

IN THE SUPREME COURT OF OHIO

07-1069

LEONARD MAYNARD, )  
 )  
Plaintiff-Appellee, )  
 )  
v. )  
 )  
EATON CORPORATION, )  
 )  
Defendant-Appellant. )

On Appeal from the Marion County  
Court of Appeals, Third Appellate District  
  
Court of Appeals  
Case No. 9-06-33

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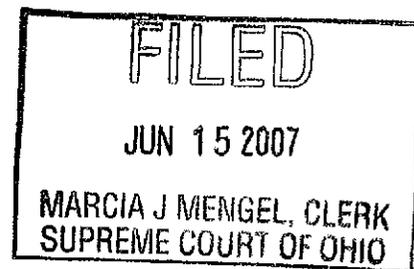
NOTICE OF CERTIFIED CONFLICT

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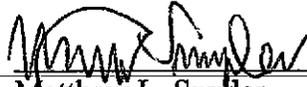


COUNSEL FOR PLAINTIFF-APPELLEE, LEONARD MAYNARD

Appellant Eaton Corporation hereby gives notice that a motion to certify a conflict was granted by the Marion County Court of Appeals, Third Appellate District on June 7, 2007.

Respectfully Submitted,

Harry T. Quick, Counsel of Record

  
Matthew L. Snyder

COUNSEL FOR APPELLANT,  
EATON CORPORATION

**CERTIFICATE OF SERVICE**

A copy of the foregoing Notice of Certified Conflict by Eaton Corporation was sent by ordinary U.S. Mail to counsel for appellee, Laren E. Knoll, Kennedy, Reeve & Knoll, 98 Hamilton Park, Columbus, Ohio 43221 on June 14, 2007.

  
Matthew L. Snyder

COUNSEL FOR APPELLANT,  
EATON CORPORATION

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FILED  
COURT OF APPEALS

JUN 07 2007

MARION COUNTY  
JULIET T. BELL CLERK

**IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO**

**MARION COUNTY**

**LEONARD MAYNARD,**

**PLAINTIFF-APPELLANT,**

**CASE NO. 9-06-33**

**v.**

**EATON CORPORATION,**

**JOURNAL  
ENTRY**

**DEFENDANT-APPELLEE.**

This cause comes on for determination of appellee, Eaton Corporation's, motion for reconsideration and motion to certify a conflict as provided in App.R. 25 and Article IV, Sec. 3(B)(4) of the Ohio Constitution, and appellant's memorandum in opposition to reconsideration.

Upon consideration the court finds that the motion for reconsideration fails to call to the attention of the court an obvious error in its decision or raise an issue not properly considered in the first instance. *Garfield Hts. City School Dist. v. State Bd. of Edn.* (1992), 85 Ohio App.3d 117; *Columbus v. Hodge* (1987), 37 Ohio App.3d 68.

At oral argument, appellee requested leave and was granted the opportunity to file a supplemental brief. App.R. 18 had no application and there was no

request for, or objection to the lack of a “reply supplemental brief.” Moreover, we note that appellant’s supplemental brief was late and not even reviewed in determination of the appeal. Appellant’s supplemental brief was filed April 23, 2007. This court’s opinion and final judgment were mailed April 20, 2007, and received and filed by the Clerk of Courts on April 23, 2007. Appellee’s disagreement with the rationale does not raise “obvious error” in the opinion.

Upon consideration of appellee’s motion to certify, the court finds that the judgment in the instant case is in conflict with judgments rendered by the Eighth Appellate District in *Hausser & Taylor, LLP v. Accelerated Systems Integration, Inc.*, Cuyahoga App. No. 86547, 2006-Ohio-1582, and the Tenth Appellate District in *City of Hilliard v. First Industrial, L.P.* (2005), 165 Ohio App.3d 335, 2005-Ohio-6469. Accordingly, the motion to certify a conflict is well taken and the following issue is certified pursuant to App.R. 25:

Does the amendment to R.C. 1343.03, effective June 2, 2004, adjust the 10% rate of post-judgment interest calculated on a final judgment that was entered prior to the date of the amendment, but not paid in full and pending on appeal?

It is therefore **ORDERED** that appellee’s motion for reconsideration be, and hereby is, denied.

It is further **ORDERED** that appellee's motion to certify a conflict be, and hereby is, granted on the certified issue set forth hereinabove.

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Vernon Z. Boston

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John B. Dellamondini  
JUDGES

DATED: June 7, 2007

/jlr

LEXSEE 165 OHIO APP. 3D 335

**City of Hilliard, Ohio, Plaintiff-Appellant, v. First Industrial, L.P. et al., Defendants-Appellees.**

No. 05AP-131

**COURT OF APPEALS OF OHIO, TENTH APPELLATE DISTRICT, FRANKLIN COUNTY**

*165 Ohio App. 3d 335; 2005 Ohio 6469; 846 N.E.2d 559; 2005 Ohio App. LEXIS 5809*

December 6, 2005, Rendered

**PRIOR HISTORY:** APPEAL from the Franklin County Court of Common Pleas. (C.P.C. No. 02CVH-03-3146). *City of Hilliard v. First Indus., L.P.*, 158 Ohio App. 3d 792, 2004 Ohio 5836, 822 N.E.2d 441, 2004 Ohio App. LEXIS 5295 (Ohio Ct. App., Franklin County, 2004)

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff city sued defendant landowner in the Franklin County Court of Common Pleas (Ohio) to appropriate the owner's realty, and the trial court's award for damage to the residue of the owner's property was reversed. On remand, an award for damage to the residue was entered, and the city appealed.

**OVERVIEW:** The city said the trial court did not offset damage to the owner's residue by special benefits. The appellate court held *Ohio Rev. Code Ann. § 163.14* did not require including special benefits in finding the award for residue damage. The city's evidence on the cost of restoring the residue to pre-appropriation value was not found persuasive. Its evidence on the residue's best use was considered, but an expert opinion that the use was not feasible could be adopted. Any error in restricting cross-examination of another expert was harmless, as it was not the basis of the court's opinion. Circuity of travel within the owner's property was properly considered, and the new location of an ingress/egress point was not. The city did not object to testimony supporting the owner's estimate of the cost to return the residue to pre-appropriation value, and the trial court did not plainly err in considering it. No error was shown when the trial court did not let the city examine certain witnesses as the city did not proffer their testimony, under *Ohio R. Evid. 103(A)(2)*. Interest on the owner's award

had to be found under pre- and post-amendment versions of *Ohio Rev. Code Ann. § 1343.03*.

**OUTCOME:** The trial court's judgment was modified by changing the owner's interest award, and, as modified, the judgment was affirmed.

