[Cite as *Delaware Cty. Bd. of Commrs. v. Home Rd. Holdings, L.L.C.*, 2010-Ohio-5298.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DELAWARE COUNTY BOARD OF COMMISSIONERS

Plaintiff-Appellee

-vs-

HOME ROAD HOLDINGS, LLC, ET AL.

Defendant-Appellant

JUDGES:
Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. John W. Wise, J.

Case No. 10CAE010007

O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Delaware County Court of Common Pleas, Case No. 08CVH030421
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	October 28, 2010

APPEARANCES:

For Plaintiff-Appellee

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Hoffman, J.

{¶1} Defendant-appellant Home Road Holdings, LLC appeals the January 5, 2010 Judgment Entry entered by the Delaware County Court of Common Pleas, which denied Appellant's motion for judgment notwithstanding the verdict, or, alternatively, for new trial. Plaintiff-appellee is the Delaware County Board of Commissioners ("the County").

STATEMENT OF THE CASE AND FACTS

{¶2} On March 24, 2008, the County filed a Complaint in Appropriation, seeking a partial taking of land owned by Appellant, in order to construct a railroad overpass public improvement project ("the Overpass Project"). The matter proceeded to jury trial on April 2, 2009.

{¶3} The following evidence was adduced at trial. Appellant owns real property on Home Road in Liberty Township, Delaware County, Ohio. Home Road, which is a major east-west traffic artery across southern Delaware County, connects U.S. Route 23 with the southwestern portion of the county. The subject property is located on the north side of Home Road, immediately east of a CSX railroad line, and is bound on the east by Liberty Road North and a parcel, situated at the northwest corner of the intersection of Home Road and Liberty Road North, owned by another individual. Liberty Road North dead-ends into Home Road, creating a "T" intersection. Liberty Road South commences south of Home Road, less than one mile east of the "T" intersection. The subject property had, at the time of trial, two established access points to Home Road, but no established access points to Liberty Road North.

{¶4} After construction of the Overpass Project, the direct access points to Home Road will be eliminated in order to accommodate the newly constructed Home Road overpass over the CSX railroad. Appellant will still have the same two access points at the front of its property, but the access points will connect to a newly constructed cul-de-sac street, which will run parallel to existing Home Road and connect to Liberty Road North. Appellant argued, after the construction, the change in access will result in a three to five mile trip to access the subject property from Home Road. The County's witnesses testified this distance would be considerably shorter as the result of a separate, but related, companion project to the Overpass Project. The Overpass Project is only one component of the overall roadway system improvement in the area. A companion project will realign Liberty Roads North and South, eliminating the "T" intersection ("the Realignment Project"). Although the Overpass Project and the Realignment Project are separately funded and managed, the two projects are interrelated companion projects. Ryan Mraz, a design engineer for the Delaware County Engineer's Office, discussed the close connection between the two projects, explaining the end result would be a reduction in congestion. The two projects were designed in conjunction by the same consultant.

{¶5} Mark Trucco, the owner of Appellant, testified the Overpass Project would decrease the value of the subject property, explaining in the after the subject property would not have a connection to Home Road. Counsel for Appellant questioned Trucco about the Realignment Project. Trucco stated the subject property would have a more proximate access to Home Road following the completion of the Realignment Project. Trucco acknowledged the circuitry of travel involved in reaching the subject property

after the completion of the Overpass Project would be an inconvenience shared by the general public. Trucco noted Appellant had no development plans for the subject property, and had not made an application to rezone the subject property. Trucco conceded public sanitary sewer service was not available to the subject property and he did not know if it ever would be available.

{¶6} Linda Menery, EMH&T land planner and landscape architect, testified the Overpass Project would isolate the subject property to such a degree a five mile trip would be necessary to access the subject property from Home Road. Menery acknowledged the distance was circuitous and less convenient, but access was, nonetheless, maintained. Menery was unaware of any development plans or approvals in place for the subject property, noting any commercial development would require rezoning. She acknowledged the development plans introduced at trial were prepared only months before the date of trial. Menery was unaware of any actual interest in developing the subject property, and no traffic or access studies had been conducted.

{¶7} Tom Horner, a commercial real estate appraiser, testified the damage to the residue would be $1 million. Horner testified the subject property's highest and best use in the before was a commercial use. After completion of the Overpass Project, the highest and best use would be a destination use, or a secondary industrial use. On cross-examination, Horner admitted his appraisal was conducted in October, 2007, and market conditions had since deteriorated.

