Opinion issued April 28, 2022

In The

Court of Appeals

For The

First District of Texas

NO. 01-20-00335-CV

ASPENWOOD APARTMENTS PARTNERS, LP, AND JACK YETIV, Appellants

V.

HARRIS COUNTY APPRAISAL DISTRICT, Appellee

On Appeal from the 11th District Court
Harris County, Texas
Trial Court Case No. 2016-81611

MEMORANDUM OPINION

This case arises from appellants' separate disputes over property tax appraisals by appellee Harris County Appraisal District ("HCAD"). Appellant Aspenwood Apartments Partners, LP ("Aspenwood") challenges the appraisal of its

apartment complex for tax years 2016 and 2017. Appellant Jack Yetiv challenges the appraisal of his residential property for tax year 2017. Yetiv is an officer of Aspenwood's corporate general partner. He is also an attorney who appeared pro se on his own behalf and appeared as Aspenwood's trial counsel. Aspenwood and Yetiv both designated Yetiv as their sole witness to testify to the market value and equal and uniform value of Aspenwood's apartment complex and Yetiv's residence.

On HCAD's pretrial motion, the trial court excluded Yetiv from testifying as a witness for Aspenwood. Because Yetiv was Aspenwood's sole witness, the parties agreed that Aspenwood's claims should not proceed to the jury, so the trial court dismissed them. The final judgment ordered that Aspenwood take nothing on its claims. In its sole issue on appeal, Aspenwood argues that the trial court abused its discretion by excluding Yetiv's testimony under Rule of Evidence 702, the property-owner rule, and Disciplinary Rule of Professional Conduct 3.08.

Trial proceeded on Yetiv's individual claims challenging both the market value and the equal and uniform value of his residential property. The jury returned a verdict on both values for an amount higher than Yetiv had sought at trial. In two issues, Yetiv challenges the sufficiency of the evidence supporting the jury's verdict on both the market value and the equal and uniform value of his residence.

We affirm.

Background

Aspenwood owns an apartment complex in the Spring Branch neighborhood of Houston. Aspenwood is a limited partnership, and its general partner is Suburban Farms, Inc. Yetiv, a real estate investor and an attorney, is the sole officer of Suburban Farms.

Yetiv owns a 1.47-acre residential property with a house in a subdivision in the Spring Branch neighborhood. He bought the property and some personal property for $617,000 in 2013, and he has lived on the property since then. The house is in poor condition, and the parties agree that it would cost less to tear down and rebuild the house than it would cost to repair it.

In 2016, Aspenwood filed suit in district court seeking judicial review of HCAD's appraisal of the value of its apartment complex for tax year 2016. Aspenwood was represented by outside counsel when it filed suit. Aspenwood later added a claim challenging HCAD's 2017 appraisal of the apartment complex. Yetiv joined the lawsuit challenging HCAD's appraisal of the value of his residence for tax year 2017. Aspenwood and Yetiv argued that HCAD excessively and unequally appraised the value of their respective properties, and they requested that the trial court reduce the appraised value of both properties. After Yetiv became a party to the lawsuit, he began representing both Aspenwood and himself as appellants' sole counsel in the litigation.

Aspenwood and Yetiv designated Yetiv as a fact witness and as an expert witness on the issues of market value and equal and uniform value for both Aspenwood's apartment complex and Yetiv's residential property. Aspenwood's and Yetiv's disclosures included a report authored and signed by Yetiv concerning the value of Aspenwood's apartment complex, and their expert designation attached Yetiv's curriculum vitae. Aspenwood and Yetiv later produced a supplemental expert valuation report authored by Yetiv after the deadline to produce expert reports had passed.

A. Resolution of Aspenwood's Claims Against HCAD

After discovery ended, HCAD filed a motion to exclude Yetiv from testifying for Aspenwood at trial. HCAD asserted multiple grounds in its motion, including that Yetiv did not qualify to offer expert opinion testimony because he was not a licensed real estate appraiser; Aspenwood did not timely designate Yetiv as an expert; and Aspenwood did not establish that Yetiv qualified to testify about the value of Aspenwood's apartment complex under the property-owner rule. Among other evidence, HCAD relied on appellants' discovery responses and designation of Yetiv as an expert witness, Yetiv's curriculum vitae and two expert valuation reports, and franchise tax records from the Comptroller of Public Accounts listing Suburban Farms, Inc. as Aspenwood's sole officer, director, or manager, and listing Yetiv as Suburban Farms' sole officer, director, or manager. HCAD supplemented

its motion to exclude, arguing that Disciplinary Rule of Professional Conduct 3.08 prohibits Yetiv from simultaneously acting as Aspenwood's lawyer and witness.

Aspenwood responded, primarily arguing that HCAD's arguments regarding Disciplinary Rule 3.08 were frivolous. Aspenwood disputed both that its expert designation of Yetiv was untimely and that its claims required expert opinion testimony from a licensed appraiser. It argued that Yetiv met the definition of a property owner, and it relied on an excerpt from Yetiv's deposition in which Yetiv testified that he worked for Aspenwood and several other entities. Aspenwood also attached a declaration from Yetiv generally averring to the truth and accuracy of statements in Aspenwood's response. Aspenwood did not rely on any other evidence.

The trial court held a brief hearing on HCAD's motion. The parties disputed Yetiv's qualification to testify to the value of Aspenwood's apartment complex as either an expert witness under Rule of Evidence 702 or as a property owner under the property-owner rule. After the hearing, the trial court entered an order granting HCAD's motion to exclude "in all things" and ordered that "Yetiv is excluded from testifying as an expert for [Aspenwood]."

The trial court held a pretrial hearing in November 2019 shortly before trial. During the hearing, Yetiv—acting as Aspenwood's counsel—expressed shock that the trial court interpreted its prior evidentiary ruling to exclude his testimony in any

capacity, not just his expert testimony as stated in the exclusion order.[1] The trial court admonished Yetiv for waiting several months to raise the issue, but Yetiv responded that he interpreted the order as allowing him to testify about the value of Aspenwood's apartment complex under the property-owner rule. The trial court denied Aspenwood's oral motion for continuance and stood on its interpretation of the exclusion order.

