
Superior Court of New Jersey

Appellate Division

Docket No. A-002958-23

EBONNI S. SHAW and ROBERT	:	CIVIL ACTION
D. SHAW,	:	
	:	
	:	ON APPEAL FROM THE
<i>Plaintiffs-Appellants,</i>	:	FINAL ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	ESSEX COUNTY
	:	
PALISADES PROPERTY AND	:	
CASUALTY INSURANCE	:	DOCKET NO.: ESX-L-004892-20
COMPANY and SHULTS	:	
INSURANCE AGENCY, INC.	:	Sat Below:
	:	
	:	HON. LOUISE GRACE SPENCER,
<i>Defendants-Respondents.</i>	:	J.S.C.

BRIEF ON BEHALF OF PLAINTIFFS-APPELLANTS

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Date Submitted: September 9, 2024



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PRELIMINARY STATEMENT

Plaintiffs/Appellants, Ebonni S. Shaw and Robert D. Shaw¹ submit this Brief in support of their appeal from the Trial Judge's Order denying their motion for a Judgment Notwithstanding the Verdict as to Interrogatory number 3 on the Jury Verdict Sheet which answered "YES" to whether Defendant, Palisades Property and Casualty Insurance Company ("Palisades"), established that plaintiff made post-loss misrepresentations and that they were material or reasonably relevant.

Palisades failed to submit any evidence at trial on the materiality element of its alleged misrepresentations defense, i.e., if a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action; and how they may have affected the attitude and action of the insurer or in what regard was the misrepresented fact relevant and germane to the insurer's investigation as it was then proceeding; or how the alleged misrepresented fact discouraged, mislead or deflected the company's investigation.

The trial record is devoid of any such evidence from which a jury could legitimately infer that the "misrepresentation" allegedly made was, in fact, material.

This appeal from the judgment below is not based on a “weight of the evidence” argument, but rather on the *non-existence of any evidence* in the trial record. The jury could not have reached a conclusion, much less a verdict on liability against plaintiffs, without evidence on an essential element of a defense in the trial record. Although the Jury failed to follow the Court’s thorough instructions as charged, in its role as “gatekeeper,” the Trial Judge should not have allowed Interrogatory no. 3 to be submitted to the jury in the first place because it is legal error to invite a jury to speculate on matters as to which no proofs are offered. Hence, the compound nature of the jury interrogatory is legally irrelevant. The Trial Court’s sole function was to determine if the trial record contains any evidence of “materiality” through testimony of Palisades’ company witnesses. This it failed to do. Beyond this *mechanical role*, the Trial Judge’s sole function, in the absence of such evidence (beyond a scintilla), was to set aside the verdict based as the product of impermissible speculation.

Consequently, the decision below on Shaw’s motion should be set aside and reversed, and a verdict entered in Shaw’s favor on liability and the matter remanded for a new trial limited to damages.

¹ As used hereafter, “Shaw” refers only to plaintiff Ebonni S. Shaw.

PROCEDURAL HISTORY

A. Relevant Background and Nature of the Case

On or about November 20, 2019, a fire caused extensive damage to a two-family dwelling owned by Plaintiffs, Ebonni S. Shaw and Robert D. Shaw, brother and sister, located at 382 Peshine Avenue, Newark, New Jersey (Pa26). Plaintiffs submitted a claim to their homeowners' insurer, Palisades Property and Casualty Insurance Company ("Palisades"), a Florida insurer, for indemnification arising from the extensive fire damage loss (Pa28-29).

Following an investigation of the fire claim loss, Palisades denied coverage and rescinded the policy of insurance based on alleged misrepresentations on the (i) application for insurance and for (ii) post-loss "material" misrepresentations allegedly made by Shaw during claims investigation (Pa47-48).

B. Commencement of Suit

On July 21, 2020, Plaintiffs filed a Complaint against Palisades and their insurance broker, Shults Insurance Agency, Inc. ("Shults") (Pa25-30). On August 27, 2020, Shults filed an Answer with Crossclaims (Pa33). On September 21, 2020, Palisades filed its Answer to the Complaint (Pa44-49).

C. Relevant Pre-Trial Motion Practice

Following discovery, Defendant Palisades filed a Notice of Motion for Summary Judgment on June 3, 2022 (Pa51). Plaintiffs filed a Brief and Certification opposing Palisades' motion on June 28, 2022. On July 20, 2022, Plaintiffs filed a Supplemental Certification in Opposition to Palisades' motion for summary judgment (Pa53-133).

On August 1, 2022, Palisades filed its Reply Brief. On September 9, 2022, following oral argument, the Court denied Palisades' motion for summary judgment (Pa135).

On January 20, 2022, Shults settled with Plaintiffs and was dismissed from the action below (Pa50).

D. The Jury Verdict

On March 11, 2024 the trial in this action commenced and continued until a jury verdict was entered on March 22, 2024 wherein jury Interrogatory 2 on the Verdict Sheet was answered in favor of plaintiffs; and Interrogatory 3 was answered in favor of defendant Palisades. This obviated the need for the jury to proceed to answer the remaining interrogatories pertaining to damages (Pa155; 7T71:24-72:21).

E. Post-Verdict Motion Filed by Plaintiffs

On April 1, 2024, Plaintiffs filed a motion for Judgment Notwithstanding the Verdict (“JNOV”) and for a new trial on damages, supported by a certification based on Palisades’ failure to introduce at trial any evidence on the essential element of “materiality” in order to sustain a *prima facie* defense of post-loss “misrepresentations” allegedly made by Shaw (Pa136-155).

On April 18, 2024, Palisades filed its opposition brief to the motion for a JNOV and a new trial on damages. On April 22, 2024, Shaw’s Reply Brief with supporting reply certification was filed (Pa156-157).

On April 30, 2024, following oral argument, the Trial Judge denied Plaintiffs’ motion for a judgment notwithstanding the verdict as to jury verdict Question 3 and for a new trial on damages (Pa1-2; see 8T14-21).

Shaw filed Notice of Appeal from the denial of the JNOV motion on May 28, 2024 (Pa3) and an Amended Notice of Appeal on July 2, 2024 (Pa11).

PLAINTIFFS' RELEVANT STATEMENT OF FACTS

A. Ebonni Shaw Moves Into Peshine Avenue

Ebonni Shaw (“Shaw”) has been employed at North Beth Israel Medical Center for approximately 22 years and is currently working as a pediatric residency program coordinator (3T5:16-19; 3T6:12-20).

In or about September 2017 (3T10:2), Shaw purchased a multi-family home located at 382-384 Peshine Avenue in Newark, New Jersey (the “Property.” “Peshine,” or “premises”) to live in (3T7:1-10). At that time, she was pregnant and wanted to start her family in a new home (3T7:11-16). She purchased the property from Jean St. Fleur (3T26:6-7).

At the time of purchase, the house was not completely vacant. A tenant already occupied Unit 1 on the ground floor and Shaw’s intent was to occupy the other floor in Unit 2 (3T7:17-3; 3T8:1-1; 3T16:12-17). Unit 1 was occupied by Sharon Cherry (“Cherry”) (3T8:20-21). The third floor of the house, which could be accessed without a key from Unit 2 unimpeded, known as the den or attic,” consisted of two bedrooms, a bathroom and kitchen area (3T9:12-18; 3T18:22-19:2).

B. Obtaining Insurance for the Property

The arrangement for obtaining homeowners insurance for the house was made by the “mortgage loan officer,” Steve Cooper (“Cooper”) (3T10:9-14). Shaw took a mortgage out of approximately \$200,000 and an additional construction loan of approximately \$29,000 for renovations (3T11:6-14). She received and electronically initialed and signed an application for insurance on July 24, 2017 (Pa366-369; (3T12:16-20;14:19) but did not fill out the application for insurance herself (3T15:18-23).

Shaw closed on 382-384 Peshine Avenue on September 1, 2017 (3T131:23-132:1). She moved into the building sometime after the closing in September 2017 (3T16:16-21). A photograph marked and admitted into evidence (Pa160) depicted Shaw standing in her “pajamas” in the bedroom of Unit 2 of the premises (3T16:9-15; 17:1-4). As of the time of the photograph, Shaw had not yet given birth to her child who was born on January 26, 2018 (3T17:18-23).

C. Financing the Purchase and Renovations of the Property

Shaw took out an FHA mortgage loan intended for first-time home buyers; if the buyer required renovations done on the property, the loan included the cost of renovations as part of the mortgage (3T25:16-22). Shaw had never owned property before this purchase (3T25:24-26:5). The

contractors initially selected by Cooper, “the loan officer,” to rehabilitate Shaw’s house was Dukes-n-Dukes (3T26:11-27:1-3). Cooper in addition to brokering the mortgage with Freedom Mortgage and selecting the contractor, arranged for the Palisades insurance policy on the Property (3T27:1-18).

D. Dukes-n-Dukes’ Faulty Construction Leads to Arbitration

The contractor, Dukes-n-Dukes, began actual construction on the Property sometime after the closing. But after Dukes-n-Dukes started work on the Property, issues arose with the construction which prolonged completing the work correctly (3T29:5-11). But Shaw had noted various defects in the contractor’s work.

Shaw reached out to Sabina Senorans, the “draw administrator” of Freedom Mortgage, regarding the issues she was having with the contractors and the “shoddy job” that they did (3T31:1-9). Senorans was responsible for releasing to the contractor the money allocated for construction through the FHA loan (3T32:12-15). Shaw wrote to Senorans describing both her circumstances with a newborn infant, and cataloging Dukes-n-Duke’s deficient work which made the unit uninhabitable her and her child (3T37:22-38:16; 42:12-45:7; Pa483, Pa486).

She was advised by Senorans that under the FHA loan guidelines she first had to go through arbitration first in order to remove Dukes-n-Dukes

before new contractors could be engaged to rectify the outstanding construction issues (3T45:22-47:3; Pa480). Senorans further advised Shaw that pursuant to the HUD regulations, Freedom Mortgage could not release additional funds until the dispute with Dukes-n-Dukes' payment was resolved (3T50:23-25), and the dispute with Dukes-n-Dukes, had to be resolved through arbitration (3T29:12-15).

The issue in the arbitration related to work that Dukes-n-Dukes stated they had completed in the house in order to be livable (3T29:16-20). But in an e-mail to the mortgagee dated March 14, 2018, Shaw listed nine incomplete or deficient items that required to be addressed. Item no. 3 stated: "Base board installed thru wall" (Pa459). Among other issues to be resolved were: the electric and plumbing was not up to code; the baseboard was installed through a wall (3T:53-15-18; see Pa160); the baseboard was protruding through the wall as depicted on the lower left-hand side of the picture where the trash can was located (Pa160; 3T53:23-54:7); the baseboard was coming through the living room into Shaw's bedroom on the other side of the wall (3T54:8-18; Pa160).

Mr. St. Fleur, the former owner of the property who sold the house to Shaw, testified at trial that the baseboard actually came through the wall leading to another bedroom (1T12:6-21). Ms. Dean, a college friend of Shaw

testified that she purchased the baby clothes to drop off at Shaw's home at Peshine (2T29:14-25). She identified a photo (Pa160) as depicting Shaw in the bedroom on the second floor at Peshine, holding "the clothes for her expected baby" which Dean had brought over (2T32:11-22; 33:1-5).

At the conclusion of the arbitration, the Arbitrator on November 6, 2018 awarded Dukes-n-Dukes \$7,912 (3T:64-3-65:8), reducing Dukes-n-Dukes' \$12,662.50 claim , based upon appliances, electrical items and other items which were not installed, and a credit to Shaw of \$350 for a hot water heater (3T65:10-25; 66:16). By check dated November 12, 2018, payment was issued to Dukes-n-Dukes (3T68:4-9).

Following the resolution of the Dukes-n-Dukes arbitration, Shaw was able to engage new contractors, Joel Construction and G&F Construction, to finish the outstanding items. The new contractors commenced their work approximately a week or two after the arbitration and soon resolved the defective work to Shaw's satisfaction (3T68:15-69:1-5; 69:23-25) (Pa508). Ms. Shaw certified to the mortgagee the work was completed and satisfactory (3T70:1-4; 3T71:1-8; Pa421).

E. In the Spring of 2019 Shaw's Father Was Diagnosed With Cancer and Her Brother, Robert, Underwent Brain Surgery

In or about April or May of 2019 Shaw's father was diagnosed with bladder and prostate cancer. A few months later, her brother Robert, underwent emergency brain surgery. These events informed Shaw's decision not to "abandon" her mother by settling in at Peshine Avenue as her mother "needed my help with the care of my father," and "to be there as much as possible with my family at 57 Coit Street in Irvington" (3T74:1-19).

F. Shaw Rented the Second Unit at Peshine to Sharonda Eleazer

Shaw rented her apartment unit to Sharonda Eleazer ("Sharonda"), who was related to Cherry, the mother of Malik Freeman ("Malik"), the father of Sharona's child (3T75:6-10). The lease term for Sharonda began on June 17, 2019 (Pa514; 3T76:12-15). Around that time, Shaw switched her PSE&G utility account for Unit 2 over to Sharonda (3T76:16-22).

At some point during Eleazer's tenancy, Shaw became alerted to the fact that Malik) was staying with Sharonda (3T77:18-78:2) in violation of Sharonda's Section 8 voucher. It was a violation of the Newark Housing Authority for anyone who is not listed on the voucher to be living in the apartment (3T78:2-10). Shaw's sought to resolve the issue by renting out the

third floor to Malik so that Malik's occupancy would not be in violation of the Section 8 guidelines (3T78:11-25).

Pursuant to a lease agreement dated July 9, 2019, for a term from August 1, 2019 to August 1, 2021, Malik was allowed to occupy the third floor area (3T80:3-17; Pa529-530). But around September or October of 2019, Shaw terminated the lease agreement due to the discovery of drugs on the premises and late rental payments. Shaw gave Malik a notice to vacate by certified letter and taped a physical copy of the notice on the front door of Unit 2 (3T81:5-82:1; Pa532-534).

Sometime in October 2019, Malik vacated the third floor (3T83:10-13), as reflected in the photographs depicting the empty rooms (3T84:13-24; Pa535-Pa538).

After Malik vacated the premises, Shaw began to move sundry items from her parents' home basement to the third floor for storage there (3T90:10-15; 3T92:5-14). The fire in question occurred on November 20, 2019. The building currently is boarded up and secured since. Shaw has been paying the mortgage on this uninhabitable property continuously for four years (3T115:2-15).

Shaw told the Palisades claims investigator, that she "lived" at 382 Peshine Avenue from October or September 2017 until May of 2019

(3T117:10-14), based on moving in when the flooring was completed (3T136:13-23).

After Malik Freeman vacated the third floor, he did not disappear. He went to his girlfriend's apartment, just below (4T49:14-25). Sharonda had changed the locks to Unit 2, her apartment, and leading to the third floor (4T50:18-25). Shaw notified Section 8 about it and Section 8 gave Sharonda an infraction notice (4T51:1-3). The locks were then changed (4T51:4-6).

When asked, for the first time at her February 2024 deposition, if Shaw stayed at Peshine "all the time," Shaw stated that she did not, testifying:

A.: That's correct, just like at 57 Coit Street, I did not stay there every time.

Q.: Okay. Isn't it --

A.: Every day.

(4T54:13-19).

G. Detective Eiken's Investigative Report

Detective (currently Captain) Kevin Eiken ("Eiken") is employed at the City of Newark with the arson unit of Newark Fire Department and is tasked with investigating the cause of the fire (4T73:18-25, 4T74:1-5). In response to the fire incident at 382-384 Peshine Avenue, Eiken was summoned to investigate and prepare a report (4T76:2-9). In the course of his investigation, Eiken took statements from the owner and tenants (4T77:16-21).

In reference to Malik’s “relationship to incident” category on the report form, the form indicated “storage in the third floor” (Pa544; 4T81:29-24). This information was conveyed to Eiken by Shaw who stated to him that Malik was not supposed to be there, but “stored stuff in the apartment. And he hadn’t paid rent.” (4T82:7-17). Cherry, Malik’s mother, told Eiken that she and Malik “lived at this location for 10 years.” (4T85:17-25, 3T86:1-6). The fire report also shows that Shaw “reaffirmed the fact that she has had problems with Malik Freeman staying at the location with no lease because of drug issues and hoarding.” (4T86:12-19).

H. Sharon Cherry Testifies That Shaw Never Moved Into Peshine Avenue

Malik’s mother, Cherry testified that she lived at 382 Peshine Avenue from 2011 to 2019 on the first floor (4T104:9-19). Cherry testified that after the “original owner,” Mildred Brown, sold the house in 2016, no one lived on the second floor. “They had to renovated [sic] floor.” (4T105:18-25, 4T106:1-2). Cherry testified that she never saw Shaw move into the building (4T110:25, 4T111:1-2) and that she only saw her at the property when she came to collect rent (4T111:3-10). Cherry acknowledged that “[t]hey renovated the second floor” (4T112:9).

