[Cite as *State ex rel. BDFM Co. v. Ohio Dept. of Transp.*, 2013-Ohio-107.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio ex rel. BDFM Company et al.,	:	
Relator/Plaintiff-Appellant,	:	No. 11AP-1094 (C.P.C. No. 10CVH-9680)
v.	:	(REGULAR CALENDAR)
Ohio Department of Transportation,	:	
Respondent/Defendant-Appellee.	:	

D E C I S I O N

Rendered on January 17, 2013

Mansour, Gavin, Gerlack & Manos Co. L.P.A., *Anthony J. Coyne*, and *Brendon P. Friesen*, for appellant.

Michael DeWine, Attorney General, *Richard J. Makowski*, and *Bruce D. Horrigan*, for appellee.

APPEAL from the Franklin County Court of Common Pleas

BRYANT, J.

{¶1} Plaintiff-appellant, BDFM Company ("BDFM"), appeals from the November 15, 2011 judgment of the Franklin County Court of Common Pleas denying BDFM's request for a writ of mandamus, its motion to compel, and its request for declaratory relief against defendant-appellee, Ohio Department of Transportation ("ODOT"). Because the trial court did not abuse its discretion in: (1) determining BDFM's evidence did not prove a legal taking of its right of access; (2) permitting certain questions during ODOT's direct examination of its witnesses; (3) admitting ODOT's documentary evidence submitted after the discovery period; (4) admitting ODOT witness Dirk Gross's

lay opinion testimony; and (5) finding BDFM failed to prove a material mistake of fact at the time of contracting that warranted rescission of the parties' agreement, we affirm.

I. Facts and Procedural History

{¶2} BDFM, a partnership, owns real property parcel 36615-36625 Vine Street, located at the intersection of Vine Street and East 365th Street in Lake County, Ohio. The property borders a State Route 2 interchange ramp to the east, Vine Street to the south and E. 365th Street to the west. To the north is a residential development extending up to Stevens Boulevard.

{¶3} BDFM's land has two improvements, a multi-tenant office building and a parking lot for that building; two driveways provide direct access from the parking lot to E. 365th Street. Because the lot abuts the interchange ramp connecting State Route 2 and Vine Street, the Vine Street side of the property has no driveway. Prior to the construction subject of this action, drivers traveling Vine Street in either direction could access the property most directly by turning onto E. 365th Street and almost immediately making another turn into the building's parking lot.

{¶4} In 2006, as part of a larger redevelopment project involving a four mile section of State Route 2, ODOT initiated plans to improve the State Route 2 and Vine Street interchange. The proposed modifications included widening the stretch of Vine Street fronting BDFM's property from two lanes to three lanes to accommodate the addition of a center, dedicated left turn lane. The planned expansion required ODOT to obtain a five- foot strip of BDFM's property where it fronted Vine Street, as well as permission to use BDFM's parking lot during construction. The project did not impact BDFM's E. 365th Street driveways.

{¶5} In February 2007, ODOT contacted BDFM by letter explaining an upcoming highway improvement project required acquisition of "certain property rights" from BDFM. (Appellant's Appendix, exhibit No. 5.) After "a number of dialog[ue]s," the parties reached an agreement as to the property at issue on July 23, 2007, granting ODOT a permanent easement for the five-foot strip of Vine Street frontage and a temporary construction easement in exchange for $15,525 in compensation. (Tr. Vol. 1, 14.)

{¶6} The proposed Vine Street improvements also necessitated changes impacting a car wash and an auto detailing business located on the south side of Vine

Street, across from BDFM. ODOT's plan was to eliminate the two businesses' existing Vine Street access drives and add a new rear service road for the businesses. Jamie Pilla, the owner of the car wash, and Lynn Fisher, the owner of the land and structure containing a tenant's auto detailing business, strongly objected to losing their direct access to Vine Street.

{¶7} After several meetings with ODOT representatives to discuss modifying the plans, Pilla contacted State Senator Timothy Grendell for help. On December 13, 2007, Grendell wrote ODOT's Deputy Director Bonita Teeuwean expressing his displeasure with the plan to remove Pilla's direct access to Vine Street and replace it with the rear service road. During the same period, ODOT Major Projects Coordinator Kathleen Sarli began conferring with others at ODOT, including Dirk Gross, administrator of the Office of Roadway Engineering, about alternatives to the original plan to replace the south side direct access drives with the rear service road. In early 2008, ODOT planners changed the Vine Street improvement project to include a median down the center of Vine Street in front of BDFM's property instead of the previously envisioned dedicated left turn lane. Once installed, the median prevented left turns between Vine Street and E. 365th Street and blocked left turns into and out of the south side businesses.

{¶8} As a result of the changed plans, BDFM filed its complaint with the Franklin County Court of Common Pleas on June 30, 2010 requesting a writ of mandamus to compel ODOT to initiate an appropriation case for taking BDFM's right of access, an order to compel ODOT to cut an opening in the median, and/or a declaratory judgment voiding the July 2007 easement agreement. ODOT filed its answer on August 11, 2010, refuting BDFM's claims.

{¶9} After the parties conducted extensive discovery, the trial court held a bench trial on October 25 and 26, 2010, which included testimony from several ODOT representatives and two of BDFM's partners, as well as "voluminous exhibits." (Decision and Judgment Entry, at 2.) After the parties filed post-trial briefs in lieu of closing arguments, the trial court issued its decision and judgment entry on November 15, 2011. The court denied BDFM's writ of mandamus, holding BDFM's evidence did not prove a legal taking of its right of access. The court further denied BDFM's request for declaratory judgment, finding "[n]o basis exists to 'rescind' the contract resulting in the granting of

the easements and rights of way." (Decision and Judgment Entry, at 11.) Finally, the court found no legal authority to order ODOT to cut an opening in the median at the E. 365th Street intersection.

{¶10} On November 28, 2011, BDFM moved for reconsideration or a new trial, pursuant to Civ.R. 59(A)(6) and (7), contending either the weight of the evidence did not sustain the judgment or the judgment was contrary to law. On December 5, 2011, the trial court denied BDFM's motion.

