

# Vinson&Elkins

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July 31, 2014

**By Electronic Filing**

Hon. Blake A. Hawthorne  
Clerk, Supreme Court of Texas  
P.O. Box 12248  
Austin, Texas 78711

**Re: No. 13-0053; *State of Texas v. Clear Channel Outdoor, Inc.***

Dear Mr. Hawthorne:

The above-captioned case is set for oral argument on September 17, 2014. Please bring this letter to the attention of the Court.

**I. On June 3, 2014, the Oklahoma Supreme Court Held That Billboards Must Be Treated as Realty, Rather Than Personality, in Condemnation.**

In the recent decision of *State v. Lamar Advertising of Oklahoma*, --- P.3d ---, 2014 WL 2519191 (Okla. 2014), the Oklahoma Supreme Court quoted the rule from *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 477 n.5 (1973), observing that, regardless of the provisions applicable between landlord and tenant in the lease, “fixtures . . . attached to the real estate . . . must be treated as real estate in determining [a] total [condemnation] award.” 2014 WL 2519191, at \*3; *see also* Respondent’s Brief on the Merits (“Resp.Br.”) 18–31; Clear Channel’s Response to the Amicus Brief of City of Houston (“Amicus.Resp.”) 8–12. Indeed, the Oklahoma court observed that this *Almota* rule is codified in an Oklahoma statute requiring that “improvement[s] shall be deemed to be a part of the real property to be acquired *notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such . . . improvement at the expiration of his term.*” *Id.* (emphasis added).

Texas law is the same. In *Adkisson*, this Court held that the condemning authority owes compensation for fixtures—improvements affixed to the land—despite the fact that the lease authorized the lessee (tenant) to remove the fixtures/improvements from the condemned property. *Brazos River Conservation & Reclamation District v. Adkisson*, 173 S.W.2d 294, 298–302 (Tex. Civ. App.—Eastland 1943, writ ref’d). This Court held in

*Adkisson* that the rule applicable in condemnation is not the rule that applies “between a lessor and a lessee, whose rights are usually determined by the lease.” *Id.* at 299. The rule for the condemnor is different. Provisions in the lease that are added to shield the tenant vis-à-vis the landlord cannot be used as a sword by a condemning authority that seeks to avoid paying compensation for improvements attached to the realty. *Id.* And on this appeal, once the Court rejects the State’s reliance on provisions in the lease, it must be plain that the billboard structures, so affixed to the land, would constitute realty under the test in *Logan v. Mullis*, 686 S.W.2d 605 (Tex. 1985); Resp.Br. 18–19, 31–40.

The State argues that the Court of Appeals here rejected *Logan*, but the Court of Appeals’ so-called rejection of *Logan* is a tempest in a teapot. The Court of Appeals applied the *Logan* factors; that court just refused to apply the provisions in the lease to deny the billboard’s realty status. Resp.Br. 7–8, 12–13.

## **II. In Its June 3, 2014 Decision, the Oklahoma Supreme Court Held That Billboard Rental Income Can Be Used To Value a Billboard Structure Where, as Here, the Billboard Structure Cannot Be Relocated.**

The Oklahoma Supreme Court’s recent decision in *Lamar Advertising* is not contrary to this Court’s decision in *State v. Central Expressway Sign Associates*, 302 S.W.3d 866 (Tex. 2009). As Clear Channel has explained, *Central Expressway* was valuing just the *easement—not* the billboard structure itself. *See* Resp.Br. 42–43; *see also State v. Moore Outdoor Properties, L.P.*, 416 S.W.3d 237, 248 (Tex. App.—El Paso 2013, pet. filed) (recognizing that, in *Central Expressway*, this Court was valuing an easement, not the billboard structure). And *Central Expressway* held that the *easement* could be valued based on the rent paid to use the *easement*. 302 S.W.3d at 869, 874; Amicus.Resp. 23–24.

Here, Clear Channel argues that rents paid to use the face of the billboard should be considered in the income capitalization approach to value the billboard structure. Clear Channel is asking the Court to adopt a rule of law that applies:

- to valuation of the billboard structure itself;
- where the billboard structure cannot be relocated to a comparable location within the same market area; and

- where the billboard can be valued based on non-speculative rents paid to use the billboard face, that can be determined by taking the advertising revenue and stripping out amounts attributable to operating expenses—like maintenance, lighting, construction, placement/removal of advertising, and marketing/design of billboard faces—thus leaving only amounts attributable to use of the billboard face (*i.e.*, rent).

The Oklahoma Supreme Court’s recent decision in *Lamar Advertising* holds that, in valuing the billboard structure and the leasehold, the income capitalization approach can be used where the billboard cannot be relocated. Indeed, the Oklahoma Supreme Court noted that “[a] majority of states concur with the conclusion that advertising income generated from a billboard face that cannot be relocated should be considered in valuing leasehold interests in order to ensure the sign owner will be justly compensated.” 2014 WL 2519191, at \*5 n.3. The Oklahoma Supreme Court’s decision in *Lamar Advertising* should be added to Clear Channel’s table of cases (Resp.Br. 46–47), listing states that allow the income approach for valuing a billboard that cannot be relocated.

The cases from other jurisdictions cited by this Court in support of its holding in *Central Expressway*, 302 S.W.3d at 872, are not controlling on the issue now before the Court because the issue now before the Court deals with (1) valuing the billboard structure itself; (2) where the billboard cannot be relocated to a comparable location in the same market area; and (3) where the valuation is based on non-speculative rent paid to use the billboard face, determined by stripping out of advertising revenues amounts attributable to operating expenses and other functions such as marketing and construction. The chart below explains why the decisions cited in *Central Expressway* are not on point here.

