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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0237-06T2

CITY OF LONG BRANCH, A Municipal Corporation of the State of New Jersey,

Plaintiff-Respondent,

v.

JUI YUNG LIU and ELIZABETH LIU, his wife, ADELINA'S PIZZA, JIMMY'S PIZZA, JIMMY JETTY, INC., and JIMMY'S FAMOUS BOARDWALK HOTDOGS,

Defendants-Appellants,

and

ADMINISTRATOR OF SMALL BUSINESS ADMINISTRATION, HOROAPH CO., L.L.C. t/a DAIRY KING, GIFTED SARA, WIZARD WORLD, INC., SPECIALTY MERCHANDISE ASSOCIATION, FUNHOUSE, and CLUB 115,

Defendants.

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Argued October 28, 2008 - Decided May 20, 2009

Before Judges Wefing, Parker and LeWinn.

On appeal from Superior Court of New Jersey, Law Division, Monmouth County, No. L-2235-01.

Peter H. Wegener argued the cause for appellants (Bathgate, Wegener & Wolf, attorneys; Mr. Wegener and Christopher B. Healy, on the briefs).

Paul V. Fernicola argued the cause for respondent (Paul V. Fernicola and Associates, LLC, attorneys; Mr. Fernicola, of counsel and on the brief).

PER CURIAM

Defendants appeal from a judgment entered following a jury trial on plaintiff's eminent domain complaint. After reviewing the record in light of the contentions advanced on appeal, we affirm.

Defendants Jui Yung Liu and his wife owned a parcel of beachfront property in Long Branch that was approximately 1.2 acres in size. The property was in the RC-3 Waterfront Mixed District in which a variety of different uses were permitted, including mid-rise apartment buildings, hotels, waterfront mixed residential units, convention center, health spas, retail uses, arcades, and eating and drinking establishments. On the property was a large building, a portion of which was one-story, another portion of which was two-story. Defendants operated several businesses at the site, including a nightclub, a pizza place, and a hotdog place, and rented out portions of the premises for other, similar businesses.

In 1996 Long Branch declared the area as one in need of redevelopment and in May 2001 it filed a complaint seeking to take defendants' property through eminent domain. In October 2001, the City filed a declaration of taking and deposited the sum of $900,000 with the Clerk of the Superior Court. Defendants

contended that sum was wholly inadequate and thus the matter proceeded to trial.

The City's expert testified in support of his calculation of $900,000. Defendants' expert testified that in his opinion the property was worth between $2.7 and $2.8 million. The jury rejected the opinions of both experts and awarded defendants $1.45 million. This appeal followed.

On appeal, defendants raise the following issues for our consideration.

> **POINT I**
> WHETHER THE JURY'S DETERMINATION TO MAKE NO AWARD FOR THE ENHANCEMENT VALUE REPRESENTED BY THE FURNITURE, FIXTURES AND EQUIPMENT FUNCTIONALLY RELATED TO THE BUSINESS WAS AGAINST THE WEIGHT OF THE EVIDENCE AND WAS A MISCARRIAGE OF JUSTICE?
>
> 1. THE PROBLEM OF AUTHENTICATION UNDER N.J.R.E. 901
> 2. THE VIDEO SHOULD HAVE BEEN EXCLUDED UNDER RULE 403
> 3. THE ENTIRE LINE OF TESTIMONY RELATING TO RELOCATION SHOULD HAVE BEEN EXCLUDED FROM THE CASE
>
> **POINT II**
> WHETHER THE UNETHICAL CONDUCT OF CONDEMNOR'S COUNSEL DESTROYED ANY SEMBLANCE OF A FAIR TRIAL BY THE UNFAIR USE OF PRIVILEGED MATERIAL CAUSING THE TOTAL EMBARRASSMENT AND LOSS OF CREDIBILITY TO DEFENDANTS' APPRAISAL EXPERT?
>
> 1. The Condemnor's Counsel's Questioning of Appellant[s'] Appraisal Expert Was Unethical and Improper and Was Designed to Confuse and Embarrass the Witness

