MARCUS SANCHEZ, BY HIS GUARDIANS AD LITEM, MIGUEL SANCHEZ , MARGEE SANCHEZ, Plaintiff, vs. PUBLIC SERVICE ENTERPRISE GROUP INC., PUBLIC SERVICE ELECTRICTY AND GAS COMPANY A.K.A. PSE&G, BOROUGH OF LODI, MICHAEL MARINO, DOLORES MARINO, JOHN DOES 1-100, JANE DOES 1-100, ABC COMPANIES 1-100, XYZ PARTNERSHIPS 1-100 (being fictitious parties), Defendant(s).	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001189-23 T4 **Civil Action** ON APPEAL FROM SUPERIOR COURT, LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-6232-19 Hon. John D. O'Dwyer, P.J.Civ. Sat Below

REPLY BRIEF AND APPENDIX OF PLAINTIFF/APPELLANT, MARCUS SANCHEZ, BY HIS GUARDIANS AD LITEM, MIGUEL SANCHEZ, MARGEE SANCHEZ

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PRELIMINARY STATEMENT

In their opposition briefs, the defendants do not offer cogent arguments to demonstrate why the summary judgment orders and opinions granted in their favor should not be disturbed. Defendant Public Service Electricity and Gas Company ("PSE&G") relies on incorrect legal precedents for its claimed entitlement to summary judgment. Defendant Borough of Lodi's factual bases, and that of the Trial Court, for its claimed entitlement to summary judgment are highly disputed by facts offered by plaintiff; and it has not shown that the Trial Court was correct in barring the testimony of plaintiff's experts.

PROCEDURAL HISTORY

Plaintiff relies on the Procedural History reflected in his initial brief.

STATEMENT OF FACTS

Plaintiff relies on the Statement of Facts reflected in his initial brief.

LEGAL ARGUMENT

POINT I

THE OPPOSITION OF DEFENDANT PSE&G IS MISGUIDED AND ERRONEOUS DUE IT ITS MISAPPLICATION OF THE LEGAL PRECEDENTS APPLICABLE TO THE FACTS OF THIS CASE.

(Raised below: Pa1021-1066; 1T14-35; 2T4-13)

Defendant PSE&G has not done much to challenge the succinct holding and rationale of the New Jersey Supreme Court's opinion in

Weinberg v. Dinger, 106 N.J. 469 (1987). PSE&G has taken the position that Weinberg decides only the "narrow issue" of immunity for water companies. (DbP14)[1]. The Appellate Division will recall that, in Weinberg, supra, the Court abrogated the erstwhile immunity that public utility companies had enjoyed up to the time when that decision was issued. Plaintiff reiterates the arguments asserted in his initial brief that the holding and rationale of Weinberg apply to any utility company, including a public electric company such as PSE&G, in that not unlike a water company, a public electric company is subject to regulation and the type of Tariff oft-cited by PSE&G; a water company and a public electric company are regulated by the same board, the Board of Public Utility; both types of companies provide services that are consumed statewide, or at least pervasively, by members of the public; and both types of company provide services that are susceptible to benefit, and at the same time harm, in significant ways, members of the public. Therefore, under Weinberg, supra, the abrogation of immunity and the application of the common law of negligence apply likewise to a public electric company such as PSE&G. As seen in plaintiff's initial brief, once a public utility company is stripped of the veneer of immunity, its actions must be scrutinized under the well established common law of negligence, including premises liability

[1] "DbP" refers to the opposition brief of PSE&G.

law, which has as its central tenet that an owner of a property must remove dangerous condition of which it has actual or constructive notice; or that no notice is required when the property owner creates itself the dangerous condition. Neither the defendants nor the Trial Court below sufficiently addressed the cogency of plaintiff's arguments as centered on the common law of premises liability. The Trial Court, in granting summary judgment to PSE&G, stated that it was not prepared to extend Weinberg, supra, to an electric company. As seen, there is no reason why that should not be the case. The lack of water pressure that renders combating a fire ineffective and the absence of effective lighting that can cause pedestrians to be harmed by vehicles present such a similarity in conduct by two public utility companies, albeit in their respective functions, that one should not be immunized from liability while the other one is not.