<i>Commissioner of Transportation v. Rocky Mountain, LLC</i> , 894 A.2d 259, 283–85 (Conn. 2006).	The billboard owner did not challenge the finding that the billboard is personalty, and the Court holds that <u>the billboards could be removed and used elsewhere</u> .
<i>State Department of Transportation &amp; Development v. Chachere</i> , 574 So.2d 1306, 1311 (La. Ct. App. 1991).	The court addressed the valuation of two billboards, both of which <u>could be moved to a comparable location</u> , such that relocation would put the billboard owner in as good a position as before the taking.
<i>In re Urban Redevelopment Authority</i> , 272 A.2d 163, 164 n.1	The <u>valuation of the billboard itself “[wa]s not in</u>

(Pa. 1970) (emphasis added).	<u>dispute</u> ” on appeal.
<i>City of Newport Municipal Housing Commission v. Turner Advertising, Inc.</i> , 334 S.W.2d 767, 768, 770 (Ky. 1960) (emphasis added).	“The <u>value of the billboard signs as physical property was stipulated.</u> ” Defendants’ “ingenious theory” was interference with a business enterprise, and their witnesses “made no attempt to correlate their [damages] computations to the market value of the [condemned] land.”
<i>Wray v. Stvartak</i> , 700 N.E.2d 347, 353–54 (Ohio Ct. App. 1997) (emphasis added).	The landowner’s testimony as to lost income from the billboard was too speculative; the court notes that “[e]vidence of the kinds of businesses to which the property is adaptable, <i>i.e.</i> , <u>rental of sign fronts for advertising</u> , is relevant to and probative of the appraisal of the property’s fair market value.”

*Central Expressway* cites the majority in the 4-3 decision in *Vivid, Inc. v. Fiedler*, 580 N.W.2d 644, 658–59 (Wis. 1998), for the four-justice majority’s view (vigorously rejected by the three-justice dissent) that it is improper to use the annual gross earnings of the billboard as a valuation method because such gross earnings include the “efforts and skill of the property owner in running the business.” *Id.* at 658. But here, Clear Channel’s expert *began* with the gross earnings of the billboard but then stripped out that portion of the earnings attributable to operating expenses—like maintenance, lighting, construction, placement/removal of advertising, and marketing/design of billboard faces—to isolate the portion of the gross earnings that is allocable to renting the sign face, rather than performing other business functions. Amicus.Resp. 20–24.

There is no speculation: some portion of that advertising revenue is attributable to rent paid to use the face of the billboard. The billboard being realty, that rent amount should be usable in an income capitalization approach to valuing the billboard. Otherwise, the billboard structure is being treated differently from other realty, such as an office building that is valued using the income capitalization approach based on the rent paid by tenants to use the building. *Central Expressway* does not hold otherwise.

The El Paso Court of Appeals in *Moore* felt compelled by *Central Expressway* to hold that, in valuing the billboard structure, a court may not consider any part of advertising

revenue received by the billboard owner. *Moore*, 416 S.W.3d at 250. But the Court of Appeals in *Moore* pointed out that “*Central Expressway*’s rule runs counter to the notion that fair market value is what a willing buyer will pay a willing seller for the property.” *Id.* After all, a willing buyer and seller will buy and sell the billboard taking into account the rent the billboard can command. *Central Expressway*, 302 S.W.3d at 871 (noting “[t]he income approach is appropriate when the property would be priced according to the rental income it generates”). Because the touchstone of valuation in condemnation is the fair market value of the property, rents paid to use the face of the billboard should be considered in valuing the billboard structure in condemnation.

It is true that the majority of jurisdictions allow the income capitalization approach for valuing billboards in condemnation based on the caveat that the billboard cannot be moved to a comparable market location. Resp.Br.45–48. Of course, physically, the billboards here could not be moved; Clear Channel would have to tear them down and build replacement billboards. Resp.Br.5–7, 32–34. But, laying aside whether the billboards could *physically* be moved, there is no comparable location, in the same market area, on which Clear Channel could construct replacement billboards. In fact, the City of Houston precludes the building of new billboards. Resp.Br.5–7, 35–38; Amicus.Resp. 4–5.

Under the City’s ordinance, the billboard owner is not required to accept the relocation option allowed for condemned billboards. Resp.Br.4–5. And here, Clear Channel declined that relocation option because there is no comparable location in the same market area. *Id.* at 4–7, 37. Moreover, the City’s relocation ordinance for condemned billboards allows a new billboard only if it meets all the spacing and other requirements of the City, and any such “relocated” billboard can receive a permit to operate for only ten years, after which the billboard must be removed. *Id.* at 4–7, 35–38. And in any event, a property owner is not required to remove its improvements in order to allow the condemning authority to avoid paying compensation. *State v. Miller*, 92 S.W.2d 1073, 1074–75 (Tex. Civ. App.—Waco 1936); *see* Brief of Amicus Curiae Outdoor Advertising Association at 12–13.

If the income capitalization approach is not available to compensate the owner of the billboard structure, then the constitutional guarantee of adequate compensation is not met. Where property is condemned, the property owner “is entitled to be put in as good a position pecuniarily as if his property had not been taken.” *Olson v. United States*, 292 U.S. 246, 255 (1934). As this Court recently observed, “freedom itself . . . demand[s] strong protections for

individual property rights.” *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 204 (Tex. 2012).

### **III. The State’s Argument That It Did Not “Take” the Billboards (Assuming They Are Personality) Violates the Parties’ Rule 11 Agreement.**

Even if the billboards were personality, the Texas Constitution guarantees Clear Channel just compensation. Resp.Br. 55–60. Although the State’s condemnation proceeding applies only to realty, Clear Channel filed an inverse condemnation counterclaim seeking compensation for the billboards in the event that they are personality. *Id.* The State erroneously tells this Court that, if the billboard structures are not realty, then the State did not “take” the billboards because the State did not take physical possession of the billboards. Reply at 3, 20, 26 n.3. Clear Channel voluntarily tore down the billboards pursuant to the parties’ Rule 11 agreement—*i.e.*, an agreement under which the State promised that it would not use Clear Channel’s voluntary removal of the billboards “to prove or disprove the compensability of Clear Channel’s billboards.” 2CR578. The State has characterized the Rule 11 agreement as being “without waiving Clear Channel’s taking claim.” Petitioner’s Brief on the Merits at 4 n.3. The State’s current arguments, in its reply brief—(1) that it did not “order” Clear Channel to tear down the billboards, (2) that it did not “take” the billboards, and (3) that it did not “destroy” the billboards (Reply at 3, 8, 20, 26 n.3)—are facile and violate the Rule 11 agreement by citing the fact that Clear Channel agreed to remove the billboards as support for the State’s argument that the billboards are noncompensable. Had there been no Rule 11 agreement, the State assuredly would have torn down the billboards for the highway.

