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THE PEOPLE ex rel. DEPARTMENT OF TRANSPORTATION, Plaintiff and Respondent, v. 927 INDIO MUERTO et al., Defendants and Appellants.

No. B219227

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SIX

2011 Cal. App. Unpub. LEXIS 8772

November 16, 2011, Filed

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PRIOR HISTORY:

Superior Court of Santa Barbara County, No. 1263988, Denise de Bellefeuille, Judge.

COUNSEL: Sheppard, Mullin, Richter & Hampton LLP, Mark Riera, Jessica A. Johnson, Finley Taylor; SNR Denton US LLP, Mark Riera for Defendants and Appellants 927 Indio Muerto, Technical Marketing, Ltd. dba Tekmar, and Santa Barbara Chemical Corp.

Ronald W. Beals, Chief Counsel, David Gossage, Deputy Chief Counsel, Lucille Baca, Assistant Chief Counsel, Samuel C. Law, Derek S. Van Hoften for Plaintiff and Respondent State of California Department of Transportation.

JUDGES: GILBERT, P.J.; COFFEE, J., PERREN, J. concurred.

OPINION BY: GILBERT

OPINION

In an eminent domain action, the People of the State of California, acting through the Department of Transportation, (State) acquired a fee parcel and an easement on property to widen Highway 101.

The owners of the property defendant 927 Indio Muerto (927 Indio), and its tenants defendants Technical Marketing Ltd., dba Tekmar (Tekmar), and Santa Barbara Chemical Corp. (SBCC) appeal the judgment awarding just compensation.

We conclude, among other things, that: 1) the trial court did not invade the province of the jury by declaring the scope of the easement, 2) it properly instructed the jury on the defendants' right to use the property, 3) it correctly determined the limitations on the State's right to re-enter the property, 4) substantial evidence supports the trial court's findings, 5) the court did not err in excluding the testimony of Tekmar's expert concerning lost profits for a new product, and 6) appellants have not shown that the trial judge was biased. We affirm.

FACTS

To accommodate increased traffic, the State sought to expand Highway 101 in Santa Barbara County. The project involved widening the highway from two lanes to three in each direction and constructing bridges, sound and retaining walls, and a new off-ramp.

On June 7, 2007, the California Transportation Commission passed a Resolution of Necessity (Resolution) declaring that the State had to acquire certain private property by eminent domain near the highway to complete the project pursuant to "Streets and Highways Code Section 102." The Resolution included "the right and easement to enter upon the owner's remaining land outside the boundaries of [the parcels acquired by eminent domain] at any time within 120 days after the date possession is authorized as indicated in the order for possession, or within 120 days after FINAL JUDGEMENT IN CONDEMNATION, for the purpose of removing all of the said existing improvements."

On September 21, 2007, the State filed a "Complaint in Eminent Domain" to condemn and acquire a portion of the real estate owned by 927 Indio near the highway. 927 Indio, SBCC and Tekmar were the named defendants. SBCC and Tekmar produce chemical products. They leased the land owned by 927 Indio.

On March 27, 2008, the trial court issued an order for possession and found "there is an overriding need for the [State] to possess [927 Indio's parcels] prior to the issuance of final judgment" The court authorized the State to take possession on May 1, 2008. The State paid for the temporary relocation of the businesses leasing the property at 927 Indio during the construction of the highway project. After completion of the highway improvements, the businesses returned to the property and continued their operations.

On that portion of the property in which the State acquired in fee and easement, it built a retaining wall and placed a "footing" to support the wall. The footing extended three feet from the face of the wall and 20 inches below the surface. The original 927 Indio lot was 7,928 square feet. The State acquired 958.25 square feet of land in fee and 2,639.63 square feet for the easement. The easement was a long strip of land running parallel with Highway 101. SBCC's and Tekmar's businesses were located on the remaining 927 Indio lot, which was a triangular-shaped 4,330.12 square-foot parcel.

After completing the work on the underground footing, the State paved the easement area with concrete. It allowed SBCC and Tekmar to use that area to store items. It was an open space and the State had placed no restrictions on its use by those businesses. At the time of trial, SBCC and Tekmar were using the easement area to conduct business, drive vehicles over it and store chemicals on it.

The State's counsel advised the trial court that the State's right to re-enter the remaining 927 Indio 4,330.12 square-foot parcel had expired. The expiration date had elapsed 120 days after May 1, 2008--the date the State obtained permission to take possession under the court's March 27th order.