The day after the hearing, Aspenwood filed a motion to reconsider the trial court's ruling that Yetiv could not testify about the value of the apartment complex under the property-owner rule. HCAD responded to the motion by emphasizing Aspenwood's delay in raising the issue. Following a brief hearing, the trial court denied Aspenwood's motion.

At the beginning of trial on Yetiv's claims, which we discuss in more detail below, Yetiv—acting as Aspenwood's counsel—argued that the exclusion of his testimony regarding the apartment complex "has the practical effect of defeating Aspenwood's claims" against HCAD. Aspenwood requested that the trial court dismiss its claims on the parties' agreed motion, but it maintained its disagreement with this disposition. The court granted the agreed motion and dismissed

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[1] This transcript of this November 2019 hearing began with the trial court stating that Aspenwood "is, for the first time, raising a point of clarification about the order that was signed in January and is asking the Court to revisit that order." The court stated that it "is going to stand on the order that was previously made."

Aspenwood's claims. After trial on Yetiv's claims, the court entered final judgment on the jury's verdict. The judgment ordered that Aspenwood take nothing on its claims against HCAD.

B. Resolution of Yetiv's Claims Against HCAD

Trial proceeded on Yetiv's claims against HCAD. Yetiv testified to both the market value and the equal and uniform value of his residence. He introduced numerous exhibits, including documents showing the values of comparable properties that he used in his valuation analyses, photographs of the property and the house, and estimates to repair and to demolish the house. Yetiv rested after calling himself as his sole witness. HCAD called its expert appraiser, Jason Mushinski, as a witness. After HCAD rested, Yetiv made an oral motion outside the jury's presence to strike Mushinski's testimony, arguing that two of the three comparable properties Mushinski used to opine on market value were not comparable. The court denied the motion.

During his closing argument, Yetiv argued that the market value of his property was $309,448, and he argued that the equal and uniform appraised value of his property was $320,567. Without distinguishing between the two values, HCAD argued that the value of Yetiv's property was between $600,000 and $665,000. The jury returned a verdict for both the market value and the equal and uniform value of

Yetiv's property in the same amount: $587,175.50. The trial court entered judgment on the jury's verdict.

Appellants filed a motion for judgment notwithstanding the verdict and a motion for new trial. The trial court denied both motions. This appeal followed.

Exclusion of Witness Testimony

In its sole issue with multiple subparts, Aspenwood argues that the trial court erred by excluding Yetiv's trial testimony under Rule of Evidence 702, the property-owner rule, and Disciplinary Rule of Professional Conduct 3.08.

A. Standard of Review

We review a trial court's exclusion of evidence for an abuse of discretion. *JLG Trucking, LLC v. Garza*, 466 S.W.3d 157, 161 (Tex. 2015). A trial court abuses its discretion if it acts in an arbitrary or unreasonable manner or without reference to guiding rules and principles. *State v. Gleannloch Comm. Dev., LP*, 585 S.W.3d 509, 524 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

We will affirm an evidentiary ruling that is supported by any legitimate ground, even if the ground was not raised in the trial court. *Id.* We will also affirm an erroneous evidentiary ruling unless the error "probably caused the rendition of an improper judgment or probably prevented a proper presentation of the appeal." TEX. R. APP. P. 44.1(a); *see JLG Trucking*, 466 S.W.3d at 161.

B. Expert Testimony

Aspenwood argues that the trial court abused its discretion by excluding Yetiv as an expert witness because HCAD's motion did not challenge Yetiv's expert qualifications, and the trial court later determined that he qualified as an expert in property valuation.[2]

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an expert opinion if the expert's opinion testimony will help the factfinder to understand the evidence or to determine a fact in issue. TEX. R. EVID. 702; *see Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 851 (Tex. 2011) ("[W]hen the main substance of the witness's testimony is based on application of the witness's specialized knowledge, skill, experience, training or education to his familiarity with the property, then the testimony will generally be expert testimony within the scope of Rule 702."). The proponent of expert testimony bears the burden to prove that the witness qualifies as an expert. *Gammill v. Jack Williams Chevrolet, Inc.*, 972 S.W.2d 713, 718 (Tex. 1998); *Benge v. Williams*, 472 S.W.3d 684, 692 (Tex. App.—Houston [1st Dist.] 2014) ("Each party has the burden to prove that her own expert

[2] Aspenwood also disputes HCAD's contention that Yetiv's second expert valuation report was not timely produced during discovery. This report does not mention Yetiv's expert qualifications. Therefore, the timeliness of producing this report has no bearing on our analysis.

is qualified to offer expert testimony at trial."), *aff'd*, 548 S.W.3d 466 (Tex. 2018). "In close cases, we defer to the trial court's resolution of expert qualifications and will not reverse its judgment." *Benge*, 472 S.W.3d at 692.

Aspenwood first argues that HCAD's motion did not challenge Yetiv's expert qualifications, relying in part on the title of the motion. Although HCAD's motion is entitled "Motion to Exclude Evidence," HCAD specifically requested that the trial court "enter an order excluding the testimony of Jack Yetiv[.]" The motion argued that "Yetiv is not qualified to opine to the equal and uniform value" of Aspenwood's apartment complex. It also challenged Yetiv's expert testimony because Yetiv is not a licensed appraiser "or a real estate appraiser at all." Courts determine the nature of a motion by its substance, not by its title. TEX. R. CIV. P. 71 ("When a party has mistakenly designated any plea or pleading, the court, if justice so requires, shall treat the plea or pleading as if it had been properly designated."); *In re J.Z.P.*, 484 S.W.3d 924, 924–25 (Tex. 2016) (per curiam) (holding that substance of motion showed that party was entitled to relief even if motion was improperly captioned under Rules of Civil Procedure); *Bauer v. Gulshan Enters., Inc.*, 617 S.W.3d 1, 23 (Tex. App.—Houston [1st Dist.] 2020, pet. denied) (relying on substance of arguments in motion to conclude that party challenged each element of opposing

party's negligence claim). We conclude that the substance of HCAD's motion was a challenge to Yetiv's expert qualifications.[3]

Furthermore, at the hearing on the motion, HCAD specifically sought to disqualify Yetiv "as an expert valuation witness," arguing that "Yetiv's testimony as an appraisal witness should be excluded." The trial court asked Yetiv about his qualifications "to act as an expert for Aspenwood." Yetiv stated that he began investing in real estate in 1987, bought his first apartment complex in 1990, has owned 800 apartment units in Spring Branch, has "done" about $150 million "worth of offers on real estate in the last 30 years," and has spent approximately 30,000 hours "running" real estate. Contrary to Aspenwood's argument, the parties' central dispute in the motion and at the hearing on the motion was whether Yetiv was qualified—as an expert and otherwise—to offer valuation testimony at trial.