Sincerely yours,

/s/ Marie R. Yeates  
Marie R. Yeates  
State Bar No. 22150700

Enclosure

cc: Michael P. Murphy [*by electronic service*]  
Christopher B. Mosley [*by electronic service*]  
Scott A. Brister [*by electronic service*]  
Kimberly S. Keller [*by electronic service*]  
J. Allen Smith [*by electronic service*]

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(Cite as: 2014 WL 2519191 (Okla.))

NOTICE: THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION IN THE PERMANENT LAW REPORTS. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

Supreme Court of Oklahoma.  
STATE of Oklahoma, ex rel. DEPARTMENT OF TRANSPORTATION, Appellant,  
v.  
LAMAR ADVERTISING OF OKLAHOMA, INC., an Oklahoma domestic corporation; Lamar Central Outdoor, Inc., Successor in interest to Chancellor Media Whiteco, a Delaware Corporation, Appellees.

Nos. 110896, 111108.  
June 3, 2014.

**Background:** Oklahoma Department of Transportation (ODOT) brought condemnation proceeding regarding outdoor advertising sign. Following a jury trial, the District Court, Oklahoma County, [Daniel L. Owens](#), J., awarded compensation to owners of sign. ODOT and owners appealed, and appeals were consolidated.

**Holdings:** The Supreme Court, [Winchester](#), J., held that:

- (1) owners were entitled to the fair market value of the property interests taken, whether real or personal;
- (2) income generated from rental of sign's face was relevant factor for consideration in determination of fair market value;
- (3) trial court acted within its broad discretion in excluding evidence of possibility of relocation;
- (4) owners had burden of proof as to valuation of sign, even though ODOT was party that demanded jury trial; and
- (5) burden that owners had in order to secure jury award in excess of ten percent of commissioners'

award so that they could recover attorney fees did not violate owners' due process rights.

Affirmed.

West Headnotes

**[1] Eminent Domain 148 ↗166**

**148 Eminent Domain**  
**148III** Proceedings to Take Property and Assess Compensation  
[148k166](#) k. Nature and Form of Proceeding.  
**Most Cited Cases**

**Eminent Domain 148 ↗167(4)**

**148 Eminent Domain**  
**148III** Proceedings to Take Property and Assess Compensation  
[148k167](#) Statutory Provisions and Remedies  
[148k167\(4\)](#) k. Strict Compliance with Statutory Requirements. **Most Cited Cases**

Condemnation proceeding is a special proceeding for the taking of private property for public use and must be carried out in accordance with legislatively prescribed procedure.

**[2] Eminent Domain 148 ↗262(4)**

**148 Eminent Domain**  
**148III** Proceedings to Take Property and Assess Compensation  
[148k250](#) Appeal  
[148k262](#) Review  
[148k262\(4\)](#) k. Questions of Fact, Verdicts, and Findings. **Most Cited Cases**

On appeal in eminent domain proceedings, the verdict of the jury may be set aside only when it manifestly appears that it is unjust and not supported by any competent evidence.

**[3] Appeal and Error 30 ↗1064.1(1)**

**30 Appeal and Error**

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**30XVI** Review

**30XVI(J)** Harmless Error

**30XVI(J)18** Instructions

**30k1064** Prejudicial Effect

**30k1064.1** In General

**30k1064.1(1)** k. In General.

**Most Cited Cases**

Appellate court's duty is to ensure that there is competent evidence reasonably tending to support the verdict of the jury and no prejudicial errors are shown in the trial court's instructions to the jury or on legal questions presented during trial.

**[4] Eminent Domain 148**  219

**148** Eminent Domain

**148III** Proceedings to Take Property and Assess Compensation

**148k213** Assessment by Jury

**148k219** k. Conduct of Proceedings in General. **Most Cited Cases**

Trial court is vested with wide discretion in determining what information it receives in a condemnation proceeding.

**[5] Eminent Domain 148**  202(1)

**148** Eminent Domain

**148III** Proceedings to Take Property and Assess Compensation

**148k199** Evidence as to Compensation

**148k202** Value of Property

**148k202(1)** k. In General. **Most Cited Cases**

In an eminent domain proceeding, any competent evidence of matters, not merely speculative, which would be considered by a prospective vendor or purchaser, or which tend to enhance or depreciate the value of the property, is admissible.

**[6] Eminent Domain 148**  219

**148** Eminent Domain

**148III** Proceedings to Take Property and Assess Compensation

**148k213** Assessment by Jury

**148k219** k. Conduct of Proceedings in General. **Most Cited Cases**

**Eminent Domain 148**  262(1)

**148** Eminent Domain

**148III** Proceedings to Take Property and Assess Compensation

**148k250** Appeal

**148k262** Review

**148k262(1)** k. In General. **Most Cited Cases**

Admissibility of evidence of value in condemnation cases is more largely within the trial court's discretion than is the determination of other issues, so that error predicated upon the exclusion of certain evidence will not be sustained except in cases of manifest error.

**[7] Eminent Domain 148**  122

**148** Eminent Domain

**148II** Compensation

**148II(C)** Measure and Amount

**148k122** k. Necessity of Just or Full Compensation or Indemnity. **Most Cited Cases**

Property owners are entitled to just compensation for their property interests when the government acquires such property through its eminent domain powers, and just compensation shall mean the value of the property taken. **Const. Art. 2, § 24.**

**[8] Eminent Domain 148**  122

**148** Eminent Domain

**148II** Compensation

**148II(C)** Measure and Amount

**148k122** k. Necessity of Just or Full Compensation or Indemnity. **Most Cited Cases**

Property owners must be placed as fully as possible in the same position they occupied before the government's taking.

