SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-003407-24 T3

NEW JERSEY MANUFACTURERS INSURANCE GROUP A/S/O JOSEPH AND CLAIRE WEISS Plaintiff/Appellant. v. JERSEY CENTRAL POWER AND LIGHT, INC., Defendant/Respondent.	:	Civil Action On Appeal From: The Superior Court of New Jersey, Law Division, Morris County Docket No.: MRS-1632-23 Sat Below: Hon. Vijayant Pawar

BRIEF OF PLAINTIFF/APPELLANT NEW JERSEY MANUFACTURERS INSURANCE GROUP A/S/O JOSEPH AND CLAIRE WEISS

AMENDED FROM 8/26/2025

DATE OF ORIGINAL SUBMISSION: August 22, 2025

CRAWFORD SLATTERY
619 South White Horse Pike
Audubon, NJ 08106
(856) 310-5550

Attorneys for Plaintiff/Appellant
NEW JERSEY MANUFACTURERS INSURANCE GROUP A/S/O JOSEPH AND CLAIRE WEISS

Dennis J. Crawford, Esquire
Attorney No.: 031001987
E-mail: djc@crawfordslattery.com
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PRELIMINARY STATEMENT

This appeal arises out of the Orders by the Honorable Vijayant Pawar, granting Summary Judgment in favor of Defendant, Jersey Central Power and Light (JCP&L), denying Plaintiff, NJM Insurance Group (NJM), Partial Summary Judgment on the issues of Strict Liability and *Res Ipsa Loquitur* and denying Plaintiff's request to compel the deposition of JCP&L's expert. These orders were entered on April 22, 2025. The lower court further declined to reconsider these rulings and further barred the Certification of Plaintiff's expert, Michael Wald, giving rise to this appeal. These Orders were entered on May 30, 2025.

This legal action arises from a fire that destroyed the home of NJM's insured, Joseph and Claire Weiss, in Flanders, NJ on April 29, 2023. On this date, a primary electrical line failed causing over 7,000 volts of electricity to enter through the Weiss' electrical meter and into their home. This primary electrical line was under the care of JCP&L, a NJ Utility. As customers of JCP&L, the voltage that should have been issued to the Weisses should have been 240v. The dangerous amount of voltage caused fires with different points of origin within the Weiss home. NJM made payments over $1 Million to the Weisses for the damage caused by the fire. NJM has stepped into the shoes of the Weisses and is pursuing its subrogation claim.

Although the primary focus of NJM's appeal is the Products Liability claim, the Appellant believes that all Causes of Action pled have life.

It is the Appellant's contention that the trial court erred in their evaluation and decision on the following issues:

1. Denying Plaintiff's Cross-Motion on the Products Liability Claim;

2. Finding that Michael Wald's Report was a Net Opinion which caused the Court to dismiss all claims;

3. Not conducting a N.J.R.E. 104 Hearing;

4. Barring Michael Wald's Certification;

5. Denying NJM's request for *Res Ipsa Loquitur*;

6. Entering an Order declaring that Michael Wald was not competent to testify as an expert; and

7. Denying NJM's Cross Motion to Compel the Deposition of Robert Neary.

The Appellant respectfully requests that this Court find that the Trial Court erred on the above issues, reverse the Orders of April 22, 2025 and May 30, 2025, and remand this matter for Trial.

PROCEDURAL HISTORY

This legal action arises from a fire that destroyed the home of NJM's insureds, Joseph and Claire Weiss in Flanders, NJ on April 29, 2023. On this date, a primary electrical line failed causing over 7,000 volts of electricity to enter through the Weiss' electrical meter and into their home. The dangerous amount of voltage caused fires with different points of origin within the Weiss home. NJM made payments of over $1 Million to the Weisses for the damage caused by the fire. NJM has stepped into the shoes of the Weisses and is pursuing its subrogation claim.

NJM filed its Complaint on September 18, 2023. **1a**. Defendant, JCP&L, filed its Answer on October 19, 2023. **10a**. On March 14, 2025, JCP&L filed its Motion for Summary Judgment and to bar plaintiff's expert, Michael Wald, from testifying at trial for Net Opinion and lack of qualification. **25a**.On April 1, 2025, the Appellant, filed its Opposition to the Motion for Summary Judgment, and filed its own Cross-Motion for Partial Summary Judgment on the issues on Products Liability/Strict Liability and/or *Res Ispa Loquitur* and to Compel the deposition of Robert Neary. **249a**. The Hon. Vijayant Pawar heard Oral Argument on the Motions on April 11, 2025. **Transcript 4/11/2025**.

On April 22, 2025, the lower court issued Orders granting summary judgment in favor of JCP&L, and barred Michael Wald from testifying at Trial (**428a**). The lower court also issued Orders denying Appellant's Cross-Motions for

Partial Summary Judgement and to the lower court provided a Statement of Reasons that addressed the Orders issued on April 22, 2025. **430a**.

On April 28, 2025, Appellant moved for reconsideration on the orders of April 22, 2025 with a request for oral argument. **455a**. Along with its opposition to the Motion for Reconsideration, JCP&L, cross-moved to bar Michael Wald's Certification from being considered at Trial. **466a**.

On May 30, 2025, without hearing oral argument, the lower court entered an Order denying NJM's Motion for Reconsideration(**485a**), and an Order granting JCP&L's Motion to Bar Mr. Wald's Certification (**500a**). A Statement of Reasons was submitted by the lower court as an accompaniment to the Orders of May 30, 2025. **487a**.

On July 1, 2025, the Appellant brought this appeal by filing its Notice of Appeal. **503a**.

STATEMENT OF FACTS

This legal action arises from a fire that destroyed the home of NJM's insureds, Joseph and Claire Weiss in Flanders, NJ on April 29, 2023. On this date, a primary electrical line failed causing over 7,000 volts of electricity to enter through the Weiss' electrical meter and into their home. The dangerous amount of voltage caused fires with different points of origin within the Weiss home. The fires caused over $1 Million in damages to the Weisses, which was paid by NJM. NJM has stepped into the shoes of the Weisses and is pursuing its subrogation claim.

NJM filed their Complaint on September 18, 2023. **1a**. Defendant, JCP&L, filed their Answer on October 19, 2023. **10a**.

During the course of discovery, the Appellant deposed certain employees of JCP&L, namely, Jason Keidel and James Bullerjohn. Mr. Keidel, a lineman for JCP&L, testified that when the line failure occurred, the electricity went into the service line, and through the meter of the Weiss home. **335a**. Mr. Bullerjohn, the crew leader of JCP&L's troubleshooters at the time of the fire, confirmed Mr. Keidels' testimony. **338a**. JCP&L admits that "an overhead primary wire (approximately 7200 volts) broke and fell on to the lower level electrical wires, causing an over-voltage to enter the Weiss home". **29a at ¶ 5.**

The Appellant also deposed JCP&L's Corporate Designee, Samuel Zarzuela. As the Corporate Designee, Mr. Zarzuela, testified that to fulfill the requirements of N.J.A.C. § 14:5-8.6 on Inspection and Maintenance Programs by

EDCs, JCP&L conducts infra-red inspections of the lines, which are performed by third-party contractors. He did not know who these third-party contractors were, nor did he know the frequency of when these inspections are performed. **328a**. Mr. Zarzuela further testified that JCP&L also completes visual inspections of the overhead wires. These inspections were performed by one person, driving at street level, looking up at the wires. **328a**. No reports relating to the infra-red inspections performed for the subject lines were produced by JCP&L.

The Appellant produced the expert reports of Michael Wald (**40a**) and Josh Jamison (**224a and 271a**) on October 28, 2024. Some of the salient points of Mr. Wald's report are:

1. Prior problems existed and reported by the Weisses to JCP&L:

> The Weiss's had experienced three power line issues in front of their house in the year preceding this fire. All of them occurred during rain storms. The first was on May 8, 2022. Mr. Weiss observed a bright flash and the power went out. JCP&L restored power and reported that a tree branch had contacted the line. In June or July of 2022 Mr. Weiss once again observed a bright flash and the power went out. He later observed tree branches being trimmed in front of his home. On April 24, 2023, five days before the subject fire, he observed a bright green and white flash from the power lines. The lights in the home got bright and dim but they did not lose power. On the day of the subject fire Mr. Weiss heard what he described as a loud "power surge noise" and once again saw a bright green and white flash at the power lines. He then heard a boom sound from the basement of the home. When he looked in the basement he saw fire at the service panel. He also observed a power line down in front of the house. As he evacuated

> people and pets from the home, he observed sparks flying out of a receptacle outlet in the kitchen. He also reported that his wife's cell phone wire and a baby monitor had exploded. ***See,*** M Wald Report**,** at **42a**.

2. JCP&L personnel further testified that there were "outage reports at this location on 8/26/19, 8/4/20 and 7/9/21. On 11/15/21 there was a report of an explosion on another part of this system nearby." **42a**.

3. The fact that a high-voltage power line broke, with no evidence of any tree branches or other objects in the area, demonstrates conclusively that this power line was in a seriously degraded condition. Power lines do not simply "break and fall down" without existing damage. The bright flashes observed during rainy conditions further demonstrate that deficiencies were present on these lines. **43a.**

4. It is noted that even after this event and the associated repairs, a damaged high voltage line was still present (see photo 5). **47a**.

5. Of course, as mentioned above, "a properly maintained power line should never just break and fall down without a significant impact from some foreign object. No such object caused this line to break". **43a**.

6. The multitude of previous failure events, and the damage that was evident on another line after this incident, demonstrates the poor maintenance present on these lines prior to this incident. **43a.**

Mr. Jamison's report includes a lightning strike report that shows that no lightning strikes occurred within a 5-mile radius of Weiss home on the date of the incident. **271a**.

Before producing its expert report late, JCP&L requested a short extension for producing its expert report, with a promise to "extend whatever deadlines you need." **367a**. This extension was granted by NJM's counsel. **366a**. JCP&L produced the expert report of Robert Neary (**198a**) on December 23, 2024. The appellant provided Mr. Wald's Rebuttal Report (**332a**) on January 2, 2025, wherein he critiques the facts raised in Mr. Neary's report, such as JCP&L's line inspections on February 21, 2022 occurred before the dates the Weiss' reported the repeated flash incidents prior to the loss. In his report, he further critiques Mr. Zarzuela's testimony of alleged infrared inspections having been performed but does not provide any records of such inspections. **333a.**

Discovery in this matter ended on January 11, 2025. **463a**. Prior to the discovery end date, as the parties were preparing for mediation, the attorneys agreed to take the expert depositions after the mediation if it was not successful. **265a** at ¶ 11. The mediation was scheduled for a date after the close of discovery. As the mediation was not successful, the Appellant proffered Mr. Wald for deposition. JCP&L declined to depose him. **374a** at 1/27/25, 6:17 pm.

The Appellant sought the deposition of JCP&L's expert, Robert Neary. On January 29, 2025, the date of March 4, 2025 was agreed upon. **374a** at 1/29/25

at 11:54 am**.** The Appellant submitted its Notice of Deposition to defense counsel on February 26, 2025[1]. **377a**. A contentious conflict arose between counsel with regard to the production of Mr. Neary for deposition. Mr. Neary was not presented for deposition in this matter.

On March 14, 2025, JCP&L filed their Motion for Summary Judgment and to bar plaintiff's expert, Michael Wald, from testifying at trial for Net Opinion and lack of qualification. **25a**. On April 1, 2025, the Appellant, filed their Opposition to the Motion for Summary Judgment, and filed their own Cross-Motion for Partial Summary Judgment on the issues on Products Liablity/Strict Liability and/or *Res Ispa Loquitur* and to Compel the deposition of Robert Neary. **249a**. The Hon. Vijayant Pawar heard Oral Argument on the Motions on April 11, 2025. **Transcript**.

On April 22, 2025, the lower court issued the Order granting summary judgment in favor of JCP&L, and barred Michael Wald from testifying at Trial. **428a**. The lower court also issued Orders denying Appellant's Cross-Motions for Partial Summary Judgement and to compel the deposition of Robert Neary. **453a**. A Statement of Reasons was provided for the Orders entered on April 22, 2025. **430a**.

On April 28, 2025, the Appellant moved for reconsideration on the orders of April 22, 2025, with a request for Oral Argument. **455a**. Along with their opposition to the Motion for Reconsideration, JCP&L, cross-moved to bar Michael

[1] Owing to an unexpected death in the undersigned's family, the Notice of Deposition did not go out sooner.

Wald's Certification from being considered at Trial. **466a**. On May 30, 2025, without hearing Oral Argument, the lower court issued the Order denying the Motion for Reconsideration (**485a**) and granted the JCP&L's Motion to Bar Mr. Wald's Certification (**500a**). A Statement of Reasons was entered as an accompaniment to the Orders of May 30, 2025. **487a**.

On July 1, 2025, the Appellant brought this appeal by filing their Notice of Appeal. **503a**.

LEGAL ARGUMENT

STANDARD OF REVIEW

Review of an order granting summary judgment is de novo; the appellate court need not accept the trial court's findings of law. ***Aronberg v. Tolbert, 207 N.J. 587,*** 597, 25 A.3rd 1121 (2011); see also ***Manalapan Realty, L.P. v. Manalapan Twp. Comm.***, 140 N. J. 366, 378, 658 A.2d 1230 (1995). The Court must consider whether the competent evidential materials presented, viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the nonmoving party. ***Brill v. Guardian Life Ins.. Co. of Am.***, 66 A,2d 146 (1995) at 540. ***See***, ***Davis v. Deveraux Foundation***, 209 N. J. 269, 286-287 (2012).

POINT I

The Lower Court Erred in Denying Plaintiff's Cross-Motion on the Products Liability Claim (453a, 430a, 485a, and 487a)

It is the Appellant's position that the lower court failed to determine that the electricity provided by JCP&L, in this situation, is a product. In its Statement of Reasons for denying Appellants Cross-Motion for Partial Summary Judgment on Strict Liability, the lower court based its decision on the finding that Mr. Wald's report was a Net Opinion and therefore, Strict Liability was not available to NJM. **448a**. Further, in the lower court's Statement of Reasons for denying Appellant's Motion for Reconsideration, it declined to apply strict liability principles to the matter at hand. **497a**.

A. Electricity is a Product When It Leaves the Public Right of Way (453a, 430a, 485a and 487a)

In 1912, the United States Supreme Court, held that *Res Ipsa Loquitur* applied when electrical utility lines fail. ***San Juan Light & Transit Co. v. Requena***, 224 U.S. 89 (1912). This finding was made nearly 50 years before the New Jersey Supreme Court adopted Strict Liability, in the seminal case of ***Henningsen v. Bloomfield Motors, Inc.***, 32 N.J. 358 (1960). Since that time, the evolution of the service/product classification of electricity has been afoot. Across the country, from about 1970 to 1990, states drawn lines of demarcation as to when electricity goes from being a service (transmission) to a product (distribution). In 1982, a New

Jersey court ruled on this issue. In ***Aversa v. Pub. Serv. Elec. & Gas Co.***, 186 N.J. Super. 130 (Law Div. 1982), the court held that once the electricity reaches the distribution line that feeds directly into the customer's home (and is removed from the public right of way), electricity becomes a product. As such, the product provided to the Weiss home—7000 volts of electricity—was in a highly dangerous condition.

The transmission of electricity through high-voltage power lines is considered abnormally dangerous activity due to the potential for catastrophic harm if not properly managed and controlled. For instance, in ***Black v. Pub. Serv. Elec. & Gas Co.***, 56 N.J. 63 (1970), the New Jersey Supreme Court described uninsulated high-voltage power lines as "one of the most dangerous contrivances known to man" and emphasized the utility company's obligation to exercise a high degree of care commensurate with the risk of harm posed by these lines. Under New Jersey law, strict liability may be imposed in cases involving abnormally dangerous activities. ***Ross v. Lowitz***, 222 N.J. 494 (2015).

JCP&L had exclusive control over the primary transmission line that led to the distribution system that delivered electricity to the Weiss residence. When the electricity left the control of JCP&L at 7000v, it was in an extremely dangerous condition.