Beyond these similarities, cases decided after Weinberg, supra, have extended its holding and rationale to other utility companies, including electric companies. More specifically, the Appellate Division, in E & M Liquors v. Public Service Elec. & Gas Co., 388 N.J.Super. 566 (App. Div. 2006), has specifically ruled that the Weinberg subrogation immunity does not apply to defendant PSE&G (in that case) where, beyond just a subrogation claim, PSE&G's negligent conduct led to damages. It made clear that, while the Weinberg immunity carve-out could apply to the parties' subrogation

transactions, it did not apply to the tortious conduct manifested in PSE&G's failure in that case to prevent a live electric wire from setting plaintiff's building ablaze. What is important to note is that the holding and rationale of Weinberg, referred to at times as the "Weinberg rule", were applied to the negligent conduct of PSE&G, itself an electric company:

> However, unlike *Franklin Mutual* and *Weinberg*, the instant case is not grounded on a claim for damages due to service interruption. Here the alleged negligence of PSE&G was the precipitating cause of the fire that destroyed the business premises. We do not read either *Weinberg* or *Franklin Mutual* to immunize a primary tortfeasor from liability in a subrogation action. Notably, other reported cases have drawn the distinction between negligent failure to provide a service and negligence directly causing harm. *See Ebert v. South Jersey Gas Co.*, 260 N.J. Super. 104, 615 A.2d 294 (Law Div.1992) (in a subrogation action a gas company may be held accountable for property damage from a gas explosion due to its alleged negligent failure to adequately install, inspect or repair a gas line) *rev'd on other grounds,* 307 N.J. Super. 127, 704 A.2d 579 (App.Div.1998), *aff'd,* 157 N.J. 135, 723 A.2d 599 (1999); *Bongo v. New Jersey Bell Telephone*, 250 N.J. Super. 524, 595 A.2d 557 (Law Div. 1991) (*Weinberg* carve-out not applicable to immunize public telephone utility from motor vehicle subrogation claim).
>
> 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.]

Because the Appellate Division, in E & M Liquors, has extended the Weinberg rule to a public electric company, by removing immunity from that company for tortious conduct, the Trial Court, espousing

the same point advanced by PSE&G in the present case, was incorrect for stating that it was not prepared to extend Weinberg, supra, to PSE&G's conduct, which plaintiff has demonstrated is tortious conduct.

Yet again in another case, Bongo v. N.J. Bell Tel. Co., 250 N.J.Super. 524 (Law Div. 1991), the Law Division, did not extend immunity to an electric company in the context of an automobile action, as the following shows:

> Immunity is a concept not favored in the law. *Merenoff v. Merenoff*, 76 *N.J.* 535, 547, 388 *A.*2d 951 (1978); *Prosser, Law of Torts*, 970 (4th ed. 1971). Immunity is offensive to the bedrock proposition of justice that responsibility be assigned to fault. Recognition of the immunity sought by N.J. Bell would have broad impact. This utility, in particular, operates a great many motor vehicles on New Jersey roads. A great deal of the litigation arising out of motor vehicle accidents involve subrogation claims. Shielding N.J. Bell from civil liability for property damage, personal injury and even loss of human life caused by its negligent operation of its motor vehicles, in what obviously would involve such broad application, is "unthinkable". See C.J. Vanderbilt. dissent, [9 *N.J.* at 149, 87 *A.*2d 325.] The failure to attach accountability to the wrongdoer under these circumstances would detract from the public perception of the justice system. Indeed, it reasonably might be expected to spawn some irresponsibility on the part of N.J. Bell drivers. [Id. at 533.]

Likewise, applying Weinberg, supra, in the case of Ebert v. S. Jersey Gas. Co., 260 N.J.Super. 104 (Law Div. 1992), the court found that a gas company could not be granted summary judgment on the issue of negligence. Holding such a utility company subject to liability for its negligent conduct serves the interest of public policy:

> In the same vein, what public policy is served when we allow a negligent provider of services and product to pass the costs of its own negligence on to an insurance carrier? Defendant, South Jersey Gas Company, is subject to a duty to properly install and thereafter inspect and maintain its system. That duty is an important one in that the product, natural gas, has dangerous propensities if allowed to get out of control. South Jersey Gas although a public utility must be accountable for its negligence and cannot be allowed to pass on such costs to a fire insurance carrier. Liability gives an incentive to South Jersey Gas to render its services and product with a reasonable degree of care. [Id. at 109-10.]

It is, therefore, clear that Weinberg, supra, and its progeny maintain immunity for a public company only on the issue of subrogation due to contractual issues, but the immunity does not extend to negligence claims. Importantly, the cited cases clearly show that the Weinberg rule is not restricted solely to a water company, in contradiction to PSE&G's and the Trial Court's position on this issue, and applies to such alleged negligent conduct by the PSE&G in E&M Liquors in leaving hanging a live electric wire that caused a fire; to the context of a motor vehicle negligence action that involved another electric company; and also to the context of a negligence claim due to a fire from a gas line that involved a gas company.