**[9] Eminent Domain 148**  167(4)

**148** Eminent Domain

**148III** Proceedings to Take Property and Assess

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## Compensation

[148k167](#) Statutory Provisions and Remedies  
[148k167\(4\)](#) k. Strict Compliance with  
 Statutory Requirements. [Most Cited Cases](#)

## **Eminent Domain 148** 200

### [148](#) Eminent Domain

[148III](#) Proceedings to Take Property and Assess  
 Compensation

[148k199](#) Evidence as to Compensation  
[148k200](#) k. Presumptions and Burden of  
 Proof. [Most Cited Cases](#)

All presumptions must favor the landowner, not the condemnor, and constitutional eminent domain statutes must be strictly construed in the landowner's favor. [U.S.C.A. Const.Amend. 5](#); [Const. Art. 2, § 24](#).

## **[10] Eminent Domain 148** 133

### [148](#) Eminent Domain

[148II](#) Compensation

[148II\(C\)](#) Measure and Amount

[148k129](#) Taking Entire Tract or Piece of  
 Property

[148k133](#) k. Improvements and Fix-  
 tures. [Most Cited Cases](#)

Although trade fixtures are often treated like personal property between a lessee and lessor, in condemnation proceedings they are generally treated as real property.

## **[11] Eminent Domain 148** 133

### [148](#) Eminent Domain

[148II](#) Compensation

[148II\(C\)](#) Measure and Amount

[148k129](#) Taking Entire Tract or Piece of  
 Property

[148k133](#) k. Improvements and Fix-  
 tures. [Most Cited Cases](#)

Because an outdoor advertising sign falls under the category of a "structure or other improvement" under statute governing taking of buildings, structures, or other improvements, further designation as

personal or real property is unnecessary as the billboard owner must be provided fair market value regardless of the characterization of the property. [27](#) [Okl.St.Ann. § 14](#).

## **[12] Eminent Domain 148** 133

### [148](#) Eminent Domain

[148II](#) Compensation

[148II\(C\)](#) Measure and Amount

[148k129](#) Taking Entire Tract or Piece of  
 Property

[148k133](#) k. Improvements and Fix-  
 tures. [Most Cited Cases](#)

Owners of outdoor advertising sign, which was subject of condemnation proceeding that was brought by Oklahoma Department of Transportation (ODOT), were entitled to the fair market value of the property interests taken, whether real or personal. [27](#) [Okl.St.Ann. § 14](#); [69](#) [Okl.St.Ann. § 1280\(A, B\)](#).

## **[13] Eminent Domain 148** 195

### [148](#) Eminent Domain

[148III](#) Proceedings to Take Property and Assess  
 Compensation

[148k189](#) Pleading

[148k195](#) k. Issues, Proof, and Variance.  
[Most Cited Cases](#)

In condemnation proceedings, the sole issue is the fair market value of the property taken and damage to the remaining property, if any.

## **[14] Eminent Domain 148** 133

### [148](#) Eminent Domain

[148II](#) Compensation

[148II\(C\)](#) Measure and Amount

[148k129](#) Taking Entire Tract or Piece of  
 Property

[148k133](#) k. Improvements and Fix-  
 tures. [Most Cited Cases](#)

There is no rigid formula for determining fair market value of an outdoor advertising sign as a measure of just compensation in an eminent domain

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proceeding; instead, all reasonable considerations that might impact the fair market value of a sign's property interests should be reviewed. 27 Okl.St.Ann. § 14; 69 Okl.St.Ann. § 1280(A, B).

### **[15] Eminent Domain 148**

148 Eminent Domain

148II Compensation

148II(C) Measure and Amount

148k129 Taking Entire Tract or Piece of Property

148k131 k. Value of Land. **Most Cited Cases**

For eminent domain purposes, "fair market value" is the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it.

### **[16] Eminent Domain 148**

148 Eminent Domain

148II Compensation

148II(C) Measure and Amount

148k129 Taking Entire Tract or Piece of Property

148k133 k. Improvements and Fixtures. **Most Cited Cases**

Income generated from rental of outdoor advertising sign's face was relevant factor for consideration in determination of fair market value in eminent domain proceeding that was brought by Oklahoma Department of Transportation (ODOT) concerning sign. 27 Okl.St.Ann. § 14; 69 Okl.St.Ann. § 1280(A, B).

### **[17] Eminent Domain 148**

148 Eminent Domain

148III Proceedings to Take Property and Assess Compensation

148k213 Assessment by Jury

148k219 k. Conduct of Proceedings in General. **Most Cited Cases**

Trial court acted within its broad discretion in excluding evidence of possibility of relocation of

outdoor advertising sign in eminent domain proceeding that was brought by Oklahoma Department of Transportation (ODOT) regarding sign; there was ample evidence in record for court to have ruled that relocation was not a possibility. 27 Okl.St.Ann. § 14; 69 Okl.St.Ann. § 1280(A, B).

### **[18] Eminent Domain 148**

148 Eminent Domain

148III Proceedings to Take Property and Assess Compensation

148k199 Evidence as to Compensation

148k200 k. Presumptions and Burden of Proof. **Most Cited Cases**

Owners of outdoor advertising sign had burden of proof as to valuation of sign in eminent domain proceeding that was brought by Oklahoma Department of Transportation (ODOT) concerning sign, even though ODOT was party that demanded jury trial. 27 Okl.St.Ann. § 14; 69 Okl.St.Ann. § 1280(A, B).