**LexisNexis(R) Headnotes*****Real Property Law > Eminent Domain Proceedings > Valuation***

[HN1] In an appropriation case, a landowner is entitled to compensation for the property actually taken, as well as damages for injury to the property that remains after the taking, the residue. *Ohio Rev. Code Ann. § 163.14*. Compensation and damages are two separate and distinct remedies. Compensation means the sum of money that will compensate the owner for the land actually taken, which is reflected in the fair market value of the land taken without deduction for benefits that may accrue to the remaining lands of the owner. Ohio Const. art. I, § 19. By contrast, damage means an allowance made for any injury that may result to the remaining lands by reason of the construction of the proposed improvement, after making all permissible allowances for special benefits, and the like, resulting thereto.

***Real Property Law > Eminent Domain Proceedings > Valuation***

[HN2] Pursuant to *Ohio Rev. Code Ann. § 163.14*, the jury assesses the damages to residue, if any, without deductions for general benefits to owner's property. General benefits are those that accrue to the community or the vicinity at large as a result of the appropriation. Through the negative implication of *Ohio Rev. Code*

165 Ohio App. 3d 335, \*; 2005 Ohio 6469, \*\*;  
846 N.E.2d 559, \*\*\*; 2005 Ohio App. LEXIS 5809

*Ann. § 163.14* and growing case law, the law suggests a fact-finder may consider elements that have a positive impact on the residue's post-appropriation value if they are considered "special benefits." Special benefits are those that accrue directly and solely to the landowner's property.

***Civil Procedure > Eminent Domain Proceedings > Experts***

***Real Property Law > Eminent Domain Proceedings > Valuation***

[HN3] In order to aid a jury's assessment in an appropriations case, expert witnesses may state their opinions regarding the damages to the residue. Such opinions must be expressed in terms of the difference between the pre- and post-appropriation fair market values of the residue. In determining both pre- and post-appropriation values, every element should be considered that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider before forming judgment in making the purchase.

***Real Property Law > Eminent Domain Proceedings > Valuation***

[HN4] In condemnation cases, neither *Ohio Rev. Code Ann. § 163.14* nor case law requires a fact-finder to include the accrual of special benefits when assessing the damage to the residue; rather, the law dictates that the fact-finder may consider special benefits when making its determination.

***Real Property Law > Eminent Domain Proceedings > Valuation***

[HN5] In an appropriations case, the amount of cost to cure damages to the residue not appropriated is significant because it may limit the amount of damages assessed if the cost to restore the residue to its pre-appropriation fair market value is less than the difference between the pre- and post-appropriation fair market values. The cost to cure, however, cannot be utilized to increase the damages to the residue, but only to reduce them.

***Real Property Law > Eminent Domain Proceedings > Valuation***

[HN6] In an appropriations case, while the cost to cure limits damages when the cost is less than the amount of actual damages to the residue, the amount of the cost to cure is not limited in itself. The cost to cure figure represents an opinion of how much it will cost to restore the residue to its pre-appropriation value.

***Civil Procedure > Eminent Domain Proceedings > Experts***

***Real Property Law > Eminent Domain Proceedings > Valuation***

[HN7] The rule of valuation in a land appropriation proceeding is not what the property is worth for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted. Accordingly, an expert need not confine his valuation testimony to the use permitted under existing zoning regulations. Rather, the expert may testify as to a highest and best use that is not permitted under existing zoning regulations even without evidence of a probable change in zoning within the foreseeable future.

***Civil Procedure > Eminent Domain Proceedings > Experts***

***Real Property Law > Eminent Domain Proceedings > Valuation***

[HN8] Although an expert, in an appropriations case, may testify to the best use of land irrespective of the current zoning restrictions, the expert may not increase the fair market value over and above that which an informed willing purchaser would presently pay.

***Real Property Law > Eminent Domain Proceedings > Valuation***

[HN9] In an appropriations case, circuitry of travel to and from real property is not compensable, but circuitry of travel created within the owner's property is compensable. Circuitry of travel within one's own property occurs when one entrance or exit is removed and another is not recreated.

***Evidence > Procedural Considerations > Weight & Sufficiency***

[HN10] Judgments supported by some competent, credible evidence going to all essential elements of the case are not against the manifest weight of the evidence. A judgment is not against the manifest weight of the evidence merely because inconsistent evidence was presented. If the evidence is susceptible of more than one construction, a reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.

165 Ohio App. 3d 335, \*; 2005 Ohio 6469, \*\*;  
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**Evidence > Procedural Considerations > Weight & Sufficiency**

**Evidence > Testimony > Credibility**

[HN11] A trier of fact determines the credibility and weight of the testimony.

**Civil Procedure > Appeals > Reviewability > Preservation for Review**

[HN12] Typically, an appellate court need not consider any claim regarding a particular error if that claim was not preserved by objection, ruling, or otherwise in the trial court.

**Civil Procedure > Appeals > Standards of Review > Plain Error**

[HN13] In civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself.

**Civil Procedure > Judicial Officers > Judges > Discretion**

**Evidence > Procedural Considerations > Rulings on Evidence**

[HN14] Evidentiary rulings lie within the broad discretion of a trial court.

**Evidence > Procedural Considerations > Rulings on Evidence**

[HN15] *Ohio R. Evid. 103(A)(2)* addresses an erroneous ruling on the exclusion of evidence and states, in part: error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected, and the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross-examination. If the party claiming error is unable to establish that the trial court's ruling affects a substantial right, the error is deemed harmless; if the party is unable to proffer the substance of the excluded evidence, the error is deemed waived.

**Evidence > Procedural Considerations > Rulings on Evidence**

**Evidence > Testimony > Credibility > One's Own Witnesses > Application > General Overview**

[HN16] Under *Ohio R. Evid. 103(A)(2)*, proffer may not be necessary if excluded evidence is related to cross-examination. Some courts still follow the statutory practice found in *Ohio Rev. Code Ann. § 2317.07* of calling witnesses "as if upon cross-examination," but *Ohio R. Evid. 607* allows a party to call even the opposing party as a witness, and to impeach that witness, on direct examination.

**Civil Procedure > Eminent Domain Proceedings > Interest**

[HN17] In an appropriations case, *Ohio Rev. Code Ann. § 163.17* directs an appropriating agency to pay interest on the appropriated land from the date of taking to the date of actual payment of the award. According to the statute, the interest shall be paid at the rate of interest set forth in *Ohio Rev. Code Ann. § 1343.03*. Prior to June 2, 2004, § 1343.03 awarded an interest rate of 10 percent per annum. Effective June 2, 2004, *Ohio Rev. Code Ann. §§ 1343.03 through 5703.47* award an interest rate equal to the federal short-term rate plus three percent.