{¶8} Richard Vannatta, another real estate appraiser, testified similarly to Horner, stating the Overpass Project would cause substantial damage to the residue. According to Vannatta, the highest and best use of the property before the take was a

mixed use development, commercial/industrial or commercial. In the after, the subject property's best and highest use would be a less intensive residential use. Vannatta's damage figure was three times that of the damage figure provided by Horner. Vannatta recognized the current market was not favorable, but assumed conditions were good for purposes of his appraisal.

{¶9} Ryan Mraz, the Delaware County design engineer responsible for the Overpass Project, testified on behalf of the County. Mraz acknowledged the Overpass Project would have a substantial effect on the subject property, but the effect he described was physical as the Overpass Project would change the appearance and layout of the area. Mraz disclaimed having the expertise to make a determination of value. He did not state or admit to a value of the subject property in either the before or after condition.

{¶10} G. Franklin Hinkle, the County's expert appraiser, testified the change in access to the subject property did not damage the residue. In response to Appellant's hypothetical, Hinkle admitted, if the subject property's best and highest use in the before was commercial, the Overpass Project would, indeed, have an impact. In his report, Hinkle described the general area as commercial, but never described the subject property as commercial, desirable for commercial use, or amenable to commercial development in either the before or after.

{¶11} The County filed its first motion in limine on January 16, 2009, seeking to exclude the introduction of evidence of the Realignment Project due to its speculative status. Prior to trial, after learning the Realignment Project was proceeding, the County withdrew its first motion in limine. The County filed a second motion in limine on March

16, 2009, seeking to exclude evidence of damages on the grounds of changes in access, redirection of traffic, circuity of travel, and change in grade. The trial court overruled the County's motion, finding it was impossible to separate the factors the County sought to exclude, with the exception of the loss of traffic flow or volume, from the jury's consideration of value.

{¶12} After hearing all the evidence and deliberating, the jury rendered a verdict in favor of Appellant. The jury awarded $91,875 as compensation for the property taken; $775 as compensation for the temporary easement taken; and $0 as compensation for damage to the residue. The trail court entered final judgment on the verdict on April 23, 2009. On May 6, 2009, Appellant filed a motion JNOV, or alternatively, for a new trial. Via Judgment Entry filed January 5, 2010, the trial court denied Appellant's motion.

{¶13} It is from this judgment entry, Appellant appeals, raising the following assignments of error:

{¶14} "I. THE FINAL JUDGMENT OF THE TRIAL COURT MUST BE REVERSED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION AND COMMITTED PLAIN ERROR BY ADMITTING EVIDENCE OF THE UNRELATED PROPOSED LIBERTY ROAD REALIGNMENT PROJECT.

{¶15} "II. THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING DEFENDANT-APPELLANT'S MOTION FOR NEW TRIAL.

{¶16} "III. THE TRIAL COURT ERRED IN DENYING HRH'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT."

I

{¶17} In its first assignment of error, Appellant submits the trial court erred and abused its discretion in admitting evidence of the unrelated proposed Realignment Project. Appellant asserts: 1) the jury was improperly permitted to consider evidence of the after condition which did not exist at the time of the take; 2) Appellant was deprived of its right to substantive and procedural due process; and 3) the County was improperly permitted to benefit from evidence of the consequential effects of the Realignment Project, which did not constitute a taking.

{¶18} During its case-in-chief, counsel for Appellant asked Mark Trucco the first question about the Realignment Project. Counsel for the County properly asked follow-up questions to Trucco during cross-examination. Under the invited error doctrine, "a party will not be permitted to take advantage of an error which he himself invited or induced." *State v. Bey* (1999), 85 Ohio St.3d 487, 493, 709 N.E.2d 484 (Citation omitted).

{¶19} Assuming, arguendo, such was not invited error, Appellant did not object; therefore, has waived all but plain error in the trial court's admission of such evidence. In civil cases, plain error must be used with utmost caution and applied only "to those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material adverse affect on the character of, and public confidence in, judicial proceedings." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099, 1997-Ohio-401.

{¶20} We find the alleged error in the trial court's admission of evidence of the Realignment Project did not rise to plain error under the circumstances in this case. County submits the realignment project is not an unrelated improvement, and the realignment project has a direct impact on access to and the value of the subject property in the after condition. Upon review of the entire record in this matter, including the transcript of the trial, we find the admission of evidence of the Realignment Project did not seriously affect the basic fairness, integrity, or public reputation of the judicial process. We do not believe a manifest miscarriage of justice resulted from the admission of said evidence.

{¶21} Appellant's first assignment of error is overruled.

