In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-18-00025-CV

STATE OF TEXAS, APPELLANT

V.

VISTA RIDGE 07 A, LLC, APPELLEE

On Appeal from the Probate Court
Denton County, Texas
Trial Court Nos. PR-2014-00612, Honorable Bonnie J. Robison, Presiding

April 22, 2019

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and PARKER, JJ.

The State of Texas appeals from a final judgment awarding Vista Ridge 07 A, LLC the loss it suffered as a result of the State's condemnation efforts. The latter were undertaken as part of a plan to expand an interstate highway adjacent to the affected property. Neither Texas nor Vista agreed to the valuation of the loss derived by three special commissioners. That disagreement resulted in a jury trial wherein the jury found that "the difference between the fair market value of [Vista's] whole property immediately before the State's acquisition on January 16, 2015 and the fair market value of the remaining property immediately after the acquisition" to be $1.6 million. The trial court

awarded Vista that sum. The State argues, through two issues, that the jury's decision was improper since it allegedly was influenced by inadmissible evidence admitted by the trial court. We reverse.[1]

Admission of Expert Evidence Regarding Lost Parking Spaces

The first issue we address pertains to the valuation of a row of parking that would be lost due to the effects of the State's condemnation. The row lay in front of a Twin Peaks restaurant and behind a landscaping buffer taken by the State. Through its ordinances, the City of Lewisville (City) required a landscaping buffer as of January 16, 2015, or the date of the taking. Abiding by those ordinances would result in the loss of the parking spaces in question, and an expert (Beck) retained by Vista to value the loss factored that circumstance into his opinion. The State, however, believed that so including the effect of the ordinance into the opinion resulted in Beck's testimony becoming irrelevant, unreliable and, therefore, inadmissible. This purportedly was so because the landscaping ordinance was not only subject to amendment but was actually modified after the date of the taking to relieve Vista from maintaining the buffer. The expert's opinion as to the impact of the lost parking ignored this happenstance, according to the State.

The decision to admit or exclude evidence lays within the trial court's discretion. *Morale v. State*, 557 S.W.3d 569, 573 (Tex. 2018). This standard obligates an appellate court to uphold the ruling if supported by any legitimate basis appearing in the record. *Azle Manor, Inc. v. Patterson*, No. 02-15-00111-CV, 2016 Tex. App. LEXIS 13616, at *25

[1] Because this appeal was transferred from the Second Court of Appeals, we are obligated to apply its precedent when available in the event of a conflict between the precedents of that court and this Court. *See* TEX. R. APP. P. 41.3.

(Tex. App.—Fort Worth Dec. 22, 2016, pet. denied) (mem. op.). And, unless the trial court acted without reference to any guiding rules or principles, its decision must stand. *See id.* (stating that a trial court abuses its discretion if it acts without reference to any guiding rules or principles, that is, if the act is arbitrary or unreasonable).

The only issue that the jury was asked to decide concerned the amount of just compensation due Vista for the entire taking by the State. Such compensation is measured by the difference between the market value of the entire property before the taking and the market value of the remainder property after the taking, considering the effects of the condemnation. *Morale*, 557 S.W.3d at 573-74. And the measuring point is the date of taking. *Enbridge Pipelines, (E. Tex.) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 261 (Tex. 2012). That difference at the time of the taking was what Beck, as an expert appraiser, attempted to calculate for Vista. In assessing whether he legitimately arrived at that end, we must remember that an expert in condemnation cases may assume facts established by legally sufficient evidence and reflect those assumptions in his opinion. *Morale*, 557 S.W.3d at 575. However, his opinion must have a reliable foundation. *Gharda USA, Inc. v. Control Solutions, Inc*., 464 S.W.3d 338, 348 (Tex. 2015); *Enbridge Pipelines*, 386 S.W.3d at 262. If there is too great of an analytical gap between the data the expert relies on and the opinion offered, the opinion is unreliable. *Enbridge Pipelines*, 386 S.W.3d at 262. The same is true if he uses improper methodology or misapplies established rules and principles in developing his opinion. *Id.* Moreover, the need for reliability extends to each material component of that opinion. *Gharda USA, Inc.,* 464 S.W.3d at 348-49.

