MARK SOLARO, Plaintiff-Appellant, v. FIRSTENERGY CORPORATION, FIRSTENERGY SERVICE COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY, TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY, NEW JERSEY DEPARTMENT OF TRANSPORTATION, STATE OF NEW JERSEY, MARION NOVACK, THE ESTATE OF EDWARD NOVACK, W/H, and ABC COMPANIES I-X, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Civil Action Docket No.: A-001071-24T1 *On Appeal from:* Superior Court of New Jersey Law Division, Passaic County Docket No. PAS-L-160-22 Sat below: Hon. Thomas J. LaConte, J.S.C.

BRIEF OF PLAINTIFF-APPELLANT MARK SOLARO

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I. PRELIMINARY STATEMENT OF THE CASE

This tort action stems from injuries Plaintiff Mark Solaro sustained on May 3, 2019 while driving on State Route 23 in West Milford Township, New Jersey. Pa10. On that evening, Mr. Solaro was driving in the right lane on the northbound side of Route 23. Id. As he was driving, a tree overhanging a power line broke loose from the ground adjacent to the road. Pa11. The tree crashed through the roof of Mr. Solaro's car, causing him life-long injuries, including a serious spinal cord injury, a traumatic brain injury, incomplete paraplegia, the loss of motor function, a badly fractured arm, and a massive laceration on his leg. Pa11-12. Jersey Central Power & Light Company (JCP&L) and FirstEnergy Service Company ("FESC") were responsible for maintaining all vegetation near the power line, including the subject tree. Mr. Solaro brought suit against, *inter alia*, JCP&L and FESC on the basis that the tree was structurally unsound and that those Defendants negligently failed to remove it, as required by regulation. Pa6-24. The trial court granted summary judgment in JCP&L and FESC's favor on grounds that they owed no duty of care to Mr. Solaro. Pa2-5; T27-12 to T29-15. This appeal challenges the trial court's summary judgment order. Pa556-564.

II. PROCEDURAL HISTORY[1]

In February 2021, Plaintiff filed a complaint in the Essex County Vicinage for the Superior Court of New Jersey against several defendants that owned, possessed, or leased the land from which the tree fell. On March 26, 2021, Plaintiff filed the amended and operative complaint. Pa6-24. Through these pleadings, Mr. Solaro sued corporate defendants JCP&L, FESC, and FirstEnergy Corp. He sued governmental defendants West Milford Township, the County of Passaic, New Jersey Department of Transportation ("NJDOT"), and the State of New Jersey. Id. He sued individual defendants Marion and Edward Novack. See id.

Preliminary activity in the case concerned venue and the dismissal of certain defendants. In November 2021, the trial court transferred the case to Passaic County on the motion of West Milford Township, joined by Passaic County. In May 2022, Plaintiff settled with and stipulated to the dismissal of defendants Marion and (the Estate of) Edward Novack. In June 2022, Plaintiff also stipulated the voluntary dismissal of Township of West Milford.

Summary judgment motions ensued. Pa58-368. In November 2022, NJDOT, the State of New Jersey, and Passaic County moved for summary

[1] The transcript in this matter is dated December 14, 2023.

judgment. In February 2023, defendants JCP&L, FESC, and FirstEnergy Corporation also moved for summary judgment. Pa58-68; see T5-9 toT7-25. The motions explained that FirstEnergy Corp. acts as the holding company of FESC and JCP&L. In turn, FESC operates JCP&L. Pa65-66; Pa279-280. The motions argued that the corporate defendants owed no duty to Mr. Solaro under the reasoning set forth in McGlynn v. State of New Jersey, 434 N.J. Super. 23 (App. Div. 2014). See T9-11 to T11-7.

The Court held oral argument on all parties' motions on December 14, 2023. See T4-1 to T103-3. Through responsive filings, and as confirmed during argument, Plaintiff withdrew opposition to FirstEnergy Corp.'s motion for summary judgment and consented to its dismissal. Plaintiff, however, opposed JCP&L and FESC's motions. At argument, the Court announced its rulings from the bench and granted JCP&L and FESC's motions, agreeing that those defendants did not owe a duty of care to Mr. Solaro under the reasoning of McGlynn. T27-12 to T29-15; T98-7-10. The Court later denied the motions for summary judgment filed by the government defendants. T98-7-10.

Mr. Solaro subsequently settled his claims against Passaic County. Plaintiff then proceeded to trial against NJDOT. Although the jury reached a verdict in NJDOT's favor on September 16, 2024, judgment was never entered on the verdict because Plaintiff and NJDOT had entered into a binding, high-

low settlement agreement that would be governed by the amount of the verdict. Thereafter, Plaintiff and NJDOT formalized their settlement agreement. On November 7, 2024, Plaintiff filed stipulations dismissing NJDOT, the State of New Jersey, and Passaic County. Having resolved his claims against all other defendants, Mr. Solaro now appeals from the trial court's order entered December 14, 2023 dismissing JCP&L and FESC. Pa556-564.

III. STATEMENT OF FACTS

On May 3, 2019, Mr. Solaro was driving north on Route 23 in West Milford Township in a 2019 Lincoln MKZ automobile. Pa10; Pa123-125; Pa364a. He was driving in the right-hand lane when, at approximately 10:20 p.m., a tree broke loose and fell near mile marker 17.5. Pa496-497. The falling tree had been adjacent to a power line and energy pole. JCP&L, an electrical distribution company, had the duty to manage and maintain trees and vegetation in the area. Pa77; Pa151. The falling tree crashed into and crushed Mr. Solaro's moving vehicle, trapping him inside and causing him to suffer serious injuries. Pa12a; Pa385a. First responders rescued Mr. Solaro from the car and transported him to Morristown Medical Center. He spent over one month in hospital care during which he underwent a series of procedures to address the injuries he had suffered, which include a spinal cord injury, a traumatic brain injury, incomplete paraplegia, abrasions, lacerations, scarring, neurological weakness,

incontinence, loss of motor functioning, hemiplegia, and loss of teeth. Mr. Solaro has permanent harm from his injuries and will experience ongoing pain and suffering for the rest of his life. Pa12.

IV. THE STANDARD OF REVIEW

On appeal from an order granting summary judgment, an appellate court applies the same standard as the trial court and exercises de novo review. Thomas Makuch, LLC v. Twp. of Jackson, 476 N.J. Super. 169, 184 (App. Div. 2023). Under that standard, the Court determines whether "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits" show the absence of a genuine issue that would entitle the moving party to judgment or order as a matter of law. Branch v. Cream-O-Land Dairy, 244 N.J. 567, 582 (2021). The Court must resolve all legitimate inferences in favor of the non-moving party. Friedman v. Martinez, 242 N.J. 449, 472 (2020). Under this framework, summary judgment must be denied unless the matter is "'so one-sided that one party must prevail as a matter of law.'" D'Amato v. D'Amato, 305 N.J. Super. 109, 113 (App. Div. 1997) (citing Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995)). Finally, when reviewing an order granting summary judgment, the Court affords no deference to a "trial court's legal analysis or statutory interpretation." Berkoski v. Honda Motor Co., Ltd., 480 N.J. Super. 379, 387 (App. Div. 2025).

V. ARGUMENT

Point One: Mr. Solaro established a duty of care under the facts of this case (T27-12 to T29-15).

A. The framework of New Jersey law

To sustain a cause of action for negligence, a plaintiff must establish four elements: (1) a duty of care; (2) breach of that duty; (3) a proximate causal relationship between the breach of duty and the resulting harm; and (4) the harm suffered by the plaintiff. D'Alessandro v. Hartzel, 422 N.J. Super. 575, 579 (App. Div. 2011). In this case, the trial court concluded JCP&L and FESC did not owe a duty to Mr. Solaro as a threshold matter. As such, the nature of duty under New Jersey's law of negligence warrants review.

Whether a defendant must act with reasonable care and the scope of any such duty are questions of law. Robinson v. Vivirito, 217 N.J. 199, 208–09 (2014). However, duty is "a malleable concept" that necessarily adjusts as social norms and expectations evolve. Wytupeck v. Camden, 25 N.J. 450, 462 (1957). Analyzing whether a duty exists and the standards by which such a duty is measured implicate both case-specific considerations and also "considerations of public policy and fairness" as developed in the case law. Hopkins v. Fox & Lazo Realtors, 132 N.J. 426, 439–40 (1993). The resulting analysis requires courts to weigh and balance multiple factors. These include "the nature of the underlying risk of harm, that is, its foreseeability and severity, the opportunity

and ability to exercise care to prevent the harm, the comparative interests of, and the relationships between or among, the parties[.]" J.S. v. R.T.H., 155 N.J. 330, 337–40 (1998). Ultimately, "the societal interest in the proposed solution" must be in harmony with public policy and notions of fairness. Id. That said, a "critical but not dispositive factor" when assessing whether there is a duty to prevent harm to a third party is always the foreseeability of harm. Robinson, 217 N.J. at 208–09.

Under New Jersey law, regulations or statutes may provide guidance as to a duty's existence or scope within a factual context. See Lechler v. 303 Sunset Ave. Condo. Ass'n, Inc., 452 N.J. Super. 574, 584 (App. Div. 2017). New Jersey law has long recognized that regulations may provide valuable guidance when assessing the existence of a duty. See Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980) (explaining that "[t]he sources of public policy include legislation, administrative rules, regulations or decisions, and judicial decisions").

An apt example is found in Reyes v. Egner, 404 N.J. Super. 433, 456–60 (App. Div. 2009), aff'd, 201 N.J. 417 (2010). There, the plaintiff fell while on a rental home's deck that did not have a handrail accompanying the deck steps. The trial court granted summary judgment on grounds that the lessors owed no duty to the plaintiff. On appeal, this Court reviewed the development of premises

liability over the years and noted that the circumstances presented did not fall neatly within the traditional premises liability construct. Id. at 453-55.

However, the Reyes Court did not confine its analysis to the case law alone. It also considered multiple statutes, regulations, and ordinances that require a handrail on a deck. The Court concluded those statutes, regulations, and ordinances were "evidential if not conclusive" of a lessor's duty and breach and concluded that those examples of positive law properly grounded a duty of reasonable care under the facts presented Id. at 458. The Court added that "the violation of a statutory duty of care is not conclusive on the issue of negligence in a civil action but it is a circumstance which the trier of fact should consider in assessing liability." Id. (quoting Braitman v. Overlook Terrace Corp., 68 N.J. 368, 385 (1975)). The Court further stated that "regulations [enacted under a] statute do not create separate causes of action for their violation but they do create standards of conduct of which a jury in a negligence action should take into consideration." Id. (internal quotation marks omitted). The Court also looked to Frugis v. Bracigliano, 177 N.J. 250, 271 (2003), where the Supreme Court noted that the violation of an administrative school regulation was relevant evidence of negligent conduct, although the violation alone was not proof of negligence *per se*.

B. Defendants owed a duty based on applicable provisions of the New Jersey Administrative Code.

Given the legal backdrop, the Court must assign significant weight to New Jersey's law governing electrical distribution companies such as JCP&L and FESC. As a starting point, the New Jersey Legislature has vested the Board of Public Utilities (the "Board") with jurisdiction and general supervisory and regulatory control over "all public utilities as defined in this section and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title." N.J.S. § 48:2-13. The term "public utility" has broad meaning. The term encompasses "every individual, copartnership, association, corporation or joint stock company . . . that now or hereafter may own, operate, manage or control any . . . electricity distribution, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof." Id. The Legislature has empowered the Board to "make all needful rules for its government and other proceedings." N.J.S. § 48:2-12.

In turn, the Board has promulgated regulations set forth in Title 14, Chapter 5 of the New Jersey Administrative Code. This chapter governs "the operation of all electric distribution companies (EDCs) operating within the State of New Jersey." N.J.A.C. 14:5-1.1. The chapter contains subchapters

addressed to different aspects of EDC operations. In 2006, the Board enacted a subchapter entitled Electric Utility Line Vegetation Management located at N.J.A.C. 14:5-9.1 *et seq*. As set forth by the Board, the subchapter sets forth the "requirements that EDCs shall follow in managing vegetation in proximity to an energized conductor." N.J.A.C. 14:5-9.1. The subchapter highlights public safety as a specific purpose. As the language provides, the purpose of the subchapter is "to ensure public safety and the efficient and reliable supply of electric power using integrated vegetation management and sound arboricultural practices." Id.

These regulations require EDCs to perform inspections and maintenance of its conductors at specified intervals. For instance, EDCs must perform visual inspection of all energized conductors that are associated with a transmission line to determine whether vegetation management is needed on an annual basis. N.J.A.C. 14:5-9.1(a). At least every four years, EDCs must perform "vegetation management on vegetation that is close enough to pose a threat to its energized conductors." N.J.A.C. 14:5-9.1(b). If an EDC becomes aware of vegetation that may impact the reliability or safety of a conductor, the EDC "shall ensure that necessary vegetation management is promptly performed." N.J.A.C. 14:5-9.1(c). Such vegetation would include a so-called "hazard tree," which is a structurally unsound tree located on or near the right of way "that could strike

electric supply lines when in it fails." N.J.A.C. 14:5-1.2.

The Code spells out additional obligations and duties EDCs must perform. In particular, the Code requires EDCs to perform vegetation management according to the standards and procedures set forth in various industry publications, including the following:

- Part 1 of the document entitled Tree, Shrub, and Other Woody Plant Maintenance-Standard Practices (Pruning). This document, also known as ANSI A300, is published by the American National Standards Institute,…;

- Part 7 of the document entitled for Tree Care Operations-Tree, Shrub, and Other Woody Plant Maintenance - Standard Practices (Integrated Vegetation Management A. Utility Rights-Of-Way). This document, also known as ANSI A300, is published by the American National Standards Institute, …;

- Part 9 of the document entitled for Tree Care Operations - Tree, Shrub, and Other Woody Plant Maintenance - Standard Practices (Tree Risk Assessment). This document, also known as ANSI A300, is published by the American National Standards Institute,…;

    - Best Management Practices, Utility Pruning of Trees, 2004. This title is published by the International Society of Arboriculture …;

    - Pruning, Trimming, Repairing, Maintaining, and Removing Trees, and Cutting Brush -- Safety Requirements, 2012. This document, also known as ANSI Z133.1, is published by the American National Standards Institute,…;

    - Native Trees, Shrubs And Vines For Urban And Rural America: A Planting Design Manual for Environmental Designers, by Hightshoe, G.L., 1987, is published by John

Wiley and Sons and may be obtained from various resellers;

- Manual of woody landscape plants 5th Ed., by Michael A. Dirr. Stipes Publishing, LLC; 5th edition (August, 1998), and may be obtained from various resellers;

- Hortus Third: A concise dictionary of plants cultivated in the United States and Canada, by L.H. Bailey Hortorium, 1976, and may be obtained from various resellers; and

- National Electric Safety Code C2-2012. ISBN: 9780738165882 is published by the Institute of Electrical and Electronics Engineers, Inc.,…

N.J.A.C. 14:5-9.6. The Code incorporates into its requirements the procedures identified in the publications. Id. Individually and together, these regulations serve to "to ensure public safety and the efficient and reliable supply of electric power using integrated vegetation management and sound arboricultural practices." E & M Liquors, Inc. v. Pub. Serv. Elec. & Gas Co., 388 N.J. Super. 566, 570 (App. Div. 2006); 47 N.J.R. 2177.

Here, JCP&L is an electrical distribution company and bound by the provisions set by the Legislature and Board of Public Utilities. See Public Utilities Act of 1948, N.J.S. § 48:1–1, *et seq.*; N.J.A.C. 14:1–1.1, *et seq.* JCP&L's corporate designee Robert G. Walton, the Manager of Forestry Services at JCP&L at the time of the accident, confirmed the JCP&L is an electrical distribution company and responsible for managing the vegetation surrounding JCP&L powerlines. Pa80-94. He agreed that "ensuring public

safety is part of our responsibility in managing vegetation." Pa91. In offering that concession, Mr. Walton chose to emphasize on the Code's purpose in providing the public's need for power as part of the public's overall health, safety, and welfare. Pa91-97. To be sure, the Code considers the "reliable supply of electric power" to be an important public policy. It also imposes a separate mandate of "ensur[ing] public safety." 37 N.J.R. 4385(a). If public safety was fully subsumed in the concept of providing reliable electricity, then the "public safety" language would not have been a necessary distinct addition in the regulations. See Burgos v. State, 222 N.J. 175, 203 (2015) ("We do not support interpretations that render statutory language as surplusage or meaningless.").

David Garrett, who served as JCP&L's supervisor of forestry, likewise acknowledged that the accident occurred in the area "covered" by JCP&L in its capacity as an electrical distribution company. Pa144, Pa171. He agreed the circumstance of a dead tree falling onto powerlines and then onto a highway where motorists were traveling would be considered an issue of public safety under the Code. Pa172-73. The record at summary judgment also was unrefuted on the point that the subject tree was a hazard tree as defined by the regulation. Pa397-430.

In New Jersey law, regulations or statutes provide valuable guidance as to a duty's existence or scope within a given factual context. See Lechler, 452 N.J.

Super. at 584; Reyes, 404 N.J. Super. at 456–60. Here, New Jersey law imposes a multitude of obligations on JCP&L and FESC related to the management and control of the vegetation affecting power lines including potentially dangerous trees. The very purpose of these laws is to promote public safety and prevent dangerous conditions. Combined with the record evidence, these laws strongly support the recognition that both JCP&L and FESC owed a duty of reasonable care to Mr. Solaro with respect to their responsibility to manage vegetation surrounding their power lines. Whether those defendants breached their duty is another matter. But surely the duty exists as a threshold matter. See Lechler, 452 N.J. Super. at 584; Reyes, 404 N.J. Super. at 456–60.

Point Two: **The trial court misplaced reliance on McGlynn when concluding that Defendants lack a duty of care in this case (T27-12 to T29-15).**

In concluding that JCP&L did not owe a duty to Mr. Solaro, the trial court relied on this Court's decision in McGlynn, supra. But a different statutory and regulatory scheme existed at the time of McGlynn, suggesting that the case has limited application to the instant case. If anything, the contrasting regulatory context that existed in McGlynn serves to support the recognition of a duty in this case given the present vegetation management regulations described above.