**Civil Procedure > Remedies > Judgment Interest Governments > Legislation > Effect & Operation > Prospective Operation**

[HN18] Since *Ohio Rev. Code Ann. § 1343.03(A)* was not expressly made retroactive, it operates prospectively only. *Ohio Rev. Code Ann. § 1.48*.

**COUNSEL:** Isaac, Brant, Ledman & Teetor, and Maribeth Deavers, for appellant.

Goldman & Braunstein, LLP, William Goldman and Michael Braunstein, for appellee First Industrial, L.P.; Crabbe, Brown & James, of counsel.

**JUDGES:** BRYANT, J. BROWN, P.J., and McGRATH, J., concur.

**OPINION BY:** BRYANT

**OPINION:**

[\*340] [\*\*\*563] (REGULAR CALENDAR)

BRYANT, J.

[\*\*P1] Plaintiff-appellant, City of Hilliard, appeals from a judgment of the Franklin County Court of Common Pleas ordering plaintiff to pay defendant-appellee, First Industrial, L.P. ("First Industrial"), \$ 510,000 in compensation for damages caused to the residue of First Industrial's real property as the result of plaintiff's appro-

priation of First Industrial's property. Because the trial court committed no reversible error, we affirm.

[\*\*P2] On January 14, 2002, plaintiff passed an ordinance appropriating 6.92 acres of First Industrial's 62.675-acre property and directed that a petition be filed to assess the compensation owed for the taking. The parties could agree neither on the compensation to be paid for the appropriated real property nor on the value of damages to the residue. As a result, plaintiff filed a petition in the Franklin County Court of Common Pleas to appropriate 6.92 acres of First Industrial's property, to establish just compensation for the appropriated real property, and to determine the value of damages to First Industrial's residue. A jury trial ensued on the sole issue of just compensation for the appropriated property and damages to the 55.552-acre residue. The jury awarded \$ 520,000 as compensation for the appropriated property and \$ 300,000 for damages to the [\*341] residue. On July 24, 2003, the trial court entered judgment on the jury verdict. Plaintiff appealed.

[\*\*P3] In the first appeal, we affirmed the jury's verdict relating to the compensation for the taking but reversed the jury's determination of damages to the residue. *Hilliard v. First Industrial, L.P.*, 158 Ohio App.3d 792, 2004 Ohio 5836, at P15, 822 N.E.2d 441 ("First Industrial I"). We held the evidence did not support the jury's determination of damages to the residue because the jury relied exclusively on evidence of cost to cure without comparing it to the actual diminution in value, calculated by finding the difference between the pre- and post-appropriation fair market values of the residue. *Id.* at P14. Since the jury verdict reflected some resulting diminution in value but used an improper method to calculate damages, we remanded the matter for a damages-only hearing regarding the residue. *Id.*

[\*\*P4] On remand, the trial court heard evidence from First Industrial and plaintiff on the pre-appropriation value of the residue, the post-appropriation value of the residue, and the cost required to restore First Industrial's residue to its pre-appropriation value. The trial court entered judgment for First Industrial, finding: (1) the general benefits created by the construction of a road open to the public, even though some of those general benefits may accrue to First Industrial, may not be used to reduce damage to the residue of First Industrial's property caused by the appropriation for that roadway; (2) the pre-appropriation value of the residue of First Industrial's property is \$ 10,515,000; (3) the post-appropriation value of the residue is \$ 10,005,000; (4) the damage to the residue of the First Industrial [\*\*\*564] site caused by the appropriation is \$ 510,000; (5) the cost of cure to reasonably restore the First Industrial site to its pre-appropriation value and functionality is \$ 300,000 for construction, plus the value of 2.5 acres of land at \$

95,000 per acre for a total of \$ 537,500; and (6) because the cost of cure is greater than the difference between the pre-appropriation and post-appropriation values of the residue, First Industrial is entitled to damages to the residue in the amount of \$ 510,000. (Decision, at 10.)

[\*\*P5] Plaintiff appeals, assigning the following errors:

I. THE TRIAL COURT'S DECISION WAS CONTRARY TO LAW.

II. THE TRIAL COURT'S DECISION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

III. THE TRIAL COURT ERRED IN NOT ALLOWING THE CITY TO CALL GLENN HALBACHER AND DON KITZMILLER AS WITNESSES AT THE TRIAL.

IV. THE TRIAL COURT ERRED IN ITS DETERMINATION OF INTEREST.

[\*\*P6] In the first assignment of error, plaintiff contends the trial court's decision was contrary to law because: (1) the trial court failed to offset the damages to the residue by the special benefits First Industrial enjoyed as a result [\*342] of the improvements plaintiff made; (2) the trial court based the cost to cure damages on a standard of best cost to cure instead of reasonable cost to cure; (3) the trial court imposed an improper restriction on testimony regarding best use of the residue; and (4) the trial court's decision was based on a fair market value of the residue that improperly considered loss of ingress and egress to the property.

[\*\*P7] Initially, plaintiff contends the trial court erred as a matter of law by failing to offset the damages to the residue by the special benefits bestowed to First Industrial as a result of the appropriation. Plaintiff alleges increased frontage, safer and more commercially efficient access to the abutting highway, and additional potential uses for the land remaining after the appropriation accrue solely to First Industrial's residue and thus limit the damage to less than \$ 55,464.

[\*\*P8] [HN1] In an appropriation case, a landowner is entitled to compensation for the property actually taken, as well as damages for injury to the property that remains after the taking, the residue. *R.C. 163.14; Norwood v. Forest Converting Co.* (1984), 16 Ohio App.3d 411, 415, 16 Ohio B. 481, 476 N.E.2d 695. Compensation and damages are two separate and distinct remedies. Compensation means the sum of money that

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will compensate the owner for the land actually taken, which is reflected in the fair market value of the land taken without deduction for benefits that may accrue to the remaining lands of the owner. *Id.*; see *Section 19, Article I, Ohio Constitution* (stating that "where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner"). By contrast, damage "means an allowance made for any injury that may result to the remaining lands by reason of the construction of the proposed improvement, after making all permissible allowances for special benefits, and the like, resulting thereto." *Norwood, at 415*; see *In re Appropriation of Easement for Hwy. Purposes* (1952), 93 Ohio App. 179, 183, 112 N.E.2d 411.