II. Assignments of Error

{¶11} BDFM appeals, assigning five errors:

> [I.] THE TRIAL COURT ERRED IN DENYING BDFM COMPANY A WRIT OF MANDAMUS ORDERING THE OHIO DEPARTMENT OF TRANSPORTATION TO BEGIN APPROPRIATION PROCEEDINGS IN LAKE COUNTY, OHIO TO COMPENSATE BDFM FOR TAKING OF ITS PROPERTY AND THE DAMAGES TO THE RESIDUE.
>
> [II.] THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING ODOT TO LEAD ITS WITNESSES ON DIRECT EXAMINATION AT TRIAL.
>
> [III.] THE TRIAL COURT ABUSED ITS DISCRETION IN ALLOWING ODOT TO PRESENT DOCUMENTARY EVIDENCE AT TRIAL THAT WAS SUBJECT TO A MOTION TO COMPEL BUT WAS NOT PRODUCED BY ODOT UNTIL THE DAY OF TRIAL CAUSING SURPRISE TO THE APPELLANT.
>
> [IV.] THE TRIAL COURT ABUSED ITS DISCRETION IN PERMITTING ODOT TO PRESENT "EXPERT" TESTIMONY OF DIRK GROSS WHERE IT NEVER FURNISHED AN EXPERT REPORT.
>
> [V.] THE TRIAL COURT ERRED IN DENYING BDFM COMPANY'S REQUEST FOR DECLARATORY JUDGMENT TO RESCIND THE AGREEMENT ENTERED INTO BETWEEN BDFM AND ODOT FOR THE APPROPRIATION OF ITS PROPERTY.

III. First Assignment of Error - Writ of Mandamus

{¶12} BDFM's first assignment of error contends installation of the Vine Street median constitutes an uncompensated taking of the company's property, so that "[t]he

trial court abused its discretion in denying BDFM a writ of mandamus requiring ODOT to initiate appropriation proceedings to acquire BDFM's property." (Appellant's brief, at 10.) ODOT refutes BDFM's contention that installation of the median constituted a taking of BDFM's right of access, arguing the median's installation was "an exercise of [the state's] police power in the regulation of the flow of traffic" and "reasonable means of access remain." (Appellee's brief, at 15.)

{¶13} Since granting or denying a writ necessarily requires the trial court "to exercise discretion, an appellate court must review its decision under an abuse-of-discretion standard." *State ex rel. Smith v. Culliver*, 186 Ohio App.3d 534, 2010-Ohio-339, ¶ 19 (5th Dist.), citing *Leland v. Lima*, 3d Dist. No. 1-02-59, 2002-Ohio-6188, ¶ 10, citing *State ex rel. Ney v. Niehaus*, 33 Ohio St.3d 118 (1987); *In re C.C.M.*, 10th Dist. No. 12AP-90, 2012-Ohio-5037, ¶ 5, quoting *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, (1983) (observing an abuse of discretion " 'connotes more than an error of law or judgment,' " but " 'implies that the court's attitude is unreasonable, arbitrary, or unconscionable").

{¶14} In the context of a taking, "The United States and Ohio Constitutions guarantee that private property shall not be taken for public use without just compensation. * * * Mandamus is the appropriate action to compel public authorities to institute appropriation proceedings where an involuntary taking of private property is alleged." *State ex rel. Shemo v. Mayfield Hts.*, 95 Ohio St.3d 59, 63 (2002), *judgment modified in part on other grounds*, 96 Ohio St.3d 379 (2002); Fifth and Fourteenth Amendments to the U.S. Constitution; Ohio Constitution, Article I, Section 19. Because "[m]andamus is an extraordinary writ that must be granted with caution," a party seeking a writ of mandamus must "establish entitlement to the requested extraordinary relief by clear and convincing evidence." S*tate ex rel. Liberty Mills, Inc. v. Locker*, 22 Ohio St.3d 102, 103 (1986); *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, ¶ 16, citing *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, paragraph three of the syllabus. As a result, the landowner has the burden of proving a clear legal right to the relief requested, a corresponding clear legal duty on the part of respondents to take appropriate action, and a lack of an adequate remedy in the ordinary course of law. *State ex rel. Gilbert v. Cincinnati*, 125 Ohio St.3d

385, 2010-Ohio-1473, ¶ 15. *See also Doner* at ¶ 56 (noting "[i]n mandamus cases, this heightened standard of proof is reflected by two of the required elements—a 'clear' legal right to the requested extraordinary relief and a corresponding 'clear' legal duty on the part of the respondents to provide it").

A. *Right of Access*

{¶15} BDFM claims it is entitled to a writ of mandamus because the median's installation constituted a legally compensable taking of the company's right of access. Indeed, one of the elemental rights of real-property ownership is the right of access to a public roadway abutting the property. *State ex rel. OTR v. Columbus*, 76 Ohio St.3d 203 (1996), syllabus. When a landowner's property abuts a public highway, that owner "possesses, as a matter of law, not only the right to the use of the highway in common with other members of the public, but also a private right or easement for the purpose of ingress and egress to and from his property, which latter right may not be taken away or destroyed or substantially impaired without compensation therefor." S*tate ex rel. Merritt v. Linzel,* 163 Ohio St. 97 (1955), paragraph one of the syllabus.

{¶16} Even so, the state may modify a property owner's access without compensation, "so long as there is no denial of ingress and egress." *Castrataro v. City of Lyndhurst*, 8th Dist. No. 60901 (Aug. 27, 1992). " 'The test of whether this right of access is so impaired as to require compensation is whether there is a substantial, material or unreasonable interference with an owner's or public's access to his property.' " *Salvation Army v. Ohio Dept. of Transp.*, 10th Dist. No. 04AP-1162, 2005-Ohio-2640, ¶ 16, quoting *State ex rel. B & B Co. v. Toledo*, 6th Dist. No. L-81-309 (Mar. 19, 1982). The landowner charging a compensatory taking must demonstrate a substantial or unreasonable interference. *State ex rel. Cleveland Cold Storage v. Beasley*, 10th Dist. No. 07AP-736, 2008-Ohio-1516, ¶ 12, citing *OTR* at 206.

{¶17} Here, some aspects of BDFM's access did not change at all. ODOT's changes to Vine Street did not affect BDFM's ability to access 365th Street from its parking lot. If drivers wish to travel north on 365th Street towards Stevens Boulevard and points beyond, the subject highway modification does not alter their travel options; they may turn right out of BDFM's parking lot and continue on as before. Likewise, if drivers want to travel westbound on Vine Street, the median does not impede their travel; they

may turn left out of the parking lot to travel south on 365th Street, then turn right onto westbound Vine Street as before. The reverse is true, and travel from the north and from westbound Vine Street to BDFM's property is unaffected as well.

{¶18} The median, however, clearly made travel between BDFM's property and eastbound Vine Street more difficult, though not impossible. With the median in place, a driver attempting to reach eastbound Vine Street from 365th Street must travel north to Stevens Boulevard, turn left onto Stevens, turn left again onto 364th Street and then turn right onto eastbound Vine Street, for a total added distance of .77 miles. A driver attempting to reach BDFM's property from eastbound Vine Street may take the reverse route, if they know that the median blocks access to 365th Street directly. If a driver does not anticipate the median, the driver must continue east and turn onto westbound Vine Street from a subdivision further down eastbound Vine, for a total added distance of .92 miles.