Moreover, any negligence action against a public utility company must be viewed in the light of Weinberg, supra. Simply put, a Tariff, regulation or contract cannot shield that company from liability. Any such company is subject to the common law of negligence, which is fully explored in plaintiff's initial brief.

As such, any case purporting to convey immunity to a public utility company is de facto inconsistent with Weinberg, supra. In this regard, the District Court opinion in Sinclair v. Dunagan, 905 F.Supp. 208 (D.N.J. 1995) advances the position, in the context of a negligence action, that an electric company owes no duty to repair or fix or replace light fixtures within a specific time frame, in that no statute or common law imposes that duty on the company. (Id. at 213-14). As seen, Weinberg, supra, and its progeny clearly impose that duty. At least in one case, the rationale of Sintclair, seeming to "revive" the type of immunity abrogated in Weinberg, was not adopted by the Appellate Division. See Press v. Borough of Point Pleasant Beach, 2010 N.J.Super.Unpub. LEXIS 183 *7 (App. Div.) (Pra1)("The motion judge also relied upon the rationale of *Sinclair v. Dunagan*, 905 F. Supp. 208 (D.N.J. 1995), that the electric company owes no duty of care to pedestrians or the general public. We do not embrace that rationale"). Likewise, PSE&G's reliance on Cochran v. PSE&G, 97 N.J.L 480 (E&A 1922) is misplaced for the same reason, to the extent PSE&G interprets this case to mean that PSE&G has no duty to provide safe lighting, in the context of a negligence action.

In the end, PSE&G seeks to escape liability claiming some form of immunity, which was abrogated in Weinberg, supra, which imposes a common law duty on any utility company (as established in Weinberg's progeny), regardless of regulation, Tariff or contract.

PSE&G may rely on its Tariff to show compliance with it. However, in the domain of a negligence action in which it is demonstrated that it installed zero foot candle lighting in a dangerous intersection that caused a driver not to see what it struck, when its streetlight was historically defective, and when a jury could find that it had notice of the defective streetlight, it is the common law of premises liability that applies to its conduct, and not its Tariff or contractual relationship with Lodi.

POINT II

DEFENDANT LODI HAS NOT EFFECTIVELY DEMONSTRATED TO THIS COURT THAT THERE WERE NO DISPUTED ISSUES OF MATERIAL FACTS, AND THAT THE TRIAL COURT PROPERLY BARRED THE COMPETENT OPINIONS OF PLAINTIFF'S ENGINEERING EXPERTS.

(Raised below: Pa1021-1066; 1T42-52; 2T21-33; 3T)

Defendant Borough of Lodi ("Lodi") failed to address the garden-variety of facts existing in this matter from many witnesses that establish that its conduct was palpably unreasonable. Even the Trial Court singled out a few such facts that were disputed, though there were many more. It was even after acknowledging such dispute of facts that the Trial Court barred the opinions and analyses of plaintiff's engineering experts.

Lodi asserts that somehow plaintiff's experts, Bryan Smith and Jeffrey Balan, improperly relied on the recall of Marcus Sanchez who testified at deposition that, at the time of the accident, he was in the crosswalk. Lodi posits that this assertion is unreliable

because of Sanchez's traumatic brain injuries. (DbL31)[2]. However, the reliability of a fact is in the province of a jury. In addition, no one in this matter has given the opinion that Sanchez could not recall that very specific fact because of his brain injury. He had recalled that fact and passed it along to his wife, as he was convalescing not long after accident, and his wife likewise recounted the same fact at deposition.

Lodi asserts that the Trial Court found that there was "no actual or constructive notice of the alleged dangerous condition." (DbL32). However, it is demonstrated at length in plaintiff's initial brief that the issue of notice is highly disputed, and that neither the defendants nor the Trial Court addressed the dispute established from the reports of plaintiff's private investigator and the testimony of Peter Bavagnoli, the neighbor living next to the streetlight. Moreover, Lodi states that it did not have constructive notice of the defective streetlight as it did not receive any complaints about it and was not aware of "of any alleged backlighting on or near Prospect Street prior to Plaintiff's injury..." (DbL36-7). As for constructive notice, Smith and Balan made it clear that it was incumbent upon Lodi to have familiarity with its lighting requirements, conduct inspection, and most definitely retain competent engineering services to ensure adequate

[2] "DbL" refers to the opposition brief of Lodi.

lighting, especially at a dangerous intersection. It had plenty of time before plaintiff's accident to have done so but did not. Its officials turned a blind eye to the problem through their ignorance of the way a lighting system functions and/or ought to function. Their ignorance and inaction do not do away with their obligation, over many years, to have noticed the absence of effective lighting in a dangerous intersection.