Cherry was shown Exhibit P-1 (Pa160) depicting Shaw in her bedroom (4T117:13-16). She testified that she did not recognize the room that Shaw is standing in – and added “that was not 382 Peshine Avenue” (4T117:17-21).

I. Malik Also Testified That Shaw Never Moved in Peshine Avenue

Malik testified that Shaw never moved into Unit 2 (4T132:14-15), and that Shaw never moved furniture into Unit 2 (4T132:16-18). When asked how he knew that, he responded, “[b]ecause my mom lived downstairs. I had a niece that lived across the street. And whenever I wasn’t in Elizabeth, I was on Peshine Avenue” (4T132:19-22). Malik also testified that he moved in six months before the fire of November 2019 (4T122:24-123:3). He also testified he moved in approximately May or June 2019 (4T135:2-5), at the same time that Sharonda Eleazer “got the keys to move in” (4T135:11-18). While Sharonda Eleazer moved in with a Section 8 voucher, Malik *admitted* that he was not on the voucher (4T135:21-25). But Malik claimed that he moved in “with Ms. Shaw’s permission.” (4T136:3-5). He also testified as follow:

- Q. Isn’t it a fact that Ms. Shaw, as the landlord, was obligated to notify Section 8 Housing Authority that ran the voucher program for Section 8, to notify them that Sharonda Eleazer had illegal tenants living there without authority?
- A. I mean, I believe – I mean, she was obligated to do it, but being that – I couldn’t have moved in without her permission. None of us couldn’t [sic] have moved in without her permission. Me – when the keys – when the

keys to the apartment was handed over to Sharonda, I was right there.

Q. So you moved right in even though you were not on the voucher and you were not supposed to be in that building.

A.: Yes.

(4T137:3-17). Malik's testimony continueds:

Q. -- and they issued an infraction notice to Sharonda Eleazer, to your girlfriend; correct?

A. I believe so.

Q. Yeah, so --

A.: But that was months after we already had been staying there.

(4T138:3-8). Malik testified that the lease entered into with Shaw to occupy the third floor had a commencement date of August 1, 2019 and an end date of August 1, 2021 (4T141:10-14). He also testified that he only moved out after the fire (4T141:22-142:3). He denied seeing a notice to quit and terminate the lease on the door (4T:142-4-17) and denied clearing his belongings and moving back to the second floor unit (4T143:20-25).

During Malik's testimony at trial, he was shown photographs, which he identified as the third floor space, and variously as "a bedroom on the third floor," and "another bedroom on the third floor," based on his knowledge of the layout (4T144:19-45:2; Pa535-538). Malik proceeded to identify "closet," "bathroom" and "storage area" that were completely empty (4T145:3-18). He was shown the photograph taken in October 2019 of the vacant rooms, but claimed that those pictures "had to be taken before we moved in" (4T146:4-6).

When given an opportunity to explain the photographs which showed an empty apartment on the third floor on October 26, 2019, Malik claimed that those “pictures can be photoshopped” (4T155:21-25, 4T156:10).

J. Atif Dukes

Atif Dukes (“Dukes”) testified he was in the construction business involving “rehab,” including work through the “FHA 203K loans.” (5T27:1-13). Dukes was assigned the job of renovating the Peshine Property in 2017 (5T27:18-22). He did not finish the job. If Dukes and the homeowner are not satisfied, “the next step is to go through arbitration.” (5T28:2-11). Dukes removed and replaced hardwood and tile flooring (5T39:4-6) and removed walls by dismantling them (5T38:21-24). Dukes installed flooring throughout the house and explained that any furnishing in the rooms must first be removed before new flooring can be installed (5T39:12-25) in the house. Dukes acknowledged the absurdity of leaving any furnishings in place while installing new flooring in the house (5T40:18-25, 5T41:1-18).

K. Elisa Lacoste Did Not Address or Testify on the Subject of Materiality of Post-Loss Misrepresentations

Elisa Lacoste (“Lacoste”), the “director of underwriting at Plymouth Rock Palisades,” was the sole party-witness Palisades called to testify at trial. Lacoste testified her job included overseeing the day-to-day operations of the

underwriting department. Lacoste also contributed to the overall underwriting guidelines that Palisades followed, including risk selection and what risks were appropriate for Palisades (5T54:10-22).

Lacoste testified that Palisades' expectation upon issuance of a policy "in terms of occupancy" was that an owner/insured was expected to reside in the property "at all times." (5T58:13-19). Lacoste explained that an "underwriter" will evaluate and review insurance applications to determine eligibility, "whether we accept it [the risk] or decline it" (5T59:3-10), and that in order to determine the eligibility of the risk, the application for insurance is a document that was important to the underwriter (5T59:11-14). Lacoste explained that in order to determine risk eligibility from a review of the insurance application, if the application was incomplete or the underwriter did not have information it deems material, the underwriter "would call the agent who wrote the business and ask the agent [or broker] for the information." (5T59:15-20; 63:22-64:10; 64:25-65:3).

At the conclusion of Lacoste's testimony, the defense rested (5T66:9). Palisades called no employee or qualified representative to testify about the "materiality," as to if, and/or how Palisade's investigation of the fire loss was affected by any alleged misrepresentations.

ARGUMENT

POINT I QUESTION 3 ON THE JURY VERDICT SHEET MUST BE SET ASIDE AND JUDGMENT *NOV* ENTERED IN FAVOR OF PLAINTIFF SHAW ON LIABILITY, BASED ON PALISADES' FAILURE TO INTRODUCE EVIDENCE OF *MATERIALITY* FROM THE STANDPOINT OF A REASONABLE INSURER (Decided at 8T16:5-21:1; Pa1; Standard of Review Is Plenary).

A. The Standard of Materiality under *Longobardi v. Chubb Insurance Co.*, with Respect to the Insurer's Burden in Proving the Materiality of Post-Loss Misrepresentations (Decided at 8T16:5-21:1; Pa1).

This is an appeal from the denial of a motion for judgment *NOV* and new trial under R. 4:40-2(b), based upon the lack of competent evidence in the record to support the jury verdict. That verdict was predicated upon the jury answering “YES, in response to “Question 3” on the verdict sheet (Pa155) as to whether Palisades “establish[ed] that [Shaw] made misrepresentations during the course of the fire claim investigation and that the misrepresentations were material or reasonably relevant” (7T72:13-73:1). Palisades failed to present even a scintilla of evidence that Shaw’s alleged misrepresentations actually were “material or reasonably relevant” to *Palisades* in its investigation of the fire claim.

Longobardi v. Chubb Insurance Co., 121 N.J. 530, 541-42 (1990) is the seminal case in New Jersey on the element of “materiality” required to be proven by an insurer to establish a post-loss misrepresentation defense. There

the Court addressed whether an insurer was justified in denying coverage on an insured's theft claim based upon a post-loss misrepresentation during his examination under oath ("EUO")---that he was not acquainted with, or did not personally know, two men believed by the insurer to have been involved in a series of insurance fraud schemes for which they were later convicted. The jury found plaintiff had been burglarized but had not conspired to defraud the insurer. However it found he had made a materially false statement during his EUO that he did not really know these individuals, "in an effort to or for the purpose of hindering, deflecting or misleading defendant in the course of its investigative process." *Id.* at 536. The trial judge in *Longobardi* dismissed the complaint based on the jury's finding. The Court affirmed, holding the proofs had met the test that "[f]or an insurer to void a policy because of a post-loss misrepresentation, the misrepresentation must be knowing and material."

Longobardi's analysis embraced *in toto* the Second Circuit's decision in *Fine v. Bellefonte Underwriters Ins. Co.*, 725 F.2d 179, 183 (2d Cir.1984), *cert. denied*, 474 U.S. 826 (1985). *Fine* held that meeting an insurer's burden of proof in order to satisfy materiality requirement and sustain a misrepresentation defense required showing a false statement concerning a subject relevant and germane to the investigation as it was then proceeding. *Id.* at 541. *Longobardi* approvingly quoted *Fine* as follows:

[f]alse sworn answers are material if they might have affected the attitude and action of the insurer. They are equally material if they may be said to have been calculated either to discourage, mislead or deflect the company's investigation in any area that might seem to the company, at that time, a relevant or productive area to investigate. (*Id.*)

But *Longobardi* also cautioned that

Not every knowingly false statement made by an insured, however, will relieve an insurer of its contractual obligations. Rather, forfeiture results only when the fact misrepresented is material. (*Id.* at 540).

The definition of a “material misstatement” emerging from *Longobardi* was that:

An insured's misstatement is material if when made a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action. (*Id.* at 542) (citations omitted).

The Appellate Division's decision in *Selective Ins. Co. v. McAllister*, 327 N.J. Super. 168 (App. Div. 2000) is instructive here on the requirement for evidential proof necessary to satisfy the element of materiality. The insured defendant, McAllister, had submitted false medical bills to Selective for which she was tried and convicted for 3rd degree theft by deception in criminal court. Selective sought to bar her claim for benefits based on her conviction under theories of *res judicata* and collateral estoppel. The court below observed that “[n]owhere does the criminal statute speak to the issue of “materiality” as an

element of the offense.” *Id.* at 176. The court continued: “In our view, the question of materiality of the alleged submissions is for the jury in the civil trial to determine.” *Id.* In doing so, the court carefully examined the holding in *Longobardi* and explained its reasoning and analysis as follows:

In a later opinion clarifying *Fine v. Bellefonte Underwriters Insurance Co., supra*, on which our Supreme Court relied in deciding *Longobardi*, the Second Circuit, in *Pacific Indemnity Co. v. Golden*, 985 F.2d 51 (2d Cir. 1993), held that materiality must be seen in the context of **whether the misstatement would have affected the investigation.** *Id.* at 56. The court found that an issue of fact existed on whether insurance misrepresentations were material. There, the fire claim submitted to the insurer involved damages in excess of two million dollars. During the initial claim investigation, the insured explained that the large volume of gasoline he had stored in trash cans was for use with snowmobiles. Later, he conceded in examination under oath that his initial answer had been false and that he had intended to use the gasoline to kill his neighbor’s lawn. Apparently, the insured and his neighbor had engaged in ongoing disputes and litigation with each other, and in fact, the neighbor was suspected of having set the fire. The court reversed the summary judgment for the insurer and held that **a jury must decide whether the initial misrepresentation was material, emphasizing that the insurer failed to show that there was no material question of fact demonstrating that its investigation would have proceeded differently had the insured initially given his true reason for storing the gasoline at his house. Specifically, “there [was] insufficient evidence in the record to determine whether [plaintiff’s] misrepresentations either affected defendant’s ‘attitude and action’ or discouraged, misled or deflected its investigation.”** *Id.* at 57 (Emphasis added)

Id. at 177-178. Accordingly, the court went on to hold that: “The jury must assess,

as an element of materiality, whether plaintiff would have changed its course of action in assessing the claims upon learning of the fraudulent conduct.” *Id.* at 178.

B. Palisades’ Defenses. (Decided at 8T16:5-21:1; Pa1).

In its answer to Shaw’s complaint (Pa44) Palisades asserted, *inter alia*, three defenses: the “1st Separate Defense”---that Shaw's policy was “void *ab initio* due to material misrepresentations in the policy application (Pa48); the “3rd Separate Defense”—that Shaw's claims were barred because she “knowingly misrepresented material facts in the presentation of the claim, including material facts relative to residency [at 382 Peshine Ave.]” (Pa48) and the “8th Separate Defense,” that her claims were barred because she “did not reside at the subject property, [thus] the property does not qualify as a ‘residence premises’....” (Pa49).

C. Shaw’s Trial Testimony. (Decided at 8T16:5-21:1; Pa1).

Shaw testified that as of the execution of her application on July 24, 2017, her *reason* for acquiring property, and *plan*, was to occupy it as her “primary residence” following the closing (which occurred in September 2017) (3T10:2-7). Her intention that the premises would become her “primary residence” was thwarted by unforeseen events, but her answers as of then were truthful.

Shaw's un-rebutted testimony also made clear that from outset of its post-loss investigation the actual facts relating to her relationship with the premises were available to Palisades. Shaw, through her own testimony and that of friends at trial shared anecdotes relating to her continuing presence at the premises, as being consistent with her original intention to "live in it." But she never misled Palisades, even per the definitions suggested by Palisades' counsel as to what would constitute "residing" or "living" there, as to actually *living* there; viz.:

Q. But you were living in Unit 2 [of the insured premises] or no [throughout the period up to May 2016]?

A. What is your definition of "living in a unit? Was everything -- was I there day to day? Was I washing there? Was I cooking there? No, I wasn't. Now, I don't think I was even asked the question, from -- as you stated, from your client.

Q. Well --

A. But it's still my residence.

Q. You were asked -- or -- strike that. You represented that you lived at 382 Peshine Avenue, didn't you?

A. I believe so, yes.

Q. Okay.

A. And you [Palisades counsel] defined in your own words at the very beginning of this cross-examination what you meant by "live."² It's my residence. (3T147:1-16).

Shaw explained that while the construction work was not completed to the point it was safe to occupy Unit 2, which she had intended to live in, she

² This referred to her responses to Palisades' counsel's prior cross-examination, in which she had testified that she currently lived at her parent's

had already moved certain things in and “it was still my residence”(3T149:7-20).

Palisades’ counsel on cross-examination later represented that, “I am not asking her to define that term [‘residence]” (4T9-20). But he then immediately tried to confront Shaw with a dictionary definition of “reside.” This prompted the court to ask, “Where are you going with this?” (4T10:7-8), and directed him to-

[j]ust ask her what does she think “reside,” -- what her definition of “reside” is without your offering a definition. And that's it. I don't see any reason to -- definition. (4T10:15-18).

This colloquy between Palisades’ counsel and Shaw then followed:

- Q. Did you reside at 382 Peshine Avenue between October 2017 and May of 2019?
- A. Yes, that was my residence.
- Q. Did you reside there?
- A. I think residence means that's –
- Q. Could you define what you understand the word “reside” -- not “residence -- “reside,” what that means to you.
- A. If I was going to the property, if I was cleaning around my property, if I was checking up on construction, the progress of the construction, things like that. (4T11:25-12:7)

On redirect-examination, **Shaw testified, and it was un-rebutted, that** in the recorded statement taken by the claims investigator, Karen Johnson, who was not produced at trial by Palisades, **Johnson never asked her if**

home in Irvington, where her child went to school, where she parked her car, where she slept, where she entertained friends, etc. (3T116:5-25).

...you sleep there every day?"; ... if you cooked there or you cleaned there or your infant slept there or you basically did the cleaning, cooking and eating and sleeping every single night, every single day (4T47:6-17)

Shaw further testified that the first time she was actually asked, "...whether you were sleeping there or staying there on daily basis" was by Palisades' counsel during the *deposition in the litigation* the previous month (4T47:18-23). She confirmed that in her *deposition testimony* she explained she was not present there on a day-to-day basis from October or November 2017 through May 2019

A:[d]ue to my family obligations and what was going on at the time and the birth of my daughter, which did a whole 360 of me going back and forth to my parents' house, I wouldn't say every day.

Q: Right. If you -- but would it be fair to say that it was essentially you were there every week multiple days during the week through that period of time that I've discussed?

A: Yes.

Q. Okay. And did you go to the house multiple times the week, some days less, some days more, during the duration of the construction that was ongoing?

A. Yes, I did.

Q. Okay. And did you respond truthfully to the more precise questions [i.e., more precise than in the recorded statement] asked by counsel for Palisades in your February 1, 2024, deposition?

A. Yes, I did.

Q. Were these questions ever asked by Karen Johnson in this way, phrased in this manner back in January of -- 6, 2020? Were they ever asked of you in the same -- phrased in the same manner?

A. No. (4T48:10-49:12)

Shaw then testified that Johnson’s questions and her answers pertained only to where she was living “after the fire”—i.e., at her parents’ house (4T53:3-8). Shaw also explained that when she was first examined in 2021 regarding events in 2017-2018, she had forgotten various details, but “I answered as truthfully as I could [i.e., at the time], but, again I did not have these documents... did not go over these documents [recently subpoenaed by Palisades from third parties] until last month, which refreshed a lot of my memory....” (4T59:25-60:5).

D. The Only Evidence Presented by Palisades Did Not Address, *from Its Perspective*, the “Materiality” as to Its Fire Claim Investigation of Any Alleged Post-Loss Misstatements by Shaw. (Decided at 8T16:5-21:1; Pa1).