{¶19} In arguing the change in access amounts to a taking, BDFM invokes this court's holding in *Salvation Army* that " ' "Substantial interference" occurs when an owner is "prevented from enjoying the continued use to which the property had been previously devoted." ' " *Id.* at ¶ 16, quoting *Wray v. Fitch*, 95 Ohio App.3d 249, 252 (9th Dist.1994), quoting *State ex rel. Morris v. Chillicothe*, 4th Dist. No. 1720 (Oct. 2, 1991). ODOT counters by noting our decision in *Salvation Army* continued by stating "[i]t is also well-established that merely rendering access less convenient or more circuitous does not by itself constitute 'substantial interference.' " *Id.* at ¶ 17.

{¶20} A line of Supreme Court of Ohio cases beginning with *Merritt*, in which the court first articulated the distinction between a highway modification resulting in "mere circuitry of travel" and a compensable impairment to the right of access, heavily informed our decision in *Salvation Army*. *Id.* at ¶ 17, citing *Merritt*, at paragraph two of the syllabus. In *Merritt*, the landowners sought compensation for a taking where the Director of Highways relocated a portion of the state highway so that it no longer abutted the landowners' commercial property, which included a gas station, a store, and a restaurant. The state-abandoned portion of the highway continued to be maintained as a county road, and the landowners retained exactly the same access to it as when the

abutting roadway was designated a state highway. As part of the highway improvement project, the state built access lanes connecting the old road with the new highway.

{¶21} The landowners claimed they suffered a compensable taking because the relocation of the highway destroyed their easement of access and the old road upon which their property continued to abut was no longer a publicly traveled highway. *Merritt* disagreed, concluding "[m]ere circuity of travel, necessarily and newly created, to and from real property does not of itself result in legal impairment of the right of ingress and egress to and from such property, where any resulting interference is but an inconvenience shared in common with the general public and is necessary in the public interest to make travel safer and more efficient." *Id.* at 102. *See also Jackson v. Jackson*, 16 Ohio St. 163 (1865), paragraph two of the syllabus (stating "[a] claimant for damages in the alteration a road is not entitled to recover where such alteration merely renders the road less convenient for travel, without directly impairing his access to the road from the improvements on his land").

{¶22} Five years later, in *New Way Family Laundry, Inc. v. Toledo*, 171 Ohio St. 242, 243 (1960), the Supreme Court of Ohio applied its *Merritt* holding to a case involving the installation of a median that eliminated left turns into and out of the landowner's commercial property. Contemplating whether recovery should "be permitted * * * for the sole reason that the plaintiff [was] no longer allowed to use the opposite half of the highway for left turns in entering or leaving its property but is limited to right turns and hence is required to take a circuitous route of approximately one mile in one direction and two miles in the other," the court resolved "the answer must be in the negative." *Id.* at 246.

{¶23} The court thus concluded that "[t]he construction of a divider strip in the middle of a highway resulting in the elimination of left turns from and into the abutting property and thereby permitting only right turns and requiring circuity of travel to leave or reach the opposite half of the highway does not constitute an actionable interference with the abutting property owner's right of ingress and egress." *Id.* at paragraph three of the syllabus. *New Way Family Laundry*, however, specifically noted the "highway improvement project involved the appropriation of none of the plaintiff's property." *Id.* at 243. BDFM contends the rule would not apply where, as in BDFM's case, the state

installed the median and also appropriated the landowner's property as part of the same road improvement project.

{¶24} The Supreme Court of Ohio has addressed that issue as well, establishing an "exception[] to the rule that when a taking occurs the landowner is entitled to compensation for the damage to the residue." *Steubenville v. Schmidt,* 7th Dist No. 01 JE 13, 2002-Ohio-6894, ¶ 18, citing *Richley v. Jones,* 38 Ohio St.2d 64 (1974). In *Richley,* the state appropriated a portion of the landowner's property in order to convert a road from a two-lane to a four-lane highway with a median divider. The construction of the median precluded traffic traveling in an easterly direction on the highway from turning directly into the landowner's property, but instead forced it to go some distance east, turn around, and travel back westerly in order to turn into the subject property.

{¶25} Presented with whether the owners should be permitted to argue the diminution in value as a result of the median's construction in a proceeding to determine compensation for the appropriation, the Supreme Court reiterated that creating a more circuitous route to an individual's property was not compensable. The court further noted "[t]he fact that this loss is coincident with an appropriation of land in no way changes the noncompensable character of the damage." *Richley* at 70. The court reasoned the median strip's installation could have been done, with or without a take, at the same time or at a later time under the police power of the state and, thus, the "placing of the median strips * * * was unrelated to the taking of the land which occurred for the purpose of widening the road." *Steubenville* at ¶ 20, citing *Hurst v. Starr,* 79 Ohio App.3d 757, 762 (10th Dist.1992), citing *Richley*.

{¶26} For the same reason, the court concluded placing the median strips was irrelevant to the issue of damages to the residue, even though the median strip affected the market value of the property. *Richley*. *See also Smith v. Joseph,* 6th Dist. No. WD-85-40 (Jan. 24, 1986) (rejecting appellant's argument "that because a portion of his property was appropriated for public use that the injury to his remaining land which otherwise would not be compensable is somehow rendered compensable due to the taking of a remote portion of his land"); *Ohio Dept. of Transp. v. Vanhoose,* 4th Dist. No. 1733 (May 28, 1985) (citing *Richley* and concluding "any interference with access caused by fencing of the roadway is not the direct result of the appropriation and use of the .39 acres

taken in this action, but is an inconvenience shared in common with all others whose property fronts on the roadway").

{¶27} In the end, applicable law dictates that any change in traffic flow occasioned by placing a median in the road results from the exercise of the police power of the state and any resulting damages, even damages to the residue, are non-compensable absent a taking. In denying BDFM's writ of mandamus, the trial court held the evidence did not prove a legal taking of BDFM's right of access, but instead merely demonstrated an inconvenience in circuitry of travel that may have resulted in economic damages but did not result in a compensable constitutional taking. BDFM nonetheless argues that "even if the median strip creates 'circuity of travel,' it still constitutes a substantial or unreasonable interference with BDFM's property rights" because "the resulting injury is not shared in common with the general public" and "ODOT did not conclude that the project was necessary for safety and efficiency." (Appellant's brief, at 16.)

B. *Shared Injury*

{¶28} BDFM contends that, unlike *Merritt*, *Richley*, and *Salvation Army*, the general public does not share its inconvenience, and the trial court's ruling to the contrary "failed to recognize * * * the distinction between 'an injury suffered in common by the entire community' and the particular damage suffered by BDFM." (Appellant's brief, at 17.) BDFM attempts to distinguish its injury from that of the general public in three related, but distinct, ways.