### **[19] Constitutional Law 92**

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4075 Eminent Domain

92k4077 k. Proceedings. **Most Cited Cases**

### **Eminent Domain 148**

148 Eminent Domain

148III Proceedings to Take Property and Assess Compensation

148k265 Costs, Fees, and Expenses

148k265(1) k. In General. **Most Cited Cases**

Burden that owners of outdoor advertising sign had in order to secure jury award in excess of ten percent of commissioners' award so that owners could recover attorney fees under statute governing

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attorney fees in eminent domain proceedings did not violate owners' due process rights in eminent domain proceeding that was brought by Oklahoma Department of Transportation (ODOT) concerning sign, even though ODOT was party that demanded jury trial; there was no common law right to award of attorney fees in eminent domain proceedings, and statute was only applicable where jury award exceeded commissioners' award by ten percent. [U.S.C.A. Const.Amend. 14; 27 Okl.St.Ann. §§ 11, 14; 69 Okl.St.Ann. § 1280\(A, B\).](#)

## [20] Eminent Domain 148 ~~265~~(1)

### 148 Eminent Domain

[148III](#) Proceedings to Take Property and Assess Compensation

[148k265](#) Costs, Fees, and Expenses

[148k265\(1\)](#) k. In General. [Most Cited Cases](#)

In condemnation proceedings, there is no common law right to an award of attorney fees.

## [21] Eminent Domain 148 ~~265~~(1)

### 148 Eminent Domain

[148III](#) Proceedings to Take Property and Assess Compensation

[148k265](#) Costs, Fees, and Expenses

[148k265\(1\)](#) k. In General. [Most Cited Cases](#)

Every party in an eminent domain proceeding is responsible for its own litigation costs unless provided otherwise by statute.

On Appeal from the District Court of Oklahoma County, Oklahoma; The Honorable [Daniel L. Owens](#), District Judge.

¶ 0 Appellant filed condemnation proceeding against Appellees, owners of an outdoor advertising sign, for the removal of the sign from real property previously purchased by Appellant. Parties disagree on the amount Appellees are to be compensated for the taking. The trial court appointed three commissioners to assess just compensation which was de-

termined to be \$212,500. Appellant filed a demand for jury trial. The jury returned a verdict in the amount of \$206,000. Both parties appealed and we have retained, and consolidated, the matter.

**AFFIRMED.**[Kelly F. Monaghan](#) and [Lori Gilliard](#), Holloway & Monaghan, Tulsa, Oklahoma, for Appellant.

[William H. Hickman](#) and [Brad S. Clark](#), Hickman Law Group, Oklahoma City, Oklahoma, for Appellees.

### WINCHESTER, J.

\*1 ¶ 1 Plaintiff/Appellant, the State of Oklahoma, ex rel. Department of Transportation ("ODOT"), filed this condemnation proceeding against Lamar Advertising of Oklahoma Inc., and Lamar Central Outdoor, Inc. (collectively "Lamar"), for the removal of an outdoor advertising sign and the acquisition of Lamar's leasehold interest associated with the sign. ODOT previously acquired the real property on which the sign was located as part of a highway improvement project to Interstate 40 and, as such, removal of the sign was necessary.

¶ 2 Lamar erected the sign on the underlying real property pursuant to a written lease agreement with the owners of the land. Lamar has since removed and kept possession of the sign. ODOT argues that the sign is a trade fixture and that trade fixtures are personal property. As such, ODOT claims Lamar is only entitled to the depreciated reproduction costs of the sign or the costs associated with the sign's relocation. Conversely, Lamar argues that the sign's label of personal or real property is irrelevant to this case as the only criteria is fair market value of the sign and its related interests. ODOT asserts that Lamar's method of valuation improperly allows for the recovery of lost business income and profits. Lamar valued its property interests at \$429,000 while ODOT valued the property significantly less at roughly \$60,000.

¶ 3 Pursuant to [69 O.S.2011, § 1203\(c\)](#). the tri-

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al court selected three disinterested commissioners to assess the just compensation to which Lamar was entitled. The Commissioners were directed to “inspect the real property and consider the injury which the owner(s) may sustain by reason of the condemnation, and they shall assess the just compensation to which the owner(s) is entitled; and they shall ... make a report in writing ... setting forth the ... just compensation for the property taken....” *Id.* On July 23, 2008, the commissioners issued a report finding that Lamar was entitled to \$212,500 for the property interests acquired by ODOT through eminent domain. ODOT demanded a jury trial.

¶ 4 At the conclusion of trial, the jury returned a verdict awarding Lamar \$206,000 in just compensation for its interests. Lamar filed a motion for new trial and a motion to reconsider, both of which the trial court denied. Both parties appealed and we have retained and consolidated the matters.

¶ 5 ODOT maintains that based on Oklahoma law the sign is personal property. Accordingly, ODOT argues just compensation should be determined based on the cost of relocating the sign and only in the event the sign cannot be relocated the fair market value of the sign itself. Lamar filed Motions in Limine to exclude evidence regarding relocation of the sign, claiming relocation was not an option <sup>FN1</sup>, and to prohibit evidence that the sign was personal property. Both Motions were sustained by the trial court and ODOT claims the rulings were in error.

¶ 6 Prior to trial, ODOT filed a motion for partial summary judgment seeking a determination that pursuant to Oklahoma law, the sign in question was a trade fixture and trade fixtures are personal property under Oklahoma law. ODOT also filed a Daubert Motion to exclude the testimony of Lamar's expert, Paul Wright, arguing that he erroneously valued the sign as if it were real property. ODOT further urges this Court to reject the use of the gross rent multiplier, or similar valuation methods used by Lamar's expert, claiming that such

methods improperly award compensation for lost business profits relating to the outdoor advertising sign business. The trial court denied ODOT's motion for partial summary judgment as well as the Daubert motion.

\*2 ¶ 7 Conversely, Lamar claims its constitutional rights were violated by having the burden of proof of valuation on it instead of ODOT, the party demanding the jury trial. Lamar also filed a Daubert motion seeking to exclude ODOT's expert's opinions as failing to adequately assess the fair market value of the sign. The trial court denied Lamar's Daubert motion.

