STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION Plaintiff/Respondent		SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO: A-812-23
vs.	: : : : : :	CIVIL ACTION
KRISMIC ASSOCIATES, INC., a New Jersey Corporation; MAGYAR BANK, a New Jersey State Savings Bank; STATE OF NEW JERSEY; AVOLIO'S RENTALS AND SALES, INC., a New Jersey Corporation, d/b/a United Rent-All of Bridgewater; and TOWNSHIP OF HILLSBOROUGH, in the County of SOMERSET, a Municipal Corporation of New Jersey Defendants	: :	On Appeal from a Final Judgment of the Superior Court of New Jersey, Law Division, Somerset County, Docket No. SOM-L-400-19 **Sat Below:** **Hon. Fred H. Kumpf, J.S.C.** **Hon. Edward M. Coleman, J.S.C.**

AMENDED BRIEF ON BEHALF OF DEFENDANT KRISMIC ASSOCIATES, INC.

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PRELIMINARY STATEMENT

In this condemnation case, the taking by the Commissioner of Transportation of March 28, 2019, involved a strip of frontage along Route 206 in Hillsborough, N.J. along with a larger taking at the north end of the property where Krismic Associates, Inc. (Krismic)was planning to install a northern access at a traffic light installed as part of a recent larger residential development access directly across Route 206.

Krismic presented testimony on the access issue, which involved the likely approval of such a northern access to the subject commercial property. Because of this project, the application was withdrawn, so the State's appraisal expert never gave an opinion on the issue, assumed no damages, and limited his opinion to the value of the land and improvements only.

The property owner's appraiser and the trial judge accepted the testimony of defendant's traffic and environmental experts and concluded that there was a reasonable likelihood that the northern driveway access would be approved and Brody's appraisal provided a value for the vacant land, which the trial court adopted and also an income approach "before and after" for a value of just compensation including both value for the taking and damages to the remainder.

The trial court accepted all of Brody's calculations except Brody's change of the capitalization rate from "7% before to 7.5%" after.

Unfortunately, the trial judge made a mistake in his calculations of just compensation using Brody's vacant land number for the "before" and the income approach for the value after as shown below:

Before value as vacant land (14.25/SF X 147,015 SF land	$2,095,000.00
After value of remainder as improved per Court with Court's 7% Cap Rate	$2,044,000.00
.....	$51,000.00

A classic example of viewing apples (land only before) and oranges (land, buildings and improvements after).

The result mistakenly reflected only $51,000 in damages.

Comparing apples (Brody Income Approach before less –	$2,700,000.00
Court's conclusion on income approach after at 7%	$2,044,000.00
	$656,000.00

Factoring out the court's finding as to land taken ($366,000), site improvements ($3,000) and easements ($27,000), leaves damages of $260,000. Accordingly, the award of just compensation should have been $656,000.00 based on Judge Kumpf's findings of fact.

AS TO THE RATE OF INTEREST

The allowance of interest on a condemnation award, as opposed to a tortious injury case, is constitutionally required. Where, as here, payment is not

contemporaneous with the actual taking of the property. Interest is regarded as part of the owner's constitutional right to "just compensation". As always in determining "just compensation" the object is to return the property owner to the same financial position he would have been in, but for the condemnor' s action.

In this case, Krismic is required to turnover the proceeds of the award to the defendant mortgagee, Magyar Bank. Because of the delay in receiving payment from the date of taking, Krismic has been paying interest at a negotiated market rate. Obviously, the fair rate to apply in this case would be to assess the same rate that Krismic has been paying on its commercial mortgage. Instead, the written opinion, in a clear abuse of discretion found that the State should not be subject to the higher commercial rates of interest based upon the riskiness of the loan or the credit worthiness of the property owner. Because of the low risk, there is no reason for the State to pay more than the rate under R.4:42-11(a)(iii).

Our concept of "just compensation" is based on market values and interest rates are an important factor in determining market value.

Further, monthly payments of interest require compound interest on at least an annual basis to stay close to full reimbursement for the monthly interest payments.

PROCEDURAL HISTORY

After the filing of the complaint on March 28, 2019 and the declaration of taking on September 12, 2019, the appointment of commissioners, a commission hearing, and appeal all followed without incident leading up to the trial. (Da1)

However, there were two relevant in limine motions argued immediately before trial on November 8, 2021. In the first motion the court ruled that damages related to placing a median separating and denying access from the existing driveway in the southern/middle section of the property were not compensable. (1T20:18-20)

We call this court's attention to the fact that Mr. Brody was allowed to modify his report to exclude any impact from the median on his opinion of value.

Also, the trial court denied the State's in limine motion to bar testimony as to the reasonable likelihood of obtaining a northern access near the traffic light on Route 206.(1T32:7-14).

The non-jury trial conducted via zoom started November 8, 2021 taking 5+ days intermittently ending on December 23, 2021 at 10:02 a.m. with summations.

On December 5, 2022, almost a year after completion of the trial the court rendered an oral opinion finding just compensation to be $396,000 for the fee simple taking and easements and $51,000 for damages to the remainder, or a total of $447,000. (7T34:20-23)

On March 15, 2023, Krismic filed a motion for reconsideration under R.1:7-4 and R.4:49-2, and a motion to award interest.

Numerous dates were scheduled and adjourned until an opinion was rendered dated September 22, 2023. (Da202). That opinion assumed that the motion for reconsideration addressed only the finding of the $51,000 in damages and clarified that of the $51,000 in damages, $30,000 was attributable to the likelihood of obtaining the proposed northbound exit at the traffic light and $21,000 for the loss of 37% of the frontage along Route 206 and because of the increased zoning non-conformity of the remainder because of the taking.

The opinion did not change any of the findings of facts of the oral opinion and did not acknowledge or recognize the error in the calculation by which the court reached the $51,000 damage conclusion. Instead, it relied upon the damages figure of $51,000 "which the court found in the decision on December 5, 2022". (Da210).

The court then addressed the interest issue and awarded interest based on the tort rule rate under R.4:42-11(a) at simple interest.

On October 4, 2023, the order for final judgment was entered fixing just compensation and interest and on November 6, 2023, was filed fixing just compensation and providing for payment. (Da214)

This appeal is from the final judgment fixing just compensation and the interest calculations included therein as to the rate and seeking compound interest[1]. (Da227).

STATEMENT OF FACTS

The subject property in this case was a tract of 3.75 acres with frontage of 620 feet on Route 206 southbound side. (1T110:23-25). The taking included a "flag" area at the northern end of the property where there was an existing light at Valley Road. The taking also relocated the intersection at Lake Road on the west side of Route 206 onto the flag area creating a new controlled intersection. (1T114:6-21). The frontage is reduced from 620 feet to 390 feet on Route 206. (1T122:24-25).

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[1] 1T-11/8/21 Trial
2T-12/06/21 Trial
3T-12/10/21 Trial
4T-12/20/21 Trial
5T-12/22/21 Trial
6T-12/23/21 Trial
7T-12/05/22 Decision
8T-06/29/23 Motion

Because of the taking of the northern flag area including the frontage on Route 206, the proposed northern access application was no longer viable and was discontinued. (1T120:17-25). Additionally a number of easements were taken.

The loss of the opportunity for the northern exit meant that a customer at the subject location who was traveling north and wanted to continue north, would have to go past the subject for a half mile, take a jughandle, a traffic light and then go a half mile back to enter the property. (1T106:19-107). To go back north one would have to exit southbound and go three quarters of a mile to a jughandle with a light and continue north for a round trip of a mile and a half. (1T107:16-108:6-12).

Accordingly, as a result of the taking and the finding by the court that obtaining the northern access of the Valley Road traffic light was reasonably likely, but for the taking, Krismic was entitled to compensation for the taking of the land and easements together with damage for the loss of 230 feet making up 37% of its original 620 feet, its loss of visibility, and increased non-conformity with zoning, together with the loss of its proposed access allowing customers to go directly north or south upon exiting the property on Route 206. (Da204).

The loss of the access at Valley Road/Lake Drive was particularly damaging in view of the fact that the new development across the street would have had direct access to the subject property for the 600 unit residential development and hotel. (3T12:18-25).

ARGUMENT

POINT I

WHETHER THE TRIAL COURT'S COMPUTATION OF DAMAGES WAS BASED ON PLAINLY INCORRECT REASONING(7T31:11-23)

The findings of fact by a trial judge in a non-jury case are entitled to deference by an appellate court, "when supported by adequate, substantial and credible evidence. In drawing conclusions from those facts, the judge is required to accept legal and equitable principles; no deference is afforded". Marioni v. Roxy Garments Delivery Co. Inc., 417 N.J. Super. 269, 275 (App. Div. 2010), Citing: Rova Farms Resorts Inc. v. Investors Ins. Co, 65 N.J. 474,484 (1974).