[\*\*P9] [HN2] Pursuant to *R.C. 163.14*, the jury assesses the damages to residue, if any, without deductions for general benefits to owner's property. General [\*\*\*565] benefits are those that accrue to the community or the vicinity at large as a result of the appropriation. *Richley v. Bowling* (1972), 34 Ohio App.2d 200, 202, 299 N.E.2d 288; see *Norwood, at 416*. Through the negative implication of *R.C. 163.14* and growing case law, the law suggests the fact-finder may consider elements that have a positive impact on the residue's post-appropriation value if they are [343] considered "special benefits." *Bowling, at 202*; *Norwood, at 415*. Special benefits are those that accrue directly and solely to the landowner's property. *Little Miami R.R. Co v. Collett* (1856), 6 Ohio St. 182, 186.

[\*\*P10] [HN3] In order to aid the jury's assessment, expert witnesses may state their opinions regarding the damages to the residue. *Wray v. Stvartak* (1997), 121 Ohio App.3d 462, 700 N.E.2d 347. Such opinions must be expressed in terms of the difference between the pre- and post-appropriation fair market values of the residue. *First Industrial I, at P5*, citing *Ry. Co. v. Gardner* (1887), 45 Ohio St. 309, 322, 13 N.E. 69; *Wray, at 476*; *Masheter v. Kebe* (1973), 34 Ohio App.2d 32, 36, 295 N.E.2d 429; *Am. Louisiana Pipe Line Co. v. Kennerk* (1957), 103 Ohio App. 133, 139, 144 N.E.2d 660. In determining both pre- and post-appropriation values, every element should be considered that can fairly enter into the question of value and that an ordinarily prudent businessperson would consider before forming judgment in making the purchase. *Hurst v. Starr* (1992), 79 Ohio App.3d 757, 763, 607 N.E.2d 1155, quoting *In re Appropriation for Hwy. Purposes of Land of Winkelman* (1968), 13 Ohio App.2d 125, 138, 234 N.E.2d 514.

[\*\*P11] Here, at the damages only hearing, both First Industrial and plaintiff introduced expert testimony regarding the pre- and post-appropriation fair market

values of the residue. First Industrial's expert witness, Robert Weiler, testified that the residue's pre-appropriation value was \$ 10,515,000 and the post-appropriation value was \$ 10,005,000. Weiler attributed this ten percent diminution in value solely to the lack of internal access from the new ingress/egress point to First Industrial's building and existing roadways. On cross-examination, Weiler stated that he considered the post-appropriation increase in road frontage, but it did not affect the value of the residue, as reflected in its omission from his written opinion. Weiler also testified on cross-examination that the land freed by the appropriation was less desirable for commercial development than it was before the appropriation.

[\*\*P12] Plaintiff's expert witness, Henry Halas, testified the residue's value increased by \$ 4 million as a result of the improvements accruing from the appropriation. Halas testified the new ingress/egress points improved access immeasurably and solely benefited First Industrial's property. Halas also testified the new access points opened up seven or eight acres of First Industrial's previously encumbered property, to new, more valuable commercial usages, thereby increasing the residue's value. Because the improvements enhanced the value of the residue beyond the amount of damages caused to the residue, Halas concluded the residue sustained no damages.

[344] [\*\*P13] After hearing the testimony of the two witnesses, among others, the trial court awarded First Industrial \$ 510,000 for damages to its residue. The court [\*\*\*566] allowed Halas to testify about special benefits but, in its role as the trier of fact, found Halas' testimony unpersuasive for various stated reasons. (Findings of Fact, at P20.) Instead, the court was heavily influenced by Weiler's valuation, which disregarded the alleged special benefits. [HN4] Neither *R.C. 163.14* nor case law requires the fact-finder to include the accrual of special benefits when assessing the damage to the residue; rather, the law dictates that the fact-finder may consider special benefits when making its determination. See *Norwood; Bowling, supra*. Since the court allowed plaintiff to introduce testimony on special benefits and the court, as the trier of fact, considered but did not include special benefits in its assessment, the court did not error as a matter of law, especially in view of the trial court's not finding Halas' testimony persuasive.

[\*\*P14] Plaintiff next contends the trial court erred as a matter of law by determining the best cost to cure rather than a reasonable cost to cure. [HN5] The amount of cost to cure damages to the residue is significant because it may limit the amount of damages assessed if the cost to restore the residue to its pre-appropriation fair market value is less than the difference between the pre- and post-appropriation fair market values. *Wray, at 478*.

The cost to cure, however, cannot be utilized to increase the damages to the residue, but only to reduce them. *Id.*

[\*\*P15] Here, each party presented differing estimates of how much it would cost to cure the damages to First Industrial's residue caused by the loss of internal access from the ingress/egress access point to the building and internal roadways. First Industrial's expert witnesses, Weiler and Kevin Smith, testified the cost to restore the residue to its pre-appropriation value was \$ 537,500. Weiler testified the cost to cure includes not only the cost of constructing a roadway from the ingress/egress point to the building and internal roadways but also the value of losing land to the newly constructed internal roadway that could otherwise be used for development. (Dec. 16, 2004 Tr. at 25.) Weiler testified First Industrial's property is worth \$ 95,000 an acre.

[\*\*P16] Smith testified construction of a roadway from the new ingress/egress access point to the building and internal roadways would cost \$ 300,000. The proposed roadway would connect to existing internal roadways in a manner similar to its pre-appropriation configuration, thereby occupying 2.5 acres of otherwise developable land. Weiler testified that Smith's proposal was a reasonable cure and would restore the residue to its pre-appropriation value. With Smith's numbers applied to Weiler's formula and acreage valuation, the cost to restore the residue to its pre-appropriation value totaled \$ 537,500.

[\*345] [\*\*P17] Plaintiff's expert witnesses, engineers Donald Kitzmiller and Letty Schamp, testified the cost to restore First Industrial's residue to its pre-appropriation fair market value was \$ 55,464. Plaintiff's figure is drastically lower because, in part, it proposes constructing two short stub roads from the new ingress/egress access points to First Industrial's existing internal roadways instead of constructing a lengthier roadway connected to the original path. Plaintiff contends these stub roads fully restore the usefulness of the residue at a reduced cost. On cross-examination, Weiler testified that plaintiff's alternative proposal was "feasible," but it would not restore the residue to its pre-appropriation value. (Dec. 16, 2004 Tr. at 57 and 42.)

[\*\*P18] The trial court adopted First Industrial's proposal that restoration of the residue to its pre-appropriation value would cost \$ 537,500. The court relied on Weiler's formula for the cost to construct, plus [\*\*\*567] lost land, to arrive at its conclusion, apparently finding plaintiff's experts unpersuasive. Plaintiff contends the trial court erred as a matter of law because the court-adopted cost to cure puts First Industrial in a better position than it was pre-appropriation.