2. Counsel inappropriately referred to privileged information before the jury in violation of the Court's ethics and discovery rules
3. Counsel's questions were a breach of R.P.C. 3.4
4. The Trial Judge's Curative Instruction To the Jury Was Insufficient and Amounted to Reversible Error

**POINT III**
WHETHER A SERIES OF CONTRADICTORY EVIDENCE RULINGS ALLOWED IMPROPER EVIDENCE AND UNFAIRLY LIMITED THE PROPERTY OWNERS' PROOFS?

1. THE TRIAL COURT SHOULD NOT HAVE PERMITTED EVIDENCE THAT THE UPSTAIRS SHOULD NOT BE VALUED AS OFFICE SPACE BUT SHOULD ONLY BE TREATED AS "STORAGE"
2. EVIDENCE OF THE SALE AND RESALE OF THE HILTON OR OCEAN PLACE HOTEL WAS IMPROPERLY EXCLUDED
3. EVIDENCE THAT RICHARD SENINSKY, LIUS['] TENANT IN THE ARCADE HAD PAID $100,000 TO BUY INTO THE LEASE OF THE ARCADE WAS APPROPRIATE EVIDENCE INDICATING THAT THE LEASE WAS IN FACT BELOW MARKET VALUE AND WOULD HAVE SUPPORTED DR. MOLIVER'S OPINION OF "MARKET RENT"
4. THE DEMOLITION OF THE FIRE DAMAGED PIER WAS CLEARLY PART OF THE BEACH REPLENISHMENT PROGRAM AND SHOULD NOT HAVE BEEN EXCLUDED UNDER THE DOCTRINE OF "SCOPE OF THE PROJECT"

**POINT IV**
WHETHER THE MOTION JUDGE ERRED IN FAILING TO REQUIRE THAT THE CITY'S VALUATION OF THE PROPERTY INCLUDE PROPERTY THAT CAME INTO EXISTENCE THROUGH THE BEACH REPLENISHMENT EFFORTS OF THE U.S. ARMY CORPS OF ENGINEERS?

1. The Lius' Property Extends to Mean High Water
2. The High Water Mark Delineates Ownership of Lands Along the Atlantic Ocean

4 [sic]. Artificial Changes to the Shoreline Inure to the Benefit of the Littoral Owner Provided the Changes Were Not in Aid of Navigation and Were Not Implemented by the Littoral Owner Himself

5 [sic]. The Motion Judge Incorrectly Interpreted The Law To Determine That The State of New Jersey Owned The Artificially Created Property

**POINT V**

THE STAY IMPOSED ON DEFENDANTS' RIGHT TO WITHDRAW THE BALANCE OF THE JUDGMENT AWARD IS IN DIRECT VIOLATION OF DEFENDANTS' CONSTITUTIONAL RIGHT TO 'JUST COMPENSATION'

**POINT VI**

THE DEFENDANTS-APPELLANTS ARE ENTITLED TO COLLECT INTEREST ON THE $748,877.67 DEPOSIT AT THE R. 4:42-11 RATE

I

As we have noted, a number of businesses operated at the site, some of which were food-related. One of defendants' contentions at trial was that they were entitled to compensation not only for the land that was being taken but for the furnishings, fixtures and equipment ("FF&E") that were on the premises. In response to the question whether the FF&E and the building formed a single functional unit, the jury responded "yes." In response to the question whether a reasonably willing purchaser would pay substantially more for the property with the FF&E in place, the jury answered "no." Those two responses are the focus of defendants' first argument on appeal.

The leading case on the valuation of FF&E in an eminent domain action is State v. Gallant, 42 N.J. 583 (1964). Defendants in that case owned a textile mill in Paterson that the State condemned in connection with the construction of interstate Route 80. Id. at 585. Inside the mill were twelve looms, which had been in operation since 1917. Ibid. Justice Haneman described the looms in the following manner.

