due to the Castellanoses is $237,013, which is the difference between the whole property value before the taking and the value of the remainder after the taking, plus the amount allotted for the temporary construction easement.

Joanne Castellanos testified about her opinion of the value of the property. She testified that they were without sewage services for less than four weeks between the time that the septic system was removed for the road expansion project and the connection of the house to the city sewage system. Joanne testified that she strongly disagreed with Baer's appraisal of the value of the property. She opined that the property was worth "maybe $690,000," and she acknowledged that her valuation was not based on comparable sales but on "how or what we feel about our property."

Ryan Dagley, a commercial real estate appraiser of 18 years, testified that Harris County hired him to appraise the property for a roadway project and give an

opinion of market value for just compensation. Dagley testified that a property's highest and best use is the "reasonable probable use that maximizes a property's value." Like Baer, he referred to the four factors: legally permissible, physically possible, financially feasible, and maximally productive. Dagley opined that the highest and best use of the property as vacant before the taking was commercial or light industrial use. As improved, he opined that the highest and best use of the property was for a single-family residence or commercial use.

Dagley testified that he relied on five land sales to determine the value of the property as vacant. He testified about each comparable sale and explained why he thought it was comparable based on size, shape, location, and physical characteristics. Dagley also considered sales of comparable single-family residences, which he used to value the entire property—land and existing house. Dagley testified about the comparable improved and unimproved land sales he chose for his analysis. Dagley opined that the property was worth $2 per square foot both before and after the taking. Dagley assumed that the water line easement resulted in a taking of 50% of that partial taking's value. He also assumed a 10% return on investment when calculating the value of the temporary construction easement. In addition, unlike Baer, he calculated the depreciated value of the existing improvements—fencing, septic system, crushed rock driveway—that were taken by virtue of being attached to the permanent road easement or the water line easement.

He also calculated a cost to cure the damage, which included the depreciation on the lost improvements and cost of additional crush rock to replace the driveway. Finally, Dagley estimated how much the value of the existing house would be impaired by the existence of the temporary construction easement by estimating a loss of half of its rental value for the two years during which the TCE would be in effect.

Dagley's appraisal was introduced into evidence, and it showed:

Whole Property Value	$ 170,000	
Permanent Road Easement		$ 69,664
Water Line Easement		$ 1,129
Improvements in the Takings		$ 6,347
Temporary Construction Easement		$ 4,375
Remainder Before the Taking	$ 88,485	
Remainder After the Taking	$ 67,485	
Damages		$ 21,000
Cost to Cure		$ 8,822
Total Just Compensation		$ 111,337

During the formal charge conference, neither party objected to the court's charge, and the jury made the following findings:

- Fair Market Value of the Land Taken for the Permanent Road Easement: $85,000
- Fair Market Value of the Land Taken for the Water Line Easement: $1,695
- Fair Market Value of the Land Taken for the Temporary Construction Easement: $5,470
- Fair Market Value of Damage to the Remainder: $21,000.

The trial court entered judgment on the verdict, and after the trial court denied the Castellanoses' motion for new trial, they appealed.

Analysis

On appeal, the Castellanoses assert that the evidence is legally insufficient to support the jury's verdict. They contend that Dagley improperly appraised the property by using sales that were not comparable, while Baer properly appraised the property, conclusively establishing the fair market value of the permanent road taking. They also argue that the trial court erred by refusing their requested jury instruction regarding damage to the remainder, which they contend they conclusively established by evidence of the $300,000 cost to elevate the existing house.

I. Condemnation law

Under both the United States and Texas Constitutions, landowners must be compensated for property taken by the government for a public use. U.S. CONST. amend. V ("[N]or shall private property be taken for public use, without just compensation"); TEX. CONST. art. I, § 17(a) ("No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made . . . ."). Just or adequate compensation for real property is its fair market value, which has been defined as "the price the property will bring when offered for sale by one who desires to sell, but is not oblig[ated] to sell, and is bought by one

who desires to buy, but is under no necessity of buying." *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001); *see City of Austin v. Cannizzo*, 267 S.W.2d 808, 813 (Tex. 1954) (defining market value as "the price which property would bring in a transaction between a willing seller and a willing buyer"); *State v. CC Telge Rd., L.P.*, 605 S.W.3d 742, 751–52 (Tex. App.—Houston [1st Dist.] 2020, pet. denied). "The market value of property in a condemnation proceeding is determined as of the date of the taking." *Morello v. Seaway Crude Pipeline Co., LLC*, 585 S.W.3d 1, 29–31 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) (citing *Sw. Bell Tel. Co. v. Radler Pavilion Ltd. P'ship*, 77 S.W.3d 482, 485 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