In this case, the trial court agreed with virtually all the findings of plaintiff's appraisal expert, but drew the wrong conclusions based on plainly incorrect reasoning.

Both appraisers gave their opinions as to the value of the land only, the court accepted the opinion of $14.25 per square foot testified to by Krismic's

appraiser, Jon Brody. (7T33:8-11). The court found that the taking caused damage to the remainder, because the loss of the reasonable probability of obtaining a second egress permit. (7T32:8-13).

The only evidence before the court as to the value of the property complete with buildings and improvements was Brody's income approach before the taking, with which the trial court did not ever disagree. Brody's opinion of $2,700,000.00 was based on overall capitalization rate of 7% (7T30:25-31:1). The trial court found the 7% before the taking to be appropriate, but disagreed with Brody's raise to 7 ½% in the after. The court found no basis to differ the 7% capitalization rate for both before and after valuations. (7T31:2-15).

The court never seemed to understand the basis for Brody's estimation of damages of $376,000 saying:

> This number seems to be arrived at by dividing the value of the land taking of $396,000 based upon the $14.25 per square foot value from the overall damage of net income over capitalization rate. (7T30:21-25).

However, based upon Brody's income approach analysis, using the 7% cap rate the court concluded to an after value of $2,044,000.00. (7T31:11-15) The appropriate mathematical computation is obviously to take the value as determined before the taking at 7% cap rate, less the value after the taking at 7%

cap rate giving a total just compensation of $2,700.000 - $2,044,000 = $656,000.00. The court however mistakenly used the before value of the land only of $2,095,000.00 and concluded to a value of $51,000 as damages to the remainder. Then adding that, "I find that the premium a buyer would consider additionally paying for the probability of a second egress permit would be $30,000. (7T31:21-23)).

The court here seems to be referring to a premium that he believed would have been paid of $30,000 for the land only referring to Brody's land only before approach applying a Gorga premium analysis (see State v. Gorga, 26 N.J. 113(1958) instead of Brody's Caoili discount of 5% from the value as if the access permit were in place. State v.Caoili, 135 N.J. 252 (1994)This analysis by the court is an inappropriate anomaly which the court translated into damages.

The issue as it relates to damages to the remainder is not the value of a second egress before the taking, but rather the loss of the property's only northbound exit in the after situation. Two very different issues. With the northern ingress/egress, the property enjoys a corner location at the existing traffic light, two factors for which Brody made positive adjustments. Further, the intersection would have provided direct access to the property from the new 600 unit residential complex.

The value of the land only based upon the $14.25 per square foot has absolutely nothing to do with the calculation of the appropriate amount of "just compensation" that value only applies to allocation.

Brody's analysis of the value of the land only was consistent with the Gorga/Caioli analysis (Da64-Da66) however Brody used the Caioli methodology in finding a reasonable likelihood of approvals deducted 5% from his land only before value concluding to the $14.25 that the court adopted.

The "before and after" analysis under the income approach included all of the factors including the taking of the land and the easements, the loss of frontage, the loss of the likely northern ingress and egress and the concomitant loss of corner influence, the loss of the use of a controlled intersection, virtually direct access from the new 600 unit residential complex across the street as factors impacting the after value of $2,044,000.00.

The court's opinion related to a premium under Gorga considered in the before land only analysis does not relate to the income analysis of the before and after approach.

Brody's before value under the income approach, with which the court implicitly agreed, included those benefits, as reasonably likely factors. The after analysis properly considered the loss of the factors of his before scenario. The

court's use of the land only as the before value in his calculation of damages makes any reference to a premium meaningless. Further, a seventy percent probability by itself has no meaning other than it is simply "reasonably likely". The court agrees to the $14.25 land value which included a 5% negative adjustment under Brody's Caioli analysis. A five percent adjustment on the land only value of $2,095,000.00 equates to $104,750.00 reduction in the land value.

The court's opinion leaves only $30,000 as a premium for the likely probability of 70% to allow for such a probability or a premium of .01 or one tenth of one percent. Such a result is absurd. The $30,000 would be closer to the cost of the making of the application with environmental and engineering experts involved and it would obviously have a dramatic impact on the value of property after the taking when its loss leaves the property with no north bound exit. The difference between the value of the northern ingress and egress access in the before and after situation has been entirely ignored by the court, but its impact in the market place is huge. As Brody testified, the loss of a second eye or a second kidney is a more dramatic example of the same point.

Surprisingly, the written opinion of September 22, 2023 (Da203)opens with an explanation of the law denying compensation for installation of the center barrier which was excluded before trial and never part of the case.

Thereafter, at (Da204) the court recounts its December 5, 2022 discussion finding as facts:

> 1. damage to the remainder,
>
> 2. a 70% probability of obtaining a second egress permit from the property,
>
> 3. damage to the remainder for the loss of frontage being reduced from 619 feet to 390 feet along Route 206;
>
> 4. increased non-conformity of the remainder of the premises.

The opinion then states that there is an additional $51,000 just compensation as a finding of fact rather than as the erroneous calculation set forth at 7T31:11-20) mixing apples and oranges by subtracting the value after under the income approach including the land and buildings for the land only value. Then, allocating that value as $30,000 for the premium and $21,000 for the loss of almost 40% of the frontage and the increased non-conformity.

By way of explanation of a reason for its ruling of $51,000 as damages for the taking, the opinion at (Da206-Da209) begins an explanation of the law as to probability of a zoning change. Ultimately, concluding “it is unlikely" that

a willing buyer would have increased an offer for the premises because of the probability of obtaining a second egress in the amount of $656,000 or even $576,00)." (emphasis added). The court then refers to the $51,000, which the court found in the decision of December 5, 2022. (Da209)

Thus, the written opinion makes clear that the trial judge was not only doubling down on his $51,000 conclusion based upon the faulty mathematical calculation made in his original oral opinion (7T31:11-20) but also, that his view of the damages to the remainder is based upon his view of the value to the property as an additional second egress in the before situation rather than as the loss of its only northbound exit in the after condition. (Da209)

POINT II

WHETHER THE TRIAL COURT RELIED UPON THE APPROPRIATE CONSIDERATION OF PREVAILING COMMERICVAL MORTGAGE AND PRIME RATES, INCLUDING THE ACTUAL RATE THE OWNER WAS PAYING IN DETERMINING THE APPROPRIATE RATE OF INTEREST TO PROVIDE "JUST COMPENSATION"(Da212)

The allowance of interest on a condemnation award is a requirement of constitutional magnitude, where, as here payment is not contemporaneous with the actual taking of the property. It is important to understand that interest is regarded as part of the owners constitutional right to just compensation. Township of Wayne v. Cassatly, 137 Super. 464, 471 (App. Div. 1975) cert. denied 70 N.J. 137 (1976) . Rockaway, v. Donofrio, 186 N.J. Super. 344, 353, (1982) cert. denied 95 NJ 183 (1983). Trial judges have broad discretion and flexibility in setting interest rates, but the Constitution requires that such rates be just. Interest is to be considered on a case by case basis rather than by reference to rigid guidelines. State v. Nordstrom 54 N.J. 50, 54, 1969; Cassatly, at 474.

The constitutional requirement of just compensation has been implemented by statute N.J.S.A. 20:3–31 which provides in pertinent part:

> [i] interest as set by the court upon the amount of compensation, determined to be payable hereunder shall be paid to the condemnee from the date of the commencement of the action until the date of payment

> of compensation… [Less all monies previously deposited].

N.J.S.A. 20:3–32 provides in part: …

> "The amount of such interest, shall be fixed and determined by the court in a summary manner after the determination of compensation…"The determination of the amount of interest in condemnation, however, is not to be devoid of evidential input, Cassatly.

In Cassatly, at 474, the seminal case in this regard, the Appellate Division, instructed that the judge consider, "prevailing commercial interest rates, the prime rates, and the applicable legal rates of interest." Id. The judge should then select the rate or rates of interest, which will indemnify the condemnee for the loss of use of the compensation, to which the condemned has been entitled from the date of complaint to the date of payment, less interest on any amount previously deposited as of the date of deposit.

It should be important to note that the New Jersey Law Revision Committee tentative Report on Eminent Domain Action, February 6, 2023, proposed a modification to N.J.S.A.20:3-32 Disputes to Interest providing:

> (b) In determining the amount of interest rate best indemnifies the condemnee for the loss of the use of the compensation to which the condemnee was entitled, the court may consider:
>
> (1) prevailing commercial interest rates;
>
> (2) prime rates;
>
> (3) the applicable legal rates of interest;

> (4) the interest rate set by N.J. Court Rule 4:42-11; (Da174,175).

After a public hearing, the Law Revision Committee rejected the proposal to add R.4:42-11 (Da176) Final Report June 15, 2023.