Elisa LaCoste, the head of underwriting of Palisades’ parent company, was the only company representative it presented as a witness. Her testimony was totally unrelated to the subsequent fire claim investigation. Instead it was devoted to attempting to support Palisades’ 1st Separate Defense---that the “Home-owners Policy” Shaw executed on July 24, 2017 was “void *ab initio* due to material misrepresentations in the policy application.”

However, LaCoste’s testimony, while it described the significance of the questions to be answered in the *application* insofar as assessing risk, and pricing coverage, did not, and could not, in any way challenge the probity of

Shaw's July 24, 2017 application responses, in which she disclosed the premises was multi-family, and *truthfully* represented that she intended it to be her primary residence. Nor did, or could, LaCoste address how unforeseen events after Shaw closed, causing her involuntary inability to continuously occupy the premises, and thwarting her ability to use the premises as intended, might be relevant to the veracity of Shaw's representations when she executed the application.

Palisades' counsel initially represented that Karen Johnson, who investigated the claim, and recorded Shaw's statement, would be called as a witness (3T48:2-2). Johnson seemingly would have been the only person within Palisades actually qualified to testify as to how, as a "reasonable insurer," it could have been misdirected, misled or diverted by Shaw's "misrepresentations" during the investigation. Despite counsel's representation Palisades failed to call Johnson.³

Palisades also failed to present any testimony from any other company witness which might have been probative as to whether, during *the fire claim investigation*, it gave any weight at all to Shaw's assertion of "residence," in

³ Shaw's counsel moved for an adverse inference charge as to Johnson. It was denied (6T3:25-11:20). The recorded statement made by Johnson had originally been admitted in evidence conditionally as (D-8) based on the representation Johnson would testify (4T28:11). But since Johnson was not produced, the court ordered that the recorded statement was to be deemed not

light of the already available, salient facts regarding the period in question. Instead, the balance of Palisades' defense case consisted of third-party witnesses, who each had an axe to grind with Shaw, and were presented in order to minimize the extent of Shaw's *presence* at the premises. Plainly the sole reason Palisades called them was to suggest Shaw's characterization of the premises as her "residence" was a lie.

E. Even If, Because of Her Unintended Inability to Continuously Occupy the Premises, Shaw's *Definition* of "Residence," Was Untenable, it Did Not Put in Dispute, or Divert Palisades from Learning, the Objectively Determinable Facts, and Was Not a Reason to Deny Coverage or Rescind the Policy. (Decided at 8T16:5-21:1; Pa1).

The overarching facts pertinent to Shaw's involuntary inability to fully occupy the insured premises were not concealed or challenged by how Shaw defined her relationship with the premises as still amounting to "residence." She conceded her definition was not based upon her sleeping, cooking, cleaning or staying there on daily basis. Her definition was not based on misrepresenting any salient facts (see 6T5:2-6:9).

Moreover, Shaw's definition of "residence" was legally defensible. In *Ayala v. Assured Lending Corp.*, 804 F. Supp. 2d 273 (D.N.J. 2011), the homeowner had been denied insurance coverage on the grounds that the home

in evidence, and not part of the record (6T11:2—12:1). Thus it was not part of the record before the jury.

was not “owner occupied” at the time of loss. The insurer also rescinded the policy for material misrepresentations relating to the insured's alleged misrepresentation that he would be moving into the home once he completed renovations. The policy in question there was essentially the same in substance as Palisades Homeowner's Policy (Pa56). Like here, the denial of coverage and rescission were based upon homeowner's failure to occupy the house at the time of a fire, which occurred shortly after the inception of the policy. There was also evidence the homeowner in *Ayala* was renovating the property with the intention of renting the property.

Ayala squarely addressed, in light of the *Longobardi* insurance construction guidelines, the interpretation, *from the standpoint of the insured*, of “residence premises” language in the policy---virtually the same as the counterpart language in the Palisades policy.⁴ *Ayala, supra.* at 280, cited *Longobardi* for the proposition that under New Jersey law words in insurance agreements are to be given their ordinary meaning, but any ambiguity is to be construed liberally in the insured's favor; see also *Zacarias v. Allstate Ins.*, 168

⁴ The policy in *Ayala*, as here, equated “resident premises” with the premises listed in the declarations and in a way which could include structures designed or intended to be used by owner, even if they were not currently being used by the owner, citing *Doto v. Russo*, 140 N.J. 544 (1995) (noting where a court is required to construe an ambiguous policy term, it must consider whether more precise policy language would have eliminated the issue); see also *The Ohio Cas. Ins. Co. v. Flanagan*, 44 N.J. 504, 513-14 (N.J. 1965; *Mazzilli v. Accident Cas. Ins. Co., Etc.*, 35 N.J. 1, 7 (1961).

N.J. 590, 595 (2001); *Werner Industries Inc. v. First State Ins. Co.*, 112 N.J. 30, 35-36 (1988) (courts must apply the “reasonable expectations doctrine” test even if the policy is unambiguous).

Here, as in *Ayala*, the owner-occupancy condition in the policy was neither conspicuous nor clear, except perhaps to a Palisades’ underwriter or licensed producer. There was no clear exclusionary clause to alert Shaw, a first-time home buyer, to the danger lurking in the policy's owner-occupancy condition, as to which the term “resident-premises” in the definitions section of the policy provided no fair warning. *Harvester Chemical Corp. v. Aetna Casualty & Surety Co.*, 277 N.J. Super. 421, 430 (App. Div. 1994); *Boswell v. Travelers Indem.Co.*, 38 N.J. Super. 599, 604 (App. Div. 1956) (though specific words may not be ambiguous, but the context may create ambiguity, the court must give effect to the insured's objectively reasonable coverage expectations as to the policy as a whole, not just one part of it in isolation); *Sparks v. St. Paul Ins. Co.*, 100 N.J. 325, 338-39 (1985).

Similarly, echoing the *Ayala* holding, in *FBS Mortgage Corp. v. State Farm Fire & Casualty Co.*, 833 F. Supp. 688 (N.D. Ill. 1993), the court concluded that an insured’s **involuntary absence** from the insured premises for a period of time due to his incarceration did not absolve the insurer from liability. The Court held that while the word “resides” necessitates some

degree of physical presence, the word “resident premises” was ambiguous because it failed to establish when and for how long the insured must be physically present at the insured premises in order to “reside” there. The court held: “Accordingly, the definition of “resident premises” does not address whether an involuntary, eight-month absence from the insured premises . . . is grounds for denying coverage.” *Id.* at 693 (Pa104).

As the mortgage documents admitted in evidence clearly show, throughout the period of 2018 and early 2019 (Pa451-463; Pa473), Shaw was unable to remain daily in the house while construction issues upended her plans, leading ultimately to arbitration, thus preventing her from settling in with her newborn infant on a day-to-day basis.

These unforeseen conditions, which prevented her from settling in, her involuntary absence from day-to-day living at the premises did not mean that she did not “live” or “reside” there. Accordingly, based simply upon Shaw's reasonable expectations of coverage, the ambiguity inherent in the policy and the tension between related terms, Palisades had no right to deny coverage and rescind the policy based on her legally defensible insistence the insured premises was her “residence.”

F. The Verdict Cannot Be Reconciled with the Jury Charge Regarding “Post-Loss Misrepresentations,” the Instructions on the Verdict Sheet, the Jury’s Questions Regarding the Evidence and the Charge and the Court’s Responses to Those Questions (Decided at 8T16:5-21:1; Pa1).

In the charging conference preceding court’s jury charge, Shaw’s counsel called attention to what he perceived to be the danger inherent in the proposed jury Interrogatory 3: that it could allow the jury to gloss over the matter of materiality: So the jury has to focus on what has been presented in the trial. The reason that’s crucial, Your Honor, is because, you know, there’s been a lot of witnesses that never showed up to give testimony. For example, especially on materiality.

Nobody came in this courtroom to say, you know what, had we known this, we would have done that. Our position would have changed. Our investigation got deflected. We were misled into thinking, and had we known earlier the truth about what Miss Shaw told us, we would have changed our course and done this. We have none of that, and there’s a reason why. None of that is relevant. (7T10:8-20)

The trial court’s charge on “Post-Loss Misrepresentations” (7T54:17-57:1) faithfully tracked *Longobardi*, including the incorporation of the language that

a misrepresentation would be material..., [if] when made, a reasonable insurer would have considered the misrepresented fact relevant to its concerns and *important* in determining the course, its course of action. (7T55:12-16) (emphasis added).

In the charge, also echoing *Longobardi* almost verbatim, the jury was instructed

[that] [i]n making your findings of fact, you may not presume facts that, which are not in evidence. Rather, you must reach your conclusion of facts based only on the evidence admitted at trial by the parties....

If you find that you cannot reach a conclusion as to how the subject of the alleged misrepresentation is reasonably relevant or germane to the investigation or important in determining the insurer's course of action, then you must not presume that the Defendant has proven all three elements [of its post-loss misrepresentation defense]: misrepresentation, knowingly made, and materiality. It is up to you to decide. (7T:56:1-13)

In other words, the jury was instructed that the element of “materiality” of a putative mis-representation had to be determined based upon evidence as to how it was processed from the *perspective of the insurer*. It could not be determined, from the perspective of the insured, or non-party witnesses. Most particularly, it could not be determined from the perspective of the jurors themselves, who here, without relevant evidence of the same in the record, could only speculate as to what impact it might have had on the perspective of Palisades in assessing the claim. *Longobardi, supra.* at 541-542

Only Palisades itself, through its representatives, was qualified to offer evidence that was probative as to whether Palisades, acting as a *reasonable insurer*, could actually have considered the perceived frailty of Shaw's “definition” as relevant to its *bonafide* concerns and important in determining its course of action; that is, how “[Shaw's definition] may have affected the

attitude and action of the insurer;” or discouraged, misled or deflected Palisades’ investigation. *Id.*

This point was well-made in *Pokhan v. State Farm Fire & Cas. Co.* No. A-1411-19 (App. Div. Sep. 19, 2022) (Pa565-572), an unpublished decision, that at all times it remains the insurer’s burden, in establishing the element of materiality to sustain a misrepresentation defense, to show the capacity of the alleged misstatement to have actually affected *its* investigation; *viz.*:

Although the motion judge also found Pokhan's post-loss misstatements were “germane to State Farm's evaluation [of] the damage resulting from the fire loss,” and “handicapped [its] investigation into the extent of the fire damage,” **there is no support for those findings in the record as State Farm never addressed on the motion how Pokhan's postloss misstatements affected its post-loss investigation.** See *Longobardi*, 121 N.J. at 542 (“An insured's misstatement is material if when made a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action.”). [*Pokhan, supra* (Pa571) (emphasis added)].

In other words, determining materiality is not a matter for a judge or a jury to determine whether, in the abstract, *they* would have considered post-loss misstatements “germane.” The burden remains entirely on the insurer itself to show how such misstatements actually “affected its post-loss investigation.” Palisades never addressed this issue. Plainly, Palisades’ trial strategy was calculated to avoid subjecting Johnson, its investigator, to vigorous cross-examination.

In conjunction with the charge, the jury was provided with a Verdict Sheet to guide it to a verdict, containing, *inter alia*, three interrogatories:

Question 1 Had Shaw “lived or resided” at premises from September 2017-May 2019?

Question 2 Did Palisades establish that Shaw “knowingly made misrepresentations in the application... as of July 24, 2017?

Question 3 Did Palisades “...establish that [a] Plaintiff made misrepresentations during the fire claim investigation and [b] that the misrepresentations were material or reasonably relevant [to Palisades in conducting its investigation]?” (7T62:22- 63:22)

Question 3 of course presumed there was at least *some evidence* in the record from which a jury could find not only (a) misrepresentations, but also (b,) that they were “material or reasonably relevant” to Palisades in its investigation as it was unfolding. As noted, during the charge conference Shaw’s counsel questioned whether Palisades actually had produced any such evidence which could justify the inclusion of Question 3 (7T10:8-21).

Before returning a verdict the jury presented two questions to the court. The first was “[c]an we please have a copy of the deposition and recorded statement⁵?” (7T68:1-3). The court denied the request because

⁵ As noted above, although the “recorded statement” was originally admitted into evidence, the court withdrew it from being considered as part of the record because of Palisades’ failure to call Johnson, contrary to counsel’s representation.

...that item is not a part of the evidence, and they are only to consider those things that are....[You are] [o]nly to consider “live witnesses or documents” *** The item which you’re seeking is not a part of the evidence... (7T69:6-7)

The jury then had a further question regarding the language in the “post-loss misrepresentation” instruction in the charge as to “...what does the ‘first instance’ refer to in the language ‘...[you are to determine] from...the evidence presented to you in this case if the Plaintiff made a misrepresentation in the first instance...?’” (7T69:18-25). Counsel for both Shaw and Palisades agreed that in this context “first instance” meant that the jury could only consider *post-loss* misrepresentations as evidence of “materiality” with respect to “misrepresentations” during the course of the fire claim investigation.

Accordingly the court’s response to the jury was that “...the first instance, the first instance would be the claim investigation, not...the application process”(7T70:11-71:6). This meant that they were not to consider any representations in the 2017 application in conjunction with assessing impact of post-loss misrepresentations. The verdict, as reflected on the verdict sheet (Pa155) and in the transcript (7T72:24-73:13), followed immediately after the trial court’s responses to the jury’s questions.

In response to Interrogatory 1, the jury answered “NO” as to whether Shaw “lived or resided” at the premises from September 2017 to May 2019.

In response to Question 2, the jury answered “NO” as to whether Palisades had established that Shaw “*knowingly* made misrepresentations” in the January 24, 2017 application.”

But in response to Question 3, the jury answered “YES” as to whether Palisades had established that Shaw “[a] made misrepresentations during the fire claim investigation and [b] that the misrepresentations were material or reasonably relevant [to Palisades in conducting that investigation]?” This “YES,” which was the basis for the verdict, cannot be squared with a finding of “materiality,” or the court’s further instructions in response to the jury’s first question---that they could only consider matters in evidence, and the second question—that they could not consider, on the issue of the materiality to the post-loss investigation, any statements in the application.

Question 3 should not have gone to the jury in the first place. The verdict was not based on Palisades introducing any evidence to show that its investigation would have proceeded differently had Shaw initially given what it deemed to be a “truthful” answer, *Pacific Indemnity Co. v. Golden*, 985 F.2d 51, 57 (2d Cir. 1993). This was not a case in which certain “facts” were implicit in Shaw’s insistence that despite her involuntary absence this still was her “residence” were contradicted by “...the undisputed facts [which]

reveal[ed] otherwise.” *Lbrty. Surplus v. Amoroso, P.A.*, 189 N.J. 436, at 447 (citations omitted).

No Palisades witness appeared to testify that Shaw, by clinging to her definition of “residence,” created “....an issue of fact [as to a “fact” which did not] exist....,” *Selective Ins. Co. v. McAllister*, *supra* at 177, or that it had the capacity to have “changed [Palisades’] course of conduct in assessing the claims...” *Id.* at 178.

**G. The Hearing and Decision on the Motion for Judgment NOV.
(Decided at 8T16:5-21:1; Pa1).**

Following the verdict Shaw timely moved for Judgment *NOV* pursuant to R. 4:40-2(b) (Pa136). The basis for the motion was that the verdict was inexplicable except as the product of the jury’s speculation, and failure to adhere to the court’s original, and further instructions.

In *Sons of Thunder, Inc. v. Borden, Inc.*, 148 N.J. 396, at 415 (N.J. 1997), the Court noted that on an appeal from the denial of a JNOV motion the Appellate Division “has the same task that a trial court has in reviewing a motion for JNOV”---to assess the existence, or not, in the record of evidence on the “element of materiality.” The appellate role in ruling on an appeal from the denial of a JNOV motion is a *mechanical* one, to “canvass the record...
***[without concern]... with the worth, nature or extent (beyond a

scintilla) of the evidence [supporting the verdict], but *only with its existence.*” *Dolson, supra.* at 6 (emphasis added).