Lodi asserts that the location of the accident did not constitute a dangerous condition. (DbL33). However, Smith and Balan clearly demonstrated that the existence of zero foot candle lighting at the intersection caused backlight, which caused the driver not to see Sanchez. That was further aggravated by the probability of the absence of lighting from a historically defective streetlight, and by the streetlight (even if it was on at the time of the accident) being blocked by overgrown tree branches. Defendants' experts tried to challenge that rather clear theory of liability, which is based on dangerous condition/premises liability law, by offering their own accident reconstruction theory, based on their own facts---and that exercise onto itself created bar none a serious dispute of facts!

Lodi asserts that the Trial Court did not err in "barring the testimony of Plaintiff's liability experts as net opinions and granting Summary Judgment to Lodi on that basis". (DbL40). As

support for this position, Lodi provides the following quote from the trial Court's opinion granting it summary judgment:

> While the experts opine as to back lighting as a dangerous condition, their reports failed to provide any information demonstrating the prevalence of same, or that safety professionals have raised concerns about same, in a general fashion.
>
> Their reports never addressed any standards, code, or recommendation, as to what entities should do with regards to the potential of the back lighting.
>
> This Court is unable, based upon the factual record, to determine whether back lighting is a common or rare condition, and whether any recognized (indiscernible) the organizations have offered any publications or made any recommendations, addressing not only the conditions, but presume the actions to be taken to(indiscernible) the condition.
>
> Neither Smith -- Mr. Smith, nor Mr. Balan references of any publication of any kind addressing dangers of back lighting and actions to be taken.
>
> While the Court commends the efforts of plaintiff's counsel in seeking to find a further remedy for a tragically injured person, the proofs are lacking to support a claim against the Borough.
>
> There are insufficient proofs to a dangerous condition, notice of palpably unreasonable conduct. There's no prof of -- there is no proof of unreasonable conduct in the record.
>
> Again, no prior complaints, no prior accidents, no reports of inoperable lighting. (Indiscernible) the question of palpably unreasonable conduct, and that of a dangerous condition, is one for the jury.
>
> This is case (indiscernible) appropriate for the Court to decide the issues as a matter of law. (3T:26-27). [(DbL41).]

Lodi simply quotes this language in its brief and offers no analysis as to why it helps its position on appeal. In fact, the language effectively ends its brief, just prior to its conclusory statements on a separate page. However, this language is problematic for various reasons.

First, the language posits that backlighting was not prevalent, and safety professionals had not "raised concerns about same, in general fashion". (DbL41). However, plaintiff's experts partially were tasked to determine what existed in the intersection that caused the driver not to have seen Sanchez in the intersection and not to have even known what he had struck. What clearly jumped off of the page to Smith and Balan were the absence of effective lighting in the foreground of Sanchez and bright lighting in his background; what existed to them were tree branches that blocked any form of lighting (assuming there was even lighting at the time of the accident); what was clear to the experts was that the observed facts gave rise to backlighting, which they offer as the explanation as to why the driver did not see Sanchez. In the end, the issue is one of what existed and was observed at the intersection---and not one of "prevalence". However, a better read of the statement can be couched in terms of notice. The statement seems to suggest that the town could not have known of the backlighting because it was not prevalent. However, it is the town's job to know of a dangerous condition if the condition was present for long enough a period of

time, and in an intersection it itself deemed dangerous! It is not an excuse for the town not to have known of the condition because safety experts did not raise it when the town did not hire, the evidence shows, any such safety expert and claims not to even have the knowledge as to why the intersection was dangerous. It is as if Lodi designated the intersection dangerous, purchased lighting that did not illuminate the dangerous intersection, then looked away and hoped for drivers always to see without difficulty pedestrians crossing the street near the area of the non-illuminating streetlight! This conduct is better viewed as one in which the town itself created the danger and need not have notice of it.

Second, as to the statement that Bryan Smith's and Jeffrey Balan's reports and testimony did not address standards with regard to potential backlighting, the notion of "backlighting" is a scientific fact, as they testified, and not an industry or professional standard. It is an observed fact that merely explains that a dangerous condition existed in the intersection at the time of the accident.