> One of the looms was nine feet long, seven were fifteen feet long and four were eighteen feet long. Their average weight was 8,000 pounds. With the exception of one self-powered loom, they were attached to a central power unit by a shaft and belt system. They were bolted to their respective floors with three inch lag screws. Although the looms were thus attached, their removal from the building would be attended with more complications than the simple removal of the screws. Because of its length and weight, transportation of each loom as a complete unit would subject the shafting to prohibitive strains and stresses. The only safe method of transportation would be by dismantling at the old location and reassembling at a new location. This in turn would give rise to a complex engineering problem. Because of the age of the machines it would be necessary to make extremely accurate drawings of every elevation point so that when reassembled, every part would be in the same position relative to every other part as it originally had been, otherwise the parts of the equipment which had "worn together" over the years would no longer fit together in precisely the same way and severe damage would result. The total value of the looms where located is $52,000. The cost of

> moving would be $39,600 for dismantling and reassembling plus transportation costs.
>
> [Id. at 585-86.]

The trial court held the property owner was not entitled to be compensated for these looms, and this court agreed. The Supreme Court, however, reversed. Justice Haneman quoted the following principle enunciated by Justice Cardozo when he served on the New York Court of Appeals.

> It is intolerable that the state, after condemning a factory or warehouse, should surrender to the owner a stock of secondhand machinery and in so doing discharge the full measure of its duty. Severed from the building, such machinery commands only the prices of secondhand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value.
>
> [Id. at 590 (quoting Jackson v. State, 106 N.E. 758 (N.Y. 1914)).]

Speaking for a unanimous Court, Justice Haneman went on to set down the following principle:

> The value of a factory containing industrial equipment employed in the business for which the property is being used is ordinarily greater than that of an empty and idle building. Such equipment in place adds more to the value of the realty than its second-hand salvage value separated from the premises. An owner, who is under no duress, and where the building and machinery are a functional unit, would undoubtedly sell only at a price which would reflect that increased value. Where, therefore, a

> building and industrial machinery housed therein constitute a functional unit, and the difference between the value of the building with such articles and without them, is substantial, compensation for the taking should reflect that enhanced value. This, rather than the physical mode of annexation to the freehold is the critical test in eminent domain cases.
>
> [Ibid.]

Defendants sought to establish that they were entitled to compensation for the FF&E on the premises through the testimony of two witnesses, Tadeusz Harski, an equipment appraiser, and Donald M. Moliver, Ph.D., MAI. Mr. Harski went to the building before the Lius vacated it and appraised all of its contents, making no distinction between items which could be removed and those which could not. He thus included in his valuation such items as the signs that were used for the various businesses, the flower containers and benches, cash registers, and kitchen equipment, including pots and pans. He admitted in cross-examination that items such as refrigerators, display cases and stoves could be moved but did not consider whether doing so would have any impact on the value of the underlying real estate.

He valued all the items on the premises at their fair market value installed, which he defined in the following manner:

> [T]he highest price estimate in terms of money which machinery and equipment will bring exposed on sale on the open market with a reasonable time to find a purchaser who buys with full knowledge of all the uses and the purposes to which it has adapted and for which it is capable of being used. The buyer is not compelled to buy and the seller is not compelled to sell. The equipment is installed with all costs included to make it operational for continued use.

Harski ascribed a total value of $176,400 to the FF&E using that methodology. Moliver then took that figure, rounded it to $175,000 and added it to the value he had reached for the fair market value of the real estate.

The City, on the other hand, had Peter Costanza, an auctioneer, visit the property in March 2002. He valued the equipment he found on the site at $19,200. The City's real estate appraiser, Hugh McGuire, attributed no enhanced value to the real estate due to FF&E.

We are satisfied that this first argument of defendants is, at bottom, no more than disgruntlement at the jury's verdict. The jury, after being properly instructed on the principles underlying an award for FF&E, rejected defendants' position. We decline to second guess the jury on this issue.