On such an appeal, the denial will only be reversed where, “....no rational juror could conclude that the [party] marshaled sufficient evidence to satisfy each prima facie element of a cause of action.” *Smith v. Millville Rescue Squad*, 225 N.J. 373, 397 (2016) (quoting from *Godfrey v. Princeton Theological Seminary*, 196 N.J. 178, 197 (2008)—that is, **only if the jury could not have reasonably used whatever the evidence was in the record to reach its verdict.** *Conforti v. Cnty of Ocean*, 255 N.J. 142, 162 (N.J. 2023).⁶

Applied in the context of this case, the test is “whether [Palisades produced evidence that Shaw’s challenged assertion that just her frequent presence at the premises constituted ‘residence’]...would have changed its course of action in assessing the claims....,” *McAllister, supra* at 178. But in this case Palisades utterly failed to produce any evidence showing that Shaw’s alleged misrepresentation(s) had the capacity to have affected Palisades’ conduct of its post-claim investigation. *Longobardi, supra* at 541. Here there simply was nothing before the jury which could give rise to “any legitimate inferences which can be drawn from that evidence, [to]...support the jury

⁶ Shaw was not required to move for a directed verdict in order to preserve her right to move for a JNOV. *Ponzo v. Pelle*, 166 N.J. 481, 488 (N.J. 2001).

verdict, *Sons of Thunder, Inc.*, *supra.* at 415 (1997); *Dolson v. Anastasia*, 55 N.J. 2, 5-6 (1969). That is, there was no evidence presented in the trial to show in what, or any regard, Palisades “would have considered the misrepresented fact [i.e., post-claim] relevant to its concerns and important in determining its course of action.” *Longobardi, supra.* at 541-542.

Lacking the ability to identify any such evidence, in opposing the motion Palisades’ counsel instead sought to rationalize the verdict by eliding the absence of any evidence from any representative of Palisades as to how Shaw’s putative post-loss misrepresentations could have had the capacity to have affected Palisades’ investigation. He argued instead that:

The materiality of -- or evidence of materiality of part of -- or in support of Palisades it’s **obvious** -- .

[t]here was a declaration [[sic.] letter sent, specifically stating what it was that it determined to be material mis-representations. The representations with regard to the occupancy and the use of the premises. Are -- were material. It was explained in that letter -- in front -- they didn't have to guess at the -- they new exactly what caused my client to void costs -- mis-representations (8T9:18-25) (emphasis added).

However, no such letter was ever received in evidence, or even marked at trial.⁷ Given Palisades' failure to present any such evidence itself, it was totally beside the point whether or not, despite Palisades presenting no evidence, the jury might have believed "materiality [was]...obvious," based upon its own irrelevant notion of what "materiality" might mean, since at all times it remained Palisades' burden to establish materiality under the *Langobardi* standard. There was nothing in the record to support a finding that Palisades had met *its burden*, regardless of what the jurors themselves might have considered "material" *to themselves* in a non-technical context.

Palisades counsel also argued that

[as] represented in the application for insurance and then during the claim investigation Ms. Shaw made those statements about moving in --

About the contractors doing work for a water claim as opposed to actually part of a renovation. Those all-- and the tenants, all of that stuff, all of those documents go to the materiality or -- as to use and occupancy.

We heard from the underwriter who [testified only as to the significance to risk of questions in app] said the expectation was that the use and occupancy was going to be rightfully -- and continuous, without interruption.

⁷ The actual rescission and declination letters were not in evidence, and only referenced Shaw's responses in the original July 24, 2017 application, which the jury found in response to Question 2 were not "knowingly made misrepresentations."

The jury had in front of them, and they heard [never identified, and non-existent] testimony regarding what my client, and it was entered into evidence. [NOV T10:6-22]

But as the court had instructed the jury in response to Question 2, the underwriter's testimony had no relevance to the post-claim investigation. "YES" on Question 2 reflected that Palisades failed to "establish...that [Shaw]...knowingly made misrepresentations in the applications for insurance as of the date of the application, July 24, 2017." Likewise, the jury was never presented with any *evidence* "regarding what [Palisades]...determined to be material..."—i.e., how any alleged misrepresentation such as "the contractors doing work for a water claim as opposed to actually part of a renovation," could have been deemed *by Palisades* to be "reasonably relevant or germane" *to the post-loss investigation*. The "obvious[ness]" argument was simply an exercise in gaslighting the court.

H. The Court Failed to Apply the Standard Under R. 4:40-2(b) in Deciding the Judgment NOV Motion (Decided at 8T16:5-21:1; Pa1).

A jury's factual determination will be disturbed only if the jury could not have reasonably used the evidence to reach its verdict. *Conforti v. Cnty of Ocean*, 255 N.J. 142, 162 (N.J. 2023). In deciding the JNOV motion the court below alluded to its responsibility to "canvas the record" (8T16:5-6), and repeated various elements of the *Longobardi* test it incorporated in the jury charge.

However, it then denied the motion offering the bewildering reasoning that:

The jury was not called to determine whether or not the ultimate -
- whether or not the mis-representations were materiality, whether
or not they -- whether or not it was materiality as to any decisions
made by the insurance company.

The verdict sheet calls for the jurors to determine only whether or
not any -- any statements made by the plaintiff were mis-
representations, whether they were knowingly made. They were
not asked -- called upon to determine the materiality of the
statement, and any impact that it may have had on any
determinations by the insured.

That question was not asked of the jurors to determine. There was
no question after---after question number three. If the jurors had
answered yes to the mis-representation, there was no additional
question calling upon the jurors to determine. Whether or not the
mis-representation constituted a materiality or constituted --
whether or not the mis-representation amount to or was to be
considered materiality as it relates to any decisions made by the
insurance company.

The jurors were simply never called upon to make that
determination.

...therefore for the reasons that I've stated,..., the application by
the plaintiff is denied for those reasons.[7T19:19-21].

The trial judge's statement seemingly rationalized the jury glossing over
materiality in reaching the verdict by asserting that the jury was not called
upon to make a determination as to materiality. That was patently wrong. The
interrogatory required the jury to find any such misrepresentations they
identified also were "material and relevant." Although Interrogatory 3 was a

compound question, which by itself was not problematic, *Ball v. New Jersey Bell Tel. Co.*, 207 N.J. Super. 100, 114 (Ap. Div. 1986), both parts of the question had to be addressed by the jury and there was no evidence in the record for an answer of “YES” as to the “material and relevant” part.

Clearly the court’s decision on the motion, unlike its charge, and the full interrogatory itself, erroneously and prejudicially sanctioned the jury ignoring *materiality* as an element to be proven to sustain Palisades’ misrepresentation defense.⁸ *Guzzi v. Jersey Central Power Light Co.*, 12 N.J. 251, 259-60 (1953). Thus, the decision below on the motion JNOV should be reversed, judgment on liability entered for Shaw, and the matter remanded for trial limited to damages.

⁸ Plainly under the court’s reasoning, the jurors would be permitted, despite the absence of evidence produced by Palisades, to arrogate to themselves the right to speculate as to whether the “misrepresentations” regarding Shaw’s “residence” actually were “reasonably relevant or germane [i.e., material] to Palisades investigation.” The decision on the motion effectively relieved Palisades of the burden of proving materiality, and approved a verdict “predicated on facts not in evidence.” *Kresse v. Metropolitan Life Ins. Co.*, 111 N.J.L. 474, at 479 (N.J. 1933).

**POINT II IT WAS PLAIN ERROR FOR THE COURT TO SUBMIT
QUESTION 3 ON THE VERDICT FORM TO THE JURY
(Not Raised Below; Standard of Review Is Plain Error: Clear
Capacity to Produce an Unjust Result)**

The submission by the trial court of Interrogatory 3 was not raised below on the JNOV motion by counsel. The trial was only audio-taped, and no transcript was available, thus severely handicapping Shaw's counsel's ability at trial either to object to the inclusion of Question 3 or to move for a directed verdict.

Nonetheless, from a review of the now-available full transcript, the error putting in Interrogatory 3 before the jury, in the absence of Palisades producing any evidence of "materiality," is manifest and an appropriate matter to raise now as plain error, since it clearly did produce an unjust result." See *Cowan v. Doering*, 215 N.J. Super. 484, 492-93, 495-96 (App. Div. 1987).

In *Massotto v. Public Service*, 58 N.J. Super. 436 (App. Div. 1959), *certif. den.*, 31 N.J. 550 (1960), the question before the court was whether there, where "[n]o...evidence bearing on [plaintiff's] alleged negligence appears in the record.... [the court was justified in propounding] a jury question as to her contributory negligence... ." *Id.* at 259. *Massoto* held it did not, quoting from *Garton v. Public Service Elec. Gas Co.*, 117 N.J.L. 520, at 522 (E.&A. 1937):

“...The scope of an instruction in a particular case is to be determined not alone by the pleadings therein, but also by the evidence in support of the issues between the parties. and even though an issue is raised by the pleadings, it is not proper to give an instruction thereon where there is no basis for it in the evidence. The principle upon which this rule is founded is that only such an instruction should be given as is based upon the legitimate evidence in the case. The fact that it may be correct as a general principle of law is not material, for it is the duty of the court to confine itself to a statement of such principles of law as are applicable to the evidence received in support of the contentions of the parties, and thus to aid the jury in arriving at a correct determination of the issues involved. If an instruction is not thus based on the evidence it is erroneous in that it introduces before the jury facts not presented thereby, and it is well calculated to mislead and induce them to suppose that such a state of facts is based on the evidence it is erroneous in that in that it introduces before the jury facts not presented thereby, and is well calculated to mislead and induce them to suppose that such a state of facts in the opinion of the court was possible under the evidence, and might be considered by them. 14 R.CL 786.”

Massotto, supra at 438-39; *Guzzi, supra* at 259-60 (1953) (a jury instruction which has no basis in the evidence tends to mislead the jury); *Massotto v.*

Public Service Coord. Transport, 71 N.J. Super. 39 (App. Div. 1961);

LaMorgese v. Kern-O-Mix, Inc., 82 N.J. Super. 581, 585-86 (App. Div. 1964)

(assumptions and speculation are insufficient to support such a charge); *cf.*,

Lesniak v. County of Bergen, 117 N.J. 12 (N.J. 1989); *Ewing v. Burke*, 316

N.J. Super. 287, 293 (App. Div. 1998).

Here as in *Cowan v. Doering, supra.* and *Massotto*, the “charge presenting such issue to the jury under the circumstances disclosed by the

evidence in the instant case was ‘prejudicially erroneous,’” given Palisades’ failure to present any proof that the alleged post-loss mis-representations were *material* to the investigation under the *Longobardi* standard. The verdict is only understandable as a product of jury speculation, untethered to any relevant evidence in the record.

It constituted plain error for the trial court to have even charged as to post-loss misrepresentations, which it compounded by propounding Question 3 on the verdict sheet as part of the jury instructions, in light of Palisades’ failure to produce any probative, competent, relevant evidence as to the materiality of the putative post-loss misrepresentations allegedly made to its fire claim investigator(s).

CONCLUSION

For all of the foregoing reasons, the decision of the trial court denying plaintiffs’ motion for Judgment *NOV* should be reversed and the motion granted, and the matter remanded to the trial court for trial as to damages only.

DATED: September 9, 2024

Respectfully submitted,

RAFFI MOMJIAN P.C.

By: /s/ Raffi Momjian
RAFFI MOMJIAN, ESQ.

IN THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Filed: November 22, 2024

Amended Filed: February 24, 2025

DOCKET No: A-002958-23

EBONNI S. SHAW AND ROBERT D. SHAW	On appeal from: SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY
Plaintiffs/Appellants,	
vs.	DOCKET NO.: ESX-L-4892-20
PALISADES PROPERTY AND CASUALTY INSURANCE COMPANY	Sat Below: Hon. L. Grace Spencer, J.S.C.
Defendant/Respondent,	

**BRIEF OF RESPONDENTS, PALISADES PROPERTY AND CASUALTY
INSURANCE COMPANY**

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Court Rules

N.J. Court Rule 4:40-1 14

N.J. Court Rule 4:40-2 14, 15, 16, 17

A. Preliminary Statement

This is an appeal from a jury verdict in an insurance coverage matter. Plaintiff, Ebonni S. Shaw, purchased a homeowner's policy from Palisades Property and Casualty Insurance Company ("Defendant" or "Palisades") in connection with purchasing a multiple-unit property at 382-384 Peshine Avenue, in Newark. After a fire at the premises, Palisades investigated and subsequently denied coverage and rescinded the policy on the grounds of misrepresentations, both on the application for insurance and during the post-loss investigation.

The misrepresentations concerned whether Plaintiff resided at the premises. The occupation of the home by Ms. Shaw and the misrepresentations made by Plaintiff during the claim investigation were the crux of this matter. The misrepresentations are what lead Palisades to deny coverage and a jury's agreement with that decision. The jury concluded that Plaintiff did not make a misrepresentation on the application, but concluded that she knowingly made a material post-loss misrepresentation in the investigation of the fire loss claim.

The financing of Plaintiff's initial purchase of the property provided her funds to renovate the home's second and third floors, and to remodel the first. The improvements included a complete gutting of the second floor unit, where Plaintiff, in both the application for insurance and during the claim investigation process, represented to Palisades that she resided. The third floor of the property is

an additional floor which was connected to the second floor unit.

Photographs of the property taken by the mortgage company documenting the remodel demonstrated that Plaintiff falsely represented that she continuously resided at the property until May of 2019. Palisades did not learn of the actual occupancy of the property until its post-fire investigation. Plaintiff represented that she occupied the second floor unit of the property at all relevant times, except for the six-month period before the fire. This admitted period of non-occupancy, Plaintiff claimed, was due to her father's and brother's health issues. However, the evidence demonstrated that Plaintiff never moved into the second floor unit.

The jury heard testimony by the residents of the first floor unit and third floor unit. They testified that at no point did Plaintiff ever live, occupy or reside at the property. Plaintiff admitted that her testimony to the jury was not the same, in any way shape or form, to that which she provided to Palisades during the claim investigation. In fact, Plaintiff admitted to the jury that her testimony on the day of the trial was different than all other versions provided.

These exact points were material and relevant to Palisade's decision-making process because, as its director of underwriting testified, Palisades only issues homeowner policies. Palisades does not seek to insure nor does it market to insure commercial rental properties, including homes used as rental properties. Moreover, Palisades written rescission letter explicitly advised how the

misrepresentations were material to its claim decision.

Here, because Plaintiff misrepresented the material facts regarding her use of the property, Palisades properly rescinded the policy and voided coverage. Palisades contends the jury found that plaintiff never resided, lived in or occupied the property in question, as she represented. The jury did not believe Plaintiff's testimony regarding occupancy, residency or whether she lived in the property at any time and found that issue "material" to Palisades' claim investigation.

Additionally, Plaintiff's appeal seeks judgment n.o.v., but she failed to move for a directed verdict at the conclusion of the case, so she is barred from seeking judgment n.o.v. on appeal. She further wrongly presents the evidence in the light favorable to her, rather in the light favorable to Palisades as the verdict winner. She attempts to side-step this issue by arguing that the issue is not a weight-of-the-evidence challenge, but merely an argument that Defendant failed to substantiate the materiality of Plaintiff's misstatement.

In fact, Plaintiff's argument specifically asserts that the verdict was against the weight of the evidence, by claiming the jury erred in discrediting her testimony and crediting that of the Defendant's witnesses. Furthermore, to the extent that Plaintiff believes that the element of "materiality" was not shown, there is simply no basis for any of the arguments proffered on this point, so this Court is asked to affirm the jury's verdict.

B. Statement of Procedural History

On July 21, 2020, Plaintiff¹ filed a five-count complaint against Palisades Property and Insurance Company, and Shults Insurance Agency (“Shults”), Plaintiff’s insurance broker. (Pa25-30) The suit, inter alia, sought coverage for a fire loss at a rental property Plaintiff owned, after Palisades denied coverage and cancelled the policy due to material misrepresentations. (Id.) The matter proceeded through discovery.

On January 20, 2022, Plaintiff and Shults entered a settlement and stipulated to the dismissal of Shults with prejudice. (See, January 20, 2022 stipulation of dismissal.) The matter proceeded to trial from March 14, 2024 to March 22, 2024 before the Hon. L. Grace Spencer, J.S.C., and a jury.² (See, 1T, 2T, 3T, 4T, 5T, 6T, and 7T)

¹ Although there are two Plaintiffs, only Ebonni Shaw took part in the trial, so to avoid confusion, Plaintiff will be referenced in the singular.