In testing reliability, we are guided by the application of non-exclusive criteria referred to as the *Robinson* factors. *Id.; see E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 557 (Tex. 1995). They include 1) the extent to which the theory has been or can be tested, 2) the extent to which the technique relies upon the subjective interpretation of the expert, 3) whether the theory has been subjected to peer review and/or publication, 4) the technique's potential rate of error, 5) whether the underlying theory or technique has been generally accepted as valid by the relevant scientific community, and 6) the non-judicial uses which have been made of the theory or technique. *Whirlpool Corp. v. Camacho*, 298 S.W.3d 631, 638 n.6 (Tex. 2009); *Robinson*, 923 S.W.2d at 557. With this said, we begin our analysis.

That a Lewisville city ordinance required the landscaping buffer as of January 16, 2015 (the date of taking) is clear. That the jury was asked to determine the fair market value of Vista's property as of that date is equally unquestionable. Nor does the State question that the loss of parking at a shopping center and restaurant could affect the value of the remaining property. Instead, it questions whether Beck could legitimately factor into his opinion the likelihood that the existing city ordinance would remain applicable and obligate Vista to maintain the buffer. It argues that he could not because an ordinance had been proposed that would have afforded some zoning relief to those landowners affected by the interstate changes. Because it had been proposed and was awaiting consideration by the city council at the time of taking, Beck had to factor that into his analysis, and he purportedly did not. We overrule this aspect of the State's complaint for several reasons.

First, evidence indicates that in initially calculating what to pay Vista for the taking, the State itself factored into its equation the need to comply with the existing landscape ordinance.[2] Having itself done that, Beck was free to do the same in developing his opinion. And, we find authority for that in *Morale*. There, the State initially determined that the landowner's business would be classified as displaced. Though it later changed the classification, the landowner's expert utilized the initial one to support his opinion regarding the damages recoverable due to the taking. The *Morale* court deemed that appropriate. As it said, "Bolton's assumption that the Morales could not continue the property's existing use is grounded in evidence such as Kimberly Morale's testimony ***and the initial displacement classification***." *Morale*, 557 S.W.3d at 575 (emphasis added). Much like the old saying about "what is good for the goose is good for the gander," what the State considers in developing its valuation opinion entitles the landowner to consider the same if beneficial.

Second, as said by the Fort Worth Court of Appeals in *State v. Little Elm Plaza, Ltd.*, No. 02-11-00037-CV, 2012 Tex. App. LEXIS 8880 (Tex. App.—Fort Worth Oct. 25, 2012, pet. dism'd by agr.) (mem. op.), "an expert may testify about how an uncertainty with regard to a governmental action may have affected the market value (in other words, how potential buyers and sellers would weigh the risks related to the property) on the date of the taking." *Id.* at *33. It continued with: "an expert may not opine about how that uncertainty will actually be resolved . . . after the taking when that opinion is speculative

[2] Though the State posits that this bit of evidence should not be considered, it was admitted at trial. The decision to admit it was accompanied by no limiting instruction. Consequently, the jury was free to consider it for all purposes. *See In re Toyota Motor, U.S.A., Inc.*, 407 S.W.3d 746, 760 (Tex. 2013). More importantly, the State failed to assign an issue or point of error to the trial court's decision admitting the evidence. Thus, whether it is inadmissible and, therefore, beyond our consideration is not before us.

or conjectural." *Id.* In saying this, the court was addressing an issue like that before us. Commercial realty of Little Elm was also being affected by the conjunction of State efforts to expand a highway and compliance by the property owners with a local town's zoning ordinance. Due to this conjunction, Little Elm's expert opined that his client would have to demolish its buildings. The reviewing court was asked to decide if his opinion was speculative and, therefore, inadmissible. The court held it was because the expert ignored, in developing his opinion, evidence of 1) the town's willingness to accommodate property owners, 2) its willingness to craft solutions to address nonconforming uses, 3) the town's delay in both applying and in deciding whether to apply the ordinance that would purportedly result in the demolition of Little Elm's buildings, 4) the town's director of planning and development having told the expert that the town would not require Little Elm to be in full compliance with the ordinance, 5) the "reasonable foreseeab[ility]," "***on the date of condemnation***," that the town would pass another ordinance allowing property owners to seek variances, and 6) the absence of evidence that Little Elm could not seek or would not obtain such a variance. *Id.* at *37-38 (emphasis added). The State here believes that these words from *Little Elm* also require us to hold Beck's opinion speculative for like reason. It wants us to conclude that Beck's opinion was based on the "certainty" that Lewisville would enforce its ordinance requiring a ten-foot landscaping buffer.