The rejection of proposed amendment to add N.J. Court Rule 4:42-11 as a source that could be considered by the courts as a new subsection (b)(4) was entirely appropriate because the rates based upon the N.J. Cash Management Fund for municipalities and other political subdivisions have no rational relationship to any of the rates applicable to a private person dealing with interest rates in the market place of the commercial world within which property owners would have to negotiate. The Final Report of the Law Revision Committee provides that the court .may consider "any relevant evidence, including but not limited to "commercial rates, prime rates and legal rates. (Da194).

In some cases, an appropriate investment return or other commercial rates of interest have been applied but, in no case, has anyone ever shown that the State Cash Management Fund rates have any rational relationship to the dilemma faced by a property owner who does not receive the compensation for his property until years after the taking. The fund rate simply represents the income return to municipalities and state agencies on their daily demand, minimum balance accounts; similar to checking accounts or private cash management funds. Short term notes are cheap

and daily deposit rates are cheaper. A demand deposit rate has no reference to a loan rate based upon an indeterminant term of 3 to 5 years.

The tort rule rate comes from the common law and does not have any relevance to meeting the constitutional requirement of just compensation.

Based upon its common law roots, the Rule provides for simple interest which has wrongly become often used as trial judges now often deny compound interest simply relying on R. 4 :42-11 even though such reliance is totally misplaced and is inconsistent with the constitutional mandate of just compensation.

Indeed, the history of R:4:42–11 reveals that it's origin was to be remedial in the sense that the common law did not provide for prejudgment interest of non-liquidated damages in tort or contract cases. In fact, the rule is probably unconstitutional as a violation of the courts rulemaking power under the New Jersey Constitution. In Busik v. Levine, 63 N.J. (1973), the court in a 3,2,2 decision decided to uphold the rule, finding that the difference between substantive and procedural law was often a difficult distinction and sometimes without a difference. Chief Justice Weintraub writing for the controlling decision found that since the courts dealt with substantive law as a matter of the nature of the judicial process, and could award interest in the individual case, the question of whether the court rule was unconstitutional as beyond the scope

of procedural rules was a moot question. The opinion noted that the rule was basically remedial since a substantial body of law found it appropriate to allow interest on unliquidated sums and the rule and would " hopefully induce prompt defense consideration of settlement possibilities." It should be noted that the Chief Justice began his analysis by pointing out that the legislature had not dealt with the subject of interest except in the area of usury. It may be a fair inference to conclude that the Chief Justice did not consider R.4:42–11 to refer to eminent domain at all, since the opinion was written in 1973 and N.J.S. A.Title 20 §31 and 32 were adopted in 1971. The Supreme Court was certainly aware of the statute, but apparently did not consider it related to the issues addressed by R.4:42 -11.

INTEREST IS PART OF JUST COMPENSATION AND MARKET RATES OF INTEREST ARE A MAJOR FACTOR IN CALCULATING THE AMOUNT OF JUST COMPENSATION.

In eminent domain cases, interest is part of the constitutionally required "just compensation". Cassatly, at 471. Just compensation is generally determined by the market value of the property taken . In partial takings such as the instant case, the just compensation is generally determined by the value of the property before the taking less the value of the property after the taking. Such was the process here. Interest awards are part and parcel of "just compensation" and the market interest rates are factors in the calculation of "fair

market value" by expert appraisers. Just compensation in eminent domain cases is almost always a function of the market value of the property before and after the taking. Market value is defined by the Dictionary of Real Estate Appraisers as "the most probable price which a property should bring in a competitive open market…under conditions whereby payment is made in cash in US dollars or in terms of financial arrangement comparable there too." (Da022). In this case, Jon Brody used a capitalization rate of 7% for the before and after 7 1/2% after. The court found the appropriate Capitalization rate to be 7% in the after but the mortgage component was 5% (Da086) for 25 years as of the date of the complaint March 28, 2019. Whether an appraiser uses the income approach where interest rates are part of the capitalization computation, or the market approach where sales prices of similar properties are influenced by the market interest rates on purchase money mortgages; the market interest rates, applicable to the type of transaction, are a functional component of the market price considered as just compensation. Accordingly, the court should award interest based on the market rate of interest appropriate to the transaction before the court as initially required by Cassatly. To do otherwise is changing the basis upon which the factfinder determined the amount of just compensation. The definition of fair market value includes the concept of cash paid upon the transfer of title or the date of taking. The interest rate paid by the purchaser is

determined by the market rate. The amount of compensation is in principal part determined by the market rate of interest. The last two paragraphs of this court's opinion in Twp of West Windsor v. Nierenberg,285 N.J. Super. 436 (App. Div. 1995). refers to the contention that there should be some uniform rule for interest rates in condemnation cases, saying:

> Deciding the issues on a case by case basis without some unifying framework of analysis poses substantial dangers to the rights of property owners, public entities and the judicial process itself. It is axiomatic that similarly situated property owners should be treated in the same manner.

However, there is an appropriate unifying framework rooted in Cassatly in using the appropriate commercial rates (including mortgage rates) in order to make an informed decision regarding the rate that will best indemnify the condemnee.

Interest is both a component of and a product of, the determination of market price in each individual case.

The dictionary of Real Estate Appraisers defines market price as "the most probable price which a property should being in a competitive open market…under conditions whereby, payment is made in cash in US dollars or…(similar terms). "Market price" is the benchmark of "market value" and thus, just compensation.

Of the three approaches to value, the income approach, utilized in this case by defendant's appraiser Jon Brody, and adopted by the trial judge most easily illustrates the point that the interest rate used in the determination of the market value of the property (based on date of contract closing) is the appropriate interest rate for that individual case; unless other facts or circumstances would supersede for some reason. The rate of interest used in Brody's calculation of the 7% capitalization rate adopted by the trial court for both the before and after values was based on Brody's investigated rate of 5%. Accordingly, that 5% interest rate was an integral component of the trial courts acceptance and finding as to the value of the property before the taking and "after", if properly computed. The actual rate for the Krismic mortgage in 2019 was 4.35%, which would have led to a slightly higher value.

A lower interest rate used would have yielded a lower cap rate and thus a higher value. Conversely a higher interest rate converts to a lower market value.

Similarly, the mortgage rates for comparable sales used in both the "market" and "cost" approaches to determine value are generally available from recorded mortgages other sources available to appraisers who are responsible to confirm that the market price is a function of financial arrangements typical to

the market and not some unique arrangement more favorable to one of the parties that would influence the market price of the sale.

In a super majority of the condemnation cases, the frame work is there and is to be found in the testimony of the appraisers. Ironically, in a case such as this, where only the income approach is appropriate, typically the condemnor' s appraiser will use a higher interest rate to form a capitalization rate yielding a lower value and vice versa. Therefore, a verdict on the high side representing the property owner's opinion of value would justify a lower interest rate; whereas a verdict on the low side would probably be based on and justify a higher interest rate. In this case, the condemnor' s appraiser gave no opinion of the market value of the entire property before the taking.

The point is that the appropriate instruction to trial courts seeking the interest rate that best identifies the fair rate for withholding the balance of the market based determination of the just compensation, is the rates used to determine the amount of just compensation in the first place. That is the appropriate framework for consistency and justice in the individual case. There is no legitimate distinction between the principles involved in determining the amount of the award for property interest and the award of interest. Both are necessary components of just compensation.

Simple or Compound Interest.

The question of whether compound interest should be awarded on the deficiency of payment of just compensation from the date of taking to payment was resolved in the affirmative by the trial court opinion in the Borough of Wildwood Crest v. Smith, 235 N.J. Super. 453, 457 (Law Div. 1988), aff'd., 235 N.J. Super. 404 (App. Div. 1988). In his well-reasoned opinion, which the Appellate Division affirmed, Judge Callinan stated:

> The basic transaction in awarding compensation to a landowner whose property is taken by the State for public purposes is to award the landowner fair compensation for the property calculated as of the date of taking. In the calculations which project forward the fair market value award to the date when compensation is finally paid, the courts have treated the question as of one of detention of funds. Just compensation requires that the owners of the land be compensated for the delay or shortfall in the deposit of this amount. U.S. v. Blankinship, supra. [543 F. 2d 1272 (9th Cir. 1976)]
>
> If the full value of just compensation had been paid to the property owner contemporaneously with the taking, the landowner would have had the opportunity to earn compound interest on those funds. Prohibiting the landowner from recovering compound interest on a deficiency acts to effectively reduce the awarded past value by understating its present worth. U.S. v. 319.45 Acres of Land, supra, [508 F. Supp. 288 (W.D. Okla. 1981)].
>
> The thrust of the present proceeding is to make the plaintiff whole for the detention of monies justly due

> and owing. To apply an annual interest rate for the use of withheld funds and not insist on either timely payment of interest (concededly impossible) or annual compounding would be fatal to the very hypothesis that the detention is to be treated as a prudent business transaction. Indeed as the unpaid interest accumulates, the accumulated interest is the equivalent of an interest free loan. This beneficence is not generally the hallmark of any prudent commercial transaction.
>
> The award is subject to interest at the previously ordered rates, compounded annually. (Emphasis added.)