² 1T=March 14, 2024 trial transcript
2T=March 15, 2024 trial transcript
3T=March 18, 2024 trial transcript
4T=March 19, 2024 trial transcript
5T=March 20, 2024 trial transcript
6T=March 21, 2024 trial transcript
7T=March 22, 2024 trial transcript
8T=April 30, 2024 motion transcript

On March 22, 2024, the jury returned a verdict in favor of Palisades, finding that Defendant established that the Plaintiff made material, reasonably relevant misrepresentations during the fire claim investigation. The jury held the rescission of the policy and denial of the fire claim was justified as a matter of fact and law, as instructed by the court. (7T72:13-18)

On April 1, 2024, Plaintiff filed a post-trial motion for judgment n.o.v. and a new trial on damages, which Palisades opposed. (Pa136-157) Oral argument on the motion was held on April 30, 2024. (8T3:1-21:7) At the conclusion of the hearing, Judge Spencer denied the motion. (Id.; 158-159)

This appeal followed. (Pa3-6)

C. Statement of Facts

In September 2017, Plaintiff purchased a three-story, two-unit property at 382-384 Peshine Avenue, Newark, New Jersey. (3T7:1-10) The property was insured by Palisades Property and Casualty Insurance Company under a homeowner's policy. (Pa371-418) However, Plaintiff operated the property as a rental property and never resided at the property. (4T107:9-19; 4T132:14-22)

In concert with the purchase, Plaintiff also borrowed money to refurbish the second and third floors of the property. (3T123:24-124:8) However, a dispute between her and the contracting company doing the refurbishment

resulted in those floors remaining unoccupied for an extended period of time.
(See, Pa503-513)

At all relevant times, the first floor unit was occupied by Ms. Sharon Cherry, who lived continuously at 382 Peshine Avenue, on the first floor, between 2011 and 2019. (4T104:10-17) Once refurbishments were completed, the second and third floors were rented to Sharonda Eleazer, who is Ms. Cherry's granddaughter's mother, and Malik Freeman, who is Ms. Cherry's son. (19T106:3-14; 19:115:22-116:13)

On November 20, 2019, a fire occurred at the property. (Pa541-548) Plaintiff made a claim with Palisades, who conducted an investigation of the fire loss claim. During the investigation, Plaintiff knowingly made misstatements, specifically concerning her residency and use of the property. (See, e.g., 3T117:10-14) Consequently, Palisades denied coverage and voided the policy based on plaintiff's intentional misstatements during the investigation as well as in her application.

Plaintiff filed suit on July 21, 2020, against Palisades and her insurance broker. (Pa25-30) The claim against Palisades sought, *inter alia*, coverage for the damages suffered in the fire. (Id.) After discovery was completed, and the insurance broker was dismissed via settlement, the case proceeded to trial. (See, January 20, 2022 stipulation of dismissal.)

A jury trial was held before Judge Spencer from March 14, 2024 to March 22, 2024. (See, 1T, 2T, 3T, 4T, 5T, 6T, and 7T) The key questions for the jury to answer was whether plaintiff made misrepresentations about living on the premises and whether those misrepresentations were knowing and material. (Pa155) The jury was charged with determining whether misrepresentations were made in the application for insurance and, separately, whether misrepresentations were made during the investigation into the fire loss claim. (Id.)

Plaintiff presented her claim, including testimony from herself and a few of her friends which sought to support her argument that she “resided” at the premises, or intended to do so, by claiming to have stored personal property at the premises and by claiming that she held parties there, including a Super Bowl party. (Generally, 1T, 2T, 3T)

The jury was presented with evidence which demonstrated that Plaintiff’s position was not to be believed. That evidence included the testimony of Ms. Cherry, who lived continuously at 382 Peshine Avenue, on the first floor, between 2011 and 2019. (4T104:10-17) Ms. Cherry testified that at the time that she lived at the location, there were two units in the building, her first floor unit and the second unit consisting of both the second and third floors together. (4T105:2-8).

She indicated that until the house was sold in 2016, that the previous owner, Ms. Mildred Brown, lived on the second floor. (4T105:12-18) She further testified that no one lived on the second floor after Ms. Brown left until 2018 when her granddaughter's mother, Ms. Eleazer, moved into the second-floor unit with her daughters. (4T105:22-107:8)

Ms. Cherry specifically testified that Plaintiff did not move into the second floor unit, and that she "never stayed there." (4T107:9-19) Ms. Cherry testified that Plaintiff never moved furniture into the house for herself, that there was no kitchen furniture in the unit during the renovations, and that there were no couches or kitchen tables in the unit before Ms. Eleazer moved in. (4T107:20-108:14)

Finally, Ms. Cherry testified that Plaintiff did not entertain people on the second floor and did not host parties there, as Plaintiff had claimed. (4T109:7-16) Indeed, Plaintiff's counsel presented Ms. Cherry with a photograph of Plaintiff which Plaintiff claimed was taken on the premises, and Ms. Cherry testified that the location in the photograph "was not at 382 Peshine Avenue." (4T117:10-21)

The jury also heard the testimony of Malik Freeman, who lived on the third floor of the premises at the time the fire. (4T121:4-11) He testified that he had been living on the property for six months at the time of the fire.

(4T122:24-123:3) He described that the second and third floors were both accessible through the front door to the second unit, such that they were not treated as two discrete living spaces because the children who lived with him and Ms. Eleazer were sisters, so they “were all family.” (4T123:13-20; 173:4-13)

Mr. Freeman testified that he entered into a lease with Plaintiff after he moved onto the premises. (4T123:24-124:7) He and Ms. Eleazer were supposed to move into the property in January of 2019, but only were able to do so in May or June of 2019, due to problems with government funding of the unit. (4T125:5-126:8) Indeed, he testified that during this time she and Ms. Eleazer were required to provide funds to Plaintiff so that she would hold the property until the governmental funding could be straightened out. (4T125:24-126:8) This was done in response to Plaintiff indicating that there were other people that were going to look at renting the apartment, so that if Ms. Eleazer and Mr. Freeman wanted to secure the unit, they would have to provide Plaintiff with funds to hold it. (Id.)

He further testified that he was never evicted by Plaintiff, never received a notice to vacate and was never taken to court to evict him, as Plaintiff had claimed. (4T126:9-18)

Mr. Freeman testified that because Ms. Cherry is his mother, that he had visited the property many times from 2016 forward. (4T127:18-24) His testimony confirmed that Mildred Brown lived on the second floor until she sold the property. (4T127:25-128:22) Moreover, once Ms. Brown moved out, the second and third floor were renovated by Plaintiff and no one else at any time moved into the second floor. (4T129:2-18)

Mr. Freeman also testified that during the renovations he visited the second and third floors but saw no couches and no clothing in the unit. (4T130:7-20) Mr. Freeman also specifically testified that Plaintiff never moved into unit two, and that Plaintiff never moved furniture into unit. (4T132:14-22)

Finally, Mr. Freeman reviewed a large number of photographs. He was shown photographs which Plaintiff purported to have taken in October 2019 showing an empty third floor. (4T144:12-147:23) He testified that the photographs could not have been taken in the October 2019 prior to the fire, because he was still occupying the unit at the time of the fire and it was not empty, therefore Plaintiff's photographs must have been taken before he moved in. (4T155:17-156:10)

Further, he reviewed additional photos taken after the fire and identified all of the property as being on the second and third floor and being owned by

himself, Ms. Eleazer, or their children. (4T158:2:165:20) None of the property belonged to Plaintiff. (Id.)

There was other evidence that rebutted Plaintiff's story presented to the jury. This included inconsistencies with Plaintiff's testimony and statements, included the lack of proofs from the furniture store known as Bob's Furniture. Plaintiff stated in her recorded statement that she bought all new furniture and it was delivered by Bob's Furniture, but later changed her story after she was asked for receipts demonstrating that delivery. (3T150:21-154:6) Plaintiff alleged at trial that the furniture was not delivered by Bob's Furniture but by her friends and family. (Id.)

Plaintiff further stated during her deposition that invoices produced were for a water damage incident but the invoices were, in fact, from the contractors that renovated the property. (3T140:9-145:22)

Furthermore, Plaintiff was confronted with her utility bills after she testified to have occupied the property from 2017-2018, including hosting a Super Bowl party on the premises. (4T20:6-23:16) However, Plaintiff's utility bills showed a complete lack of gas usage for the time period Plaintiff claims to have lived at the property, including the time of this alleged party, which the jury could have considered in assessing her credibility. (Id.)

Palisades also presented the testimony of Elisa Lacoste, its director of underwriting. She specifically testified that Palisades only issues homeowners and condominium owners policies in New Jersey. (5T55:2-15) Consistent with that position, Palisades has the expectation that when it issues a homeowners policy, that the insured will reside at the premises at all times. (5T58:13-20) She further explained that the reason for that limitation was that the company did not have the risk tolerance for the higher risks posed by rental units and that Palisades did not have the ability to assess renters with the same depth of information it can obtain from owners, in order to make a proper assessment of the risks. (5T58:24-57:19)

The jury was also presented with the homeowner's insurance policy containing the language which Palisades relied upon in denying coverage for the fire loss and in issuing its rescission letter, which explained the reason why Palisades rescinded Plaintiff's homeowner's insurance policy. (Pa376) The policy specifically requires that the homeowner reside on the premises. The policy provided that the "insured location" is the "residence premises".

(Pa376) "Residence premises" is, in turn, defined as:

11. "Residence premises" means:

- a. The one family dwelling where you reside;
- b. The two, three or four family dwelling where you reside in at least one of the family units; or

c. That part of any other building where you reside;
and which is shown as the “residence premises” in the
Declarations.

“Residence premises” also includes other structures
and grounds at that location.

(Pa376)

The “residence premises” in the Declarations is specified as “382
PESHINE AVENUE, NEWARK, NJ 07112”. (Pa372)

The matter was then submitted to the jury. The first interrogatory asked,
“[d]o you find that the Plaintiff lived or resided at 382-384 Peshine Avenue
from September 2017 until May 2019?” and the jury responded “No.” (7T72:3-
6)

The second question asked about misrepresentations in the application
process, asking, “[d]id the Defendant establish that the Plaintiff knowingly
made misrepresentations in the application for insurance as of the date of the
application, July 24th, 2017?” The jury answered, “No.” (7T72:7-12)

The third jury interrogatory asked about misrepresentations during the
investigation into the claim. It asked, “[d]id the Defendant establish that the
Plaintiff made misrepresentations during the fire claim investigation and that
the misrepresentations were material or reasonably relevant?” The jury
responded, “Yes.” (7T72:13-18)

In light of the jury's finding to interrogatory 3, verdict was entered in favor of Palisades. (7T74:3-4) Plaintiff subsequently filed a motion for new trial, which was denied by the trial judge. (Pa1-2) This appeal follows.

D. Legal Argument

ISSUE I: PLAINTIFF'S MOTION FOR JUDGEMENT N.O.V. CONCERNING QUESTION 3 IS PROCEDURALLY BARRED BECAUSE PLAINTIFF DID NOT MOVE FOR ENTRY OF A VERDICT AT THE CLOSE OF DEFENDANT'S CASE.

Plaintiff appeals the denial of the motion for judgment n.o.v. However, Plaintiff failed to move at the end of Defendant's case for a directed verdict under R. 4:40-1. Consequently, Plaintiff is barred from seeking judgment n.o.v.

In order to seek a judgment n.o.v. under R. 4:40-2(b), a party is required to move for judgment at the close of a case or an equivalent motion at trial.

Preliminarily, we emphasize that a party who does not make a motion for judgment at the close of a case may not subsequently move for judgment notwithstanding the verdict. If a party fails to move for judgment prior to submitting the case to the jury or the jury verdict, a motion for judgment notwithstanding the verdict may still be sustainable where an adequate substitute for the requisite trial motion is made.

Sun Source, Inc. v. Kuczkir, 260 N.J. Super. 256, 266 (App. Div. 1992) (internal cites and quotes omitted.)

In Velazquez ex rel. Velazquez v. Jiminez, 336 N.J. Super. 10 (App. Div. 2000), aff'd, 172 N.J. 240 (2002), this Court stated that "[u]nder R. 4:40-

2, a judgment n.o.v. cannot be entered unless a motion for judgment or its equivalent has been made during trial.” Velazquez, 336 N.J. Super. at 33. The Velazquez Court further noted there that the appellant “did not move for judgment either at the close of plaintiffs’ evidence or at the close of all the evidence, and the record did not support the grant of such a motion. Thus, under the rule, a judgment n.o.v. was inappropriate.” Id., at 33-34.

In this case, Plaintiff did not move for the entry of judgment at the end of Defendant’s case, nor did Plaintiff make an “equivalent” motion during trial.³

In her brief, citing to Ponzo v. Pelle, 166 N.J. 481, 488 (2001), Plaintiff asserts that she was not required to first move for a directed verdict before moving for judgment n.o.v. (Pb40, n.6) This argument is misguided. In Ponzo, the Supreme Court held that the plaintiff did not need to have sought a directed verdict on the question of whether the defendant conceded the proximate cause element of her claim for a knee injury, in the context of arguing that the jury interrogatories were insufficient.

³ In her brief, Plaintiff alleges that her counsel “questioned” whether Palisades produced evidence which could justify including interrogatory number 3. (Pb36) In fact, Plaintiff’s counsel never moved for directed verdict on the issue, nor moved to exclude question 3. Rather, Plaintiff’s counsel, in coordination with defense counsel and Judge Spencer, crafted a version of jury interrogatory 3 to give the jury that was acceptable to both parties. (7T4:1-27:4)

In this case, by contrast, Plaintiff's argued that she should have been awarded judgment as a matter of law because of the alleged failure of Defendant to establish the materiality element, moving specifically under R. 4:40-2. Because that rule specifically requires a motion for directed verdict, Plaintiff's failure to so move must doom her appeal.

Consequently, Plaintiff is procedurally barred from seeking judgment n.o.v., and her appeal should be denied.

ISSUE II: IN THE ALTERNATIVE, PLAINTIFF IS NOT ENTITLED TO JUDGEMENT N.O.V., BECAUSE THE JURY'S VERDICT WAS FULLY SUPPORTED.

In the alternative, if this Court were to somehow find that Plaintiff's request for judgment n.o.v. is not procedurally barred, it should nevertheless be denied.

Palisades case was premised on the fact that Plaintiff, Ebonni Shaw, made multiple misrepresentations during the investigation into the fire loss concerning her residency and use of the Peshine Avenue property. The evidence, taken as whole, makes clear the reasonable jurors in this matter determined that Plaintiff's misrepresentation concerning her occupancy and use of the Penshine Avenue property were relevant and germane to Palisades investigation of the loss, and therefore material.

Under the standard for determining a motion for judgment n.o.v. under R. 4:40-2, the court must accept as true the evidence which supports the position of the party opposing the motion—in this case Palisades—and must give that party the benefit of any and all legitimate inferences. Velazquez, 336 N.J. Super. at 30. Having done so, if reasonable minds could still differ on the question at issue, then the motion must be denied. Id.; Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969). An appellate court applies the same standard when reviewing a trial court’s order on such a motion. See Frugis v. Bracigliano, 177 N.J. 250, 269 (2003). “[T]he jury’s factual determination will be disturbed only if we find that the jury could not have reasonably used the evidence to reach its verdict.” Estate of Roach v. TRW, Inc., 164 NJ. 598, 612 (2000). A jury’s verdict is entitled to great deference. Id.

In analyzing the record under that standard, the Court should not be “concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the party opposing the motion.” Velazquez, 336 N.J. Super. at 30-31, quoting Dolson, 55 N.J. at 5-6. “The purpose of the test is to ensure that the jury resolves disputed factual matters.” Id., at 31, quoting Lewis v. American Cyanamid Co., 155 N.J. 544, 567 (1998).

In this case, the evidence—properly viewed in the light most favorable to Palisades, and giving it the benefit of every reasonable inference—was more than adequate to support the jury’s verdict that Palisades established that Plaintiff knowingly made material or reasonably relevant misrepresentations during the fire claim investigation.

In Longobardi v. Chubb Insurance Co. of New Jersey, 121 N.J. 530 (1990), the New Jersey Supreme Court held that an insured’s contractual commitment to avoid material misrepresentations extended to “misrepresentations [that] strike at the heart of the insurer’s ability to acquire the information necessary to determine its obligations and to protect itself from false claims.” Id. at 539. See, also, Rutgers Cas. Ins. Co. v. LaCroix, 194 N.J. 515, 527-28 (2008). Consequently, when a policy, such as the policy in this case, clearly states that material misrepresentations will void the policy, “the insurer need not pay the insured for an alleged loss if the insured makes a material misrepresentation to the insurer while it is investigating the claim.” Longobardi., at 533; 538 (“[W]e agree with those courts that have concluded that ‘concealment or fraud’ clauses apply when an insured misrepresents facts to the insurer that is investigating a loss.”)

When an insurer clearly warns in a “concealment or fraud” clause that it does not provide coverage if the insured makes a material misrepresentation about any material fact or circumstance relating to the insurance,

the warning should apply not only to the insured's misrepresentations made when applying for insurance, ***but also to those made when the insurer is investigating a loss.*** Such misrepresentations strike at the heart of the insurer's ability to acquire the information necessary to determine its obligations and to protect itself from false claims. ***Thus, an insured's commitment not to misrepresent material facts extends beyond the inception of the policy to a post-loss investigation.***

(Id., at 539, emphasis added.)

Furthermore, the post-loss misrepresentation must be "knowing and material" for the policy to be voided. Id. at 540. It is not enough for the insured to make "[a] mere oversight or honest mistake." Id.