## STANDARD OF REVIEW

[1][2][3][4][5][6] ¶ 8 A condemnation proceeding is a special proceeding for the taking of private property for public use and must be carried out in accordance with legislatively-proscribed procedure. *See Gaylord v. State ex re. Dept. of Highways*, 1975 OK 63, 540 P.2d 558, 560; *Bd. Of County Com'rs of Creek Co. v. Casteel*, 1974 OK 31, 522 P.2d 608, 610. On appeal in eminent domain proceedings, the verdict of the jury may be set aside only when it manifestly appears that it is unjust and not supported by any competent evidence. *Denver, W. & M. Ry. Co. v. Atkinson*, 1911 OK 18, 119 P. 247. An appellate court's duty is to ensure that there is “competent evidence reasonably tending to support the verdict of the jury and no prejudicial errors are shown in the trial court's instructions to the jury or on legal questions presented during trial.” *Florafax Intern., Inc. v. GTE Market Resources Inc.*, 1997 OK 7, ¶ 3, 933 P.2d 282, 287.

¶ 9 The trial court is vested with wide discretion in determining what information it receives in a condemnation proceeding. *See, e.g., State ex rel. Dept. of Transp. v. Little*, 2004 OK 74, ¶ 11, 100 P.3d 707, 712 (evaluation of property value left largely to discretion of trial court). Any “competent evidence of matters, not merely speculative, which would be considered by a prospective vendor or purchaser, or which tend to enhance or depreciate the value of the property, is admissible.” *City of*

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*Enid. v. Moyers*, 1945 OK 281, ¶ 5, 165 P.2d 818, 820. The “admissibility of evidence of value in condemnation cases is more largely within the trial court’s discretion than is the determination of other issues, so that error predicated upon the exclusion of certain evidence will not be sustained except in cases of manifest error.” *Finley v. Bd. of County Comm.*, 1955 OK 321, ¶ 13, 291 P.2d at 339.

## DISCUSSION

¶ 10 In 1965, Congress enacted the Highway Beautification Act (HBA) which provided for, among other things, the regulation of outdoor advertising signs along the interstate and federal aid primary highways. *See 23 U.S.C. §§ 131, et seq.* Thereafter, Oklahoma adopted its own version of the HBA entitled the Highway Advertising Control Act. *See 69 O.S. §§ 1271, et. seq.* The Legislature determined that it was “in the public interest to control the size, number, spacing, lighting, type and location” of outdoor advertising structures in certain areas. *69 O.S.2011, § 1271*. In addition, local municipalities often impose their own restrictions. With all of these regulations, the legal sites for the erection of outdoor advertising signs are dwindling.

\*3 [7] ¶ 11 The Fifth Amendment to the U.S. Constitution, and *Article 2, Section 24* of the Oklahoma Constitution, both provide that the government shall not take private property for public use without just compensation. Oklahoma case law provides that property owners are entitled to just compensation for their property interests when the government acquires such property through its eminent domain powers and “just compensation shall mean the value of the property taken.” *State of Oklahoma, ex rel. Dep’t of Transportation v. Norman Industrial Development Corp.*, 2001 OK 72, 41 P.3d 960; OKLA. CONST. Art. 2, § 24.

[8][9] ¶ 12 Property owners must be placed as fully as possible in the same position they occupied before the government’s taking. *State ex rel. Dep’t of Transp. v. Little*, 2004 OK 74, ¶ 23, 100 P.3d 707, 718; *Oklahoma Turnpike Authority v. New Life Pentecostal Church of Jenks*, 1994 OK 9, ¶ 12, 870

P.2d 762, 766. Further, all presumptions must favor the landowner, not the condemnor, and constitutional eminent domain statutes must be strictly construed in the landowner’s favor. *See State ex rel. Department of Transportation v. Sissom*, 2009 OK 40, ¶ 9, 236 P.3d 49, 51, citing *Public Serv. Co. v. B. Willis, CPA, Inc.*, 1997 OK 78, ¶ 16, 941 P.2d 995, 999.

[10] ¶ 13 Where billboards are part of a taking in a condemnation proceeding, Oklahoma law provides that the just compensation to a sign owner must be based on fair market value for the “outdoor advertising and property rights pertaining thereto.” *69 O.S.2011, § 1280(A)*. The Act further specifies that outdoor advertising “is a trade fixture, and owners shall be awarded just and fair compensation for its taking.” *69 O.S.2011 § 1280(B)*. Although trade fixtures are often treated like personal property between a lessee and lessor, in condemnation proceedings they are generally treated as real property.

[11] ¶ 14 Pursuant to *27 O.S.2011 § 14*. “[w]here any interest in real property is acquired, an equal interest shall be acquired in all buildings, structures or other improvements located upon the real property.” The statute goes on to provide:

For the purpose of determining the just compensation to be paid for any building, structure or other improvement required to be acquired as by subsection A of this section, such building, structure or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure or improvement at the expiration of his term, and the fair market value which such building, structure or improvement contributes to the fair market value of the real property to be acquired or the fair market value of such building, structure or improvement for removal from the real property, whichever is greater, shall be paid to the tenant therefor.

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27 O.S. § 14. See also *Almota Farmers Elevator & Warehouse Co. v. U.S.*, 409 U.S. 470, 477 n. 5, 93 S.Ct. 791, 796 n. 5 [35 L.Ed.2d 1] (“if the fixtures are attached to the real estate, they must be treated as real estate in determining the total award.”) Because an outdoor advertising sign falls under the category of a “structure or other improvement,” further designation as personal or real property is unnecessary as the billboard owner must be provided fair market value regardless of the characterization of the property.