Third, on the same point, the quoted language posits that Smith and Balan do not discuss publications, recommendations addressing not only the dangerous condition but actions to be taken about it. Here again, Lodi, in conjunction with PSE&G, created the dangerous condition and had no professional engineer on staff to conduct any type of inspection at its dangerous intersection. It is common sense

that a town should not create a hazard and pretend to have no knowledge of how it was created.

Lastly, the last few paragraphs of the language suggest that plaintiff offers no proof of palpably unreasonable conduct. However, as seen in the initial brief, Lodi's conduct with regard to the intersection and lighting in the town is not only palpably unreasonable, but also it is reckless: Lodi knows nothing about why the intersection was designated dangerous (knowledge which would help it address any problem such as poor lighting there); Lodi purchased zero foot candle lighting for a dangerous intersection; it knows nothing about the light purchase system; it did not inspect the dangerous intersection; it let tree branches grow at the intersection; it did not ensure continuous light coverage in the intersection; its employees such as police officers, public works workers and borough officials did not report or handle the problems at the intersection; Lodi did not hire any engineering professional to ensure that its lighting system was functioning properly; etc.

Therefore, the facts surrounding Lodi's negligence are highly disputed, and the Trial Court should not have barred Smith's and Balan's testimony and grant summary judgment to Lodi.

CONCLUSION

For the foregoing reasons and reasons asserted in plaintiff's initial brief, the defendants were not entitled to summary

judgment, and the Appellate Division should reverse the Trial Court's decisions and orders, and remand the case for trial.

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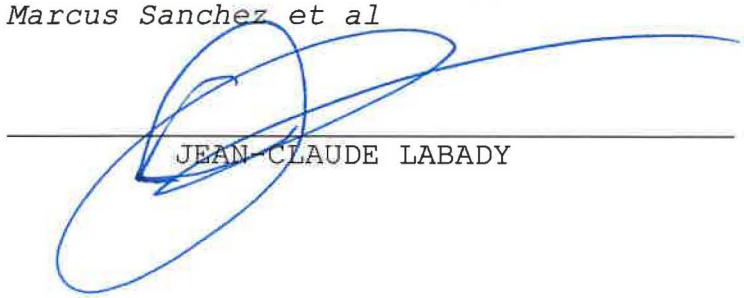

JEAN-CLAUDE LABADY

DATED: August 16, 2024

MARCUS SANCHEZ, BY HIS GUARDIANS AD LITEM, MIGUEL SANCHEZ , MARGEE SANCHEZ, **Plaintiffs,** VS. PUBLIC SERVICE ENTERPRISE GROUP INC., PUBLIC SERVICE ELECTRICTY AND GAS COMPANY AK.A. PSE&G, BOROUGH OF LODI, MICHAEL MARINO, DOLORES MARINO, JOHN DOES 1-100, JANE DOES 1-100, ABC COMPANIES 1-100, XYZ PARTNERSHIPS 1-100 (being fictitious parties), **Defendants.**	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001189-23 T4 **Civil Action** ON APPEAL FROM SUPERIOR COURT, LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-6232-19 Hon. John D. O'Dwyer, P.J.Civ. Sat Below

BRIEF OF DEFENDANT PUBLIC SERVICE ELECTRIC AND GAS COMPANY

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PRELIMINARY STATEMENT

By way of this appeal, Plaintiff once again seeks to relitigate his claims against PSE&G in connection with a motor vehicle accident that took place in the Borough of Lodi ("Lodi"), New Jersey – despite the trial court's grant of summary judgment to PSE&G and subsequent denial of Plaintiff's motion for reconsideration.

Plaintiff alleges that he was struck by a motor vehicle while crossing a crosswalk on the night of May 31, 2017. Plaintiff claims that the accident was due to a streetlight outage along the roadway, and that the outage was caused by PSE&G's negligence. In a thorough and well-reasoned oral decision, the trial court granted summary judgment to PSE&G and dismissed Plaintiff's claims against it, finding that: (1) PSE&G did not have a duty with respect to the streetlight at issue; (2) even assuming that PSE&G had a duty, it did not have any notice of the alleged outage; and (3) based on the record evidence, there were no material facts in dispute with respect to Plaintiff's claims.

Plaintiff's appeal retreads the same arguments rejected by the court below and fails to provide any justification – grounded in case law or otherwise – to merit a reversal of the trial court's decision. For the reasons set forth below, the trial court's order granting summary judgment to PSE&G should be affirmed in its entirety.

PROCEDURAL HISTORY

Plaintiff filed his Complaint against PSE&G and Lodi on April 29, 2019. (Pa1).[1] PSE&G subsequently filed its Answer on June 3, 2019. (Pa36). PSE&G and Lodi filed their motions for summary judgment on August 25, 2023. (Pa61).