Materiality must be judged "as of the time when the misrepresentation is made," as hindsight "is irrelevant to the materiality of an insured's misrepresentation to an insurer." Id., at 541. This "provides insureds with an incentive to tell the truth. It would dilute that incentive to allow an insured to gamble that a lie will turn out to be unimportant." Id. at 541-42.

Furthermore, a misrepresentation is material if, when made, "a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action." Id., at 542. "[M]ateriality should be judged according to a test of prospective reasonable relevancy." Id. See, also, Palisades Safety & Ins. Ass'n v. Bastien, 175 N.J.

144, 148 (2003) (“Bastien”). Thus, when the misrepresentation “affected assessment of the risk and the premium charged,” it is material. Id., at 149.

Materiality is “generally a question of fact to be determined by a jury.” Selective Ins. Co. v. McAllister, 327 N.J. Super. 168, 178 (App. Div. 2000) (“McAllister”).

Here, viewing the evidence in the light most favorable to Defendant, there was more than a sufficient basis for the jury to have found that Plaintiff made a material misrepresentation during the investigation of Plaintiff’s claim concerning whether this was an owner-occupied property or whether she operated it as a rental property.

That evidence included the testimony of Ms. Cherry and Mr. Freeman, who both specifically denied that Plaintiff ever resided at the property. (4T107:9-19; 4T129:2-18; 4T132:14-22) This also included inconsistencies in the evidence, included the lack of proofs concerning the furniture allegedly purchased from Bob’s Furniture; the inconsistencies regarding invoices supposedly for water damage but which were, in fact, from the contractors that renovated the property; and the complete lack of gas usage during the time Plaintiff claimed to have lived at the property and hosted parties. Further, it included testimony by Ms. Cherry, confirming that a photograph purportedly showing Plaintiff living at the Peshine Avenue property was not taken on the

premises. All these things showed a lack of credibility on Plaintiff's part, and the jury believed the tenants and not Ms. Shaw.

Furthermore, contrary to Plaintiff's arguments, the evidence was clearly capable of supporting the jury's conclusions that the misstatements were material and to support the jury's conclusion that a reasonable insurer would have considered the misrepresented facts relevant to its concerns and important in determining its course of action.

Specifically, Palisades issued a homeowner's policy and the expectation was that Ms. Shaw would occupy or live in the premises on a primary basis. At trial, Palisades underwriter, Elisa Lacoste, testified that the expectation was that property owners, like Ms. Shaw, would live there all the time.

Q: Do you establish the guidelines for the policies that are issued?

A: Yes.

Q: Are you familiar with the types of business that Palisades writes in the state of New Jersey?

A: Yes.

Q: And what's that?

A: Homeowner policies.

Q: Are you familiar with Palisades' homeowners policies?

A: Yes.

Q: Does Palisades issue anything besides homeowners policies in New Jersey?

A: Homeowners, condo owners.

(5T55:2-15)

Q: Could you explain to the jury what the expectation of Palisades is when they issue a homeowners policy in terms of occupancy?

A: In terms of occupancy, the insured, the owner is expected to reside in the property.

Q: At all times?

A: At all times.

Q: Thank you. That's all I have.

(5T58:13-20)

Moreover, Ms. Lacoste testified as to why Palisades specifically only insures owner-occupied properties:

Q: Is there, are you familiar with the reason or criteria for why Palisades does not issue rental property policies?

A: Yes.

Q: And what is that?

A: So rental properties just pose a higher level of risk than an owner-occupied home, and it is not in our risk appetite.

Q: And what is it in terms of underwriting that, your position, that increases the risk? What is it about rental property risk?

A: So when we underwrite, we underwrite the physical property but also the owner as well. You know, we look into prior losses. We ask questions about animals they may own, business they may conduct on property. So it is, we evaluate the physical risk and the owner-occupant of the home as well. With tenant policies, we just don't have that visibility into the tenants, so we just don't have enough information to make an accurate, you know, assessment of the risk, and therefore it is, you know, not sort of a class of property that we choose to insure.

(5T58:24-57:19)

That testimony was sufficient for the jury to conclude that a reasonable insurer would determine that the misrepresentation as to fact that Plaintiff did not occupy the property and that she operated the property as a set of rental units would be material to the insurer's investigation as to whether there was a covered loss.

As such, viewing the evidence in the proper manner, in the light favorable to Palisades, there was more than a sufficient basis to support the jury's verdict and it should be affirmed on appeal.

***ISSUE III: NONE OF THE ARGUMENTS RAISED BY PLAINTIFF
PROVIDE A BASIS FOR JUDGMENT N.O.V.***

Next, none of the arguments raised by Plaintiff in her brief demonstrate a basis for awarding judgment n.o.v.

**A) There Is No Basis To Set Aside Question 3 Or
To Enter Judgment In Plaintiff's Favor.**

Plaintiff's argument as to why there was error in this case is set out in eight separate sections, each of which will be discussed, *seriatim*.

1) STANDARD FOR MATERIALITY

First, Plaintiff argues that Palisades did not present any evidence to support the conclusion that Plaintiff's misrepresentations were material or reasonably relevant to the investigation of the fire claim. This argument is absurd. As previously detailed, the evidence in this case is more than sufficient to support the jury's conclusion on this issue, as Plaintiff lied about this being an owner-occupied premises.

Ms. Lacoste testified that Palisades only insures owner-occupied properties because the higher risk of rental properties compared to owner-occupied properties, and Palisades is not interested in insuring rental properties. (5T55:2-15; 58:13-20; 58:24-57:19) Given the fact that the policy defines "insured premises" in a way requiring the owner to reside on the premises, (Pa376), Plaintiff's misrepresentation that she lived there when she did not is clearly material. It had the potential to "affect[] the attitude and action of the insurer" and could be said to have been "calculated either to discourage, mislead or deflect" Palisades' investigation. See, Longobardi, at 540-542. Plaintiff's misstatement was expressly made to mislead Palisades

into concluding the property was occupied as represented by Plaintiff and as expected by Palisades, and the jury concluded as such.

Moreover, Plaintiff quotes McAllister at length, to the effect that the materiality element is premised on the jury's assessment of whether the carrier would "change its course of action in assessing the claims upon learning" of Plaintiff's misstatements. (Pb40, citing McAllister, supra, at 178.).

In this case, there was more than sufficient evidence for the jury to conclude the misstatements did in fact cause Palisades to change its course of action upon learning of Plaintiff's misstatements. Palisades denied the claim. The misstatements were made to mislead Palisades into thinking the property was occupied as intended, as Plaintiff's home. The effect on Palisades' determination to provide coverage is patently obvious.

Plaintiff's reliance on McAllister is wholly misplaced. McAllister cites to Pacific Indemnity Co. v. Golden, 985 F.2d 51 (2d Cir. 1993) ("Golden") for clarification with regard to the concept of a carrier "changing its course of action" due to a misrepresentation. In Golden, the insured stored gasoline in a building and intended to use it to burn his neighbor's lawn. Golden, 985 F.2d at 53. When a fire did occur at the insured property the insured told the Fire Marshal of the gasoline's existence and the gas was removed, without incident.

Id. The insured told the Fire Marshal that he kept it there for his snowmobiles.

Id.

The insured later told the insurer, in his examination under oath during the claim investigation, of the real purpose he stored the gas in the garage. Id., at 53-54. The insurer denied the claim on the basis of misrepresentation. Id., at 54. Summary judgment was granted of the insurer, but it was remanded as the court determined that materiality was not obvious and needed to be proven by the insurer showing how it affected its claim handling decision. Id., at 56-57. In other words, there was no showing what difference it made to the insurer that the insured told the Fire Marshal about snowmobiles. Id.

Here, the policy is a homeowner's policy, and its occupancy and use as such is the entire issue. The misrepresentation regarding use as the Plaintiff's home was obviously meant to mislead Palisades into believing the basic premise for the policy's issuance had been met. Plaintiff's arguments are without merit.

2) PALISADES DEFENSE

Next, Plaintiff discusses a number of the affirmative defenses asserted by Palisades. (Pb23) These defenses include the defense that the claims are barred because Plaintiff did not reside at the subject property and as such, the property does not qualify as a "residence premises" under the policy. Further,

the defenses includes the defense that Plaintiff's claims are barred by her knowing, material misrepresentations in the presentation of the claim.

By virtue of its verdict, it is apparent that the jury in this case credited these defenses.

3) SHAW'S TRIAL TESTIMONY

Next, Plaintiff cites at length to her own trial testimony, wherein she attempted to justify her intentions and plans for the property, to support her definition of "residence," to bolster her supposed truthfulness, and to convey her experiences in connection with the investigation and her deposition in this litigation.

However, that testimony is irrelevant under this Court's standard of review, because the jury was well within its rights to reject the evidence and testimony which Plaintiff believes favors her position, and to credit the evidence favoring Palisades' position. From that proper view of the evidence, the jury must be presumed to have concluded that Plaintiff knowingly and materially misstated whether she ever resided at the premises and to have credited the evidence demonstrating that she did not, and did not intend, to ever reside on the premises.

Plaintiff further claims that some of the evidence was "un-rebutted."
(Pb24) While that is not the case, it would not matter even if it were, because

the jury was entitled to reject that testimony, and to find that Plaintiff's testimony was unbelievable in light of the other testimony and evidence presented in the case. "Any issues of credibility must be left to the finder of fact. That is so even where a witness's testimony is uncontradicted, as long as, when considering the testimony in the context of the record, persons of reason and fairness may entertain differing views as to its truth." Akhtar v. JDN Properties at Florham Park, L.L.C., 439 N.J. Super. 391, 399 (App. Div. 2015) (internal cites, quotes and bracketing omitted.); Ferdinand v. Agric. Ins. Co. of Watertown, N.Y., 22 N.J. 482, 494 (1956) ("Where men of reason and fairness may entertain differing views as to the truth of testimony, whether it be uncontradicted, uncontroverted or even undisputed, evidence of such a character is for the jury.")

In this case, the evidence was not such that Plaintiff was entitled to judgment as a matter of law, so the question of her credibility was one for the jury to determine. As such, the jury was well within its rights to reject even her unrebutted testimony.

4) THE EVIDENCE CONCERNING MATERIALITY

Next, Plaintiff purports to examine the evidence concerning materiality, but, once again, improperly views the evidence in the light most favorable to Plaintiff, when the evidence must be viewed in the light favorable to Palisades.

For example, Plaintiff attempts to limit the scope of Ms. Lacoste's testimony as related solely to the question of whether Plaintiff knowingly made material misrepresentations in the policy application. However, this argument is misguided. Ms. Lacoste's testimony was equally relevant to the effect that Plaintiff's misrepresentations had in the post-loss investigation, because it demonstrated why Plaintiff's misrepresentations about residing on the property mattered to the carrier. Palisades had specifically declined to insure anything but owner-occupied properties. Palisades' policy provisions clearly sets out that residential requirement as a condition of coverage, and therefore Plaintiff's misrepresentation were germane to Palisades' determination as to whether Plaintiff's loss was a covered claim.

Further, the disingenuousness of Plaintiff's position is clear when she asserts that she "truthfully" represented her intent that the premises be her primary residence and that she was only involuntarily thwarted from using the property as intended. (Pb28) Properly viewing the evidence in the light most favorable to Palisades would lead to the reasonable inference the jury concluded that Plaintiff never intended the property to be anything other than a rental property and that she never intended to reside there.

Such an inference would not be inconsistent with the jury's verdict on question two, concerning the application for the policy, because that question

asked whether Plaintiff “knowingly” made a misrepresentation on the application. The jury may have found that element—and only that element—to favor Plaintiff. In other words, the jury could have found that although there were misrepresentations on the application concerning whether Plaintiff intended the property to be an owner-occupied one, they did not constitute a misrepresentation “knowingly” made by Plaintiff, in light of her testimony that she did not, in fact, complete the information on the policy application.

(3T15:18-25)

Finally, Plaintiff discusses Palisades’ decision not to call its investigator, Karen Johnson, and argues that, as a result, Palisades supposedly had no evidence demonstrating that Palisades was misdirected, mislead or diverted by Plaintiff’s misrepresentation during the investigation. (Pb28) This argument is misguided.

First, Ms. Lacoste’s testimony, as well as the evidence demonstrating that Plaintiff never resided at 382 Peshine Avenue, were relevant to the jury’s determination on question three, because it demonstrates why falsely asserting that the property was owner-occupied would be material to a reasonable insurer in determining if the claim is a covered loss, given the policy’s definitions of “insured location” and “residence premises” and Palisades’ decision not to market or issue rental property policies.

Further, the standard did not require the jury to determine materiality from the standpoint of the specific investigator in the case, but from that of a reasonable insurer. Consequently, Plaintiff's position—that the jury's verdict required evidence specific to Palisades' decision-making process here beyond what was presented to the jury—is simply untenable.

As such, Plaintiff's arguments are without merit.

5) PLAINTIFF'S MISREPRESENTATIONS ABOUT
NOT OCCUPYING THE PROPERTY WAS A PROPER
REASON TO DENY COVERAGE AND RESCIND THE
POLICY

Next, Plaintiff argues that her “unintended inability to continuously occupy the premises” was not a basis to deny coverage or rescind the policy, due to her idiosyncratic definition of “residence.” (Pb29) In making the argument, Plaintiff, again, erroneously views the evidence in the light most favorable to her. For example, Plaintiff frames the argument as discussing “Shaw's involuntary inability to fully occupy the insured premises...” (Id.) Furthermore, she asserts that that “her relationship with the premises [] still amount[ed] to ‘residence’” and her assertion that she did not misrepresent any “salient facts.” (Id.)

However, viewing the matter properly and giving Palisades the benefit of all inferences, the jury concluded that Plaintiff never occupied the property, and that she did this purposefully and intentionally, as she desired to have a

multi-unit rental property, including an illegal third floor unit, and not an owner-occupied property with sole tenant on the first floor. They further concluded that she did, in fact, misrepresent salient facts during the investigation into the claim.

Next, Plaintiff cites to Ayala v. Assured Lending Corp., 804 F. Supp. 2d 273 (D.N.J. 2011) and FBS Mortgage Corp. v. State Farm Fire & Casualty Co., 833 F. Supp. 688 (N.D. Ill, 1993) in support of her argument.

However, as federal decisions, neither is binding on this Court. Additionally, Ayala is distinguishable. In Ayala, the carrier moved for summary judgment, so the facts had to be resolved in the light favorable to the insured. Ayala, 804 F. Supp. 2d at 276. Viewed in that light, there was a genuine issue of fact on whether the Ayala plaintiff intended to reside at the insured premises or was going to lease it. Id., at 280. Further, given those disputed facts, and the fact that the insured was not immediately occupying the property but allegedly intended to do so, the definition of “residence premises” was deemed ambiguous. Id., at 281.

By contrast, this appeal arose in response to a jury verdict, not a motion for summary judgment, so there is no genuine issue of fact. Rather, based on the jury verdict that Plaintiff never resided at the insured premises, and viewing the evidence properly, the jury must be deemed to have found that

Plaintiff never intended to ever reside at the insured premises, and that she intended to operate the property as a rental property. Thus, the dispute of fact, which led to the Ayala decision, does not exist in this case, therefore Ayala is irrelevant.

Furthermore, there is simply no support to Plaintiff's argument that the owner-occupancy condition of the policy was not conspicuous and clear. (Pb31) The policy specifically provided that the "insured location" is the "residence premises," which, in turn, is defined as:

11. "Residence premises" means:

- a. The one family dwelling where you reside;
- b. The two, three or four family dwelling where you reside in at least one of the family units; or
- c. That part of any other building where you reside;

and which is shown as the "residence premises" in the Declarations.

"Residence premises" also includes other structures and grounds at that location.

(Pa376)

Thus, the term "residence premises" is clear and conspicuous, and is defined as the dwelling or other part of the building where Plaintiff resides and which is shown on the Declarations page—which is specifies as "382 PESHINE AVENUE, NEWARK, NJ 07112". (Pa372) Thus, for Plaintiff to

have had coverage under the policy, she was required, in no uncertain terms, to reside at 382 Peshine Avenue. The jury found that she did not and that her statements to the contrary were material misrepresentations.

Plaintiff's citation to FBS Mortgage is equally unavailing. In FBS Mortgage, as with Ayala, the insurer moved for summary judgment, requiring the evidence to be viewed in favor of the insured. FBS Mortgage, 833 F. Supp. at 691. In this case, the jury's verdict means that the evidence must be viewed in the light favorable to the carrier. Further, in FBS Mortgage, the question at issue is whether an involuntary absence of the insured from the premises, during his incarceration, meant that he no longer resided at the insured premises. Id., at 693. The Court found evidence from which it could be concluded that, notwithstanding his incarceration, the insured premises was still the place where the insured resided. Id., at 693-94.