\*4 [12] ¶ 15 Oklahoma case law has consistently recognized that property interests entitled to compensation include every valuable interest that can be enjoyed and recognized as property, including leasehold interests and personal property. *Southern Kansas Ry. Co. v. City of Okla. City*, 1902 OK 63, 69 P. 1050 (syllabus 1). See also *Graham v. City of Duncan*, 1960 OK 149, 354 P.2d 458 (property entitled to compensation includes easements, personal property and a tenant's crops). Property taken through eminent domain and for which just compensation must be made “includes not only the soil but everything attached to it, whether attached by the course of nature, as trees, herbage, water, mines, and minerals, or by the hand of man, as buildings, fences, or other structures....” *Wright v. State ex rel. Dept. of Highways*, 1951 OK 119, ¶ 11, 230 P.2d 462, 463 (quoting 29 C.J.S. § 66, p. 855). Accordingly, Lamar is entitled to the fair market value of the property interests taken, whether real or personal.

[13][14] ¶ 16 In condemnation proceedings, the sole issue is the fair market value of the property taken and damage to the remaining property, if any. *Eberle v. State of Oklahoma ex rel. Dept. of Highways*, 1963 OK 224, ¶ 14, 385 P.2d 868, 871. There is no rigid formula for determining fair market value as a measure of just compensation. Instead, all reasonable considerations that might impact the fair market value of a sign's property interests should be reviewed. *McAlester Urban Renewal Auth. v. Lorince*, 1972 OK 109, 499 P.2d 925.

¶ 17 There are three standard property appraisal approaches: the cost approach, the income approach and the comparable sales approach. *Liddell v. Heavner*, 2008 OK 6, ¶ 20, 180 P.3d 1191. Where circumstances warrant, however, other recognized approaches or variations thereof can be employed. *Id.* In the present case, ODOT's expert used a cost approach analysis to value Lamar's interests at \$60,094. This amount included \$10,900 for a positive leasehold position and \$49,194 for actual sign value after depreciation. Conversely, Lamar's expert used the gross income multiplier method, a method that he testified is commonly utilized by buyers and sellers in the market of billboard advertising. Under this method, the expert determined that Lamar's fair market value loss was \$410,184. FN2

[15] ¶ 18 Fair market value is the amount of money which a purchaser willing, but not obliged, to buy the property would pay to an owner willing, but not obliged, to sell it. See *Grand Hydro v. Grand River Dam Auth.*, 1943 OK 158, ¶ 9, 139 P.2d 798; OUJI-Civ 25.5. When measuring the fair market value of real property in a condemnation proceeding, courts may not restrict how the determination of fair market value is derived to any particular method for appraisal. See, e.g., *State of Okla. ex rel. Dept. of Transp. v. Lamar Central Outdoor, Inc., and Sober Bros., Inc.*, 2007 OK CIV APP 105, 170 P.3d 551 (trial court may not restrict how fair market value is determined in billboard valuation: any recognized appraisal method may be employed); *Sill Corp. v. U.S.*, 343 F.2d 411, 416 (10th Cir.1965)(applying Okla. law)(no particular method for determining fair market value as a measure of just compensation should be espoused; instead, allowing the use of a number of methods and factors). In *Sill*, the court reasoned that fair market value may be measured using comparable sales, reproduction costs, capitalization of net income or any interaction of such determinants. *Sill Corp. v. U.S.*, 343 F.2d 411, 416 (10th Cir.1965).

\*5 ¶ 19 In accordance with this guidance, the

trial court first instructed the commissioners to “employ all recognized appraisal methods” as well as “any other relevant factors reasonably affecting the fair market value of the property interest in reaching the determination of just compensation.” The jury was later given the same instructions.

[16] ¶ 20 ODOT contends that Lamar's expert should not consider income from Lamar's sign face rentals in determining the sign site's fair market value. However, in *State ex rel. Dept. of Highways v. Robb*, 1969 OK 47, ¶ 11, 454 P.2d 313, 317, the Court held that “within the exercise of sound judicial discretion by the trial court evidence concerning the income and profits from a business being conducted on the property involved is admissible, ... as bearing upon the question of the fair market value of such property, although it is not admissible for the purpose of establishing a separate item of damages for loss of business profits.” *See also*, 7A Nichols on Eminent Domain § G9A.04(4)(c)(ii) (“When the business income or loss relates to market value, or it is otherwise demonstrated that such evidence is germane to a depreciation in market value after a taking, it may be admissible relative to market value, but the loss is not recoverable as a separate component of market value or severance damages.”).

¶ 21 Likewise, in *Finley v. Bd. of County Commissioners*, 1955 OK 321, ¶ 13, 291 P.2d 333, 339, the Court recognized that “evidence is admissible as to gross sales and the net profits of a business to aid the jury in determining the depreciation in the market value of the property taken or damaged.” The Court acknowledged in *Finley* that the trial court admitted a “wide range of evidence” relative to the value of the property and that the testifying experts considered the income from the property in arriving at their conclusions as to the market value. *Id.* All factors that may be given weight in the negotiation of a market transaction are factors that affect the determination of fair market value. We agree that income generated from the rental of the sign's face can be a relevant factor for consideration

in the determination of fair market value. FN3

¶ 22 The property taken from Lamar is a sign site that includes the billboard structure as well as the real property leasehold for a specific location identified by an outdoor advertising permit. Lamar's expert testified that the existence of a sign structure at a specific location is a factor that a buyer or seller in the marketplace would consider in valuing a sign site. ODOT's method of valuation would value all signs the same regardless of sign site location. This approach fails to take into account the sign's fair market value as a willing buyer would likely pay more for a sign on a busy highway than it would for a sign on a remote, country road. Lamar is entitled to full indemnification by just compensation which includes an evaluation of its fair market value.

\*6 [17] ¶ 23 As for the exclusion of evidence relating to the sign's relocation options, Lamar argued it could not relocate its sign to a similarly situated site and the trial court agreed. Taking into account the parties' witness testimony and evidence, the trial court determined prior to trial that evidence of relocation should not be submitted in this case. There is ample evidence in the record for the court to have ruled that relocation was not a possibility herein and, therefore, should not be considered. While evidence of relocation may be relevant in another case of this nature, we do not find the trial court abused his broad discretion in excluding evidence of the possibility of relocation in this case. *Finley v. Bd. of County Commissioners*, 1955 OK 321, ¶ 13, 291 P.2d 333, 339.

