LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date April 21, 2017 Case No. 15CV186701

JERRY WRAY, DIRECTOR - ODOT
Plaintiff

Eric M. Hopkins
Plaintiff's Attorney

VS

BUFFALO-BAL BUSINESS TRUST, *et al.*
Defendant

Joseph R. Miller
Defendant's Attorney

This matter is before the Court on Defendants' Motion For Reconsideration. For good-cause shown, the Motion is hereby GRANTED.

The Court hereby vacates the Court's previous Journal Entries filed June 29, 2016 and September 20, 2016 and rules *in limine* on the following issues, *seriatim,* to wit: Evidence of Compensation as to Loss of Access, Internal Circulation, View, and Visibility.

See Judgment Entry.

IT IS SO ORDERED. No Record.

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JUDGE D. Chris Cook

cc: Hopkins, Esq.
Miller, Esq.

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INTRODUCTION

This matter is before the Court on Defendants', Buffalo-Bal Business Trust and SDI Business Trust ("Defendants") Motion For Reconsideration, filed February 9, 2017; Plaintiff, Jerry Wray, Director, Ohio Department of Transportation's ("ODOT") Memo Contra Defendant's Motion For Reconsideration, filed February 21, 2017; the parties oral argument had March 30, 2017; and the parties Position Statement Regarding Appraisal and Testimony of Debi Wilcox, filed April 21, 2017.

PROCEDURAL HISTORY

On May 10, 2016, ODOT filed a Motion *In Limine* to (among other things), exclude expert evidence as to the scope of Defendant's alleged damages.

On May 23, 2016, ODOT filed a Supplemental Motion *In Limine* to (among other things), exclude expert evidence of any damages to the residue resulting from the loss of view or visibility.

On May 25, 2016, Defendant's filed their Memorandum Contra ODOT's Motion *In Limine.*

On May 25 , 2016, the Court heard oral arguments by the parties then issued the two (2) Journal Entries noted above granting, then *sua sponte* modifying, ODOT's Motions.

On April 19, 2017 the Court had a conference call with counsel to further clarify an issue relative to Defendant's expert report and considered the parties Position Statement Regarding Appraisal and Testimony of Debi Wilcox, filed April 21, 2017.

JURISDICTION

As a threshold matter, ODOT urges denial of consideration of Defendants' Motion For Reconsideration on, essentially, jurisdictional grounds. According to ODOT, this Court lacks the authority to entertain a motion for reconsideration; is bound by the law of the case doctrine; and, there is no "obvious error" prerequisite for appellate review.

All of these arguments lack merit.

I. MOTION FOR RECONSIDERATION

The Court agrees with ODOT that, as a general maxim "The Ohio Rules of Civil Procedure do not allow for motions for reconsideration after a *final judgment* of the trial court." (ODOT - Memo Contra, emphasis added.)

Succinctly stated, the Rules of Civil Procedure specifically limit relief from judgments to motions expressly provided for within the same Rules. A motion for reconsideration is conspicuously absent within the Rules. Rather the Civil Rules do allow for relief from final judgments by means of Civ.R. 50(B) (motion notwithstanding the verdict), Civ.R. 59 (motion for a new trial), and Civ.R. 60(B) (motion for relief from judgment). Without a specific prescription in the Civil Rules for a motion for reconsideration, it must be considered a nullity. *Pitts v. ODOT* (1981), 67 Ohio St.2d 378.

The application for a motion for reconsideration after a final judgment is simply a legal fiction created by counsel, which has transcended into a confusing, clumsy and "informal local practice." We hold that the motion for reconsideration . . . will not lie and . . . said motion is a nullity." *Pitts, supra.*

In the matter at bar, however, no "final judgment" was entered. At issue are a series of Interlocutory, evidentiary orders made in response to the parties various motions *in limine*.

II. MOTIONS *IN LIMINE*

A motion "*in limine*" is defined in Black's Law Dictionary (5 Ed.1979) **145 914, as "[a] written motion which is usually made before or after the beginning of a jury trial for a protective order against prejudicial questions and statements * * *." *State v. Maurer* (1984), 15 Ohio St.3d 239, 259, 473 N.E.2d 768.