Oral argument on the summary judgment motions was held on October 13, 2023, at which time the trial court granted PSE&G's motion for summary judgment. (Pa922). Plaintiff filed a motion for reconsideration of the trial court's October 13, 2023, decision on November 1, 2023. (Pa924). Plaintiff's motion was denied following oral argument on November 17, 2023. (Pa929).[2] This appeal followed on December 19, 2023. (Pa999).

STATEMENT OF FACTS

A. Plaintiff's Accident

This matter arises from a motor vehicle accident that took place on May 31, 2017, at approximately 9:41p.m., on Prospect Street near Central Avenue in Lodi, New Jersey. (Pa1). The Plaintiff's Complaint names several Defendants, including PSE&G, Michael Marino ("Mr. Marino"), and Lodi. (Pa1). The Complaint asserts that all the aforementioned Defendants were negligent. More specifically, the Complaint alleges that PSE&G was negligent for failing to maintain an operable

[1] "Pa" refers to Plaintiff's appendices.
[2] "1T" refers to the October 13, 2023 transcript of oral argument on PSE&G's motion for summary judgment.

streetlight on Prospect Street on the date of the accident. (Pa3). Based on this alleged negligence, Plaintiff claims he was struck by a motor vehicle operated by Mr. Marino while walking in a crosswalk and thereafter sustained multiple injuries, which have left him permanently disabled. (Pa17).

Plaintiff was struck by a motor vehicle operated by Mr. Marino, whose vehicle was traveling north on Prospect Street toward the intersection with Central Avenue. (Pa16). Plaintiff asserts that he was walking east along Central Avenue, crossing Prospect Street from the West side of the street within the marked pedestrian crosswalk before being struck by Mr. Marino's vehicle. (Pa16). However, the findings in the report by Investigator Sergeant Brian Zivkovich, from the Bergen County Prosecutor's Office, indicated that "the collision occurred as follows: Mr. Sanchez was navigating his skateboard in the roadway, attempting to negotiate a left turn when he encroached into [Mr. Marino's] lane of travel." (Pa90). PSE&G's expert, Steven Emolo, confirms the findings of Sergeant Zivkovich that—based upon physical evidence, including the location of Plaintiff after the accident and markings on the vehicle—Plaintiff was riding his skateboard at the time of impact, not walking in the crosswalk carrying his skateboard. (Pa127, ¶ 5).

The evidence indicates that Plaintiff was riding his skateboard traveling West on Central Avenue, down a hill, when he made a left turn heading South onto Prospect Street and veered into Mr. Marino's lane of travel as he was driving North.

(Pa90). The police report indicates impact between Plaintiff and Mr. Marino's vehicle took place on Prospect Street, forty (40) feet from the intersection. (Pa1009). Mr. Marino stated in his response to interrogatories that he was traveling on Prospect Street when he "felt a bump in the road under [his] vehicle and [heard] a loud noise." He backed his vehicle up thinking he hit a construction cone or pole. (Pa133).

B. Accident Scene and Lighting Conditions

At the intersection of Central Avenue and Prospect Street, there is one streetlight on a utility pole on the Northeast corner. This streetlight was operational at the time of the accident. (Pa117). Plaintiff alleges that the streetlight depicted in the attached photograph was off at the time of accident. (Da2).

This subject streetlight is seventy-three (73) feet from the intersection. (Pa116). Lodi Police Officer Philip Nobile arrived at the accident scene less than two minutes after receiving the call from dispatch. (Pa146, Pa160). Officer Nobile testified that, based on his observations at the scene and review of dashcam video, all the streetlights were on. (Pa151-63). Office Nobile's Police report reflects that the "streetlights [are] on, continuous." (Pa 1009). The dash-cam video from Officer Nobile's vehicle shows that the streetlights were on. (Da1).[3] The still photographs

[3] "Da" refers to Defendant PSE&G's appendix and the hard copy of the dash cam video to be provided to the Court.

from the video shows the subject streetlight operational minutes after the happening of the accident. (Da3).

A second responding person to the scene, Detective Joseph Lanfrank, also recalls all the streetlights being on when he arrived. (Pa169-70, Pa171-73). In addition, Sergeant Brian Zivkovich prepared a report for the Bergen County Prosecutor's Office. (Pa 86-90). This report made no mention of any streetlights being out or that insufficient lighting was a contributing factor in the accident. (Pa 86-90). Sergeant Zivkovich confirmed at his deposition that if lighting had been insufficient, he would have included it in his report. (Pa177-81).