In determining market value, the factfinder in a condemnation case may consider the property's current use as well as the highest and best use to which the land can be adapted. *See Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 611 (Tex. 2016) (factfinder may "consider all of the uses to which the property is reasonably adaptable and for which it is, or in all reasonable probability will become, available within the foreseeable future" (quoting *State v. Windham*, 837 S.W.2d 73, 77 (Tex. 1992)); *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 628 (Tex. 2002). "'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.'" *Morello*, 585 S.W.3d at

30 (quoting *Enbridge G & P (E. Tex.) L.P. v. Samford*, 470 S.W.3d 848, 857 (Tex. App.—Tyler 2015, no pet.) (quoting *City of Sugar Land v. Home & Hearth Sugarland, L.P.*, 215 S.W.3d 503, 511 (Tex. App.—Eastland 2007, pet. denied))).

"When a governmental entity condemns only part of a tract, as occurred here, it must pay adequate compensation for the part taken and for any resulting damage to the remainder." *Morello*, 585 S.W.3d at 29–31; *see* TEX. PROP. CODE § 21.042(c) (providing that "damage to the property owner" includes "the effect of the condemnation on the value of the property owner's remaining property"). "Damages to remainder property are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the use of the land taken." *Cty. of Bexar v. Santikos*, 144 S.W.3d 455, 459 (Tex. 2004).

II. Legal sufficiency

The appellants argue that the amounts found by the jury for fair market value of the takings and for the damage to the remainder were too low and not supported by legally sufficient evidence. In particular, they argue that Ryan Dagley, the appraiser who testified for the County, relied on comparable sales of unimproved property when their property was improved. They reason that because Dagley's analysis was flawed it amounts to no evidence.

When property owners challenge the amount of compensation—"the market value of the property taken and the damages, if any, to the remainder not taken"—the burden of proof shifts to the defendant property owners. *State v. Westgate, Ltd.*, 798 S.W.2d 903, 908 (Tex. App.—Austin 1990), *aff'd and remanded*, 843 S.W.2d 448 (Tex. 1992) (citing *State v. Walker*, 441 S.W.2d 168, 170 (Tex. 1969)). On appeal, when the complaining parties challenge the legal sufficiency of the evidence to support an adverse finding on which they had the burden of proof, the parties must demonstrate that the evidence conclusively established all vital facts in support of the issue. *See Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001).

The Castellanoses did not object to Dagley's qualifications as an expert, his methodology, or the foundational data and assumptions he used in his appraisal. They made no objections during Dagley's testimony. Instead, they opted to challenge his assumptions, conclusions, and opinions through cross-examination. Likewise, on appeal, the Castellanoses do not raise an issue about the admission of Dagley's testimony. Because this testimony was admitted without objection or limiting instruction, the jury was free to consider it for all purposes. *See Bay Area Healthcare Grp., Ltd. v. McShane*, 239 S.W.3d 231, 235 (Tex. 2007) ("Error is waived if the complaining party allows the evidence to be introduced without objection."). Although the Castellanoses argue that the only evidence of fair market

value of the permanent taking is Baer's testimony, the jury was free to consider Dagley's testimony regarding fair market value as well.[1]

Here, both Baer and Dagley used a comparable sales model for appraising the property and determining the compensable fair market value of the taking and the damage to the remainder. Their choices for comparable sales and some assumptions differed, and their testimony explained their choices and the reasons for the differing assumptions and conclusions. The jury returned a verdict within the range of values that Baer and Dagley opined would provide just and adequate compensation to the homeowners. We conclude that the Castellanoses did not conclusively establish that the fair market value for the permanent road easement was $130,620, and we overrule their legal sufficiency issue.

II. The challenge to the jury instruction is not preserved.

In their second issue, the Castellanoses argue that the trial court erred by refusing to include in the jury charge a requested instruction regarding damage to

---

[1] The Castellanoses do not argue that Dagley's testimony was conclusory or that his bare *ipse dixit* testimony was no evidence. The record demonstrates that Dagley explained the basis, methodology, and foundational data upon which his opinions were based. The Castellanoses' challenge is to the underlying foundational data—the comparable sales—that formed the basis, in part, for Dagley's appraisal. This type of challenge requires an objection in the trial court. *See Coastal Transp. Co. v. Crown Cent. Petroleum Corp.*, 136 S.W.3d 227, 232–33 (Tex. 2004) (noting that objection required when challenging "underlying methodology, technique, or foundational data" supporting expert testimony, whereas no objection is required to preserve a no-evidence challenge alleging that an expert's opinion testimony is wholly speculative or conclusory).

the remainder. Prior to trial, the Castellanoses filed a proposed jury charge, which included a definition for "damage to the remainder":

> The term "Damage to the Remainder" means the reduction in the Fair Market Value of the property immediately after the acquisition by Harris County and the City of Baytown together with Special Damages. The damages are to be determined by ascertaining the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after the appropriation, taking into consideration the nature of the improvement, and the use to which the land taken is put. Of course, this rule relates to the ascertainment of the damages to the property itself. There may possibly be items of special damages which may not be accurately reflected in the difference between the market value before and the market value after, but everything which affects the market value of the land itself, having due regard for past and probable future injuries, may be accurately reflected by ascertaining the difference in value, when all the legitimate testimony is properly submitted to the jury for consideration.