[\*\*P19] In support of its argument, plaintiff contends the cost to cure figure should operate to mitigate

damages, not finance improvements to the residue. [HN6] While we agree the cost to cure limits damages when the cost is less than the amount of actual damages to the residue, the amount of the cost to cure is not limited in itself. The cost to cure figure represents an opinion of how much it will cost to restore the residue to its pre-appropriation value. Plaintiff and First Industrial both presented expert opinions as to this cost. The court found First Industrial's witnesses more credible and First Industrial's proposal to be a more reasonable method of restoring the residue to its pre-appropriation value and functionality. Although First Industrial's proposal is considerably more expensive than plaintiff's, the trier of fact weighs the credibility of the witnesses and makes the determination. Because the evidence supports the trial court's conclusion that First Industrial's proposal was reasonable, the court did not err as a matter of law.

[\*\*P20] Plaintiff's third argument under its first assignment of error contends the trial court erred as a matter of law by restricting experts from considering better zoning uses in determining the post-appropriation value of the residue. [HN7] "The rule of valuation in a land appropriation proceeding is not what the property is worth for any particular use but what it is worth generally for any and all uses for which it might be suitable, including the most valuable uses to which it can reasonably and practically be adapted." *Sowers v. Schaeffer (1951), 155 Ohio St. 454, 99 N.E.2d 313*, paragraph three of the syllabus. Accordingly, "an expert need not confine his valuation testimony to the use permitted under existing zoning regulations." *Wray, at 477* [\*346], quoting *Wray v. Mussig (Sept 20, 1996), Lake App. No. 95-L-172, 1996 Ohio App. LEXIS 4113*. Rather, "the expert may testify as to a highest and best use that is not permitted under existing zoning regulations even without evidence of a probable change in zoning within the foreseeable future." *Id.*

[\*\*P21] Here, plaintiff's expert witness, Henry Halas, testified that First Industrial's residue was worth about \$ 7 million before the appropriation based on its industrial zoning restriction, good location, and poor access. According to Halas, First Industrial's residue is worth about \$ 11.5 million after the appropriation because of improved access to the site and potential commercial uses that were previously unavailable. Despite repeated objections by First Industrial's counsel, the court allowed Halas to testify that First Industrial could best use 15 acres of its post-appropriation residue for commercial development, which would increase the residue's value by \$ 4 million. Plaintiff contends Halas' testimony was competent, credible, and admissible and thus the court should not have excluded it from consideration.

[\*\*P22] Nothing in the record suggests the trial court failed to consider Halas' testimony. Rather, plaintiff

once again is asking this court to substitute its judgment for that of the trial court regarding the witnesses' credibility. The trial court, acting as the trier of fact, found Weiler to be a more credible witness on valuing the property. Weiler testified that he considered this new "commercially useful" land in his appraisal, but it did not [\*\*\*568] impact the damages to the residue because the land was less commercially desirable.

[\*\*P23] [HN8] Although an expert may testify to the best use of land irrespective of the current zoning restrictions, the expert may not increase the fair market value over and above that which an informed willing purchaser would presently pay. *Masheter v. Kebe* (1976), 49 Ohio St.2d 148, 153, 359 N.E.2d 74. Weiler's appraisal considered what a willing purchaser would pay for First Industrial's post-appropriation property, considered alternative uses, but focused exclusively on loss of internal access from the ingress/egress point to the building and internal roadways. Weiler was not required to appraise the land upon the basis of an alternative commercial use, since he believed it was not feasible for the area in question. The trial court's choice not to include Halas' highest and best use valuation is an issue of credibility, not a matter of law. The court did not error when it found Weiler more credible than Halas.

[\*\*P24] Although the court allowed plaintiff to appraise First Industrial's residue with some commercial usage, the court ended plaintiff's cross-examination of Smith when the questioning broached First Industrial's application to have the property rezoned. (Dec. 16, 2004 Tr. at 94-95.) Plaintiff asserts the trial court's action is contrary to the law of valuing post-appropriation residue, because Smith valued First Industrial's [\*347] residue based upon a light industrial zoning restriction and did not consider potential commercial development in his post-appropriation appraisal.

[\*\*P25] Any error in the trial court's restricting plaintiff's cross-examination of Smith was harmless. The court's assessment of damages to the residue was based almost exclusively on the testimony of Weiler, who discounted the value of a commercial zoning change. Thus the status of the rezoning application would not and did not affect Weiler's opinion of the land's value. Additionally, the trial court's reply at the time of the ruling on cross-examination indicated it already knew the application was pending, and thus its ruling denying plaintiff's attempt to elicit that fact had no impact on the court's decision.

[\*\*P26] Lastly, plaintiff contends the trial court erred as a matter of law by including the loss of ingress and egress into the post-appropriation fair market value, as the change of highway access is not properly considered in determining the damages to the residue. Plaintiff

correctly asserts that [HN9] circuitry of travel to and from real property is not compensable, *First Industrial I, at P8*, citing *State ex rel. Merritt v. Linzell* (1955), 163 Ohio St. 97, 126 N.E.2d 53, but circuitry of travel created within the owner's property is compensable. *First Industrial I, at P8*, citing *State ex rel. OTR v. Columbus* (1996), 76 Ohio St.3d 203, 1996 Ohio 411, 667 N.E.2d 8. Circuitry of travel within one's own property occurs when one entrance or exit is removed and another is not recreated. As we stated in the previous appeal, "[plaintiff] has created circuitry of travel within First Industrial's site. It has taken away a point of ingress and egress to and from First Industrial's internal loading dock and failed to create another point of ingress and egress to and from the loading dock." *First Industrial I, at P8*.

[\*\*P27] Plaintiff nonetheless contends that because Weiler included in his valuation of the residue an amount to compensate for a change in the location of the ingress/egress access point, the trial court, by adopting Weiler's opinion, improperly included a non-compensable item into its damage assessment. Weiler testified that, [\*\*\*569] because "the same access off of the highway is no longer physically available, traffic must navigate a different route to the residue, and \* \* \* such route is complicated by the addition of a median." Even so, Weiler's appraisal of the damages to the residue was based solely on the diminution in value to the building caused by a lack of access from the egress/ingress points to the building. (Dec. 16, 2004 Tr. at 20.) As a result, the trial court did not include the change in location of the ingress/egress access point in its assessment and therefore did not err.

[\*\*P28] Plaintiff's first assignment of error is overruled.

[\*348] [\*\*P29] In its second assignment of error, plaintiff contends the trial court's decision was against the manifest weight of the evidence for three reasons: (1) the trial court improperly ignored relevant testimony from plaintiff's expert witness that the residue increased in value due to its potential for a better use; (2) the trial court did not determine the fair market value of the building prior to the taking; and (3) First Industrial's proposed estimate of \$ 300,000 was not supported by a proper foundation and was improperly based on hearsay.