II, III

{¶22} Because Appellant's second and third assignments of error require similar analysis, we shall address said assignments together. In the second assignment of error, Appellant maintains the trial court abused its discretion in denying its motion for new trial. In the final assignment of error, Appellant argues the trial court erred in denying its Motion JNOV.

{¶23} Civ. R. 59, which governs motions for new trial, states, in pertinent part:

{¶24} "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶25} " * * *

{¶26} "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

{¶27} "(7) The judgment is contrary to law;"

{¶28} In *Helfrich v. Mellon,* Licking App. No. 06CA69, 2007-Ohio-3358, this Court found when a party files a motion for a new trial because the judgment is not sustained by the sufficiency of the evidence, the trial court must review the evidence presented at trial and weigh the sufficiency of the evidence and the credibility of the witnesses. *Helfrich* at paragraph 86, citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685. In reviewing a trial court's decision regarding a motion for new trial, we apply the abuse of discretion standard. *Sharp v. Norfolk & Western Railway Company,* 72 Ohio St.3d 307, 1995-Ohio-224, 649 N.E .2d 1219. This Court may not disturb a trial court's decision unless we find the decision was unreasonable, unconscionable, or arbitrary. Id. (Citation omitted).

{¶29} Civ. R. 50(B) governs motions for judgment notwithstanding the verdict, and provides:

{¶30} "Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no

verdict was returned the court may direct the entry of judgment or may order a new trial."

{¶31} When ruling on a motion for judgment notwithstanding the verdict, a trial court applies the same test as in reviewing a motion for a directed verdict. *Ronske v. Heil Co.,* Stark App. No.2006-CA-00168, 2007-Ohio-5417. See also, *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 127, 522 N.E.2d 511. "A motion for judgment notwithstanding the verdict is used to determine only one issue i.e., whether the evidence is totally insufficient to support the verdict." *Krauss v. Streamo,* Stark App. No.2001 CA00341, 2002-Ohio-4715, paragraph 14. See, also, *McLeod v. Mt. Sinai Medical Center* (2006), 166 Ohio App.3d 647, 853 N.E.2d 1235, reversed on other grounds, 116 Ohio St.3d 139, 876 N.E.2d 1201. Neither the weight of the evidence nor the credibility of the witnesses is a proper consideration for the court. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334. See, also, Civ.R. 50(B); and *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347, 504 N.E.2d 19. In other words, if there is evidence to support the nonmoving party's side so that reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Osler,* supra.

{¶32} Appellate review of a ruling on a motion for judgment notwithstanding the verdict is de novo. *Midwest Energy Consultants, L.L.C. v. Utility Pipeline, Ltd.,* Stark App. No.2006CA00048, 2006-Ohio-6232; *Ronske v. Heil,* supra.

{¶33} Appellant contends the arguments which support its position the trial court's final judgment should be reversed also support its position the trial court erred in denying its motion for new trial and motion for judgment notwithstanding the verdict.

Having found no merit in Appellant's first assignment of error, we likewise find no merit in its final two assignments of error.

{¶34} Appellant places much emphasis on the fact the Overpass Project will result in a three to five mile diversion to access Home Road. This Court has repeatedly found "[a] diversion of traffic resulting from an improvement in the highway, or the construction of an alternate highway, is not an impairment of a property right for which damages may be awarded; mere circuity of travel does not of itself result in impairment of the right of ingress and egress to and from a property, where the interference is an inconvenience shared in common with the general public." *Proctor v. Davison*, Licking App. No. 09CA122, 2010-Ohio-3273; *Proctor v. Hankinson*, Licking App. No. 08CA0115, 2009-Ohio-4248, both citing *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, 126 N.E.2d 53.

{¶35} Based upon the foregoing, we find the trial court did not abuse its discretion in denying Appellant's motion for new trial. We further find there was sufficient evidence to support the trial court's denial of Appellant's motion JNOV.

{¶36} Appellant's second and third assignments of error are overruled.

By: Hoffman, J.

Gwin, P.J. and

Wise, J. concur

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

DELAWARE COUNTY BOARD OF COMMISSIONERS	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
HOME ROAD HOLDINGS, LLC, ET AL.	:	
Defendant-Appellant	:	Case No. 10CAE010007

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Delaware County Court of Common Pleas is affirmed. Costs to Appellant.

s/ William B. Hoffman
HON. WILLIAM B. HOFFMAN

s/ W. Scott Gwin
HON. W. SCOTT GWIN

s/ John W. Wise
HON. JOHN W. WISE