A. The vegetation management regulations did not exist at the time of the accident in McGlynn.

McGlynn arose from the tragic death in 2003 of Pamela McGlynn when a tree along JCP&L's right of-way fell and struck her vehicle. McGlynn, 434 N.J. Super. at 27. Mr. McGlynn filed suit against JCP&L and its contractor who were responsible for vegetation maintenance. Summary judgment was granted in favor of JCP&L on the basis that JCP&L did not owe a duty. Id. at 26.

This Court focused on the question of duty on appeal. At the time, New Jersey's Board of Public Utilities (the "Board"), had not yet promulgated regulations governing vegetation management by electrical distribution companies. The Court could not consider any such regulations in connection with a duty analysis because the regulations did not exist. Given the lack of regulatory guidance, the plaintiffs claimed JCP&L owed a duty of reasonable care with respect to vegetation management only through JCP&L's contractual undertaking to perform such management. Id. at 32. Against the backdrop of that argument, the Court acknowledged that it was "not disputed that JCP&L had a clear and defined commitment to keep vegetation controlled in order to prevent interruptions in service." Id. at 32. However, the Court did not agree that this contractual undertaking supposed a duty of reasonable care for the general public with respect to public safety. The contract required JCP&L to perform vegetation management to "maintain the consistent flow of electricity"

for the utility's customers. Id. at 27. But the contract did not obligate JCP&L "to do more than to maintain the lines within its designated right-of-way so as to provide uninterrupted service." Id. at 33-34. Within this framework, the Court concluded that the defendant had not assumed a general responsibility to tend to the trees so as to promote highway safety. As the Court noted, "[t]o expand that commitment to include maintenance of vegetation for the benefit of passing motorists, where power lines are unaffected, would create an onerous burden without a corresponding benefit." Id. at 32.

B. The Board's enactment of vegetation management regulations focusing on public safety inform the duty analysis.

McGlynn did not consider the vegetation management regulations because they did not exist in 2003. Those regulations were promulgated and took effect in 2006. See 37 N.J.R. 4385(a); 38 N.J.R. 5396(a). These regulations serve the purpose of advancing public safety:

> This subchapter sets forth requirements that electric public utilities shall follow in managing vegetation in proximity to an energized conductor **in order to ensure public safety** and the efficient and reliable supply of electric power.

37 N.J.R. 4385(a) (emphasis added).

This concern for public safety informs the vegetation management regulations. Those regulations require the defendants to ensure that vegetation management is properly conducted with respect to all powerlines. N.J.A.C. 14:5-

9.1(a). The regulations also define vegetation management as including "the removal of vegetation or the prevention of vegetative growth, to maintain safe conditions around energized conductor(s) and ensure reliable electric service." N.J.A.C. 14:5-1.2. Such regulations plainly implicate the assessment of dangerous trees such as the tree that fell on both an electrical line and Mr. Solaro.

Since 2006, the Board has amplified the vegetation management regulations by requiring adherence to a number of laws, regulations, and industry standards. These regulations were non-existent when the accident occurred that gave rise to McGlynn. They were in full force when the hazard tree took down a powerline and crashed into Mr. Solaro. Especially given the focus on public safety, these regulations strongly support the proposition that defendants owe a duty of care beyond removing vegetation from the vicinity of powerlines. They meaningfully distinguish this case from McGlynn.

Since its enactment in 2006, this "public safety" purpose statement has been reviewed and reenacted twice—in 2008 and 2015. N.J.A.C. 14:5-9.1. In the 2015 amendments, the Board added the term "hazard tree" and added requirements for EDCs to comply with reporting standards vis-à-vis hazard trees. 47 N.J.R. 631(a); 47 N.J.R. 2166. Thus, the Board has enjoyed multiple opportunities to reconsider the issue of "public safety" and decide whether that

was not in fact a purpose of the vegetation management regulations.

The Board's insistence on public safety as a dimension of its regulatory scheme should impact the duty analysis. Regulations are subject to the "same rules of construction as a statute and should be construed according to the plain meaning of the language." In re 1999-2000 Abbott v. Burke Implementing Regs., 348 N.J. Super. 382, 399 (App. Div. 2002). Like legislators, regulators are "presumed to be familiar not only with the statutory law of the State, but also with the common law." Magierowski v. Buckley, 39 N.J. Super. 534, 554 (App. Div. 1956). Here, the Board has promulgated increasingly stringent standards including those particularly aimed at public safety since a tree fell on Ms. McGlynn's car. However, the trial court failed to appropriately consider the regulatory amendments when undertaking its analysis. The regulations demonstrate the Board's heightened and specific interest in ensuring public safety independent from reliable electricity. They support the recognition of a duty that "conforms with established precedents treating statutory or regulatory violations as non-dispositive proof of negligence." Reyes, 201 N.J. at 557. In this case, the regulations show that EDCs such as JCP&L and FESC must exercise reasonable care with respect to vegetation management and are subject to potential liability when their negligence causes harm to another.

C. Additional case law demonstrates that Defendants undertook a duty of reasonable care in this case.

Numerous additional cases support the proposition that JPC&L and FESC owed a duty of reasonable care with respect to their inspection and management of trees and vegetation generally. One such case is Anderson v. Davoren, 2010 WL 307956 (N.J. App. Div. Jan. 28, 2010). There, the plaintiff was struck by a vehicle while walking across a crosswalk. The plaintiff sued JCP&L because it owned and maintained a streetlight located at the crosswalk whose malfunction plaintiffs argued contributed to the accident. The trial court granted summary judgment for JCP&L based on a federal court decision captioned Sinclair v. Dunagan, 905 F. Supp. 208 (D.N.J. 1995). Id. at *2. At the time Sinclair was decided, the utility company had only a contractual duty to maintain working streetlights. See id. at *4 (explaining that Sinclair found no duty because the power company "had complied with its contractually-obligated duties to replace [streetlight] bulbs").

This Court reversed and found that JCP&L did owe the plaintiff a duty. Id. at *7. The Court emphasized that reliance on Sinclair was misplaced since JCP&L there had only a contractual obligation to maintain streetlights. The Court noted that post-Sinclair the Board had implemented new regulations requiring JCP&L to maintain working streetlights and fix broken lights within three days of notice. Id. at **6-7. The Court pointed to the Board's express

policy statement that"[s]treet lighting is important to public safety." Id. at *7. The Court also pointed to the Supreme Court of New Jersey's decision making clear that utility companies owe duties to more than just the entities with whom they are contracted. See id. at **5-7 (citing Franklin Mut. Ins. Co. v. Jersey Cent. Power & Light Co., 188 N.J. 43, 44 (2006) (rejecting the argument that utilities owe no "duty of care to a third party with whom no privity of contract existed")). In addition, Sinclair noted that recognition of a tort duty would not impose a material burden on JCP&L because JCP&L already was required to fix broken streetlights under state law. Id. at *4. The same point applies here: JCP&L and FESC already are obliged to identify and remediate hazard trees such that recognizing a duty to motorists would not cause any burden these defendants have not already assumed. The risk of trees falling and injuring motorists falls within "the range of harm that should be recognized and protected." See id.

A two-case arc supporting the existence of duty on these facts may be found in Contey v. New Jersey Bell Telephone Co., 136 N.J. 582, 583 (1994), followed by Seals v. County of Morris, 210 N.J. 157 (2012). In Contey, the Supreme Court examined questions of legal duty and proximate causation following an accident in which a vehicle struck a telephone pole. The plaintiff veered from the road and crashed into a utility pole. She sued the telephone and

electric companies in connection with the resulting injuries. The trial court granted the utility companies' summary judgment motions. The Supreme Court affirmed, reasoning that responsibility for the positioning of the poles was not under the control of the utility companies but governed by law enacted by public entities. The courts concluded that the "responsibility for the safety of motorists should rest with those who own, control, and maintain the thoroughfare." Id. at 590.

The Supreme Court revisited the implications of Contey in its subsequent decision in Seals. There, Mr. Seals crashed a vehicle into a utility pole owned by JCP&L and FirstEnergy Corp. Seals, 2010 N.J. at 160. Mr. Seals sued for negligence JCP&L and Morris County (which had responsibility for the area around the pole). Mr. Seals alleged JCP&L negligently placed the pole in a location where it was foreseeable a motorist veering off the road would strike it, and the County was negligent for not having the pole removed. JCP&L argued on summary judgment that Contey protected JCP&L from any liability stemming from the placement of a utility pole. Id. The trial court disagreed and denied the motion, reasoning JCP&L was not immune from suit where the placement of the pole was not at the direction of the municipality. Id. This Court reversed under Contey, reasoning that JCP&L could not be liable for its placement of the pole because "the County and Township gave implicit approval

for the pole's location by their silence." Id. at 161.

But the Supreme Court reversed in turn, and reinstated the denial of summary judgment. The Court noted that the statutes governing telephone poles (under which Contey was decided) differed materially from the laws governing utility poles. The Court added that "neither the County nor the Township directed JCP & L where to locate the electric pole" and that JCP&L was solely responsible for the location of its pole. Id. The Court credited the history of accidents relating to the pole, explaining that where vehicles repeatedly strike the same point, "it may suggest that the pole poses an unreasonable risk of causing serious bodily injury or death." Id. The Court explained that "under such circumstances, the utility company that placed that pole, in exercising due care, may have a duty to act." Id. The Court also offered a helpful comparison between utility poles and trees as they relate to highway safety:

> Utility poles, like trees, dot the edges of our roadways across this State. In the ordinary course, tragedies occur when cars veer off a road, striking a tree or utility pole. Every potential hazard abutting our roads and highways cannot be eliminated; our roadways cannot be made perfectly safe. But that does not mean that certain known and unacceptable risks that pose great danger should not be minimized.

Id. at 161. Under these circumstances, the Court explained that Contey did not entitle JCP&L to "immunity for any negligence related to in the placement of the pole" and held that summary judgment was properly denied.

Another case involving utility poles was Mazzone v. Czyzewski, 2015 WL 7783643 (N.J. App. Div. Dec. 4, 2015) (unpublished). There, Ms. Czyzewski was operating her vehicle when she approached an intersection divided by a triangular traffic island. The traffic island was owned by the county and contained bushes and shrubs planted by a civics association as well as two ivy-covered utility poles owned by Atlantic City Electric Company (ACE). As Ms. Czyzewski attempted to get a clear view of the oncoming traffic, she collided with a motorcyclist who sustained serious injury. The motorcycle rider filed suit against Ms. Czyzewski, the civic association, the county, and ACE. Plaintiff argued that ACE failed to place the poles in a safe location on the island and failed to maintain the island in a manner that would not obstruct the view of motorists. The trial court denied ACE's motion for summary judgment and the case proceeded to trial. There was conflicting testimony as to the alleged obstructive view offered by the landscaper and association member. A jury returned a verdict in favor of plaintiff and assessed liability against each defendant.

On appeal, this Court reversed and found that ACE did not owe duty of care to motorists for vegetation management relating to utility poles. Id. at *2. The Court explained that ACE was a subsidiary of a holding company that had published a manual on vegetation management for ACE. The aim of the manual

was only to "ensure the vegetation will not conflict with our facilities and allow our maintenance and construction crews ready and safe access to structures, both transmission and those which carry distribution lines." The Court also noted that the local civic association had received permission by the county to landscape the island and hired the landscaper who planted the vegetation. The Court added that ACE had complied with the vegetation maintenance requirements promulgated by the Board of Public Utilities that utility poles be inspected for vegetation management every four years. ACE's senior staff forester had testified that "the purpose of the inspections was simply to provide reliable and safe [electric] service as opposed to removing obstructions on poles." Id. at *5. Importantly, the vegetation management regulations applicable here did not apply in Mazzone. What mattered was that ACE had undertaken to act with respect to reliable electrical service but not driver safety. Given the precise record at issue there, the record did not establish that ACE had assumed a duty to remove vegetation for a motorist's benefit—in contrast to the duties imposed by regulations on JCP&L and FESC in this case. Id.

The aforementioned cases illustrate that McGlynn's contrasting facts and the arguments presented in McGlynn both inform and limit the application of that case. Most importantly, the McGlynn court had no occasion to consider the Electric Utility Line Vegetation Management regulations because those

regulations did not yet exist. Those regulations apply directly to this case. In turn, regulations may provide valuable guidance in assessing whether a defendant has undertaken an applicable duty. See Reyes, 404 N.J. Super. at 458. In the end, McGlynn does not support summary judgment in this case. Like the other cases cited above, McGlynn's contrasting facts support the denial of summary judgment.

VI. CONCLUSION

The order granting summary judgment should be reversed.

Respectfully submitted,

By: /s/ Charles L. Becker

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Amended: March 31, 2025

Superior Court of New Jersey

Appellate Division

Docket No. A-001071-24

MARK SOLARO,	:	CIVIL ACTION
	:	
Plaintiff-Appellant,	:	ON APPEAL FROM
	:	A FINAL ORDER OF
vs.	:	THE SUPERIOR COURT
	:	OF NEW JERSEY,
FIRST ENERGY CORPORATION; FIRST ENERGY SERVICE COMPANY; JERSEY CENTRAL POWER & LIGHT COMPANY; TOWNSHIP OF WEST MILFORD; PASSAIC COUNTY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; STATE OF NEW JERSEY; MARION NOVACK and EDWARD NOVACK, h/w and ABC COMPANIES I-X,	:	LAW DIVISION, CAMDEN COUNTY
	:	
	:	DOCKET NO. PAS-L-160-22
	:	
	:	Sat Below:
	:	
		HON. THOMAS J. LACONTE, J.S.C.

Defendants-Respondents.

BRIEF FOR DEFENDANTS-RESPONDENTS

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PRELIMINARY STATEMENT

Respondents, Jersey Central Power & Light Company ("JCP&L") and FirstEnergy Service Company ("FESC") (also collectively referred to as "JCP&L"), submit this brief in opposition to Plaintiff's appeal. Throughout this case, Plaintiff has attempted to expand JCP&L's duty far beyond a public utility's true legal obligations. This attempt fails because settled law and the evidence adduced in discovery demonstrate that JCP&L owed no duty to Plaintiff other than what legally prescribed duties it did, in fact, perform. Thus, JCP&L did not and could not have breached Plaintiff's imagined expanded duty, nor could it have played a role in causation.

McGlynn v. State, 434 N.J. Super. 23 (App. Div.), *certif. denied*, 217 N.J. 589 (2014), with facts nearly identical to those of this case, prescribes JCP&L's duty and was the precedent for the trial court's decision. In *McGlynn*, this Court held that JCP&L did not breach its duty to users of a roadway where electric service or equipment was not involved. *McGlynn* held that regulations do not require that public utilities conduct exhaustive inspections of all wooded areas through which distribution lines may run and cannot be saddled with such overarching responsibilities. *McGlynn* drew the correct line in holding that electric utilities are not guarantors of generalized public safety to passing motorists where electric service or facilities play no role in the harm alleged;

otherwise an electric utility would be required to inspect every tree anywhere near its right of ways for any and all possible issues.

McGlynn is legally and factually on all fours with the instant case and was a well-reasoned, policy-based decision made under New Jersey law. Plaintiff incorrectly posits that this Court in *McGlynn* did not adequately consider policy and regulation in rendering its decision and that New Jersey Board of Public Utilities' ("BPU") post-2006 vegetation management regulations overruled *McGlynn*. In fact, the regulations to which Plaintiff refers did not change an electric utility's duties after *McGlynn.* Despite Plaintiff's denials on the topic, there was vegetation management regulation in place in 2003, the year of Ms. McGlynn's tragic death, and public safety was included as one of the concerns addressed in the regulations' promulgation and reenactment. It is thus important to bear in mind that the *McGlynn* Court had public safety-oriented regulations at its disposal in its analysis of the public utility's duty and the scope of that duty in the relevant time frame of 2003; its holding set forth the scope of that duty; and there is no tension between *McGlynn* and current vegetation management regulations.

As *McGlynn* held, the law has never contemplated that a public utility is required to be a public arborist accountable for roadway safety; rather, "public safety" in the context of electric utility vegetation management must be viewed

through the lens of providing electricity, "to maintain ***safe conditions around energized conductor(s)*** and ensure reliable electric service … "***in order to prevent hazards caused by the encroachment of vegetation on energized conductor***(s) […]." N.J.A.C. 14:5-1.2 (emphasis supplied).

Even in the unlikely event that *McGlynn* and the 2003 BPU regulations were deemed to be unconcerned with public safety, Plaintiff would not prevail because it is uncontroverted that JCP&L met its duties under regulations in place at the times relevant to this action. In order to prevail here, JCP&L does not need to establish that it complied with existing regulations; however, JCP&L prevails on that point as well.

The foregoing highlights the irrelevance of Plaintiff's discussion of court decisions addressing or relying on various regulatory schemes to determine existence or scope of duty. It is also noted that Plaintiff fails to even address the public policy concerns underlying the BPU's regulation of public utilities, which include not only safe and reliable service but also rate regulation, which make the vital commodity of electricity affordable to the public.

Furthermore, there are independent reasons why FESC, the shared service company for operating public utilities, does not belong in this action and why its dismissal should stand. These are in addition to the grounds for dismissal of JCP&L, one of the operating utilities that FESC serves.

PROCEDURAL HISTORY

This action arises from an incident on May 3, 2019, wherein a tree fell onto a public street, on State Route 23 in West Milford Township. The tree fell onto the automobile operated by Plaintiff, Mark Solaro ("Plaintiff"), who sustained severe, life-changing injuries as a result. Pa6. In February 2021, Plaintiff filed a complaint in the Essex County Vicinage for the Superior Court of New Jersey the above-listed defendants. On March 26, 2021, Plaintiff filed the amended complaint. Pa6-24.