As related to trial, a motion *in limine* is a precautionary request, directed to the inherent discretion of the trial judge, to limit the examination of witnesses by opposing counsel in a specified area until its admissibility is determined by the court outside the presence of the jury. The power to grant the motion is not conferred by rule or statute, but instead lies within the inherent power and discretion of a trial court to control its proceedings. *Id.* at 224, 353 N.E.2d 624. *Riverside Methodist Hosp. Assn. v. Guthrie, supra,* 3 Ohio App. at 310, 444 N.E.2d 1358. See, also, Evid.R. 103(A) and 611(A).

The sustaining of a motion in limine does not determine the admissibility of the evidence to which it is directed. Rather it is only a preliminary interlocutory order precluding questions being asked in a certain area until the court can determine from the total circumstances of the case whether the evidence would be admissible. * * * " *State v. Leslie* (1984), 14 Ohio App.3d 343, emphasis added.)

Thus, a motion *in limine,* if granted, is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue. In virtually all circumstances **finality does not attach** when the motion is granted. Therefore, should circumstances subsequently develop at trial, the trial court is certainly at liberty "* * * to consider the admissibility of the disputed evidence in its actual context." *State v. White* (1982), 6 Ohio App.3d 1. (See also: *State v. Grubb* (1986), 28 Ohio St.3d 199, emphasis added.)

In the case at bar, as no final judgment was ever ordered and the Court's rulings *in limine* were ". . . tentative [and] interlocutory," they most certainly are subject to review and reconsideration by the trial Court.

III. LAW OF THE CASE DOCTRINE

The law of the case is a longstanding doctrine in Ohio jurisprudence. "[T]he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels." *Nolan v. Nolan* (1984), 11 Ohio St.3d 1.

The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. *Nolan, supra;* citing, *State ex rel. Potain v. Mathews* (1979), 59 Ohio St.2d 29. It is considered a rule of practice, not a binding rule of substantive law. *Hubbard ex rel. Creed v. Sauline* (1996), 74 Ohio St.3d 402.

Here, there is no "law of the case" as no reviewing court has issued any decisions, rulings, or law. The only rulings that have been made have been issued by the trial court. As such, the doctrine is inapposite.

IV. THE OBVIOUS ERROR TEST

Like the law of the case doctrine, to implicate the obvious error test, some type of appellate review must be at hand. Rule 26(A)(1) of the Ohio Rules of Appellate Procedure deals with reconsideration of an *appellate decision.*

The test generally applied upon the filing of a motion for reconsideration **in the court of appeals** is whether the motion calls to the attention of the court an obvious error in its decision, or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been. *Matthews v. Matthews* (1981), 5 Ohio App.3d 140. (Emphasis added.)

At the risk of didactic effrontery, this case is indisputably not on appeal; thus, the obvious error test is also inapposite.

THE MERITS

I. COMPENSATION FOR LOSS OF ACCESS & INTERNAL CIRCULUATION

As part of Defendants' damages calculus, they allege loss of access and internal circulation or "circuity.' Loss of access, or ingress and egress, is compensable. "The owner of property abutting on a public highway has the right to use that highway in common with other members of the public, and also the right of ingress and egress to and from this property, which latter right may not be destroyed without compensation." *Wray, Director ODOT v. Frank,* 2015 –Ohio-4248, citing: *Masheter v. Diver* (1969), 20 Ohio St.2d 74. See also: *Branahan v. Hotel Co.* (1883), 39 Ohio St. 333; *State ex rel. Thieken v. Proctor* (2008), 180 Ohio App.3d 154, 2008 –Ohio-6960.

A change, modification, or elimination of "access" to property *may* result in loss of circulation or travel within the property or "circuity," hence, the two principles are often discussed *in pari materia.*

Circuity of travel to and from real property is not compensable but circuity of travel created within the owner's property is compensable. See *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, and its progeny.