As the proponent of the testimony, Aspenwood—not HCAD—had the burden to prove Yetiv's expert qualifications. *See Gammill*, 972 S.W.2d at 718; *Benge*, 472 S.W.3d at 692. Yet in response to HCAD's motion, Aspenwood did not argue that Yetiv qualified as an expert. Nor did it attach any evidence showing he possessed

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[3] Aspenwood also argues, "HCAD's motions make no mention of Texas Rules of Evidence Rule 702, nor do they cite any of the classic Texas expert-exclusion cases." However, our review of HCAD's motion to exclude reveals that HCAD cited to Rule 702, albeit in the section addressing the property-owner rule. A fair reading of HCAD's motion to exclude shows that it challenged Yetiv's qualifications to offer opinion testimony.

any expert qualifications. Aspenwood simply disputed HCAD's assertion that an expert must be a licensed appraiser.[4] It made no effort to meet its burden to prove Yetiv's qualifications as an expert valuation witness.[5]

Aspenwood did argue Yetiv's qualifications at the hearing on HCAD's motion. When pressed by the trial court, Yetiv made the representations about his experience which we discussed above. But we agree with HCAD that Yetiv did not connect his experience in real estate investing—including making offers on real estate and "running" real estate—to expertise in applying generally accepted appraisal methods and techniques. *See* TEX. TAX CODE § 23.01(b) ("The market value of property shall be determined by the application of generally accepted

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[4] Aspenwood continues this challenge on appeal, arguing that the Tax Code does not require testimony from a licensed appraiser. HCAD appears to have abandoned this argument on appeal by arguing only that "license or not, an expert is someone" who qualifies under Rule 702. We agree with Aspenwood that Rule 702 does not require a witness to be licensed to qualify as an expert. *See* TEX. R. EVID. 702; *Reid Rd. Mun. Util. Dist. No. 2 v. Speedy Stop Food Stores, Ltd.*, 337 S.W.3d 846, 852 n.3 (Tex. 2011) (declining to address argument that witness did not qualify as expert because he was not licensed appraiser "except to state that Rule 702 does not require a witness to have any particular license to qualify as an expert"); *Cura-Cruz v. CenterPoint Energy Houston Elec., LLC*, 522 S.W.3d 565, 573 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("Neither a particular college degree nor a particular license is required under Rule 702 for a witness to qualify as an expert."). Nevertheless, our ultimate conclusion remains the same.

[5] Some of HCAD's evidence was relevant to Yetiv's expert qualifications, but Aspenwood does not rely on any of this evidence. For example, HCAD's evidence included Aspenwood's expert designation and Yetiv's expert reports and curriculum vitae. Our review of this evidence reveals that it is similar to Yetiv's representations at the hearing about his experience. We therefore do not independently consider this evidence.

appraisal methods and techniques."), (f) (requiring same in determining equal and uniform value of property under section 42.26(a)(3)); *Harris Cty. Appraisal Dist. v. Kempwood Plaza Ltd.*, 186 S.W.3d 155, 158 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (stating that "part of the work involved in making appraisals" of property under the Tax Code is determining "(1) what a reasonable number of properties was, (2) what qualified as a comparable property, or (3) how to make appropriate adjustments").

Aspenwood did not demonstrate that Yetiv possessed expertise in the valuation of real property, which was the subject matter of his proposed opinion testimony. *See, e.g.*, *Gammill*, 972 S.W.2d at 718 (stating that proponent of expert testimony bears burden to prove witness possesses special knowledge as to very matter on which expert proposes to opine); *Schronk v. Laerdal Med. Corp.*, 440 S.W.3d 250, 261 (Tex. App.—Waco 2013, pet. denied) (stating that proponent of expert testimony must demonstrate witness "possesses expertise concerning the actual subject about which they are offering an opinion"). Thus, Aspenwood did not meet its burden to establish that Yetiv qualified to offer opinion testimony about the value of Aspenwood's apartment complex. *See Gammill*, 972 S.W.2d at 718; *Gleannloch Comm. Dev.*, 585 S.W.3d at 524 (stating that evidentiary ruling will be upheld if supported by any legitimate ground).

On appeal, Aspenwood does not rely on any of the evidence that was before the trial court at the time it made its ruling. Rather, Aspenwood relies on Yetiv's declaration filed with its motion for reconsideration on the eve of trial long after the court made its evidentiary ruling. It also relies on Yetiv's trial testimony and the trial court's qualification of him as an expert on the valuation of his residence.

But assuming without deciding that this evidence established Yetiv's expertise to appraise Aspenwood's apartment complex, this evidence was not before the trial court when it entered the order excluding Yetiv's expert testimony. Aspenwood does not argue or rely on any authority establishing that a trial court abuses its discretion by not considering new evidence when deciding a motion to reconsider a prior evidentiary ruling. *See* TEX. R. APP. P. 38.1(i) (requiring appellate brief to "contain a clear and concise argument for the contentions made, with appropriate citations to authorities"); *Guimaraes v. Brann*, 562 S.W.3d 521, 538 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) ("Failure to cite to appropriate legal authority or to provide substantive analysis of the legal issues presented results in waiver of a complaint on appeal."). As HCAD points out, "In determining whether a trial court abused its discretion, a reviewing court is generally bound by the record before the trial court at the time its decision was made." *In re M-I L.L.C.*, 505 S.W.3d 569, 574 (Tex. 2016) (orig. proceeding).