Plaintiff brought the underlying action against JCP&L, a public utility defined as an Electric Distribution Company[1] under the New Jersey Administrative Code., FirstEnergy Corp., and FirstEnergy Service Company, as well as the Township of West Milford, Passaic County, New Jersey Department of Transportation ("NJDOT"), the State of New Jersey, and Marion and Edward Novack, property owners. Pa9.

[1] Per N.J.A.C. § 14:5-1.2, "an 'electric distribution company' or 'EDC' means a company that has an electric distribution system and meets the definition of a public utility at N.J.S.A. 48:2-13." Under Section 48:2-13 of the statutes, the term "public utility" "shall include every individual, copartnership, association, corporation … that now or hereafter may own, operate, manage or control within this State any electricity distribution … under privileges granted or hereafter to be granted by this State or by any political subdivision thereof."

In November 2021, the trial court transferred the case to Passaic County on the motion of West Milford Township, joined by Passaic County. In May 2022, Plaintiff settled with and stipulated to the dismissal of defendants Marion and (the Estate of) Edward Novack. In June 2022, Plaintiff also stipulated the voluntary dismissal of Township of West Milford.

Summary judgment practice took place. Pa58-368. In November 2022, NJDOT, the State of New Jersey, and Passaic County moved for summary judgment. In February 2023, JCP&L, FESC, and FirstEnergy Corporation moved for summary judgment. Pa58-68; T6-29. The motions explained that FirstEnergy Corp. acts as the holding company of FESC and JCP&L; and FESC is a shared service company providing certain services for JCP&L, among other EDCs. Pa65-66; Pa279-280. In addition to the holding company status, of FirstEnergy Corp., the three defendants argued, under *McGlynn v. State of New Jersey*, 434 N.J. Super. 23 (App. Div. 2014), as well as other relevant law and regulation, that the scope of a public utility's duties did not include the expanded duties proposed by Plaintiff. *See* T6-29.

The Court held oral argument on all parties' motions on December 14, 2023. *See* T4-103. Through responsive filings, and as confirmed during argument, Plaintiff withdrew opposition to FirstEnergy Corp.'s motion for summary judgment and consented to its dismissal but opposed JCP&L and

FESC's motions. At argument, the Court announced its rulings from the bench and granted JCP&L and FESC's motions, agreeing that those defendants did not owe a duty of care to Mr. Solaro under the reasoning of *McGlynn*. T27-12 to T29-15; T98-7-10. The Court later denied the motions for summary judgment filed by the government defendants. T98-7-10.

After disposition of the summary judgment motions, additional trial and settlement activities took place, with which JCP&L and FESC were not involved. JCP&L and FESC now respond to Plaintiff's appeal from the trial court's December 14, 2023 Order entering summary judgment in favor of JCP&L and FESC and dismissing Plaintiff's claims against them. Pa2-Pa4.

COUNTERSTATEMENT OF THE FACTS

A. Allegations of the Amended Complaint

Plaintiff sued all defendants in a two-count amended complaint under two putative theories of liability: Negligence (Count I) and Negligence *Per Se* (Count II). Pa6. Plaintiff lumped together all of the defendants, without separating private landowners from public landowners from public utilities such as JCP&L. Pa6-21. He alleged as to all of them that they provided tree care and inspection services, "with regard to trees close to the power lines and electric utility lines located along State Route 23 North in West Milford Township, New Jersey." Pa19.

B. Evidence of JCP&L's Regulatory Compliance

The evidence adduced in discovery shows that JCP&L strictly adhered to its well-thought-out maintenance schedules and, in so doing, comported with New Jersey regulations.

At his deposition, Robert Walton, who was Manager of Forestry Services for JCP&L in the relevant time period, addressed the particulars of the incident in which Plaintiff was injured, testifying that the wire involved was a three phase (primary) wire, requiring a 15 foot trimming radius in all directions; that is, it was JCP&L's responsibility to manage vegetation within 15 feet of the

conductors, and this duty was met.[2] He stated that JCP&L would inspect, post trimming, trees along power lines. When a contractor has completed trimming a circuit, JCP&L will inspect to make sure the job was completed according to specification.[3] Trees and vegetation growing along a power line are trimmed every four years, per regulatory requirements.[4] JCP&L hires contractors to do that work, and inspects their work while it is in progress, and post trimming. Pa86. At his deposition, Mr. Walton reviewed the Form 1051, the final inspection report by a JCP&L forestry employee named Randy Brockett.[5] The final report evidences a December 13, 2017 inspection prior to the accident and within the four-year time period, an approximately 1½ year span of time between final inspection of the Cozy Lake Circuit and the incident in question.[6] Pa97.

Mr. Walton reviewed Section 14:5-9.1 of the New Jersey Administrative Code ("N.J.A.C."),[7] which is an introductory paragraph to the regulations set

[2] Pa83 (33:16-34:9).

[3] Pa85-86 (44:19-45:3).

[4] Pa86 (45:4-46:7).

[5] Pa97 (91:23-96:23).

[6] Pa111 (Form 1051).

[7] N.J.A.C. 14:5-9.1, "Purpose and scope," provides:

forth in subchapter 9. Requirements are set forth for JCP&L and similar companies to follow in vegetation management "to ensure public safety and the efficient and reliable supply of electric power."[8] Per Walton, this language means that the safety of the public is directly tied to reliable electrical supply, and that workers responsible for vegetation management and other employees should do their jobs safely,[9] which is in conformance with the regulation concerning "mitigat[ion]" of "hazard tree," wherein to "mitigate" means "to make safe and eliminate or adequately reduce the risks of the hazard tree ***to the distribution system***."

Walton reviewed another exhibit, the Report on the Outage,[10] which showed that the distance from the center line to the fallen tree is 15-24 feet, which is outside the trimming corridor. The tree was a live white oak, 55-64 feet tall, which had root rot and broke at the root ball.[11] This was confirmed by David

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> This subchapter sets forth requirements that EDCs shall follow in managing vegetation in proximity to an energized conductor in order to ensure public safety and the efficient and reliable supply of electric power using integrated vegetation management and sound arboricultural practices.

N.J.A.C. 14:5-9.1.oncerning

[8] Pa90-91 (64:19-66:24).

[9] Pa91 (66:25-68:12).

[10] Pa123 (Report on the Outage Investigation Detail dated May 8, 2019).

[11] Pa104 (120:13-129:20).

Garrett, who was a forestry supervisor for JCP&L in 2019.[12] When shown a copy of the Outage Investigation Detail, Pa123, Garrett said that they were filled out by foresters or contractors.[13] The May 8, 2019 form gives the cause as "Trees off ROW (right of way)" and as a contributing cause "uphill slope" and "uprooted live tree."[14] Thus, the investigator described the tree which fell as a live tree, reflecting there was no notice to JCP&L that the subject tree was in any way unsound; as such there was no indication of a "hazard tree." *Id.* The record in this matter is devoid of any evidence that the subject tree was a hazard tree when JCP&L completed its inspection in 2017.

Plaintiff's Amended Complaint incorrectly alleged that the tree at issue was located "immediately next to" the power line. Pa11. The subject tree was well outside of the trimming corridor, among many other trees in the forest, and not even near the power line; the evidence establishes that the fallen tree was well beyond the 15-foot trimming corridor. Pa123 (showing a 37-foot distance of fallen tree from the right-of-way). Mr. Walton reviewed that document at his deposition, stating that it appeared that the distance from the center line to the

[12] Mr. Garrett's department's forestry responsibilities included electrical distribution lines; transmission lines were handled by a separate department. Pa150.

[13] Pa205-206 (79:12-80:2).

[14] Pa123; Pa207-210 (81:11-84:5).

fallen tree was 15 to 24 feet.[15] The New Jersey Department of Transportation ("NJDOT") survey of their own highway right-of-way shows that the subject tree stump is located more than thirty feet (30') away from the pole centerline. Pa222.

Under an EDC's[16] regulatory duties, if a tree were to fall on a power line and into a highway, vegetation management personnel are mainly concerned with a fallen tree's effect on electrical service.[17] Mr. Garrett testified that, when he was working as a forester for JCP&L, "all I looked at was the trees, and what it would do to the wires. I didn't take into account other events that might happen."[18] That is in keeping with relevant industry standards. Utilities are required to perform only a visual tree risk assessment classified by the American National Standards Institute ("ANSI").[19]

Without support, Plaintiff's putative arborist expert purported that a higher level ANSI level assessment was required. Pa413-414. This red herring

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[15] Pa105 (123:9-12).

[16] "'Electric distribution company' or 'EDC' means a company that has an electric distribution system and meets the definition of a public utility at N.J.S.A. 48:2-13." N.J.A.C. 14:5-1.2

[17] Pa86 (47:9-21).

[18] Pa174 (48:6-11).

[19] N.J.A.C. § 14:5-1.2; Pa224 (*ANSI A300 - Part 9: Tree Shrub, and Other Woody Plant Management - Standard Practices (Tree Risk Assessment a. Tree Failure) as a Level 1: Limited visual assessment.*)

was debunked by Respondents' expert, an expert with training, education, and real-world experience in public utility vegetation management, Richard A. Johnstone, RFP.[20] Pa508-512. Mr. Johnstone concluded:

> In my professional opinion, JCPL and its contractors followed their specifications, policies and procedures and the directives outlined by New Jersey Administrative Code 14:5 subchapter 9 relative to inspecting trees along its Cozy Lake#17735 circuit and performing necessary tree work to provide reliable electric service to its customers over a 4-year period. They are not obligated to inspect nor perform tree work outside of their 15-foot wide easement for any purpose other than addressing trees that they consider a threat to electric service safety and reliability immediately adjacent to their energized facilities.

Pa512.

C. Evidence Regarding FESC's Status as a Shared Service Company

Plaintiff's only prior basis for maintaining his suit against FESC was a reference from a deposition in which it was stated that an FESC employee would check if a tree was in imminent risk of failure along with a JCP&L employee.[21] This does not offer a basis for a case against FESC.

[20] Pa530-537 (Mr. Johnstone's C.V.)

[21] Pa96 (86:12-87:13).

FESC produced for a deposition its employee, corporate representative Thomas Nuzback. Pa290. He provided information as to the functions of FESC as a shared service company, which does not function as an EDC.[22] He testified that FESC holds all the shareable resources for the operating companies such as JCP&L, so that each such electric utility does not have to have its own human resources, legal, accounting, claims department. Pa310-315. There are nine or ten utilities comprising the publicly traded FirstEnergy Corporation, and one of them is JCP&L. Pa310-312. FESC thus provides the shared resources, but it does not manage JCP&L, which is an electric distribution company. Pa315-216.

[22] Pa309 (20:15-24).

COUNTERSTATEMENT OF THE STANDARD OF REVIEW

The Court views the grant of summary judgment *de novo,* applying the same legal standards as the trial court. *See Green v. Monmouth Univ.*, 237 N.J. 516, 529 (2019). When no genuine issue of material fact is at issue and the moving party is entitled to a judgment as a matter of law, summary judgment must be granted. *R.* 4:46-2(c); *see Brill v. Guardian Life Ins. Co.*, 142 N.J. 520, 540 (1995). Under Rule 4:46-2(c),

> [t]he judgment or order sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences therefrom favoring the non-moving party, would require submission of the issue to the trier of fact.

"The factual findings of a trial court are reviewed with substantial deference on appeal and are not overturned if they are supported by 'adequate, substantial and credible evidence.'" *Manahawkin Convalescent v. O'Neill,* 217 N.J. 99, 115 (2014) (quoting *Pheasant Bridge Corp. v. Twp. of Warren,* 169 N.J. 282, 293 (2001)).

Allegations are not enough to defeat summary judgment; the non-moving party "must produce sufficient evidence to reasonably support a verdict in its

favor." *Invs. Bank v. Torres,* 457 N.J. Super. 53, 64 (App. Div. 2018), *aff'd and modified by* 243 N.J. 25 (2020). Further, "[b]ald assertions are not capable of … defeating summary judgment." *Ridge at Back Brook, LLC v. Klenert,* 437 N.J. Super. 90, 97-98, 96 A.3d 310 (App. Div. 2014) (citing *Puder v. Buechel,* 183 N.J. 428, 440-41 (2005)).

If there is no genuine issue of material fact, then the Court must decide whether the trial court "correctly interpreted the law." *DepoLink Ct. Reporting & Litig. Support Servs. v. Rochman,* 430 N.J. Super. 325, 333 (App. Div. 2013) (citations omitted) (internal quotation marks omitted). "A trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan,* 140 N.J. 366, 378 (1995).

The *Brill* Court expressly stated that the "thrust" of its decision "is to encourage trial courts not to refrain from granting summary judgment when proper circumstances present themselves." 142 N.J. at 541.

ARGUMENT

Point I: This Court's decision in *McGlynn* is on point and was binding on the trial court.[23]

A. *McGlynn v. State* is legally and factually on all fours with this case and grounded in public policy.

McGlynn v. State, is legally and factually on all fours with this case and grounded in public policy. With facts nearly identical to those of this case, *McGlynn* prescribes JCP&L's duty and was the precedent for the trial court's decision. In that case, a dead tree fell onto a highway striking a vehicle and killing one occupant and injuring three others. *See id.* at 27. The tree was located on private property, but within JCP&L's right-of-way. *See id.*[24] JCP&L had retained a vendor (JAFLO) to perform vegetation maintenance on a four-year cycle along a ninety-mile stretch of roadway, which included the location of the dead tree. *See id.* As in this case, JCP&L's purpose in hiring JAFLO was to "keep its power lines free of encroaching vegetation, such as trees" in order to

[23] JCP&L and FESC inform the Court that, while their points and arguments address each of Plaintiff's points and arguments, the order of Respondents' points differ from the order set out by Plaintiff. Respondents' Point I corresponds to Plaintiff's Point II, Respondents' Point II corresponds to Plaintiff's Point I , and Respondents' Point III is a separate issue not raised by Plaintiff, *i.e.*, that there are independent grounds for affirmance of the trial court's dismissal of FESC, which a shared services company and not an EDC.

[24] As established in the foregoing counterstatement of facts, the evidence in this case is that the subject tree was outside of the right-of-way.

"maintain consistent flow of electricity to its nearly one million customers in thirteen counties." *Id.*

The motion judge in *McGlynn* granted summary judgment to JCP&L and JAFLO, and this Court affirmed. *See id.* at 27-28. In affirming, this Court in *McGlynn* noted that the private landowner bears the "principal responsibility to exercise due care over trees that might pose a hazard to travelers on an adjoining highway," and JCP&L's obligation was limited to maintaining its line so as to provide uninterrupted service. *Id.* at 33. The Court observed that JCP&L's purpose in controlling vegetation was to maintain its service:

> It is not disputed that JCP&L had a clear and defined commitment to keep vegetation controlled in order to prevent interruptions in service. ***To expand that commitment to include maintenance of vegetation for the benefit of passing motorists, where power lines are unaffected, would create an onerous burden without a corresponding benefit where the responsibility already exists, to a greater or lesser extent, on individual property owners and [the New Jersey Department of Transportation].***

Id. at 32 (emphasis supplied).

The trial court here made it known to the parties at the time of oral argument and the issuance of the summary-judgment opinion that *McGlynn* was the precedent for its decision, holding:

> [I]t is not disputed that JCP&L had a clear and defined commitment to keep vegetation control, in order to prevent interruption in service. To expand that

> commitment to include maintenance of vegetation for the benefit of passing motorists, where power lines are unaffected would create an onerous burden without a corresponding benefit, where the responsibility already exists to a greater or lesser extent on individual property owners and NJDOT. More on that later.
>
> And finally, it goes on to—I'm going to repeat what I said earlier. Moreover, the obligation to monitor trees over hundreds of miles of roadway for a broad purpose such as the safety of passing motorists would be an overwhelming burden on a private entity. And here, the property owner had that responsibility, as did NJDOT, a government entity.

T28:17-29:8 (quoting *McGlynn*, 434 N.J. Super. at 32-33).

The *McGlynn* Court engaged in a thoughtful, policy-based analysis regarding the duty of utilities to maintain vegetation, noting the venerable basis for same:

> In determining whether a duty is owed, the first step in the analysis, notions of fairness and public policy must be taken into account. *Acuna v. Turkish*, 192 N.J. 399, 413-14, 930 A.2d 416 (2007), *cert. denied*, 555 U.S. 813, 129 S. Ct. 44, 172 L. Ed. 2d 22 (2008). As the court said in *Acuna*, quoting PROSSER & KEETON ON TORTS, LAWYER'S EDITION § 53, at 359 (W. Page Keeton ed., 5th ed. 1984): "No better general statement can be made than that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." *Acuna, supra*, 192 N.J. at 414, 930 A.2d 416.
>
> An injured party must demonstrate more than the mere foreseeability of harm. *Kelly v. Gwinnell*, 96 N.J. 538, 544, 476 A.2d 1219 (1984). A claimant must also establish grounds for a "value judgment, based on an

> analysis of public policy, that the actor owed the injured party a duty of reasonable care." *Ibid.*

McGlynn v. State, 434 N.J. Super. 23, 31-32.[25]

Employing this policy analysis, the *McGlynn* Court held that "the obligation to monitor trees over hundreds of miles of roadway for a broad purpose such as the safety of passing motorists would be an overwhelming burden on a private entity." *Id.* at 33. Noting that the property owner had that responsibility, as did NJDOT, a government entity, this Court further opined that "JCP&L is a private utility company. That JCP&L did not remove a dead tree from a stretch of woods, and that the fall had such tragic consequences, was neither foreseeable nor within the scope of its day-to-day activities." 434 N.J. Super. at 34.

Judge LaConte embraced the sound, policy-based analysis of *McGlynn*, observing that the members of the public contemplated are those affected by electric utilities' equipment and service:

> The Court: Well, would you agree or would you—would you agree with the concept that using the word safety in this context, is safety from the perils that can occur as a result of power lines being destroyed or brought down by vegetation, by trees, by limbs?
>
> Mr. Di Florio: Yes.

[25] It should also be noted that our Supreme Court did not find it necessary to entertain an appeal from the Appellate Division's disposition. 2014 N.J. LEXIS 586,* 217 N.J. 589 (May 27, 2014).