[18] ¶ 24 On appeal, Lamar also argues it shouldn't have the burden of proof regarding the determination of fair market value because it did not demand the jury trial, ODOT did. However, Oklahoma law has long provided that once the condemnor proves the validity of a taking, the burden shifts to the condemnee to prove the value of the property in condemnation proceedings. *See Nichols v. Oklahoma City*, 1945 OK 66, ¶ 7, 157 P.2d 174, 175. *See also*, *Western Farmers Electric Co-op. v.*

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*Rowlett*, 1955 OK 254, ¶ 0, 288 P.2d 726 (defendant/condemnee has burden of proof in establishing their damages); *Curtis v. WFEC Railroad Co.*, 2000 OK 26, ¶ 17, 1 P.3d 996 (condemnee bears burden of establishing damages).

¶ 25 In *Nichols*, the condemnor similarly appealed the award of the commissioners and, at trial, received an award slightly less than the commissioners' award. The condemnee complained of error in placing the burden of proof on him at trial. The *Nichols* court rejected the condemnee's argument finding that the burden was properly placed on the condemnee as per the general rule. *Nichols v. Oklahoma City*, 1945 OK 66, ¶ 7, 157 P.2d 174, 175. Accordingly, the burden of proof as to valuation properly rested with Lamar.

[19] ¶ 26 Lamar further argues that it has been denied due process because of the undue burden to secure a jury award in excess of ten percent of the commissioners' award in order to seek attorneys' fees when ODOT is the party that demanded the jury trial. Pursuant to 27 O.S.2011 § 11(3), a property owner may be reimbursed for "reasonable attorney, appraisal and engineering fees, actually incurred because of the condemnation proceedings" when the jury's award exceeds the court-appointed commissioners' award by ten percent. Here, the jury returned an award for slightly less than the commissioners' award. Lamar argues that it should be allowed to recover its fees because ODOT demanded the jury trial and it would be unfair to make Lamar responsible for such costs.

[20][21] ¶ 27 In condemnation proceedings, there is no common law right to an award of attorneys' fees. Every party is responsible for its own litigation costs unless provided otherwise by statute. *State ex rel. Dept. of Transp. v. Carter*, 2005 OK 7, ¶ 6, 107 P.3d 593, 594. Section 11 of title 27 is such a statute and it shifts the attorneys' fees obligation to the condemnor where the jury award exceeds the commissioners' award by ten percent or greater. *Oklahoma Turnpike Auth. v. New*, 1993 OK 42, ¶ 6, 853 P.2d 765, 766. Nevertheless, because

the statute, by its express terms, is only applicable where a jury award exceeds the commissioners' award by ten percent, it is not triggered in this case and Lamar is not entitled to its fees regardless of which party brought this action. FN4

## CONCLUSION

\*7 ¶ 28 This court will not substitute its judgment for that of a jury in matters of damages to be awarded for the condemnation of property for a public use, nor will it disturb the verdict of a jury if supported by any competent evidence. *Eberle v. State of Oklahoma ex rel. Department of Highways*, 1963 OK 224, 385 P.2d 868. We find there was competent evidence to support the verdict of the jury as to the amount of damages awarded Lamar. As such, we find no grounds for reversing the judgment of the lower court. The parties' requests for oral argument are denied.

AFFIRMED.

ALL JUSTICES CONCUR.

FN1. Lamar contends that Oklahoma City passed a complete ban on the construction of new billboards in the Downtown Scenic Area where the newly constructed I-40 is located, prohibiting the relocation of the sign.

FN2. Lamar's expert testified that many factors went into his valuation, including the location of the sign, the gross annual rent of the sign face, what a willing buyer would pay for the sign, the size of the sign, the circulation, the traffic volume and the sign's overhead. He then came up with a multiplier of six by analyzing the sale of similar billboards. He also utilized a second approach, the cash flow multiplier method, in which he determined the fair market value to be approximately \$429,000.

FN3. A majority of states concur with the

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conclusion that advertising income generated from a billboard face that cannot be relocated should be considered in valuing leasehold interests in order to ensure the sign owner will be justly compensated. See 8A *Nichols on Eminent Domain*, § 23.04[4] (West 2005). See also, *Nat'l Adv. Co. v. State, Dept. of Transp.*, 116 Nev. 107, 993 P.2d 62 (2000) (advertising income appropriately considered in valuing condemned leasehold interests, noting importance of location); *Lamar Corp. v. Commonwealth Transp. Comm'r*, 262 Va. 375, 552 S.E.2d 61 (2001) (evidence of income admissible because intrinsic to land, not business profit); *National Advertising v. State, DOT*, 611 So.2d 566, 568–70 (Fla. Dist. App. 1992) (evidence of rental income is relevant to value of leasehold interest); *State v. Obie Outdoor Advertising*, 9 Wash. App. 943, 516 P.2d 233 (1973) (rental income appropriately considered in valuing property where sign could not be relocated); *City of Scottsdale v. Eller Outdoor Advertising*, 119 Ariz. 86, 579 P.2d 590 (App. 1978) (valuation based on rental income appropriate for unique billboard location); *Lamar Advantage Holding Co., Inc. v. Arkansas State Highway Comm'n*, 369 Ark. 295, 253 S.W.3d 914 (2007) (income primarily function of unique location); *DURA v. Berglund-Cherne*, 193 Colo. 562, 568 P.2d 478 (1977) (rental income generated by uniqueness of land appropriate consideration).

**FN4.** A similar due process argument was rejected by the Court in *Root v. Kamo Elec. Co-op., Inc.*, 1985 OK 8, 699 P.2d 1083. In *Kamo*, the Court addressed a similar statute which required the jury award to exceed the commissioners' award by ten percent to trigger an award of attorneys' fees. The *Kamo* Court found "the classification as to the qualification for the award

to be reasonable." *Id.* at ¶ 39.

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