Nor does Aspenwood offer any explanation for failing to produce this additional evidence in response to HCAD's motion to exclude and instead waiting months to bring it to the trial court's attention. Considering that the evidence consisted only of Yetiv's testimony about his own experience, it is reasonable to presume that the evidence was available to Aspenwood when it responded to HCAD's motion. Given Aspenwood's delay in presenting evidence to meet its burden to prove Yetiv's expert qualifications, we cannot conclude that the trial court abused its discretion by excluding Yetiv's testimony under Rule 702.

C. Property-Owner Rule

Aspenwood also argues that the trial court abused its discretion by excluding Yetiv's testimony under the property-owner rule. Generally, a property owner may testify to the value of his property even if he is not an expert and would not qualify to testify to the value of other property. *See* TEX. TAX CODE § 23.01(g) (stating that "property owners representing themselves are entitled to offer an opinion of and present argument and evidence related to the market and appraised value or the inequality of appraisal of the owner's property"); *Speedy Stop*, 337 S.W.3d at 852–53. This rule is based on the presumption that an owner is familiar with the value of her own property. *Speedy Stop*, 337 S.W.3d at 853. Business entities have the power to own and hold property, and the entity exercises this power through agents or employees who are authorized to act on behalf of and to bind the organization. *Id.*

Employees of an entity are as capable as individual property owners of knowing the market value of an entity's property. *Id.* Entities "frequently have employees whose duties require that they not only be personally acquainted with the entity's properties, but also require the employees to obtain and maintain current valuations of the entity's property for business reasons." *Id.* But not all employees qualify: "There must be some limit on who is permitted to testify on an entity's behalf under the Property Owner Rule." *Id.* (stating that this limit prevents entities from engaging in "trial by ambush" by identifying various employees under property-owner rule in discovery and then, after discovery closes, choosing employee who was not deposed to testify to property value at trial). The property-owner rule limits who may offer testimony of the value of an entity's property to "an officer in a management position with duties that at least in some part relate to the property at issue, or an employee of the entity in a substantially equivalent position." *Id.* at 854–55.

Aspenwood first argues that HCAD failed to establish that Yetiv does not qualify as a property owner. HCAD argued in its motion to exclude that Yetiv is an officer of Aspenwood's corporate general partner but "does not appear to actually work for [Aspenwood]." HCAD supported its arguments with documents from the Comptroller of Public Accounts showing that Aspenwood's only registered officer, director, or manager for purposes of satisfying franchise tax requirements is

Suburban Farms, Inc. These documents also showed that Yetiv was the sole officer, director, or manager for Suburban Farms. According to these documents, Yetiv is not listed as either an officer or an employee of Aspenwood at all, and therefore Yetiv does not qualify to testify under the property-owner rule. *See id.*

Aspenwood disputed HCAD's contention that Yetiv does not qualify as a property owner of its apartment complex under *Speedy Stop*. It solely relied on an excerpt from Yetiv's deposition in which Yetiv testified that he does a "bunch of different things" for employment, including a real estate investor and attorney, and that he worked for eight different companies, including Aspenwood. But even so, this evidence does not establish that Aspenwood employed Yetiv in a management position with duties related to the apartment complex. *See id.* Nor did Aspenwood make any argument or offer any evidence at the hearing on HCAD's motion to establish that Yetiv qualified as a property owner under the rule. Thus, the uncontroverted evidence before the trial court at the time of the challenged evidentiary ruling showed that Yetiv did not qualify to testify under the property-owner rule.

Like its arguments concerning expert testimony, Aspenwood does not rely on any of this evidence that was before the trial court when it ruled on HCAD's motion. *See In re M-I L.L.C.*, 505 S.W.3d at 574 (stating that appellate court conducting abuse-of-discretion review is generally bound by record before trial court when

ruling was made). Rather, Aspenwood again relies on Yetiv's declaration that it later filed in support of its motion to reconsider on the eve of trial ten months after the trial court excluded Yetiv's testimony. Aspenwood does not cite to any authority showing that the trial court was required to consider this new evidence.[6] The substance of Yetiv's declaration was available to Aspenwood when it responded to HCAD's motion to exclude, yet it did not rely on it at that time.

Aspenwood argues that it was not informed until after trial was called that Yetiv could not testify under the property-owner rule. It bases this argument on the language in the trial court's order stating that "Yetiv is excluded from testifying as an expert for Aspenwood[.]" According to Aspenwood, this order did not clearly prohibit Yetiv from testifying under the property-owner rule, only as an expert witness.[7]

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[6] We note that at the hearing on Aspenwood's motion to reconsider, the trial court stated that Yetiv's declaration was inconsistent with other statements he had made about Aspenwood's corporate structure. The court also questioned whether Aspenwood had met its burden to establish that Yetiv qualified to testify about the value of its apartment complex under the property-owner rule.

[7] Aspenwood's argument is questionable. Although the order stated that Yetiv was excluded from testifying as an expert for Aspenwood, the order also stated that HCAD's "Motion to Exclude Evidence should be GRANTED in all things . . . ." In its motion and at the hearing, HCAD sought to exclude all of Yetiv's testimony regarding the value of Aspenwood's apartment complex, not just his expert opinion testimony. A reasonable reading of the order reveals that the trial court granted HCAD's motion "in all things" and excluded his testimony entirely.

But even so, this does not change the fact that Aspenwood did not produce any evidence to establish Yetiv as a property owner of the apartment complex in the first instance. Aspenwood had notice of HCAD's challenge to Yetiv's testimony under the property-owner rule when HCAD filed its motion to exclude. HCAD's uncontroverted evidence showed that Yetiv was not an officer or manager employed by Aspenwood. Aspenwood's burden to produce evidence of Yetiv's qualification under the rule arose when HCAD filed its motion—that is, before the trial court ruled. The language of the order does not change the fact that the trial court had no evidence before it showing that Yetiv qualified as a property owner of Aspenwood's apartment complex when it made its ruling. *See Gleannloch Comm. Dev.*, 585 S.W.3d at 524 (stating that appellate court will affirm evidentiary ruling if supported by any legitimate ground, even ground not raised in trial court). Under these circumstances, we conclude that the trial court did not abuse its discretion in excluding Yetiv's testimony under the property-owner rule.[8]

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[8] Aspenwood also argues that the trial court erred by excluding Yetiv's testimony under the lawyer-witness rule. *See* TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 3.08(a), *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G, app. A (Tex. State Bar R. art. X, § 9) ("A lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client . . . ."). The parties do not dispute that Aspenwood was required to prove the value of its apartment complex either through expert opinion testimony or through testimony by the property owner. *See State v. Gleannloch Comm. Dev., LP*, 585 S.W.3d 509, 528 (Tex. App.—Houston [1st Dist.] 2018, pet. denied) ("Market value is typically established through expert testimony."); *see also Speedy Stop*, 337 S.W.3d at 852–53 (stating that property

We overrule Aspenwood's sole issue.