> The Court: I mean is that the purpose? I mean when you are talking about power lines, and you talk about safety, you're talking about hazards that likely could result from power lines coming down, because vegetation was permitted to grow indiscriminately over power lines. I mean all of us see it. You see power companies coming down and taking down branches that are over power lines, because you don't want them to come down, because that's an extreme hazard, because it's a hazard of electricity. Not that it's going to crush a car.

T25:13-26:4.

Recognizing that there are and must be limits to the scope of a public utility's duties to members of the public, the *McGlynn* Court and the trial court in this case based their decisions on the solid foundation of public policy analysis, an important and fundamental part of the New Jersey tort law.

B. BPU vegetation management regulation was in place in 2003.

Plaintiff dissembles about *McGlynn*, going so far as to posit that this Court did not adequately consider policy and regulation in rendering its decision and that the BPU's post-2006 vegetation management regulations overruled *McGlynn*. However, these points are incorrect. In fact, the regulations to which Plaintiff refers did not change an electric utility's duties after *McGlynn*. Importantly, and despite Plaintiff's denials on the topic, there was vegetation management regulation in place in 2003, the year of Ms. McGlynn's tragic death, and public safety was included as one of the concerns addressed in the

regulations' promulgation and reenactment. It is thus important to bear in mind that the *McGlynn* Court had public safety-oriented regulations at its disposal in its analysis of the public utility's duty and the scope of that duty in the relevant time frame of 2003; its holding set forth the scope of that duty; and there is no tension between *McGlynn* and current vegetation management regulations.

Plaintiff has emphasized the 2006 inclusion of the phrase "public safety" in the "scope" regulation concerning vegetation management. N.J.A.C. § 14:5-9.1. Plaintiff appears to contend that the 2006 addition of an already considered, employed, and necessarily implied word "public" overrules this Court's precedent in *McGlynn*. Given that the meaning of the word "public" was included by necessary implication and was expressly stated with reference to protection of the "the safety and well-being of the public," 34 N.J.R. 1390(a), and the Court is deemed to know the law, Plaintiff's theory that *McGlynn* is overruled by Section 14:5-9.1 is unsupported and unsupportable.

Plaintiff asserts that *McGlynn* and the regulations in place when Ms. McGlynn was tragically killed were unconcerned with "public" safety. This does not carry the day and is a straw argument for at least two reasons. First, in this case, JCP&L met its duties under the regulations; accordingly, the "public safety" goal of Section 14:5-9.1 was satisfied. There is no controversy as to whether a safety duty was met.

Second, despite plaintiffs' statement to contrary, vegetation management regulation was in place in 2003, the year of Ms. McGlynn's tragic death:

> 14:5-7.7 Inspection and maintenance programs
>
> (a) In accordance with N.J.A.C. 14:3-2.6 and 2.7, each EDC shall have inspection and maintenance programs for its distribution facilities, as appropriate to furnish safe, proper and adequate service. These programs shall be based on factors such as applicable industry codes, national electric industry practices, manufacturer's recommendations, sound engineering judgment and past experience. A significant portion of these inspection and maintenance programs shall be focused on mitigating those interruption causes with the greatest impact on reliability such as those related to equipment, vegetation, and animals. EDCs shall endeavor to utilize tree trimming, physical plant inspections, maintenance and protective measures and equipment to assist in the prevention and management of interruptions when appropriate.

N.J.A.C. § 14:5-7.7.

Although more specific vegetation management regulations were later adopted, the safety of the public was included as an important goal and this concern was addressed in its promulgation. N.J.A.C. § 14:5-7.7 ("In accordance with N.J.A.C. 14:3-2.6 and 2.7, each EDC shall have inspection and maintenance programs for its distribution facilities, as appropriate to furnish safe, proper and adequate service."); N.J.A.C. § 14:5-7.1 ("It is the general

obligation of a regulated EDC to provide sufficient resources in order to provide safe, adequate and proper service to its customers.").[26]

Plaintiff asserts that the *McGlynn* Court did not take regulations into account when it rendered its decision. Pb15. This is not only incorrect, but it is also presumptuous inasmuch as (1) regulations were in place as addressed above and (2) it is black letter law that "[a] court will in general take judicial notice of and apply the law of its own jurisdiction … the judges being deemed to know the law or at least where it is to be found." *Leary v. Gledhill,* 8 N.J. 260, 266 (1951). *See also Walton v. Arizona,* 497 U.S. 639, 642 (1990) ("judges are presumed to know the law").[27]

The regulations as they existed in 2003 were concerned with public safety; there is no question on this. In fact, in 2002, this is what was written in readopting the regulations, including N.J.A.C. § 14:5-7.7 (previously facilities maintenance and vegetation management), emphasizing that public safety was a necessary and desired social impact of the public utility regulatory system:

> The rules proposed for readoption with amendments relate directly to the provision of **safe, adequate and proper service** by New Jersey electric utilities. Said rules are necessary to ensure that electric plant is

[26] These regulations were originally adopted on January 2, 2001. 33 N.J.R. 123(a).

[27] *Overruled in part on other grounds by Ring v. Arizona*, 536 U.S. 584, 589 (2002).

> constructed and installed pursuant to acceptable standards and is maintained and inspected in a manner **that will protect the safety and well-being of the public.** There is no additional impact resulting from the proposed amendments, all of which are technical.

34 N.J.R. 1390(a) (emphasis supplied).

Moreover, settled tenets of statutory construction do not permit the strained reading proposed by Plaintiff. One need only look to the doctrine of necessary implication. The word "public" is implied in the regulation inasmuch as the public is a part of the class of persons for which safety is contemplated. An effort to expand regulatory duties based upon the later inclusion of the word "public," which was already contained by necessary implication in the regulation and explicitly stated in legislative history in 34 N.J.R. 1390(a) ("the safety and well-being of the public"), is unfounded. "The language under consideration does not require construction since it is not of doubtful meaning. A strained construction cannot be adopted in order to give effect to what a court may think is the unexpressed intention of the Legislature." *In re Hudson Co. Elections,* 125 N.J.L. 246, 254 (Sup. Ct. 1940). *See also Hoboken v. State Board of Tax Appeals,* 127 N.J.L. 179 (Sup. Ct. 1941).

Importantly, "public safety" in the context of the post-2006 and newer regulations does not encompass protecting passing motorists from non-electrical tree hazards. The "public safety" provision, N.J.A.C. § 14:5-9.1 is a purpose

provision describing the subchapter's function, and the subchapter's operative provisions do not guard against non-electrical hazards, for example, to passing motorists. The definition of "vegetation management," N.J.A.C. § 14:5-1.2, enunciates those activities' goals: "to prevent hazards caused by the encroachment of vegetation on energized conductors." This regulation defines "reliability" as the degree to which safe, proper and adequate electric service is supplied to customers without interruption." *Id.*

Relevantly, when the regulation instructs the EDC to "mitigate" vegetation issues, it defines "mitigate" as "to make safe and eliminate or adequately reduce the risks of the hazard tree ***to the distribution system*.**" N.J.A.C. § 14:5-1.2 (emphasis added). Also notable are the *New Jersey Register's* entries on this subchapter, which only concern electric service and electrical hazards and do not address non-electrical hazards to the public at large. *See* 39 N.J.R. 3716(a) ("These rules are necessary in that they relate directly to the provision of safe, adequate and proper service by regulated New Jersey electric distribution companies."); 40 N.J.R. 1684(a) (same).

Under Section 286 of the *Restatement (Second) Torts* and the New Jersey cases embracing those principles, regulations supporting a tort claim must be aimed at guarding against risks *of the type* that caused the injury. *See*

Restatement (Second) Torts § 286;[28] *Piscitelli v. Classic Residence by Hyatt*, 408 N.J. Super. 83, 105–06 (App. Div. 2009) ("Our courts have adopted [*Restatement (Second) Torts* § 286]"); *Freed v. Bastry*, No. A-3284-18T2, 2020 N.J. Super. Unpub. LEXIS 1279, at *9 (App. Div., June 29, 2020) (reaffirming *Piscitelli*); *Miller v. Hackert*, No. A-5591-11T3, 2013 N.J. Super. Unpub. LEXIS 2896, at *7 (App. Div., Dec. 9, 2013) (same). The risks guarded against by the BPU regulations are those confronted in an EDC's provision of "safe, adequate and proper service," not generalized forestry risks where electrical service or equipment are not involved.

There thus is no tension between *McGlynn* and N.J.A.C. § 14:5-9.1, the current regulation. The *McGlynn* Court recognized that the safety of the public did not extend to all members of the public who were using the highways, observing that JCP&L had not "assumed a general responsibility to tend to the trees so as to promote highway safety." 434 N.J. Super. at 34. *McGlynn* did not

[28] This section of the Restatement (Second) of Torts provides in relevant part:

> The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part … (d) to protect that interest against the particular hazard from which the harm results.

Restatement (Second) Torts § 286.

say that public safety is unimportant, and as addressed above, the Court considered public policy and its implications in making its legal determination as to the scope of JCP&L's duty. But, as contemplated by the BPU in previous and current regulations and noted in *McGlynn*, there are limits to the scope of a public utility's duties to members of the public. This is what Judge LaConte also recognized in the trial court, observing that the members of the public contemplated are those affected by electric utilities' equipment and service. T25:13-26:4

The *McGlynn* decision and the Law Division's determination in this case are consistent with the regulations as written. Despite Plaintiff's insinuation to the contrary, *McGlynn* was not overruled by the regulations to which JCP&L scrupulously adhered. *McGlynn* was decided with facts very similar to the ones in this case, under BPU regulations that contemplated the safety of the public, and that panel of the Court engaged in the same policy considerations as contemplated by the trial court in the instant matter.

In addition to the trial court in this action, courts rely on the sound reasoning of *McGlynn*. *See e.g., Mazzone v. Czyzewski,* Nos. A-4165-13T2, A-4285-13T2, 2015 N.J. Super. Unpub. LEXIS 2801 (App. Div. Dec. 4, 2015) (based upon the *McGlynn* holding vis-à-vis a public utility's vegetation management duties, reversing jury verdict against public utility and remanding);

Boguszewski v. Burke, Memorandum Opinion, Law Div. No. 000575-20 (Hudson County, Jan. 3, 2022) (granting summary judgment to PSE&G in personal injury case based upon reasoning in *McGlynn*.).[29]

C. Plaintiff's "additional case law" is inapposite.

Plaintiff's "additional case law" is inapposite. *Anderson v. Davoren*[30] was a defective street light case, while *Seals v. County of Morris* [31] was a utility pole placement case. Both of those types of cases involve equipment owned by the public utility, which is not a scenario presented in this case.

Anderson is not relevant nor is it even analogous because there the issue was the existence or nonexistence of duty to service equipment that the public utility owned. This is likewise true of *Seals,* which also involved utility-owned equipment. In that case, the husband crashed into an electric utility pole owned by the utility, which was located on private property, a few feet off a road maintained by the county. Plaintiffs claimed that the utility was liable for negligently placing the pole in a dangerous location where it was foreseeable that a vehicle would veer off the road and that the county was liable for its negligence in not having it removed. The Supreme Court determined that the

[29] Pa235.

[30] No. A-6430-06T3, 2010 N.J. Super. Unpub. LEXIS 201 (App. Div. Jan. 28, 2010), Pa460.

[31] 210 N.J. 157 (2012).

utility did not enjoy precedential or statutorily conferred immunity for its negligence, if any, in placing the electric pole.

Judge LaConte recognized this when he dismissed the relevance of *Anderson* out of hand,[32] succinctly stating: "We're dealing with electricity. There's a nexus between the power and whatever happened in that case, because it deals with the facts that streetlights were involved." T20-8. Unlike here, public utility-owned equipment was alleged to have caused the harm in *Seals* and *Anderson*.

Plaintiff's continued references to the outmoded line of cases based upon *Sinclair v. Dunagan,* 905 F. Supp. 208 (D.N.J. 1995), must also be addressed. There, the plaintiffs were a husband and wife who filed a claim against an electric company following the husband's injury when he was hit by a motor vehicle while he was in a crosswalk that was dimly lit due to a malfunctioning streetlight. *See* 905 F. Supp. at 210. The District Court held that no duty existed on the part of the utility company, and even if a duty had existed, the utility would not have breached that duty because it complied with its contractually obligated duties. *Sinclair* is irrelevant here. JCP&L does not claim that it is immune from all liability so long as it meets its contractual obligations. New Jersey courts are in agreement that BPU regulations set forth the duties of a

[32] Plaintiff had not yet brought *Seals* to the trial court's attention.

public utility, their duties are not just a matter of contract, and public policy is considered in determining the existence of a duty and scope thereof.

In *Press v. Borough of Point Pleasant Beach,* No. A-2807-07T3, 2010 N.J. Super. Unpub. LEXIS 183, *16 (App. Div. Jan. 28, 2010), this Court described the evolution of the doctrine:

> [P]olicy considerations aimed at the ultimate protection of rate-payers do not preclude the recognition of a duty on the part of regulated utilities to act with reasonable care to avoid harm to those who foreseeably may be harmed by their actions, after the utility has been notified of the need to act. …. Nor do we see in this case any reason not to recognize a duty of reasonable care to provide adequate lighting to promote the safety of foreseeable pedestrians who might otherwise be exposed to increased danger within crosswalks. On the other hand, as we stated above, we agree with the trial judge the plaintiff presented no competent evidence from which a jury could conclude that JCP&L had actual or constructive notice of any problem with the light sufficiently in advance of the accident to have taken steps to remedy the condition.

Press, 2010 N.J. Super. Unpub. LEXIS 183 at *14 (citations omitted).

Plaintiff's dependence on the *Anderson* and *Seals* cases signifies another attempt to broadly expand JCP&L's duties to parties far beyond those adversely affected by electric service or electric utilities' equipment. JCP&L has existing vegetation management duties and has performed them in conformance with its duty under N.J.A.C. § 14:5-9.1 "to ensure public safety and the efficient, reliable supply of electrical power." The public policy underlying the non-expansion of

public utilities' duties and liabilities is their mandate to provide services to the public **and** further the public good by providing utility services and keeping costs under control. There is nothing in *Anderson* or *Seals* to contradict the reality that JCP&L's duty **does not** include working beyond its scope, looking for extraordinary exigencies such as finding latent defects in trees beyond the trimming corridor, or conducting a survey of all trees in a forest through which distribution lines may run. This is in keeping with settled New Jersey law that public utilities are "under no obligation of guarding against extraordinary exigencies;" rather, they are expected to exercise ordinary care. *Oram v. N.J. Bell Tel. Co.*, 132 N.J. Super. 491, 494 (App. Div. 1975).

It is also necessary to address Plaintiff's rewriting of the significance of *Mazzone v. Czyzewski*. There, based upon the *McGlynn* holding vis-à-vis a public utility's vegetation management duties, the *Mazzone* Court reversed a jury verdict against the public utility defendant. While it is an unpublished decision and not of precedential value, *Mazzone's* facts are similar to what happened here and in *McGlynn*. The *Mazzone* plaintiffs sought recovery for an alleged lapse in vegetation management. The pole was not placed by the electric utility, ACE. Rather Verizon installed it in 1978. After a vehicle struck and damaged the pole in 2004, it was replaced pursuant to an agreement between Verizon and the electric utility, whereby the electric utility became the owner of

the pole, which was placed on a traffic island. ACE played no role in planting the ivy or any of the other vegetation on the island.

The *Mazzone* Court held that ACE's vegetation management plan, which was designed solely to prevent the growth of trees, plants, and bushes from interfering with its service, did not create a duty of care to motorists. There, the Court observed:

> The trial judge's finding that, after the 2008 vegetation inspection, ACE personnel may have learned that ivy was growing on the brace pole and may have created a sight line obstruction, is speculative and ignores the fact that the Davey inspector was not tasked with remediating traffic sight obstructions. We rejected a similar argument in *McGlynn*, where we concluded that to expand a "commitment to include maintenance of vegetation for the benefit of passing motorists, where power lines are unaffected, would create an onerous burden…where the responsibility already exists" on other parties. *McGlynn supra*, 434 N.J. Super. at 32.

2015 N.J. Super. Unpub. LEXIS 2801, *14-15.

There, as here and as in *McGlynn*, the court held that the electric utility's vegetation management, which was created pursuant to BPU regulations, did not create a general duty to motorists. Notably, the accident in *Mazzone* occurred in 2008, after the 2006 inclusion of the word "public" next to the word "safety" in the vegetation management regulations. Moreover, in *Mazzone*, the electric utility had undertaken to act with respect to reliable electrical service but not as

to general driver safety. Similarly, here, the regulations do not establish a duty to protect a passerby where electrical service or equipment do not play a role.

It is unclear why Plaintiff states that "the vegetation management regulations applicable here did not apply in *Mazzone*." Pb24. It appears to be an incorrect assertion. In both cases, vegetation management procedures were developed and employed in strict compliance herewith. The *Mazzone* Court observed that the record established this:

> ACE senior staff forester, Matthew Simons, testified that ACE inspects its poles for vegetation every four years as mandated by the Board of Public Utilities. The poles on the Briarcliff island were inspected by a subcontractor, Davey Tree Expert (Davey), for vegetation in May 2008, prior to the accident. The arborist for Davey, Bryce Bixby, determined that no work was necessary. Simons, who contributed to drafting the vegetation management protocol followed by ACE, explained that the purpose of the inspections was "to provide reliable and safe [electric] service as opposed to removing obstructions on poles[.]"

2015 N.J. Super. Unpub. LEXIS 2801, *12.

That is remarkably similar to the record in discovery in this case. In his deposition, Robert Walton, who was Manager of Forestry Services for JCP&L in the relevant time period, stated that JCP&L would inspect, post trimming, trees along power lines. When a contractor has completed trimming a circuit, JCP&L will inspect to make sure the job was completed according to specification. Pa85-86. Trees and vegetation growing along a power line are

trimmed every four years, per regulatory requirements. Pa86-87. Mr. Walton reviewed Section 14:5-9.1 and stated that this language means that the safety of the public is directly tied to reliable electrical supply, and that workers responsible for vegetation management and other employees should do their jobs safely. Pa91.