> Where the electricity is no longer in transmission in the public right of way but has been introduced into the stream of commerce by a sale thereof or otherwise, the liability of

> the electric company is no longer dependent upon a showing of negligence but may be based upon a strict liability cause of action unrelated to fault.
>
> ***Aversa*** at 135.

In ***Aversa,*** the defendant electric utility filed a Motion to Dismiss plaintiff's claims for Strict Liability and Breach of Warranty. Both these counts are asserted by Appellant/Plaintiff in the instant case. The ***Aversa*** court, after careful scrutiny of out-of-state case law, determined that the negligence standard applied when the electricity was being transmitted through the primary lines. The Court reasoned at this juncture the electricity is deemed a service; thus, the traditional standard of reasonable care and negligence applies. On the other hand, once the electricity was placed into the stream of commerce (i.e., via the distribution line to a customer's home), the electricity becomes a product. At that point, strict liability applies.

> Where, however, the electricity is no longer in transmission in the public right of way but has been introduced into the stream of commerce by a sale thereof or *otherwise*, the liability of the electric company is no longer dependent upon a showing of negligence but may be based upon a product liability cause of action unrelated to fault. ***Elgin Airport Inn, Inc. v. Commonwealth Edison Co.***, 88 Ill. App. 3d 477, 43 Ill. Dec. 620, 410 N.E.2d 620 (1980); ***Ransome v. Wis. Elec. Power Co.,*** 87 Wis. 2d 605, 275 N.W.2d 641 (Sup. Ct. 1979); ***Kulhanjian v. Det. Edison Co.***, 73 Mich. App. 347, 251 N.W.2d 580 (1977); [*136] ***Buckeye Union Fire Ins. Co. v. Det. Edison Co.***, 38 Mich. App. 325, 196 N.W.2d 316 (1972). ***Aversa*** at 135. (Emphasis added.)

The ***Aversa*** Court finally concluded:

> It is the holding of this court that the principles of strict liability in tort, as well as the implied warranties of merchantability and fitness for particular use, are applicable in cases where injuries are sustained from electricity placed in the stream of commerce. While a sale is conclusive as to the placement of the product in the stream of commerce, evidence that an electric company relinquished exclusive control over its product may establish strict liability at a point prior to its running through a meter where charges are computed.
>
> ***Aversa*** at 137.

Other jurisdictions have recognized the application of strict liability to electric utilities in similar circumstances. Precedent in the following jurisdictions confirms that electrical energy that has passed the customer's meter is a "product" for strict liability purposes under Section 402(A) of the Restatement: California; Colorado; Connecticut; Georgia; Illinois; Indiana; Pennsylvania; Texas; Wisconsin; and the Virgin Islands[2]. **In fact, this Court has been unable to locate any legal**

[2] California (*Pierce v. Pac. Gas & Elec. Co.*, 166 Cal. App. 3d 68, 82-84, 212 Cal. Rptr. 283 (1985)) ; Colorado (*Smith v. Home Light & Power Co.*, 695 P.2d 788, 789 (Colo. App. 1985)); Connecticut (*Travelers Indem. Co. of Am. v. Conn. Light & Power Co.*, 2008 Conn. Super. LEXIS 1387, 2008 WL 2447351, at *5 (Conn. Super. Ct. June 4, 2008)); Georgia (*Monroe v. Savannah Elec. & Power Co.*, 219 Ga. App. 460, 465 S.E.2d 508, 510 (1996)); Illinois (*Elgin Airport Inn, Inc.*, 88 Ill. App. 3d 477, 410 N.E.2d at 624, 43 Ill. Dec. 620); Indiana (*Hedges v. Pub. Serv. Co.*, 396 N.E.2d 933 (Ind. Ct. App. 1979)); Pennsylvania (*Cincinnati Ins. Co. v. PPL Corp.*, 979 F. Supp. 2d 602, 609-10 (E.D. Pa. 2013), and *Schriner v. Pa. Power & Light Co.*, 348 Pa. Super. 177, 501 A.2d 1128, 1134 (1985)); Texas (*Hous. Lighting & Power Co. v. Reynolds*, 765 S.W.2d 784, 785 (Tex. 1988) and *Hanus v. Tex. Utils. Co.*, 71 S.W.3d 874, 878 (Tex. App. 2002)); Wisconsin (*Ransome*, 87 Wis. 2d 605, 275 N.W.2d 641); and the Virgin Islands (*DeJesus v. Virgin Is. Water & Power*

authority under Restatement Section 402A suggesting that electrical energy actually metered and delivered to a customer is anything other than a "product" for at least tort purposes. ***In re Escalera Res. Co.***, 563 B.R. 336, 365-66 (Bankr. D. Colo. 2017) (emphasis added)[3].

At least 22 States, of which New Jersey is one (N.J. Stat. Ann. § 54:32B-2(g)), expressly define "electricity" as "tangible personal property" in connection with state taxation. ***In re Escalera Res. Co.***, supra.

Applying strict liability in this case would be consistent with New Jersey's (and many neighboring states') recognition of strict liability for abnormally dangerous activities and would continue to serve the public interest by holding electric utilities to the highest standard of care in maintaining their infrastructure. Given the nationwide acceptance and a NJ Court's own finding that electricity is a product, it is respectfully submitted that electricity should be deemed a "product" in the case at bar.

B. NJM has Established a *Prima Facia* Products Liability Cause of Action (453a, 430a, 485a and 487a)

In prosecuting or pursuing a Strict Liability case, the focus should be on the condition of the product rather than the reasonableness of the defendant's

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Auth., 55 V.I. 402, No. ST-10-CV-205, 2011 WL 5864552 (V.I. Super. Ct. Oct. 26, 2011)).

[3] Texas is the only state to hold a public utility strictly liable without making a distinction as to whether the electricity has passed through the meter. *See Hous. Lighting & Power Co. v. Reynolds*, 712 S.W.2d 761 (Tex. App. 1986)).

conduct. The plaintiff does not need to prove negligence nor intent but must establish causation between the defect and the injury. ***Becker v. Baron Bros***., 138 N.J. 145 (1994), ***James v. Bessemer Processing Co.***, 155 N.J. 279 (1998), ***Coffman v. Keene Corp***., 133 N.J. 581 (1993). Successful assertion of a cause of action in strict products liability requires that a plaintiff prove several elements: "that the product was defective, that the defect existed when the product left the defendant's control, and that the defect caused injury to a reasonably foreseeable user." ***Feldman v. Lederle Lab'ys***, 97 N.J. 429, 449, 479 A.2d 374 (1984).

The lower court conceded that Mr. Wald was a competent expert but asserts he provides a net opinion, primarily because he does not establish a standard to be met. **437a**. However, in a strict liability case, the plaintiff does not need Mr. Wald to establish standards, which appears to be the core reason for the lower court's decision for finding a Net Opinion. To support a strict liability claim, the expert would only have to opine that the product (electricity) was provided by the defendant in a defective/dangerous condition and caused the fire. Surely, Mr. Wald's credentials and investigation into this matter allows, at a minimum, that portion of his opinion to survive. This is particularly so since the defendant admits to this in its Statement of Facts (***See***, ¶5 JCP&L's Statement of Fact to the Motion for Summary Judgment, at **39a)** which is consistent with Mr. Neary's conclusion in his report. **198a.**

With Mr. Wald being credentialed, the pertinent part of his report and conclusion is:

> Based on the information presented above, IEI does herein conclude to a reasonable degree of engineering certainty, that this fire was caused by the failure of the JCP&L high voltage line. This line fell down and contacted the secondary power lines below, thereby sending dangerous voltages into the home, beyond JCP&L's exclusive control, which ignited this fire. This it is the failure to JCP&L to maintain it power lines in a reasonable manner that is the proximate case of this fire. **43a**.

The plaintiff/appellant has provided an opinion from a competent expert, that the product (electricity) was in a defective condition (unreasonably dangerous) that caused damage (the fire). Thus, NJM has established a *prima facie* strict liability case.

C. The Defenses Raised by the Lower Court and JCP&L Concerning NJM's Product Liability Claim are Either Not Applicable or Do Not Meet the Requisite Level of Proof for Affirmative Defenses. (485a and 487a)

As the Appellant has established a *prima facie* strict liability case, then the defenses raised by the lower court and JCP&L should be scrutinized for their validity.

In referring to JCP&L's defenses the lower court states in the Statement of Reasons: "Additionally, JCP&L's defense, focusing on regular inspections and the uncontrollable nature of damage to power lines, presents significant hurdles for the plaintiffs to overcome under a strict liability framework." **448a**.

Regular inspections[4] have no bearing on a strict liability case. A manufacturer whose assembly line meets all OSHA, UL and ANSI requirements has no bearing (and is not a defense) on a strict liability case if a product leaves their control in a defective condition.

> "The Restatement defines a manufacturing defect as one in which "the product departs from its intended design though all possible care was exercised in the preparation and marketing of the product." Restatement (Third) of Torts: Prods. Liab. § 2 (1998) (a). The Act's and the Restatement's definitions of a manufacturing defect both emphasize the safety of the product rather than the reasonableness of the manufacturer's conduct. *Becker*, 138 N.J. at 152, 649 A.2d 613; *Feldman*, 97 N.J. at 450, 479 A.2d 374.
>
> ***Myrlak v. Port Auth.***, 157 N.J. 84, 97 (1999)

This then results in the defendant presenting, as this Court states, "the uncontrollable nature of damages to power lines…to overcome." **448a**. This is a challenge that the plaintiff accepts, but believes the defendant fails to present such defenses as a matter of law[5].

That is, if JCP&L wants to play the Act of God card, it can. However, this is an affirmative defense. Affirmative defenses must be proven by a

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[4]Plaintiff disputes that regular inspections were conducted because no reports of infrared inspections were produced.

[5] It should be noted that having the lower court rely on defense expert, Neary, without allowing the expert's deposition (when he was promised to be presented) is extremely unfair.

preponderance of the evidence. "Of course, '[w]hen an affirmative defense is raised [in a civil case], the defendant normally has the burden of proving it.' " ***Roberts v. Rich Foods, Inc.,*** 139 N.J. 365, 378, 654 A.2d 1365 (1995) (quoting ***Biunno, Current N.J. Rules of Evidence***, comment 2 on Evid.R. 101(b)(1) (1994-95)). ***Cavanaugh v. Skil Corp.***, 164 N.J. 1 (2000) (4-5)

The lower court's characterizations of Mr. Neary's conclusions makes the "uncontrollable nature" defenses fatal. Mr. Neary's thoughts are conjecture, and the jury should not be allowed to guess. The lower court accurately states Mr. Neary's insight: "damage to the power lines ***could*** occur between inspections, such as from external factors like rodents or lightning." **433a** (emphasis added). This is an opinion of possibility, not probability. An opinion of probability "more likely than not, within a reasonable degree of scientific certainty" is required to bolster an affirmative defense. The weather conditions at the time of the fire was not akin to Super Storm Sandy. There was rain, but it was not heavy. The conditions should not have warranted the failure of a primary electrical line. Curiously, the lower court, as well as Mr. Neary, completely ignore the lightning strike study, secured and relied upon by plaintiff's Origin and Cause expert, Josh Jamison. **271a**. This report clearly states there was no lightning strike occurred within 5 miles of the line failure. There exists no affirmative proof that lightning, at any time, contributed to this failure.

This leaves JCP&L with the rodent defense. As explained above, that defense is entirely speculative. Could rodents have contributed to this? Anything is

possible. An airplane could have struck the wires, but we are not going allow the jury to speculate on that scenario because there is no physical or analytical proof that this occurred. The same should be true for the rodents[6] . It is acknowledged that rodents will gnaw on wires that are insulated. They are drawn to the soy product often used in insulation. However, the primary line that failed was uninsulated. In our fact pattern, the secondary line is insulated, but a rodent on that line would have no causal effect on the primary line. Again, there is no affirmative proof that rodents contributed to this failure.

It is respectfully submitted that the lower court should have found that electricity is a product AND that it was provided in a dangerous condition when it left JCP&L's control (a fact admitted by JCP&L and supported by expert, Michael Wald) AND the dangerous product caused the damage (the fire). The Appellant further submits that the Trial Court should have deemed JCP&L's defenses inapplicable to a products liability claim, and its affirmative defenses did not meet the required burden of proof. As such, the lower court should have granted the Appellant's/Plaintiff's Motion for Partial Summary Judgment on the issue of Products Liability.

D. The Appellant's Breach of Warranty Claim Improperly Dismissed. (Issue not raised)

[6] Denying Plaintiff the opportunity to depose the defendant's expert prevented the opportunity to flush this speculative opinion out.

Although not discussed by the lower court, it dismissed NJM's Breach of Warranty claim. Upon declaring Mr. Wald's opinion, a "net opinion" the lower court dismissed all of plaintiff's causes of action, including NJM's breach of warranty claim. The lower court, quoting the JCP&L's Statement of Fact No.: 5 (**29a**) states, "Through discovery and depositions, it was discovered that an overhead primary wire broke and fell onto the lower-level electrical wires, causing an over-voltage to enter the owner's home." **432a**. This is an admission and should be recognized as such under ***N.J.R.E.*** 803(b). It is also a statement to which both parties agree. This supports plaintiff's Breach of Warranty Claim (Count IV) (**6a**), as well as the other claims. The plaintiff asserted an express warranty claim. While the plaintiff recognizes that an implied warranty claim will be subsumed by the Products Liability Act ("PLA") claim, much like the negligence claim; an express warranty claim will not. The express warranty, in this case, is JCP&L's own tariff. The tariff expressly warrants that the electricity will be delivered safely. Further it will be delivered to a residential home at the 120/240v level. This did not happen. The amount of voltage was approximately 30 times greater than expected by the consumer. Based on the above admission (and the opinion of both experts) that unreasonably dangerous voltage, well beyond marketable levels, entered the Weiss home. As such the Breach of Warranty Claim should not have been dismissed.

E. The Request for Oral Argument on the Motion for Reconsideration Was Ignored (Issue not raised)

A request for Oral Argument was made relative to the Motion for Reconsideration. **456a.** That request was ignored, and an Order denying the Motion for Reconsideration (**485a**) with a Statement of Reasons (**487a)** was simply entered onto the docket. The record does not indicate why.

> While a request for oral argument respecting a substantive motion may be denied, *see Great Atl. & Pac. Tea Co. v. Checchio*, 335 N.J. Super. 495, 497-98, 762 A.2d 1057, 1058-59 (App. Div. 2000); *Spina Asphalt Paving v. Borough of Fairview*, 304 N.J. Super. 425, 427 n.1, 701 A.2d 441, 442 n.1 (App. Div. 1997); *cf.* [*532] *Cobra Prods., Inc. v. Fed. Ins. Co.*, 317 N.J. Super. 392, 396, 722 A.2d 545, 547 (App. Div. 1998), *certif. denied,* 160 N.J. 89, 733 A.2d 494 (1999), the reason for the denial of the request, in that circumstance, should itself be set forth on the record. *Raspantini v. Arocho*, 364 N.J. Super. 528, 531-32 (App. Div. 2003)

Oral argument would have been beneficial in this matter for the following reasons:

1. The application of the ***Funtown Pier Amuses., Inc. v. Biscayne Ice Cream***, 477 N.J. Super. 499 (App. Div. 2024) case (which was raised by the lower court in its initial Statement of Reasons (at **438a**)) could have been discussed.

2. Why the court did not make a finding that electricity was a product could have been discussed.

3. Why the court refused to, at the very least, parse out the portions of Mr. Wald's opinion that would support a products claim since such a claim does not require a standard of care finding.

4. Frankly, all the issues raised in this brief could have been addressed and molded for a better appellate review, if needed.

For the reasons set forth above, it is the Appellant's position that the lower court erred in denying the Cross-Motion for Partial Summary Judgment on Products Liability. As such, the denial must be reversed, and this matter should be remanded for trial.

POINT II

The Lower Court Erred in Deciding that Michael Wald's Report Was a Net Opinion which Caused the Court to Dismiss All Claims. (428a and 430a)

It is Appellant's position that the lower court reasoned that since Michael Wald's opinion was a Net Opinion it rested on the notion that all of the Appellant's Causes of Action were non-availing and therefore dismissed all claims.