At trial, Parvinder Pal Singh Gill, the State's highway engineer, testified that the work on the project was complete. It was not necessary for the State to exercise any right to re-enter the remaining property at 927 Indio for further construction on the highway project. Follow-up work would be done with the consent of the property owner.

Leslie Gilman, the State's appraiser, testified that the State was prohibited from re-entering the 927 Indio property because the Resolution did not contain a "right to re-enter" provision. Matthew Goetz, the State's right-

of-way engineer, testified that the footing for the retaining wall would not need to be replaced in the future. He said, "Once it's in place, it stays there," and the State would not re-enter to make repairs.

Gina Sunseri, a fire department inspector, testified that 927 Indio, SBCC and Tekmar could store chemicals on the easement. In 2006, she determined that after the completion of the State highway project, they would be able to continue their chemical processing operations as they had in the past. Aaron Amster, a business appraiser, testified there was no change in SBCC's and Tekmar's business operations before and after the State's project. Consequently, they did not sustain any damages for "loss of goodwill."

James LeCron, an architect who testified for the defendants, said the easement area is not available for use because it is owned by the State "for their use." He said he talked with Susan Gantz of the Santa Barbara City planning department who agreed with his assessment.

Nevin Sanli, the defendants' business evaluation expert, testified that as a result of the State's action, Tekmar sustained a business "goodwill loss" of \$701,000. At an earlier Evidence Code section 402 hearing, the trial court precluded Sanli from testifying about Tekmar's loss of profits involving a Tekmar "Biotek" cleaning product.¹ It ruled his testimony about Biotek was too speculative to be admissible and Sanli did not rely on "any actual facts" to base his lost profit projections.

1 All further statutory references are to the Evidence code.

After hearing the trial testimony, the trial court signed an order with findings that the defendants had "the right to use the land encumbered by the easement for any and all purposes which do not conflict with the easement, including the right" to store and blend chemicals and to conduct their business activities. It instructed the jury that it had made these findings, which they were to consider in deciding just compensation. The defendants objected and claimed that the court's findings involved factual issues that the jury must decide.

The jury awarded 927 Indio \$130,000 as just compensation for the market value of the "fee parcel" the State acquired; \$90,000 for the "easement parcel"; \$86,000 as "severance damages to the remainder parcel"; and \$25,000 for the fair market value of the "improvements damaged, lost or taken." Tekmar was awarded \$75,000 as damages for its "goodwill loss."

DISCUSSION

Invading the Province of the Jury

Appellants contend the trial court invaded the jury's province because it declared and defined the scope of the easement and made findings on their legal rights to store chemicals and conduct business operations on it. We disagree.

The trial court instructed the jury, in relevant part:

"I have to make rulings on the law. So I have made a finding that I'm going to read to you regarding the easement. This is a court order. I actually signed it yesterday and not only am I going to read it to you, but you are going to have it to refer to in your work.

"The Court's findings on the issue of the easement. Having reviewed [the] resolution of necessity number C-19656 passed by the California Transportation Commission and plaintiff's complaint and having considered the evidence and arguments of counsel, the Court finds and declares as follows: Plaintiff, that's the State of California, seeks to acquire parcel 8568-2, an easement for the purpose of a retaining wall footing, together with all of the existing improvements and the right to enter defendant 927 Indio Muerto[s] remaining land within 120 days after the date of possession is authorized, or after final judgment, more specifically described in the resolution of necessity and in the complaint.

"Defendant 927 Indio Muerto and its tenants *shall retain the right to use the land encumbered by the easement for any and all purposes which do not conflict with the easement, including the right of traverse, the right to store and blend chemical products, the right to store equipment and the right to conduct business activities* dated June 23rd, signed Denise DeBellefeuille, Judge of the Superior Court.

"Now, *this order that they may use it not inconsistently . . . speaks for itself.* You may in your wisdom and discretion find that there has been a diminishment in use from the entire taking that has an impact on the damages or the just compensation you award. *My order does not interfere with your decision making on the facts and the just compensation.*" (Italics added.)

Appellants claim the "[c]ourt's order declaring how the Property could be used in the after condition deprived the jury of its ability to weigh the testimony of the opposing experts in determining the impact of the condemnation"

The State responds that the trial court was making a "declaration of rights under the easement," a matter within "the province of the trial court" in an eminent domain action. It claims the court must make findings on these issues before the jury decides compensation. The State is correct.