Additionally, a review of legislative history establishes that similar vegetation management regulations were in place in 2008 when the *Mazzone* accident occurred and in 2019, when Mr. Solaro sustained his injuries. *Compare* 2008 N.J.A.C. 14:5-9.1 ("This subchapter sets forth requirements that EDCs shall follow in managing vegetation in proximity to an energized conductor in order to ensure public safety and the efficient and reliable supply of electric power.") *with* 2019 N.J.A.C. 14:5-9.1 (same); *compare* 2008 N.J.A.C. 14:5-9.4 ("An EDC shall perform vegetation management on vegetation that is close enough to pose a threat to its energized conductors at least once every four years.") *with* 2019 N.J.A.C. 14:5-9.4 (same).

Plaintiff's attempt to transform public utility employees into teams of arborists exhaustively inspecting all of the trees in the woods is without precedent. True public policy underlying the non-expansion of public utilities' duties and liabilities is their mandate to provide services to the public and further the public good by providing utility services and keeping costs under control.

See in re Pub. Serv. Elec., 167 N.J. at 384-85. *In re Hackensack Water Co.,* 41 N.J. Super. at 422.

The regulations do not require that public utilities conduct exhaustive inspections of all wooded areas through which distribution lines may run. Public utilities are not and cannot be saddled with such overarching responsibilities. The courts in *McGlynn*, *Mazzone*, and *Boguszewski* recognized that fact. Those courts did not say that the public utility is without a duty to the public. Rather, they understood and expressed that public utilities are not guarantors of generalized public safety to passing motorists where electric service or facilities play no role in the harm alleged.

Point 2: The trial court properly entered summary judgment because JCP&L met its duties under the law, including Board of Public Utilities regulations.

A. JCP&L met its duties under New Jersey law, and the law and public policy support this.

At the outset, it is noted that Plaintiff appears to have waived his claim for Negligence *Per Se* (Count II) for putative violation of vegetation management regulations set forth in the New Jersey Administrative Code. His briefing does not contain argument or legal support for it.[33] In relationship to the BPU regulations, however, Plaintiff seeks to advance an argument that an

[33] *Sklodowsky v. Lushis,* 417 N.J. Super. 648, 657 (App. Div. 2011) ("An issue not briefed on appeal is deemed waived.").

alleged violation of regulations is indicative of "a duty's existence or scope within a factual context." Pb7. He inaptly relies on cases wherein defendants were adjudicated to have violated statutes, regulations, and ordinances, a far cry from what happened here.[34]

For example, in *Reyes v. Egner,* 404 N.J. Super. 433, 456–60 (App. Div. 2009), *aff'd,* 201 N.J. 417 (2010), this Court considered statutes, regulations, and ordinances, *inter alia,* to determine whether there was a duty to include a handrail on a porch of a rental property. The *Reyes* Court was faced with a defendant landlord who failed to provide a handrail in violation of several building-related codes. Likewise, in *Frugis v. Bracigliano,* 177 N.J. 250 (2003), there was evidence that a board of education did not implement effective reporting procedures and disregarded critical information about a school principal who was found to be engaged in wrongdoing, and this was in violation of education regulations. Also inapposite are *Braitman v. Overlook Terrace Corp.,* 68 N.J. 368, 383 (1975), wherein the apartment owner defendant was found in violation of N.J.A.C. 5:10-6.6(d), a regulation under the New Jersey Hotel and Multiple Dwelling Law mandating specific reinforced locks and bolts on doors to dwelling units, *Lechler v. 303 Sunset Ave. Condo. Ass'n,* 452 N.J. Super. 574, 586 (App. Div. 2017), wherein the condominium association was

[34] Pb7-8

found to be in violation of statutory and regulatory under N.J.S.A. 46:8B-14(a) and N.J.A.C. 5:10-7.7(a)(1).

Here, by contrast, there is no evidence whatsoever that JCP&L failed to meet its regulatory duties or otherwise committed a violation of the regulations. As set forth above, the evidence is uncontroverted that JCP&L performed its vegetation management duties in conformance with the very regulations on which Plaintiff relies. N.J.A.C. § 14:5-9.1, *et. seq.*

JCP&L's mandate under N.J.A.C. § 14:5-9.1 "to ensure public safety and the efficient, reliable supply of electrical power" means working to keep the power flowing and maintain reliable electrical service. The significance of JCP&L's scrupulous compliance with vegetation management regulations also will be addressed in a following section of this brief.

Citing *Hopkins v. Fox & Lazo Realtors,* 132 N.J. 426, 439–40 (1993), and *J.S. v. R.T.H.,* 155 N.J. 330, 337–40 (1998),[35] Plaintiff also writes that considerations of public policy and fairness require the weighing and balancing of multiple factors such as foreseeability, the severity of harm, and the comparative interests and relationships of the parties. As noted above, the trial court here did exactly that, and made it known to the parties in issuing its summary-judgment opinion. T28:17-29:8 ("I'm going to repeat what I said

[35] Pb6.

earlier. Moreover, the obligation to monitor trees over hundreds of miles of roadway for a broad purpose such as the safety of passing motorists would be an overwhelming burden on a private entity. And here, the property owner had that responsibility, as did NJDOT, a government entity."). This Court in *McGlynn*, too, engaged in a thoughtful, policy-based analysis regarding the duty of utilities to maintain vegetation. *McGlynn v. State*, 434 N.J. Super. at 31-32.[36] Thus, the *McGlynn* Court and the trial court in this case did not make their determinations in a vacuum but rather issued them based upon the solid foundation of public policy analysis, an important and fundamental part of the New Jersey tort law, together with regulatory and statutory law.

The policy concerns addressed in *McGlynn* and by the trial court here show why a public utility cannot be expected to monitor all trees for all purposes over hundreds (actually, thousands) of miles of roadways in the State, as Plaintiff urges. "To expand that commitment to include maintenance of vegetation for the benefit of passing motorists, where power lines are unaffected, would create an onerous burden without a corresponding benefit where the responsibility already exists, to a greater or lesser extent, on individual property owners and NJDOT." *McGlynn*, 434 N.J. Super. at 32

[36] It should also be noted that our Supreme Court did not find it necessary to entertain an appeal from the Appellate Division's disposition. 2014 N.J. LEXIS 586,* 217 N.J. 589 (May 27, 2014).

Indeed, the Appellate Division recently rejected another attempt to expand a utility's duties well beyond what sound public policy (and regulation) mandate. *Funtown Pier Amusements, Inc. v. Biscayne Ice Cream*, 477 N.J. Super. 499, 522 (App. Div. 2024). In *Funtown Pier*, this Court addressed a fire ensuing from Hurricane Sandy in 2012 that originated underneath the boardwalk in storm-damaged electrical service equipment, which was privately owned. The Court held that the electric utility had no existing duty of care to inspect customer-owned equipment pursuant to the Underground Facility Protection Act, N.J.S.A. 48:2-73 to 91.

The *Funtown Pier* Court recognized that a finding of such expanded duty would be in contravention of principles of fairness and public policy, writing:

> [P]laintiffs' argument that it is in the public's interest to expand the liability of public utilities is not persuasive. In this era of rapid climate change, the future risk of "superstorms" striking New Jersey's coast and causing damage to electric utility infrastructure is significant.….As a matter of public policy, we conclude an expansion of JCP&L's duty to inspect to include redundant inspections of customer-owned equipment would place an unfair burden on the utility and its ratepayers, making them insurers for the negligent acts or omissions of others.
>
> [* * *]
>
> [I]n an era likely to include more extreme weather events, not less, clarity in establishing the duty of care for public utilities towards their customers is paramount, so that the public utility "can anticipate

> when liability will attach to certain conduct." [*Coleman v. Martinez*, 247 N.J. 319, 338 (2021). **We thus decline plaintiffs' invitation to create a new legal duty for JCP&L, with its attendant consequences.**

Funtown Pier, 477 N.J. Super. at 522-523 (record citations omitted; emphasis supplied).

As *Funtown Pier* and *McGlynn* held, the expansion of scope of duty that Plaintiff proposes would "place an unfair burden on the utility and its ratepayers, making them insurers for the negligent acts or omissions of others." *Funtown Pier Amusements, Inc. v. Biscayne Ice Cream*, 477 N.J. Super. at 522.

This reflects the public policy underlying the non-expansion of public utilities' duties and liabilities – their mandate to provide safe and reliable services to the public and further the public good by providing utility services and keeping costs under control. "The Legislature has endowed the BPU with broad power to regulate public utilities [and] considerable discretion in exercising those powers." *In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling*, 167 N.J. 377, 384-85 (2001). As this Court aptly put it:

> The prime importance to modern living, commerce and industry of water, electricity, gas, sewage disposal, public transportation of goods and people and rapid means of personal communication requires no elaboration. Governmental regulation of these essentials when furnished by private corporations, as well as direct governmental furnishing of many of them, has long since been had and upheld as in the highest public interest.

In re Hackensack Water Co., 41 N.J. Super. 408, 422 (App. Div. 1956). Given that the utility's duties are set forth in the regulations, Plaintiff's requested expansion of the scope of an electric utility's duties beyond what its equipment and service affects is not in conformance with the settled and vital public policy underlying the limitation of scope of a public utility's duty.

B. JCP&L met its duties under Board of Public Utilities regulations.

1. JCP&L did not breach its regulatory duties.

At the outset, it is important to bear in mind that JCP&L does not need to establish that it complied with existing regulations in order to prevail here. This is because, as *McGlynn* and the trial court held, New Jersey law, including BPU regulations, does not require a public utility to operate as a "public arborist," inspecting trees anywhere near rights-of-way and roadways, too.

Plaintiff has omitted it from his Statement of Facts, but the evidence of record is that JCP&L scrupulously met its duties under the regulations and kept with relevant industry standards.[37] JCP&L followed its maintenance schedules and, in all ways, conformed to New Jersey regulations in performing its

[37] JCP&L and other utilities are required to perform a visual tree risk assessment classified by the American National Standards Institute. ANSI A300 - Part 9: Tree Shrub, and Other Woody Plant Management - Standard Practices (Tree Risk Assessment a. Tree Failure) as a Level 1: Limited visual assessment. N.J.A.C. § 14:5-1.2; Pa224.

inspections. Pa 97-98; Pa205-210. Furthermore, the subject tree was at least 15 and possibly up to 37 feet beyond the trimming corridor and there is no evidence that there was notice to JCP&L that the subject tree was in any way unsound. Pa123; Pa105; Pa222.

In his brief, Plaintiff is incorrect in his assertion that "[t]he record at summary judgment also was unrefuted on the point that the subject tree was a hazard tree[38] as defined by the regulation."[39] To the contrary, this **was** refuted, and the evidence establishes that it was **not** a hazard tree. Pa123; Pa207-210. In the underlying litigation, Plaintiff equated the treatment of a "danger tree" with that of a "hazard tree" and asserted JCP&L's knowledge of the latter of the existence. This is unsupported, and, in any event, Plaintiff's position amounts to a theory that JCP&L had a broad duty to fully inspect thousands of leaning trees, which in clearly not within the scope of its duties under *McGlynn* or the relevant BPU regulations. Bearing this in mind, JCP&L would prevail on this point as well, if the trial court had reached the evidence of record. This is because the affirmative evidence is that the subject tree was an "uprooted live

[38] Per the BPU Code, a "'[h]azard tree' is a structurally unsound tree on or off the right of way that could strike electric supply lines when it fails. Structural unsoundness distinguishes a hazard tree from a danger tree, such that while all hazard trees are danger trees, not all danger trees are hazard trees." N.J.A.C. § 14:5-1.2

[39] Pb13; Pb17.

tree"[40] establishing that any alleged unsoundness was not visible and, as such could not be identified on inspection as a hazard tree.

Plaintiff did not meet his burden to show that JCP&L missed a hazard tree or engaged in any other regulatory violation. In other words, he failed to offer any evidence that it was a hazard tree or other regulatory violation and merely has alleged it. But a plaintiff must establish the existence of negligence "by some competent proof" because "[n]egligence is a fact which must be shown and which will not be presumed." *Franco v. Fairleigh Dickinson Univ.,* 467 N.J. Super. 8, 25 (App. Div. 2021). Allegations are not enough to defeat summary judgment; the non-moving party "must produce sufficient evidence to reasonably support a verdict in its favor." *See Invs. Bank v. Torres,* 457 N.J. Super. at 64; *Ridge at Back Brook*, 437 N.J. Super. at 97-98 ("[b]ald assertions are not capable of … defeating summary judgment."). Plaintiff's unsupported allegations of a breach of duty by way of regulatory violation were and are insufficient to withstand summary judgment.

[40] Pa123; Pa207-210.

Point 3: FESC was entitled to summary judgment on grounds independent of the grounds upon which summary judgment was entered in favor of JCP&L.

FESC was entitled to summary judgment on grounds independent of the grounds upon which summary judgment was entered in favor of JCP&L. Plaintiff has not addressed these independent grounds in his appeal, but FESC brings them to the Court's attention because affirmance may be made on any basis, even if that basis is absent from the underlying trial court reasoning in entering summary judgment in Respondents' favor. The trial court referred to FESC and JCP&L as one and the same, both as EDCs, and granted summary judgment in their favor.

FESC respectfully submits that, as the shared service company ("SSC") for operating public utility Defendant JCP&L, it is not an EDC as that is defined in the public utility statues and regulations. FESC is a shared service company for several EDCs, including JCP&L. Per N.J.A.C. § 14:5-1.2, JCP&L is an EDC, which "means a company that has an electric distribution system and meets the definition of a public utility at N.J.S.A. § 48:2-13." FESC does not have an electric distribution system and does not meet the definition of a public utility under the statute. Plaintiff has attempted to expand the duty of JCP&L as an EDC far beyond what is set forth in the N.J.A.C. The fact is that FESC, which is not an EDC under the Code, is not within the ambit of the regulations cited

by Plaintiff. Thus, Plaintiff's issues with JCP&L, all of which are based on allegedly improper vegetation management, simply do not apply to FESC.

Plaintiff's only prior basis for maintaining his suit against FESC was a reference from a deposition in which it was stated that an FESC employee would check if a tree was in imminent risk of failure along with a JCP&L employee. Pa95. This reflects the circumstance that one of the shared services is a forestry consultant to provide additional expertise to the EDCs served by FESC; and specifically, JCP&L was using FESC to carry out **its** own duties. That is a slender thread indeed to hang a characterization of FESC as an EDC and place upon it the duties of an EDC under the BPU's regulations. There simply is no basis for such an assertion.

As addressed in the Counterstatement of Facts, FESC produced its employee, corporate representative Thomas Nuzback, for a deposition. Pa290. He provided information as to the functions of FESC as a shared service company, which does not function as an EDC. Pa309. He testified that FESC holds all the shareable resources for the operating companies such as JCP&L, so that each such electric utility does not have to have its own human resources, legal, accounting, claims department. Pa310-315. There are nine or ten utilities comprising the publicly traded FirstEnergy Corporation, and one of them is

JCP&L. Pa310-312. FESC thus provides the shared resources, but it does not manage JCP&L, which is an electric distribution company. Pa315-216.

It is clear that, as a shared service company and not an EDC, FESC did not owe or breach any duty regarding vegetation management as alleged in this action. Plaintiff offers virtually nothing to counter the fundamental truth that, as a shared service company and not an EDC, FESC did not owe or breach any duty regarding vegetation management as alleged in this action. This is not a piercing of the corporate veil situation inasmuch as FESC does not own JCP&L but rather provides services such as personnel, claims, and accounting.

The fact is that FESC, which is not an EDC under the Code, is not within the ambit of the regulations cited by Plaintiff. Thus, Plaintiff's complaints about "hazard trees" under N.J.A.C. § 14:5-1.2 and § 14:5-9.5, and any of his other claims, all of which are based on allegedly improper vegetation management, simply do not apply to FESC.

CONCLUSION

The December 14, 2023 Orders granting summary judgment in favor of Defendants, Jersey Central Power & Light Company and FirstEnergy Service Company, and dismissing the action with prejudice, should be affirmed.

/s/ Marco P. Di Florio
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Acting Director

May 19, 2025

Via Ecourts
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Superior Court of New Jersey, Appellate Division
Richard J. Hughes Justice Complex
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Trenton, New Jersey 08625

Re: Mark Solaro v. FirstEnergy Corporation, FirstEnergy Service Company, Jersey Central Power & Light, Township of West Milford, Passaic County, New Jersey Department of Transportation, and State of New Jersey.
Docket No: A-001071-24T1

Civil Action: On Appeal From a Final Decision of the Superior Court of New Jersey Law Division, Passaic County, Docket No.: PAS-L-160-22.

Letter on Behalf of Respondents, State of New Jersey and the New Jersey Department of Transportation.

Dear Ms. Hanley:

Please accept this letter on behalf of Respondents State of New Jersey and the New Jersey Department of Transportation (together, State Defendants).

This appeal stems from a negligence action originating from a May 3, 2019 single-vehicle incident where a tree overhanging a power line broke loose and fell onto plaintiff-appellant's car as he was driving, leading to serious injuries. (Pa11-12).

On March 26, 2021, the appellant filed the operative complaint in this matter, alleging negligence on behalf of each of the State, NJDOT, Passaic County, Jersey Central Power & Light Company (JCP&L), and FirstEnergy, for failure to properly maintain the trees surrounding the power lines and proximately causing his injuries. (Pa6-22).

On December 14, 2023, the Court granted summary judgement as to JCP&L and FirstEnergy but denied it as to the State Defendants and Passaic County. (Pa2-4). Trial proceeded against the State Defendants, where State Defendants secured a no-cause verdict, but as appellant now explains, the outcome of that trial was subject to a high-low settlement agreement. (Ab4).[1] As a result, plaintiff filed a stipulation dismissing State Defendants from the matter on September 19, 2024.