In this case, that is not true, as the jury determined that Plaintiff did not reside at 382 Peshine Avenue. (7T72:3-6) As such, the determination in FBS Mortgage simply does not apply to this case.

Finally, Plaintiff cites to mortgage documents to support the notion that "construction issues" upended her plans and led to her not settling in on a day-to-day basis, and that her absence was "involuntary." However, the jury was under no obligation to agree with this argument or to construe the evidence in

the manner consistent with Plaintiff's views of this evidence or its meaning for the ultimate outcome of the case. Given their verdict, the jury clearly rejected the Plaintiff's argument and to have credited the evidence that demonstrated that she never intended to reside at 382 Peshine Avenue and that, therefore, her absence was intentional and permanent.

As such, there is no basis for rejecting the jury's verdict.

6) THE VERDICT IS COMPLETELY IN ACCORD
WITH THE VERDICT SHEET, THE JURY'S
QUESTION, AND THE COURT'S RESPONSE.

Next, in arguing that the verdict was not in accord with the instructions and the verdict sheet, Plaintiff repeats her false argument that the materiality element in Longobardi required evidence showing how the insured's misrepresentation "was processed from the *perspective of the insurer*." (Pb34, emphasis in original.) This is false. All the jury had to determine was whether the misrepresentation would be reasonably relevant or germane to a *reasonable insurer*. The evidence presented by Palisades—especially the testimony of Ms. Lacoste—was sufficient for the jury to conclude that misrepresentations as to the owner's residence would be material to a reasonable insurer, as the policy premised coverage on the property being an owner-occupied property.

Furthermore, Pokhan v. State Farm Fire & Cas. Co., A-1411-19, 2022 WL 4295310 (App. Div. Sept. 19, 2022), cited by Plaintiff in support of her argument, is irrelevant. Pokhan involved the review of the grant of summary judgment to an insurer concerning whether post-loss statements—addressing whether the property had been previously covered by another insurer and whether there were previous claims—were sufficient to justify cancelation of the property. The Pokhan Court held that there was a material dispute of fact which precluded granting summary judgment. “State Farm’s post-loss fraud argument on the motion was premised entirely on its contention that Pokhan provided false information in her application, which continues to be a disputed issue of fact.” Pokhan, at *6. The trial court, therefore, erred when it concluded that the misstatements were “germane to State Farm’s evaluation [of] the damage resulting from the fire loss,” and “handicapped [its] investigation into the extent of the fire damage,” because there was no evidence submitted by State Farm to substantiate those conclusions as a matter of law, to justify summary judgment. Id.

Here, the case is not one on summary judgment, but an appeal from a jury verdict in favor of the carrier. Furthermore, there was no absence of evidence on the relevancy question, as it was supported by the testimony of Ms. Lacoste, as well as by other witnesses in the case.

Moreover, to the extent Plaintiff is interpreting Pokhan to have established that the “materiality” requirement is a subjective one and, contrary to Longobardi, requires a carrier to show it specifically altered its behavior, then that interpretation must be rejected. Pokhan is an unpublished Appellate Division decision and, as such, is incapable of overruling the Supreme Court’s holding in Longobardi that the standard only asks whether a reasonable insurer would have considered the misrepresented fact relevant to its concerns and important in determining its course of action. Thus, Longobardi controls.

Plaintiff next addresses the jury’s questions. The first question asked for copies of matters which were not in evidence, so were not provided to the jury. The second question asked what “first instance” meant in the instruction reading “[i]t is your responsibility to determine from the evidence presented to you in this case if the Plaintiff made a misrepresentation in the first instance.” (7T69:18-25)

Plaintiff’s counsel indicated that “[w]ell, actually, I meant it to mean ‘in the first place,’ in a very simple colloquial way.” (7T70:6-8) The Court ultimately determined to instruct the jury that it means “as a preliminary matter as it relates to post-lost misrepresentation.” (7T70:21-22)

Nowhere in the discussion of the question is there any mention of what evidence can be considered by the jury in resolving the issues before it, nor

was there any discussion about the materiality element, as Plaintiff argues.

(Pb37) Indeed, the term “material” or any variant of it, is not mentioned anywhere in the section of the transcript addressing the jury questions.

(7T68:1-71:17) As such, Plaintiff’s argument on this point should be disregarded.

Finally, in arguing that jury interrogatory 3 should not have gone to the jury, Plaintiff quoted Golden, *supra*, Liberty Surplus v. Nowell Amoroso, P.A., 189 N.J. 436 (2007) and McAllister, *supra*. However, none of those cases support Plaintiff’s position that insufficient evidence was produced by Palisades here.

Golden is a Second Circuit case, so it not binding in any way. Liberty Surplus was a case decided on a motion for summary judgment, so the evidence on the point discussed by Plaintiff was viewed in the light most favorable to the insured, contrary to how it is viewed here. Finally, McAllister did not change the requirement under Longobardi, so it does not support the notion that the evidence was insufficient to put interrogatory 3 to the jury in this case.

As such, Plaintiff’s arguments should be rejected.

7) THERE WAS NO ERROR IN CONNECTION WITH
THE DECISION ON THE POST-TRIAL MOTION.

Next, Plaintiff discusses the review of a motion for judgment n.o.v., and incorrectly argues that there was a lack of evidence to meet the Longobardi standard. Specifically, Plaintiff argues that

...the test is “whether [Palisades produced evidence that Shaw’s challenged assertion that just her frequent presence at the premises constituted “residence”]...would have changed its course of action in assessing the claims....,” *McAllister, supra* at 178. But in this case Palisades utterly failed to produce any evidence showing that Shaw’s alleged misrepresentation(s) had the capacity to have affected Palisades’ conduct of its post-claim investigation.

(Pb40)

However, the passage from McAllister cited by Plaintiff did not establish that an insurer in a post-loss fraud case must demonstrate that it actually changed position in light of the misrepresentation. Nothing in Longobardi holds such a thing. See, Longobardi, 121 N.J. at 541 (holding that an insurer need not demonstrate prejudice in order for a misstatement to be material.)

Indeed, one of the key motives of the Court in Longobardi was to provide an incentive to insureds to tell the truth. Id., at 541. It is for that reason that the Court held that the focus of materiality must be made from the perspective of the time the statement was made, because doing otherwise

“allow[s] an insured to gamble that a lie will turn out to be unimportant.” Id., at 542.

In the same way, it would be contrary to the Longobardi Court’s goal of promoting truthfulness to excuse a knowing misrepresentation of a fact a reasonable insurer would have considered important in determining its course of action, because the carrier had not changed its position based on the misrepresentation. That is especially so in a case like this, when the carrier had not reached a definitive position on whether the claim was covered prior to the investigation in which the material misrepresentation was made, leading to the policy’s rescission.

Additionally, the materiality of Plaintiff’s misrepresentations concerning her residence are obvious, contrary to Plaintiff’s arguments otherwise. (See, Pb40-43) Given that the policy in this case required the property to be an owner-occupied one, the jury’s conclusion that the Plaintiff knowingly misrepresented that she resided at the property is clearly a fact relevant to Palisades’ concerns, and important in determining its course of action, as Palisades’ determination of whether Plaintiff’s fire claim was a covered loss depended, in part, on whether Plaintiff resided at the premises.

Finally, it should be noted that Plaintiff’s allegation that “the court had instructed the jury in response to Question 2, the underwriter’s testimony had

no relevance to the post-claim investigation” is simply a false statement. No such limitation on what evidence the jury could consider in answering the interrogatories was discussed at any time in response to the jury questions. (7T68:1-71:17)

Nothing in the judge’s instruction to the jury, in response to the jury’s second question, concerned the underwriter nor what evidence could be considered, other than the jury instruction that the jury had to determine if Plaintiff had misstated the facts, “from the evidence presented to you in this case.” (7T69:19-23)

As such, Plaintiff’s arguments are without merit.

8) THE TRIAL JUDGE PROPERLY DENIED THE
POST-TRIAL MOTION.

Finally, Plaintiff argues that Judge Spencer somehow erred in denying Plaintiff’s post-trial motion. There is no merit to this claim. First, Plaintiff cites to Conforti v. County of Ocean, 255 N.J. 142, 162 (2023) for the proposition that a jury’s verdict will be disturbed only if “the jury could not have reasonably used the evidence to reach its verdict.” (Pb43) As demonstrated elsewhere in this brief, the evidence was more than sufficient to support its factual determinations that Plaintiff knowingly and intentionally misrepresented the facts, that she was intentionally not a resident of the insured premises, and that the misrepresentation was knowing and material.

Thus, any error in Judge Spencer’s reasoning for denying Plaintiff’s post-trial motion could amount to nothing worse than harmless error, because even if her reasoning was faulty on the post-trial motion, she still reached the correct result by affirming the jury’s verdict. Ex parte Kershner, 9 N.J. 471, 473-74 (1952) (“An appeal is taken from a ‘judgment, order or determination,’... not from an opinion or ‘letter decision.’”); Walker v. Briarwood Condo Ass’n, 274 N.J. Super. 422, 426 (App. Div. 1994) (“[A]ppeals are taken from judgments and not from a judge’s reasons. Thus, a judgment will be affirmed on appeal if it is correct, even though the judge gave the wrong reasons for it.”)

Second, however, there was nothing erroneous in Judge Spencer’s decision. When read in the context of the entirety of her reasoning, there was no error. It must be understood that while Plaintiff snipped four paragraphs out of her decision and called it “bewildering,” Judge Spencer explained her rationale over almost seven transcript pages.

Further, Plaintiff incorrectly asserts that Judge Spencer asserted that the jury was “not called upon to make a determination as to materiality.” (Pb44) This is patently false. What Judge Spencer repeatedly stated was that the jury was not called upon to determine “whether or not it was material[] *as to any decisions made by the insurance company*,” or to “consider[] materiality *as it*

relates to any decisions made by the insurance company.” (8T19:19-23; 20:6-15, emphasis added)

In other words, Judge Spencer was rejecting Plaintiff’s argument—repeated in this Court—that the materiality element required a finding by the jury that the Plaintiff’s misrepresentation had a material effect on Palisades’ decision-making. However, under Longobardi, materiality is not measured with respect to the subjective view of the insurer at issue, but with regard to what “a reasonable insurer” would consider relevant and important in determining its course of action. Longobardi, 121 N.J. at 542.

Thus, because there was plentiful evidence from which the jury could have concluded that a reasonable insurer would have found a knowing and intentional misrepresentation by the insured that she resided at the insured premises when she did not, the standard of Longobardi is met in this case.

As such, there is no merit to Plaintiff’s argument.

B) There Was No Plain Error In Submitting Question 3 To The Jury.

Finally, Plaintiff argued that under the Plain Error standard, that the submission of Question 3 to the jury was error. There is no merit to this claim.

Ordinarily, “a trial court’s interrogatories to a jury are not grounds for reversal unless they were misleading, confusing, or ambiguous.” Sons of Thunder v. Borden, Inc., 148 N.J. 396, 418 (1997). The purpose of

interrogatories is to “require the jury to specifically consider the essential issues of the case, to clarify the court’s charge to the jury, and to clarify the meaning of the verdict and permit error to be localized.” Wenner v. McEldowney & Co., 102 N.J. Super. 13, 19 (App. Div.), certif. denied, 52 N.J. 493 (1968). Further, when reviewing an interrogatory for reversible error, it must be considered in the context of the charge as a whole. Sons of Thunder, supra, 148 N.J. at 418.

In this case, Plaintiff’s argument that this jury interrogatory was erroneous is premised on her incorrect belief that there was insufficient evidence to support the jury’s determination that the Plaintiff’s post-loss misrepresentations were material. Because, as demonstrated throughout this brief, there was more than sufficient evidence from which the jury could have determined that Plaintiff’s misrepresentations were knowing and material, this argument is without merit and should be rejected by this Court.

E. Conclusion

For all the foregoing reasons, Defendant Palisades Property and Casualty Insurance Company respectfully requests that this Court affirm the decision of the jury and deny Plaintiff's appeal.

Respectfully Submitted,
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Superior Court of New Jersey

Appellate Division

Docket No. A-002958-23

EBONNI S. SHAW and ROBERT	:	CIVIL ACTION
D. SHAW,	:	
	:	
	:	ON APPEAL FROM THE
<i>Plaintiffs-Appellants,</i>	:	FINAL ORDER OF THE
	:	SUPERIOR COURT
	:	OF NEW JERSEY,
vs.	:	LAW DIVISION,
	:	ESSEX COUNTY
	:	
PALISADES PROPERTY AND	:	
CASUALTY INSURANCE	:	DOCKET NO.: ESX-L-004892-20
COMPANY and SHULTS	:	
INSURANCE AGENCY, INC.	:	Sat Below:
	:	
	:	HON. LOUISE GRACE SPENCER,
<i>Defendants-Respondents.</i>	:	J.S.C.

PLAINTIFFS-APPELLANTS BRIEF IN REPLY TO RESPONDENT'S AMENDED BRIEF

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PLAINTIFF’S SUPPLEMENTAL PROCEDURAL HISTORY

As noted in plaintiff’s opening brief (Pb4), Palisades brought a motion for summary judgment on the basis that: (1) in providing the coverage, it contemplated the insured premises would be owner-occupied; (2) Shaw admitted she had not resided there since at least May 2019; and (3) despite the premises being fully occupied by tenants for nearly six months prior to the November 20, 2016 fire, she was not entitled to coverage because it had not been occupied by the *insured* during that period.

On September 9, 2022, the court heard Palisades’ summary judgment motion (Pa135).¹ It identified the issue as whether coverage *lapsed* because the dwelling was deemed to be “vacant or unoccupied beyond a period of 60 consecutive days,” since it had been occupied by tenant when the fire occurred, not the insured (SJT53:14-20). It denied the motion, holding *as a matter of law*:

[that] [w]hether or not the occupant is an owner---owner or tenant is immaterial for -- to me, to my interpretation of this statute [*N.J.S.A.* 17:36-5.20] *** I would have to say that the Palisades Policy is more restrictive than the New Jersey Statute 17:36-5.20 allows it to be. So, it’s not in conformity with the statute, and I am going to deny the motion for summary judgment [SJT53:25-54:8].

PLAINTIFF’S SUPPLEMENTAL STATEMENT OF FACTS

The sole document comprising Palisades’ previously filed “Supplemental Appendix” (Db1-57) was identified in Palisades original brief as “D-8 Recorded

¹ References in the form “SJT” are to the transcript of the September 9, 2022 hearing on Palisades’ summary judgment motion.

Statement [of plaintiff].” As noted in the opening brief (Pb28, n.3), at the outset of the trial Palisades’ counsel expressly represented that he would call as his witness Karen Johnson (“Johnson”), who investigated the fire claim for Palisades and recorded Shaw’s statement (3T48:2-3). The recorded statement was marked as “D-8” (4T25:7-14) during Shaw’s cross-examination. Based on Palisades’ counsel representation that Johnson would testify, Shaw’s counsel did not see a basis for objection and it was then received in evidence (4T28:6-11).

Despite counsel’s prior representation that Johnson would appear, i.e., the predicate for admitting the recorded statement in evidence, Palisades did not call Johnson to introduce the recorded statement. Shaw’s counsel then requested an adverse inference charge based on the failure to call Johnson, and that D-8 be stricken from the record (6T5:4-7:15; 9:3-21). In response the court ruled:

THE COURT: ...The statement, the recorded statement [D-8], should not have been admitted. All right. It should not have been because Ms. Johnson needs to be here because she asks the questions. And the -- the motivation, the understanding, the context in which she asks those questions, that certainly is something that she has to testify to, and she’s -- she did not testify. [6T10:6-13]

All right. Now --.... -- D-8 is out. All right. [6T12:20-22].

The court also later charged the jury,

You should not concern yourselves of Plaintiff’s non-occupancy of the building after May 2019 through 2000, November of 18 2019, at the time of the fire, as the Court [i.e., on the summary judgment motion] previously determined that the non-occupancy does not cost the insured her coverage. [6T47:16-21]

Before returning a verdict the jury presented two questions to the court. The first was “[c]an we please have a copy of the deposition and recorded statement?” (7T68:1-3). The court then stated to counsel

...that item is not a part of the evidence, and they [the jury] are only to consider those things that are....[You are] [o]nly to consider “live witnesses or documents” testified. *** “The item which you’re seeking is not a part of the evidence...

So I’m going to instruct them that that item is not a part of the evidence, and they are only to consider those things that are [in evidence] [7T68:1-7]

Despite this ruling, and the jury instruction, Palisades’ proposed “Supplemental Appendix,” attached to its original appellee’s brief, consisted *entirely* of “the recorded statement” not in the evidence (Da1-57).