"[T]he general rule in eminent domain actions is that "the right to a jury trial . . . goes *only* to the *amount* of compensation.'" (*Emeryville Redevelopment Agency v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1116.) "All other questions of fact, or mixed fact and law, are to be tried . . . without reference to a jury.'" (*Ibid.*) "Consistent with this rule, the court, rather than the jury, typically decides questions concerning the pre-conditions to recovery of a particular type of compensation, even if the determination turns on contested issues of fact." (*Ibid.*) "Thus, where a landowner seeks compensation for impairment of access to a remaining easement, 'the question of whether access rights are impaired is a question for the court.'" (*Id.* at p. 1117.)

Here the trial court's review of the Resolution to determine the legal limits on the State's right of access and the scope of appellants' rights involved issues of law. In addition, rights involving the use of land encumbered by the easement in an eminent domain case were issues the court had to decide before giving the case to the jury. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 971; *Emeryville Redevelopment Agency v. Harcros Pigments, Inc.*, *supra*, 101 Cal.App.4th at p. 1117; *Estate of Phelps* (1990) 223 Cal.App.3d 332, 340 [jury may not decide quiet title issues]; *Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1140 [trial court decides factual issue of causation]; *Redevelopment Agency v. Tobriner* (1984) 153 Cal.App.3d 367, 376 [court must decide whether taking occurred]; *Pacific Gas & Electric Co. v. Peterson* (1969) 270 Cal.App.2d 434, 438 [jury may not decide easement issue in eminent domain action]; *People v. Ricciardi* (1943) 23 Cal.2d 390, 402.)

Appellants suggest that because the jury decides compensation, it must initially decide whether the taking impairs the right of access and then it will determine the effect of that impairment on their financial loss. Such an approach applied to an eminent domain action would have the jury assume the court's role of deciding easement rights of access and impairments. But the court must decide such issues. "[O]nce the court finds that the taking has substantially impaired the property owner's right of access--it is for the jury to determine the effect of the impairment . . . on the property's market value." (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.*, *supra*, 41 Cal.4th at p. 973.) In other words, "the trial court and not the jury must decide whether in the particular case there will be an actionable interference with the defendants' right of access." (*Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 664.)

Here the trial court carefully delineated the limits of its findings and order from the issues reserved for the jury. It instructed jurors that, notwithstanding the order it

had issued, "You may in your wisdom and discretion find that there has been a diminishment in use from the entire taking that has an impact on the damages or the just compensation you award. My order does not interfere with your decision making on the facts and the just compensation."

Appellants note that the trial court also instructed jurors, "You are also required to accept the testimony regarding how the easement will be used for the highway project." They claim this improperly took this issue from the jury because there were conflicts in the testimony of the State's witnesses that the jury should have resolved. The State responds that its witnesses were consistent on how the State would use the easement.

The instruction is not a model of precision because it does not name the witnesses, identify the testimony or give jurors guidance about what to do if they found a conflict. But there is no reversible error, because as will be seen, the legal restrictions on the State in the Resolution, combined with the testimony of the State's witnesses, presented overwhelming evidence that the State's use of the completed highway structure and easement would not impair appellants' business operations or property interests.

Findings and Instructions on the State's Right of Access and Use of the Property

Appellants suggest that: 1) the trial court should have instructed the jury that the State retained a right to enter the property for 120 days after the final judgment; and 2) because they were subject to that right, they were entitled to compensation until the State's right of entry elapsed.

The trial court did not give that instruction. It concluded that the State's right of entry had elapsed before trial. The court did not err.

The Resolution provides, in relevant part, that the State had "the right and easement to enter upon the owner's remaining land outside the boundaries of said parcel *at any time within 120 days after the date possession is authorized as indicated in the order for possession, or* within 120 days after FINAL JUDGEMENT IN CONDEMNATION, for the purpose of removing all of the said existing improvements." (Italics & underlining added.)