A. Mike Wald's Opinion is Not a "net opinion."(437a)

(1) A Standard of Care has been established by expert report and common law. (40a, 322a, and 326a)

The lower court suggests that without a specific standard of care set forth in by Mr. Wald's report, the plaintiff's negligence case is fatal. There are two significant problems with this argument. One, Mr. Wald did set forth a standard for the defendant to meet. He cited JCP&L's own tariff. Mr. Wald indicated in his report that JCP&L exceeded the amount of electricity permitted by its statute. This tariff becomes law once approved by the NJBPU. **326a**.

Second, there already is an established, common law standard of care, in part, by the New Jersey Supreme Court. That standard, in part, is "Great Care". ***N.Y. & N.J. Tel. Co. v. Bennett***, 62 N.J.L. 742, 42 A. 759 (E. & A. 1899) ("Reasonable care means great care; so that the care required to maintain the line and the poles upon which they were carried means great care.")[7].

[7] "Great Care" is the level of the duty the plaintiff refers to in its negligence Count of the Complaint.

The irony or juxtaposed position in this case is that the lower court latches on to JCP&L's tariff and finds JCP&L insulated from a negligence claim because it performed inspections made pursuant to its tariff/BPU requirements. At the same time, the lower court ignores the report of plaintiff's expert when he opines that JCP&L did not meet its own tariff standards or industry standards. ***See*** Mr. Wald's expert report at **40a**, and Mr. Wald's Certification at **322a**.

With regard to the common law standard, there has been much written concerning the care involving primary electrical lines. Given Mr. Wald's factual discovery and personal investigation, as set forth in his report and discussed below, the following are some jury charges that were presented to the lower court that potentially would incorporate the standard of care in this case:

First Jury Charge:

> Negligence may be defined as a failure to exercise, in the given circumstances, that degree of care for the safety of others, which a person of ordinary prudence would exercise under similar circumstances. It may be the doing of an act which the ordinary prudent person would not have done, or the failure to do that which the ordinary prudent person would have done, under the circumstances then existing.
> NJ CV JI 5.10A

Second Jury Charge

> "Reasonable care means great care; so that the care required to maintain the line and the poles upon which they were carried means great care."[8] .

This statement of the law is sanctioned by the charge in the case of ***N.Y. & N.J. Tel. Co.***, 62 N.J.L. 742, 42 A. 759, in which the Court of Errors and Appeals said: "One factor in the measure of reasonable care is the probable result of negligence. In the use of powerful electric current in the public streets, reasonable care is 'great care'".

Third Jury Charge:

> Whoever uses, controls or manages a highly destructive agency (electric current) is held to a correspondingly high degree of care. ***Anderson v. Jersey City Elec. Light*** *Co.*, 63 N.J.L. 387, 390 (1899); 43 *Atl. Rep.* 654; ***Heyer v. Jersey Cent. Power & Light Co***., 106 N.J.L. 211, 214 (E. & A. 1929); 147 *Atl. Rep.* 452. .

Fourth Jury Charge:

> In accordance with these principles we have held that an electric company owning and controlling a high tension line along a much traveled thoroughfare is under a duty, after knowledge of an accident and trouble along its line at a certain point, *without unreasonable delay* to refrain from transmitting electrical energy at that point which may cause injury to persons lawfully upon the highway, or otherwise to safeguard such persons. And we have further held that the jury may, if the proofs warrant, notwithstanding the employment of standard equipment and standard practices, conclude that there has been a failure to exercise the required degree of care. ***Gereghty v. Wagner***, 117 N.J.L. 174 (E. & A. 1936); 187 *Atl.*

[8] "Great Care" is the level of the duty the plaintiff refers to in its negligence Count of the Complaint

> *Rep.* 152. ***Adams v. Atl. City Elec. Co***., 120 N.J.L. 357, 363-64.

Fifth Jury Charge:

> The care which must be exercised in the handling of a highly dangerous and destructive agency means more than the use of mere mechanical skill and approved mechanical contrivances or appliances or pursuit of methods of operation generally followed in the industry. It includes circumspection and foresight with respect to contingencies reasonably to be anticipated in the light of the current social, industrial and commercial ambience. Thus, it has been said in cases involving electric wires that safety codes represent minimum standards and do not establish the complete duty of the utility under all circumstances. ***Gladden v. Missouri Public Service Company, supra***, 277 *S.W.* 2d at 515; and see generally, ***McComish v. De Soi***, 42 *N.J.* 274, 282-285 (1964); ***Beck v. Monmouth Lumber Co.***, *supra*, 137 *N.J.L.* at 273; ***Adams v. Atlantic City Electric Co***., 120 *N.J.L.* 357, 364 (E. & A. 1938). ***See***, ***Black v. Public Serv. Elec. & Gas Co***., 56 N.J. 63, 77

There are two standards of care here (of which neither is needed for Products Liability), which were overlooked by the lower court.

It is acknowledged that "Great Care" is a high standard. But the supply and distribution of potentially fatal voltages of electricity requires the highest level of vigilance on the part of JCP&L, for the good of the public.

(2) Mr. Wald's Report Provides the "Why and Wherefores" (40a and 322a)

As part of his investigation, Mr. Wald performed a site inspection, relied on industry standards, as well as JCP&L's own tariff. Additionally, he reviewed hundreds of photographs, a half dozen deposition transcripts, and hundreds

of documents produced in discovery. He used his education, and over 30 years of experience handling claims of this nature to conclude: (1) The primary line failed; (2) more likely than not, the failure was due to improper maintenance; (3) the occurrence caused a dangerous amount of voltage to enter the Weiss home; and (4) this dangerous amount of voltage caused the fire ignition at more than one point of origin. Frankly, the defense expert report agrees with this assessment save finding number 2. On that issue, whether Mr. Wald ignored the prior inspections as claimed by the defense (*and denied by the plaintiff*) is a subject for cross examination. Furthermore, whether there were adequate inspections is a disputed material fact and was improperly resolved via summary judgment.

With regard to the inspections, in his Rebuttal Report (**332a**), Mr. Wald points out that JCP&L's Corporate Designee has no knowledge concerning an infrared camera inspection. This fact unto itself could lead a jury to find that "Great Care" was lacking. In his initial report (**40a**) and rebuttal report (**332a**), Mr. Wald also points out that the defense ignored the electrical anomalies which took place after JCP&L's February 2022 inspection but prior to the fire at issue. These incidents would have placed JCP&L on notice of a potentially defective condition. In fact, frayed wires remained as depicted in photograph 5 in Mr. Wald's Report. **47a**.

Mr. Wald's report explains further, with support, that poor maintenance was the most likely cause of the line failure:

1. Prior problems existed and reported by the Weisses to JCP&L:

> The Weiss's had experienced three power line issues in front of their house in the year preceding this fire. All of them occurred during rain storms. The first was on May 8, 2022. Mr. Weiss observed a bright flash and the power went out. JCP&L restored power and reported that a tree branch had contacted the line. In June or July of 2022 Mr. Weiss once again observed a bright flash and the power went out. He later observed tree branches being trimmed in front of his home. On April 24, 2023, five days before the subject fire, he observed a bright green and white flash from the power lines. The lights in the home got bright and dim but they did not lose power. On the day of the subject fire Mr. Weiss heard what he described as a loud "power surge noise" and once again saw a bright green and white flash at the power lines. He then heard a boom sound from the basement of the home. When he looked in the basement he saw fire at the service panel. He also observed a power line down in front of the house. As he evacuated people and pets from the home, he observed sparks flying out of a receptacle outlet in the kitchen. He also reported that his wife's cell phone wire and a baby monitor had exploded. ***See,*** M Wald Report**,** at **42a**.

2. JCP&L personnel further testified that there were "outage reports at this location on 8/26/19, 8/4/20 and 7/9/21. On 11/15/21 there was a report of an explosion on another part of this system nearby." **42a**.

3. The fact that a high-voltage power line broke, with no evidence of any tree branches or other objects in the area, demonstrates conclusively that this power line was in a seriously degraded condition. Power lines do not simply "break and fall down" without existing damage. The bright flashes observed during rainy conditions further demonstrate that deficiencies were present on these lines. **43a.**

4. It is noted that even after this event and the associated repairs, a damaged high voltage line was still present (see photo 5). **47a**.

5. Of course, as mentioned above, "a properly maintained power line should never just break and fall down without a significant impact from some foreign object. No such object caused this line to break". **43a**.

6. The multitude of previous failure events, and the damage that was evident on another line after this incident, demonstrates the poor maintenance present on these lines prior to this incident. **43a.**

7. Finally, Mr. Neary reports that JCP&L inspected the subject lines on February 21, 2022. This is before the repeated flash incidents that the Weiss's observed before the subject incident. JCP&L's corporate designee, Mr. Zarzuela, also testified that JCP&L contracts out routine infra-red inspections of its power lines but they do not have any records of such inspections being done on the lines in front of the Weiss residence. ***See,*** M. Wald's Rebuttal Report at **332a**.

Given the above observations and conclusions, in conjunction with the above common law standard of care, a jury could conclude that no intervening causes contributed to the failure: no tree limbs, no lightning, no rodents, no heavy winds. Furthermore, a jury would be charged that the inspection 14 months before the fire is not conclusive evidence concerning whether JCP&L was negligent (An inspection that is flawed, on its face, because the infrared portion of the inspection may have never taken place, as JCP&L has been unable to produce records of such

an inspection). Finally, the jury could conclude that the section of the wire that failed was in dire need of replacement given the prior incidents (which allegedly occurred after the alleged competent inspection). The fraying wires and the multitude of splices (indicating prior repairs) were present in the area of failure. It is not difficult for one to imagine that a jury could conclude this failure was an accident waiting to happen and that the requisite care was not given or provided or observed.

Given the above standards and the "why and "wherefores" provided by Mr. Wald it should be decided that the expert opinion(s) provided by Mr. Wald is not a "net opinion".

B. The Lower Court Misapplies the Findings in *Funtown* to Support its Own Opinion (438a)

In its Statement of Reasons, the lower court went out on its own[9], to find a case that supported its opinion. It cited and discussed ***Funtown Pier Amusements, Inc. v. Biscayne Ice Cream,*** 477 NJ Super. 499 (App. Div. (App. Div. 2024). **438a**. Neither party cited this case in their original submissions. While the Appellant/Plaintiff submitted that the case was not applicable in its Brief in Support of the Motion for Reconsideration, JCP&L did not state otherwise. Like the case at hand, ***Funtown*** is a subrogation case and the opinion focused on the standards relied upon by the expert. However, it is diametrically the opposite of this case. In ***Funtown,*** Chris Graham, the electrical expert went beyond the tariff requirements

[9] It is conceded that a court is permitted to do so.

for the electrical utility and attempted to create a broader duty for the utility based on what he thought would be a prudent practice for the utility. This duty would require a utility to inspect connections within in the domain of the customer. His attempt to expand the utility's duties was not based on industry norms, but a personal preference. Conversely, Mr. Wald is opining that the utility failed to meet the baseline requirement of the voltage within JCP&L's own tariff standard. He does not seek to enhance that standard as was attempted in ***Funtown.*** Furthermore, the lower court's reliance on ***Funtown***, for whatever reason, does not obviate the common law standard of "Great Care" as established by case law in this jurisprudence.

For the reasons set forth above, it is respectfully submitted that the lower court erred in deciding that Michael Wald's report was a Net Opinion which caused the Court to Dismiss All Claims. As such, this Court should reverse the Orders barring Mr. Michael Wald's reports and Certification and testimony and remand this matter for Trial.

POINT III

The Lower Court Erred in Barring Michael Wald's Certification from Consideration (500a and 487a)

After the Appellant filed its Motion for Reconsideration, Defendant, JCP&L filed a Cross-Motion to Bar Michael Wald's Certification. **466a**. The lower court, without hearing oral argument, entered the Order granting the Motion to Bar the Certification. **500a**. It is the Appellant's position that this Certification should not have been barred from consideration.

On this issue, the Appellant relies, in part, on ***McCalla v. Harnischfeger***, 215 NJ Super. 160 (1987).). In ***McCalla***, the Appellate court determined that the trial court erred in disallowing an expert to testify about matters which naturally flows from within the four corners of the expert's report. The Appellate court went on to say: "When an expert's report is furnished, 'the expert's testimony at trial may be confined to the matters of opinion reflected in the report.' ***Maurio v. Mereck Construction Co. Inc.***, 162 *N.J. Super.* 566, 569 (App.Div.1978). However, the logical predicates for and conclusions from statements made in the report are not foreclosed."

Citing Judge Furman in ***Hall v. Zuckerman***, 202 NJ Super. 455, 569 (App. Div. 1978), the ***McCalla*** court went on to state:

> Although the trial judge is given great discretion to determine the appropriate sanction for a breach of the discovery rules, ***see R***. 4:23, "the sanction . . . must be just and reasonable." ***Brown v.***

Mortimer, 100 *N.J. Super.* 395, 401 (App.Div.1968). Ordinarily a court should not order sanctions if there is no "design to mislead" or surprise and there is an "absence of prejudice which would result from the admission of the evidence." ***Westphal v. Guarino***, 163 *N.J. Super.* 139, 146 (App.Div.1978), aff'd o.b., 78 *N.J.* 308 (1978). ***See also, Brown v. Mortimer****, supra*, 100 *N.J. Super.* at 401-402.

In the case before us, much as in ***Hall v. Zuckerman,*** *supra*, when the net opinion was given by the expert, the adversary would have been permitted by interrogatory and deposition to discover the basis for the expert's opinion. *Evid.R. 57* provides that "a witness may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts and data, unless the court requires otherwise." Yet the rule continues: "The witness may in any event be required to disclose the underlying facts or data on cross- examination." Since this inquiry was open to plaintiff, it should not have been foreclosed to defendant on direct examination. The trial judge's limitation on Schwalje's testimony to a mere rebuttal, without foundation, of plaintiff's expert's report was substantially worthless and lacked credibility and conviction; it required "factual underpinning." ***Hall v. Zuckerman****, supra***,** 202 *N.J. Super.* at 459.

Since the jury here determined that the crane was defectively designed, the issue of a code violation was critical. Had the expert been permitted to testify concerning such lack of violation with specific

> reference to applicable codes, a verdict for defendant was not inconceivable. Although Defendant should have provided a supplemental and more detailed report, **Plaintiff had no right to eschew discovery and then object to the admission of the materials that were fairly obtainable through interrogatories or depositions, and which logically flowed from the expert report already provided.** We determine that this error was "clearly capable of producing an unjust result," *R.* 2:10-2. We consequently must reverse the judgment and remand this matter for a new trial, notwithstanding the considerable time and expense already invested by the parties in this case. ***McCalla*** at 171-172 (emphasis added).

A review of the Certification by Mr. Wald shows that only paragraphs 12-13 of Mr. Wald's certification go to the merits of his opinions. **322a**. These paragraphs are well within the four corners of Mr. Wald's original report. He merely states an industry standard set forth by ANSI and the specific tariff section that the defendant violated. There can be no prejudice to the defendant since JCP&L presumably knows its own tariff and knows the standards of the industry standard to which they belong. Certainly, a deposition, which the defendant voluntarily waived, (***See***, **374a** at 1/27/25, 6:17 pm) would have flushed these points out, if needed. As stated above, a party cannot eschew discovery opportunities, then object to the admission of materials which were fairly obtainable through interrogatories **or** depositions, and which logically flows from the expert report already provided. With

the opportunity to depose Mr. Wald, and the absence of surprise and prejudice, the certification should have been allowed.

For the reasons set forth above, it is respectfully submitted that the lower court erred in barring the Certification of Mr. Wald from consideration at Trial. This court should reverse the Order barring Mr. Wald's Certification and remand this matter for Trial.

POINT IV

The Lower Court Erred in not Conducting a N. J. Rules of Evidence 104 Hearing (485a and 487a)

In its brief to Motion for Reconsideration, the Appellant requested that the lower court conduct a ***N.J.R.E.*** 104 hearing to determine the admissibility of Mr. Wald's testimony. The lower court declined to do so under the rationale presented in the Statement of Reasons for the denial of the Motion for Reconsideration. **498a.** It is the Appellant's position that the lower court should have conducted an N. J. Rules of Evidence 104 hearing if the soundness of Mr. Wald's report was in question.