There are, however, several other aspects to defendants' argument with respect to their claim for FF&E. During the City's case, it presented a video which had been filmed in the early spring of 2002; it showed the interior of defendants'

building after defendants had vacated the premises. Defendants claim they were severely prejudiced by the video because it displayed the premises in such a poor light and they assert several reasons why Long Branch should not have been permitted to show this video.

While we are uncertain as to the relevancy of this video, since it was made some time after the pertinent valuation date, we see no reversible error. First, the trial court's determination of the admissibility of this video was not an abuse of its gatekeeper role over the presentation of evidence. Bitsko v. Main Pharmacy, Inc., 289 N.J. Super. 267, 284 (App. Div. 1996). There was testimony which clearly outlined for the jury the timeframe in which the video was made and a number of photographs which showed the condition of the property well before defendants left. In Spedick v. Murphy, 266 N.J. Super. 573 (App. Div.), certif. denied, 134 N.J. 567 (1993), we found the trial court did not abuse its discretion in admitting photographs taken more than six years after the subject accident when testimony explicated the differences between what was portrayed in the picture and the conditions at the time of the occurrence.

In addition, we are satisfied, after reviewing this record, that defendants' case with respect to FF&E did not comply with the analytical model adopted by the Supreme Court in Gallant,

supra. The items at issue here did not, with the premises, constitute a single functional unit. Town of Montclair v. D'Andrea, 138 N.J. Super. 479 (App. Div. 1976) (holding the trial court erred when it included in a condemnation award for property housing an on-going restaurant the value attributed to items such as the refrigerator, steam table, sign, broiler, and grill). Because defendants' evidence would not have supported an award for FF&E, they suffered no cognizable harm as a result of this video.

II

Defendants' second argument revolves around an incident which occurred during the cross-examination of their expert, Moliver. Defendants specifically take issue with plaintiff's counsel questioning Moliver about one particular report. Near the beginning of his cross-examination, plaintiff's counsel asked Moliver to see "[o]ne of the documents I know that you had up on the stand with you today, . . . a report dated July 1st, 2002." Moliver denied the existence of such a report, claiming that he had a report dated July 1, 2003, but that report was an appraisal of a different property.

Shortly thereafter, during an objection by defendants' counsel, plaintiff's counsel claimed outside the presence of the jury that he had seen a report on the subject property dated July 2002 in Moliver's possession, a report that had not been

produced during discovery. Defendants' counsel denied the existence of such a report. The trial court told defendants' counsel to "just lay out every article that he [Moliver] brought with him today."

The following day, after an in-camera discussion about the report, the trial court held an evidentiary hearing on the issue during which both defendants' expert and plaintiff's counsel testified under oath outside the presence of the jury. The following facts came to light at that hearing. First, the report to which plaintiff's counsel referred turned out to be a typed draft report about the subject property prepared by Moliver in July 2001. Although the report contained the lowest valuation figures opined by Moliver, and defendants' counsel had known about it, he had not turned it over to plaintiff during discovery, considering it only a draft since it had also contained Moliver's handwritten notes. Second, plaintiff's counsel had seen the report and taken notes on it during a lunch break in the trial when Moliver was testifying on direct. Prior to that break, plaintiff's counsel had asked defendants' counsel if he could examine the documents Moliver had taken to the witness stand with him, and counsel had agreed. Third, after that lunch break, Moliver had removed the draft report from the stand before continuing his testimony, because defendants' counsel had reminded him during that break that he could have

nothing with him except his reports produced during discovery. Fourth, defendants' counsel claimed that he had not asked Moliver any questions about that report during his direct examination, and he accused plaintiff's counsel of staying behind during the break to examine the privileged items on counsel's desk.