Here there is an alternative. Selection of the first necessarily excludes the second. The term "or" in the Resolution "expresses a choice between either one of two alternatives [*sic*], but not both." (*Kustom Signals, Inc. v. Applied Concepts, Inc.* (1998 D. Kan.) 995 F. Supp. 1229, 1236.) The State elected to obtain an order of possession from the trial court before trial. That gave the

State the right of access on May 1, 2008. Its right to enter appellants' property without their consent ended 120 days from that date. The language of the Resolution is clear regarding the restrictions placed on the State. "If the grant is specific in its terms, it is decisive of the limits of the easement." (*Pasadena v. California-Michigan Etc. Co.* (1941) 17 Cal.2d 576, 588; see also *Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1598 [easement is a right to use the property only for the specified purpose in the granting instrument].)

Appellants contend the Resolution is ambiguous because it does not explicitly restrict the State from entering appellants' property and interfering with their business operations. They suggest this omission allows the State free access. We disagree with their interpretation, but even if there is an ambiguity, the result does not change.

Before sending the case to the jury, the trial court issued an order that declared appellants' rights to store chemicals and conduct business. That order binds the State and gives appellants protection from the State's interference. Moreover, it is well established that the owner of land subject to an easement may exercise "[every] incident of ownership not inconsistent with the easement . . ." (*City of Los Angeles v. Ingersoll-Rand Co.* (1976) 57 Cal.App.3d 889, 893; *Wright v. Austin* (1904) 143 Cal. 236, 241.) That includes the right to conduct business. (*Wright*, at p. 241.)

Substantial Evidence

Appellants suggest that the trial court's findings that they could conduct business operations on the easement and were not subject to the State's future entries on their property are not supported by the evidence. In eminent domain cases, if the "evidence is subject to opposing inferences, it must upon review . . . be regarded in the light most favorable to the ruling of the trial court." (*Emeryville Redevelopment Agency v. Harcross Pigments, Inc.*, *supra*, 101 Cal.App.4th at p. 1117.)

The State claims appellants waived all challenges to the sufficiency of the evidence by omitting references to the State's evidence that supported the findings that were challenged in appellants' opening brief. We agree. "Where, as here, the appellant fails to set forth all of the material evidence, a claim of insufficiency of the evidence fails." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279; see also *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 409-410.) But even on the merits, the result is the same.

The trial court's findings that appellants had the right to use the easement are supported by Gill's testimony. Gill said the easement area could be used to conduct business and store chemicals as the State had placed no

restrictions on the use of that area. Appellants claim LeCron contradicted that testimony. But the trial court could reasonably find LeCron was impeached. LeCron said he talked to Gantz who said the easement could only be used by the State. But on cross-examination, he admitted that in her deposition Gantz denied ever making that representation. Gill was qualified to speak for the State about the use of its easement. LeCron had no such authority or qualifications. Moreover, the State presented evidence showing that appellants were using the easement to conduct their business operations.

The findings that the State would not interfere with appellants' property rights are also supported by the record. The trial court said, "I disagree with the property owner's position that they have to live in fear . . . for 120 days after entry of judgment in the case that the State will march on over to the property and overtake it and do something with that easement area." At trial, the State conceded that it had no further right to enter the property. The State's counsel said the right of entry "had expired from--120 days from . . . May 1st, 2008." This concession supported the court's finding. A court may base a finding on a concession by a party's counsel. (*Ellis v. Roshei Corp.* (1983) 143 Cal.App.3d 642, 649; *D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 15-16.)

The trial court found that the highway project had been completed. It said, "They're done." This finding tracks Gill's testimony. Gill said that the work on the project "is done" and "[t]he planned work in that area is complete."

There also was evidence to support the trial court's findings that the State would not enter appellants' property without their permission and would not re-enter the easement area. Goetz said the Resolution gave the State an easement to build a "retaining wall footing" for the highway project. But it does not contain a right to re-enter to make repairs. He said the Department of Transportation has "never gone back to maintain a footing Once it's in place, it stays there."

Appellants note that prior to trial Gilman said the State had a right to re-enter the property, fix a retaining wall and shore up a footing. But at trial Gilman testified the easement does not provide for a "right to re-enter" for the State, "therefore they can't" re-enter. The trial court acted within its discretion in resolving the conflict in favor of his trial testimony. (*Emeryville Redevelopment Agency v. Harcros Pigments, Inc.*, *supra*, 101 Cal.App.4th at p. 1117.)

Appellants claim the City of Santa Barbara would not permit them to store chemicals on the easement. But Sunseri testified they could store chemicals there. In 2006, she determined that appellants "would be able to

continue their business as they currently were after the project was done."