Palisades’ subsequently filed an amended brief (referred to herein as “Dab__”), deleting the references to “Da1-57).” See Point III *infra*.

ARGUMENT

POINT I PALISADES CANNOT IDENTIFY A SCINTILLA OF EVIDENCE TO SUPPORT THE *MATERIALITY* TO PALISADES’ POST-CLAIM INVESTIGATION OF MS. SHAW’S ALLEGED MISREPRESENTATIONS AS TO RESIDING AT THE INSURED PREMISES “FROM SEPTEMBER 2017 UNTIL MAY 2019.” (SJT53:14-54:8; 6T10:8-11; 6T47:16-21; 7T10:8-11; 7T18-21; 8T14:16-21)

As predicted, Palisades utterly failed to reference a scintilla of evidence of any “post-loss misrepresentation” which was *material* to its investigation of the fire loss claim---i.e., how its investigation *of the fire loss claim* would have

proceeded differently had the insured initially given “truthful” answers regarding her pre-June 2019 occupancy and how those misrepresentations either affected Palisades’ “attitude and action,” or “discouraged, misled or deflected” its investigation *of the fire loss claim*.

In this connection, this Court must be mindful of the important operative facts. *First*, the fire loss occurred on November 20, 2019, approximately *five months* after Ms. Shaw rented her unit in the insured premises to a tenant. Palisades always knew that from June 2019 until the fire the premises had only been tenant-occupied.

Second, on Palisades’ pre-trial summary judgment motion, the court ruled that non-occupancy by Ms. Shaw herself thereafter did not result in a forfeiture of coverage under the policy because Palisades’ policy (or its interpretation) was more restrictive than the minimum requirements under *N.J.S.A. 17:36-5.20*, which adopted the 1943 New York Standard Fire Policy form (Pa4).

Third, based on the pre-trial ruling, the jury was expressly instructed “not [to] concern yourselves of Plaintiff’s non-occupancy of the building after May 2019 through ... the time of the fire...[since] the non-occupancy does not cost the insured her coverage” (6T47:16-21). The reason was that the post-loss “misrepresentation” regarding “occupancy,” which Palisades focuses on only related to the period from September 2017 to May of 2019, not the relevant 60 day

period prior to the fire loss. Palisades fails to explain, in light of the summary judgment ruling, how: (i) Ms. Shaw’s “misstatements” about living or residing at the insured premises prior to June 2019 could have affected its investigation of a claim with respect to the fire which occurred six months later; (ii) its investigation would otherwise have proceeded differently, or (iii), as compared to a “truthful” answer, these “misrepresentations” would either have affected its “attitude and action” or “discouraged, misled or deflected its investigation [of the fire claim].”

In an attempt to conjure evidence of materiality, Palisades points to its sole witness, Lacoste. But Lacoste was an underwriting director who oversaw the operations of Palisades underwriting department. Her testimony was confined to the application executed *at the time of the issuance of the policy*. She did not, and could not, testify about either post-claim “misrepresentations” or how they could have affected the post-loss loss investigation of the *fire claim*.

Lacoste testified that in issuing a policy Palisades’ “expectation...in terms of occupancy” was that an owner/insured would reside in the property “at all times” (5T54:10-22). But per the ruling on the summary judgment motion, *this* was irrelevant to the fire-claim investigation *since the non-occupancy by the insured at the time of the fire did not bar coverage for the fire loss*. Lacoste did not, and could not, address the *reasonable relevancy* of plaintiff’s “misstatement” that she resided there through May 2019 to *the post-claim investigation*. Whether Ms. Shaw had

stated she had only lived there from September 2017 until February 2018 (6 months), or until any later date through May 2019, it could not have made any difference to a “reasonable insurer” because after May 2019, the premises, being fully occupied, would be covered on the fire claim *whether she lived there or not*.

Assuming *arguendo* that Plaintiff misrepresented her occupancy status during the period between September 2017 and May 2019 (as we must for purposes of this appeal), the trial record remains utterly devoid of evidence addressed to the materiality of this, or any such putative *post-loss* misstatement regarding *the fire claim*. Undaunted, Palisades nonetheless baselessly argues:

[g]iven the fact that the policy defines ‘insured premises’ in a way requiring the owner to reside on the premises (Pa376), Plaintiff’s misrepresentation that she lived there when she did not is clearly material. [Db24]

This notion that in order to maintain coverage the insured was required to reside at the insured premises: (1) was exactly the position unambiguously *rejected* on the summary judgment motion; (2) thus, a “*misrepresentation*” that she lived there through a date six months before the fire could not be material, let alone “*clearly material*” to the fire claim; (3) no other testimonial, or other proof of materiality existed in the trial record; and (4) it would not have been within the jury’s province to interpret the policy language in *contravention* of the trial judge’s express instruction that, “...the Court previously determined that the [insured’s] non-occupancy does not cost the insured her coverage”(6T47:16-21).

Palisades further contends that “...there was more than sufficient evidence for the jury to conclude the misstatements did in fact cause Palisades to change its course of action upon learning of Plaintiff’s misstatements. Palisades denied the claim.” (Db25). This argument is equally without merit. Tellingly, nowhere did Lacoste, its only witness, testify, or would she have been competent to testify, that, but for the alleged misstatement, Palisades would have accepted coverage *for the fire claim*. Nor did she, or could she identify any “misstatements” as changing Palisades’ investigative conduct, or attitude and actions regarding coverage, or having the capacity to affect any such change while the investigation *as to the fire claim* was then unfolding.

Defendant’s argument on “evidence of materiality” is set forth at pages 28-35 of its brief---the very heart of its argument on this appeal. Given the opportunity there to lay bare its proofs on this appeal, beyond a scintilla, Palisades totally fails to sustain the elements of its *prima facie* defense.

Lastly, Palisades refers to Lacoste’s testimony, coupled with allegedly demonstrating that Plaintiff never resided at the subject dwelling, as evidence

...relevant to the jury’s determination on [jury] question there, because it demonstrates why falsely asserting that the property was owner-occupied would be material to a reasonable insurer in determining if the claim is a covered loss, given the policy’s [legally untenable] definitions of “insured location” and “residence premises” and Palisades’ decision not to market or issue rental property policies.” [Db30].

Lacoste did not, and could not have so testified since this is the same spurious argument rejected on the summary judgment motion, where court held, as a matter of law, that Plaintiff's non-occupancy did not bar coverage for the *fire loss* claim, and the trial judge later so instructed the jury. And Palisades always was made aware that a tenant, not plaintiff, had not been occupying the premise as of the time of the fire. It would not have made a whit of difference to Palisades if she resided there during the period of pre-May 2019 just for one day, one month, one year or the whole time, since, *per Lacoste*, Palisades still, *improperly*, would have denied coverage. Palisades' trial strategy was not to put into evidence any testimony on the materiality of the "misrepresentations" but instead leave the jury to speculate, because any such testimony could not have survived vigorous cross-examination regarding reasonable relevancy,

The law of the case emerging from the summary judgment motion was that as long as the premises were *occupied within the 60 days prior to the fire*, it was irrelevant to coverage under the policy that it was not "occupied" by the insured homeowner, which was binding on all of the proceedings which followed; *Lanzet v. Greenberg*, 126 N.J. 68, 192 (N.J. 1991; see also, *State v. Reldan*, 100 N.J. 187, 203 (1985); *State v. Hale*, 127 N.J. Super. 407, 410-11 (App. Div. 1974). Thus, submitting Question No. 3 to the Jury in the absence of proof of an essential element of a defense, was clearly plain error, inviting improper speculation and an

exercise in futility.

Per Palisades' brief, the purported "relevance" of Lacoste's testimony to the post-loss investigation (Db 22-23, 28) was limited to her testimony that "when [Palisades] issues a homeowners policy in terms of occupancy *** the insured, the owner is expected to reside in the property...at all times" (5T5813-18). The only significance Palisades attributes to this testimony is that it "mattered to the carrier" (Db28) (i.e., when it accepted the application).

But whether or not this may have been Palisades' "expectation," or it "mattered" to Palisades then, it cannot override both the express law of the case and the policy terms, as interpreted by the court---i.e., that in order to maintain coverage under the policy, it was *not required* that "the owner to reside in the property...at all times," as long as the property was occupied during the relevant period up to the fire. Even more at war with the coverage ruling on the motion is Palisades' brazen assertion on this appeal that "[t]he policy specifically require[d] that the homeowner reside on the premises," (Db13), i.e., the same contention explicitly rejected on the summary judgment motion.

The question posed in the first jury interrogatory was, "Do you find that the Plaintiff lived or resided at 382-384 Peshine Avenue *from September 2017 until May 2019*, yes or no?" In other words, the jury was only asked whether it found from the evidence that Ms. Shaw "lived or resided" there *continuously* from

September 2017 until May 2019 (i.e., not whether she ever moved in, as Defendant implies). To this the jury answered “NO.” But this response did not preclude the jurors from also believing she actually had lived for some time within that period.

Giving Palisades the benefit of all of the negative inferences (i.e., based on the testimony of Ms. Cherry and Malik Freeman) as to whether or not during the September 2017 through May 2019 period Ms. Shaw lived there for *any* length of time before June 2019, it still would have had no relevance legally because first of all the pre-June 2019 period was not the relevant period for determining *coverage on the fire claim* coverage. Second, Palisades was aware that the insured was not residing there thereafter, and had rented the unit. Third, under the law of the case, it did not matter to coverage whether either the owner or the owner’s tenant was the occupant for the 60 days preceding the fire.

Even if Exhibit “D-8” had actually been admitted at trial, no Palisades company witness testified as to whether or how, as a “reasonable insurer,” it could have considered any such allegedly misrepresented “fact” as to occupying the premises pre-June 2019 was relevant to its concerns and important in determining its course of action on the *fire claim*, or a *scintilla* of evidence as to the *relevance of pre-May 2019 occupancy* to its post-claim *fire* investigation.

Unlike *Longobardi v. Chubb Ins. Co.*, 121 N.J. 530 (1990), where “Chubb had good reason to be concerned about Longobardi’s connection” with two

individuals suspected of prior insurance fraud, *id.* at 535, or *Fine v. Bellefonte Underwriters Ins. Co.*, 725 F.2d 179, 183 (1984), *cert. denied*, 474 U.S. 826 (1985), the “misrepresentations” as to Ms. Shaw’s “occupancy” of the premises pre-May 2019 had no relevance to “occupancy” during the pertinent 60 day period preceding the fire (Pa382). And no Palisades witness ever testified that any misrepresentation regarding pre-June 2019 occupancy had any clear capacity to affect the insurer’s attitude and actions or that it impeded, misled or deflected its investigation of the *November fire loss*.

POINT II THERE WAS AN “ADEQUATE SUBSTITUTE” IN THE RECORD FOR A MOTION FOR A DIRECTED VERDICT. (7T10:8-11; 7T18-21)

As plaintiff’s opening brief noted (at Pb33), in the charging conference, Ms. Shaw’s counsel called attention to what he perceived to be the danger inherent in the proposed jury Interrogatory 3: that it could allow the jury to gloss over the matter of materiality, despite a lack of *actual* evidence in the record, since “... there's been a lot of witnesses that never showed up to give testimony. For example, especially on materiality” (7T10:8-11). He further pointed out that

[n]obody came in this courtroom to say, you know what, had we known this, we would have done that. Our position would have changed. Our investigation got deflected. We were misled into thinking, and had we known earlier the truth about what Miss Shaw told us, we would have changed our course and done this. We have none of that, and there's a reason why. None of that is relevant. [7T10:13-20]

Palisades knew from the outset of the investigation from Ms. Shaw herself that she had not been in occupancy any time after May 2019---six months before the fire. Prior to trial the law of the case was established that “*non-occupancy*” by *the insured* during the subsequent period had no relevance to the fire claim, since the premises were *occupied*---by a tenant. In other words, what Shaw’s counsel argued was that it was erroneous to present an interrogatory to the jury which *implied* there was some evidence in the record from which the jury could find these putative misrepresentations regarding pre-May 2019 occupancy had *materiality* to investigation of the fire claim, i.e., a capacity to change Palisades’ position on the *merits*, or to deflect or mislead it in investigating *the fire claim*.

Menza v. Diamond Jim's, Inc., 145 N.J. Super. 40 (App. Div. 1976) dealt with whether a directed verdict motion, R. 4:39-1, was a prerequisite to moving for a judgment *n.o.v.* where the judgment had been based on special interrogatories. *Menza* held that in such a case, contrary to earlier decisions,

[t]he rule enunciated in these [earlier] cases has been tempered by *Logan v. No. Brunswick Tp.*, 129 N.J. Super. 105, 109 (App.Div. 1974), *certif. den.* 66 N.J. 328 (1974). In any event, ... [a motion for judgment/directed verdict] is inapplicable, since the basis for the motion in the instant case arose upon the return of the special verdict, R. 4:39-1, and not by reason of proofs which reasonably may have required a motion for judgment pursuant to R. 4:40-2. *Dolson v. Anastasia*, 55 N.J. 2 (1969). It might have been better practice if instead of moving for judgment *n.o.v.* plaintiff moved to vacate the judgment and to enter a judgment molded on the thesis that the jury intended to find for plaintiff [*Menza*, 145 N.J. Super. at 44].

See also *Ponzo v. Pelle* 166 N.J. 481, 488 (N.J. 2001) (where the verdict was also based on a special interrogatory, holding the plaintiff was not required to move for a directed verdict in order to move post-verdict for a judgment *n.o.v.*). See also *Spaulding v. Hussain*, 229 N.J. Super. 430, 442 (App. Div. 1988), which, following *Logan* and *Menza*, held that a motion for a directed verdict is not a prerequisite for a judgment *n.o.v.* motion if there was an “adequate substitute” in the record, there an objection to a special interrogatory which identified the same substantive problem with the special interrogatory that would have been raised by a directed verdict motion. *Id.* As in *Spaulding*, Shaw’s counsel’s objection was that there was no basis for Interrogatory #3 going to the jury because Palisades had not presented any evidence supporting a *post-claim* “materiality” defense (7T10:8-20).

Palisades’ further contention is that because plaintiff moved for a judgment *n.o.v.* pursuant to R. 4:40-2, rather than for a new trial pursuant to R. 4:40-1, an objection to an interrogatory question could be an adequate substitute (Db14). But the plaintiff’s successful motion in *Spaulding*, on the contrary, was brought under R. 4:40-2, *id.* at 441-442 and the court there dismissed any “technical impropriety” as form over substance, deeming the objection to the special interrogatory an “adequate substitute” under *Logan* and *Menza*.

Plainly the trial record here presented an “adequate substitute” for a directed verdict motion.

POINT III PALISADES' AMENDED BRIEF DISINGENUOUSLY REPEATS THE SAME REFERENCES TO, OR ALLUDES TO, "THE RECORDED STATEMENT," AND PLAINTIFF'S "DEPOSITION," ALBEIT WITHOUT RECORD CITATIONS.

Palisades previously attempted, per a "Supplemental Appendix," to improperly put before the Court a "Recorded Statement," marked as D-8, but not in evidence---i.e., a "gross violation of appellate practice and rules [i.e., *R. 2:5-4(a)*]...of no consequence on the merits of this appeal..." *Middle Dep't Insp. Agency v. Home Ins. Co.*, 154 N.J. Super. 49, at 56 (App. Div.1977); *Cherry Hill Dodge, Inc. v. Chrysler Credit Corp.*, 194 N.J. Super. 282, 283 (App. Div.1984) (dismissing appeal, *inter alia*, for including, as here, "documents...presented in the appendix which were not in evidence below"). The only differences between Palisades' original and the amended brief are the deletions (at Dab6 and Dab11) of references to "Da-8." But the attendant assertions, *sans* citations, still refer to the "recorded statement," and plaintiff's "deposition," also not in evidence, doubling down on the end-run around *R. 2:5-4(a)*.

The amended brief (at Dab6 and Dab11) also retains the original citations to various portions of plaintiff's trial testimony regarding pre-June 2019 occupancy which have no relevance to *the fire claim*. They do not address Palisades' utter failure to sustain a *prima facie* defense as to the *post-loss investigation* of the fire claim, and thus are of "no consequence on the merits of this appeal..." *Middle Dep't Insp. Agency Co., supra*, at 156.

CONCLUSION

For all of the foregoing additional reasons: (i) the decision of the trial court denying plaintiffs' motion for Judgment NOV should be reversed and instead plaintiffs should be granted Judgment NOV and (ii) the matter should be remanded for trial as to damages only.

Respectfully submitted,
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Dated: March 3, 2025