It is true that the record contains evidence of Lewisville's eventual decision to forgo application of the landscaping ordinance to Vista's property. That evidence appears in the form of emails written about ten months after the date of condemnation or taking. A governmental decision ten months after the taking is hardly evidence suggesting that it

was ***reasonably foreseeable at the time of taking*** that neither Vista nor a willing buyer would have to maintain a landscaping buffer.

"There's many a slip between the cup and the lip." Experience makes that especially true in matters pertaining to governmental decisions. Simply because legislation on a national, state, or local level is proposed does not make its passage a relative certainty. Simply because it is passed does not mean its benefits will be given to those to whom it was designed to help, especially when governmental authorities retain discretion in meting out those benefits. So, the presence of other evidence indicating that a new ordinance which may provide relief to Vista and others was being proposed at the time of the taking does not make its passage a certainty; a witness at trial said as much. Moreover, the proposed (and eventually enacted) ordinance still mandated that "[a]ll Impacted Sites must comply with the Lewisville City Code and be brought into compliance as required." So too did it establish a procedure for them to follow, which procedure involved the submission of an I-35 modified site plan. If that plan required "variances to bring the Impacted Site into compliance, such variances ***may*** be approved by the City Council or the Board of Adjustment, depending on the type of variance sought." (Emphasis added). It also granted authority to the "City Manager, or her designee" to "approve . . . minor changes . . . without further City Council approval." Those minor changes included a "reduction of required landscaping" in certain situations. Yet, the ordinance did not mandate that those affected by the construction ***must be*** relieved from complying with applicable ordinances. Beck factored this into his analysis. He conceded that notice of the proposed ordinance "was posted for a long time" before its adoption in March of 2016. When asked if "a market participant would have known about its posting

and would have factored that in before the date of value . . . in their analysis," he responded with both "[a]bsolutely" and "[y]es, sir."

Yet, uncertainty remained, and it would be factored into a willing buyer's decision, according to Beck. So, it was a factor considered in developing his opinion about values after the taking. He testified that he did not know whether parking would actually be lost. If it were assumed that parking was not lost, then he "imagine[d] that there wouldn't be" damages. But "[t]hat's the whole point . . . there's a lot of uncertainty revolving around it." "If it were a guarantee that the parking would not be affected, then I believe that a buyer would purchase it with that knowledge and not penalize it for losing parking if it were guaranteed that they weren't going to," he said. However, he "appraised [the loss] with all the uncertainty that was there on the date the State took the property." And, when asked if he appraised it "as if a willing buyer would never have known that they could go to the City and try to get a variance," he replied no.

We have been cited to no evidence of a city official with authority to bind the city calling Vista or its representatives before the taking and informing them that they would not have to maintain a landscaping buffer. Something like that may have happened in *Little Elm*, but the State has not shown that to have occurred here.

Simply put, the record reveals that Beck's opinion as to the $376,000 difference between the property's value immediately before January 16, 2015, and immediately after was based upon the uncertainty around the matter and a willing buyer's consideration of that uncertainty. At the time of taking, an ordinance required the requisite landscape buffer. Though a buyer would take into consideration the prospect of a new ordinance being enacted and the possibility of receiving a variance from restrictions imposing