[\*\*P30] [HN10] "Judgments supported by some competent, credible evidence going to all essential elements of the case" are not against the manifest weight of the evidence. *Young v. Univ. of Akron, Franklin App. No. 04AP-318, 2004 Ohio 6720, at P25*, citing *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, paragraph one of the syllabus. A judgment is not against the manifest weight of the evidence merely because inconsistent evidence was presented. *State v.*

165 Ohio App. 3d 335, \*, 2005 Ohio 6469, \*\*;  
846 N.E.2d 559, \*\*\*; 2005 Ohio App. LEXIS 5809

*Raver, Franklin App. No. 02AP-604, 2003 Ohio 958, at P21.* "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment." *Estate of Barbieri v. Evans (1998), 127 Ohio App.3d 207, 211, 711 N.E.2d 1101.* (Citation omitted.)

[\*\*P31] Initially, plaintiff contends the trial court's decision is against the manifest weight of the evidence because the court ignored Halas' testimony regarding the residue's potential for a better use. Plaintiff asserts Halas was credible and competent, and even if Halas was unpersuasive, Weiler was equally unpersuasive due to the inconsistencies in his trial testimony as compared to his testimony in the damages-only hearing.

[\*\*P32] The trial court wholly adopted Weiler's testimony into its decision and disregarded Halas' testimony. Although Weiler's testimony regarding the damages to the residue's building varied from the first trial to the damages-only hearing, any inconsistency, along with any inconsistency in Halas' testimony, presented a matter for the trier of fact's resolution. [HN11] The trier of fact determines the credibility and weight of the testimony. Although plaintiff claims Weiler provided inconsistent appraisals, Weiler explained that his second appraisal considered the damage to the building and its lack of internal access, while his first appraisal was limited to damage to the real property. (Dec. 16, 2004 Tr. at 20.) His explanation was adequate and justifiable, thereby permitting the trial court to find his testimony persuasive. Since Weiler's testimony was sufficient, competent credible evidence of damages to the residue, plaintiff's first issue is not well-taken.

[\*\*P33] Plaintiff next contends the trial court's decision is against the manifest weight of the evidence because First Industrial's building was not [\*349] appraised prior to the taking. Plaintiff [\*\*\*570] asserts the building's \$ 5.1 million value was not established by one of the three recognized appraisal methods, and thus the court's determination of damages was contrary to law.

[\*\*P34] Three expert witnesses testified as to the fair market value of the First Industrial's building. Plaintiff's expert, Halas, testified the pre-appropriation valuation of the building was \$ 5.1 million. Halas calculated the value of the building by multiplying the building's 262,000 square feet by \$ 20 a square foot. Weiler testified he valued First Industrial's building from Halas' appraisal and independently stated the appraisal was "in the range of value." (Dec. 16, 2004 Tr. at 24.) Smith also appraised the building in a manner similar to Halas: he multiplied the building's square footage by \$ 15 a square foot for a value of \$ 3.93 million. Although Smith appraised the building at a lesser value, he valued the build-

ing's post-appropriation diminution in value comparably to Weiler's testimony.

[\*\*P35] All three witnesses provided their independent professional opinions of the building's value. Plaintiff cannot provide an assessment, testify to the value, and then, after the fact, complain that no appraisal was performed. The trial court did not err in accepting the value to which even plaintiff's witness testified.

[\*\*P36] Plaintiff's third argument under its second assignment of error contends Smith's estimate of \$ 300,000 to restore the functionality of First Industrial's internal roadways was not supported by a proper foundation and was improperly based on hearsay; without Smith's testimony, plaintiff asserts the trial court's decision is against the manifest weight of the evidence. Plaintiff argues that Smith was not qualified to testify as an expert under *Evid.R. 702(A)* because he is not an engineer and does not have the special knowledge needed to opine on the cost to construct an internal roadway. Plaintiff further asserts Smith's testimony was invalid because he did not personally make the calculations but relied on the calculations of a team of engineers working under his supervision.

[\*\*P37] Plaintiff never objected to Smith's qualifications as an expert regarding his cost-to-cure opinion and never objected to the alleged hearsay during trial. [HN12] Typically, we need not consider any claim regarding a particular error if that claim was not preserved by objection, ruling, or otherwise in the trial court. *Motorists Mut. Ins. Co. v. Hall, Franklin App. No. 04AP-1256, 2005 Ohio 3811.* Here, since plaintiff failed to preserve this issue with an objection, we examine it only to determine if the trial court committed plain error.

[\*\*P38] [HN13] In civil cases, the "plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the [\*350] basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson (1997), 79 Ohio St.3d 116, 1997 Ohio 401, 679 N.E.2d 1099, syllabus.* Here, plaintiff cannot demonstrate plain error. Smith's testimony is not patently erroneous. Even assuming his testimony was not proper, his testimony did not affect the fairness or integrity of the judicial process.

[\*\*P39] Because the trial court's judgment is not against the manifest weight of the evidence, plaintiff's second assignment is overruled.

[\*\*P40] In its third assignment of error, plaintiff contends the trial court erred by not allowing Glenn Halmbacher and Don Kitzmiller to testify as witnesses at

[\*\*\*571] the hearing, even though their depositions had been taken on videotape for trial. Plaintiff claims its not being allowed to re-cross-examine Halmbacher substantially prejudiced its case.

[\*\*P41] [HN14] Evidentiary rulings lie within the broad discretion of the trial court. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66, 567 N.E.2d 1291. [HN15] *Evid.R. 103(A)(2)* addresses an erroneous ruling on the exclusion of evidence and states, in pertinent part: "error may not be predicated upon a ruling which \* \* \* excludes evidence unless a substantial right of the party is affected, and \* \* \* the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. Offer of proof is not necessary if evidence is excluded during cross-examination." If the party claiming error is unable to establish that the trial court's ruling affects a substantial right, the error is deemed harmless; if the party is unable to proffer the substance of the excluded evidence, the error is deemed waived. *Campbell v. Johnson* (1993), 87 Ohio App.3d 543, 551, 622 N.E.2d 717.

[\*\*P42] Here, plaintiff objected to the exclusion of the live testimony of Kitzmiller and Halmbacher but failed to proffer the substance of what their testimony would tend to prove. Plaintiff explained to the trial court it wanted to ask Halmbacher three or four follow-up questions about "some things he testified to on [his video deposition]," and wanted Kitzmiller "to have an opportunity to get up and respond to some of [Halmbacher's] testimony." (Dec. 16, 2004 Tr. at 6-7.) Because plaintiff failed to disclose the substance of the excluded evidence, under *Evid.R. 103(A)(2)* its third assignment of error cannot be predicated on the trial court's exclusionary ruling.