Sufficiency of the Evidence

In two issues, Yetiv challenges the legal and factual sufficiency of the evidence supporting the jury's verdict on both the market value and the equal and uniform value of his residential property.

A. Standard of Review

We review a jury's verdict for legal and factual sufficiency of the evidence. *See Starflight 50, L.L.C. v. Harris Cty. Appraisal Dist.*, 287 S.W.3d 741, 745 (Tex. App.—Houston [1st Dist.] 2009, no pet.). When, as here,[9] a party challenges the

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owner is generally qualified to testify to value of property even if owner is not expert). Thus, Rule 3.08 is an alternative basis to *exclude* Yetiv's testimony, not an alternative basis to *allow* it. Because we have already concluded that the trial court did not abuse its discretion in excluding Yetiv's testimony under Rule 702 and the property-owner rule, we decline to consider whether the trial court also properly excluded Yetiv's testimony under the lawyer-witness rule. *See* TEX. R. APP. P. 47.1.

9 In his reply brief, Yetiv argues for the first time that, under section 23.01(e) of the Property Tax Code, HCAD had the burden of proof on his equal and uniform value claim based on a written agreement that he attached in an appendix to his reply brief but that does not appear in the record on appeal. *See* TEX. TAX CODE § 23.01(e). An issue raised for the first time in a reply brief is ordinarily waived. *N.P. v. Methodist Hosp.*, 190 S.W.3d 217, 225 (Tex. App.—Houston [1st Dist.] 2006, pet. denied). Moreover, we cannot consider matters outside the record in our review, and documents attached as exhibits or appendices to briefs do not constitute formal inclusion of such documents in the record on appeal. *Democratic Schs. Research, Inc. v. Rock*, 608 S.W.3d 290, 305 (Tex. App.—Houston [1st Dist.] 2020, no pet.). But even if this issue were not waived, this Court and many of our sister courts have "assigned the burden of proof to the taxpayer in tax appraisal suits." *See Cypress Creek Fayridge, L.P. v. Harris Cty. Appraisal Dist.*, No. 01-16-00003-CV, 2016 WL 7164032, at *4 & n.1 (Tex. App.—Houston [1st Dist.] Dec. 8, 2016, no pet.) (collecting cases).

legal sufficiency of an adverse finding on an issue on which that party has the burden of proof, the party must demonstrate on appeal that the evidence establishes, as a matter of law, all vital facts in support of the issue. *Id.* at 745–46 (citing *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) (per curiam)). In conducting our legal sufficiency review, we must "examine the record for evidence that supports the finding, while ignoring all evidence to the contrary." *Nguyen v. Yovan*, 317 S.W.3d 261, 270 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) (quoting *Dow Chem.*, 46 S.W.3d at 241).

If there is no evidence supporting the finding, then we must "examine the entire record to determine if the contrary proposition is established as a matter of law." *Id.* (quoting *Dow Chem.*, 46 S.W.3d at 241). We will sustain the legal sufficiency challenge "only if the contrary proposition is conclusively established." *Id.* (quoting *Dow Chem.*, 46 S.W.3d at 241). This is a "heavy burden": "To conclusively establish [a] fact, the evidence must leave no room for ordinary minds to differ as to the conclusion to be drawn from it." *Catholic Diocese of El Paso v. Porter*, 622 S.W.3d 824, 834 (Tex. 2021) (quoting *Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224, 235 (Tex. 2019)) (internal quotation marks and citation omitted); *see Gunn v. McCoy*, 554 S.W.3d 645, 658 (Tex. 2018) (stating that primary consideration in legal sufficiency review is whether evidence at trial would enable reasonable and fair-minded factfinder to reach verdict under review).

When a party challenges the factual sufficiency of an adverse finding on an issue on which that party has the burden of proof, the party "must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence." *Nguyen*, 317 S.W.3d at 270 (quoting *Dow Chem.*, 46 S.W.3d at 242). In reviewing a factual sufficiency challenge, we must "consider and weigh all of the evidence," and we may "set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust." *Id.* (quoting *Dow Chem.*, 46 S.W.3d at 242); *see Crosstex N. Tex. Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580, 615 (Tex. 2016).

Jurors are the sole judges of the credibility of witnesses and the weight to give their testimony. *City of Keller v. Wilson*, 168 S.W.3d 802, 819 (Tex. 2005). Jurors "are entitled to resolve inconsistencies in witness testimony, whether those inconsistencies result from contradictory accounts of multiple witnesses or from internal contradictions in the testimony of a single witness." *Guimaraes*, 562 S.W.3d at 549. Jurors may also choose to believe one witness over another. *City of Keller*, 168 S.W.3d at 819. In conducting our factual sufficiency review, we may not substitute our judgment for that of the jury. *Id.*

B. Governing Law

The Texas Constitution requires taxation to be equal and uniform and in proportion to the property's value. TEX. CONST. art. 8 § 1(a), (b). Real property

located in Texas is subject to taxation each year. *See* TEX. TAX CODE §§ 11.01(a)–(b), 21.01. All taxable property is appraised at its market value as of January 1 each year. *Id.* § 23.01(a).