After hearing the testimony, the trial court indicated that it found both witnesses credible. Although it found that the existence of the report had been revealed, it found that there was no evidence proving where the report came from or how it got to the witness stand. The trial court also stated: "I would say ringingly there is absolutely no evidence, either by design, coincidence or effect that [plaintiff's counsel] had anything whatsoever to do with what could be described as a pernicious, malevolent act of commission that caused that particular document to appear here [near the witness stand]."

The trial court further found that, although the document showed no indication on the outside that it was a draft report and although anything brought to the stand by an expert "becomes fair game for the lawyer that is doing the cross examination," the document's contents proved "that this is a draft report or preliminary report," especially since it was unsigned and contained handwritten notes. Accordingly, the trial court concluded that the "preliminary draft report" did not have to be

disclosed during discovery and its privileged contents could not be used during the trial.

Defendants' counsel thereafter asked the trial court to instruct the jury "to disregard any reference to the entire incident and indicate that you have ruled that anything relating to any other report was simply inadmissible." Plaintiff's counsel "strongly disagree[d] . . . because that create[d] the impression in [the jury's] mind[s] that [he had] concocted this whole thing."

The judge instructed the jury as follows:

> Members of the jury, during your absence I have held a hearing. I've determined that an earlier report of Dr. Moliver from the year 2001, a report by the way that I've reviewed, has no role to play, at least from your end, in this trial.

"[A]n expert witness is always subject to searching cross-examination as to the basis of his opinion." County of Ocean v. Landolfo, 132 N.J. Super. 523, 528 (App. Div. 1975). "The weight to be given to an expert's appraisal of land depends, of course, upon his candor, intelligence, knowledge, and especially upon the facts and reasoning which are offered as foundation of his opinion." Ibid. The scope of cross-examination is not unlimited, however; the trial court has broad discretion in setting the parameters of permissible cross-examination.

Glenpointe Assocs. v. Twp. of Teaneck, 241 N.J. Super. 37, 54 (App. Div.), certif. denied, 122 N.J. 391 (1990).

Moliver himself admitted on his direct examination that he had changed his valuation of this property and prepared more than one report. Indeed, he changed his valuation during his testimony, attributing that to mathematical errors he had not detected in time. He was properly subject to a searching cross-examination.

We reject defendants' argument that the conduct of plaintiff's attorney violated R.P.C. 3.4(e). That rule states in pertinent part that a lawyer shall not:

> (e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused[.]
>
> [R.P.C. 3.4(e).]

Plaintiff's attorney testified in a hearing conducted outside the presence of the jury that he believed the report Moliver took with him to the stand was not a preliminary or draft report and, because Moliver took it with him to the witness stand, was properly subject to his examination.

At the conclusion of that hearing, the trial court found plaintiff's counsel had not committed any wrongdoing. An appellate court will not disturb a trial court's factual findings unless they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice . . . ." Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974). "[A] trial judge's findings are substantially influenced by his or her opportunity to hear and see the witnesses and to get a 'feel' for the case that the reviewing court can not enjoy." Twp. of West Windsor v. Nierenberg, 150 N.J. 111, 132 (1997). Credibility determinations are entitled to particular deference, because the trial court has a better perspective to evaluate the veracity of the witnesses before it. Id. at 132-33.

Here, the trial court concluded that Moliver inadvertently mixed the draft report in with the other papers he took with him when he went to the witness stand. We have no basis to disregard that conclusion. Because the report was with Moliver's other papers and gave no immediate indication that it was confidential, plaintiff's counsel properly inspected it together with the other material.

Further, there is, in our judgment, no reasonable prospect that the few questions posed by plaintiff's counsel before

defendants' attorney intervened would serve to influence the jury unfairly. Additionally, the trial court gave a curative instruction to the jury, which we presume it followed. State v. Coruzzi, 189 N.J. Super. 273, 301 (App. Div.), certif. denied, 94 N.J. 531 (1983). In short, this brief incident, which occurred in the midst of a trial which commenced in December and did not conclude until March, provides no basis for us to reverse the judgment and order an entirely new proceeding.