Appellants note that at the time of trial the State was performing work. Gill testified that there was a "punch list" of items that "need [to] be fixed on the property." These included "low spots in the concrete that was put in to replace the existing pavement that was there," dirt in a "sump pump," and missing fences. Appellants argue that because the State "did, in fact, enter the remainder after August 29, 2008," "[i]t does not make sense to construe [the State's] rights in a manner that results *in illegal action* rather than applying the alternative of a right of entry for 120 days after Final Judgment." (Italics added.)

But the State was not taking appellants' property, interfering with their businesses or seeking to remove them, and appellants incorrectly assume the punch list work was illegal and unauthorized. Because the State had an easement, it also had the authority to make necessary repairs under the "secondary easement" doctrine. (*Kreiger v. Pacific Gas & Electric Co.* (1981) 119 Cal.App.3d 137, 145.) At trial, appellants suggested they were subject to involuntary State intrusions. But Gill testified that "[t]he only reason we would have to go onto the property is to address the punch list item, *with the owner's permission*." (Italics added.) This testimony supports a finding that the State would not make any uninvited entry. Appellants have not shown how they could be damaged for consenting to allow the State to complete the punch list work. (Cf. *Civic Western Corp. v. Zila Industries, Inc.* (1977) 66 Cal.App.3d 1, 16-17 ["Where there is a consensual entry, there is no tort"].) Nor have they made an adequate showing to demonstrate how such activity would harm their businesses, constitute an actionable intrusion or exceed the secondary easement right to make repairs. (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 940-941; *Haley v. Los Angeles County Flood Control Dist.* (1959) 172 Cal.App.2d 285, 290.)

Appellants retain the right to refuse the State's request to enter their property if it exceeds the State's legal authority derived from the Resolution. If the State enters without consent and contrary to its representations to the court, appellants may then have a claim based on judicial estoppel (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422), or the court may require the State to obtain a new Resolution.

But appellants may not impeach a judgment supported by substantial evidence with only speculation about what the State might do in the future. (*People ex rel. Department of Public Works v. Russell* (1957) 48 Cal.2d 189, 197.) They have not shown that the court abused its discretion in making its findings. Moreover,

given the strength of the State's evidence, appellants have not shown how any alleged error would be prejudicial.

Excluding the Testimony of Tekmar's Expert about Lost Biotek Profits

Tekmar contends the trial court erred by preventing Sanli from testifying about lost profits caused by its inability to produce Biotek, a textile industry cleaning solution. It claims this improperly reduced its damages for lost business goodwill. We disagree.

"The state's power to take property by eminent domain is conditioned on its obligation to pay "just compensation" to the owner." (*City and County of San Francisco v. Coyne* (2008) 168 Cal.App.4th 1515, 1521.) A business owner has a statutory right to compensation for loss of goodwill. (*Id.* at p. 1522.) Goodwill includes "the benefits that accrue to a business as a result of its location, reputation for dependability, skill or quality" (*Ibid.*)

"A challenge to the trial court's . . . rejection of expert testimony regarding the calculation of lost goodwill is reviewed for abuse of discretion." (*City and County of San Francisco v. Coyne, supra*, 168 Cal.App.4th at p. 1523.)

"[T]he goodwill statute does not contemplate compensation for hypothetical or potential" loss of goodwill; there must be proof of "actual goodwill lost." (*Redevelopment Agency of San Diego v. Mesdaq* (2007) 154 Cal.App.4th 1111, 1131.) The expert "measures its present value by taking into account *some past result*." (*Ibid.*) Consequently, a trial court may not permit an expert to testify about "a goodwill value determined by creating a future income stream not tied to [the owner's] actual business operations." (*Ibid.*) An expert may not value it based on "anticipated profits from an 'imaginative' better use of [the] existing facility." (*Id.* at p. 1132.) The valuation must be "an empirical measure of what actually existed" and not "a laboratory exercise." (*Ibid.*)

Tekmar claims it had developed the Biotek cleaning product and introduced it at a trade show. It had customers and Sanli accurately calculated the lost profits caused by eminent domain.

But the trial court found Sanli did not rely on "any actual facts" to base his lost profit projections and his testimony was too speculative to be admissible. It noted that Biotek was a "new product that was rolled out at the trade show but never brought to market." There was an "extrapolation of profits" with "no history for the marketing" of it. "It doesn't have a track record."