In the case of the case of ***Nardi v. Rbb Enters***., DOCKET NO. A-1243-14T4, 2016 N.J. Super. Unpub. LEXIS, 1973 (N.J. Super. Ct. Aug. 26, 2016) (copy attached at **476a**), the court determined that when a trial level court has concerns of a net opinion, an ***N.J.R.E.*** 104 hearing should be conducted.

> We note our Supreme Court has cautioned against barring an **expert report**, particularly if doing so will be dispositive of a case, when the **expert** has not had the opportunity to explain his opinions through testimony.
>
> Although the parties did not request a *Rule* 104 hearing, we hold that it was plain error for the trial court not to conduct an evidentiary hearing in order to determine the reliability of plaintiffs' **expert** testimony. We fully agree with the Third Circuit's

> observation in ***In re Paoli [R.R. Yard PCB Litig.]***, 916 F.2d [829,] 854 [3d Cir. 1990] (internal citations omitted):
>
> The adversarial process upon which our legal system is based assumes that a fact finder will give the parties an adequate opportunity to be heard; if it does not, it cannot find facts reliably. Thus, the detailed factual record requirement, firmly entrenched in our jurisprudence, requires adequate process at the evidentiary stage, particularly when a summary judgment may flow from it.
>
> Moreover, although the need for a hearing is remitted to the trial court's discretion, in cases in which the scientific reliability of an expert's opinion is challenged and the court's ruling on admissibility may be dispositive of the merits, the sounder practice is to afford the proponent of the **expert**'s opinion an opportunity to prove its admissibility at a *Rule* 104 hearing.
>
> ***Kemp ex rel. Wright v. State***, 174 N.J. 412, 432-433, 809 A.2d 77 (2002) (alteration in original).

The case at bar is significant with over $1 Million in damages. To avoid the obviation of a claim owing to gatekeeping duties, which should otherwise be decided by a jury, our Court rules provide for a ***N.J.R.E***. 104 hearing. The purpose of a ***N.J.R.E***. 104 hearing is to fulfill the court's gatekeeping function, ensuring that only reliable and relevant expert testimony is presented to the jury. During the hearing, the court evaluates the expert's qualifications, the methodology used, and whether the testimony is based on sound scientific principles or reliable data. This

process allows the court to exclude testimony that is speculative, lacks factual support, or is otherwise unreliable. ***State v. Torres***, 183 N.J. 554, ***State v. J.R.***, 227 N.J. 393, ***State v. Canfield***, 470 N.J. Super. 234. Depending on the results of such a hearing, the court could effectuate limited admissibility pursuant to ***N.J.R.E.*** 105. Further, such a hearing would complete the record for appellate review.

A ***N.J.R.E*** 104 hearing would have allowed the court to explore the standard(s) raised by Mr. Wald relative to the tariff infraction and the industry standards[10] he raised. The lower court could have asked Mr. Wald about his lengthy career testifying about electric utilities. Inquiry could have been made into why Mr. Wald believed the inspections made by JCP&L were deficient. In short, the lower court could have availed itself to all of Mr. Wald's opinions and findings.

It seems logical that when a judge makes a matter of law finding on an expert report that makes, in the court's opinion, every one of the plaintiff's causes of action fatal and there is at least some room for discussion on the issues, a ***N.J.R.E*** 104 hearing should be utilized. Unfortunately, the undersigned is old enough to remember when ***N.J.R.E*** 104 hearings would take place during a trial. But now, with the advent of Zoom hearings, which makes the hearings cost efficient and practical, there really is no reason not to conduct such a hearing.

[10] A hearing would have been especially important in light of the fact that JCP&L declined to take Mr. Wald's deposition.

Moreover, ***N.J.R.E.*** 105 allows for the court to parse out portions of the expert report. If the lower court wanted to parse out that portion of Mr. Wald's report which dealt with unreasonably dangerous voltage and causation it could have done so.

To be clear, for all the reasons set forth in this brief, the Appellant believes the report and background of Mr. Wald exceed the necessity of a ***N.J.R.E*** 104 hearing. However, if some level of doubt exists, which appeared to have for the lower court, then a ***N.J.R.E*** 104 hearing should have taken place to satisfy the judge's concerns and help build a record so the appellate court may make the most informed decision possible.

For the reasons set forth above, it is respectfully submitted that the lower court erred in not conducting a ***N.J.R.E*** 104 hearing. As such, this Court should reverse the Order barring Michael Wald's report and testimony in this matter and remand this matter for Trial.

POINT V

The Trial Court Erred in denying Plaintiff's Request for *Res Ipsa Loquitur*. (453a and 430a)

In Appellant's Motion for Partial Summary Judgment, NJM presented the alternative of finding that *Res Ipsa Loquitur* applied in this matter if the lower court could not support a finding in favor of Products Liability. **263a**. The lower court ruled that *Res Ipsa Loquitur* was not applicable. **453a and 449a**. The lower court did not even discuss the issue in its ruling on the Motion for Reconsideration.

If this Honorable Court does not find that Products Liability applies, then it is submitted that *Res Ipsa Loquitur* be found applicable in this case.

> "One exception to the necessity for an expert witness to establish the standard of care and deviation is recognized when the doctrine of *res ipsa loquitur* is applicable. That doctrine creates an inference of negligence and can be invoked only where the facts and circumstances are such that furnish reasonable grounds for the inference that "if due care had been exercised by the person having control of the instrumentality causing the injury, the mishap would not have occurred." ***Bornstein v. Metropolitan Bottling Co.***, 26 *N.J.* 263, 269, 139 *A.*2d 404 (1958).

Mr. Wald's report indicates, when referring to JCP&L employees' testimony: "They did not observe the presence of any tree branches or other foreign materials in the area that could have impacted the lines and although it was raining there were not any high winds, lightning or other adverse conditions present." **42a**.

Since there is no apparent cause for the wire's failure[11], the utility has an obligation to explain to the jury the cause of the wire's failure. Public utilities do not enjoy a general tort immunity. ***Weinberg v. Dinger***, 106 N.J. 469, 472, 524 A.2d 366 (1987). As such, this is another issue for a factfinder to determine.

For the reasons set forth above, the Appellant submits that the lower court erred in denying the applicability of *Res Ipsa Loquitur* in the instant matter. As such, the Order denying the Motion for Partial Summary Judgment on the issue of *Res Ipsa Loquitur* must be reversed, and this matter by remanded for Trial.

[11] The defendant claims Neary's report cannot be used to refute these arguments. **820a**.

POINT VI

The Lower Court Erred in Entering an Order Declaring that Michael Wald was not Competent to Testify an Expert. (428a and 485a)

One issue the lower court appears to agree with the Appellant is that Mr. Wald is competent to testify as an electrical expert. In the Statement of Reasons, the court states: "While Wald is experienced in electrical engineering…" **437a**. And yet, the lower court signed the Order holding that Mr. Wald's credentials did not rise to the level of competency to testify. The Order in pertinent part bars Mr. Wald "from testifying at trial based on his lack of qualifications" **429a**.

The Appellant brought this inconsistency to the lower court's attention in the Motion for Reconsideration.. In the lower court's Statement of Reasons for denying the Motion for Reconsideration, Judge Pawar recognizes Mr. Wald's qualifications but makes no effort to correct this inconsistency. **497a to 498a.**

For the reasons set forth above, it is respectfully submitted that the lower court erred in declaring that Michael Wald's was not competent to testify at Trial. As such, this Court should reverse the Orders barring Mr. Michael Wald's reports and Certification and testimony and remand this matter for Trial

POINT VII

The Trial Court Erred in Denying the Cross Motion to Compel the Deposition of Robert Neary. (428a and 430a)

Appellant made numerous attempts to depose defense expert, Robert Neary. During several occasions, the discussion between counsel became contentious. As a result, the Appellant filed a Cross-Motion to Compel the deposition of Mr. Neary. **249a**. Since the lower court granted defendant's motion for summary judgment, it deemed this issue moot. **428a** and **452a**. The lower court did not address the issue in its Order and Statement of Reasons for denying Appellants' Motion for Reconsideration. **485a and 487a.**

If this Honorable Court grants Appellant's relief concerning the Products Liability claim and remands this matter for damages, then the issue remains moot.

Otherwise, this issue is germane because JCP&L relied on Mr. Neary's report to support its Motion for Summary Judgment. More importantly it is clear that the lower court relied on this Mr. Neary's to support its decision, particularly concerning the issue of inspections.

Before producing its expert report late, JCP&L requested a short extension for producing its expert report, with a promise to "extend whatever deadlines you need." **367a**. This extension was granted by NJM's counsel. **366a**.

Discovery in this matter ended on January 11, 2025. **463a**. Prior to the discovery end date, as the parties were preparing for mediation, the attorneys agreed

to take the expert depositions after the mediation if it was not successful. **317a** at ¶ 11. The mediation was scheduled for a date after the close of discovery. As the mediation was not successful, the Appellant proffered Mr. Wald for deposition. JCP&L declined to depose him. **374a** at 1/27/25, 6:17 pm.

The Appellant sought the deposition of JCP&L's expert, Robert Neary. On January 29, 2025, the date of March 4, 2025 was agreed upon. **374a** at 1/29/25 at 11:54 am. The Appellant submitted its Notice of Deposition to defense counsel on February 26, 2025[12]. **377a**. A disagreement between the attorneys ensued relating first to the documents requested to be brought by Mr. Neary to his deposition and then later, relating to the format in which the deposition was to conducted, in-person or via Zoom. **382a through 391a**. Even after JCP&L filed their Motion for Summary Judgment, the Appellant made multiple attempts to reconcile the issue of the need to depose Mr. Neary. **392a through 404a**. Mr. Neary was never presented for deposition in this matter.

In its Motion for Summary Judgment, JCP&L relied on the report of Mr. Neary in supporting its position relating to the line inspections performed by JCP&L. **34a through 35a.** More importantly, the lower court also relied upon Mr. Neary's report in granting summary judgment in favor of JCP&L. In its Statement of Reasons, the lower court stated:

[12] Owing to an unexpected death in the undersigned's family, the Notice of Deposition did not go out sooner.

> JCP&L has provided evidence showing that its wires were inspected in compliance with New Jersey BPU standards, with the most recent inspection occurring just fourteen (14) months prior to the fire. Additionally, JCP&L's expert, Neary, has explained that damage to power lines could occur between inspections, such as from external factors like rodents or lightning." **443a to 444a**.

Relying on a defense expert's report when the expert's deposition was promised and then withheld, is manifestly unfair.

Notwithstanding, a deposition would have allowed Appellant to have Mr. Neary clarify his claim with respect to the soundness of the inspection(s). For instance, Mr. Neary claims that regular visual and infrared inspections have taken place, but he cites no standard as to what the intervals are to take place. Furthermore, JCP&L's own corporate designee, Samuel Zarzuela, testified that a third-party vendor performs the infrared inspections. Mr. Zarzuela did not know who the third-party vendor was, nor did he know when those infrared inspections even took place. **328a**. The testimony of a Corporate Designee is binding on a party. Mr. Neary's deposition would have made him reconcile his opinion that the inspections where competent in light of these inconsistencies.

Deposition examination on the issue of inspections can create a plethora of conditions and situations that may give a jury pause. For instance, both experts present photographs of fraying primary conductors in an area where there were several complaints prior to the inspection took place. ***See***, M. Wald Report at **47a** and R. Neary report at **220a**. Several splices are at this location as well. These fraying

wires are in close proximity to where the primary failure took place. This undisputed fact, together with no affirmative proof from JCP&L to support the "rodent, tree or lightning strikes" theories, creates an inference that these inspections were less than competent and were therefore incomplete. Rodents either die or leave teeth marks. Tree limbs are tangible and are left on site if they cause a problem. Lightning strikes are recorded by weather bureaus. Mr. Jamison's report indicates there was no lightning strike within five miles of the loss site. ***See***, STRIKEnet Report, **271a.** No such proofs have been put forward on any of these issues. Plaintiff was prevented from challenging Mr. Neary's findings as to these issues at a deposition.

Furthermore, Mr. Neary's position on the entire methodology of JCP&L's inspections could have been questioned during a deposition. According to JCP&L's own corporate designee, the inspection is performed by a single person driving along at street level looking up at wires. **328a**. The NJBPU does not indicate that this inspection should be done by only one person. A jury could find that not having a driver while another person inspects is a negligent method[13]. Further, no equipment is utilized to perform such an inspection. A pair of binoculars with 3x or 5x magnification would be beneficial. Even 2x magnification would allow for twice as good a review. Again Mr. Neary should have been questioned on this issue.

[13] In ***PCIC v. PSEG***, Superior Court of New Jersey, Law Division, Civil Part, Docket No.: MER-L-343-11, the corporate designee for PSE&G testified that two individuals conduct the visual inspection. One individual drives, while the other inspects. **341a**.

All Mr. Neary knows is that an inspection took place 14 months prior. He has no first-hand knowledge of the inspections, nor of the inspector who conducted them, and his report lacks any specificity on the mechanics of the inspections. His report and the validity of his opinions were taken at face value. Our adversarial litigation procedures allow for a deposition so a proper cross examination can be completed in the search for the truth. That opportunity was denied.

For the reasons set forth, it is respectfully submitted that the lower court erred in denying Appellant's Cross-Motion to Compel the deposition of Robert Neary. This court should reverse the Order and remand this matter for Trial.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the lower court erred in

1. Denying Plaintiff's Cross-Motion on the Products Liability claim;
2. Finding that Michael Wald's Report was a Net Opinion which caused the Court to dismiss all claims;
3. Not conducting a *N.J.R.E* 104 Hearing;
4. Barring Michael Wald's Certification;
5. Denying NJM's Request for *Res Ipsa Loquitur*;
6. Entering an Order declaring that Michael Wald was not competent to testify as an expert; and
7. Denying NJM's Cross Motion to Compel the Deposition of Robert Neary.

The Appellant respectfully requests that this Court find that the lower court erred on all of the above issues and the Orders of April 22, 2025 and May 30, 2025 be reversed and this matter be remanded for Trial.

Respectfully submitted,

CRAWFORD SLATTERY

By: *s/ Dennis J. Crawford*
DENNIS J. CRAWFORD

Dated: 8/27/2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-003407-24

NEW JERSEY MANUFACTURERS INSURANCE GROUP A/S/O JOSEPH AND CLAIRE WEISS Plaintiffs	:	SUPERIOR COURT OF NEW JERSEY LAW DIVISION MORRIS COUNTY DOCKET NO: MRS-L-1632-23
v.	:	
	:	SAT BELOW
JERSEY CENTRAL POWER & LIGHT, INC. Defendant	:	HON. VIJAYANT PAWAR, J.S.C.
		CIVIL ACTION

BRIEF OF DEFENDANT/RESPONDENT, JERSEY CENTRAL POWER & LIGHT

RUDOLPH KAYAL & ALMEIDA
Counselors at Law, P.A.
Atlantic Corporate Center
2317 Highway 34, Suite 2-C
Manasquan, NJ 08736
TEL # (732) 449-0190
srudolph@rudolphkayal.com
Attorneys for Defendant
Jersey Central Power & Light

On The Brief

STEPHEN A. RUDOLPH, ESQ.
(034441994)

DATED: September 25, 2025

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PRELIMINARY STATEMENT

For years, plaintiff, New Jersey Manufacturers (NJM), has been searching for a theory of liability for this fire subrogation case. This is a simple negligence case involving a downed power line and a fire at a residential home. However, plaintiff's scattershot search for a legal theory has meandered from negligence, to product liability, and, ultimately, coming to rest on *res ipsa loquitur*, after finally realizing it cannot prove negligence or a "product defect" against defendant, Jersey Central Power & Light (JCP&L).

On April 29, 2023, a primary wire broke, causing it to come down and make contact with another wire, sending irregular voltage into a residential home insured by NJM. Plaintiff's liability expert, Michael Wald (Wald), opined that JCP&L was negligent for failing to maintain the primary wire. That is the extent of Wald's opinions. He gives no product liability opinions, and he does not opine that JCP&L violated any specific industry standards or regulations.