The trial court in Wildwood Crest, supra, rightly concluded that the thrust of the proceeding to determine the issue of interest is to make the property owner whole for the detention of the monies justly due and owing and rightly concluded that the award of interest must be compounded as a mandate of constitutional dimension. The Appellate Division affirmed the award of compound interest substantially for the reasons given by the trial judge. 235 N.J. Super. at 407.

Compounding interest recompenses the property owner for the condemnor's detention and use of funds owed to the owner as of the date of taking, and which the condemnor should have paid at the outset. Thus, compound interest falls squarely within the constitutional purview of just compensation. For example, a condemnee could have earned compound interest in the marketplace or made an investment that received incremental increases in value, which would become added to the principal and, thus, also subject to the

rate of return. Annual compound interest, compared to simple interest, properly adjusts the award of just compensation to more closely resemble economic realities, and accounts for the actual economic loss and penalty to the property owner for the delay in payment.

Annual compound interest also serves the constitutional purpose of making the property owner as whole as possible for the taking of the property by acknowledging the economic impact to the landowner resulting from the inability to immediately use the funds that became due at the time of the taking. In light of economic realities, compounding interest on the condemnation award represents the total "just compensation" owed to the property owner by taking into account the time value of money. Jersey City Redev. v. Clean-O-Mat, 289 N.J. Super. 381, 401 (App. Div. 1996) certif. denied, 147 N.J. 262 (1996). In Clean-O-Mat, the Appellate Division affirmed the Rule rates, compounded annually, although another panel in Casino Reinvestment Dev. v. Hauck 317 N.J. Super 584 (App. Div. 1999) upheld the application of R. 4:42-11 and affirmed an award of simple interest mistakenly citing the Clean-O-Mat case.

It is given that the constitutional requirement is that the property owner be made whole by the award of just compensation. Interest is required because the full amount cannot possibly be yet determined as of the date of taking. One could argue that the result is a necessary "temporary taking" by the government

of the money. This suggests another possible approach again using market rates of interest. Ordinarily where there is a temporary taking the appropriate mode of compensation is an amount based upon an appropriate rent. Perhaps, another possible idea behind the original legislation (N.J.S.A. 20:3-32) and Cassatly. Thus, application of the prevailing commercial rates and mortgage rates would represent appropriate compensation or rent for the temporary taking of the balance of the compensation until the determination of a final judgment and any appeals.

State Tax Rates.

It may also be instructive to look at what the State says the rent or interest rate should be when the situation is reversed and citizens are holding money due to the State. The assessed interest rate on the tax balances due for the period from January 1 through December 31, 2023 is 10% compounded annually. That rate is based upon a prime rate of 7% plus 3% compounded annually. is the N.J. Division of Taxation's Notice of the 10% interest, compounded annually for tax deficiency in 2023, as well as the rates for past years.

Prime Rates

It should be remembered that prime rates are only given to corporations or other major clients of the bank with the absolute best credit rating. Most

commercial loans negotiated are based on prime +1,2, or 3 added percentage points.

The Certification of Jon Brody (Da142), for defendant provides the actual Krismic rates paid to Magyar Bank, American Council of Life Insurance ('ACLI') fixed commercial mortgage rate for loans less than $2 million, and the prime rates as set by JP Morgan Chase Bank and Commerce Bank for the Court's consideration with respect to the relevant time period. (Da230)

The Trial Court Opinion on Interest is Not Based on Factors Relevant to Satisfy the Constitutional Requirement of Just Compensation

The concept of "just compensation," as to interest requires the property owner be put in the same position he would have been in had the money been paid contemporaneously with the taking. Wildwood Crest, at 457. In this case, the property owner was forced to pay interest on the balance of the award at the previously contracted variable rate of prime plus 2%. A rate freely negotiated at the market rate prior to the taking.

The trial court reviewed the chart of rates submitted by defendants and concluded that "the Krismic rates were fairly stable or going down from 2019 [Apr-Dec] to July of 2022. Then beginning in July of 2022 rates began creeping up from 6 3/4% to 9 ½%". The trial court opinion does not reveal to what extent

"stability" means when prime rates and Krismic rates jumped more than double from 2021 to the beginning of 2023, had on the opinion, but it obviously should have been a factor based upon the trial court's opinions.

Frankly, we have never been able to recognize why the "stability of interest rates should justify using a rate that is in no way relevant to the market rate applicable to the market value of a given subject property.

Assume the taking of a single family residence where purchase mortgage rates are generally stable at 6% during the relevant three year period. Why would a "stable" rate of 2.25% under the tort rule for the same period be suitable as a measure for determining an appropriate rate to satisfy the constitutional requirement of just compensation in a case where the property owner is actually paying the market rate of 6%. Similarly, if rates vary, commercial market rates are adjusted as in the instant case on the property owner by variable rate mortgages. In 2023, the Krismic adjustable rate and prime rate jumped by 3 percentage points. Payment under the tort rule rate have no effect on the obligation to restore the defendant to the financial position he would have been if payment had been paid in case simultaneously with the taking.

The "stable rates" idea seems to having sprung from the trial court in the Hauck case and was later conditionally endorsed by both the Appellate Division,

317 N.J. Super. 384 (App. Div. 1999) and the Supreme Court 162 N.J. 576 (2000); although a review of those opinions suggests that not much thought or analysis was focused on the point. Those opinions endorse Wayne v. Cassatly, supra, which requires the use of applicable market rates and is diametrically opposed to basing the applicable rate in the individual case on a rule, much less a rule that bears no relationship to the market rate applicable to the individual case.

More importantly, the actual finding of the trial opinion in the instant case at (Da212) states:

> I find that the State should not be subject to the higher rates of interest based upon the riskiness of the loan or credit worthiness of the property owner. The State is not subject to that kind of risk with respect to the funds it owes. So there is no reason to make the State pay the higher interest rate beyond that provided for in R.4:42-11(a)(iii). I find that the interest rate under R.4:42-as(a)(iii) provides for a just compensation for the taking in the circumstances in this case.

This opinion turns on the takings clause of the Constitution on its head. The interest of the constitutional provision is to protect property owning citizens from the autocratic aggressiveness advocated by the State's expert witness in this case and adopted by the trial court opinion. Just compensation is considered from the viewpoint of the property owner, not the State. State v. Willaim G. Roher, 80 N.J. 462, 467 (1979), citing 4 Nicholas, Eminent Domain §12,21 at

12-86-1 (3rd Ed 1978). Further compensation implies full indemnity to the owner.

As referenced above, Cassatly, at 474 sets forth the appropriate standard to guide the trial judge in determining "the rate of interest which will best meet the constitutional requirement of just compensation." That court then ordered that after reviewing evidence as to the prevailing commercial interest rates, the prime rate, and applicable legal rates of interest, the court should then select the rate or rates of interest which will best indemnify the condemnee for the loss of the use of the compensation to which he has been entitled from the date of taking.

The expert witness for the State misunderstood the nature of his version of the hypothetical transaction of the State as the purchaser of the property. The terms of the payment of "market value" are cash at closing, not a loan to the State at an artificially low interest rate because the State has good credit. Market value was the standard used by both appraisers and accepted appraisal practice.

In this case, selection of the appropriate rate of interest which will best indemnify the property owner and return him to the same financial position he would have been in had the compensation been paid to him on the date of taking, is painfully obvious. The money would have gone directly to the bank and the

owner would have been spared the obligation to pay interest on that amount at his market mortgage rate of prime rate plus 2%.

CONCLUSION

For the reasons set forth above, the plainly incorrect reasoning of the trial court. and because the trial judge, then retired and on recall and is now fully retired, we ask the court to make appropriate findings and conclusions and correct the error of using the value of the land only of $2,095,000.00 instead of the value of the land and buildings of $2,700,000 in the calculation of just compensation deducting $2,044,000 from the value of the land and building before concluding with an award of just compensation of $656,000 and entering judgment in that amount, plus interest as determined by this Court, under its original jurisdiction under R.2:10-5. The alternative is to require a new trial and a new determination of interest, which should be unnecessary since the trial court accepted the relevant facts testified to by Brody, but simply misunderstood the implications of the facts and drew the wrong mathematical conclusion.

Respectfully submitted
Bathgate, Wegener & Wolf
Attorneys for Defendant,
Krismic Associates, Inc.