{¶29} BDFM initially asserts it suffered "unique damage" because its office building is the only *business* located on 365th Street. (Appellant's brief, at 16.) In *Salvation Army*, the plaintiff-business owner likewise contended the subject highway modification was "not an inconvenience shared in common with the general public by virtue of the fact '[n]o other businesses were affected, as no other businesses are located on [the subject street].' " *Salvation Army* at ¶ 20. Concluding the argument was unpersuasive, *Salvation Army* held that the general public shared the burden that modification of public roads imposes, as it affects all drivers' use of the roads. *Id*.

{¶30} *Salvation Army* applies here as well. The median's installation does not solely burden BDFM's property, as it prevents all drivers from accessing 365th Street from eastbound Vine Street, not only drivers attempting to reach the 365th Street driveways to

BDFM's property but also the residential neighborhood behind BDFM's property and points beyond, such as Stevens Boulevard. The median also prevents drivers traveling westbound on Vine Street from accessing the Eastlake Compass auto wash and Stevens Auto detailing businesses located on the south side of Vine Street. *See Steubenville* at ¶ 26 (concluding that where movement of a traffic light hindered use of restaurant's driveway and one other restaurant was likewise affected, the "placement of the traffic light does not solely burden [plaintiff's] property," but rather "the burden is shared in common with the general public"). BDFM's first argument is unpersuasive.

{¶31} BDFM next contends its injury is unique because the median "has caused economic damage to BDFM," deterring potential tenants from leasing office space and thereby "prevent[ing] BDFM from realizing the economic value attached to the property." (Appellant's brief, at 16-17.)

{¶32} BDFM's argument fails to acknowledge the difference between the differing analyses that apply to an alleged regulatory taking as opposed to an alleged physical taking, such as a denial of right of access. *See State ex rel. River City Capital v. Clermont Cty. Bd. of Commrs.*, 12th Dist. No. CA2010-07-051, 2011-Ohio-4039, ¶ 25 (holding "[t]wo main theories exist for establishing a taking, one based on land-use or zoning regulations and the other, on physical invasions by the government"); *State ex rel. Hilltop Basic Resources, Inc. v. Cincinnati,* 118 Ohio St.3d 131, 136, 2008-Ohio-1966 (distinguishing between physical and regulatory takings). To the extent BDFM's "economic damage" assertion has any relevance to a right of access taking, the fundamentally same argument was set forth and rejected in *Merritt* and *Salvation Army*.

{¶33} *Merritt* specifically addressed "whether loss of trade and business to an owner of property abutting on an established highway, because of a diversion of traffic over such highway, * * * is a compensable injury chargeable to the highway authority." *Merritt* at 104. In answering the inquiry, *Merritt* concluded, "[i]t is now an established doctrine in most jurisdictions that such an owner has no right to the continuation or maintenance of the flow of traffic past his property." *Id*. at 104. As the court explained, "[t]he diminution in the value of land occasioned by a public improvement that diverts the main flow of traffic from in front of one's premises is noncompensable. The change in traffic flow in such a case is the result of the exercise of the police power or the

incidental result of a lawful act, and is not the taking or damaging of a property right." (Citations omitted.) *Id*.; *Salvation Army* (reasoning that, in order to constitute a taking, the alleged interference must relate to *access*, not a diminution in value stemming from a change in traffic flow). *See also OTR* at 214, citing *State ex rel. Schiederer v. Preston*, 170 Ohio St. 542, 544-46 (1960). BDFM's second argument is unpersuasive.

{¶34} BDFM lastly contends the trial court did not adequately consider the extent of the circuity and "the difficultly associated in making the circuitous route" when it determined BDFM's harm was not unique. (Appellant's brief, at 19.) BDFM asserts the trial court erred by considering only "the distance involved" and not "the particular obstacles that those wishing to access BDFM's property must incur in addition to the distance." (Appellant's brief, at 19.)

{¶35} The only "obstacles" BDFM cites are "several turns" and a vague reference to "various traffic prohibitions." (Appellant's brief, at 19-20) "Circuitry" of travel, by definition, will necessarily be roundabout and indirect. Nothing in the record, however, suggests drivers must do anything more than obey routine road regulations, such as speed limits and stop signs, in the course of the new routing. Cf. *Cincinnati Entertainment Assoc., Ltd. v. Hamilton Cty. Bd. of Commrs.*, 141 Ohio App.3d 803, 821 (1st Dist.2001) (noting the necessary circuitry where, although a new bridge and plaza would eventually be built to connect the coliseum to the new stadium, it would be built at a lower grade, requiring the negotiation of an "abrupt fifteen-foot elevation change" and leaving the connection between the coliseum and the new stadium disjointed). BDFM's argument that the circuitous route to its property is a compensable interference because it "requires several additional turns" is not well-taken. (Appellant's brief, at 20.)

{¶36} Accordingly, the trial court did not err in relying on the noted case law to determine BDFM failed to demonstrate a unique injury entitling the company to compensation.

C. *Safety and Efficiency*

{¶37} BDFM also contends ODOT did not install the median for safety and efficiency, but instead was "simply folding to political pressure." (Appellant's brief, at 16.) BDFM asserts "Senator Grendell's complaints were ODOT's main concerns with regard to

this project. Safety is simply a contrived excuse and one that was not proven up at trial." (Appellant's brief, at 21.)

{¶38} Invoking *Merritt*'s holding that circuity of travel does not result in legal taking where the public interest requires it to make travel safer and more efficient, BDFM argues "ODOT bore the burden to establish" the median is "necessary for the safety and efficiency of travel." (Appellant's brief, at 20.) The "regulation of traffic," however, is "an exercise of the police power," generally subject to a presumption of validity. *Marich v. Bob Bennett Constr. Co.*, 116 Ohio St.3d 553, 2008-Ohio-92, ¶ 14 (noting "[i]t is now clear that the regulation of traffic is an exercise of police power that relates to public health and safety as well as the general welfare of the public"); *Village of Hudson v. Albrecht, Inc.*, 9 Ohio St.3d 69, 71 (1984) (determining an exercise of police power enjoys a "strong presumption exists in favor of the validity").

{¶39} Accordingly, ODOT is entitled to a rebuttable presumption that the median's installation, as an exercise of the state's police power, bears a "real and substantial relation[ship] to the public health, safety, morals or general welfare of the public" and was not "unreasonable or arbitrary"; the "landowner has the burden of showing any capricious or unreasonable activity on the part of the state." *Richley* at 66, fn*, 67 (noting "[t]he ordinary rule is that any change in traffic flow occasioned by placing medians in the road results from the exercise of the police power of the state"); *Benjamin v. Columbus*, 167 Ohio St. 103 (1957); *see also Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006-Ohio-954 (holding that to rebut the presumption of validity, the plaintiff must prove the restriction is unreasonable and arbitrary or has no real or substantial relation to the public health, safety, morals, or general welfare).