When the state completely deprives a property owner of all access to an abutting roadway, the state has substantially or unreasonably interfered with the right of access. *Thieken, supra.,* at 209. However, a taking can occur even if the state's interference does not amount to a total obstruction of access. Courts have also found a substantial or unreasonable interference with the right of access when the state blocks an existing access point so as to create circuity of travel within a property. *Hilliard v. First Indus., L.P.,* 158 Ohio App.3d 792, 2004-Ohio-5836; *Castrataro v. Lyndhurst* (Aug. 27, 1992), Cuyahoga App. No. 60901, 1992 WL 209578.

Circuity of travel within one' own property occurs when one entrance or exit is removed and another is not recreated. As noted by the court in *First Industrial I,* 158 Ohio App.3d 792, 2004–Ohio-5836, "[plaintiff] has created circuity of travel within First

Industry's site. It has taken away a point of ingress and egress . . . and failed to create another point of ingress and egress . . ." *First Industrial I,* at ¶8.

Such is the situation in the case at bar. Like the Plaintiff-Appellant in *City of Westerville v. Taylor,* 2014 –Ohio-3470, ODOT sought and got a fee simple interest in Defendants' property. By acquiring fee simple title to the property at issue herein, ODOT has "taken" Defendants right of ingress and egress to Center Ridge Road – a point of access that ODOT does not propose to replace. Where Defendants' once had four (4) access points to their property, they now only have three (3).

In support of its position that loss of access and circuity are not compensable in this case, ODOT relies exclusively on a Tenth District opinion, *City of Dublin v. Pewamo, Ltd.* (2011), 194 Ohio App.3d 57, 2011 –Ohio-1758.

In *Pewamo,* the property owner owned a farm that had ingress and egress to SR 161 through three (3) "dirt and gravel" access points designed for farm-vehicle access. The City of Dublin ("Dublin") proposed to eliminate (or "take") all three of the access points and replace them with a "single, 16-foot driveway." Pewamo argued that the residue lost value due to the reduction of access to SR 161 and change to internal circuity.

Despite receiving $548,041.00 for the taking at trial, Pewamo appealed and argued, among other things, that the jury should have been given a more "complete" instruction on internal circuity of travel within the property. While the *Pewamo* court reiterated the maxim, "Among the important elements to consider are loss of ingress and egress and any other losses reasonably attributable to the taking," *Pewamo, supra,* @¶6, citing *Hilliard, supra,* at ¶5, the Tenth District rejected Pewamo's argument.

The *Pewamo* court found that (unlike most such cases where circuity is alleged) the property at issue was "undeveloped" property and, thus, there was no restriction of access because there were ". . . no structures on the land." Accordingly, the Tenth District found that ". . . removal of the dirt and gravel access roads did nothing to impair access to Pewamo's property," @¶37, and by extension, did not impair circuity.

Pewamo is instructive, but not controlling on this court. That said, this Court agrees with the sound rationale enunciated in *Pewamo* to the extent that undeveloped, unimproved, or vacant property, as that term is often used, cannot suffer damages due to loss or impairment of internal circuity. After all, if there are no structures, buildings, or other improvements to real property, one's locomotion around, through, and/or across the property are unaffected by how or where one enters it.

Conversely, if the property is developed or improved with buildings or other structures, then a change in access to the property may very well disrupt internal circuity.

In the case at bar, the property is not "undeveloped" property; quite the contrary. The property consists of improved property. There is a large, commercial structure on the property; a concrete parking area; three (3) paved driveways; access to utilities, water, sewer, etc.; and some landscaping. While the premises may be "vacant,"[1] it is not "unimproved."

Notwithstanding this reality, in the case at bar, Defendant's expert did not consider the property as improved for purposes of her damages appraisal, but instead, appraised the property as "vacant." As such, Defendant's expert determined that ". . . the building is not directly impacted by the Taking."