Dated: August 5, 2024

By: _____
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October 7, 2024

Via eCourts
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Superior Court of New Jersey
Appellate Division
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Re: State of New Jersey, by the Commissioner of Transportation v. Krismic Associates, Inc., et al.
Docket No: A-812-23T1

On Appeal from Final Orders of the Superior Court of New Jersey, Law Division, Somerset County
Docket No. SOM-L-400-19
Sat Below:
Hon. Fred H. Kumpf, J.S.C., retired on recall
Hon. Edward M. Coleman, P.J. Ch., retired on recall

Letter Brief on Behalf of Respondent State of New Jersey, by the Commissioner of Transportation

Dear Mr. Orlando:

Please accept this letter brief on behalf of respondent State of New Jersey by the Commissioner of Transportation.

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TABLE OF APPENDIX

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS[1]

This appeal arises from a condemnation action in which the New Jersey Department of Transportation ("DOT") exercised its eminent domain power to acquire a portion of property from Krismic Associates, Inc. ("Krismic"). The DOT filed a Verified Complaint on March 28, 2019. The subject property consisted of 3.375 acres with frontage of 620 feet on Route 206. (1T110:23-25).[2] The property was improved with a commercial building. (7T7:18-21).

DOT condemned a "flag-type" shaped piece of property. (7T5:24-5). The fee taking consisted of a strip of land along the western side of Route 206 and the eastern side of the property, in total about .59 acres, or 17.5% of the total square footage of the property. (7T6:1-7). The DOT also acquired permanent easements: a 4,492 square foot permanent utility easement and a 1,642 square foot permanent slope easement. (1T95:17-18; 1T222:22-25; 1T223:5-6; 7T6:16-21). The DOT also acquired a temporary site mitigation easement and a temporary erosion control easement. (1T102:4-6; 7T7:1-4). The taking enables DOT's contractor to relocate the intersection at Lake Road on the west side of Route 206. (1T:114:6-21). The location of Krismic's potential second

[1] Because the procedural history and facts are closely related, they have been combined to avoid repetition and for the court's convenience.

[2] This brief will follow Appellants' key to transcripts.

driveway would have been within the area to which the DOT relocated the intersection at Lake Road. (5T10:5-7). The taking reduced the property's frontage from 624 linear feet to 390 linear feet. (1T122:24-25).

Prior to trial, DOT filed two motions in limine. The trial judge granted DOT's motion to bar Krismic from presenting testimony at trial of alleged damages resulting from DOT's installation of a median barrier on the highway and revised traffic flow. (1T20:18-20). The trial judge denied DOT's motion to exclude testimony about Krismic's reasonable probability of obtaining a permit for a second driveway at the north end of the property. (1T32:7-14). The location of the potential second driveway was within the DOT's taking area.

At trial, both parties presented testimony by several experts, including real estate appraisers, to aid the court in reaching a just compensation amount. The DOT presented the testimony of Jerome J. McHale, MAI, an expert in real estate valuation. McHale's estimate of just compensation was $251,000. (7T10:18-20; 2T34:2-5). Krismic presented testimony by John Brody, an expert in real estate valuation. Brody's estimate of just compensation was $772,000. (7T16:22-25; 5T94:23-35). A six-day virtual bench trial was held from November 8, 2021 until December 23, 2021.

On December 5, 2022, nearly a year after the trial, the court rendered a bench verdict of just compensation in the amount of $447,000, which consisted

of $396,000 for the fee taking and the easements, and $51,000 in damages to the remainder. (7T34:20-23).

Judge Kumpf adopted the $14.25 per square foot value from Krismic's expert appraiser, Mr. Brody. (5T88:9-17; 7T31:16-18; 7T31:21-25). Judge Kumpf also considered Brody's testimony regarding capitalization rates at 7% and 7.5%. (5T78:22-25; 5T79:1-4). Judge Kumpf determined the before taking value of the property based on $14.25 per square foot for the 147,015 square feet was $2,095,000, rounded. (7T31:16-18). The judge determined the after - taking value should be based on a 7% capitalization rate.[3] (7T31:11-13). He arrived at a total value of the property that is left after the taking of $2,044,000. (7T31:13-16).

By adopting Krismic's per square foot value of $14.25, the judge found the value of the 25,700 square foot fee taking to be $366,000 (rounded) and concluded that it is a reasonable estimate of value. (7T33:8-14). The $366,000 value of the fee taking was directly from Brody's testimony. (5T88:14-17). Further, the judge used Brody's per square foot to arrive at a value of $30,000

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[3] "The overall capitalization rate is an income rate for a total real property interest that reflects the relationship between a single year's net operating income expectancy and the total property price or value. The overall capitalization rate is used to convert net operating income into an indication of overall property value. TD Bank v. City of Hackensack, 28 N.J. Tax 363, 400 (2015) (internal quotation marks omitted) (quoting Appraisal of Real Estate, 462 (13th ed. 2008)).

for all of the easements. (7T33:15-25; 7T34:1-4). Judge Kumpf concluded total damages for the taking is $396,000. (7T34:5-6).

Judge Kumpf also found damages to the remainder from the takings due to the reasonable probability that the owner could have obtained a second egress permit but for the project. (7T32:10-13). He considered Brody's testimony and found there would be a 70% probability that the second permit would be granted. (7T33:21-25; 7T33:1-4; 5T70:16-25; 5T71:1-8). The judge determined the premium a buyer would pay for the probability of the second egress permit would be $30,000. (7T34:7-12). The judge concluded the rest of the damages to the remainder to be $21,000 for the reduced frontage on Route 206 and the greater zoning non-conformity of the remainder. (7T34:7-15;5T67:24-6). These damages total $51,000. (7T34:16-19).

Altogether, the judge concluded $396,000 for the fee simple taking and the easements and $51,000 for damages to the remainder for a total of $447,000. (7T34:20-23).

On March 15, 2023, Krismic filed a motion to award interest as well as a motion for reconsideration, requesting the court reconsider and revise its just compensation verdict. Krismic's motions did not include any expert reports regarding the interest calculation. Instead, the motion included certifications by non-experts in support of Krismic's argument that the court should adopt

Krismic's actual mortgage rates paid on the subject property. On June 27, 2023, the DOT responded to the motions with an expert report on interest by economist Kristin Kucsma of Sobel Tinari Economics Group. (Pa1).[4] In that report, Kucsma concludes it is not reasonable to award an interest rate that reflects Krismic's mortgage rates because the mortgage rates reflect a level of risk not comparable to the DOT. (Pa4; Pa15). The interest rate attached to the DOT's debt to Krismic should reflect the DOT's low risk of default. Ibid.

Judge Kumpf denied Krismic's motion for reconsideration of the verdict and reiterated his findings in the original opinion. Additionally, Judge Kumpf found Krismic's assertion of $376,000 in damage to the remainder based upon a rental loss to be excessive. (Da209). He found that the probability of obtaining a second egress permit to the light at Valley Road, the reduction in the linear frontage on Route 206 for the property, the loss of 37% of the frontage on Route 206, and the increase in the nonconformity of the remaining property, resulted in minimal damage to the remainder. Ibid. He determined it is unlikely that a willing buyer would have increased an offer for the premises because of the probability of obtaining a second egress in the amount of $656,000 or even the $376,000. (Da209). Judge Kumpf found that Krismic failed to establish that the damage to the remainder of the property exceeds the $51,000 he originally

[4] "Pa" refers to DOT's appendix. "Da" refers to Krismic's appendix.

concluded on December 5, 2022. (Da209).

Regarding Krismic's motion to award interest, Judge Kumpf considered Krismic's brief and accompanying certifications, and DOT's brief and expert report. (Da209). Both parties agreed to rely on the papers submitted to the court rather than hold an evidentiary hearing. (Da209; Da210). Krismic did not provide an expert report on interest. (Da209). Judge Kumpf made findings after weighing all the submissions of both parties. His determinations were adoptions and conclusions from DOT's expert report by Kristen Kucsma. (Da209-Da212; Pa1; Pa4; Pa15).

Among the factors Judge Kumpf considered were the stability of rates under Rule 4:42-11(a)(iii) and the creditworthiness of the property owner compared with the creditworthiness of the state. (Da212; Da209; Pa4; Pa8-13; Pa17-18). He also considered Krismic's mortgage rates, American Counsel of Life Insurance mortgage rate, the prime rates, and the Rule 4:42-11(a)(iii) rates. (Da211-212). Judge Kumpf examined the ACLI Commercial Mortgage Contract Interest Rates and determined they were stable or reduced until 2022. (Da212). He also noted a bump of 2% above the rates paid on judgment amounts. (Da212).

Significantly, Judge Kumpf found the DOT should not be subject to Krismic's creditworthiness and risk assessment by Magyar Bank as of the time

that the loan was negotiated. (Da212). Having weighed the DOT's ability to timely pay judgments with Krismic's risk, Judge Kumpf ruled that the State should not pay the same rate as a risky property owner. (Da212). After considering the expert report and arguments, Judge Kumpf concluded that the calculation of interest pursuant to the rate under R. 4:42-11(a)(iii) more accurately reflected that particular time period for which interest was owed than Krismic's mortgage rates, and the rate would be at a simple interest rate, not compounded. (Da212).