The trial court's findings are supported by the record. At the section 402 hearing, Sanli said the State's actions caused a loss of \$1,045,000 as a result of Tek-

mar's inability to produce and sell Biotek. His lost profit calculations were based on his estimates of future production and future Biotek sales.

But on cross-examination, Sanli admitted that he calculated the loss based on the "assumption" that Biotek sales "would grow from 2008 to 2011," and he conceded "a lot of things can happen . . . that could make these projections *not happen*." (Italics added.) His projected prices for Biotek did not come from Tekmar; it was derived by using a "similar product" from another company. His projections about Biotek's marketability also were based on assumptions. He conceded that during the period from January 2007 to the time when the State took possession on May 1, 2008, Tekmar had never marketed the product and had *decided not to produce it*. Consequently, there were no Tekmar business records, no record of sales, no shipping orders from customers and no Tekmar price sheets that he could use to base a calculation.

Sanli's conclusions were based upon assumptions about what might occur had the product been produced. He essentially testified about "a goodwill value determined by creating a future income stream not tied to [the owner's] actual business operations." (*Redevelopment Agency of San Diego v. Mesdaq, supra*, 154 Cal.App.4th at p. 1131.) Because there was no ongoing or actual business in producing the product, Sanli's speculations fell short in meeting the standard of providing an "empirical measure of what actually existed." (*Id.* at p. 1132.)

Sanli's analysis also was impeached when he admitted that in his deposition he said he obtained information about the projected sales volume of Biotek from Simon Clifford. But in his deposition, Clifford said he had no projection about volume or unit sales. The trial court could reasonably infer Sanli's conclusions were anchored on an inadequate foundation.

Moreover, "courts have the obligation to contain expert testimony within the area of the professed expertise . . ." (*Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523.) Sanli was not an expert on chemical cleaning products and he had never worked in the "chemical mixing business." At the section 402 hearing, Tekmar did not call an expert who specialized in the field of the marketing of new chemical products. Sanli was unfamiliar with the Biotek production process. He did not know what chemicals Tekmar had to purchase to produce Biotek and he had never talked with the "vendors" of these materials. Knowledge of the production process was important to assess financial feasibility. The court could reasonably infer: 1) his lack of knowledge about essential supplies impeached his ability to calculate production costs, and 2) his lack of experience with the chemical

industry impeded his ability to make a comparative marketing analysis of Biotek with other chemical products. (*Korsak*, at p. 1523; *In re Breast Implant Litig.* (D. Colo. 1998) 11 F.Supp.2d 1217, 1243 [expert with no experience in manufacturing or marketing lacked qualifications to opine on those issues].) Sanli also did not know whether permits were required for Biotek or if Tekmar could obtain them to start production. At the section 402 hearing, he had trouble answering questions about Biotek research and development costs.

The trial court could reasonably find that Sanli's projections about the future sales of a chemical product were beyond his expertise and were based on speculation. It is well established that "[a]n expert's opinion based on assumptions of fact without evidentiary support . . . or on speculative or conjectural factors . . . has no evidentiary value . . . and may be excluded from evidence." (*Dee v. PCS Property Management, Inc.* (2009) 174 Cal.App.4th 390, 404.) There was no abuse of discretion.

Trial Court Bias and Unfairness to Appellants

Appellants claim the trial court was biased in favor of the State as shown by the court's questioning of witnesses and rulings on the admissibility of evidence.

A party is entitled to a fair and impartial decision maker. (*People v. Freeman* (2010) 47 Cal.4th 993, 1000.) A trial judge may not "prejudge" the case and must refrain from "forming an opinion on [factual] issues until the case [is] finally submitted . . ." (*Webber v. Webber* (1948) 33 Cal.2d 153, 161.) Here appellants have not cited any statements by the court that would indicate bias. They suggest it is shown by the way the court conducted its proceedings.

Leading a Witness to an Answer Favoring the State's Position

Appellants claim the trial court "led" a witness to the conclusion that the easement could be used for storage in order to support the State's position. But the record does not support them. During Sunseri's testimony, the court asked, "So in other words, that easement area could be used for storage?" Sunseri answered: "Yes."