buffers, uncertainty remained, nonetheless. *Little Elm* permitted an expert to consider such uncertainty. Again, an expert may "testify about how an uncertainty with regard to a governmental action may have affected the market value (in other words, how potential buyers and sellers would weigh the risks related to the property) on the date of the taking." *Little Elm Plaza, Ltd.*, 2012 Tex. App. LEXIS 8880, at *32-33. So too did it deny "an expert [from opining] about how that uncertainty will actually be resolved in a date after the taking when that opinion is speculative or conjectural." *Id.* It seems as though the State was attempting to push Beck into doing the improper, that is, into voicing an opinion about how the uncertainty would actually be resolved. It was the State who wanted him to remove the uncertainty from his calculations by assuming that the City would resolve the matter of landscaping by requiring none. Yet, he would not so assume. Nor could he so assume under *Little Elm*. Beck did what *Little Elm* permitted experts to do. *See also Morale*, 557 S.W.3d at 575-76 (holding that Bolton's testimony that Morale could not continue the property's existing use was not speculative and inadmissible because it was grounded on evidence that Morale's business would be displaced, that a willing buyer would conclude the property was designed for an auto collision body shop but no longer could be used for it, and that relief may still be granted thereby avoiding displacement). In short, the trial court did not err in overruling the State's objection to this aspect of Beck's opinion.

Admission of Expert Evidence Regarding Lost Signage

The State next questions whether the trial court reversibly erred by admitting Beck's expert testimony illustrating that approximately $1,155,000 in damages related to

the loss of one of two advertising signs. There are multiple facets to this complaint, and we address each to the extent needed.

Sign Relocation

The State initially contends that Vista failed to prove that it would lose one of the two signs advertising the shopping center and its tenants due to the expansion of the I-35 corridor. In its view, there existed comparable locations at which the sign could be reinstalled, and Vista failed to prove otherwise. However, the record contained sufficient evidence to allow an expert to opine otherwise.

Two potential locations were mentioned. Neither were feasible, and Beck explained why. Concerning the first, there existed underground public and private utilities. Those utilities were installed via the authority of easements, and "there's no rights to the landowner" (i.e., Vista) in those easements. Whether the underground utilities installed per those easements could be moved for purposes of relocating the sign would simply depend upon the easement owner agreeing to move, he continued. He also opined that 1) a potential buyer would have to contend with that uncertainty, 2) buyers do not "buy properties with that kind - they will go to a worst case scenario, not a best case scenario," 3) "[a]t the very bare minimum there's a large amount of uncertainty," and 4) "I don't think that a buyer would assume that they could put a sign there on the effective day." That Beck had legal basis for his opinion is rather clear.

As reiterated by our Supreme Court in *Severance v. Patterson*, 370 S.W.3d 705 (Tex. 2012), "[b]ecause the easement holder is the dominant estate owner and the land burdened by the easement is the servient estate, the property owner may not interfere with the easement holder's right to use the servient estate for the purposes of the

easement." *Id.* at 721. The State, with its right of eminent domain, most likely has never had the lesser hand when dealing with an easement holder. But those entities denied the power of condemnation, like Vista, must contend with the law of easements and accept their status as owner of a servient estate.

As for the second potential location, it was located back in the interior of the shopping center. Beck explained that it was infeasible "from a market standpoint" because:

> you don't see shopping centers with a giant sign tucked back in the center like that. I don't think that a buyer would consider that a reasonable replacement or even worth the exercise, honestly, because once you're there, you're right in front of the stores. You know, why put a giant sign right in front of the store signage.

Other evidence also indicated that 1) locating the sign in the suggested area would make it difficult to see, 2) it would be too far from the frontage road or right of way, 3) few, if any, shopping centers have major signage 300 or more feet from a right of way or frontage road, and 4) the alternate location placed the sign 500 feet from the right of way or frontage road. Simply put, the foregoing is some evidence supporting the conclusion in Beck's opinion that alternative locations were unavailable and that one of the two signs would be lost to Vista. Consequently, we reject the State's argument to the contrary.

Valuation of Impact

As for the damages suffered by Vista due to the loss of a sign, Vista offered expert testimony valuing the loss at approximately $1,155,000. The State questions the legitimacy of that testimony in two ways. First, it allegedly encompassed damages that the Supreme Court deemed unrecoverable. Second, the expert opinion underlying the amount was speculative, unreliable, and conclusory.