Sergeant Joseph Savino, who arrived at the scene to document the accident and collect evidence, did not recall the street lighting in the area. (Pa185-86). Sergeant Savino testified that he took a picture after the accident that appeared to show the streetlight being out hours after the accident occurred. (Pa185-91). Sergeant Savino testified that the crime scene investigation truck spotlight meant to illuminate the area potentially could have activated the photocell on the light, turning it off. (Pa186-86, Pa190-91). Sergeant Savino further testified that prior to putting up the crime scene investigation spotlight, he has no recollection of that streetlight being off. (Pa190-91). The crime scene investigation team never advised Sergeant Savino to take photographs of any light that was believed to be out in the area.

(Pa190-91). The Sheriffs' light is depicted in a photograph at the scene of the accident. (Da4).

Mr. Marino testified that his headlights were on and that he could see fine on Prospect Street at the time of accident. (Pa95). Mr. Marino testified that he could see well on Prospect Street as he traveled down the road before the accident. (Pa96).

C. Evidence of Operation of the Streetlight Prior to the Accident

The Plaintiff's expert, Bryan Smith asserts, as a foundation of his original report, that the subject streetlight was reported as being out on multiple occasions months prior to the incident. (Pa457). Yet Plaintiff did not produce any witnesses or evidence to indicate that the light was out prior to the subject accident. Plaintiff's father, Miguel Sanchez, testified that he and the entire family lives at 49 Central Avenue, Lodi, New Jersey, three (3) houses up from the intersection of Central and Prospect Street. (Pa201). Miguel Sanchez made no observation of the light being out when he went to the scene of accident while his son was still there. (Pa204). Miguel Sanchez testified that he never observed the streetlight out prior to the accident and never reported the light being out to Lodi or PSE&G. (Pa202-05).

Plaintiff's mother, Margee Sanchez, has resided in her home for 27 years and never called Lodi or PSE&G to complain about the light. (Pa209-14). She further testified that no neighbor ever discussed the lighting conditions on the street with her. (Pa209-14). Margee Sanchez did not make any observations of the light when

she responded to the scene the night of the accident. (Pa209-14). Heather Sanchez, Plaintiff's wife, made no observation of the light being out when she went to the scene of accident while Marcus was still there. (Pa217-18). Heather Sanchez testified that she never observed the streetlight out prior to the accident and never reported the light being out to Lodi or PSE&G. (Pa217-18).

Peter Bavagnoli ("Mr. Bavagnoli"), who lives at 147 Prospect Street, spoke with Plaintiff's investigator and gave a statement that he had reported a streetlight outage once sometime in the last three to four years. (Pa235-38). He could not confirm if he complained about the light prior to the 2017 accident. (Pa235-38). At his deposition, Mr. Bavagnoli directly testified that he only called once about the streetlight being out prior to 2021. (Pa235-46). He further testified that PSE&G responded the next day after his one call, and the light subsequently remained on. (Pa235-46). PSE&G records reflect that Mr. Bavagnoli called on October 4, 2018, to report the streetlight being out. (Pa247-50). Mr. Bavagnoli confirmed that the first time he noticed the light being off and then called about the light was on October 4, 2018, ***a year after the subject accident***. (Pa235-46). PSE&G has no record of this streetlight being reported out before the accident occurred on May 31, 2017. The only records PSE&G has are for two (2) repair jobs in 2018 and one maintenance job in 2019. (Pa257).

D. PSE&G Street Light Installation

PSE&G installs streetlights at the control and direction of the New Jersey Board of Public Utilities ("BPU"), specifically defined in the Electric Tariff. (Pa292-323). Section 2.5 of the PSE&G Tariff for Electric Service, dated October 30, 2018, states the following:

> Selection of Lighting Options: Public Service will assist in the selection of lighting options by making recommendations for the most appropriate option based on the customer's defined illumination needs. However, responsibility for the final selection shall, at all times, rest with the customer. Any advice given by Public Service will be based on the customer's statements and by giving such advice, Public Service assumes no responsibility, nor shall it incur liability.

A light is only installed in a municipality at the control, request, and cost to the municipality. (Pa255-56). Sean Chester, PSE&G's Operations Manager for Sales and Services, testified that the municipality fills out an order form and indicates to PSE&G the exact streetlight and the pole that they want the light attached to. (Pa356-64, Pa375-79). The municipality pays for unmetered service on the light (they are charged per light and not by usage). (Pa375-79). The design, location and choice of lighting is solely controlled by the municipality. (Pa255-56). PSE&G does not set requirements for luminance at intersections. (Pa275). There is no obligation set forth by the BPU making PSE&G responsible for lighting design. (Pa292-323).