1. Market Value

The Property Tax Code defines "market value" as:

> the price at which a property would transfer for cash or its equivalent under prevailing market conditions if:
>
> (A) exposed for sale in the open market with a reasonable time for the seller to find a purchaser;
>
> (B) both the seller and the purchaser know of all the uses and purposes to which the property is adapted and for which it is capable of being used and of the enforceable restrictions on its use; and
>
> (C) both the seller and purchaser seek to maximize their gains and neither is in a position to take advantage of the exigencies of the other.

Id. § 1.04(7); *see City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 182 (Tex. 2001) (stating that market value is "the price the property will bring when offered for sale by one who desires to sell, but is not obligated to sell, and is bought by one who desires to buy, but is under no necessity of buying") (quoting *State v. Carpenter*, 89 S.W.2d 979, 980 (Tex. [Comm'n Op.] 1936)). The market value must be determined by applying generally accepted appraisal methods and techniques and by using the same or similar methods and techniques in appraising the same or similar kinds of property. TEX. TAX CODE § 23.01(b).

Under the market data comparison method of appraisal, which the parties used here, market value is determined by using comparable sales data adjusted to the subject property. *See id.* § 23.013(a); *Estate of Sharboneau*, 48 S.W.3d at 182 ("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."). Comparable sales must have occurred within twenty-four months of the valuation of the subject property and be appropriately adjusted for any change in the market value since the sale.[10] TEX. TAX CODE § 23.013(b), (c). Whether a property is comparable to the subject property depends on similarities in location, square footage, age, condition, access, amenities, views, income, operating expenses, occupancy, and existence of any easements, deed restrictions, or other legal burdens. *Id.* § 23.013(d). Other probative evidence of a property's market value includes the price paid, tax valuations, appraisals, online resources, and any other relevant factors. *See Nat. Gas Pipeline Co. of Am. v. Justiss*, 397 S.W.3d 150, 159 (Tex. 2012).

Each property must be appraised "based upon the individual characteristics that affect the property's market value, and all evidence that is specific to the value

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[10] Comparable sales occurring more than twenty-four months from valuation of the subject property may be considered if too few properties were sold within the period to constitute a representative sample. TEX. TAX CODE § 23.013(b).

of the property shall be taken into account in determining the property's market value." TEX. TAX CODE § 23.01(b). "The market value of a residence homestead shall be determined solely on the basis of the property's value as a residence homestead, regardless of whether the residential use of the property by the owner is considered to be the highest and best use of the property." *Id.* § 23.01(d).

2. Equal and Uniform Value

Property is appraised unequally if:

> (1) the appraisal ratio of the property exceeds by at least 10 percent the median level of appraisal of a reasonable and representative sample of other properties in the appraisal district;
>
> (2) the appraisal ratio of the property exceeds by at least 10 percent the median level of appraisal of a sample of properties in the appraisal district consisting of a reasonable number of other properties similarly situated to, or of the same general kind or character as, the property subject to the appeal; or
>
> (3) the appraised value of the property exceeds the median appraised value of a reasonable number of comparable properties appropriately adjusted.

Id. § 42.26(a).

A property owner has a right to protest the appraised value or the unequal appraisal of the owner's property. *Id.* § 41.41(a)(1), (2). If the owner is dissatisfied with the appraisal review board's determination of the protest on either ground, the owner may seek judicial review of the determination. *Id.* §§ 42.01(a)(1)(A), 42.26(a). If the owner is successful at trial, a trial court may order a reduction in the

appraised value of the property or order the value changed to the value calculated on the basis of the median level of appraisal of other properties. *Id.* §§ 42.25, 42.26(b).

C. Market Value

In his second issue, Yetiv argues that the evidence is legally and factually insufficient to support the jury's verdict of market value, although his arguments focus on the legal insufficiency of the evidence. The jury's verdict of the market value of Yetiv's property as of January 1, 2017, was $587,175.50. *See id.* § 23.01(a).

Yetiv argues that the jury "simply copied the erroneous number" it had calculated for the equal and uniform appraisal value of Yetiv's residence, and "it is essentially mathematically impossible for the two values to be identical to the penny . . . ." Yetiv does not support these arguments with a citation to record evidence or to appropriate authority.[11] *See* TEX. R. APP. P. 38.1(g), (i); *Guimaraes*, 562 S.W.3d at 545 (stating that "a brief that does not contain citations to appropriate authorities and to the record for a given issue waives that issue"). Moreover, because these arguments are based on speculation rather than evidence, they have no bearing

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[11] Yetiv argues in a footnote about the differences between the data used to determine market value and that used to determine equal and uniform value, and he relies on "the undersigned's decade-long experience with these two forms of valuation[.]" These arguments are not supported by a citation to the record or to appropriate authority, and the issue is therefore waived. *See* TEX. R. APP. P. 38.1(g), (i); *Guimaraes v. Brann*, 562 S.W.3d 521, 545 (Tex. App.—Houston [1st Dist.] 2018, pet. denied). In any event, Yetiv's brief is signed by his appellate counsel, not Yetiv, and there is no record evidence showing appellate counsel's expertise in valuing property.

on our review of the sufficiency of the evidence. *See Starflight 50*, 287 S.W.3d at 745 (stating standard for reviewing legal sufficiency of *evidence*); *Nguyen*, 317 S.W.3d at 270 (stating standard for reviewing factual sufficiency of *evidence*).

Much of Yetiv's sufficiency challenge to the jury's market value verdict relies on his argument that the trial court erred by denying his motion to strike Mushinski's testimony as unreliable because the testimony was based on insufficient data of comparable properties, specifically three comparable properties that could be used for commercial purposes. HCAD argues that Yetiv did not preserve this complaint for review because, among other things, Yetiv did not object to the evidence either before trial or when it was offered at trial. *See* TEX. R. APP. P. 33.1(a) (stating that party must timely object and obtain ruling on objection to preserve error for appeal).

A party may challenge conclusory opinions as legally insufficient to support a judgment even if the party did not object to admission of the testimony. *City of San Antonio v. Pollock*, 284 S.W.3d 809, 816 (Tex. 2009). When a party challenges the reliability of an expert's opinion, on the other hand, a party must timely object so that the trial court has the opportunity to conduct a reliability analysis. *Id.* at 816–17. A timely objection also prevents trial by ambush and allows the proponent of the testimony an opportunity to cure any defect. *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 716 (Tex. 2016).