[\*\*P43] [HN16] Under *Evid.R. 103(A)(2)*, proffer nonetheless may not be necessary if the exclusion is related to cross-examination. Some courts still follow the statutory practice found in *R.C. 2317.07* of calling witnesses "as if upon cross-examination," but *Evid.R. 607* allows a party to call even the opposing party as a witness, and to impeach that witness, on direct examination. *In Re M.R.D.*, [\*351] *Franklin App. No. 05AP-324*, 2005 Ohio 5705, at P14. Although plaintiff's remarks in the trial court indicate plaintiff sought to "cross-examine" Halmbacher, under *Evid.R. 607* plaintiff would call Halmbacher on direct rather than cross-examination. Because the evidence was not excluded during cross-examination, and because plaintiff's reason for wanting to call Halmbacher and Kitzmiller as witnesses at the hearing does not reveal what plaintiff hoped to elicit from either witness, plaintiff's failure to proffer the excluded evidence renders any error waived. *Campbell, supra*. To find prejudicial error on this record would re-

quire speculation that is inappropriate to appellate review.

[\*\*P44] Plaintiff's third assignment of error is overruled.

[\*\*P45] In its fourth assignment of error, plaintiff contends the trial court erred in awarding First Industrial ten percent interest when the applicable interest rate is four percent.

[\*\*P46] [HN17] *R.C. 163.17* directs the appropriating agency to pay interest on the appropriated land from the date of taking to the date of actual payment of the award. According to the statute, the interest shall be paid at the rate of interest set forth in *R.C. 1343.03*. Prior to June 2, 2004, *R.C. 1343.03* awarded an interest rate of ten percent per annum. Effective June 2, 2004, *R.C. 1343.03* through 5703.47 awards an interest rate equal to the federal short-term rate plus three percent, which the parties stipulate to be four percent per annum.

[\*\*P47] [\*\*\*572] First Industrial is entitled to receive interest from February 26, 2002, the date of the taking, until plaintiff pays the damages award. Since this interest award spans a period in which the statutory rate has changed, the first rate will apply until the statutory change; then, the second rate will apply. *Tony Zumbo & Son Constr. Co. v. Ohio Dept. of Transp.* (1984), 22 Ohio App.3d 141, 148-149, 22 Ohio B. 381, 490 N.E.2d 621; *Cleveland Heights Fire Fighter Assn. v. Cleveland Heights* (July 12, 1984), Cuyahoga App. No. 47727. "To do otherwise would make *R.C. 1343.03(A)* retroactive. [HN18] Since *R.C. 1343.03(A)* was not expressly made retroactive, it would operate prospectively only. See *R.C. 1.48*." *Sheets v. Sheets* (Dec. 30, 1994), *Gallia App. No. 94CA17*, 1994 Ohio App. LEXIS 6102. First Industrial, therefore, is entitled to an interest rate of ten [\*352] percent from February 26, 2002 until June 2, 2004 and four percent from June 2, 2004 until the day plaintiff pays the damages award. Plaintiff's fourth assignment of error is sustained in part and overruled in part.

[\*\*P48] Having overruled plaintiff's first, second and third assignments of error, and having sustained in part and overruled in part plaintiff's fourth assignment of error, we affirm the judgment of the trial court in all respects except the award of interest, and we modify the interest award to reflect interest at the rate of ten percent from February 26, 2002 until June 2, 2004 and four percent from June 2, 2004 until plaintiff pays the damages award.

*Judgment affirmed as modified.*

BROWN, P.J., and McGRATH, J., concur.

LEXSEE 2006 OHIO 1582

**HAUSSER & TAYLOR, LLP, ET AL., Plaintiffs-Appellees: v. ACCELERATED SYSTEMS INTEGRATION, INC., ET AL., Defendants-Appellants**

NO. 86547

**COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYAHOGA COUNTY***2006 Ohio 1582; 2006 Ohio App. LEXIS 1482***March 30, 2006, Date of Announcement of Decision**

**SUBSEQUENT HISTORY:** Related proceeding at *Accelerated Sys. Integration, Inc. v. Hausser & Taylor, L.L.P.*, 2007 Ohio 2113, 2007 Ohio App. LEXIS 1968 (Ohio Ct. App., Cuyahoga County, May 3, 2007)

**PRIOR HISTORY:** [\*\*1] CHARACTER OF PROCEEDING: Civil Appeal from Common Pleas Court, Case No. CV-468216. *Hausser & Taylor, LLP v. Accelerated Sys. Integration, Inc.*, 2005 Ohio 1017, 2005 Ohio App. LEXIS 1030 (Ohio Ct. App., Cuyahoga County, Mar. 10, 2005)

**DISPOSITION:** JUDGMENT MODIFIED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellee LLP brought an action against appellant corporation, and others, seeking to enforce an arbitration award. The Cuyahoga County Court of Common Pleas (Ohio) granted the LLP's motion to confirm. In an earlier appeal, the appellate court modified the judgment as to prejudgment interest and remanded the case. The trial court then modified the prejudgment interest award and awarded postjudgment interest. The corporation appealed.

**OVERVIEW:** The corporation did not challenge the award of postjudgment interest, but rather, it challenged the rate of 10 percent per annum. Specifically, the corporation cited the June 2, 2004 amendment to *Ohio Rev. Code Ann. § 1343.03*, which governed prejudgment and postjudgment interest and which provided that in a situation such as the instant one, the interest rate was determined by *Ohio Rev. Code Ann. § 5703.47*. The former *Ohio Rev. Code Ann. § 1343.03*, which the LLP argued governed in this case, set the interest rate at 10 percent per annum. The appellate court found that its first opinion did not render a decision on the issue of the interest

rate to be applied and, hence, there was no law-of-the-case on this issue. The trial court's original entry did not specifically state what the interest rate was. It was not until the trial court's second judgment, issued after the remand, that the trial court specifically stated that the interest rate was 10 percent per annum. Because this case was pending at the time of the amendment to the statute, the amended version of *Ohio Rev. Code Ann. § 1343.03* governed.

**OUTCOME:** The postjudgment interest rate was modified to accrue as follows: at the rate of 10 percent from April 30, 2004 to June 1, 2004, 4 percent from June 2, 2004 to December 31, 2004, and 5 percent from January 1, 2005 until the judgment was satisfied.

**LexisNexis(R) Headnotes*****Civil Procedure > Judgments > Preclusion & Effect of Judgments > Law of the Case***

[HN1] The law-of-the-case 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.