{¶40} Although BDFM contends interference with its right of access was unreasonable because it was the result of undue political influence, not a "valid safety concern," the trial court considered and rejected BDFM's argument. (Appellant's brief, at 20.) Acknowledging the median likely would not have been installed had Senator Grendell not intervened, the court found "the testimony of Dirk Gross and the Exhibits establish that the median actually acts to eliminate congestion on Vine Street and promote traffic safety." (Decision and Judgment Entry, at 4.) As the court explained, "The median prevents vehicles attempting to turn left from either making a dangerous turn in

attempting to negotiate through vehicles in a 'que' or line in the east [b]ound lanes of Vine Street waiting to enter the freeway ramp and vehicles trying to turn onto the property opposite the Plaintiff's property." (Footnote deleted.) (Decision and Judgment Entry, at 4-5.) The court added that "the median was much less expensive to install than the original 'back access road' called for in the original plans." (Decision and Judgment Entry, at 5.) The court resolved that "[i]n spite of the political pressure brought to bear, O.D.O.T had legitimate traffic safety and congestion concerns for ultimately deciding to install the median." (Decision and Judgment Entry, at 5.)

{¶41} The record supports the trial court's decision. Several ODOT representatives explained the median's value as a traffic regulation tool on Vine Street, including Major Projects Coordinator Sarli, who testified the median improves road safety, and Roadway Engineering Administrator Gross, who stated that without the median "cars would potentially turn through gaps in the left turning vehicles, and you would have accidents result from the cars getting hit either turning into or out of those driveways." (Tr. Vol. II, 337-38.) In addition, ODOT Director James Beasley's January 2, 2008 letter to Senator Grendell explained the plan to widen Vine Street and add a designated left turn lane was a "safety and capacity improvement[]," and it singled out the median option as a way to maintain the goal of reducing "conflict movements from those entering and exiting private access points" but in a "less costly" way than the designated left turn lane and rear access road plan. (Appellant's Appendix, exhibit No. 8.)

{¶42} Even assuming ODOT's decision to change its plan to accommodate Pilla's retaining his direct access drive was the result of Senator Grendell's involvement, the record shows ODOT's decision about how the plan should be changed to accomplish this goal was not. As Gross explained, once ODOT began considering ways to retain the south side properties' front "access - - because the rear access wasn't going to serve the property the way that the property needed to be served - - that in order to preserve the safety of this interchange [ODOT] needed to put in a median barrier from here to prevent [left] turns from happening." (Tr. Vol. II, 297.) The record thus indicates the median was the manner ODOT chose to implement its safety concerns for the traveling public and to prevent unnecessary congestion while at the same time allowing the south side properties

to retain direct access to Vine Street. The trial court did not err by concluding the median's installation was a proper exercise of the state's police power.

{¶43} BDFM's first assignment of error is overruled.

IV. Second Assignment of Error - Leading Questions

{¶44} BDFM's second assignment of error contends the trial court "abused its discretion in allowing ODOT to lead its witnesses on direct examination at trial." (Appellant's brief, at 22.)

{¶45} "A leading question is 'one that suggests to the witness the answer desired by the examiner.' " *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶ 149, quoting 1 McCormick, *Evidence*, Section 6 (5th Ed.1999). According to Evid.R. 611(C), "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." The exception stated in the rule, however, "is quite broad and places the limits upon the use of leading questions on direct examination within the sound judicial discretion of the trial court;" a reviewing court generally will not reverse an evidentiary ruling absent an abuse of discretion. *State v. Small*, 10th Dist. No. 00AP-1149 (May 1, 2001), citing *State v. Lewis*, 4 Ohio App.3d 275, 278 (3d Dist.1982); *Andrew v. Power Marketing Direct, Inc.*, 10th Dist. No. 11AP-603, 2012-Ohio-4371, ¶ 73. Moreover, in a bench trial, a trial court is presumed to have "considered only the relevant, material, and competent evidence" in arriving at its judgment unless it affirmatively appears to the contrary. *In re: B.K.*, 10th Dist. No. 12AP-343, 2012-Ohio-6166.

{¶46} BDFM initially claims the trial court abused its discretion by overruling BDFM's objection to a question placed to the office of Roadway Engineer Administrator Gross. ODOT asked, "Now, so the simulation that was developed in connection with your analysis driveways, direct driveways or indirect rear access on the south side of Vine was done relying on or inputting traffic, certified traffic data that was used for the development of the project itself?" (Tr. Vol. II, 284.) At that point in his testimony, Gross had testified in response to numerous technical questions regarding the computer program he used to create several simulations using this traffic data. As a result, the trial court responded to BDFM's ojection, "I'm gonna le[t] him lead. He's already testified to it." (Tr. Vol. II, 284.)

{¶47} If evidence is elicited from the witness on direct examination without using leading questions or on cross-examination, then using leading questions to review the testimony is permissible. *Columbus v. Lipsey*, 10th Dist. No. 90AP-543 (Mar. 12, 1991). Since ODOT's question only summarized and clarified a number of previous responses, the trial court did not abuse its discretion in overruling BDFM's objection. *State v. Penwell*, 12th Dist. No. CA2010-08-019, 2011-Ohio-2100, ¶ 22.

{¶48} BDFM also generally contends ODOT's "leading questions to Gross were specifically designed to try to establish that the median strip was necessary for safety and efficiency when that clearly was not the case." (Appellant's brief, at 23.) Gross's testimony as a whole does not support BDFM's assertion, and BDFM does not offer any specific question it believes reflects its claim, much less a question reflecting its claim to which BDFM objected at trial. *See State v. Glaros*, 170 Ohio St. 471 (1960), paragraph one of the syllabus (noting "[a]n appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.")

{¶49} BDFM also asserts the trial court improperly allowed ODOT to ask the Vine Street interchange improvement project manager Sarli several leading questions. BDFM argues ODOT used a leading question to elicit testimony from Sarli, inquiring:

- "Now, as a result of - - before the plan was changed formally, was it necessary to conduct any traffic impact study or analysis to make the changes that related to switching the right-of-way take from a limited access line, physically eliminating the driveways with a rear access road to a standard highway easement taking across the front which retained direct driveways to the Pilla and Conley properties but which added the median divider on the center of Vine Street?" (Tr. Vol. I, 199.)
- "In your review of [the Conley property appraisal], does it suggest that any element, any amount of the damages to the residue was paid by the reason of the installation of the

median divider that restricted left turns into or out of the Conley property?" (Tr. Vol. I, 125.)

- "Did that communication, that letter from the State Senator cause ODOT to develop any particular plan relative to this interchange at Vine Street and what was to happen with the access points?" (Tr. Vol. I, 190.)

{¶50} Arguably, none of the questions suggested the answer ODOT hoped to elicit. In any event, ODOT provided in each question enough clarifying information to permit the witness to understand the precise question asked. Accordingly, the trial court could reasonably determine these questions were not improperly leading. *See State v. D'Ambrosio,* 67 Ohio St.3d 185, 191 (1993).