Yetiv did not object to the reliability of Mushinski's testimony prior to trial or when it was admitted at trial. Instead, he waited until after Mushinski finished testifying and after HCAD rested its case-in-chief to lodge his objection, thereby depriving HCAD of an opportunity to cure any defect in Mushinski's testimony. *See id.*; *Pollock*, 284 S.W.3d at 818 (stating that opinion testimony admitted into evidence without objection may be considered probative evidence even if basis for opinion is unreliable). We therefore conclude that Yetiv's objection was not timely, and he therefore waived this complaint for review.

But even if Yetiv had preserved error on this complaint, he testified that he also used the same three comparable properties for his valuations.[12] Moreover, there is no record evidence showing that these challenged comparable properties were actually used for commercial purposes or that such a potential purpose was not reflected in the market value of the properties, as Yetiv argues. To the contrary, Mushinski testified that he adjusted these properties based on their location, and these properties fairly compared with Yetiv's property when appropriately adjusting their value due to a lack of zoning ordinances in Houston and the lack of deed restrictions.

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[12] Yetiv argues in his reply brief that he did not use the same comparable properties in his equal and uniform value analysis. However, a review of the reporter's record reveals that Yetiv testified he "used 12 comparables," including "the three comps from Mr. Mushinski's appraisal report . . . ."

Based on the evidence, Mushinski opined that the property had a market value of $642,950 less approximately $20,000 to remove the house. Yetiv testified that the market value of the property was $309,448. The jury determined that the market value was $587,175.50, which is within the range of evidence presented at trial. We therefore conclude that the evidence is legally sufficient to support the jury's verdict of market value. *See Callejo v. Brazos Elec. Power Co-op., Inc.*, 755 S.W.2d 73, 75 (Tex. 1988) ("There is simply no testimony or other evidence in this record" to support jury's easement value of $364,928.80 where no witness testified that value was greater than $33,541); *Calhoun/Holiday Place, Inc. v. Wells Fargo Bank, N.A.*, No. 01-14-00872-CV, 2016 WL 7671372, at *5–6 (Tex. App.—Houston [1st Dist.] Dec. 22, 2016, pet. denied) (mem. op. on reh'g) (holding that evidence was legally and factually sufficient to support jury's verdict of market value because finding was within range of evidence presented at trial); *Waterways on Intercoastal, Ltd. v. State*, 283 S.W.3d 36, 46 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (same).

Finally, we disagree with Yetiv's conclusory argument that the evidence is factually insufficient to support the jury's verdict on market value. Yetiv and Mushinski largely relied on the same comparable properties and similarly valued most of Yetiv's property. However, Yetiv's comparisons failed to account for his unsupported division of his property into two portions based on their usability. Yetiv claimed that 38,577 square feet of his property was usable and valued this portion of

his property at $306,448, while he claimed that the remaining 26,348 square feet was unusable because it had flooded twice previously. He therefore valued this portion of the property as agricultural land with a value of only $3,000, for a total market value of $309,448.

The Property Tax Code requires the market value of a residence homestead to be appraised "solely on the basis of the property's value as a residence homestead, regardless of whether the residential use of the property by the owner is considered to be the highest and best use of the property." *See* TEX. TAX CODE § 23.01(d). Thus, regardless of Yetiv's belief that the highest and best use of nearly half of his property is agricultural use, the market value of his residence homestead is based *solely* on the property's value as a residence homestead. *See id.*

Moreover, no record evidence shows that any residential property in Harris County, much less a comparable property, has been valued wholly or partially as agricultural land due to flooding. The only basis Yetiv asserted for valuing half of his property for agricultural use only was his testimony that the land could be used only to house his pet horse. But "property valuations may not be based solely on a property owner's *ipse dixit*." *Justiss*, 397 S.W.3d at 159.

Yetiv also testified that his neighbor's property drains onto his property and that the water "would be flowing very strongly in this direction" towards the part of Yetiv's property that floods. He said he could "easily" block the water draining from

his neighbor's property but doing so would cause his neighbor's property to flood, "so [Yetiv's property has] to continue being the drain channel for" the neighbor's property. A rational jury could have found that Yetiv's property floods, at least in part, because Yetiv allows his neighbor's property to drain onto his own property. A rational jury could have further found that by blocking the water draining from the neighbor's property, Yetiv could restore any loss in market value of his property that he contends is caused by the flooding.

There were other inconsistencies in Yetiv's testimony. *See Guimaraes*, 562 S.W.3d at 549 (stating that jurors are "entitled to resolve inconsistencies in witness testimony"). For example, Yetiv testified that the current house on the property is a tear down, he wants to build another house on the property, and the "only place logical" to put a new house is in "precisely the area that has all that flooding." He estimated that it would cost $30,000 to build up the low-lying part of the property so that it would be suitable to build a new house. However, he never explained why the market value of the entire property should be reduced by about half rather than by the $30,000 that he estimated would make all of his property usable in his opinion.

On cross-examination, Yetiv conceded that his valuation of $309,448 equaled $4.81 per square foot when applied to the total square feet of his property, although he stated that he "would love the market value to be a lot less, you know." He also conceded that the comparable properties he used in his analysis had a median price

per square foot of $9.45, and that multiplying this median price per square foot by the total square feet of his property yielded a value of $607,587. Yetiv testified that these calculations were improper, however, because they did not consider that only part of his property is "usable land" that should be valued at this median price. But as discussed above, this valuation technique violates section 23.01(d) of the Property Tax Code and is unsupported by any evidence.