III

Defendants also contend that certain evidentiary rulings of the trial court were erroneous and entitle them to a new trial. A trial court's decisions about the admission or exclusion of evidence are discretionary. Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999), certif. denied, 163 N.J. 79 (2000). "[W]hether to admit evidence of value in a condemnation case is 'liberally entrusted to the sound discretion of the trial judge.'" State v. Caoili, 262 N.J. Super. 591, 595 (App. Div. 1993) (quoting N.J. Highway Auth. v. Rudd, 36 N.J. Super. 1, 3 (App. Div. 1955)), aff'd, 135 N.J. 252 (1994).

A

Defendants' first assertion revolves around the treatment the parties' experts accorded the second story of this building. Before the trial commenced, defendants' expert, Moliver, valued the second floor as residential/apartment use, which was

consistent with the manner in which defendants actually used it. Plaintiff objected to that characterization of the second story, pointing out that when defendants submitted a minor site plan application for the second story in 1987, it was for an upstairs office and storage area. The trial judge therefore barred defendants from presenting evidence of valuation based upon a residential use of the second story.

Plaintiff's expert then made a downward adjustment in his valuation but defendants' expert did not. During the presentation of plaintiff's case, there were a number of references to the second story serving as office or storage area. Prior to Moliver taking the stand for defendants, plaintiff sought a ruling barring him from referring to the second story as residential space. The trial court agreed with plaintiff that Moliver could not value the space as residential. Moliver then issued an amended report which stated that the space would have the same value as office and storage space.

Prior to the conclusion of defendants' case, the parties deposed the architect who had been involved in an application to the Long Branch Planning Board in 1983. His original drawings showed the space as "attic area," not "office space," and the Planning Board resolution approving the application stated that the space was "strictly for storage and no other use intended."

In 1987, the Planning Board approved defendants' application to construct additional storage space on the second floor.

Following that development, the trial court heard extensive legal argument from the attorneys at the conclusion of which the court ruled that plaintiff could, for the balance of the trial, adopt a characterization of this space as purely storage space, as opposed to office/storage, which is how plaintiff's expert, McGuire, had referred to it in his testimony.

Defendants, relying in part on the doctrine of judicial estoppel, argue that it was improper to permit plaintiff to make this change mid-trial. They point to N.J. Dep't of Envtl. Prot. v. Fairweather, 298 N.J. Super. 421 (App. Div. 1997). In that case, we applied the principle of judicial estoppel in a condemnation action to preclude the State from contending at trial that the subject property was worth $21,000 when it had been appraised at $23,000 and the State had deposited that sum in court. Id. at 425.

Under judicial estoppel, a party is precluded from taking a position that is contrary to a position that the party has already successfully asserted in the same or prior litigation. McCurrie v. Town of Kearny, 174 N.J. 523, 533 (2002). Judicial estoppel is aimed at protecting the integrity of the judicial process; it will not permit a litigant to prevail on an issue and then, later, argue the converse. Id. at 534.

We reject defendants' argument that judicial estoppel requires that we reverse and remand this matter because of the shift in plaintiff's position on use of this space. We are satisfied that judicial estoppel is inapplicable because there was no prior proceeding at which plaintiff successfully established that the second story of defendants' building was office/storage space. Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 607 (App. Div. 2000) (noting that "the doctrine of judicial estoppel only applies when a court has accepted a party's position").

Our decision with respect to this portion of defendants' argument rests upon more than our analysis of judicial estoppel. The essential question at trial was the fair market value of this property on the date of taking. The first step in determining a property's fair market value in connection with a condemnation action is to identify the property's highest and best use at the time of taking. Caoili, supra, 135 N.J. at 260. "[T]he inquiry is not limited to the actual use of the property on the date of taking but is, rather, based on its highest and best use," which, in turn, is defined as a use that is legally permissible, physically possible, financially feasible, and maximally productive. County of Monmouth v. Hilton, 334 N.J. Super. 582, 587-88 (App. Div. 2000), certif. denied, 167 N.J. 633 (2001). In Casino Reinvestment Dev. Auth. v. Lustgarten,

332 N.J. Super. 472, 486 (App. Div.), certif. denied, 165 N.J. 607 (2000), the court explained that "the fair market value of the property is not necessarily limited to what the owner actually used the property for. The uses to which an owner may realistically and legally put the property is one of the first things to consider in arriving at its value."