With his brief, Appellant makes clear that this appeal concerns only the December 14, 2023 order dismissing JCP&L and FirstEnergy and that the claims against all government actors are fully and properly resolved. (Ab4). The trial court orders at issue in this appeal similarly pertain only to the December 14, 2023 grants of summary judgement for FirstEnergy and JCP&L. (Pa559). In summary, all claims against State Defendants have been finally resolved and are not at issue in this appeal.

[1] Ab" refers to appellant's amended brief filed on March 31, 2025.

Therefore, State Defendants take no position as to the issues in this appeal and do not intend to participate in any argument that the court may schedule.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

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MARK SOLARO, Plaintiff/Appellant v. FIRSTENERGY CORPORATION; FIRSTENERGY SERVICE COMPANY; JERSEY CENTRAL POWER & LIGHT COMPANY; PASSAIC COUNTY; NEW JERSEY DEPARTMENT OF TRANSPORTATION; and STATE OF NEW JERSEY, Defendants/Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO: A-001071-24 **CIVIL ACTION** ON APPEAL FROM A FINAL DECISION BY: THE HON. THOMAS J. LACONTE, J.S.C. THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, PASSAIC COUNTY DOCKET NO: PAS-L-160-22

BRIEF OF AMICUS CURIAE NEW JERSEY UTILITIES ASSOCIATION IN SUPPORT OF DEFENDANTS/RESPONDENTS

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Submitted: May 19, 2025

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PRELIMINARY STATEMENT

The New Jersey Utilities Association ("NJUA") seeks leave to appear as amicus curiae and to file this amicus brief in support of the decision by the trial court to dismiss with prejudice the complaint of Mark Solaro ("Appellant") as to Jersey Central Power & Light ("JCP&L" or "Respondent") concerning the alleged liability for negligence and injury associated with a tree fall onto a motor vehicle. As will be discussed in detail below, the New Jersey Board of Public Utilities ("BPU" or "Board") has issued regulations on the obligations and requirements for vegetation management, which includes trees, for utilities such as JCP&L. As the only statewide organization of investor-owned utilities in New Jersey, the NJUA and its membership has a keen and immediate interest in this matter, and believes that the Court should be aware of a number of concerns and considerations. Ultimately, and at the core of this argument, the jurisdiction and obligation to engage in vegetation management, developed and implemented by the Board, did not and should not be seen as expanding upon the duty of care owed by utilities to motorists and others in the State. The utilities are not designed to be the entity with ultimate responsibility over the protection of motorist from tree falls, especially when neither the roadways nor the trees themselves are utility property.

Precedential determinations, most notably in McGlynn v. State, 434 N.J. Super. 23 (App. Div.), certify. denied, 217 N.J. 589 (2014), have set a foundation for the understanding that utilities are not responsible for, and have no duty to mitigate, the possibility of tree limbs or trees themselves falling onto roadways in the State. Subsequent rulemaking by the State has increased and clarified the obligations of the utilities for vegetation management, but nothing in those regulations has or could be considered to have expanded the obligation and duty of New Jersey utilities to serve as the first, last, or any entity designed and directed to protect automobiles from tree falls. Instead, based upon long-standing obligations, as well as the foundation for the updating of the vegetation management rules, makes clear that the purpose, intent, and design of the vegetation management rules is for the protection of utility infrastructure, and not the protection of public motor rights-of-way. To imposes this obligation, where no such obligation has previously existed and no intention was made to expand it, would not only be unfair and unfounded, but would impose a cost upon the utilities that would, ultimately, result in an increase in costs for all ratepayers in the State, with no commensurate protection, change, or benefit. As such, the NJUA strongly supports the decision of the trial court, and calls upon

this Court to affirm the dismissal of the negligence claim through the issuance of a summary judgment.

Additionally, the foundation, basis, and understanding of the Vegetation Management Regulations promulgated by the New Jerey Board of Public Utilities ("Board" or "BPU") needs to be considered. The BPU is an economic regulatory agency designed to ensure safe, adequate, and proper utility service at reasonable rates. It is not, and does not claim to be, an entity charged with or seeking to enforce the general safety of roadways and drivers. As will be discussed, this falls so far out of the purview of the Board as to be utterly without merit.

STANDARD OF REVIEW

Under New Jersey Court Rule 1:13-9(a), an application for leave to appear as amicus curiae shall be granted if the court in its discretion is satisfied that the applicant's participation will assist in the resolution of an issue of public importance. In this case, the NJUA is a State organization representing investor-owned utilities, and providing insight and awareness of the results and implications of extending liability to electric utility companies for tree falls onto public rights-of-way when the electric company has no control or ownership of the trees or roadways in question. Because of the far-reaching impact of such a

major change, the NJUA's input into this matter will assist in the resolution of an important issue, such submission is timely, and no party is prejudiced.

The NJUA is the State's only organization for the investor-owned utilities in the State. Primary membership includes Atlantic City Electric, Jersey Central Power & Light, PSE&G, Rockland Electric, New Jersey Natural Gas, South Jersey Industries, Atlantic City Sewerage Co., Aqua Water Company, Gordon's Corner Water Company, Middlesex Water Company, New Jersey American Water, Veolia, and Verizon. Associate members run the gamut from construction to engineers to attorneys to consultants, all involved in the utility industry in the State.

Because of this cross-industry focus, and based upon the direct and immediate impact of the proposed change in obligation for the safety and security of roadways from tree falls inherent in the Plaintiff/Appellant's ask, the NJUA believes that its insight and understanding of the situation can provide a valuable foundation for the judicial affirmation of the property decided decision below, and as such seeks amicus curiae status.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The NJUA essentially adopts the Procedural History and Statement of Facts provided by the Defendants-Respondents, and only highlights the following selected elements:

The Board's vegetation management regulations were first promulgated in response to the significant August 2003 blackout, where a tree came into contact with a transmission line in Ohio, and caused a cascade event leading to over 50 million people in the northeast United States and southeastern Canada being without power.[2] In response, the United States Department of Energy and the North American Electric Reliability Corporation ("NERC") issued obligations and frameworks for vegetation management. This document, Standard FAC-003.1 – Transmission Vegetation Management Program, noted its express purpose was:

[1] Because of they are inextricably intertwined, Amicus Curiae NJUA has combined the Statement of Facts and Procedural History into one statement for better clarity and for the court's convenience.

[2] See James Barron, "The Blackout of 2003: The Overview; Power Surge Blacks Out Northeast, Hitting Cities in 8 States and Canada; Midday Shutdowns Disrupt Millions," New York Times, (Aug 15, 2003) (AC001), available online at https://www.nytimes.com/2003/08/15/nyregion/blackout-2003-overview-power-surge-blacks-northeast-hitting-cities-8-states.html.

> To improve the reliability of the electric transmission systems by preventing outages from vegetation located on transmission rights-of-way (ROW) and minimizing outages from vegetation located adjacent to ROW, maintaining clearances between transmission lines and vegetation on and along transmission ROW, and reporting vegetation related outages of the transmission systems to the respective Regional Reliability Organizations (RRO) and the North American Electric Reliability Council (NERC).
>
> [FAC-003.1, at A.3. (AC007).[3]]

The BPU promulgated a preliminary set of regulations in 2006 in order to ensure consistency across New Jersey's four electric distribution companies. These rules were re-adopted by the Board in February 2008 as part of an overall readoption of the Electric Service rules, and codified as N.J.A.C. 14:5-9.1 et seq. A full stakeholder process was conducted in 2014, which was open to significant input from all interested parties, and which resulted in the full set of vegetation management regulations. On August 15, 2022, the readoption notice

[3] References to the Amicus Curiae Appendix shall be in the form of ACxxx.

of N.J.A.C. 14:5 was published in the New Jersey Register, and noted the intention to readopt the vegetation management regulations, mostly without amendment. 54 N.J.R. 1584. Following the required public comment period, the regulations were readopted and remain in effect today. 55 N.J.R. 312.

LEGAL ARGUMENT

POINT I

THE BOARD'S VEGETATION MANAGEMENT REGULATIONS WERE DESIGNED TO PROTECT THE ELECTRICAL TRANSMISSION AND DISTRIBUTION SYSTEMS, AND WERE NOT DESIGNED TO ADD OR AMEND A DUTY OF CARE TO MOTORISTS

Since the first application of the concept of "vegetation management" by the Board, the protection sought through the trimming of trees and the limitation of tall growing plants in utility rights-of-way has been and has remained the protection of the electrical system.

As noted above, Standard FAC-003.1 – Transmission Vegetation Management Program from NERC was a federal document issued prior to the Board's development of vegetation management rules. This document included an explicit purpose section, and this purpose section was clear as to the need and intent of imposing vegetation management upon transmission lines throughout the country – to "preventing outages from vegetation located on transmission rights-of-way." FAC-003.1, at A.3. (AC007). This is not a case of trying to

understand intent; this is a clearly and unambiguously expressed purpose – improve reliability of the electrical system by protecting the right-of-way from vegetation intrusion. In 2006, with the first Board regulations were issued, and then again in 2008, with the full adoption, the Board's expressed purpose and scope was "to ensure the public safety and the efficiency and reliable supply of electrical power." N.J.A.C. 14:5-9.1.

This makes sense. The statutory mandate of the Board is clear. Pursuant to N.J.S.A. 48:2-13, the Board has "general supervision and regulation of and jurisdiction and control over all public utilities…so far as may be necessary for the purposes of carrying out the provisions of [Title 48]." N.J.S.A. 48:2-13(a). Furthermore, N.J.S.A. 48:2-23 has been interpreted to require that the Board must ensure that a utility provides "safe, adequate and proper service" at reasonable rates. See, e.g., I/M/O the Petition of New Jersey-American Water Company Inc. for Approval of Proposed Cost Recovery of Lead Service Replacement Plan, New Jersey Board of Public Utilities, Order, Docket No. WR22010017, dated October 12, 2022, at 5 (AC012). N.J.S.A. 48:2-23 also highlights that the Board should consider and ensure that utilities operate in such a manner to "conserve and preserve the quality of the environment and prevent the pollution of the waters, land and air of the State, and including furnishing

and performance of service in a manner which preserves and protects the water quality of a public water supply." N.J.S.A. 48:2-23.

No legislative intent has ever been identified or pointed towards to indicate that the Board was designed or intended to have jurisdiction over the safety of motorists based upon possible tree falls onto State roadways. Significantly, if the Board believed it had jurisdiction over such activity, the Board would be expected and authorized to exert and exercise primary jurisdiction over cases such as this. Yet, for nearly 25 years, the Board, and the Courts of this State, have understood that the Board's primary jurisdiction is limited to the "those issues which, under a regulatory scheme, have been placed within the special competency of an administrative body." Daaleman v. Elizabethtown Gas Co., 77 N.J. 267, 269 n. 1 (1978).

This understanding of primary jurisdiction continued and was explicitly set forth in terms of the Board in Muise v. GPU, Inc., 332 N.J. Super. 140 (App. Div. 2000). In Muise, a class action suit was brought by customers of a utility who claimed to have suffered damages from the effects of an electric service outage. The trial court denied a motion to dismiss the matter based upon a claim that the BPU had primary jurisdiction over consequential damages to individual customers resulting from power outages. In addition to accepting the Board's

position that it did not have primary jurisdiction over the damages caused to individuals from an outage, the Court also found that primary jurisdiction cannot be invoked when the claim is outside the agency's jurisdiction or the remedy is outside the agency's power. Id. at 160. This understanding – that the Board has primary jurisdiction over certain elements that were explicitly provided to them by legislative grant – couples with the Court's decision in Musie that the Board did not have any such jurisdiction in the absence of express legislative grant.

In this matter, had the Plaintiff/Appellant believed that the jurisdiction and control of the regulatory required the Board to consider and control tree falls for street travel based upon the regulatory vegetation management rules, it would have been incumbent upon the Plaintiff/Appellant to have asked the Court to seek the input of the Board under the doctrine of primary jurisdiction. While the Board would not, and could not, have exclusive jurisdiction, if the Plaintiff/Appellant believes that the Board set, designed, and was granted the authority to require the protection of drivers from tree falls through the Board's vegetation management regulations, then the Board, based upon the Muise decision and subsequent cases, should have been, at a minimum, asked to exercise its primary jurisdiction over the rules and regulations. No such ask was

made, and rightly so; the Board does not have any jurisdiction over the protection and obligations of a utility to trim trees for the benefit of motorists.

POINT II

THE CASE LAW ON LIMITING THE DUTY OF VEGETATION MANAGEMENT TO THE SAFETY OF THE ELECTRICAL SYSTEM IS CORRECT, PROPER, AND SHOULD CONTROL

The Court cited McGlynn v. State, 434 N.J. Super. 23 (App. Div. 2014) for the concept that a utility does not have a duty of care to remove vegetation that poses a risk of harm to motorists. Id. at 28. This is the correct position and remains the current state of the law.

The decision in McGlynn predates the accident in this matter, but also predates the Board's 2022 full consideration and readoption of the vegetation management regulations. A review of those regulations shows that the Board, if it disagreed with the McGlynn court about its jurisdiction, took no steps to remedy that situation. In 2008, the vegetation management rules, N.J.A.C. 14:5-9.1, Purpose and Scope, read:

> This subchapter sets forth requirements that EDCs shall follow in managing vegetation in proximity to an energized conductor in order to ensure public safety and the efficient and reliable supply of electric power.

The current rule, effective today, reads:

> This subchapter sets forth requirements that EDCs shall follow in managing vegetation in proximity to an energized conductor in order to ensure public safety and the efficient and reliable supply of electric power using integrated vegetation management and sound arboricultural practices.
>
> [N.J.A.C. 14:5-9.1 (underline added).]

This change was made March 16, 2015, the year after McGlynn was decided, and the change made by the Board was to include "using integrated vegetation management and sound arboricultural practices" to the end of the sentence. 47 N.J.R. 631(a). The Board added nothing on the scale and scope of protecting the public, on the responsibility and duty of care to motorists, or in any way modified the intended scope and purpose to include additional members of the public to be benefitted.

If the Board believed that McGlynn had restricted, impeded, or otherwise acted to limit or control the Board's scope and jurisdiction, the Board could very easily have made a clear modification to the regulation. In fact, the Board did make modifications to this very regulation; just none that added to the scope and

role of the regulation upon the public. This makes clear that the Board did not believe that its role and responsibility was in any way limited or restricted by the Court's determination in McGlynn.

POINT III

AS AN ECONOMIC REGULATORY AGENCY, THE BOARD OF PUBLIC UTILITIES WAS AWARE AND EXPLICITLY ENSURED THAT THE UTILITIES DID NOT BECOME RESPONSIBLE FOR ROADWAY PROTECTION AS PART OF THE VEGETATION MANAGEMENT REGULATORY REGIME

Since its inception in 1911, the Board has been granted jurisdiction, duties, and obligations over public utilities and their property rights, equipment, facilities, and franchises. P.L. 1911, c. 195, codified as various provisions in N.J.S.A. Title 48; see also N.J.S.A. 48:2-13. As part and parcel of this obligation, the Board is required to consider costs to ratepayers in all of its activities. N.J.S.A. 48:2-21 (The Board may "fix just and reasonable individual rates, joint rates, tolls, charges or schedules…"). Because of the nature of utility regulation, costs imposed by the Board for regulatory oversight are traditionally passed on to the customer, also known as the ratepayer. See, e.g., Transcon. Gas Pipe Line Corp. v. Bernards Township, 111 N.J. 507, 519 (1988) (noting that "the cost of an asset owned by a utility is eventually charged to the ratepayers").

Because of this, the Board must take care in weighing the impositions and obligations placed upon utilities with the costs associated with such obligations.

It is not news to note that the New Jersey Legislature is currently actively considering the cost and impact of utilities and utility service upon consumers in the State. On Friday, March 28, 20205, and again on Friday, April 25, 2025, a Joint Session of the Assembly Telecommunications and Utilities Committee and the Senate Select Subcommittee conducted joint hearings with the express purpose of allowing "The committees [to] receive testimony from invited guests on the affordability of energy in New Jersey."[4] Multiple bills have been proposed by the Legislature, seeking to limit the Board from rate increase, Session 2024-2025, Bill Number A5446 (AC030), to limiting the authorized rate of return, Session 2024-2025, Bill Number A5436 (AC032), to developing best practices for rate cases, Session 2024-2025, Bill Number A5553 (AC035). In each case, the Legislature is looking to limit the impact of rates on the consumers.

[4] Notice of the meetings and archives of the proceedings are available on the Legislative website: https://www.njleg.state.nj.us/live-proceedings/2025-03-28-10:00:00/ATU/Joint and https://www.njleg.state.nj.us/live-proceedings/2025-04-25-10:00:00/ATU/Joint.

This is significant, because putting the risk of responsibility upon the utilities for tree falls onto roadways would represent an enormous shift in financial obligations from the property owners and other, truly responsible entities, onto the utilities. This is not the case where the costs are immaterial; the utilities have, as required, agreed to, initiated, effectuated, and continue to engage in vegetation management on a level that represents the obligations imposed by the Board. These costs have been and continue to be passed through to the ratepayers. Were the utilities now required to serve as the "insurer" of the roadways from any and all tree falls, the cost would, quite obviously, have to significantly increase. When the amount of trees, the amount of rights-of-way, and the amount of vehicles are all considered, the costs of having utilities serve as the insurers of last resort and the primary entities responsible not only for the protection of the utility system – which they currently are – but also the protector of the roadway system, would necessitate a level of spending, insurance, and costs that will be enormous, burdensome, and would be passed on to the ratepayers.

This fact is one of the strongest foundations to show that the Board did not, and could not, have imposed such a duty and obligation upon the utilities. The Board has not and is not willing to allocate the level of funding in rates to

utilities to have those utilities able to function as insurers of last resort. The costs would be astronomical, unnecessary, and passed on to all ratepayers. All while likely being beyond the Board's legislative mandate and jurisdiction. See, e.g., In re Centrix Homes, LLC, 411 N.J. Super. 244, 261-62 (App. Div. 2008) (finding that main extension rules based upon smart growth considerations were an extreme departure from the legislative intent and thus invalid). Instead, as the Court has consistently seen and determined, the vegetation management requirements imposed by the Board upon the utilities are for exactly the purpose set forth – the protection of the electric transmission and distribution system.