On September 22, 2023, the court issued an opinion denying Krismic's motion for reconsideration and setting simple interest based on the rates provided for in Rule 4:42-11(a) (iii). (Da202). On October 4, 2023, the court entered an order for final judgment fixing just compensation and interest. (Da214). On November 6, 2023, the court filed an amended order fixing just compensation at $447,000 and applying simple interest based on the rates in Rule 4:42-11(a) (iii). (Da220). This appeal by Krismic followed.

ARGUMENT

POINT I

THE TRIAL COURT'S ORDERS SHOULD BE AFFIRMED BECAUSE THE JUDGE'S VERDICT OF JUST COMPENSATION WAS BASED ON COMPETENT, RELEVANT, AND CREDIBLE EVIDENCE.

The Appellate Division's review of a trial judge's findings in a bench trial is limited. D'Agostino v. Maldonado, 216 N.J. 168, 182 (2013). The Appellate Division reviews "the trial court's determinations, premised on the testimony of witnesses and written evidence at a bench trial, in accordance with a deferential standard." Ibid. The Appellate Division affords substantial deference to the evidentiary rulings of a trial judge. Benevenga v. Digregorio, 325 N.J. Super. 27, 32 (App. Div. 1999). "[W]e defer to the trial court's credibility determinations, because it "'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)).

"'Only when the trial court's conclusions are so "clearly mistaken" or "wide of the mark"' should we interfere to 'ensure that there is not a denial of justice.'" Gnall, 222 N.J. at 428 (quoting N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008). The "appellate court should not disturb the factual

findings and legal conclusions of the trial judge unless it is convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Seidman v. Clifton Sav. Bank, S.L.A., 205 N.J. 150, 169 (2011)

"Deference is especially appropriate when the evidence is largely testimonial and involves questions of credibility. Because a trial court hears the case, sees and observes the witnesses, and hears them testify, it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Ibid.

Indeed, in condemnation actions, "[t]here is no precise and inflexible rule for the assessment of just compensation." Jersey City Redevelopment Agency v. Kugler, 58 N.J. 374, 383-84 (1971). "Courts have been careful not to reduce the concept to a formula." Ibid.

Here, the trial court's findings and conclusions were based on a factual record and on evidence presented at trial. The evidence in this case is testimonial and is a matter of credibility. The trial judge considered the expert testimony by the DOT's real estate appraiser (McHale) and Krismic's real estate appraiser (Brody).

Judge Kumpf determined just compensation to be $447,000 and it should be left undisturbed. Judge Kumpf's reasoning and factual findings were all either directly adopted from the appraisal by Krismic's expert Brody, or were

derived from it, which is at the judge's discretion. In fact, Judge Kumpf's determination of $14.25 per square foot was based on Brody's testimony (5T88:9-17). Judge Kumpf's adoption of the 7% capitalization rate was also from Brody's testimony. (5T78:22-25; 5T791-4; 7T31:11-13). Judge Kumpf determined the before taking value of the property based on $14.25 per square foot for the 147,015 square feet is $2,095,000, rounded. (7T31:16-18). Kumpf arrived at a total value of the property that is left after the taking of $2,044,000. (7T31:13-16). These determinations are solidly based on credible evidence presented at the bench trial.

After applying the $14.25 to the fee taking, Judge Kumpf applied the same value to the remaining easements and discounted Krismic's arguments about rental loss. (7T33:8-14; 5T88:14-17; 7T33:15-25; 7T34:1-4).

In the reconsideration decision, the Judge amply explained the rationale behind the exclusion of the rental loss damages. (7T33:8-14). Judge Kumpf also found damage to the remainder from the takings due to the reasonable probability that the owner could have obtained a second egress permit but for the project. (7T32:10-13). He considered Brody's testimony and found there would be a 70% probability that the second permit would be granted. (7T33:21-25; 7T33:1-4). The judge determined the premium a buyer would pay for the probability of the second egress permit would be $30,000. (7T34:7-12). The

judge concluded the rest of the damage of the remainder to be $21,000 for the reduced frontage on Route 206 and the greater zoning non-conformity of the remainder. (7T34:7-15). These damages total $51,000. (7T34:16-19). Altogether, Judge Kumpf concluded $396,000 for the fee simple and the easements and $51,000 for damages to the remainder for a total of $447,000. (7T34:20-23).

The determination of fair market value is not a hard and fast rule. Instead, the determination rests on the consideration of expert testimony and judgment to apply that testimony. Judge Kumpf considered Krismic's expert appraisal testimony by Mr. Brody who valued the taking at $772,000. He considered DOT's expert appraisal testimony by McHale, who valued the taking at $251,000.

While not required to follow any precise and inflexible rule for the assessment of just compensation, Judge Kumpf nevertheless accepted Brody's testimony and he also considered DOT's arguments regarding rental loss and other factors concerning the probability of the second driveway. Although Krismic prefers a different calculation method, Judge Kumpf rejected Krismic's approach and made his own determination.

The trial judge's opinion is entitled to deference. The trial judge considered the testimonial evidence and his findings were supported and

consistent with that evidence. Therefore, the bench verdict of just compensation should not be disturbed.

POINT II

THE TRIAL COURT'S AWARD OF SIMPLE INTEREST PURSUANT TO RULE 4:42-11(a)(iii) SHOULD BE AFFIRMED BECAUSE NEW JERSEY COURTS HAVE LEFT THAT DETERMINATION TO THE TRIAL COURT'S DISCRETION.

Pursuant to the New Jersey Eminent Domain Act, N.J.S.A. 20:3-31, "interest as set by the court upon the amount of compensation determined to be payable hereunder shall be paid by the condemnor." In addition, N.J.S.A. 20:3-32 sets forth that "[u]nless agreed upon by the parties, the amount of such interest shall be fixed and determined by the court in summary manner after final determination of compensation." The statute provides broad discretion to the court in setting the interest rate. Borough of Saddle River v. 66 E. Allendale, LLC, 424 N.J. Super. 516, 540 (App. Div. 2012), rev'd on other grounds, 216 N.J. 115 (2013). The court may require "a hearing … during which expert evidence as to prevailing commercial and legal rates of interest" is presented. State, By Commissioner of Transportation v. St. Mary's Church Gloucester, 464 N.J. Super. 579, 585 (App. Div. 2020) (citing Twp. of Wayne v. Cassatly, 137 N.J. Super. 464, 474 (App. Div. 1975); accord Casino Reinvestment Dev. Auth.

v. Hauck, 317 N.J. Super. 584, 594 (App. Div. 1999). Here, the court, after a review of the evidence presented, determined that the interest should be calculated pursuant to R. 4:42-11(a)(iii) and that interest should be simple interest. Because the judge reasonably exercised his discretion in determining that the presented evidence and expert report supported the rule rate, it is neither arbitrary nor capricious.

A. THE COURT RULE, RULE 4:42-11(a)(iii), REPRESENTS A REASONABLE INTEREST RATE BECAUSE INTEREST RATES WERE RELATIVELY STABLE FROM MARCH 28, 2019 TO THE DATE OF FINAL PAYMENT.

In general, interest rates in condemnation matters follow the court rule. Rule 4:42-11(a) provides, "except as otherwise ordered by the court or provided by law, judgments, awards, and orders for the payment of money, taxed costs and attorney's fees shall bear simple interest" at the rates prescribed in the rule. An additional "plus 2% annum" is added for judgments exceeding the Special Civil Part monetary limit. N.J. Court Rules, R. 4:42-11(a)(iii). The rule rate has been applied to condemnation actions. Pressler & Verniero, Current N.J. Court Rules, Comment R. 4:42-11, 6.1 (GANN).

In establishing the interest rate in a condemnation matter, the court should consider the "prevailing commercial, legal and prime rates of interest" during the applicable period of the date of the filing of the Verified Complaint to the date of final payment. See, Cassatly, 137 N.J. Super. at 474; Township of West Windsor v. Nierenberg, 345 N.J. Super. 472, 478 (App. Div. 2001). The interest rate should "best indemnify the condemnee for the loss of use of the compensation." Cassatly, 137 N.J. Super. at 475.[5] The rate selected should not "exceed the legal rate". Ibid., citing N.J.S.A. 31:1-1. Cassatly found that, "the legal rate . . . is [ ] the rate permitted to be contracted under the usury statute," or per N.J.S.A. 31:1-1, $6.00 for the forbearance of $100.00 for a year." Ibid.