Applying the rationale in *Pewamo* to this case mandates that Defendant be prohibited from introducing evidence or testimony for loss or disruption to internal circuity. If the property is considered unimproved or vacant, and the presence of the building is irrelevant, than internal circuity (or travel in, about, or across the property) cannot be impacted by the taking.

Conversely, this Court will not extend the holding in *Pewamo* to prevent evidence and testimony for the loss of access. The great majority of appropriation jurisprudence recognized loss of access as a valid, compensable element of damages. The facts at play in *Pewamo* are too attenuated from the facts of this case to apply the *Pewamo* rationale to loss of access.

Accordingly, the Motion *In Limine* regarding the exclusion of Defendants' expert testimony, evidence, and reports relative to Loss of Access is DENIED.

Conversely, the Motion *In Limine* regarding the exclusion of Defendant's expert testimony, evidence, and reports relative to Loss of Internal Circulation is GRANTED.

II. COMPENSATION FOR LOSS OF VIEW & VISIBILITY

Unlike the issues surrounding access and circuity, there is less case law on the issue of compensation for loss of view and visibility. That said, it remains clear that interference with the view and visibility of property after a take may be compensable.

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[1] This distinction is relevant as Defendant's expert appraised the property as in a "vacant" condition and opined that ". . . the building is not directly impacted by the Taking."

The right to ". . . an unobstructed view . . . is an incorporeal hereditament attaching to such abutting lots, and its property within the meaning of [eminent domain statute]." *Village of Port Clinton v. Hall* (1919), 99 Ohio St. 153.

It is the established law of Ohio that an abutting owner's rights to light, air, view, ingress and egress are property which may not be interfered with or appropriated without making compensation therefore. See: *Crawford* v. *Delaware,* (1857), 7 Ohio St. 460, and its progeny.

In *City of Westerville, supra,* the trial court properly instructed the jury that the property owner is entitled to compensation for governmental action that substantially or unreasonably ". . . interferes with that property owner's visibility over the public street or roadway," *Id* @¶30, or loss of ". . . visibility due to the landscape easement." *Id.* @¶31.

For a commercial property, ". . . visibility is often integral to the success of the commercial venture. *Id.* @¶33. And ". . . two key elements that a willing buyer would consider in purchasing the residue that could potentially devalue the property were access **and visibility**." *Id.* @¶34, emphasis added.

Like in *City of Westerville,* the case at bar deals with a taking, *not* the governmental entity exercising its right to make a reasonable use of its own property. Here, ODOT has acquired property that it intends to use that will partially block the view and visibility of the residual property.

This court is guided by the fundamental axiom that in assessing damages to the residue as a result of a taking, the jury is to consider those factors that would enter into a prudent business person's determination of value. *Hilliard v. First Indus, L.P.,* 158 Ohio App.3d 792, 2004 –Ohio-5836.

Clearly, the obstruction to the view and visibility caused by the erection of a wall by ODOT, however *de minimus* it may be, is within the jury's purview to consider.

Accordingly, ODOT's Motion *In Limine* to exclude any evidence regarding the damage to the residue from loss of view or visibility is DENIED.

CONCLUSION

For the foregoing reasons, Defendant's Motion For Reconsideration is GRANTED;

The Court's previous Entry's *in limine* addressing loss of access and internal circulation and loss of view and visibility are hereby vacated;

ODOT'S Motion *In Limine* relative to Loss of Access is DENIED;

ODOT's Motion *In Limine* as to Internal Circulation is GRANTED; and,

ODOT's Motion *In Limine* as to View and Visibility is DENIED.

Final pre-trial remains set for Wednesday, May 18, 2017 @ 1:30 pm before Judge Cook. All parties, counsel, and individuals with authority to settle are ordered to attend.

Jury trial remains set for **Tuesday, May 30, 2017 @ 8:30 am.**, before Judge Cook.

The parties are further ordered to familiarize themselves with the Court's standing Trial Order.

IT IS SO ORDERED. No Record.

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JUDGE D. Chris Cook

cc: Hopkins, Esq.
Miller, Esq.