The evidence below established that JCP&L inspected the subject wires fourteen months before the fire as part of its regularly-scheduled inspection program that occurred every five years. Wald does not opine that the inspection program should be different or that JCP&L should conduct inspections more frequently than every five years. The Trial Court properly barred Wald's

inadmissible net opinion (negligent maintenance) and granted JCP&L summary judgment motion on liability.

PROCEDURAL HISTORY

JCP&L generally accepts plaintiff's Procedural History, but adds the following.

By Order dated September 27, 2024, plaintiff's expert reports were to be served by November 8, 2024. (Pa464). Plaintiff served a liability expert report from Michael Wald (Wald) dated October 24, 2024. (Pa041). After the deadline to serve expert reports, plaintiff served a rebuttal report from Wald dated December 31, 2024. (Pa332).

On January 11, 2025, the discovery end date expired. On March 14, 2025, JCP&L filed its summary judgment motion on liability and motion to exclude Wald. (Pa025). The motion was filed because the trial date was May 5, 2025. On April 1, 2025, plaintiff filed an opposition to JCP&L's motions. (Pa249). Now recognizing the weaknesses of Wald's report, plaintiff attached as an exhibit a four-page "Certification" from Wald, which was, in reality, a new, late expert report with new opinions filed on e-courts only that was filed four months after the discovery end date and 35 days before the May 5, 2025, trial date. (Pa322). The late report was signed by Wald on March 31, 2025. (Pa325).

Plaintiff did not amend its answers to interrogatories to serve this new, late Wald report, nor did plaintiff supply a Certificate of Due Diligence. Plaintiff did not file a motion to re-open discovery to serve this late report. It was merely uploaded to e-courts as an exhibit.

Plaintiff's opposition did not raise the issue of "breach of warranty," as noted by the omission in its Table of Contents. (Da1). Similarly, in its motion for reconsideration, plaintiff failed to raise the issue of "breach of warranty," as noted by the omission in its Table of Contents. (Da3). In fact, plaintiff admits in its brief that its breach of warranty claim was an "ISSUE NOT RAISED" below. (Pb 021).

Procedurally, plaintiff's argument that electricity is a "product" is merely a theoretical and academic argument because Wald gives no product liability opinions and the matter below was never litigated as a product liability case under the Product Liability Act (PLA). And since Wald never gave product liability opinions, JCP&L never retained product liability experts. Negligence cases are defended very differently than product liability cases. As such, JCP&L does not believe the issue of whether electricity is a product under the PLA is properly before this Court.

STATEMENT OF MATERIAL FACTS

Plaintiff's complaint alleges the following: Count I-Negligence; Count II-Strict Liability; Count III-Res Ipsa Loquitur; and Count IV-Breach of Warranty. (Pa001).

In Count II, plaintiff broadly alleges that there was "defective electricity," (Pa005, ¶32), and a "defect in the electricity." (Pa005, ¶31). Plaintiff does not allege that the JCP&L electricity was a design defect, manufacturing defect or had inadequate warnings, nor does plaintiff mention the PLA.

During discovery, plaintiff took the unrestricted depositions of four JCP&L witnesses. No limitations were placed on these four JCP&L depositions. Through discovery and depositions, it appears that a JCP&L overhead primary wire simply broke and fell onto lower-level electrical wires, causing an over-voltage to enter the Weiss home.

Plaintiff relies on the expert report from Wald. (Pa041). In his report, Wald acknowledged that the JCP&L wires had been previously damaged by external forces, when he stated: "It is therefore reasonable to conclude that these lines had been damaged during one or more of the numerous previous failure incidents but had not been properly repaired." (Pa043). Wald's singular conclusion was:

> Conclusion – Based on the information presented above, IEI does herein conclude to a reasonable degree of engineering certainty, that this fire was caused by the failure of the JCP&L high voltage line. This line fell

> down and contacted secondary power lines below, thereby sending dangerous voltages into the home, beyond JCP&L's exclusive control, which ignited this fire. This line would not have failed if it had been maintained in proper operating condition. Thus, it is the failure of JCP&L to maintain it [sic] power lines in a responsible manner that is the proximate cause of this fire. (Pa043) (emphasis added).

Plain and simple, Wald's opinion is based solely on negligence – the wire broke because JCP&L negligently maintained the wire. Wald does not opine that the electricity constituted a design defect, manufacturing defect and/or had inadequate warnings. (Pa041). Since he gave no product liability opinions, Wald does not provide any of the mandatory product liability opinions, such as a risk-analysis of alternative designs that are both practical and feasible, or that the product was not reasonably fit, suitable or safe for its intended purpose. (Pa041).

Based on this negligence opinion by plaintiff's expert, JCP&L never retained a product liability expert to give product liability opinions.

In JCP&L's answer filed on October 19, 2023, affirmative defense Number 25 asserted: "If any of plaintiff's claims are governed by the New Jersey Product Liability Act, then the claims in the complaint are barred, in whole or in part, for failing to serve an expert report under the Product Liability Act on issues related to liability, inadequate warnings, design defects, manufacturing defects, proximate cause, economics and/or damages." (Pa20).

Further, Wald does not opine that JCP&L violated any specific industry standards or regulations. (Pa041). Ignoring the fact that JCP&L inspected these wires fourteen months before the fire (as part of its five-year inspection cycle), Wald simply opines that the wire broke because it was not properly maintained: "Thus, it is the failure of JCP&L to maintain it [sic] power lines in a responsible manner that is the proximate cause of the fire." (Pa043).

In Wald's rebuttal report to JCP&L's expert Robert Neary, P.E., (Neary), he opines that, "[i]n conclusion, there is nothing in Mr. Neary's report that would cause me to change the conclusions in my original report." (Pa333). Once again, Wald gives no product liability opinions.

Wald is not a Professional Engineer (P.E.), (Pa049), nor is he a licensed electrician. (Pa049). Wald has a 1977 college degree and a 1983 master's degree in electrical engineering. (Pa049).

Wald was deposed on January 20, 2025, in another fire subrogation case involving the same parties (NJM and JCP&L) and same law firms (Crawford & Slattery and Rudolph, Kayal & Almeida), entitled *NJM v. JCP&L*, MON-L-2269-22. (Pa052). Wald testified that he is not a Professional Engineer or a licensed electrician. (Pa055, page 11). He has no known certificates or licenses in any vocational field. (Pa055, page 11). Wald has never been employed as an

employee for any electric utility company, (Pa059, pages 28-29), or for any electrical contractor. (Pa059, page 29).

Wald has never worked as a lineman or journeyman (lineman) with high-voltage power lines, (Pa060, page 32), and has never been through any type of linemen school or linemen training for working with high-voltage power lines. (Pa060, page 32). Wald has never worked as a "troubleman" handling high-voltage power lines. (Pa060, pages 32-33).

Wald has never performed repairs on high-voltage power lines, (Pa060, page 33), and has never installed high-voltage power lines. (Pa061, page 34). He has never been up in a bucket truck performing repairs on high-voltage power lines or transformers. (Pa061, page 35).

Wald has never designed any product used by any electric utility company. (Pa059, page 29). He has never written any training, safety or operational manuals for utility linemen who work on high-voltage power lines. (Pa060, page 30).

For the last seven years, Wald has worked out of his home in St. Augustine, Florida. (Pa054, pages 7-8). Wald has no private clients – lawyers and insurance companies are his only source of work. (Pa058, page 22).

Wald is the classic "courtroom engineer."

Through discovery, JCP&L has provided documentation that the subject wires were inspected during JCP&L's five-year circuit inspection on February 21,

2022, just fourteen months before the fire, as part of JCP&L's regularly-scheduled circuit inspections of its wires. (Pa192). Thus, the next regularly-scheduled inspection of the subject wires would have been three years and ten months after the fire.

As noted by JCP&L's expert Neary, "JCP&L's inspection procedures and intervals are required to be approved by the Board of Public Utilities for the State of New Jersey." (Pa220).

The New Jersey Board of Public Utilities (BPU) is the State of New Jersey's governing authority over all utility companies in New Jersey. Neary opined that JCP&L satisfied the inspection requirements set forth by the BPU:

> JCP&L conducts regular visual and infrared inspections of its primary electrical systems. Documents provided in discovery show JCP&L was conducting these inspections regularly and there were no deficiencies observed. Between inspections, there can be events that can cause damage to overhead power lines, such as rodent damage or lighting. This damage would not be observed until the next inspection. JCP&L's inspection procedures and intervals are required to be approved by the Board of Public Utilities for the State of New Jersey. (Pa220).

Neary opined that many things can damage JCP&L wires between the five-year inspection periods, such as rodent damage and lightning events. He opined that, "[b]etween inspections, there can be events that can cause damage to overhead power lines, such as rodent damage or lighting. This damage would not be observed until the next inspection." (Pa220).

Wald does not opine that JCP&L should have conducted wire inspections on a different schedule (*i.e.*, every six months or every year), and he does not cite to any standards or regulations about wire inspection intervals.

LEGAL ARGUMENT

I. The Trial Court properly held that Michael Wald's unsupported opinion about negligent maintenance was an inadmissible net opinion. (Pa220; Pa433-435; Pa437;Pa440; Pa498; NJRE 702).

A. Daubert/Accutane standard. In 2018, the New Jersey Supreme Court adopted the expert witness standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). *In re Accutane Litigation*, 234 N.J. 340, 390 (2018). The *Accutane* Supreme Court held that "both our law and the *Daubert* trilogy are aligned in their general approach to a methodology-based test for reliability" because "[b]oth ask whether an expert's reasoning or methodology underlying the testimony is scientifically valid." *Accutane*, 234 N.J at 397 (citing *Daubert*, 509 U.S. at 594-95). The *Accutane* Supreme Court further held:

> We are persuaded that the factors identified originally in *Daubert* should be incorporated for use by our courts. The factors dovetail with the overall goals of our evidential standard and would provide a helpful—but not necessary or definitive—guide for our courts to consider when performing their gatekeeper role concerning the admission of expert testimony. Several are aimed at achieving the same examination for peer acceptance of a methodology (but not the outcome reached from that methodology) described in our earlier opinions. (Citations omitted). *Accutane*, 234 N.J. at 398-99.

In *Daubert*, the Supreme Court clarified the operation and scope of *Rule* 702 regarding scientific testimony. *Milanowicz v. Raymond Corp.*, 148 F. Supp. 2d

525, 530 (D.N.J. 2001). *Daubert* mandated scrutiny of "the scientific validity – and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission." *Daubert*, 509 U.S. at 588-89, 595-96; *Milanowicz*, 148 F. Supp. 2d at 530. *Daubert* compels a three-part analysis: (1) qualification – whether the expert is qualified to speak with authority on the subject at issue; (2) reliability – whether the expert's methodology is sound and whether his or her opinion is supported by "good grounds" and (3) fit – whether there is a relevant "connection between the scientific research or test result to be presented and particular disputed factual issues in the case." *In re Paoli R.R. Yard PCB Litig. (Paoli II)*, 35 F.3d 717, 741-43 (3d Cir. 1994); *Milanowicz*, 148 F. Supp. 2d at 530-31.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L. Ed. 2d 238, 119 S. Ct. 1167 (1999), the Supreme Court re-examined the trial judge's "gatekeeping" function under *Daubert*. See also, *Ebenhoech v. Koppers Industries, Inc.*, 239 F. Supp. 2d 455, 465 (D.N.J. 2002). The Court found that when a party challenges the expert's factual basis, data, principles, methods, or their application, Rule 702's "standard of evidentiary reliability" requires that the trial court determine whether the testimony has "a reliable basis in the knowledge and experience of [the relevant] discipline." *Kumho*, 526 U.S. at 149; *Ebenhoech*, 239 F. Supp. 2d at 465. The Court must "make certain that an expert, whether basing his testimony upon

professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho*, 526 U.S. at 152; see also *Ebenhoech*, 239 F. Supp. 2d at 465-66 (emphasis added).

Daubert, *Kumho* and the Third Circuit in *Paoli II* identified several factors that a Court should consider when determining whether certain scientific methodology is reliable. *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806-07 (3d Cir. 1997); *Ebenhoech*, 239 F. Supp. 2d at 466. These factors include: (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put. *Kannankeril*, 128 F. 3d at 806-07 n.6; *Paoli II*, 35 F. 3d at 742 n.8; *Ebenhoech*, 239 F. Supp. 2d at 466.

B. Net opinion standard. The net opinion rule mandates that experts be able to identify the factual bases for their conclusions, explain their methodology, and demonstrate that both the factual bases and the methodology are reliable. *Townsend v. Pierre*, 221 N.J. 36, 55 (2015); *Landrigan v. Celotex Corp.*, 127 N.J.

404, 417 (1992). The net opinion rule has been succinctly defined as a "prohibition against speculative testimony." *Koruba v. American Honda Motor Co.*, 396 N.J. Super. 517, 525 (App. Div. 2007), *certif. denied*, 194 N.J. 272 (2008); *Grzanka v. Pfeifer*, 301 N.J. Super. 563, 580 (App. Div. 1997), *certif. denied*, 154 N.J. 607 (1998).

The net opinion rule is a mere restatement of the established rule that an expert's bare conclusions, unsupported by factual evidence, is inadmissible. *Townsend*, 221 N.J. at 55; *Buckelew v. Grossbard*, 87 N.J. 512, 524 (1981); *Jimenez v. GNOC Corp.*, 286 N.J. Super. 533, 540 (App. Div.), *certif. denied*, 145 N.J. 374 (1996).

An expert is required to give the "why and wherefore" of his opinion, not just a mere conclusion. *Koruba*, 396 N.J. Super. at 525-526; *Rosenberg v. Tavorath*, 352 N.J. Super. 385, 401 (App. Div. 2002). An expert's conclusion "is excluded if it is based merely on unfounded speculation and unquantified possibilities." *Townsend*, 221 N.J. at 55; *Grzanka*, 301 N.J. Super. at 580. When an expert speculates, "he ceases to be an aid to the trier of fact and becomes nothing more than an additional juror." *Townsend*, 221 N.J. at 55; *Jimenez*, 286 N.J. Super. at 540.

"By definition, unsubstantiated expert testimony cannot provide to the factfinder the benefit that N.J.R.E. 702 envisions: a qualified specialist's reliable

analysis of an issue beyond the ken of the average juror." *Townsend*, 221 N.J. at 55; *Polzo v. County of Essex*, 196 N.J. 569, 582 (2008). "Given the weight that a jury may accord to expert testimony, a trial court must ensure that an expert is not permitted to express speculative opinions or personal views that are unfounded in the record." *Townsend*, 221 N.J. at 55. "A party's burden of proof on an element of a claim may not be satisfied by an expert opinion that is unsupported by the factual record or by an expert's speculation that contradicts that record." *Townsend*, 221 N.J. at 55.

"Expert opinion is valueless unless it is rested upon the facts which are admitted or are proved." *Townsend*, 221 N.J. at 58. The failure of the expert to explain a causal connection between the act or incident complained of and the resulting injury or damage renders the expert's opinion an inadmissible net opinion. *Koruba*, 396 N.J. Super. at 526.

An expert must be able to point to a generally accepted, objective standard of practice and "not merely to standards personal to the witness." *Koruba*, 396 N.J. Super. at 526 (citing *Fernandez v. Baruch*, 52 N.J. 127, 131 (1968)). Otherwise, "[a]n opinion lacking in foundation is worthless," *State v. One Marlin Rifle*, 319 N.J. Super. 359, 370 (App. Div. 1999), and ceases to aid "the trier of fact to understand the evidence or determine a fact in issue." *Koruba*, 396 N.J. Super. at 526 (citing *Landrigan*, *supra*, 127 N.J. at 417)).

Here, Wald ignored the fact that JCP&L inspected these wires on February 21, 2022, just fourteen months before the fire, as part of JCP&L's five-year circuit inspections of its wires. As noted by JCP&L's expert Neary, "JCP&L's inspection procedures and intervals are required to be approved by the Board of Public Utilities for the State of New Jersey." (Pa220).