Courts have affirmed the use of R. 4:42-11 rate to set the interest rate for condemnation matters. In Hauck, the court found that R. 4:42-11 was appropriate where rates are relatively stable during the pendency of the action. 317 N.J. Super. at 594-595. And courts have ruled that "interest rates set pursuant to R. 4:42-11 meets the principle of restoring condemnee to position

[5] In its brief Krismic cites to the New Jersey Law Revision Commission *Final Report Concerning Eminent Domain Actions and Interest Rates*, (June 15, 2023), but that does not help it here. The report, which has not been acted on, simply states that a court may consider prevailing commercial interest rates, the prime rate or rates; and the applicable legal rates of interest. (Da194). It does not preclude consideration of the R. 4:42-11 rate which has been used in numerous courts as set forth below.

on the date of taking". Jersey City Redev. v. Clean-O-Mat, 289 N.J. Super. 381, 400-401 (App. Div. 1996), certif. denied 147 N.J. 262 (1996). The application of the rule rate is often considered fair to a condemnee where, as in this matter, interest rates have not fluctuated widely during the applicable time period and because of the widely held belief that the interest rate applied should represent a return on a relatively secure, non-speculative investment, with no risk of default. Borough of Wildwood Crest v. Smith, 235 N.J. Super. 453, 456 (Law Div. 1988), aff'd, 235 N.J. Super. 404 (App. Div. 1988).

For the period in question here, national interest rates were relatively stable and consistent, except for rate changes beginning in 2022. (Da211-212). (Pa11). The rule rate plus 2% as required by R. 4:42-11(a)(iii), as shown by Kucsma, was a competitive rate during the 2019-2023 timeframe. (Da212-213; Pa11). In fact, at times during this timeframe, the rule rate plus 2% annum exceeded the prime rate, which actually lost value in some of this period. (Da212).

Judge Kumpf's application of the rule rate was not mistaken. Both parties consented to using Krismic's certifications, DOT and Krismic's briefs, and DOT's expert report rather than holding an evidentiary hearing. (Da209; Da210). Krismic did not provide an expert report on interest. (Da209). Judge Kumpf made findings after weighing all the submissions of both parties and

deemed the DOT's expert report from Kristen Kucsma credible. (Da209-Da212; Pa1).

Kucsma showed that the risk of non-payment was low and the return higher than other forms of investment. (Pa4; Pa8-13; Pa17; Da212). Additionally, the rule rate demonstrates that it is competitive toward the prevailing commercial rates of this period, at time exceeds the prime rates, and is well within the legal rates of interest. (Da211; Da212; Pa9-11). Judge Kumpf examined the ACLI Commercial Mortgage Contract Interest Rates and determined they were stable or reduced until 2022. (Da212). Judge Kumpf also noted a bump of 2% above the rates paid on judgment amounts. (Da212). Judge Kumpf found the DOT should not be subject to Krismic's creditworthiness and risk assessment by Magyar Bank as of the time they negotiated the loan. (Da212).

Krismic argued the interest rate should be the rate Krismic was paying the bank for the loan it had against the subject property, which was the prime rate plus 2%. (Da210). The trial judge weighed the DOT's ability to pay judgments in a timely manner with Krismic's risk and determined the DOT should not be bound to pay the same rate as a risky property owner. (Da212). After weighing the expert report and argument, the judge properly concluded that the calculation of interest pursuant to R. 4:42-11(a)(iii) reflected the period of interest owed

more accurately than Krismic's mortgage rates. (Da212). The court's findings were proper and should not be overturned.

B. THE APPLICATION OF SIMPLE INTEREST TO RULE 4:42-11, IS APPROPRIATE.

In condemnation actions, the court's determination of an interest rate is only the first step in the analysis, the second step is to determine whether simple or compound interest should be applied. N.J.S.A. 20:3-31 and N.J.S.A. 20:3-32. Rule 4:42-11(a) provides that "judgments, awards, and orders for the payment of money, taxed costs and attorney's fees shall bear simple interest," unless otherwise ordered by the court. As such, the court maintains discretion on whether to apply simple or compound interest. Indeed, the Legislature has not set forth any rule specifying whether one or the other should be used in condemnation cases. Nierenberg, 345 N.J. Super. at 479-480. And New Jersey courts have not mandated that interest be compounded annually. Rather, the evaluation of interest is done on a case by case basis. Id. at 479.

Krismic relies on its interpretation of Wildwood Crest, but that case did not lay down a rule that compound interest must be applied. In Wildwood Crest, the Appellate Division looked to federal courts and ultimately opined that the 9th Circuit was persuasive and ordered compound interest. Wildwood Crest, 235 N.J. Super. 453, 457. More recently, this court found that simple interest was

appropriate. Borough of Saddle River v. 66 East Allendale, LLC, 424 N.J. Super 516, 701 (App. Div. 2012), rev'd on other grounds, (216 N.J. 115) (2013). In 66 East Allendale, the appellant claimed that the application of R. 4:42-11 was appropriate, but that the trial court had no discretion to award simple interest. Ibid. This court rejected appellant's argument that relied on Wildwood Crest and upheld the trial court's determination of simple interest. Id. at 702. See also Hauck, 317 N.J. Super. at 594-595 (upholding trial court's award of simple interest and applying R. 4:42-11).

Thus, in cases decided since Wildwood Crest, such as 66 East Allendale (in 1988) and Hauck, (in 2012), this court declined to make an inviolate rule that compound interest should be paid and, instead, deferred to the proofs and discretion of the trial court under the particular circumstances present in the cases. The timeframe of analysis and evaluation of the proofs was an obvious factor in applying simple or compound interest. Here, simple interest as proscribed in the rule rate is both supported by the stability of interest rates over this period and by case law.

Judge Kumpf weighed the submissions on the subject of simple and compound interest and rejected Krismic's claim that it must be compounded. (Da209-210; Da211; Da212). Accordingly, the court's determination of simple interest was a proper exercise of judicial discretion and should not be disturbed.

CONCLUSION

For these reasons, this court should affirm the orders of the trial court.

Respectfully submitted,

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STATE OF NEW JERSEY, by the COMMISSIONER OF TRANSPORTATION Plaintiff/Respondent		SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION: DOCKET NO: A-812-23
vs.	: : : : : :	CIVIL ACTION
KRISMIC ASSOCIATES, INC., a New Jersey Corporation; MAGYAR BANK, a New Jersey State Savings Bank; STATE OF NEW JERSEY; AVOLIO'S RENTALS AND SALES, INC., a New Jersey Corporation, d/b/a United Rent-All of Bridgewater; and TOWNSHIP OF HILLSBOROUGH, in the County of SOMERSET, a Municipal Corporation of New Jersey Defendants	: :	On Appeal from a Final Judgment of the Superior Court of New Jersey, Law Division, Somerset County, Docket No. SOM-L-400-19 **Sat Below:** **Hon. Fred H. Kumpf, J.S.C.** **Hon. Edward M. Coleman, J.S.C.**

REPLY BRIEF ON BEHALF OF DEFENDANT KRISMIC ASSOCIATES, INC.

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PRELIMINARY STATEMENT

On this appeal from a bench trial award of just compensation, plaintiff concedes that the trial judge's fact findings were all directly adopted from the appraisal of Krismic's appraisal expert, Jon Brody, or derived from it. Accordingly, there is no need for any deference to the trial court's opinion as to credibility of the witnesses. The issue in this bench trial is whether the trial court's computation of damages was based upon plainly incorrect reasoning.

As to the second point raised on this appeal, the interest issue, plaintiff now claims on appeal, that defendant failed to supply "expert evidence" as to the prevailing commercial rates of interest. (Pb17). On the contrary, Krismic's appraisal expert supplied a certification setting forth mortgage rates relevant to this case including, commercial mortgage rates published by the American Council of Life Insurance (ACCI) and published prime rates of interest. Also, Brody provided the actual mortgage rates Krismic was actually paying on its mortgage with co-defendant, Magyar Bank based upon the certification of Colin Fletcher, Vice President of Magyar Bank, who certified this was a market based commercial loan at prime rates plus 2%.

Frankly, plaintiff simply cites the tort rule rate and recites that the tort rule rate has been applied to condemnation actions. Then like those decisions that resort to the tort rule rate they pay homage to Twp of Wayne v. Cassatly, 137

N.J. Super. 464 (App Div. 1975) the leading and most cited case on the interest issue, which is absolutely contradictory to the use of the tort rule R.4:42-11 et seq. Cassatly and its progeny assert that the court should consider commercial, prime and legal rates of interest as applicable to the circumstances of the individual case. Plaintiff then goes on to ignore and never mention that interest is part of the "just compensation" required by the Constitution. Plaintiff ignores the Appellate Divisions admonition that the interest rate applied should "best indemnify the condemnee for the loss of use of the compensation", when the defendant is actually paying the bank prime+2 on the money being withheld by the State.

Defendant relies upon its constitutional right to "just compensation" as previously set forth in its initial brief and its further comments below.