{¶51} BDFM's second assignment of error is overruled.

V. Third Assignment of Error - Admitted Evidence

{¶52} BDFM's third assignment of error contends the trial court abused its discretion by admitting evidence that ODOT produced after discovery concluded, by only offering BDFM a continuance to remedy the alleged late submission, and by not imposing a sanction on ODOT for its conduct.

{¶53} A trial court has broad discretion concerning the admission or exclusion of evidence; in the absence of an abuse of discretion materially prejudicing a party, a reviewing court generally will not reverse an evidentiary ruling. *Andrew* at ¶ 73, citing *State v. Issa,* 93 Ohio St.3d 49, 64 (2001). Likewise, a "trial court has broad discretion when imposing discovery sanctions. A reviewing court shall review these rulings only for an abuse of discretion." *Nakoff v. Fairview Gen. Hosp.,* 75 Ohio St.3d 254 (1996), syllabus. BDFM asserts ODOT's production of "500 pages of highly relevant emails" the day before trial prejudiced it, and the trial court abused its discretion in its response to ODOT's conduct. (Appellant's brief, at 25.)

{¶54} BDFM during discovery broadly requested "all documents pertaining to the negotiations, purchase and right-of-way plans relating to BDFM's property, the surrounding area and the Interchange." (Appellant's brief, at 25.) Its initial interrogatories and requests for production of documents included a definition of "document" that did not include e-mail, so that its March 2011 letter sent to ODOT asked

for "[a]ll correspondence regarding the [Vine Street] revisions including correspondence and documents exchanged between other property owners with respect to the construction on Vine Street." (R. 52, exhibit E.) Not until May did BDFM request "all email correspondence between Kathy Sarli, Dirk Gross and Dan Dougherty." (R. 52, exhibit K.) A July 26 letter from BDFM added four more named ODOT employees, as well as "any other representatives of ODOT who would have pertinent information," and, without providing any defined time period or subject matter, asked for "[a]ll Emails between the [named] representatives of ODOT." (R. 52, exhibit M.) When BDFM did not receive the requested documents, it filed a motion to compel.

{¶55} In its memorandum opposing BDFM's motion to compel, ODOT explained that its "IT staff's" search for the first three employees' e-mails alone "identified approximately 1,000 emails and emails with attachments" that all had to be reviewed for privileged communication before submission to BDFM. (R. 52, at 22.) Furthermore, in its July 26 letter, BDFM acknowledged ODOT had informed the company it was vetting the e-mails requested in May between Sarli, Gross, and Dougherty for attorney-client privilege.

{¶56} The record indicates BDFM's requests for e-mails were sweeping. In light of the indefinite and open-ended nature of the requests and the resulting difficulty in responding to them, the trial court did not act "unreasonably, arbitrarily, or unconscionably" in admitting the subject e-mails produced after the close of the discovery period in light the continuance the trial court offered BDFM. Nor does BDFM suggest how a continuance would not have cured any surprise it encountered in litigating the e-mail messages. On this record, we cannot say the trial court abused its discretion in not sanctioning ODOT for the delay.

{¶57} Moreover, the only specific documents BDFM cites in connection with its assignment of error are the ODOT negotiator's notes regarding the BDFM purchase, introduced during ODOT Realty Specialist Cheryl Everett's testimony. The parties disagree whether ODOT produced the notes during discovery. Everett testified she did not recall whether the negotiator's notes indicated BDFM asked about access changes to its property as a result of the taking. The notes did not mention such a question, and Everett stated the negotiator would note such a question if it were raised in negotiations. In the

end, the trial court's decision and judgment entry reveal the court did not rely on the subject notes at all. Any error, therefore, did not adversely impact BDFM.

{¶58} BDFM's third assignment of error is overruled.

VI. Fourth Assignment of Error - Gross's Opinion Testimony

{¶59} BDFM's fourth assignment of error asserts the "trial court abused its discretion in permitting ODOT to present 'expert' testimony of [Roadway Engineering Administrator] Dirk Gross where it never furnished an expert report." (Appellant's brief, at 26.) BDFM further asserts the court improperly allowed Gross to testify regarding "the safety and efficiency of the median strip" without requiring him "to provide or justify the specific data on which he relied." (Appellant's brief, at 26, 28.) ODOT responds that it presented Gross as a lay witness to testify about his personal experiences and "to explain why he recommended a change in the highway project plans to include a median divider." (Appellee's brief, at 29.) Consequently, ODOT asserts it could not provide an "expert report" because one does not exist.

{¶60} BDFM's argument essentially contends Gross testified to matters beyond the knowledge of lay persons, matters that required expert testimony and an expert report. Evid.R. 701 limits the testimony of lay witnesses to statements "in the form of opinions or inferences" which are "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." In certain circumstances concerning matters "of a technical nature," a court may allow "lay opinion testimony on a subject outside the realm of common knowledge" where the testimony still falls "within the ambit of the rule's requirement that a lay witness's opinion be rationally based * * * upon a layperson's personal knowledge and experience." *State v. McKee*, 91 Ohio St.3d 292, 297 (2001). As with documentary evidence, a trial court's decision regarding the admission or exclusion of witness testimony will not be reversed absent an abuse of discretion. *State v. Bond*, 10th Dist. No. 11AP-403, 2011-Ohio-6828, ¶ 1.

{¶61} The record indicates ODOT presented Gross as a witness to recount his first-hand experience with the Vine Street and State Route 2 interchange improvement project. Gross's testimony established that his job was "to determine the most effective way to design the projects with cost savings, effectiveness, better effectiveness, designs."

(Tr. Vol. II, 311.) In the course of his testimony, Gross described his role in creating the original Vine Street modification plan, his perspective on the plan's evolution, his interactions with Project Coordinator Sarli regarding alternatives to the original dedicated left turn lane plan, and his reasons for ultimately recommending ODOT instead install the median. In response to BDFM's questions, he also explained why he did not think less-intrusive methods of preventing left turns, such as painted lines or a sign prohibiting left turns, would have been sufficiently effective.

{¶62} Gross thus testified to those matters that are "rationally based on the perception of the witness," and Evid.R. 701 allows it. The trial court did not abuse its discretion in permitting Gross's testimony, and BDFM's fourth assignment of error is overruled.

VII. Fifth Assignment of Error - Rescission

{¶63} BDFM's fifth assignment of error contends the "trial court abused its discretion in failing to grant a declaratory judgment that BDFM is entitled to void the contract settling the appropriation of its property" based on either mutual or unilateral mistake. (Appellant's brief, at 29.) BDFM claims it, or both BDFM and ODOT, mistakenly assumed and materially relied on representations that ODOT would follow the plans ODOT provided, which did not include a median strip, or ODOT would notify BDFM of any changes. In response, ODOT asserts BDFM's assignment of error must fail because BDFM now argues for rescission based on either a mutual or a unilateral mistake of fact, while at trial it asked for rescission based solely on a fraudulent misrepresentation. ODOT further asserts BDFM's argument fails on its merits since it presented no evidence of material mistake at the time of negotiations. Even if we assume BDFM properly raised both unilateral and mutual mistake arguments at trial, BDFM did not establish it is entitled to rescission under either theory of recovery.