Wald does not give any "why or wherefore" opinions about his "negligent maintenance" opinion. He merely says the wire broke because of negligent maintenance of the wire. He does not criticize the JCP&L inspection program, nor does he cite to any other inspection schedules or standards that should have been used. This type of unsupported opinion does not assist a jury in any way.

Further, Wald does not opine that JCP&L violated any specific industry standards or regulations. Ignoring the true facts about the JCP&L wire inspections, Wald's inadmissible opinion is that the wire broke because it was negligently maintained. Under *Townsend*, *Daubert and Accutane,* Wald's opinion that the wire broke because of negligent maintenance is not based on any evidence in the record, and Wald just ignores the fact that the wires were inspected on February 21, 2022, just fourteen months before the fire.

The Court's critical gatekeeping role must be utilized to prevent such unsupported opinions from reaching a jury.

The Trial Court properly held that Wald's negligent maintenance opinion was an unreliable and unsupported net opinion.

C. Alleged Prior Calls. The Weiss homeowners have fabricated various alleged telephone calls to JCP&L about power issues at their home. Based on the customer account records and other internal JCP&L documents, Joseph or Claire Weiss called JCP&L on the following dates and for the following reasons:

8/26/2019	No Lights
8/4/2020	No Lights
7/9/2021	No Lights
11/15/2021	Loud sounds; arcing from wires
4/29/2023	Date of Fire (Da4).

JCP&L records show no calls from Joseph or Claire Weiss in 2022 or 2023 (before the fire). Further, the Weiss' cell phone records were subpoenaed, which showed no calls from the Weisses to JCP&L on May 8, 2022 (Mother's Day incident). Plaintiff has not produced any evidence to rebut JCP&L's evidence (cell phone records and customer account records) that there were no calls made by the Weiss' to JCP&L in 2022 or 2023 (before the fire). Once again, plaintiff's evidence (Weiss' claims of telephone calls) is untrustworthy and unreliable.

By way of example, if an alleged eyewitness to a motor vehicle accident claims Driver A had a green light at the intersection, but videos from four Ring cameras in the area clearly show Driver A had a red light, then the "witness" testimony about the green light is untrustworthy and unreliable.

Also, Joseph and/or Claire Weiss are claiming they called JCP&L on May 8, 2022 (Mother's Day) and in June/July 2022 to report a loud "sizzling" sound coming from the power lines near the utility pole, bright lights and power outages. There is a third, similar incident that allegedly occurred on April 24, 2023, just five days before the subject fire. However, Joseph and Claire Weiss admit they did not call JCP&L after this third incident.

Evidence must be reliable and trustworthy. Although the Weisses are free to make up stories about alleged phone calls, their own cell phone records and the JCP&L records disprove their claims and establish that they made no calls to JCP&L in 2022 or 2023 before the fire, and no calls on Mother's Day in 2022.

II. The Trial Court properly barred Michael Wald's late report with new opinions from April 1, 2025, that was uploaded onto e-courts 35 days before trial without a Certificate of Due Diligence and without a motion to re-open discovery. (Pa322; Pa325; Pa489; Pa499-500).

By Order dated September 27, 2024, plaintiff's expert reports were to be served by November 8, 2024. (Pa464). Plaintiff served the expert report from Wald dated October 24, 2024. (Pa041). After the deadline to serve expert reports, plaintiff served a rebuttal report from Wald dated December 31, 2024. (Pa332). On January 11, 2025, the discovery end date expired. On March 14, 2025, JCP&L filed its summary judgment motion and motion to exclude Wald. (Pa025). The trial date was May 5, 2025.

On April 1, 2025, plaintiff filed an opposition to JCP&L's motions. (Pa249). Now recognizing the weaknesses of Wald's report, plaintiff attached a four-page "Certification" from Wald, which was, in reality, a new, late expert report with new opinions filed on e-courts that was filed four months after the discovery end date and 35 days before trial. (Pa322). The new report was signed by Wald on March 31, 2025. (Pa325).

Plaintiff did not amend its answers to interrogatories or discovery to serve this new, late Wald report, nor did plaintiff supply a Certificate of Due Diligence under *Rule* 4:17-7. Plaintiff did not file a motion to re-open discovery to serve this late report. It was merely uploaded to e-courts.

Under these facts, the Trial Court did not abuse its discretion in barring the late report with new opinions, which was uploaded onto e-courts 35 days before trial. It is entirely unfair, and contrary to the Court Rules, to allow a party to fix its expert's deficiencies by slapping a new expert report with new opinions as an exhibit to a summary judgment opposition. And calling it a "certification" is a distinction without a difference – it is a new expert report with new opinions. Due to the discovery end date and impending trial date, JCP&L had no ability or opportunity to rebut the new opinions in the late report, which is inherently unfair. Even if JCP&L did scramble around to try to rebut these new opinions in the late report, plaintiff would most likely have served another rebuttal report.

The Court Rules do not allow, or even contemplate, for new expert reports to be served 30 days before trial and many months after the discovery end date.

III. The Trial Court properly granted JCP&L summary judgment on the alleged product liability claim because plaintiff's expert provided no product liability opinions. (Pa041; Pa333; Pa448-449; *N.J.S.A.* 2A-58C; *N.J.S.A.* 4:19-16; Civil Jury Charge 5.40).

A. New Jersey Product Liability Act. As a preliminary matter, plaintiff's "electricity is a product" argument under the PLA is merely a theoretical and academic argument because Wald gives no product liability opinions and the matter below was never litigated as a product liability case. Based on Wald's report, this has been an unwavering negligence case from Day 1. And since Wald never gave product liability opinions, JCP&L never retained product liability experts.

As such, JCP&L does not believe the issue of whether electricity is a product under the PLA is properly before this Court. If plaintiff had prosecuted a legitimate product liability case below, JCP&L would have retained different experts to defend one or more of the following cases: (1) manufacturing defect; (2) design defect; and/or (3) inadequate warnings. Nevertheless, JCP&L will address the issue because it is raised in plaintiff's brief.

The PLA, enacted in 1987, evidences "a legislative policy to limit the expansion of products-liability law." *Zaza v. Marquess and Nell, Inc.*, 144 N.J. 34, 47 (1996); *Roberts v. Rich Foods, Inc.*, 139 N.J. 365, 374 (1995). "The Legislature intended for the Act to limit the liability of manufacturers so as to balance the

interests of the public and the individual with a view towards economic reality." *Zaza*, 144 N.J. at 47-48.

The PLA provides: "A manufacturer or seller of a product shall be liable in a product liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was not reasonably fit, suitable or safe for its intended purpose because it: (a) deviated from the design specifications, formulae, or performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae, or (b) failed to contain adequate warnings or instructions, or (c) was designed in a defective manner." *N.J.S.A.* 2A:58C-2.

Thus, in any product liability claim, there are only three potential theories of liability for the product: (1) manufacturing defect; (2) inadequate warnings; or (3) design defect. *Zaza*, 144 N.J. at 48; *Jurado v. Western Gear Works*, 131 N.J. 375, 384 (1993). Further, expert testimony is required to establish a defective product under the PLA. *Lauder v. Teaneck Volunteer Ambulance Corp.*, 368 N.J. Super. 320, 331 (App. Div. 2004). Without competent expert testimony to support a product liability claim, those product liability claims necessarily fail. *Omnipoint Communications Enters., L.P. v. Newtown Township*, 219 F.3d 240, 242 (3d Cir. 2000).

Here, Wald does not provide any product liability opinions and he does not opine that there was a design defect, manufacturing defect or inadequate warnings with the electricity. This failure is critical because each of the three product liability defects requires a different legal analysis with different case law, statutes and defenses.

To succeed under a design defect theory, plaintiff must prove "that the product was defective, that the defect existed when the product left the defendant's control, and that the defect caused injury to a reasonably foreseeable user." *Zaza*, 144 N.J. at 49; *Jurado*, 131 N.J. at 384-85; *Becker v. Baron Bros.*, 138 N.J. 145, 151 (1994). "The determination of whether a product is defectively designed centers on the condition of the product at the time it left the hands of the manufacturer." *Saldana v. Michael Weinig, Inc.*, 337 N.J. Super. 35, 48 (App. Div. 2001).

Under the statute, plaintiff has the burden to identify and establish a "practical and technically feasible alternative design that would have prevented the harm." *N.J.S.A.* 2A:58C-3(1). Failure to provide a "practical and technically feasible alternative design" is a statutory defense for manufacturers under *N.J.S.A.* 2A:58C-3(1).

The statute provides: "In any product liability action against a manufacturer . . . for harm allegedly caused by a product that was designed in a defective manner,

the manufacturer . . . shall not be liable if . . . at the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product." *N.J.S.A.* 2A:58C-3(1).

Here, Wald has performed no such analysis. Our Courts have consistently held that "a plaintiff who asserts a design defect products liability claim must prove under a risk-utility analysis the existence of an alternative design that is both practical and feasible." *Hinojo v. New Jersey Manufacturers*, 353 N.J. Super. 261, 276 (App. Div.), *certif. denied*, 175 N.J. 76 (2002); *Cavanaugh v. Skil Corp.*, 164 N.J. 1, 8-9 (2000); *Lewis v. American Cyanamid Co.*, 155 N.J. 544, 571 (1998).

Plaintiff's obligation to prove a practical and feasible alternative design is the "ultimate issue" that will determine a manufacturer's liability. *Hinojo*, 353 N.J. Super. at 276. Further, "the issue upon which most claims will turn is the proof by plaintiff of a reasonable alternative design." *Green v. General Motors Corp.*, 310 N.J. Super. 507, 518 (App. Div.), *certif. denied*, 156 N.J. 381 (1998).

As the Supreme Court has held, "the plaintiff must prove the product's non-conformity with the feasible technology to overcome what is otherwise an absolute bar to recovery." *Cavanaugh*, 164 N.J. at 7. "Importantly, the statute [PLA] does not alter the plaintiff's burden to show defendant's failure to follow a reasonable alternative design." *Id.* at 7.

Wald has not established any of these requirements and standards.

B. Negligence is not recognized as a cause of action under the PLA.

In New Jersey, a product liability action is defined as "any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim, except actions for harm caused by breach of an express warranty." *N.J.S.A.* 2A:58C-1(b)(3); *Sinclair v. Merck & Co.*, 195 N.J. 51, 62 (2008). Put simply, the PLA "encompass[es] virtually all possible causes of action relating to harms caused by consumer and other products." *Sinclair*, 195 N.J. at 65.

New Jersey Courts have consistently held that the PLA no longer recognizes negligence as a viable cause of action for injuries caused by an allegedly defective product. *Tirrell v. Navistar International, Inc.*, 248 N.J. Super. 390, 398 (App. Div.), *cert. denied*, 126 N.J. 390 (1991); *Port Authority of New York and New Jersey v. Arcadian Corp.*, 189 F. 3d 305 (3d Cir. 1999); *Brown ex rel. Estate of Brown v. Philip Morris, Inc.*, 228 F. Supp.2d 506 (D.N.J. 2011); *Reiff v. Convergent Technologies, Inc.*, 939 F. Supp. 573 (D.N.J. 1997). Negligence as a cause of action has been "subsumed" by the PLA. *Universal Underwriters Insurance Group v. PSE&G*, 103 F.Supp.2d 744, 746 (D.N.J. 2000).

Here, Wald only gives one opinion and it is grounded entirely in negligence. (Pa043). If this case suddenly becomes a product liability case, Wald's negligence opinion would be barred because negligence is subsumed by the PLA. At that

point, what is plaintiff left with? Dismissal. Plaintiff cannot serve a "negligence" expert report and then seek damages under the PLA, especially when there are no product liability opinions from any expert.

To this day, JCP&L does not know if it is defending a design defect claim, or a manufacturing defect claim, or a warnings defect claim. That is not JCP&L's fault.

C. Product liability is not strict liability.

Plaintiff incorrectly thinks that, if it can pivot this case into the product liability arena, it will save its case because plaintiff believes JCP&L will be "strictly liable." Product liability claims in New Jersey are not, in any sense, true strict liability cases. One of the only true strict liability cases in New Jersey (with no comparative negligence and no defenses) are under the Dog Bite statute, *N.J.S.A.* 4:19-16. One need only read the PLA statutes and the Model Jury Charges to realize there are many defenses afforded to product manufacturers and many facts that contravene the strict liability plaintiff so desperately seeks here.

For example, the Model Jury Charges have a comparative negligence charge against plaintiff at Charge 5.40(J), which would be counter to an alleged strict liability claim. Also, under the inadequate warnings charge at 5.40(C), the analysis is whether the manufacturer "acted in a reasonable, prudent manner" which is a standard at odds with a so-called strict liability claim.

Further, Model Jury Charge 5.40D-4 sets forth a host of statutory and case law defenses that provide product manufacturers with absolute defenses to so-called strict liability claims. Many of the absolute defenses in the Charge are set forth in *N.J.S.A.* 2A:58C-3, which provides:

> 2A:58C-3 . Exemptions from liability
>
> a. In any product liability action against a manufacturer or seller for harm allegedly caused by a product that was designed in a defective manner, the manufacturer or seller shall not be liable if:
>
> (1) At the time the product left the control of the manufacturer, there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product; or
>
> (2) The characteristics of the product are known to the ordinary consumer or user, and the harm was caused by an unsafe aspect of the product that is an inherent characteristic of the product and that would be recognized by the ordinary person who uses or consumes the product with the ordinary knowledge common to the class of persons for whom the product is intended, except that this paragraph shall not apply to industrial machinery or other equipment used in the workplace and it is not intended to apply to dangers posed by products such as machinery or equipment that can feasibly be eliminated without impairing the usefulness of the product; or
>
> (3) The harm was caused by an unavoidably unsafe aspect of the product and the product was accompanied by an adequate warning or instruction as defined in section 4 of this act.
>
> b. The provisions of paragraph (1) of subsection a. of this section shall not apply if the court, on the basis of clear and convincing evidence, makes all of the following determinations:

> (1) The product is egregiously unsafe or ultra-hazardous;
>
> (2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and
>
> (3) The product has little or no usefulness.
>
> c. No provision of subsection a. of this section is intended to establish any rule, or alter any existing rule, with respect to the burden of proof.

Clearly, a product manufacturer has numerous absolute defenses available to it under the PLA and current case law. That said, the PLA is not a true strict liability statute. Plaintiff's simplistic claim is that, if electricity is a "product," then plaintiff automatically wins because there was a house fire caused by electricity. In other words, plaintiff is hoping it has to do nothing more than show electricity is a product and electricity caused a fire. Clearly, that is wrong on many levels and for many reasons.

D. Interplay with Economic Loss Doctrine.

Although the limited negligent-maintenance opinion from Wald makes this case ripe to resolve under a net opinion analysis, there are undercurrent issues that could develop, in future cases, under the economic loss doctrine in *Alloway v. General Marine Industries, L.P.*, 149 N.J. 620 (1997) and *Spring Motors Distributors, Inc. v. Ford Motor Co.*, 98 N.J. 555 (1985).

If an electric utility company like JCP&L is ever declared to be a "product manufacturer" and its electricity is declared to be a "product" under the PLA, then the legal analysis might, in fact, shift by necessity to an analysis under the economic loss doctrine to bar the tort, product liability and strict liability claims of subrogation insurance companies like NJM. This issue, however, is not before the Court.

IV. Although not properly before this Court, for widespread public policy reasons affecting all electric (and natural gas) utility companies, electricity cannot be classified as a product under the PLA. (Pa445; Pa448-449; Pa497).

A. Electricity is not a product. Items that qualify as products under the PLA can typically be held, touched, boxed, mailed, assembled and placed in boxes or containers that have various on-product warnings, pictograms and owner's manuals. Ladders, microwaves, chainsaws and bicycles are examples of true products that can be sold, boxed, assembled, mailed, held, used and distributed with warning labels and owner's manuals. True products come with an owner's manual where the manufacturer sets forth many pages of safety warnings, instructions and precautions with the product.

Electricity, and natural gas, are not products that can be touched, held, mailed, assembled or taken out of a box. There are no warning labels that can be affixed to electricity or natural gas and there are no owner's manuals that come with electricity or natural gas.