LEGAL ARGUMENT
POINT I
WHETHER THE TRIAL COURT'S COMPUTATION OF DAMAGES WAS BASED ON PLAINLY INCORRECT REASONING (7T31:11-23)

This appeal does not involve any question as to the credibility of any of the witnesses. As plaintiff concedes beginning at the bottom of Pb11:

> Judge Kumpf's reasoning and fact findings were all either directly adopted from the appraisal by Krismic's expert Brody, or were derived from it...[1]

At Pb12-4, plaintiff repeats the error that invalidates the trial court 's conclusion without any comment or recognition of the obvious error. In fact, plaintiff's brief confirms that the trial judge adopted Brody's value conclusion of $14.25 per square foot of the "land only", the 7% cap. Rate and the $2,044,000 after value as derived by Brody's income approach for the land, building and improvements.

Defendants agree that the factual findings above are "solidly based on the credible evidence" presented by Jon Brody at the bench trial.

The problem with the Judge's opinion and plaintiff's argument is that the trial judge drew the wrong conclusion from the value opinions that were rendered by Brody and accepted by the Court and mistakenly used the before value for the land only rather than the value of the land and buildings under the income approach, from which he subtracted the value of the land and buildings after the taking under the same income approach.

As previously shown on Db2, the court and now the plaintiff's argument at Pb12 make the same error mixing apples and oranges. The before value used

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[1] The only exception as noted at Db2 and 7T31:2-15) was as to Brody's use of a capitalization (cap) rate of 7 ½% in the after and found appropriate cap rate to be 7% in both the "before and after" calculations

in the before-after calculation has to be the before value of $2,700,000 which included both land and buildings in the income approach using the 7% cap rate previously accepted by the court.

The trial court then simply then applied the $14.25 to the easements and applying Brody's $30,000 for the easements, reached the sum of $396,000 for the taking (not damages).

The effect of the loss of the opportunity for a north bound exit and the loss of frontage were already accounted for in the computations of the before and after under the income approach, which conclusions were already accepted and utilized in the court's flawed before and after calculation. Nonetheless, both the plaintiff and the court in the September 22, 2023 opinion (Da221) double down on the court's original mistake and rely upon the $51,000 damage figure. A number that has no significance at all and is simply the product of manifest error.

The written opinion (Da221) in its last paragraph on this issue, states without reference to any evidence in the case "it is unlikely that a willing buyer would have increased an offer for the premises because of the probability of obtaining a second egress in the amount of $656,000 or even the $376,000." Then goes on to claim that even $263,000 "seems" excessive. The $260,000 is the proper conclusion to be drawn from the evidence previously accepted by the trial judge. The trial court accepted Brody's income approach with the exception

of the 7 ½% cap rate in the after value using the $2,044,000 in his erroneous before-after calculation. The appropriate calculation comparing apples with apples is:

Brody before income approach value	$2,700,000.00
Less –	
Court's income approach value	
(using the 7% cap rate)	$2,040,000.00
Total Compensation	$656,000.00

Factoring out the court's findings as to the value of the land taken ($366,000) and the site improvements taken ($3,000) and the easements taken ($27,000) leaves damages in the amount of $260,000.

The Court allocated its damages between the loss of the northern access point at approximately 60% and 40% for the loss of 37% of the frontage on Route 206.

Considering the value before the taking was $2,700,000 the loss of the northern access point at the existing traffic light which would have allowed at "left out" northbound and probably a "left in" as well as direct access from the 600 unit residential project across the street; the 5.7% of the before value should not "seem" excessive. In fact it is consistent with the view expressed by Brody and the commercial brokers with whom he consulted and used the 5%

adjustment in his land only analysis leading to the $14.25 opinion of the land only.

At bottom, both the trial court and plaintiff stick to the $51,000 conclusion as to damages based upon the false calculation made by the trial judge mixing apples and oranges. The court's last word at Da000209 is that defendant didn't establish that the damage to the remainder "is excess of the $51,000 which the court found in the decision on December 5, 2022."

Plaintiff's final argument is that while Judge Kumpf accepted Brody's testimony, the judge is entitled to use his own conclusions. (Pb13). While we can agree that the Judge's factual findings based upon Brody's appraisal testimony were supported by the evidence, the conclusion that he drew, i.e., that the damages were $51,000, was not a valid conclusion based on the evidence. It was a conclusion based on "plainly incorrect reasoning".

POINT II
WHETHER THE TRIAL COURT RELIED UPON THE APPROPRIATE CONSIDERATION OF PREVAILING COMMERCIAL MORTGAGE AND PRIME RATES, INCLUDING THE ACTUAL RATE THE OWNER WAS PAYING IN DETERMINING THE APPROPRIATE RATE OF INTEREST TO PROVIDE "JUST COMPENSATION" (Da12)

Once again, this issue of determining the appropriate amount of interest is not an issue of credibility of any witness. It is appropriate here to review the trial court's interpretation of the law and the legal consequences that flow from established facts de novo. Manalapan Realty L.P. v. Twp. Comm of Manalapan, 140 N.J. 366, 378 (1995).

While defendants do not challenge the credibility of plaintiff's expert economist, who specializes in micro economics and macro economics, the relevance of her testimony is suspect as she concedes that she is not competent to speak to the legal rationale. Thus, she is unaware that the award of interest in a condemnation case is a matter of constitutional magnitude and is part of the award of just compensation required by the constitution. Cassatly at 471. Nor is the economist aware as to the rationale put forward by the Appellate Division in Rockaway v. Donofrio, 136 N.J. Super. 344, 353 wherein Judge Morton L. Greenberg, J.A.D. writing for a panel including Judges Furman and Milmed after noting that a condemnee has a constitutional right to just compensation, but he

must engage an attorney, not to mention expert witnesses and other fees, noted that the court in an effort to be solicitous of the rights of the condemnee require that a "condemnee could obtain interest on an award at a rate that would best indemnify him for the loss of use of the compensation to which he was held to be entitled. This was the rationale for departing from the court rule, which set interest on judgments at a fixed rate, citing R.4:42-11(a).

Just compensation (which includes interest) is required in law to be viewed from the point of view of the owner and not the condemnor. State v. Rohrer, 80 N.J. 462, 467 (1979).

On page 2 in her executive summary, the economist suggests factoring the judgment, which in many cases either doesn't have a payment date and even if there is no appeal, the determination of the amount would in most cases be years after the taking and on the verge of being paid any way. Also, factoring involves a discount which would take into account the then current commercial rates and at Pa13 notes that there would be a 10% fee on the discounted value or $17,640 in her illustration so instead of receiving the $196,000 the property owner loses $20,000 on the discount then another $17,640 on the factoring fee, that does not seem to be a scenario representing full indemnity to the victim of the taking.

Also, at Pa0004, the economist posits that "interest attached to the State's debt to defendants should reflect the true time to collect and the risk of default.

The date of taking and valuation was March 28, 2019. As of that date, there was no expected time to collect. Neither the economist nor the trial judge even seem to deal with that issue, however the tort rule rate is based on a payment on demand daily rate.

Both the economist and the trial court simply intellectually divert the issue from its proper setting as search to find the appropriate interest rate to fully indemnify the defendant for the loss of the use of the money while paying a rate of prime +2 to codefendant Magyar Bank and transform the setting to hypothetical loan of money to the State for an unknown period of time and because of the wonderful credit rating of the State to have the unwilling property owner accept a rate of interest ranging between 1% to 7.25% below the interest rate he is required to pay on that same money to the bank on an ongoing monthly basis. Although the bank is only charging simply interest, he is paying the interest monthly, so he is entitled to interest on his interest payment. So interest on the judgment compounded annually is necessary to come as close as possible for indemnification. As discussed in defendant's original brief, the amount of just compensation awarded is strongly influenced by the current commercial rates applied to the individual case. The defendant is not looking for a windfall, all defendant is asking for is to be put back in the same financial position he would have been in had the money been paid on the date of valuation

and paid over to Magyar Bank at the same time. Defendant further relies on the arguments set forth in its initial brief on appeal.

CONCLUSION

For the reasons set forth above, the plainly incorrect reasoning of the trial court, and because the trial judge, then retired and on recall and is now fully retired, we ask the court to make appropriate findings and conclusions and correct the error of using the value of the land only of $2,095,000.00 instead of the value of the land and buildings of $2,700,000 in the calculation of just compensation deducting $2,044,000 from the value of the land and building before concluding with an award of just compensation of $656,000 and entering judgment in that amount, plus interest as determined by this Court, under its original jurisdiction under R.2:10-5. The alternative is to require a new trial and a new determination of interest, which should be unnecessary since the trial court accepted the relevant facts testified to by Brody, but simply misunderstood the implications of the facts and drew the wrong mathematical conclusion.

Respectfully Submitted
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Dated: October 18, 2024