{¶64} "Rescission is an equitable remedy that invalidates an agreement." *Areawide Home Buyers, Inc. v. Manser,* 7th Dist. No. 04 MA 154, 2005-Ohio-1340, ¶ 24. The primary purpose of rescission is to restore the status quo and return the parties to their respective positions had the contract not been formed. *Rosepark Properties, Ltd. v. Buess,* 167 Ohio App.3d 366, 2006-Ohio-3109, ¶ 51 (10th Dist.), citing to *Mid-Am. Acceptance Co. v. Lightle,* 63 Ohio App.3d 590 (10th Dist.1989). A trial court's decision to

grant or deny a party's request for rescission is reviewed for an abuse of discretion. *Randolph v. Campbell*, 3d Dist. No. 3-87-10 (Mar. 29, 1989). *See also Mid-Am. Fire & Cas. Co. v. Heasley*, 113 Ohio St.3d 133, 2007-Ohio-1248, ¶ 14.

{¶65} In certain "exceptional situations," parties to a contract can avoid contract liabilities through rescission on the ground of mistake. *Areawide Home Buyers* at ¶ 24; *Weber v. Budzar Industries, Inc.*, 11th Dist. No. 2004-L-098, 2005-Ohio-5278, ¶ 33. In contract law, a "mistake" is defined as a belief that is not in accord with the facts. 1 Restatement of the Law 2d, Contracts, Section 151, at 383 (1981). To warrant rescission, the erroneous belief must relate to the facts "as they exist at the time of the making of the contract" and must concern a mistake that is "material to the subject matter of the contract." *Weber* at ¶ 33, citing Restatement at Section 151, Comment a; *Reilley v. Richards*, 69 Ohio St.3d 352, 353 (1994). The complaining party has the burden to establish mistake by clear and convincing evidence. *Home S. & L. Co. of Youngstown, Ohio v. Norfolk S. Ry. Co.*, 8th Dist. No. 96878, 2012-Ohio-1634, ¶ 18 (involving mutual mistake); G*artrell v. Gartrell*, 181 Ohio App.3d 311, 316, 2009-Ohio-1042 (5th Dist.) (involving unilateral mistake). "Clear and convincing evidence is that measure or degree of proof * * * which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469 (1954), paragraph three of the syllabus.

{¶66} A mutual mistake is a mistake of both parties at the time the contract was made concerning a basic assumption on which the contract was made that has a material effect on the agreed exchange of performances. *Reilley* at 353, citing 1 Restatement at Section 152(1). A unilateral mistake is a mistake of only one party at the time the contract was made as to a basic assumption on which the contract was made, has a material effect on the agreed exchange of performances and is adverse to the party seeking relief. *Weber* at ¶ 37, citing *Aviation Sales, Inc. v. Select Mobile Homes*, 48 Ohio App.3d 90, 93-94 (2d Dist.1988). Unilateral mistake involves the other party's having reason to know of the mistake or being at fault in causing the mistake; the effect of the unilateral mistake must be such that enforcing the contract would be unconscionable. *Weber* at ¶ 37. Moreover, relief for unilateral mistake will not be granted where the party seeking relief bore the risk of mistake or where the mistake is the result of that party's negligence. *Id.* at ¶ 38, citing

Convenient Food Mart, Inc. v. Con. Inc., 11th Dist. No. 95-L-093 (Sept. 30, 1996). *See also Marshall v. Beach*, 143 Ohio App.3d 432, 437 (11th Dist.2001).

A. *Access*

{¶67} Arguing mutual mistake, BDFM claims "both BDFM and ODOT's representatives were mistaken that BDFM's access rights would remain the same after the Vine Street project." (Appellant's brief, at 30.) Alternatively arguing unilateral mistake, BDFM claims ODOT led BDFM "to believe that its access would remain unchanged." (Appellant's brief, at 32.) BDFM asserts this assumption that access would not change "was the basis of the settlement and had a material effect on the transaction that ultimately took place." (Appellant's brief, at 30.)

{¶68} In a holding directed at BDFM's mutual mistake argument, but applicable to the company's unilateral mistake argument as well, the trial court concluded no mistake necessitated rescission because the alleged mistake (1) did not relate to the facts as they existed at the time the parties made the contract, and (2) did not concern a material fact.

1. Facts at the Time of Contracting

{¶69} The court initially found the evidence did not demonstrate either party was mistaken regarding the facts as they existed at the time the contract was made and, in fact, "O.D.O.T had no plans to install a median when it negotiated with Plaintiff. The plans to install a median only occurred some 4-5 months after an agreement had been reached with the Plaintiff." (Emphasis sic.) (Decision and Judgment Entry, at 11.) Thus, when the parties executed their contract in July 2007, ODOT's plan was still to create a dedicated left turn lane down Vine Street's center and, insofar as the parties believed the highway project would not alter BDFM's access, they were not mistaken in their belief at that time.

{¶70} The evidence supports the court's conclusion that ODOT did not alter its plans for the subject portion of Vine Street until the end of 2007 or the beginning of 2008. ODOT Realty Specialist Everett testified ODOT did not change BDFM's access based on the plans in place during the time it contracted with BDFM; rather, the plans changed after ODOT concluded its easement agreement with BDFM. In addition, an ODOT representative's "Negotiator Notes" extensively describe ODOT's communications with

the Conleys, owners of Steven's Auto Glaze and Security, Inc., in the period from July 2, 2007 to August 1, 2008 and document in detail the considerations and decisions that led ODOT officials to change the initial plan well after BDFM's easement agreement was executed. (Appellant's Appendix, exhibit No. 9.) The negotiator's notes, in turn, are consistent with project manager Sarli's testimony that the plan to create a dedicated left turn lane and remove the south side properties' direct access to Vine Street was still in place as of a December 7, 2007 meeting with Pilla.

{¶71} Nor may a mistake claim be predicated, in general, on a representation concerning a future event. *Wells Fargo Bank, N.A. v. Sessley,* 188 Ohio App.3d 213, 2010-Ohio-2902, ¶ 41 (10th Dist.). Even if ODOT's representatives told BDFM its access would not change, this mistake did not relate to any fact in existence as of the contracting date, but instead only to a "future contingency." *Snyder v. Monroe Twp. Trustees*, 110 Ohio App.3d 443, 452 (2d Dist.1996). A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a "mistake" in the context of mutual or unilateral mistake. *Snyder* at 453, citing *Lenawee Cty. Bd. of Health v. Messerly*, 417 Mich. 17, 24 (1982) (noting that to constitute a contractual mistake, a "belief which is found to be in error may not be, in substance, a prediction as to a future occurrence or non-occurrence"); Cf. *Frazier v. Kent,* 11th Dist. No. 2004-P-0077, 2005-Ohio-5413, ¶ 14 (holding, where a proposed contract is entered into with a present intention not to perform, a misrepresentation of an existing fact exists even where performance is to occur in the future).