Regarding the first contention, we are directed to the Supreme Court opinion of *State v. Schmidt*, 867 S.W.2d 769 (Tex. 1993). The latter stands for the proposition that a landowner has no right to insist that premises be visible or recovery for the loss of visibility to passing traffic. *Id.* at 774. Yet, care must be taken to understand that *Schmidt* involved circumstances wherein the loss of visibility was not attributable to the property actually taken. That is, the State contended "Schmidt and Austex [were] not entitled to severance damages because the damages they claim did not result from the taking ***of their property***, but from the State's new use of its existing right-of-way and of property taken from other landowners to widen it," and the court agreed. *Id.* at 777 (emphasis added). It further observed that the "diminution in value claimed by Schmidt and Austex in their remaining property is due entirely to the State's modifications to Highway 183 and ***not to the use of the strip taken from each tract***." *Id.* at 778-79 (emphasis added).

Indeed, in *Interstate Northborough P'ship v. State*, 66 S.W.3d 213 (Tex. 2001), the Supreme Court explained why it agreed with the State's argument in *Schmidt.* It reiterated that the State was contending the damages were "noncompensable because they resulted from the State's new use of its existing right-of-way and property taken from other landowners." *Id.* at 219. Yet, "section 21.042 of the Property Code allow[ed] recovery only for the effects of the State's use of the condemned land on the value of the remainder property." *Id.* "This rule exists . . . because the effects of condemnation on the remainder property differ from the effects of the State's new use of its existing right-of-way or adjoining land." *Id.* "[W]e concluded that the State's converting the roadway to a controlled-access highway, ***and not the State's using the condemned strips of land***, caused the traffic diversion, circuity of travel, and impaired visibility damages." *Id.*

(emphasis added). Furthermore, the injury being valued is that "peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of [realty]." *Id.* If nothing else, this verbiage confirms the dichotomy between a landowner seeking compensation for injury to his property being taken and injury due to the State taking another's property or altering the use of its own property. Under *Schmidt* and *Interstate Northborough*, the latter is not compensable, but the former is. And, that result simply mirrors the equation utilized in calculating condemnation damages; again, the equation measures the damages to the remainder as the difference between the market value of the remainder property immediately before the condemnation and the market value of the remainder property immediately after the condemnation, taking into consideration the nature of any improvements and "the use of the land taken." *Id.* at 218; *see also State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170, 172 (Tex. 2009) (reiterating that remainder property damages 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").

Here, the land on which the sign existed was a portion of the land actually taken by the State. Thus, Vista's situation falls within the clarification provided in *Interstate Northborough*. It was not attempting to recover simply for the effects experienced from the taking of someone else's land or the State altering the use of its own land or right-of-way. The State took a portion of Vista's realty particularly suitable for purposes of signage. So, it was entitled to recover damages to the remainder as measured by the

difference between the market value of the remainder considering "the use of the land taken."[3] This leads us to the State's next argument.

Again, it posits that Beck's opinion regarding the value of the loss was conclusory and unreliable. And, though it cited to various aspects of the expert's opinion, the sum and substance of its analysis simply encompassed the expert's purported reliance on the synopsis of a particular study.

The synopsis in question was utilized as a component of the income method selected by Beck in measuring the damage to the remainder of Vista's land. *See State v. Cent. Expressway Sign Assocs*, 302 S.W.3d 866, 871 (Tex. 2009) (stating that Texas recognizes three ways to determine the market value of condemned property those being the comparable sales method, the cost method, and the income method). In other words, he was attempting to calculate what a willing buyer would pay a willing seller for the land if the property were priced according to the rental income it generated. *See id.* (noting that use of the income method is appropriate when the realty would be priced according to the rental income it generates and all three methods of calculating market value are designed to approximate the amount a willing buyer would pay a willing seller for the property). The State's argument here concerns methodology and the manner in which Beck valued the loss under the income method. Relying on the synopsized study

[3] It may be that "use of the land taken" had a particularly beneficial relationship with visibility and signage. Yet, it is not unknown for such a characteristic to be a consideration in calculating damages. To paraphrase *State v. Clear Channel Outdoor, Inc*., 463 S.W.3d 488, (Tex. 2015) (involving condemnation of land used for billboards), the "compensation the State owed for the land taken, given that its highest and best use was for outdoor advertising, should have taken into account the fact[] that . . . the site was especially suited to that use." *Id.* at 498. The valuation should take "into account the rents the owner could command from so desirable a location," that is, desirable due to its favorable visibility to passersby. *Id*. (emphasis added).

allegedly made his "entire lost signage damages speculative and conclusory as a matter of law."