Again, this is not a guess and not a hypothesis. As seen in a recent filing by JCP&L, accepted by the Board, JCP&L clearly noted that

> JCP&L performs vegetation management to help ensure the continued safe and reliable operation of the distribution system. The Company's Distribution vegetation management specification is designed to support line operations by improving reliability, and maintaining access to perform maintenance, make repairs, or restore electrical service in a safe and timely manner. JCP&L's currently approved vegetation

> specification calls for: (1) vegetation to be pruned to achieve four years of clearance, (2) removal of selected incompatible trees within the clearing zone corridor, (3) removal of certain defective limbs that are overhanging primary conductors, (4) controlling selected incompatible brush mechanically and/or using herbicide, and (5) if authorized by property owners to do so, removal of off-corridor priority trees that are dead, dying, diseased, and leaning or significantly encroaching the corridor.
>
> [Jersey Central Power & Light Company, Vegetation Management Circuit Performance Program Report, filed with the New Jerey Board of Public Utilities, Docket No. ER20020146, dated March 1, 2021, at 3 (AC042).]

The Board accepted this report. The purpose of vegetation management is set forth clearly, in detail, and in a manner that the Board accepted in total. Nothing in the program is designed to place a duty on any utility to provide protection of vehicles driving under or near a utility right-of-way. Any claim to the contrary

is simply unfounded, and runs in violation of the Board's express mandate, implied obligations, regulations, and practice.

CONCLUSION

The New Jersey Utilities Association fully supports the concept behind vegetation management, and supports its use for the protection of the energy infrastructure. Utilities are not, and should not, be the insurer of last resort for motorists or others injured through no action of the utility, and the protection of motorists and highways is not, and has never been, upon the utility industry. Allowing this change would increase costs to all New Jersey ratepayers at no significant increase of safety, and would be outside the legislative mandate placed upon the Board of Public Utilities. Instead, as the Court has determined time and again, the responsibility for tree falls rests with the owner of the trees or the entities responsible for the roadway, and not with a utility that happens to have electric wires in the area.

As such, the New Jersey Utilities Association calls upon the Court to accept this motion for amicus curiae status, accept this brief, and consider the arguments included in this Brief.

For these reasons, and for the reasons expressed above, the New Jersey Utilities Association supports the Defendants/Respondents in seeking to have the trial court's decision upheld and affirmed.

Respectfully submitted,

GENOVA BURNS LLC

By: *<u>/s/ Kenneth J. Sheehan</u>*
Kenneth J. Sheehan, Esq.
GENOVA BURNS, LLC
Attorneys for Amicus Curiae, New Jersey Utilities Association

Dated: May 19, 2025

MARK SOLARO Appellant-Plaintiff vs. FIRSTENERGY CORPORATION AND FIRSTENERGY SERVICE COMPANY AND JERSEY CENTRAL POWER & LIGHT COMPANY AND TOWNSHIP OF WEST MILFORD AND PASSAIC COUNTY AND NEW JERSEY DEPARTMENT OF TRANSPORTATION AND STATE OF NEW JERSEY AND MARION NOVACK AND EDWARD NOVACK, W/H, AND ABC COMPANIES I-X, Respondents-Defendants.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NUMBER A-001071-24 TRIAL COURT DOCKET NOS.: PAS-L-160-22 Sat Below: Thomas J. LaConte, J.S.C. CIVIL ACTION

RESPONDENT-DEFENDANT, TOWNSHIP OF WEST MILFORD'S MOTION TO FILE RESPONDENT'S BRIEF

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Dated: May 20, 2025

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TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

This appeal stems from a negligence action originating from a May 3, 2019 single vehicle incident where a tree overhanging a power line broke loose and fell onto plaintiff-appellant's car as he was driving, leading to serious injuries. (Pa11-12).

On March 26, 2021, the appellant filed the operative complaint in this matter, alleging negligence on behalf of each of the State, NJDOT, Township of West Milford, Passaic County, Jersey Central Power & Light Company (JCP&L), and FirstEnergy, for failure to properly maintain the trees surrounding the power lines and proximately causing his injuries. (Pa6-22).

In this appeal, plaintiff seeks review of the December 14, 2023 orders granting summary judgement as to JCPL and FirstEnergy only, and not any claims related to the Township.

Moreover, the Township has been dismissed from this matter since June 9, 2022, and played no part in the litigation since that time. (Ra001)

As per the docket, Respondents' briefs were originally due on May 5, 2025, per an April 4, 2025 scheduling order.

On December 23, 2024, the Township, by and through counsel, filed a letter of non-participation under the belief that no action was required by the Township in this appeal because the Township Defendants had been voluntarily dismissed from the matter and the

appeal concerned only JCPL and FirstEnergy.

On May 14, 2025, this court ordered all respondents, including the Township Defendant, to file a brief or statement in lieu of a brief within a week thereof.

I immediately sought approval from the Morris County Municipal Joint Insurance Fund to be appointed to this matter as my prior law firm no longer is in existence.

My current firm was formally assigned to this matter on May 17, 2025.

For the reasons set forth below, the Township takes no position as to the issues in this appeal and do not intend to participate in any argument that the court may schedule.

LEGAL ARGUMENT

I. The Township was dismissed from this matter on June 9, 2022, and therefore no appealable issues relate to any claims against the Township.

A voluntary dismissal terminates the action and may not be appealable to reinstate what has been voluntarily terminated. Shulas v. Estabrook, 895 A.2d 1234 (N.J. Super. App. Div. 2006), see also Mack Auto Imports, Inc. v. Jaguar Cars, Inc., 581 A.2d 1372 (N.J. Super. App. Div. 1990).

On March 26, 2021, the appellant filed the operative complaint in this matter, alleging negligence on behalf of each of the State,

NJDOT, Township of West Milford, Passaic County, Jersey Central Power & Light Company (JCP&L), and FirstEnergy, for failure to properly maintain the trees surrounding the power lines and proximately causing his injuries. (Pa6-22).

Thereafter, the Plaintiff and all defendants signed a Stipulation of Dismissal as to the Township Defendants, which included all claims, counterclaims and cross-claims. (Ra001)

On December 14, 2023, the Court granted summary judgement as to JCP&L and FirstEnergy but denied it as to the State Defendants and Passaic County. (Pa2-4). No order was made against the Township in that hearing.

With his brief, Appellant makes clear that this appeal concerns only the December 14, 2023 order dismissing JCP&L and FirstEnergy and that the claims against all Township actors are fully and properly resolved. (Ab4).

The trial court orders at issue in this appeal similarly pertain only to the December 14, 2023 grants of summary judgement for FirstEnergy and JCP&L, and not the June 9, 2022 voluntary dismissal.

In summary, all claims against the Township Defendants have been finally resolved and are not at issue in this appeal. Therefore, the Township takes no position on the Plaintiff/Appellant's appeal.

CONCLUSION

It is respectfully submitted that the Township takes no position on the Plaintiff/Appellant's appeal since all claims, counterclaims and cross-claims were dismissed against the Township on June 9, 2022.

Semeraro & Fahrney, LLC
Attorneys for Defendant-Respondent, Township of West Milford

Dated: May 22, 2025

By:_____
R. Scott Fahrney, Esq.

MARK SOLARO, Plaintiff-Appellant, v. FIRSTENERGY CORPORATION, FIRSTENERGY SERVICE COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY, TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY, NEW JERSEY DEPARTMENT OF TRANSPORTATION, STATE OF NEW JERSEY, MARION NOVACK, THE ESTATE OF EDWARD NOVACK, W/H, and ABC COMPANIES I-X, Defendants-Appellees.	APPELLATE DIVISION Civil Action Docket No.: A-001071-24T1 *On Appeal from:* Superior Court of New Jersey Law Division, Passaic County Docket No. PAS-L-160-22 Sat below: Hon. Thomas J. LaConte, J.S.C.

REPLY BRIEF OF PLAINTIFF-APPELLANT MARK SOLARO

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Amended: May 30, 2025

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I. ARGUMENT

The trial court concluded that Mr. Solaro cannot pursue a remedy against the parties responsible for maintaining trees and vegetation growth in the vicinity of his accident based on this Court's decision in McGlynn v. State of New Jersey, 434 N.J. Super. 23 (App. Div. 2014). Recognizing the central importance of McGlynn to the trial court's summary judgment analysis, Respondents JCP&L and FESC strive to equate the regulatory scheme that governed McGlynn to the regulatory scheme that governs the instant case. In fact, the regulatory schemes are different. When the accident at issue in McGlynn occurred, the governing regulations sought primarily to prevent interruptions in electrical service. The word "safety" had not made its way into the regulatory scheme. The Board of Public Utilities later amended the regulations to encompass vegetation management and likewise to "ensure public safety and the efficient and the efficient and reliable supply of electric power . . . ." N.J.A.C. 14:5-9.1. This change in language, with the updated language applicable here, makes clear that McGlynn does not control the instant case and that summary judgment was wrongly granted.

Respondents suggest the safety-focused mandate that animates the current regulatory scheme was always embedded in the regulations governing electrical distribution companies. That argument is not supported by the regulatory history. It

is contrary to New Jersey law, which rejects interpretations that render statutory or regulatory language superfluous. See Burgos v. State, 222 N.J. 175, 203 (2015). Summary judgment was wrongly granted for this reason as well.

Respondents seek to diminish Anderson v. Davoren, 2010 WL 307956 (App. Div. Jan. 28, 2010), a case that closely parallels this one and strongly supports reversal. In Anderson, the trial court found that one of the defendants here, JCP&L, did not owe a duty of reasonable care in connection with maintaining its streetlights because an earlier federal court case held JCP&L's obligations were limited to its contractual streetlight maintenance. This Court reversed on the basis that subsequent public-safety regulations made clear that JCP&L indeed owed a duty to the general public and hence that the claim could proceed. While the facts of Anderson are different, the underlying focus on the regulatory scheme that existed at the time of the incident is exactly on point. Respondents' arguments suggesting Anderson does not apply do not withstand scrutiny.

Finally, Respondents argue that summary judgment should be affirmed on various alternative grounds. Of course, the trial court never assessed the evidence concerning breach of duty. Should the Court reverse the trial court's ruling on duty, it should remand for assessment of those downstream issues. In any event, Respondents' alternative arguments fail for factual reasons, as summarized below.

Point One: **The applicable regulations on vegetation management promote public safety and support recognition of a duty in this case (T27-12 to T29-15).**

It is well established that administrative regulations may provide useful context for evaluating the existence and scope of a duty applicable in tort law. Pierce v. Ortho Pharm. Corp., 84 N.J. 58, 72 (1980); Lechler v. 303 Sunset Ave. Condo. Ass'n, Inc., 452 N.J. Super. 574, 584 (App. Div. 2017). Here, the Board of Public Utilities has written vegetation management regulations that are squarely addressed to public safety. Those regulations post-dated the events that gave rise to the McGlynn case. The subsequent regulations underscore that McGlynn does not represent controlling case law. They illustrate that the trial court ought not have relied on McGlynn as a basis for summary judgment. They provide ample basis for recognizing a duty applicable in this case, given this timeline, and these facts.

A. Legal background

The Administrative Procedure Act confers rulemaking authority on state agencies. Bergen Pines Cty. Hosp. v. N.J. Dep't of Human Servs., 96 N.J. 456 (1984); see also N.J.S. § 48:2-12. ("The board may make all needful rules for its government and other proceedings.").The Act requires agencies to give notice of intended adoption, amendment, or repeal of a rule via publication in

the New Jerey Register (N.J.R.).N.J.S. § 52:14B-3; N.J.S. § 52:14B-4; N.J.S. § 52:14B-4.9. Under this framework, when the Board of Public Utilities proposes a rule, the Board must include a summary of the proposed action. It must include statements on the effect the proposed rule may have on jobs or the environment. It must provide a social impact statement. Interested parties are given a period of at least 30 days to offer comment on the proposal. N.J.A.C. 1:30-5.1. The Board must consider any such comments and then may adopt a proposed rule without changes or "substantial changes." N.J.S. § 52:14B-4; N.J.S. § 52:14B-4.10. Collectively, these requirements "give those affected by the proposed rule an opportunity to participate in the process, both to ensure fairness and also to inform regulators of consequences which they may not have anticipated." L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 576 (2019). Here, the Board's regulatory activity post-dating McGlynn provides ample basis for recognizing a duty in this case.

B. The vegetation management regulations applicable to this case focus on public safety .

1. The Board's pre-2006 regulatory scheme focused on the reliability of electrical production.

Title 14, Chapter 5 of the Administrative Code 5 governs "the operation of all electric distribution companies (EDCs) operating within the State of New

Jersey." N.J.A.C. 14:5-1.1. On August 21, 2000, the Board proposed adding Subchapter 7, entitled "Interim Electric Distribution Service Reliability and Quality Standards." 32 N.J.R. 2980(a). Summarizing the proposed rule, the Board explained that the new rules were primarily intended to promote the reliability of electrical service:

> The purpose of the proposed new rules is to set forth interim requirements for service reliability levels based on a uniform methodology for measuring reliability and quality of electric distribution service that is being delivered to New Jersey customers by the electric distribution companies (EDCs) operating in New Jersey subject to the Board's regulatory authority.

32 N.J.R. 2980(a), *summary*.

The focus on reliable electrical service was emphasized in an accompanying "Social Impact" statement, where the Board highlighted that the public relies on EDCs to provide reliable service that is subject to few interruptions. The Board recognized "the potential for reliability to diminish" prompting it to establish "reliability and quality of service" requirements. These requirements were to alert utilities and the Board to areas where standards of service are not met and allow appropriate corrective actions. 32 N.J.R. 2980(a), (social impact statement).

On January 2, 2001, the Board adopted Subchapter 7 with only modest changes to the original formulation. See 32 N.J.R. 2980(a); 33 N.J.R. 123(a);

see N.J.A.C. 1:30-6.3. As enacted, Subchapter 7 focused on the "reliability and ensuring quality of the electric distribution service that is being delivered to New Jersey customers by [EDCs] operating in New Jersey[.]" 33 N.J.R. 123(a) (codifying purpose and scope of Subchapter 7 as N.J.A.C. 14:5-7.1). The Subchapter sought to ensure that EDS had "sufficient resources in order to provide safe, adequate and proper service to its customers." 33 N.J.R. 123(a); N.J.A.C. 14:5-7.1(b). The central objective of Subchapter 7 was to promote the quality and reliability of electrical service, not to keep the public safe. See e.g., N.J.A.C.14:5-7.3 (reliability of performance levels); N.J.A.C. 14:5-7.4(service reliability); N.J.A.C. 14:5-7.5 (power quality).

Illustrating its limited function, the Subchapter contained a provision regarding vegetation management but only in the context of promoting reliable electrical service:

> 14:5-7.7 Inspection and maintenance programs
>
> [E]ach EDC shall have inspection and maintenance programs for its distribution facilities, as appropriate to furnish safe, proper and adequate service. These programs shall be based on factors such as applicable industry codes, national electric industry practices, manufacturer's recommendations, sound engineering judgment and past experience. A significant portion of these inspection and maintenance programs shall be focused on mitigating those interruption causes with the greatest impact on reliability such as those related to equipment, vegetation, and animals. EDCs shall endeavor to utilize tree trimming, physical plant inspections,

> maintenance and protective measures and equipment to assist in the prevention and management of interruptions when appropriate.

33 N.J.R. 123(a); N.J.A.C. 14:5-7.7(a).

On April 1, 2002, the Board publicized its intent to readopt certain provisions applicable to EDCs. 33 N.J.R. 1390(a). Respondents rely on this proposed rule-making when arguing that the regulations before the McGlynn Court involved public safety yet McGlynn still found no duty under the facts of that case. While the notice of proposed rulemaking did refer to the "safety and well-being of the public," the language was still confined to the construction of an electric plant. As the social impact statement stated:

> The rules proposed for readoption with amendments relate directly to the provision of safe, adequate and proper service by New Jersey electric utilities. Said rules are necessary to ensure that electric plant is constructed and installed pursuant to acceptable standards and is maintained and inspected in a manner that will protect the safety and well-being of the public. There is no additional impact resulting from the proposed amendments, all of which are technical.

34 N.J.R. 1390(a), social impact statement. Consistent with this language, when Board adopted its 2022 proposals, the Board explained that the purpose of Subchapter 7 remained to "set forth requirements based on a uniform methodology for measuring reliability and ensuring quality of the electric distribution service that is being delivered to New Jersey customers by the electric distribution companies (EDCs) operating in New Jersey subject to the

Board's regulatory authority." See 32 N.J.R. 2980 (2000 proposal to readopt provisions Subchapter 7); 34N.J.R.1390(a) (2002 proposal to readopt provisions of Subchapter 7); 34 N.J.R. 3234(a) (adopting the 1390(a) provisions).

2. In 2006, the Board promulgated regulations on vegetation management to promote public safety.

In November 2005, the Board proposed regulations would add an entire subchapter to the regulatory scheme governing EDCS devoted to vegetation management and tree trimming standards. 37 N.J.R. 4385(a). These proposed regulations specifically contemplated public safety as a basis for the regulatory requirements. These regulatory changes occurred several years after the facts giving rise to McGlynn. The Board also provided a summary of its multiple reasons for proposing the vegetation management standards. The Board explained the new vegetation standards were intended to "ensure the continued reliability of the electric transmission and distribution system and to provide consistent safety standards to protect vegetation management workers and the public." 37 N.J.R. 4385(a) (summary). The Board directly addressed public safety and worker safety from the vegetation itself as a core value that the regulations sought to promote:

> A uniform set of requirements governing the performance of vegetation management is needed to ensure that electric utilities use proper vegetation management techniques to ensure the safety of

> workers and the general population, and the continued reliability of the electric distribution system, while minimizing impacts on valuable vegetation. Under the proposed rules, electric utilities would be required to ensure that workers who perform vegetation management on behalf of the electric utility are properly trained to perform vegetation management according to the standards contained in the publications listed under proposed N.J.A.C. 14:5-8.5

37 N.J.R. 4385(a), *summary*.

Through the rulemaking process, the Board took additional pains to identify its dual objectives of safety *and* reliable supply of electricity, evincing an intent that was ultimately embodied in the regulatory text. The rules required EDCs to "employ a vegetation manager who would be a utility employee and provided further that the vegetation manager that have the "authority and the resources to administer all aspects of the utility's vegetation management program." The rules required that EDCs would "promptly remove" "any dead, rotten, or diseased vegetation which overhangs, leans toward, or may fall into an energized conductor" upon notice or actual knowledge of the vegetation." The rules added technical requirements that vegetation management be performed in accordance with safety-oriented procedures. See 37 N.J.R. 4385(a) (proposing adopting technical standards); 38 N.J.R. 5396(a) (adopting regulations). Further, the regulations required EDC to "ensure that all contractors hired to perform vegetation management inform their workers of all

applicable Federal, State, county, and municipal laws, rules or regulations that apply to the work performed under this subchapter." They also required EDCs to "ensure that all contractors comply with each applicable requirement of this subchapter and all other applicable law." 38 N.J.R. 5396(a); N.J.A.C. 14:5-8.