In the jury charge, the trial court included the following instruction:

> **INSTRUCTION NO. 4**
>
> You are instructed that in determining "Damage to the remainder" you should find 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.

At the charge conference, the Castellanoses' attorney specifically stated that there were no objections to the court's charge. On appeal, the Castellanoses argue that the court did not define "damage to the remainder," and they assert that they "highlighted this omission in their Motion for New Trial." They also argue that they

were not required to preserve error as to their requested instruction on damage to the remainder because they conclusively proved that the cost to cure the damage to the remainder was $300,000.

The Castellanoses concede that they waived error as to the jury charge by failing to object during the charge conference. *See* TEX. R. CIV. P. 274 ("Any complaint as to a question, definition, or instruction, on account of any defect, omission, or fault in pleading, is waived unless specifically included in the objections."); TEX. R. APP. P. 33.1 (providing generally that, to preserve error for appeal, party must make timely objection stating grounds for ruling sought and obtain ruling from trial court); *see also State Dep't of Highways v. Payne*, 838 S.W.2d 235, 241 (Tex. 1992) (stating basic test for preservation of error in jury charge is "whether the party made the trial court aware of the complaint, timely and plainly, and obtained a ruling").

The Castellanoses argue, however, that because they conclusively proved that the cost to cure was $300,000—the cost to elevate the house—they did not need to preserve error in the charge. They rely on Rule of Civil Procedure 279, which states: "Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and no element of which is submitted or requested are waived." TEX. R. CIV. P. 279. The Castellanoses argue that this rule exempts them from preservation of error and permits them to argue on appeal that the court

erred by failing to give the jury their requested instruction on damage to the remainder. We disagree. "The right of trial by jury exists only with respect to disputed questions of fact." *Thorne v. Moore*, 105 S.W. 985, 987 (Tex. 1907). The failure to submit a ground of recovery or defense would not be waiver if the ground of recovery or defense is conclusively proven and could properly be the subject of a post-verdict motion such as a motion for judgment notwithstanding the verdict or a motion to disregard a jury finding. But the Castellanoses did not file either such motion in the trial court.

Moreover, the evidence does not show that the Castellanoses conclusively proved that the cost to cure damage to the remainder was $300,000, which exceeded the total property value as determined by their appraiser, Baer. At trial, Dagley testified in some detail about the elements he considered as part of the cost to cure the damage to the remainder. For example, the taking required the Castellanoses to create a new driveway, which used a larger volume of crushed rock than the existing driveway. Dagley estimated the full cost of the crushed rock for the new driveway as part of the cost to cure damage to the remainder. In addition, Dagley recognized that the existing septic system could not be replaced in kind. Rather, it could be replaced only with more expensive, new equipment. To account for the difference between the cost of a new septic system and the amount previously estimated for the

value of the existing septic system, Dagley added the depreciation to the cost to cure.[2]

The Castellanoses waived their challenge to the jury charge. We overrule their second issue.

Conclusion

We affirm the judgment of the trial court.

Peter Kelly
Justice

Panel consists of Justices Kelly, Guerra, and Farris.

[2] Just and adequate compensation under both the Texas and United States Constitutions has been defined as fair market value or fair market value plus damage to the remainder in the case of a partial taking in Texas. *See U. S. v. 564.54 Acres of Land, More or Less, Situated in Monroe & Pike Ctys., Pa.*, 441 U.S. 506, 516–17 (1979); *Religious of the Sacred Heart of Tex. v. City of Hous.*, 836 S.W.2d 606, 617 (Tex. 1992). The Castellanoses' argument that they are entitled to an additional $300,000 in compensation to elevate their house is inconsistent with the rule of fair market value because, based on the evidence adduced at trial, the highest appraised fair market value of the improved property before the taking was $245,025. *See Religious of the Sacred Heart of Tex.*, 836 S.W.2d at 618 (J. Cornyn, concurring) (citing *564.54 Acres of Land*, 441 U.S. at 510, and noting that, in some cases, use of fair market value as constitutional standard for just compensation "may not fully compensate the landowner for all economic losses").