The record developed at trial makes clear that the legal use of the second story was only for storage purposes, notwithstanding the fact that plaintiff incorrectly understood at the time it presented its case in chief that office use was permissible. Defendants suffered no detriment from plaintiff's adopting the limitation to storage space because their expert testified that he made no distinction in valuing this space between storage space and office space. Finally, we are satisfied that defendants should be charged with notice of this limitation on permissible uses since it was inserted in connection with their site plan applications.

B

Defendants also argue that the trial court erred when it did not permit their expert to testify with respect to certain information about the adjoining property, which contained a Hilton hotel. Defendants' expert had appraised the hotel in 1993 for purposes of a tax appeal. In the report he prepared in connection with that appeal, he described the surrounding

neighborhood as containing "a dilapidated pier" and a commercial strip "in a stage of decline, with dated storefronts and buildings in generally fair condition."

Plaintiff, in cross-examining defendants' expert, brought out those references in his earlier report. It sought to corroborate the opinion of its expert that the area was in decline and not economically viable; its expert had testified that the hotel had been sold twice in 1998 and nearly pulled out completely because of the nature of the surrounding area.

Defendants sought to counter this cross-examination by having their expert testify to other portions of his earlier report which contained information that the hotel was economically viable, including specific data about a large capital investment later made in the hotel. Defendants wanted to present this information to demonstrate to the jury that the area was not in decline.

The trial court upheld plaintiff's objection to this testimony because defendants' expert had not included this material in the report he prepared for this case. In light of the fact that plaintiff had this earlier report and used it itself in cross-examination and thus had to be aware of its entire contents, we are uncertain as to the prejudice plaintiff may have suffered if defendants' expert had been allowed to offer this testimony. Nonetheless, we find no reversible error.

Whether the area was in decline was settled through the City's 1996 declaration that the area was in need of redevelopment. The amount of a capital investment in the Hilton, if any, was not directly pertinent to the fair market value of this parcel.

C

A portion of defendants' building housed an arcade, Wizard World, which had been leased to Wizard World, Inc., a company in which Richard Seninsky had, at one time, been a shareholder. After disposing of his interest in the company in 1985, Seninsky repurchased the company in 1988 after a nearby pier had been extensively damaged by a fire. Seninsky paid $100,000 for this interest and then took over the lease and negotiated a five-year extension of the leasehold. Defendants wanted to present Seninsky as a witness to testify to this chain of events to establish that the area remained commercially viable.

The trial court did not permit defendants to do so, citing two reasons: that the transaction was too remote in time and that Seninsky had not been identified as a potential witness during the jury voir dire. We agree with the first but not the second.

We understand the reluctance of the trial court to risk a mistrial at the point in the proceedings at which the issue of Seninsky's testimony arose. The first step in the process,

however, should have been to inquire whether any members of the panel knew Seninsky rather than a blanket ruling barring him from taking the stand.

D

As we noted, a nearby pier to defendants' property was damaged by a fire in 1988. The trial court precluded defendants from presenting evidence that the pier had been demolished and removed by the time of taking and was scheduled to be rebuilt. Defendants wanted to present this evidence to demonstrate that the demolition of the pier had improved the neighborhood.

Before ruling on the issue, the trial court held an evidentiary hearing outside the presence of the jury. Plaintiff's Business Administrator, Howard H. Woolley, Jr., testified in that hearing that the pier's demolition and proposed reconstruction were part of the redevelopment plan the City had adopted in 1996. At the conclusion of the hearing, the trial court ruled that because the demolition of the pier was part of the redevelopment project, neither party could use evidence with respect to the pier, its demolition or its reconstruction, as a factor in determining the fair market value of defendants' property on the date of taking.