Attempting to place electricity and natural gas into a design defect or a manufacturing defect category will be a pragmatic legal nightmare, resulting in consistently inconsistent Court rulings from trial judges throughout New Jersey, and wildly inconsistent jury verdicts. Further, if electricity is considered a product, then all utilities, such as water and natural gas, from other utility companies will,

by legal necessity, be considered a product thrown under the umbrella of the PLA. Consequently, any broad ruling that electricity and natural gas are products under the PLA would directly and immediately affect JCP&L, PSE&G, Atlantic City Electric, New Jersey Natural Gas, Elizabethtown Gas and South Jersey Gas.

Since there is no way to provide a warning to a customer about electricity, it is inherently unfair to subject JCP&L to the PLA, which provides true product manufacturers with various statutory defenses. JCP&L would not be allowed to benefit from those PLA statutory defenses. Or, conversely, if JCP&L simply places a conspicuous warning at the top of every customer's monthly bill that states "**WARNING/DANGER: Electricity May Cause Injury, Death Or Fires!**," would that immunize JCP&L from all product liability or warnings cases?

Plaintiff cites to a 1982 Law Division case, *Avera v. PSE&G*, 186 N.J. Super. 130 (Law Div. 1982), that makes a peculiar and unscientific distinction between electricity outside the meter versus electricity inside the meter. This is nothing but an indistinguishable distinction. How can electricity right outside the meter (not a product) suddenly become a product four inches away when it is inside the meter – when it is the identical electricity with identical voltage? Why does the meter become this artificial geographic line of demarcation? The voltage is identical on both sides of the meter.

If the rationale for transforming electricity into a product after it enters the meter is based on "customer payment" or "purchasing," then that is clearly no reason to fabricate this geographic fiction. Payment for a product has nothing to do with the right to sue the manufacturer under the PLA. If, hypothetically, Walmart gives away free hair dryers (brand new, in the box) during a promotional event and someone subsequently gets injured with that free hair dryer, that person can still sue the hair dryer manufacturer, irrespective of a sale between the manufacturer and the end-user. Whether the person paid for the hair dryer is immaterial.

Similarly, if a person purchases a chainsaw and lets his neighbor use the chainsaw, and the neighbor gets injured using the product, the neighbor can still sue the chainsaw manufacturer despite not purchasing the chainsaw.

And if "payment" or "purchase" is the driving force, then what happens if JCP&L unilaterally waives the customer payment of the bill that included the electricity from that fire event? Under this scenario, the customer did not pay for the electricity. Is it still a product – even though it went through the meter and there was no payment from the customer? The point is simply that payment or purchasing of a product is immaterial under the PLA and a poor barometer to utilize in this analysis.

Plaintiff relies on the 43-year-old Law Division case of *Avera v. PSE&G*, 186 N.J. Super. 130 (Law Div. 1982), where a trial judge in 1982 held that electricity is a product once it is "placed in the stream of commerce." The trial judge held that, "[w]hile a sale is conclusive as to the placement of the product in the stream of commerce, evidence that an electric company relinquished exclusive control over its product may establish strict liability at a point prior to its running through a meter where charges are computed." Thus, this trial judge is ambiguously saying that electricity may become a product after it goes through the meter – but maybe even before it goes through the meter. That vague, overly broad and confusing ruling does nothing but create uncertainty on this issue and in the utility industry.

And if "relinquishing exclusive control" of the electricity is relevant, which JCP&L denies, then JCP&L never actually relinquishes exclusive control because it can instantaneously cut electrical power to that customer at any time from remote locations. So, although the electricity may be "temporarily available" for use by the customer, JCP&L still has at least partial control because it can remove that "product" from the household at any time in less than one second. Can any other true manufacturer who sells a customer a product take it away from the customer, like JCP&L can do with electricity?

This confusing "meter" distinction in *Avera* and other cases makes no scientific, electrical or engineering sense.

B. Electricity Is Dangerous. Stating the obvious, plaintiff argues that electricity is dangerous. That is common knowledge – not a legal argument. Similarly, natural gas is dangerous and can instantaneously explode.

Electricity is dangerous at all locations – inside and outside the home. Every electrical outlet in a residential home is dangerous and can, without warning, cause injuries or a fire. That is why they sell plastic outlet covers for the potentially dangerous electrical outlets throughout the home. If someone sticks a paper clip into an electric outlet in his/her home, that person can be injured by electrical voltage or current.

Also, uneven or excess voltage can enter a home, which is why every home has panel boxes with circuit breakers that are designed to trip if too much voltage flows into an area of the circuit. The circuit breakers throughout a home are there because it is expected that uneven or excess voltage may enter a home.

Every person who lives in a house or apartment is, at all times, near dangerous electricity in their home or apartment. Electricity is both ubiquitous and vitally necessary. Simply because electricity can possibly be dangerous does not mean: (1) all electric utility companies must be transformed into "product

manufacturers"; (2) reclassify electricity as a product; and (3) place all electrical claims under the PLA statutes, thus eliminating all negligence claims.

And plaintiff's inside-the-meter versus outside-the-meter arguments would only cloud an already foggy standard that would never be applied uniformly or fairly.

V. The Trial Court properly held that *res ipsa loquitur* was not applicable to plaintiff. (Pa449-452).

Tellingly, by arguing *res ipsa loquitur*, plaintiff is acknowledging that it cannot affirmatively prove negligence or a product defect by JCP&L.

Res ipsa loquitur is a Latin phrase meaning "the thing speaks for itself." *Brown v. Racquet Club of Bricktown*, 95 N.J. 280, 288 (1984); *Szalontai v. Yazbo's Sports Café*, 183 N.J. 386, 398 (2005). The doctrine of *res ipsa loquitur* permits an inference of defendant's negligence only when plaintiff proves (1) the occurrence itself ordinarily bespeaks negligence; (2) the instrumentality causing the injury was within the defendant's exclusive control; and (3) there is no indication in the circumstances that the injury was the result of plaintiff's own voluntary act or neglect. *Brown*, 95 N.J. 280, 288-89 (1984); *Szalontai*, 183 N.J. 386, 398 (2005).

The *res ipsa loquitur* doctrine has limitations, and it is well settled that the existence of a possibility of a defendant's responsibility for a plaintiff's injuries is insufficient to impose liability. *Szalontai*, 183 N.J. at 399 (quoting *Hansen v. Eagle-Picher Lead Co.*, 8 N.J. 133, 141 (1951).

As aptly stated by our Supreme Court, "*res ipsa loquitur* is not a panacea for the less-than-diligent plaintiff or the doomed negligence cause of action." *Szalontai*, 183 N.J. at 400. *Res ipsa loquitur* does not shift the burden of proof to the defendant, but rather requires the defendant to provide "an explanation, not

exculpation." *Szalontai*, 183 N.J. at 400 (quoting *Myrlak v. Port Authority of N.Y. and N.J.*, 157 N.J. 84, 95-96 (1999).

Here, a primary wire simply broke, which does not in any sense "bespeak negligence." Wires can break for many reasons – without negligence. As noted above, JCP&L inspected these wires fourteen months before the fire and no issues were noted in the inspection report. And as noted by JCP&L's expert Neary, anything could have damaged the wire after the inspection, such as a falling tree, lightning or various animals, such as squirrels. (Pa220). JCP&L is not negligent for a homeowner's tree falling into the wires, or for lightning strikes on wires, or for squirrels or other animals damaging the wires.

For alleged authority, plaintiff cites to a Mercer County trial judge's opinion in a bench trial from 2011 (*PCIC v. PSE&G*). However, *res ipsa loquitur* was not raised on appeal by PSE&G and the unreported Appellate Division opinion does not discuss, analyze or address *res ipsa loquitur*. If PSE&G did not raise the *res ipsa loquitur* arguments that JCP&L raises here (*i.e.*, JCP&L not negligent for trees falling, lightning or animals), that is PSE&G's issue.

In this case, *res ipsa loquitur* has no applicability. A primary wire can break for many different reasons -- none of which "bespeak negligence" on JCP&L. Plaintiff's last-ditch effort to claim res ipsa loquitur applies is similarly without

merit, and an admission it cannot prove negligence (or even a product defect under the PLA).

VI. A Rule 104 hearing was not necessary because Michael Wald's negligence opinion was short and self-explanatory, and did not need a lengthy court hearing to "further develop" Wald's opinions. (Pa041; Pa333; Pa498).

Wald's opinion was short, concise and limited to negligence ("Thus, it is the failure of JCP&L to maintain it [sic] power lines in a responsible manner that is the proximate cause of this fire.") (Pa043). There is nothing complicated about this opinion. Experts are required to put all their proposed opinions in a report, which then places an adversary on notice of the proposed trial testimony. Plaintiffs cannot use 104 hearings to save their deficient expert, bolster weak opinions or create new opinions altogether. 104 hearings are not designed to salvage a poor or insufficient expert.

Here, plaintiff wants a 104 hearing so Wald can change, alter, add and fix all his deficient opinions. That is not the purpose of a 104 hearing.

VII. Defendant JCP&L was ready, able and willing to produce its expert, Robert Neary, P.E., for a deposition, and the deposition was confirmed until plaintiff's counsel refused to go forward with the deposition. (Pa382-390; Pa401; Pa420; Pa424; Pa498; *R.* 4:14-2; *R.* 4:18-1).

Every deposition in this case was conducted by Zoom. JCP&L was ready, willing and able to produce Neary for his deposition via Zoom on March 4, 2025. Neary is an engineer who resides in Maryland. On February 26, 2025, six days before the deposition, plaintiff's attorney unilaterally changed the Zoom deposition to an in-person deposition at his Camden County office (this is a Morris County case), and propounded a Notice to Produce for Neary to compile documents for the convenience of plaintiff. (Pa378).

Undaunted by his own unreasonable actions, plaintiff's attorney then states in his letter that, if JCP&L and Neary want the deposition to be conducted by Zoom (which is the way it was scheduled all along), plaintiff's attorney demanded that all the documents he was now demanding be delivered to him five days later – by March 3, 2025. (Pa378).

With depositions, *Rule* 4:14-2(a) provides that the "time and place for taking the deposition . . . shall be reasonably convenient for all parties." Further, *R.* 4:14-2(d) provides that, if a party seeks documents for the deposition, the demand must be "made in compliance with and in accordance with the procedure stated in *R.* 4:18-1 for the production of documents and tangible things at the taking of the

deposition." *R.* 4:18-1(b)(2) allows for 35 days (not 5 days) for a party to respond to the demand for documents.

Here, six days before the deposition of an out-of-state expert, plaintiff's attorney (1) changed the deposition from Zoom to in-person; (2) changed the Zoom deposition and demanded that the out-of-state expert appear in-person at his Camden County office – in this Morris County case; and (3) propounded a Notice to Produce on February 26, 2025, and demanded that the documents be produced in five days (by March 3, 2025) – not the 35 days allowed under *R.* 4:18-1(b)(2).

Despite this, JCP&L was still willing to produce Neary for his deposition via Zoom on March 4, 2025. On March 3, 2025, at 12:54 p.m., defense counsel sent an email to plaintiff's attorney reiterating that JCP&L was ready and willing to produce Neary for his Zoom deposition on March 4, 2025. (Pa420). Plaintiff's attorney adjourned Neary's deposition. Plaintiff's attorney could have taken an unlimited deposition of Neary on March 4, 2025. He decided not to. That is not JCP&L's fault. By adjourning Neary's deposition, plaintiff created its own problems.

Finally, Neary is not required to compile and create documents for plaintiff's attorney or to do the work that plaintiff's attorney is expected to do. *Gensollen v. Pareja*, 416 N.J. Super. 585, 593 (App. Div. 2010). Many of plaintiff's demands fit this description. The Appellate Division has held that, "we can think of no

circumstance in which an expert should be ordered to compile or produce nonexistent documents." *Gensollen*, 416 N.J. Super. at 593. The Appellate Division has held that an expert should not be burdened with an obligation "to cull additional information from five years' worth of records or to compel him to create documents, which do not presently exist. . ." *Gensollen*, 416 N.J. Super. at 592. The Court has held that the "discovery rights provided by our court rules are not instruments with which to annoy, harass or burden a litigant or a litigant's experts. *Gensollen*, 416 N.J. Super. at 591.

The Trial Court did not abuse its discretion in denying plaintiff's cross-motion to compel Neary's deposition.

CONCLUSION

For the reasons set forth herein, defendant Jersey Central Power & Light respectfully requests that the Trial Court's rulings as to JCP&L be affirmed in their entirety.

Respectfully submitted,

RUDOLPH KAYAL & ALMEIDA
Counselors at Law, P.A.
Attorneys for Defendant
Jersey Central Power & Light

STEPHEN A. RUDOLPH

DATED: September 25, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No.: A-003407-24 T3

NEW JERSEY MANUFACTURERS INSURANCE GROUP A/S/O JOSEPH AND CLAIRE WEISS Plaintiff/Appellant. v. JERSEY CENTRAL POWER AND LIGHT, INC., Defendant/Respondent.	:	Civil Action On Appeal From: The Superior Court of New Jersey, Law Division, Morris County Docket No.: MRS-1632-23 Sat Below: Hon. Vijayant Pawar

REPLY BRIEF OF PLAINTIFF/APPELLANT NEW JERSEY MANUFACTURERS INSURANCE GROUP A/S/O JOSEPH AND CLAIRE WEISS

DATE SUBMITTED: 10/10/2025

CRAWFORD SLATTERY
619 South White Horse Pike
Audubon, NJ 08106
(856) 310-5550

Attorneys for Plaintiff/Appellant
NEW JERSEY MANUFACTURERS INSURANCE GROUP A/S/O JOSEPH AND CLAIRE WEISS

Dennis J. Crawford, Esquire
Attorney No.: 031001987
E-mail: djc@crawfordslattery.com
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PRELIMINARY STATEMENT

In reviewing the respondent's opposition brief, NJM observes and argues as follows:

1) JCP&L's argument that electricity is not a product is inconsistent with NJ case law and all reported jurisdictions across the country.

2) JCP&L's attempt to distinguish Strict Liability from the PLA is a pretextual argument unsupported by the record.

3) JCP&L or the electric utilities should not be protected from having the electricity they produce and distribute classified as a product under the PLA under our facts.

4) Michael Wald's Opinion is Properly Supported.

5) The issue of the phone calls made by the Weiss' to JCP&L are an issue of credibility.

6) JCP&L was not surprised nor prejudiced by Mr. Wald's Certification.

7) *Res Ipsa Loquitur* can apply in this case.

8) Robert Neary's Deposition should have been Compelled.

9) JCP&L ignores and avoids entirely, certain issues raised by NJM.

LEGAL ARGUMENT:

1. JCP&L's argument that electricity is not a product is inconsistent with NJ case law and all reported jurisdictions across the country.

Electricity is a product. In its effort to influence this court to decide that electricity is not a product, for purposes of a strict liability claim, JCP&L fails to site supporting case law. JCP&L's inability to provide case law (since there is none) is consistent with the quote from ***In re Escalera Res, Co.***, 563 B.R. 336 (Bankr. D. Col. 2017), which states :

> In fact, this Court has been unable to locate any legal authority under Restatement Section 402A suggesting that electrical energy actually metered and delivered to a customer is **anything other than a "product"** for at least tort purposes. (emphasis added).

NJM, on the other hand, cites dozens of cases in jurisdictions which hold that electricity is a product, including New Jersey in the matter of ***Aversa v. Public Service Electric and Gas Co.*** 186 N.J. Super. 120 (Law Div. 1982).

Rather than cite case law, JCP&L attempts to obfuscate the issue by attempting to reverse the ***Aversa*** case with a pseudo-public policy argument laced with uncertainty of when electricity becomes a product - which in their opinion is never. It is NJM's simple position is that if an item is manufactured and can be sold for consumer use, it is a product, which consistent with the PLA.

While JCP&L argues that making electricity a product will create confusion and uncertainty for the courts; history indicates otherwise. That is, since 1982, electricity has been deemed a product in New Jersey.