Appellants suggest that this question was improper and it encouraged Sunseri to answer in the affirmative. But appellants did not object at the time the court asked this question. That omission waives this claim. (*People v. Cook* (2006) 39 Cal.4th 566, 598; *Hart v. Farris* (1933) 218 Cal. 69, 76 [where the trial court questions a witness, counsel must object "to the court's examination at the time," or any error is waived].) Yet even on the merits, such questions by the judge do not contravene appellants' right to a fair trial. The court may ask questions of witnesses to help the jury understand the evidence. (*Cook*, at

p. 598; *United States v. Saenz* (5th Cir. 1998) 134 F.3d 697, 708 ["A trial court may ask questions to clarify witnesses' testimony"]; *Hart*, at p. 76.) Here Sunseri had already testified that she wrote a letter in 2006 confirming that "Santa Barbara Chemical Corp. will be able to continue operating their business at their current location despite the reduction in property size" caused by the Highway 101 expansion project. There were, however, questions about where chemicals could be stored on the property. The court was seeking clarification. Appellants have not shown that the question was improper.

Unevenly Applying the Business Records Exception to the Hearsay Rule

Appellants claim the trial court unevenly applied the business records exception to the hearsay rule in favor of the State. They note that the court allowed the State to introduce a letter from Sunseri to John Magorian of Caltrans and overruled a defense objection that it did not qualify under the business record exception. Appellants claim when Magorian was called to testify, the defense tried to introduce Magorian's diary entry, but the court sustained a hearsay objection even though it was a business record. Magorian's entry stated, "[D]irt and dust will make [defendants'] processing *impossible during construction.*" (Italics added.)

But the objections to the diary were not based solely on hearsay. The State's counsel said, "The problem I have with this, Your Honor, *is relevancy.* We are talking about the construction period. We are not talking about the after condition of the property which is the relevant area of inquiry You are looking at the after condition and you compare it with the before condition. The construction period really has no bearing on the issues." (Italics added.) "THE COURT: I am with you." Appellants have failed to show that they made an adequate offer of proof on relevance.

Moreover, the record refutes the claim that the court was biased. Even though it concluded this entry was inadmissible, the trial court attempted to see whether there could be a stipulation for its admission. The court asked opposing counsel, "I am just asking does it hurt you at all?" It then asked, "This page, standing alone, stipulation it's a business record, for whatever reason they want to have this in."

Unfair Treatment of Expert Witnesses

Appellants contend the trial court treated the State's experts more favorably than their experts. They note that it did not admit some of the charts their experts relied on. The State objects to this portion of appellants' opening brief. It claims they fail to make an adequate showing of unfairness or abuse of discretion by simply listing rulings

against them and comparing it with a list of rulings they claim favor the State. This objection is well taken. "The biggest flaw in [appellants'] argument is their failure to offer any analysis that articulates their evidentiary claims within the context of the applicable standard of review." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 281.)

We cannot decide abuse of discretion claims without an adequate statement of facts, legal argument, a description of evidentiary objections at trial, offers of proof, arguments of counsel, and the court's reasons for its rulings. Each ruling on admissibility of evidence must be decided individually within the factual framework of the issues and objections raised. We do not presume unfairness; an appellant must make an adequate showing.

Here appellants try to make comparisons to prove a pattern of unfairness in the use of charts. But each side prepared unique charts that had diverse evidentiary consequences. Charts are visual aids. They are not automatically admissible. "Trial courts have broad discretion to admit demonstrative evidence such as maps, charts, and diagrams to illustrate a witness's testimony." (*People v. Mills* (2010) 48 Cal.4th 158, 207.) "[T]he right to use this form of evidence is within the sound discretion of the trial judge." (*Ibid.*) Courts may properly exclude charts that contain irrelevant or inadmissible material or contain questionable summaries. Exclusion is proper where the charts are used as improper substitutes for trial

testimony, will highlight extraneous issues, are confusing, or will consume excessive trial time. (B 352.) Appellants have not shown that their excluded charts fell outside of the above categories or that the court acted beyond its broad discretion by excluding these materials. (*Mills*, at p. 207; *Miyamoto v. Department of Motor Vehicles* (2009) 176 Cal.App.4th 1210, 1217.)

Moreover, the record reflects that the trial court allowed appellants a complete opportunity to present their positions and admitted extensive testimony by their experts. "We will not hold that every statement a judge makes to explain his or her reasons for ruling against a party constitutes evidence of judicial bias." (*Mouton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1219.)

We have reviewed appellants' remaining contentions and conclude they have not shown error.

The judgment is affirmed. Costs on appeal are awarded in favor of respondent State.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.