Mushinski disagreed with Yetiv that his property should be split into two portions based on the usability of the land because, based on the market data that he reviewed, properties were sold based on their actual square footage, not based on dividing the property into usable and unusable portions. *See City of Keller*, 168 S.W.3d at 819 (stating that jurors may choose to believe one witness over another). He also disagreed that the portion of Yetiv's property that had flooded should be properly valued as agricultural land. *See id.* He testified that, based on his bachelor's and master's degrees in agricultural economics, he did not consider a residential property in a Houston neighborhood to be valued as agricultural land. *See id.* He also testified that he disagreed with valuing Yetiv's residential property as mixed-use property because such a valuation typically applies to new developments that have retail or grocery stores at the front of the property and apartments or office space at the back of the property. *See id.*

Mushinski testified that he inspected Yetiv's property in April 2018, spending several hours walking through the property and taking measurements and photographs. During the inspection, Yetiv told Mushinski that the property was in the same condition as it was in January 2017, the date when real property is appraised for purposes of assessing property taxes. *See id.* § 23.01(a). Mushinski testified that he valued the property both as improved and vacant,[13] and he explained his methodology. He stated that he found three comparable properties. He made adjustments to the comparable properties for market conditions, including the amount of time the property sat on the market before selling, location, size, size of the pool of buyers, zoning restrictions, and other considerations. He also testified about the specific adjustments he made to each of the comparable properties he used in his analysis. Mushinski ultimately opined that the market value of Yetiv's property was $10 per square foot for a total of $642,950. Mushinski agreed that the house on Yetiv's property should be demolished and that the cost to remove the house from the property is properly deducted from the market value. He conceded that this amount should be deducted from his market valuation of $642,950.

[13] Mushinski explained that he valued "the site as if it was vacant, ready to be offered or rebuild a new structure on it, a new residential home, based on the deed restrictions," and he "also did the sales-comparison approach as improved, as what a buyer in this market would consider on comparable properties."

Mushinski also testified that these comparable properties, like Yetiv's property, were not in the floodplain. He said that flooding on Yetiv's property was not irrelevant to its market value, and his market valuation considered properties in the same market area and with similar flooding issues as Yetiv's property. He also said that, although the property had flooded, it did not sit in a floodplain and it flooded only during two catastrophic flood events that did not impact Yetiv's property alone. He testified that a lay buyer of property would look to floodplain maps in determining whether to purchase property based on its likelihood of flooding. Nevertheless, Mushinski's opinion of the market value of Yetiv's property was not changed by the fact that it had flooded. *See City of Keller*, 168 S.W.3d at 819.

We conclude that the jury's verdict of market value is not clearly wrong and unjust. *See Gardiner*, 505 S.W.3d at 615; *Nguyen*, 317 S.W.3d at 270. The primary difference in the parties' valuations was Yetiv's unsupported and inconsistent testimony that half of his property should be valued at 1/100th the value of the other half, which in turn tainted his entire market value calculation. Because the evidence supporting the verdict is not weak or against the great weight and preponderance of the evidence, we conclude that the evidence is factually sufficient to support the jury's verdict of market value.

We overrule Yetiv's second issue.

D. Equal and Uniform Value

In his first issue, Yetiv argues that the evidence was legally and factually insufficient to support the jury's verdict on the equal and uniform value of his property. He argues that he provided the only evidence on this value, HCAD did not designate an expert witness to testify on this value, the verdict was based on incorrect calculations and improper testimony of opposing counsel, and the jury could only have arrived at its verdict by ignoring the Property Tax Code provision requiring equal and uniform value to be based on selecting comparable properties with appropriate adjustments.

The jury charge instructed that "a property is unequally appraised if . . . the appraised value of the property exceeds the median appraised value of a reasonable number of comparable properties appropriately adjusted." *See* TEX. TAX. CODE § 42.26(a)(3).

Yetiv argues that the jury's verdict is "precisely" based on his testimony that the median value of the comparable properties he used in his equal and uniform valuation was $9.45 per square feet, which equals $607,588 for his property, and the estimated cost of $20,412.50 to demolish the house should be deducted from that amount, which "precisely . . . to the penny" matches the jury's verdict of $587,175.50. We agree that Yetiv's own testimony and evidence of the comparable properties used in his equal and uniform valuation and his demolition estimate

"precisely" supports the jury's verdict. We therefore conclude that the jury's verdict of equal and uniform value is supported by legally sufficient evidence. *See Starflight 50*, 287 S.W.3d at 745.

Yetiv characterizes the calculations that opposing counsel asked him to make on cross-examination as improper testimony by opposing counsel, but we disagree. Opposing counsel only asked the questions; Yetiv's testimony supplied the evidence. For the reasons discussed above, we also disagree with Yetiv's argument that these calculations were incorrect because they did not consider that only part of his land was usable.

Even though Yetiv provided the only evidence on equal and uniform value, it was his testimony on cross-examination based on his own comparable properties that supported the equal and uniform value of his property. Yetiv testified that the usable portion of his property should be valued at $373,000, and the unusable portion of his land should be valued at only $3,000. From a total of $376,000, Yetiv subtracted approximately $20,000 to demolish the house and $30,000 to build up the low-lying part of his property. In his closing statement, Yetiv argued that this calculation equals $320,567. As discussed above, this testimony was based on the flawed and unsupported premise that nearly half of his property should be valued significantly lower than the other half. The jury could have decided not to believe this testimony from an interested witness. *See Guimaraes*, 562 S.W.3d at 549.

On cross-examination, Yetiv conceded that he "ha[d] no idea" how to calculate a median of several numbers because he "used Excel to do the calculations." *See* TEX. TAX CODE § 42.26(a)(3) (providing that property is unequally appraised if appraised value exceeds median appraised value of reasonable number of comparable properties appropriately adjusted). He eventually responded that the median value was $9.45 per square foot, which would yield an equal and uniform value for the total square feet of Yetiv's property of $607,588, which is more than the jury's verdict. The jury could have resolved the inconsistencies in Yetiv's testimony in reaching its verdict. *See Guimaraes,* 562 S.W.3d at 549. Therefore, Yetiv has not demonstrated that the jury's verdict of equal and uniform value is so weak or against the great weight and preponderance of the evidence such that it is clearly wrong and unjust. *See Gardiner*, 505 S.W.3d at 615; *Nguyen*, 317 S.W.3d at 270. We therefore conclude that the evidence is factually sufficient to support the jury's verdict.

We overrule Yetiv's first issue.

Conclusion

We affirm the judgment of the trial court.

April L. Farris
Justice

Panel consists of Justices Goodman, Rivas-Molloy, and Farris.