> Where, however, the electricity is no longer in transmission in the public right of way but has been introduced into the stream of commerce by a sale thereof or *otherwise*, the liability of the electric company is no longer dependent upon a showing of negligence but may be based upon a product liability cause of action unrelated to fault. ***Aversa*** at 135 (String cite omitted).

2. JCP&L's attempt to distinguish Strict Liability from the PLA is a pretextual argument unsupported by the record.

A claim for strict liability under our circumstances ***is*** a Products Liability Claim. As stated by Judge Drier in ***Green v. General Motors***, 310 N. J. Super. 507, 517:

> Under the New Jersey Products Liability Act, *N.J.S.A.* 2A:58C-1 *et seq.* (PLA or the Act), the causes of action for negligence, strict liability and implied warranty have been consolidated into a single product liability cause of action, **the essence of which is strict liability.** (emphasis added).

The essence of the PLA is strict liability. And in this case, NJM, through Count II of its Complaint, made it abundantly clear that there was only one product theory it was pursing - a manufacturing. defect. The language of Count II (with emphasis added) states:

Count II
Strict Liability

…

26. Defendant, at all times material to this action***, sold electricity and placed such product into the stream of commerce*** when said electricity passed through Plaintiff's meter.
27. The electricity was defective and unreasonably dangerous.
28. The electricity reached Plaintiff without any substantial change in its condition.
29. Defendant owed a duty of care to Plaintiff to manufacture and sell electricity in a way that was ***free from defects and fit for its intended purpose***.
30. Plaintiff used the electricity in a way that was intended and expected by Defendant.
31. The defect in the electricity was the direct and proximate cause of the injury and damages suffered Plaintiff.
32. As a direct and proximate result of the defective electricity, plaintiff, NJM, was caused pay the insureds an amount in excess of $700,000.00 for the property damage incurred.
33. As a result of the defectively provided electricity, defendant is strictly liable to plaintiff, NJM.

…

Pa4 through Pa5

The pertinent part of the PLA states:

A manufacturer ***or seller of a product*** shall be liable in a ***product*** liability action only if the claimant proves by a preponderance of the evidence that the product causing the harm was ***not reasonably fit, suitable or safe for its intended purpose*** because it: a. ***deviated from*** the design specifications, formulae, or ***performance standards of the manufacturer or from otherwise identical units manufactured to the same manufacturing specifications or formulae***, or b. failed to contain adequate warnings or instructions, or c. was designed in a defective manner.
N.J. Stat. **§ 2A:58C-2**

The pertinent parts of NJM's expert report states:

> No matter the specific mechanism, the evidence demonstrates that ***improper voltage, far in excess of what is allowed by JCP&L tariffs and industry standards***, was present on both the neutral and one or more of the line conductors, entered this home, beyond JCP&L's exclusive control and caused this fire. (emphasis added)

Pa43

The reality is that JCP&L waived its right to depose plaintiff's expert and asserts surprise, notwithstanding the pleadings averring a Strict Liability claim which asserts the sale of a product in a defective condition[1]. This surprise is claimed even in the face of the Complaint which copies pertinent language as set forth in the PLA. Even when NJM's expert concludes that there was an improper voltage, far in excess of their own tariff, JCP&L disingenuously claims surprise. Moreover, for nearly 40 years there has been a New Jersey case which holds that strict liability applies to electricity that leaves the control of the utility and is headed into the home of the consumer for their use.

As an aside, the undersigned questions whether another expert, a so called "products" expert, would have been retained. Their expert, Robert Neary, is a nice man. I have presented him as an expert at trial in Federal Court in the Eastern District of Pennsylvania in a products liability case. He ***is*** a products expert.

[1] Although not evidential, NJM asserted a strict liability claim during mediation, which preceded JCP&L's waiver of Mr. Wald's deposition.

Mr. Neary works for SEA, Ltd., a large forensic engineering concern in Maryland. However, JCP&L has not proffered what Mr. Neary or any expert could possibly say that would refute the underlying fact that a primary line fell and energized a secondary line. A factual sequence they admit.

It is worth noting that although JCP&L admits the increased voltage went through the Weiss' meter, they never argue against the assertion that the voltage surge did not exceed their own tariff limit. There is no explanation, from the trial court, or JCP&L, given stating why the tariff was not a sufficient standard. Given that JCP&L's tariff is a public document which is a law for the utility to abide, then even a Breach of an Express Warranty cause of action should survive regardless of the admissibility of all, or portions, of Mr. Wald's opinion.

3) JCP&L or the electric utilities should not be protected from having the electricity they produce and distribute classified as a product under the PLA under our facts.

JCP&L wishes to lump electric utilities and gas utilities and argue that utilities should be protected from subrogation/tort claims. JCP&L infers public policy arguments much like in ***Weinberg v. Dinger***, 106 N. J. 469, 490, 524 A.2d 366 (1987) and ***Franklin Mutual Co., v. Jersey Central Power & Light Co***., 188 N.J. 43, 46-47, 902 A.2d 885(2006). However, these arguments have been refuted in NJ with a series of cases, such as ***Ebert v. S. Jersey Gas Co.*** 206 NJ Super. 104, 1992 (Court found gas utility not protected by ***Weinberg*** on a subrogation claim which asserted that defendant failed to install, inspect and maintain gas lines) and

E&M Liquors, Inc. v. PSE&G, 388 NJ Super. 566, 2006. (Subrogation claim against utility company not protected by ***Weinberg & Franklin Mutual*** to immunize a primary tortfeasor). Finally, ***Mercer Ins. Co. of NJ v. Allstate Jersey Casualty***, 2011 NJ Super. Unpub. LEXIS 2978 (Neither tariff nor ***Weinberg***, protected JCP&L from subrogation carrier owing to plaintiff's claim that JCP&L was the primary tortfeasor whose conduct caused the fire). ***See*** **Reply Appendix 514a.**

The common denominator is that when the utility is the legal cause for the tort it must be held responsible.

> "That is contrary to our tort law, which has always recognized that the burden of loss should fall, as a matter of justice, on the party at fault. *See, e.g.*, *People Express Airlines, Inc. v. Consol. Rail Corp.*, 100 N.J. 246, 255, 495 A.2d 107 (1985). ***E & M Liquors, Inc. v. Public Service Elec. & Gas Co.***, 388 N.J. Super. 566, 569

The ***E&M*** court went on to state:

> Immunity from wrongful acts is not favored, *see e.g.*, *Merenoff v. Merenoff*, 76 N.J. 535, 547, 388 A.2d 951 (1978), and public utilities do not enjoy a general tort immunity. *Weinberg supra*, 106 N.J. at 472, 524 A.2d 366; *Muise v. GPU, Inc.*, 332 N.J. Super. 140, 166, 753 A.2d 116 (App.Div.2000); 64 Am.Jur.2d "Public Utilities," § 14, p. 456 (2001). We see no basis to extend the limited immunity for subrogation claims against public utilities to claims for damages for negligent actions precipitating property damage claims. ***Id***. at 570

Here, JCP&L's defective product is the singular cause. JCP&L is the primary tortfeasor and should not be able to allocate cost to the dozens of in-state

insurance carriers. NJM and the dozens of insurance carriers have been underwriting homeowner policy rates in New Jersey since 1982 with electric utilities subject to strict liability. If we followed JCP&L's argument to its logical conclusion, the law would have consumers, through higher premiums, pay for the homes the utilities cause to burn down. Who better to hold responsible for house fires caused by 7000V entering a home? The homeowner who did nothing wrong? Or the party who cuts corners, or falls below the "great" care standard, that lead to the cause of the fire?

The obvious answer is the utility company in charge of the transmission, maintenance, inspection and sale of the electricity. Utility companies are for profit entities; they are not public entities. They are not entitled to Tort Claims Act defenses. As a for-profit entity, an electric utility should be held accountable for the condition of their product at the time and place it leaves their control for a user's consumption.

PSE&G, Atlantic Electric and JCP&L, have been subject to strict liability in tort with electricity being deemed a product for close to 45 years. This reality has not caused any notable confusion within New Jersey's Court system. Likewise, the other numerous jurisdictions cited by the appellant have, for decades, functioned just fine with electricity classified as a "product".

On the issue of public policy, New Jersey is in a crisis because of the actions of utility companies' failure of transparency and accountability. At least that is the position of one of the gubernatorial candidates, Mikie Sherrill, who expresses

via her television ads and web page this position[2]. Of course, holding an electric utility accountable under tort law so that it maintains the safeguards necessary for its high voltage lines to be secured with "great care" is what should be done for the safety of all New Jerseyans.

4) Michael Wald's Opinion is Properly Supported

Without repeating itself, NJM's appeal brief outlines the "Whys and Wherefores" to support his opinions. ***Pb28 through Pb32.***

5) The Issue of the Weiss' Prior Calls is an Issue of Credibility.

On the issue of prior calls, at the Summary Judgment level the Weiss' testimony should be deemed credible, which they are. The inconsistent phone records is a credibility issue. If NJM must present 10 rebuttal witnesses concerning the Mother's Day party, so be it.

6) JCP&L is not surprised nor prejudiced by Mr. Wald's Certification

On the issue of the purported "late" report/Certification of Mr. Wald, JCP&L does not direct this Court to anything that could have supported their "surprise" or "prejudice" they suffered. Mr. Wald's Certification only expounds on two substantive issues. It cites the industry standard and JCP&L's own tariff. ***Pa322***. Since both of these items were mentioned in Wald's original report, they are logical

[2] It is respectfully submitted this Court can take judicial notice of a candidate's advertisements concerning the gubernatorial race. Mikie Sherrill's ads state in part, "on the first day of office, I'm declaring a state of emergency against electrical utilities for skyrocketing rates."

predicates which are not foreclosed. ***Mc Calla v. Harneschfeyes***, 215 NJ Super. 160 (App. Div. 1987).

***7) Res Ipsa Loquitur* can Apply in this Case.**

High powered primary electrical lines do not just break. In our case, there is no direct evidence which explains this failure. Given the absence of a cause, the breaking of the primary line does *bespeak* of negligence. *Res Ipsa Loquitur* was permitted by Judge Hurd, the Presiding Civil Judge for Mercer County in ***PCIC v. PSE&G , MER-L-343-11 (2014)***. ***Pa345 (at 93:1).*** In 1912, the US Supreme Court applied *Res Ipsa Loquitur* to a primary line failure in, ***San Juan Light and Transit Co. v. Requena,*** 224 US 89 (1912). If this Honorable Court deems strict liability is not applicable, then *Res Ipsa Loquitur* should still apply.

8) Robert Neary's Deposition Should have been Compelled.

This issue feels personal. Appellant for the most part will rely on plaintiff's Certification to the Cross Motion to Compel the Deposition of Robert Neary. (***Pa264 through Pa268***). The salient points are as follows:

Defense counsel requested an extension to submit expert reports and promises any extension needed by the undersigned will be given in turn. The extension was granted.

Six days before the deposition a Notice of Deposition was issued with a cover letter. Both the cover letter (***Pa378***) and the Deposition Notice (***Pa379 through Pa381***) indicate that the deposition can be done in person or by Zoom.

There was no objection until the day before the deposition. Contrary to JCP&L's characterization, NJM did not ask Mr. Neary to generate any list that did not exist (i.e., please go back through your old files and tell us how many "floating neutral" cases you have handled). NJM merely asked Mr. Neary to identify which sections of the authorities he listed in his report upon which he relied to formulate his opinion. It would be a disservice to my client had I not asked.

At no time did Mr. Rudolph express his objection to the Notice of Deposition and/or cover letter until the very day before the deposition. Compromises were attempted but failed. New dates were proposed. None were confirmed by Rudolph's office. A promise to work out the document "issue" was made. Despite several attempts to work this out no response was received from Rudolph's office. Instead, what *was* received was a Motion for Summary Judgment, wherein Mr. Neary's report was relied upon to support its motion. Furthermore, based on his Statement of Reasons ("SOR") (***Pa430***) it is apparent that Judge Pawar also relied on this report.

JCP&L's pretext for filing the Summary Judgment motion was to ensure the motion return date would be sufficiently timed before the Trial Date. Remembering the open-ended promise for an extension, I asked Mr. Rudolph to agree to postpone the trial to a date which would allow for the deposition of Mr. Neary and still give JCP&L ample time to file its Motion for Summary Judgment. This was denied.

I then requested that, at a minimum, JCP&L refile its motion extracting the portions that relied upon Mr. Neary's opinion. (After all, their motion hinged on the "net opinion" of Mr. Wald and Mr. Neary's own opinions would not be needed for such an argument). This request was denied. The rest brings us here.

The Neary deposition could have influenced many factors/issues (inspections, tariffs, industry standards, Act of God defenses, etc.) that could have influenced the Motion for Summary Judgment. This deposition should have taken place.

9) JCP&L Ignores or Avoids the Following Issues:

Sometimes, silence speaks louder than the written word. The following are topics which the Respondent, JCP&L, has either ignored or mentioned merely incidentally. Through its own omissions, it is respectfully submitted that JCP&L either concurs, or cannot not argue against, these issues.

The *Funtown*[3] Decision

JCP&L makes no position on this case, which the lower court used to support its position. Anecdotally, JCP&L mentions that Mr. Wald does not give his opinion as to what the proper timing of inspections should be. If he had done so, that aspect of his opinions would be prohibited, per the ***Funtown*** decision.

[3] *Funtown Pier Amuses., Inc. v. Biscayne Ice Cream*, 477 N. J. Super. 499 (App. Div. 2024)

Great Care as the appropriate Standard of Care.

New Jersey's Supreme Court has established that the standard of care is great care. JCP&L's conduct and methodology of maintaining their 7,000 vault electrical lines is a jury question. JCP&L does not argue to the contrary of this valid common law standard of care. If JCP&L's argument is played out to its logical conclusion, then all they need to do to be immune from liability is hold up a one-page document that says a drive-by inspection took place. Merely complying with the industry standard of care is the bare minimum. Whether an entity complies with or fails to meet these standards is evidence of non-negligence or negligence; it does not absolve a defendant from negligence.

The inadequacy of JCP&L's Defenses.

Appellant spent considerable time outlining why JCP&L's affirmative defenses to its products liability claim were speculative and deficient. JCP&L does not argue otherwise.

The "inspections" by JCP&L were negligent/deficient on its face;

JCP&L's Corp. designee indicates that the wire inspections include an infra-red inspection. The record is devoid of any infra-red inspections having had taken place. While Mr. Wald mentions that this creates a deficiency in the inspections, JCP&L is silent on the infra-red issue.

The failure of JCP&L to adhere to its own tariff.

NJM asserts that JCP&L's tariff is a baseline standard which it must meet. That is, the electricity is not to exceed the 240Vs (+/- 5%). Mr. Wald opines that this min. standard was not met. JCP&L does not refute this.

The inconsistency of the Lower Court's ruling relating to Mr. Wald's credentials and the ultimate order it issued.

Appellant asserts it was a mistake for the trial court to declare Mr. Wald competent and then turn around and sign an order that stated otherwise. JCP&L takes no issue with this.

The failure of the Lower Court to grant Oral Argument on the Motion for Reconsideration.

Appellant asserted several reasons why oral argument should have been granted on the motion for reconsideration. JCP&L did not oppose that argument.

CONCLUSION

For the reasons set forth above, and as a supplement to the appellant's brief, it is respectfully submitted that the lower court erred in

1. Denying Plaintiff's Cross-Motion on the Products Liability claim;

2. Finding that Michael Wald's Report was a Net Opinion which caused the Court to dismiss all claims;

3. Not conducting a *N.J.R.E* 104 Hearing;

4. Barring Michael Wald's Certification;

5. Denying NJM's Request for *Res Ipsa Loquitur*;

6. Entering an Order declaring that Michael Wald was not competent to testify as an expert; and

7. Denying NJM's Cross Motion to Compel the Deposition of Robert Neary.

The Appellant respectfully requests that this Court find that the lower court erred on all of the above issues and the Orders of April 22, 2025 and May 30, 2025 be reversed and this matter be remanded for Mr. Neary's deposition and Trial.

Respectfully submitted,

CRAWFORD SLATTERY

By: *s/ Dennis J. Crawford*
DENNIS J. CRAWFORD

Dated: 10/10/2025