2. Material Fact

{¶72} The trial court also concluded the alleged mistake did not concern a material fact. The court noted, pursuant to *Reilley*, that a material mistake inquiry focuses "upon the 'intent' of the parties in entering into the contract," which, "[i]n the case at bar, * * * was to reach an agreement for compensation for property actually being legally 'taken' by O.D.O.T." (R. 107, Entry Denying Motion for Reconsideration, at 2.) The court reasoned that "[b]ecause the installation of the median does not constitute a 'taking' of the Plaintiff's property, the alleged 'mistake' did not involve a material fact and did not frustrate the intent of the parties in making the agreement." (Emphasis sic.) (R. 107, at 2.) As the court further explained, "[t]he installation of the median is a right O.D.O.T. has the

authority to decide at any time without compensating any property owners" pursuant to the state's police power. (R. 107, at 2.)

{¶73} Despite BDFM's allusions to a broader "settlement agreement" that included reference to access or promised "the construction would proceed as indicated," the record supports the trial court's finding the sole purpose of the parties' contracting was to transfer BDFM's land for the highway project and compensate BDFM for the taking. (Appellant's brief, at 32.) The offer letter sent to BDFM on February 16, 2007 explained the department was contacting BDFM "to acquire certain property rights," and its "objective" was "to compensate every affected owner in a fair and equitable manner." (Appellant's Appendix, exhibit No. 5, at 1-2.) The subsequent easement and temporary right-of-way, entered into in July 2007, were the only expression of the parties' agreement and pertained exclusively to the compensable taking.

{¶74} The disconnect between BDFM's alleged mistake and the actual agreement is illustrated in BDFM's reliance on the pre-contract appraisal as evidence that "ODOT's representatives ultimately settled the take on the assumption that BDFM's access rights would be maintained." (Appellant's brief, at 30.) The appraiser concluded, prior to the change in plans, that "[e]xposure to the site is considered to be good from both an easterly and westerly direction from Vine Street. Site access is not considered to be limited." (Appellant's Appendix, exhibit No. 7.) BDFM apparently interpreted the appraisal to expressly represent that "access would not change after the take." (Appellant's brief, at 32.)

{¶75} The "purpose of th[e] appraisal," however, was to "estimate the current Market Value of the subject property subsequent to proposed 'takings' of portions of the property for highway improvement purposes." (Appellant's Appendix, exhibit No. 7.) Although the finding that access would not change was incorrect, the mistake did not impact the ultimate question the appraiser was to answer concerning the compensation ODOT owed BDFM as a result of the taking. Indeed, when the court asked ODOT Realty Specialist Everett whether, had the median been part of the plan at the time of the appraisal, the appraiser "would * * * have factored [the median] in coming to a fair market value for a property," Everett replied unequivocally that the median would not have been taken into consideration. (Tr. Vol. I, 108.)

{¶76} Despite BDFM's assertions that it would have either negotiated differently or refused to enter the easement agreement completely if it had known of the impending median installation and resulting change to its access, in reality the circumstances limited BDFM's options. The parties' negotiations concerned the legal taking apart from the median, and ODOT could install the median without BDFM's permission under the state's police power without compensating BDFM. As a result, BDFM would not have gained any negotiating leverage had it known of the median.

{¶77} Similarly, had BDFM refused to transfer its land to ODOT at all, as explained in the initial offer letter ODOT sent in February 2007, its refusal of ODOT's offer would trigger appropriation proceedings. ODOT then would have appropriated the land needed for the highway improvement project without BDFM's cooperation, and the parties would have entered into appropriation proceedings where a jury would determine BDFM's "just compensation." (R. 69.) *Richley*, however, prohibits a landowner from introducing evidence of damages to the residue from a non-taking installation of a median divider made in the exercise of police power where the landowner can still reach the subject property through circuity of travel. Thus, BDFM's reason for not accepting ODOT's offer and for requesting rescission and appropriation proceedings on appeal could not be introduced as a potential factor in a jury's compensation determination.

B. *Notification*

{¶78} In furthering its mutual mistake argument, BDFM claims both BDFM and ODOT's representatives were mistaken in believing BDFM would be notified of any changes; alternatively, it asserts ODOT led BDFM to believe ODOT would inform it of any changes in its plans concerning Vine Street. Such circumstances, BDFM asserts, constitute a material mistake since BDFM would have sought additional compensation for the taking had it known ODOT was going to install a median.

{¶79} Although BDFM claims "[t]here is a clause in the contract requiring ODOT to inform BDFM of any changes in the plans," (Appellant's brief, at 29.) the only documents in the record referencing ODOT's responsibilities when conducting a legal taking are the "O.D.O.T. manuals, guides, and pamphlets given to property owners in cases involving a 'taking' of property"; they "require O.D.O.T. to offer fair and just compensation and require O.D.O.T. to notify owners in writing of any plan changes."

(Decision and Judgment Entry, at 2.) In particular, the "Plan Letter Attachment," included with the February 2007 offer letter, stated "[c]hanges to the plan required by engineering revisions or as agreed too [sic] in negotiations will be documented in writing by the Department of Transportation or its representatives." (Appellant's Appendix, exhibit No. 5: Plan Letter Attachment, at 1.)

{¶80} The trial court found "O.D.O.T. did not notify [BDFM] in writing, or even orally, of the change in plans as required by its policy and manual," and even observed "[i]t would have been much better for ODOT to have notified [BDFM] of the change in plans." (Decision and Judgment Entry, at 4, 11.) The court ultimately concluded, however, "that failure does not change the outcome of the case. The simple fact is that O.D.O.T's actions do not constitute a legal 'taking' that is compensable under Ohio law." (Decision and Judgment Entry, at 11.)

{¶81} Because ODOT's change in plans occurred well after BDFM and ODOT entered into their easement agreement, any failure to notify also occurred well after BDFM and ODOT entered into their easement agreement. BDFM could not prevent ODOT from installing a median on a public highway as an exercise of its police power; nor could it obtain additional compensation for any loss of access attributable to the median. As a result, any mistaken belief that BDFM would be notified of the decision to install a median down the center of Vine Street was not a mistake regarding a material fact, as it did not have a material effect upon the parties' easement agreement or exchange of performances.

{¶82} BDFM's fifth assignment of error is overruled.

VIII. Disposition

{¶83} Having overruled BDFM's five assignments of error, we affirm the decision of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and DORIAN, JJ., concur.