The synopsis appeared in a 2002 appraisal journal and described a multi-year study undertaken from 1995 to 1997 of 100 Pier One stores. Its purpose was to assess the effect on sales of installing a pole sign advertising the store where none previously existed. Apparently, seven years of sales were being reviewed. Yet, the range of years being reviewed were unknown. Beck assumed they consisted of the seven consecutive years immediately preceding either 1995 or 1997. They could have been others, however. Other information was also missing from the synopsis. For instance, it did not disclose, nor did Beck know, the locations of the stores being studied.[4] Similarly unknown was whether the stores were part of a mall or strip center or merely stand-alone businesses. Furthermore, Beck never saw the study itself or the data upon which it relied, only a summary of it done by third parties who submitted it to an appraisal journal.

Per the synopsis, the study indicated that placing a sign in front of a Pier One store located somewhere or another resulted in an increase in store sales from 4 to 12%. Whether and how those conducting the study removed factors, if any, unrelated to the impact of mere signage is unknown. Nonetheless, this 4-12% range provided Beck with the "quantitative" factor needed to perform his calculations, despite conceding that the "research doesn't fit my problem exactly." And in utilizing it, he simply inverted the finding to fit his circumstance. That is, he acknowledged that nothing in the study dealt with the effect, if any, of losing a sign on the sales of a retail store. Nevertheless, he apparently

[4] Beck assumed that they were located in some retail, as opposed to industrial, area, though.

concluded that if installing a sign increased sales 4-12%, then removing a sign decreased them by a like percentage.

The "qualitative" data utilized by the expert appraiser came in the form of synthesizing responses from brokers and others whom he queried about the effect signage had on retailers. Such synthesis led him to conclude that signage was important to retailers, was often part of the negotiations between landlord and tenant, and could impact the rent paid. This "qualitative data" did not measure loss, however. It simply dealt with whether signs were important to retailer tenants and whether their absence or availability could affect what they would pay a landlord. Beck turned to the aforementioned "quantitative" data to assign a number to that value.

With both categories of data in hand, Beck then calculated the sales derived by the four stores most effected by the loss of a sign. The four stores were those that would have to be omitted from the one remaining sign. That is, each of the original two signs Vista maintained had space for the names of nine tenants; thus, advertising space was available for a total of eighteen tenants. At the time of the taking by the State, the center had only thirteen tenants, though not all thirteen advertised on the signs. With one sign gone, there was space only for nine tenants. That left four tenants without room on the remaining sign. Those four tenants, apparently, were the ones most affected by the lost sign.

According to Beck, the "implied sales" of those four tenants before sign removal approximated $2,226,000. Their "implied sales" after removal of the sign approximated $2,140,600 if the lower 4% range adopted from the synopsized study were used. Applying the 12% range resulted in post loss "implied sales" of around $1,987,700. Next,

he calculated the "annual income" of these tenants based on the "implied sales" after sign loss. That sum then was divided by the total square footage rented by the four tenants. From that result, an "NNN"[5] of $6.36 was subtracted which led to a market rent per square foot of $23.79 at a 4% loss and $21.64 at a 12% loss. Taking $23 per square foot, Beck calculated annual market rent payable to Vista at $249,182, which amount equaled lost rent of $21,668 annually from the four tenants. However, he was not finished.

