

SUPREME COURT OF THE STATE OF KANSAS

Pener v. King

Pener v. King · No. No. 114,850 · Decided March 24, 2017

SUMMARY

The Kansas Supreme Court affirmed a district court's eminent domain damages award arising from the Kansas Department of Transportation's partial taking of property in Wyandotte County. The court held that fence replacement costs must be considered only insofar as they affect the property's overall value, that the damages award was supported by substantial evidence and fell within the range of admitted valuation testimony, and that the district court properly declined to award attorney fees and expenses. The court also rejected claims based on Kansas administrative regulations and the court's inherent sanction authority.

CASE DETAILS

|                       |                                                                                                                                                                                                                                                               |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of the State of Kansas                                                                                                                                                                                                                          |
| WRITING FOR THE COURT | Biles, J.; Michael J. Malone, Senior Judge, assigned                                                                                                                                                                                                          |
| JURISDICTION          | Kansas                                                                                                                                                                                                                                                        |
| DECIDED               | March 24, 2017                                                                                                                                                                                                                                                |
| DOCKET                | No. 114,850                                                                                                                                                                                                                                                   |
| DISPOSITION           | affirmed                                                                                                                                                                                                                                                      |
| PROCEDURAL POSTURE    | Appellant landowner appealed from a Wyandotte County District Court judgment awarding damages in a partial eminent-domain taking and denying attorney fees and expenses.                                                                                      |
| STANDARD OF REVIEW    | Questions of statutory and administrative-regulation interpretation are reviewed de novo. Factual valuation findings and a condemnation award are reviewed for substantial competent evidence and will not be disturbed if supported by substantial evidence. |
| PRECEDENTIAL VALUE    | Published Kansas Supreme Court opinion; precedential.                                                                                                                                                                                                         |
| PARTIES               | Adam Pener, as Personal Representative of the Estate of Alexander Gold, and as Trustee of the Alexander Gold Revocable Trust dated 01/26/1994 v. Michael S. King, Secretary of Transportation for the State of Kansas                                         |

TOPICS

eminent domain

statutory interpretation

administrative law

remedies

appellate procedure

## PRACTICE AREAS

eminent domain

real estate

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## QUESTIONS PRESENTED

1. Whether the district court improperly failed to award the full replacement cost of a security fence as a separate item of damages in a partial taking.
2. Whether the district court's before-and-after property valuation was unsupported because it did not give sufficient weight to a particular comparable sale.
3. Whether K.A.R. 36-16-1 and incorporated federal regulations authorized attorney fees and litigation expenses in this condemnation proceeding.
4. Whether the district court had inherent authority to award attorney fees and expenses as sanctions for KDOT's alleged prelitigation bad-faith conduct.

## HOLDINGS

1. In a partial taking, fence replacement cost is not a separate item of damages; it may be considered only to the extent the loss or replacement of the fence affects the value of the remaining property. The district court therefore properly used the fence's \$11,000 contributory diminution in value rather than awarding the asserted \$65,720 replacement cost.
2. A condemnation award will not be disturbed when supported by substantial evidence, and the before-and-after values must fall within the range of admitted opinion testimony. The district court's award satisfied that requirement, and its refusal to reweigh the comparable-sale evidence was proper.
3. K.A.R. 36-16-1 and the federal regulations incorporated through it do not authorize attorney fees and litigation expenses in this condemnation proceeding because the taking was not abandoned and the case was not an inverse-condemnation proceeding.
4. The district court did not err in denying attorney fees and expenses under its inherent sanction authority because the record did not show that sanctions were necessary to compel obedience to law or that the condemnation was an exceptional, bad-faith, harassing, or otherwise improper proceeding.

## KEY QUOTATIONS

*“Under the Eminent Domain Procedure Act, K.S.A. 26-501 et seq., in a partial taking case there are only two issues: (a) the value of the entire property or interest immediately before the taking; and (b) the value of that portion of the land or interest remaining immediately after the taking.” (1)*

*“The 'summation method' denotes a process of appraisal whereby each of several items that contribute to the value of real estate are valued separately and the total represents the market value thereof.” (6)*

*“The witnesses' opinions on value—not the comparable sales on which they rely—are the controlling consideration in determining whether the award is proper” (10)*

## FACTUAL BACKGROUND

KDOT condemned permanent highway right-of-way easements covering 142,858 square feet of three Wyandotte County tracts totaling approximately 338,000 square feet. The appraisers' panel awarded \$195,500, and after a bench trial the district court determined that the taking caused \$295,702 in damages, including an \$11,000 diminution attributable to the loss of a security fence rather than the fence's full replacement cost. The court denied attorney fees and expenses because neither statutory fee-shifting circumstance—abandonment or a condemning-authority appeal followed by a greater jury verdict—was present.

## PROCEDURAL HISTORY

The Kansas Department of Transportation condemned permanent highway right-of-way easements over portions of three tracts. A court-appointed appraisers' panel awarded \$195,500, after which Pender exercised the statutory right to a district-court trial. Following a bench trial, the district court awarded \$295,702 in damages and denied attorney fees and expenses. Pender timely appealed to the Kansas Supreme Court.

## DISPOSITION

affirmed

## CASES CITED

- Hoesli v. Triplett, Inc., 303 Kan. 358, 362, 361 P.3d 504 (2015)
- Rostine v. City of Hutchinson, 219 Kan. 320, 323-24, 548 P.2d 756 (1976)
- Hoy v. Kansas Turnpike Authority, 184 Kan. 70, 334 P.2d 315 (1959)
- Kansas City Mall Assocs. v. Unified Gov't of Wyandotte County/KCK, 294 Kan. 1, 12, 272 P.3d 600 (2012)
- Creason v. Unified Gov't of Wyandotte County, 272 Kan. 482, 485-86, 33 P.3d 850 (2001)
- Gault v. Board of County Commissioners, 208 Kan. 578, 584, 493 P.2d 238 (1972)
- Diefenbach v. State Highway Commission, 195 Kan. 445, 447, 407 P.2d 228 (1965)
- Miller v. Glacier Development Co., 284 Kan. 476, 492-93, 161 P.3d 730 (2007)
- Mettee v. Kemp, 236 Kan. 781, 787, 789, 696 P.2d 947 (1985)
- City of Wichita v. May's Company Inc., 212 Kan. 153, 156, 510 P.2d 184 (1973)
- Peterson v. Ferrell, 302 Kan. 99, 104, 349 P.3d 1269 (2015)
- In re Central Kansas Electric Coop., Inc., 224 Kan. 308, 319, 582 P.2d 228 (1978)
- Bonanza, Inc. v. Carlson, 269 Kan. 705, 707, 718-20, 9 P.3d 541 (2000)
- May v. Cline, 304 Kan. 671, 675, 372 P.3d 1242 (2016)
- Ussery v. Kansas Dept. of SRS, 258 Kan. 187, 194, 899 P.2d 461 (1995)
- Comprehensive Health of Planned Parenthood v. Kline, 287 Kan. 372, 419-20, 429, 197 P.3d 370 (2008)
- Wilson v. American Fidelity Ins. Co., 229 Kan. 416, 421, 625 P.2d 1117 (1981)
- Alpha Med. Clinic v. Anderson, 280 Kan. 903, 926, 128 P.3d 364 (2006)