In our judgment, the trial court's ruling was correct. Hous. Auth. of Atlantic City v. Atlantic City Exposition, Inc., 62 N.J. 322 (1973), is instructive. In that case, "everyone

knew" that a street was vacated as part of a proposed plan of urban renewal, and that the condemnee might get "the full beneficial use" of that additional twenty-five-foot strip of land. Id. at 328-29. The Supreme Court, however, held that neither party could use evidence of that proposed project to affect the valuation in the condemnation case. Id. at 329. According to the Court,

> anything done pursuant to the announcement of such a public improvement, and in implementation thereof--as in this case the vacation of South Georgia Avenue--will be equally irrelevant upon the issue of fair value. Improvements or changes contemplated by the condemning authority and undertaken at its expense cannot be taken into account in determining just compensation.
>
> [Id. at 330.]

IV

When plaintiff filed its complaint, it described the property to be taken as having a depth of 125 feet to the high water mark of the Atlantic Ocean. Defendants filed a motion to amend the complaint to enlarge the description of defendants' property to include an additional 93,393 square feet of beach upland, created as a result of a beach replenishment project undertaken by the Army Corps of Engineers and funded by the federal government, the State of New Jersey and the City of Long Branch. At the completion of this project, the mean high water mark of the Atlantic Ocean had moved 256 feet eastward from the

point at which it had existed previously. The trial court rejected defendants' pretrial motion to include this extra land within the property being taken. City of Long Branch v. Liu, 363 N.J. Super. 411 (Law Div. 2003). Defendants argue on appeal this was wrong.

We do not find it necessary in order to resolve this issue that we delve into the distinctions drawn by the common law with respect to boundary lines between accretion (a gradual, imperceptible buildup of land caused by natural forces), Hous. Auth. of Atlantic City v. State, 193 N.J. Super. 176, 179 (App. Div. 1984), and avulsion (a sudden removal or addition to land as a result of either natural or manmade forces), Garrett v. State, 118 N.J. Super. 594, 601 (Ch. Div. 1972).

It is undisputed that the enhanced beachland to which defendants seek to lay claim and for which they seek compensation was the result of a public agency spending public funds. We can perceive no policy justification which would permit defendants to reap such a private monetary benefit from those public efforts.

V

Defendants make two remaining, but related arguments. After the jury's verdict and the trial court's denial of defendants' post-verdict motions, the trial court entered an order for judgment on July 26, 2006, entering judgment in favor

of defendants for $1,450,000 plus interest from the date of taking through July 31, 2006, of $198,877.67. The order further provides that post-judgment interest shall "accrue pursuant to Court Rule 4:42-11 until said judgment is paid in full."

The trial court thereafter granted plaintiff's motion to stay defendants from withdrawing any of the funds on deposit. Defendants contend that was error. That argument, however, is moot because this court dissolved that stay by our order of October 17, 2007.

Finally, the parties dispute the proper calculation of post-judgment interest. Plaintiff argues that defendants are not entitled to post-judgment interest beyond that set by the trial court because defendants chose to appeal the judgment. We disagree. Defendants cannot be penalized in such a fashion for exercising their appellate rights. That is particularly so, in our judgment, in light of plaintiff's efforts to bar defendants from withdrawing any of the funds on deposit.

Defendants are entitled to post-judgment interest, calculated as directed by the trial court, from the time the funds were deposited with the court until October 17, 2007, the date upon which we dissolved the stay which had precluded defendants from obtaining access to these funds. Once defendants had the ability to obtain these funds, their entitlement to post-judgment interest ended. Harris v. Peridot

Chem., Inc., 313 N.J. Super. 257, 300 (App. Div. 1988). If the parties are not able to agree between themselves as to the proper calculation, they shall seek relief before the trial court.

Affirmed.