The Board adopted the subchapter on vegetation management on December 18, 2006. 38 N.J.R. 5396(a); N.J.A.C. 14:5-8. This subchapter (now codified as Subchapter 9) represented a substantial overhaul of the inspection and maintenance standards governing public utilities. The regulations placed public safety front and center in the context of vegetation management.

This emphasis was underlined in 2008 when the Board recodified the vegetation management scheme. The Board reiterated its safety commitment in the context of responding to public comments, specifically mentioning the threat to public safety caused by poor vegetation management:

> COMMENT [#46]: The "vegetation management" that is being practiced in New Jersey involves utility company workers slashing up the trees in a neighborhood, which results in their death and disease. We need to bury more transmission lines to prevent this tactic presently being practiced by electric utilities. (BS)
>
> [Board] RESPONSE: The rules are intended to protect public safety, without unnecessary destruction of trees. As such, these rules require that EDCs hire vegetation managers who are electrical utility arborists. If an energized conductor is threatened by encroaching vegetation, thereby creating a potentially hazardous situation, the electric utility company is required to perform the necessary vegetation management

activities to protect the public safety. ….

40 N.J.R. 1684. As expressed in this public comment, the Board's focus on hiring arborists and managing adjacent vegetation makes clear that the Board contemplated dangers posed by imperiled trees.

In 2015, the Board revisited its vegetation management standards, adding definitions as well as imposing new requirements. Newly defined terms included "danger tree," defined as "any tree on or off the right of way that could contact electric supply lines if it were to fall;" and "hazard tree," defined as "a structurally unsound tree on or off the right of way that could strike electric supply lines when it fails. 47 N.J.R. 631(a); 47 N.J.R. 2165(c); N.J.A.C. 14:5-8.7, 9.5, and 9.8. Among the changes instituted in 2015 was a requirement providing that where a vegetation manager determines that a tree is a "hazard tree," the EDC must arrange to remove or mitigate it as part of its scheduled vegetation management or as soon as practicable if the tree "poses an imminent risk of failure." 47 N.J.R. 2165(c); N.J.A.C. 14:5-8.7, 9.5, and 9.8.

All of these post-2006 developments occurred after the events that gave rise to McGlynn. None of those developments were before the McGlynn Court. Two implications flow from this reality. First, McGlynn is not dispositive and does not dictate summary judgment. Rather, McGlynn involved a materially different legal

context that contrasts starkly with the post-2006 regulatory landscape in which public safety emerged as a paramount concern. Second, as more fully set forth in Plaintiff's opening brief, the post-2006 regulatory changes provide ample context for establishing that Respondents owed a duty of reasonable care in relation to public safety that grounds Mr. Solaro's claim. The trial court's decision should be reversed accordingly.

Point Two: **Anderson supports the reversal of summary judgment (T27-12 to T29-15).**

Respondents seek to minimize the relevance of Anderson, supra, by noting that it involved a utility pole rather than a downed tree. They attempt to distance the instant case by noting that Anderson involved equipment owned by the utility. See Respondents' Brief at 28. These distinctions are immaterial. As noted in Plaintiff's opening brief, Anderson is on point because it demonstrates that intervening regulatory changes may meaningfully inform the assessment of whether New Jersey law recognizes that EDS owe a duty of care under the circumstances presented in this case.

By way of summary, the trial court in Anderson concluded JCP&L did not owe a duty of care with respect to streetlight operations. Anderson, 2010 WL 307956. Reversing the trial court, this Court took special care to distinguish a federal court ruling in Sinclair v. Dunagan, 905 F. Supp. 208 (D.N.J. 1995), which was

decided on similar facts. The Appellate Division explained that, at the time Sinclair was decided, JCP&L's contractual obligation was limited to maintaining streetlights. However, subsequent changes to the Administrative Code since Sinclair warranted an assessment of "the fairness of recognizing such a duty." The Court also reviewed the Board's "Social Impact Statement" stating the rules "relate directly to the provision of safe, adequate and proper services" by EDCs. Overall, the Court reasoned that the Board's adoption of the subsequent provision addressing the safety need for timely repairs "undercut" the argument that JCP&L was entitled to summary judgment as a matter of law. Id. This approach is exactly on point. Consistent with Anderson, this Court should consider the post-2006 regulatory changes that emphasize public safety as a basis for effective vegetation management. That language further supports the reversal of the trial court's summary judgment ruling.

Point Three: Arguments concerning breach of duty are properly reserved for the jury (not raised below).

Respondents argue that they were entitled to summary judgment on various alternate grounds revolving around the Board's regulations. JCP&L says that it complied with the Board's applicable regulations and hence discharged its tort duties as a matter of law. FirstEnergy argues that it is not an EDC and therefore entitled to summary judgment regardless of the regulations. As a

threshold matter, the trial court granted summary judgment solely on no-duty grounds. It never reached a decision on these downstream issues. Should this Court reverse the no-duty ruling, the Court should remand the case to the trial court for consideration of these downstream issues.

In any event, both arguments are wrong as a basis for summary judgment. The summary judgment record contains substantial evidence that JPC&L committed negligence with respect to the tree that fell on Mr. Solaro's car. As set forth in the expert report of Plaintiff's arboreal expert, Mr. A. Wayne Cahilly, the tree that fell on Mr. Solaro's car was in very poor condition based on its precipitous 30 degree lean and epicormic shoots that indicated significant structural distress. Pa.397. These hazards were plainly visible from the roadway. Yet JPC&L never identified the at-issue tree as a hazard tree, never performed an appropriate inspection of the tree, and never undertook to remediate or remove the tree such that it would not fall on the road. Mr. Cahilly's expert opinion combined (based on extensive deposition testimony from fact witnesses) provides ample basis for establishing a genuine factual dispute on the issue of breach of duty. Id. What remains is JPC&L's perspective on the evidence, which is not a basis upon which summary judgment may be granted and should not be a basis for this Court to affirm summary judgment on alternative grounds.

FirstEnergy also is not entitled to summary judgment on grounds that it is not an EDC but only a shared service provider. The summary judgment record reflects that FirstEnergy employed the forestry specialist charged with assessing the tree that fell on Mr. Solaro. That tree represented an imminent risk of failure and should have been remediated or removed. Pa96. FirstEnergy's potential liability in this case is contingent on its vicarious liability for the acts and omissions of its forestry employees, regardless of its status as an EDC. Summary judgment would be improper on this basis as well, as would affirmance on an alternative basis.

II. CONCLUSION

The order granting summary judgment should be reversed.

Respectfully submitted,

By: /s/ Charles L. Becker

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Resubmitted: May 30, 2025

MARK SOLARO, Plaintiff-Appellant, v. FIRSTENERGY CORPORATION, FIRSTENERGY SERVICE COMPANY, JERSEY CENTRAL POWER & LIGHT COMPANY, TOWNSHIP OF WEST MILFORD, PASSAIC COUNTY, NEW JERSEY DEPARTMENT OF TRANSPORTATION, STATE OF NEW JERSEY, MARION NOVACK, THE ESTATE OF EDWARD NOVACK, W/H, and ABC COMPANIES I-X, Defendants-Appellees.	APPELLATE DIVISION Civil Action Docket No.: A-001071-24T1 *On Appeal from:* Superior Court of New Jersey Law Division, Passaic County Docket No. PAS-L-160-22 Sat below: Hon. Thomas J. LaConte, J.S.C.

APPELLANT'S RESPONSE TO THE AMICUS CURIAE BRIEF

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I. PROCEDURAL HISTORY AND STATEMENT OF FACTS

Mr. Solaro relies on the procedural history and statement of facts set forth in his opening brief.

II. ARGUMENT

The Court has granted leave to the New Jersey Utilities Association (NJUA) to file an *amicus curiae* brief in this matter. Plaintiff respectfully files this brief in response to the NJUA's *amicus* brief.

Point One: The Board broadened the scope of its regulations in 2006 to promote public safety (T27-12 to T29-15).

NJUA argues that vegetation management standards were implemented to protect the electrical system rather than the public at large. Ab7.[1] It argues since protecting the electrical system continues to be the focus of these regulations, the trial court properly granted summary judgment. Id. NJUA focuses on McGlynn v. State of New Jersey, 434 N.J. Super. 23 (App. Div. 2014), which rejected the notion that general highway safety was implicated when EDCs performed vegetation maintenance based on the regulatory scheme that existed when the incident occurred giving rise to that case.

The regulatory scheme has changed a lot since the events giving rise to

[1] Plaintiff cites to NJUA's brief as "Ab7" to connote Amicus brief page 7 to align with the citation format under New Jersey N.J.R. 2:6-8.

McGlynn. In 2001, the Board adopted requirements for "measuring reliability and ensuring quality of the electric distribution service" provided by EDCs. These included obligations for data maintenance, records retention and service interruption information to evaluate the general reliability of service. The Board explained the obligation to provide "sufficient resources in order to provide safe, adequate and proper service to its customers" falls on the EDCs, but the Board imposed regulations to ensure EDCs provided adequate service and were taking appropriate action to further the overall goal of reliable electrical service. 33 N.J.R. 123(a); N.J.A.C. 14:5-7.1(b). To be sure, reliable electrical service was the central feature of this earlier regulatory scheme. But public safety was not highlighted, certainly not as to the management of vegetation.

The emphasis on public safety in relationship to vegetation management first emerged in 2006. At that time, the Board adopted additional requirements on EDCs to "ensure the continued reliability of the electric transmission and distribution system and to provide consistent safety standards to protect vegetation management workers and the public." 37 N.J.R. 4385(a) (summary). These regulations imposed on EDCs a host of new obligations to ensure public safety. 38 N.J.R. 5396(a). EDCs had to employ "a vegetation manager who would be a utility employee" to specifically carry out the "utility's vegetation management program" and to adhere to best practices pursuant to ANSI, the

National Electric Safety Code, the Edison Electric Institute Vegetation Management Task Force, and other authorities on pruning, maintaining, and removing trees safely. Id.; N.J.A.C. 14:5-8. These 2006 changes were complex, numerous, and extensive. They represented a complete overhaul of the regulations with public safety at the forefront, including a particular focus on public safety as it relates to vegetation management.

The regulations were recodified in 2008 and amplified in 2015 when additional requirements were imposed bearing on safety in relation to vegetation management. New terms were included and defined such as "danger tree" and "hazard tree" and protocols for their mitigation and removal were included. 47 N.J.R. 2165(c); N.J.A.C. 14:5-8.7, 9.5, and 9.8.

All of these substantial changes took place years after the accident that prompted McGlynn. Even if one views McGlynn as correctly decided given the regulatory scheme that applied to that case, the regulatory scheme has changed since the events underlying McGlynn. An entirely different texture exists given the Board's current regulations on public safety in the context of vegetation management. This different texture commands at least the recognition that the FirstEnergy defendants owed duties of reasonable care on which Mr. Solaro's claim can be grounded. Whether the FirstEnergy defendants breached those duties of care is a different question. But the duties exist as a matter of first principle—if not in

McGlynn, then at least here.

Point Two: The 2006 Standards issued by the North American Electric Reliability Corporation do not govern whether the FirstEnergy defendants owe duties of care (not raised below).

NJUA argues the concept of 'vegetation management' has been and remains limited to the efficient delivery of electrical service. Ab7. NJUA supports this argument by reference to "a federal document issued prior to the Board's development of vegetation management rules." Id.; see AC7-11. According to NJUA, this document, "Standard FAC-003-1-Transmission Management Program," (FAC-003-1) was issued by the United States Department of Energy and the North American Electric Reliability Corporation (NERC) prior to the Board's adoption of its 2006 regulations. FAC-003-1 included a stated purpose of "preventing outages from vegetation located on transmission rights-of-way." Ab7-8. NJUA suggests that the regulations adopted in 2006 and 2008 by the Board existed only "to ensure the public safety and the efficiency and reliable supply of electrical power," and hence those regulations could not serve a broader purpose for the benefit of the public. Ab8-9.

NJUA emphasizes the idea that NERC had published FAC-003-1 in 2006 to "prevent outages" and the Board adopted its public-safety-oriented regulations after that time. NJUA suggests the Board's 2006 regulations should be interpreted as confined by or extending no further than FAC-003-1. Even if

that was how the Board understood its regulations (and there is no evidence to that effect) New Jersey courts are not bound by an agency's interpretation of a statute it is charged with enforcing. Teeters v. Division of Youth and Family Services, 387 N.J. Super. 423, 429 (App. Div. 2006). Rather, New Jersey courts "give the greatest sway to our Legislature's intendments as they are illuminated by the language of the statute at issue, the public policies underpinning the statute, and such State law precedents as are available." Id. The same tenets apply to interpreting regulations. L.R. v. Camden City Pub. Sch. Dist., 238 N.J. 547, 558 (2019). Here, what matters most are the actual state regulations at issue. Those regulations speak fully to the issue of public safety in the context of vegetation management.

Should NJUA's argument be read as suggesting the 2006 NERC document preempts New Jersey regulations, that argument fails to support summary judgment. Preemption exists where (1) the federal regulation scheme was "so pervasive as to make" the reasonable inference that the states could not supplement it; (2) it is a "physical impossibility" to apply both the federal and state regulations; or (3) the state regulation "stands as an obstacle" to fulfillment of the full federal purpose and objective. R.F. v. Abbott Lab'ys, 162 N.J. 596, 619 (N.J. 2000). None of these circumstances apply. The Board's regulations provide helpful guidance to the Court in its analysis of whether the FirstEnergy

defendants owed duties of reasonable care and the character of those duties. The NERC document does not vitiate the Board's regulations.

Point Three: This case was properly brought in the Law Division (not raised below).

NJUA invokes the doctrine of primary jurisdiction and argues there is no legislative intent that indicates "the Board was designed or intended to have jurisdiction over the safety of motorists based upon possible tree falls onto State roadways." Ab10-11. According to NJUA, "if the Board believed it had jurisdiction over such activity, the Board would be expected and authorized to exert and exercise primary jurisdiction over cases such as this." Id. It is unclear whether NJUA is arguing this action should not have been brought in the Superior Court or if it is advocating for some level of immunity. In any event, there is no issue of primary jurisdiction in this case. The doctrine of primary jurisdiction applies when a case is properly filed in the Superior Court, but agency expertise is required to resolve questions presented in the case. Boldt v. Correspondence Management Inc., 320 N.J. Super. 74, 83 (App. Div. 1999). In those circumstances, the court retains jurisdiction but defers action until the agency has reviewed the case and resolved issues that fall within its area of competence. Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 405 (2014). The doctrine is intended to allow an agency to apply its expertise to questions involving the interpretation of regulations and promote uniformity of

interpretation. Muise v. GPU, Inc. 332 N.J. Super. 140, 160 (App. Div. 2000).

Questions regarding the Board's regulations may fall within the agency's jurisdiction. But that does not apply to claims sounding in negligence and seeking damages, which are beyond the agency's authority. Id. at 165. Because "primary jurisdiction cannot be invoked when the claim is outside the agency's jurisdiction, or when the remedy for such a claim is outside the agency's power," it is not implicated in this dispute. Id.

Point Four: The Board's regulations after McGlynn do not support affirmance (not raised below).

NJUA argues McGlynn controls the outcome of this case. In support, NJUA contends that (1) the 2008 vegetation management provisions state they are in place "to ensure public safety and the efficient and reliable supply of electric power;" (2) the decision in McGlynn was published in 2014; and (3) in 2015, the Board revised the purpose and scope provision to include reference to the use of "integrated vegetation management and sound arboricultural practices." Ab11-13. NJUA argues this timeline demonstrates that the Board in no "way modified the intended scope and purpose to include additional members of the public to be benefitted" after McGlynn was decided. Id. NJUA's argument flows from the assumption that the Board's intent to incorporate safety into the regulations can be gleaned by looking at actions of the Board following McGlynn's publication in 2014. Therefore, NJUA argues, because the 2015

changes to the purpose and scope of the regulations did not include additional safety language, the Board did not intend to include safety as part of the purpose of the regulations. However, as discussed, the Board proposed safety-related obligations bearing directly on vegetation management in 2005 (and adopted them in 2006), long before the facts giving rise to this case and before the McGlynn opinion was published. The Board made this policy shift independent of McGlynn.

NJUA's legal analysis amounts to a policy argument about the financial implications of potential liability. Ab14-18. According to NJUA, "putting the risk of responsibility upon the utilities for tree falls onto roadways would represent an enormous shift in financial obligations from the property owners and other, truly responsible entities, onto the utilities" which will be passed through to the ratepayer. Id. That policy argument could be addressed to the legislature as a basis for statutory immunity. But the question now is whether the FirstEnergy defendants owed duties of reasonable care to Mr. Solaro given the facts of this case. Given the Board's regulatory scheme concerning public safety in the context of vegetation management, the trial court should have concluded that the defendants owed duties of care applicable to this case. This Court should fix the trial court's mistake.

III. CONCLUSION

The order granting summary judgment should be reversed.

Respectfully submitted

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