***Civil Procedure > Remedies > Judgment Interest > General Overview***

[HN2] See *Ohio Rev. Code Ann. § 1343.03*.

**COUNSEL:** For Plaintiff-Appellee (MRK Technologies, Ltd.): James R. Wooley, Stephan J. Schlegelmilch, Baker & Hostetler, LLP, Cleveland, OH.

For Defendants-Appellants: Joseph G. Ritzler, Drue M. Skaryd, Ritzler, Coughlin & Swasinger, LTD, Cleveland, OH.

JUDGES: CHRISTINE T. McMONAGLE, JUDGE. ANTHONY O. CALABRESE, JR., P.J., and MICHAEL J. CORRIGAN, J., CONCUR.

OPINION BY: CHRISTINE T. McMONAGLE

OPINION:

ACCELERATED DOCKET

JOURNAL ENTRY AND OPINION

CHRISTINE T. McMONAGLE, J.:

[\*P1] This cause came to be heard upon the accelerated calendar pursuant to *App.R. 11.1* and *Loc.R. 25*, the records from the Cuyahoga County Court of Common Pleas, the briefs and the oral arguments of counsel.

[\*P2] Defendants-appellants, Accelerated Systems, Inc., Michael T. Joseph and Michael T. Joseph ESBT, appeal the judgment of the trial court that awarded plaintiff-appellee, MRK Technologies, Ltd., postjudgment interest at the rate of 10% per annum. For the reasons that follow, we modify the judgment.

[\*P3] The record before us demonstrates that on April 30, 2004, the trial court granted appellee's motion to confirm the arbitration award and motion for prejudgment interest. In regard to the prejudgment interest, the court's entry only provided that the interest would begin to accrue on February 29, 2000.

[\*P4] On appeal, appellants challenged numerous aspects of the trial court's judgment. In regard to the court's order of the prejudgment interest, appellants contended that the court erred in its determination of the February 29, 2000 accrual date. This court agreed, finding that the accrual date should have been October 30, 2003, and modified the trial court's judgment to reflect its finding. *Hausser & Taylor, LLP v. Accelerated Systems Integration, Inc., Cuyahoga App. No. 84748, 2005 Ohio 1017, at P42*. This court then remanded the case for "execution of judgment." *Id. at P43*.

[\*P5] On remand, the trial court issued an entry modifying the prejudgment interest award in accordance with this court's determination and awarding postjudgment interest at the rate of 10% per annum. It is from that judgment that appellants now appeal.

[\*P6] Appellants do not challenge the award of postjudgment interest; rather they challenge the rate of 10% per annum. Specifically, appellants cite the June 2, 2004 amendment to *R.C. 1343.03*, which governs

prejudgment and postjudgment interest and which provides that in a situation such as the instant one, the interest rate is determined by *R.C. 5703.47*. *R.C. 5703.47* provides that the interest shall be that as determined by the tax commissioner. For 2004, the tax commissioner set the interest rate at 4% per annum, and for 2005, the tax commissioner set the interest rate at 5% per annum. The former *R.C. 1343.03*, which appellee argues governs in this case, set the interest rate at 10% per annum.

[\*P7] Appellee further argues that the law-of-the-case established in the first appeal set the interest rate at 10% per annum. Appellee contends that the 10% interest rate is the law-of-the-case because appellants only challenged the accrual date of the interest as opposed to the actual per annum rate. Appellee's argument fails for two reasons.

[\*P8] First, at the time of the trial court's first judgment relative to interest, April 30, 2004, the former *R.C. 1343.03* [\*\*4], which provided for interest at the rate of 10% per annum, was in effect. Thus, appellants could not have raised the issue of the new interest rate, as the current *R.C. 1343.03* had not yet been enacted. [HN1] "The [law-of-the-case] 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, 11 Ohio B. 1, 462 N.E.2d 410*. Here, this court's first opinion did not render a decision on the issue of the rate of the interest to be applied and, hence, there is no law-of-the-case on this issue. See *Hausser & Taylor, LLP, supra*.

[\*P9] Second, the trial court's April 30, 2004 entry did not specifically state what the interest rate was; it only stated in that regard that interest would begin to accrue on February 29, 2000. It was not until the trial court's second judgment, issued after this court's remand, that the trial court specifically stated that the interest rate would be 10% per annum.

[\*P10] Appellants argue that postjudgment interest should apply [\*\*5] at the rate of 10% from April 30, 2004 to June 1, 2004; 4% from June 2, 2004 to December 31, 2004; and 5% from January 1, 2005 until the judgment is satisfied. In support of their argument, appellants cite this court's decision in *Highlands Business Park, LLC v. Grubb & Ellis Co., Cuyahoga App. No. 85225, 2005 Ohio 3139*. In that case, this court ruled that the trial court's August 16, 2004 judgment granting interest at the rate of 10% was excessive. In so ruling, this court applied the current version of *R.C. 1343.03*. In *Highlands Business Park*, the trial court's judgment granting 10% interest was subsequent to the effective date of the current *R.C. 1343.03*. This court, in deciding

the matter, relied upon Section 3 of H.B. No. 212, the legislation which amended *R.C. 1343.03*, and which provides as follows:

[\*P11] [HN2] "The interest rate provided for in *division (A) of section 1343.03 of the Revised Code*, as amended by this act, applies to actions pending on the effective date of this act. In the calculation of interest due under *section 1343.03 of the Revised Code* [\*\*6] , in actions pending on the effective date of this act, the interest rate provided for in *section 1343.03 of the Revised Code* prior to the amendment of that section by this act shall apply up to the effective date of this act, and the interest rate provided for in *section 1343.03 of the Revised Code* as amended by this act shall apply on and after that effective date."

[\*P12] Because this case was pending at the time of the amendment to the statute, the amended *R.C. 1343.03* governs and the postjudgment interest rate is modified to accrue as follows: at the rate of 10% from April 30, 2004 to June 1, 2004; 4% from June 2, 2004 to December 31, 2004; and 5% from January 1, 2005 until the judgment is satisfied.

Judgment modified.

It is ordered that appellants recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. [\*\*7]

CHRISTINE T. McMONAGLE

JUDGE

ANTHONY O. CALABRESE, JR., P.J., and MICHAEL J. CORRIGAN, J., CONCUR.

N.B. This entry is an announcement of the court's decision. See *App.R. 22(B), 22(D) and 26(A)*; *Loc.App.R. 22*. This decision will be journalized and will become the judgment and order of the court pursuant to *App.R. 22(E)* unless a motion for reconsideration with supporting brief, per *App.R. 26(A)*, is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per *App.R. 22(E)*. See, also, *S.Ct.Prac.R. II, Section 2(A)(1)*.