Beck also opined that the remaining nine tenants who could get their names on the remaining sign also experienced some impact from the loss of the other sign. As his theory went, no longer did they have two signs upon which to advertise, only one. Calculating the impact did not involve the 4-12% study range, though. Instead, Beck opted to "adjust[] the capitalization rate to account for the other things that we don't have studies on." The capitalization rate selected was 6.75%. As he explained, "the smallest basis point movement that [investors] negotiate is usually in increments of 25" or "25 percent of 1 percent." "And so, I'm just saying that there would be some impact to it. And without . . . more detailed data . . . this [6.75%] is as reasonable a conclusion as I can come up with." The capitalization rate before loss of one sign was 6.5%, according to Beck. So, he raised the rate .25 of one percent to reflect an increased risk investors would feel due to the missing sign's availability to the nine tenants.

These multiple calculations then led the expert to arrive at a "market impact" of $1,047,961. This reflected the difference between the remainder's value of $22,627,961 before sign loss and value of $21,580,000 after. To $1,047,961, Beck added a "cost to cure" equaling $5,015.63 and arrived at a "total just compensation" figure attributable to

[5] Beck did not explain nor did we find in the record what was meant by the use of "NNN."

sign loss of $1,155,016. In short, the one lost sign constituted about 5% of the market value of the remainder under Beck's income method calculations.[6]

As previously mentioned, experts may offer their opinions if it is relevant and based on a reliable foundation. The State questions the reliability of the foundation upon which Beck based his opinion. No doubt, inverting the finding of the Pier One study *(*i.e., the 4-12% increase in sales if a sign is installed) constitutes a material part of Beck's opinion. It provided the incremental "quantitative" factor by which loss of sales, and therefore, reduced rents, would be determined. So, it being a material component, Beck's opinion regarding the applicability of the synopsis after inverting its findings must be reliable. Testing it against the aforementioned *Robinson* factors, though, leads us to conclude that it is not.

There is some indication that either the synopsis or study underwent peer review before inclusion in the appraisal journal. Yet, no one testified that the decision to invert those findings as a means to accurately assess the impact of losing a sign underwent like review. To reiterate, the study purported to measure the effect adding signage had on sales. Beck was called upon to measure the effect, if any, removing signage had on sales. No one testified that any authoritative body or peer group reviewed the accuracy of Beck's decision to invert the findings. Nor was there evidence of an independent third party verifying the proposition that experiencing the removal of a sign equates to a 4-12% sales loss irrespective of the type of store involved, its location, or its juxtaposition to anchor stores in a strip mall that have community signage.

[6] Dividing 1,155,016 by 22,627,961 equals .05104375069 or roughly 5%.

It appears that Beck's decision to both adopt and invert the 4-12% factor was subjectively based. He acknowledged that the study did not "exactly fit" but applied it anyway because that was about all he could find "remotely applicable." Nor did he review the underlying data of the study to determine whether the circumstances were remotely comparable. And, it is quite doubtful that he or anyone else ever used his inversion of the study to measure the impact of a signage loss; this is so because he developed the theory for purposes of the litigation at bar. *See Robinson,* 923 S.W.2d at 559 (observing that opinions formed solely for the purpose of testifying are more likely to be biased toward a particular result).

Nor did Beck offer substantive explanation to support the reasonableness of his decision to invert the study's findings as a means of accurately calculating loss of sales. That a study of circumstances which do not "exactly fit" was the only information "remotely applicable" does not alone make its adoption as appropriate methodology reasonable. A claim will not stand on the mere *ipse dixit* of a credentialed witness. *See Gharda USA, Inc.,* 464 S.W.3d at 349. It may be possible that his methodology was right but that is not enough. The accuracy of it must be reasonably probable, *id.*, and it was not shown to be here.

Given the foregoing circumstances, Beck's opinion about the financial impact of one lost sign was not shown to be reliable. So, the trial court abused its discretion in admitting it over the State's objection. That his opinion probably caused the rendition of an improper judgment cannot be denied. Vista sought damages related to land taken for parking and signage and the effects of that loss on the remainder. Damages for the lost parking and its affect equaled $647,000, according to Beck. The jury awarded

$1,600,000. The difference between the two sums can reasonably be attributed to the damages awarded Vista based on opinion testimony quantifying the impact of the lost sign, which opinion testimony was not shown to be reliable.

We reverse the judgment of the trial court and remand the cause for further proceedings.

Brian Quinn
Chief Justice