E. Plaintiff's Expert Report and Testimony

Plaintiff's expert, Jeffrey Balan, admitted that the streetlight was operational minutes after the accident when the police arrived. (Pa384-88). Mr. Balan stated that he had no information that the light was defective or non-operational prior to the incident as stated in his report. (Pa406-08). Mr. Balan further testified that PSE&G only received notice of the light being out a year and a half after the subject accident and that PSE&G had no notice of any issue with the light prior to the accident. (Pa408-10).

He also confirmed that there is no factual evidence indicating the light was defective prior to the accident. (Pa413). Mr. Balan testified that the customer here, Lodi, provides its illumination needs to PSE&G. (Pa419-22). He further testified that PSE&G has no responsibility as it relates to determining illumination needs. (Pa419-22). Finally, Mr. Balan confirmed that PSE&G has no duty as to the selection and design of street lighting pursuant to the Electric Tariff. (Pa419-22).

F. The Court's Decision Granting Summary Judgment to PSE&G

At oral argument on October 13, 2023, the trial court granted PSE&G's motion for summary judgment in a detailed oral opinion. With respect to the issue of whether PSE&G had notice regarding the alleged non-functioning light, the court held that it had not. It stated:

> The proofs on the issue of notice are such that a termination of the merits of the public service request and summary judgment can be made by this Court.

It is first noted that multiple members of the Sanchez family lived in close proximity to the location but had testified that they never reported the subject streetlight being out to [PSE&G].

The sole witness who presented evidence to same is Mr. Bagdagnoli. He's a person who lived in the immediate vicinity of the intersection. Plaintiff relies heavily and exclusively upon information provided by Mr. Bagdagnoli and is seeking to demonstrate notice prior to the event. It is undisputed that Public Service had no record of the streetlight being reported out any time prior to the accident. The only records Public Service has are two repair jobs in 2018 and one maintenance job in 2019.

It is further undisputed that there are no reports of the light being out had been made to Public Service, the police, or the (indiscernible) prior (indiscernible) prior to the accident. ….

The recorded statement at his deposition testimony this witness demonstrated is not of the quality to raise a disputed issue of material fact as to the inoperability of the streetlight at the time of the event. The witness testified that he reported the light out to -- once to Public Service and the light was fixed the following day.

We were presented with call records at the time of deposition. Mr. Bagdagnoli recalled that he had reported the light out on October 4th, 2018, a year following the subject accident. Most important to this accident, -- analysis -- I'm sorry -- neither the recorded statement nor the deposition provide a factual basis for which a fact finder would be able to find that Mr. Bagdagnoli called Public Service before the accident. …

While the Court is well aware the standard for summary judgment motion is giving all favorable inferences to the non-moving party, the testimony of Mr. Bagdagnoli is insufficient. …

Its imprecision and speculative nature of such that it cannot afford a fact finder [a] sufficient basis to rely upon same. By its own admission, Mr. Bagdagnoli does not know when he made the call. He is certain he made one call. That call is corroborated by the records of Public Service being made after the accident.

[(1T28-32).]

The court also rejected Plaintiff's alternative arguments that: (1) PSE&G had acted negligently in failing to advise Lodi as to light placement and design, and (2) PSE&G had a duty to Plaintiff to provide streetlights with sufficient illumination at the crosswalk, noting that it had "fail[ed] to find any support by statute of case law for such a position." (1T33:14-21). The trial court further added:

> In this matter, it appears that the plaintiff seeks to expand the law and the potential liability of the related public -- regulated public utility. The Court is unaware of any statute, rule, or case law that requires a public utility providing streetlights to undertake the responsibility to assure their adequacy as distinct from their operation of statute upon the plaintiff.
>
> [(1T34:6-13).]

Finally, the trial court found that Plaintiff's claims against PSE&G for negligent lighting and design could not be sustained because PSE&G's obligations are expressly governed by the BPU's Tariff for electric service:

> As best this Court knows, this is a duty that has not heretofore been imposed upon Public Service by case law or statute. Based on the foregoing, summary judgment is granted to Public Service in this matter.
>
> [(1T35:17-20).]

LEGAL STANDARD

A party is entitled to summary judgment when "the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." Brill v. Guardian

Life Ins. Co. of Am., 142 N.J. 520, 528 (1995) (quoting *R.* 4:46-2(c)). The determination of whether issues of material fact exist requires the court to consider "whether the *competent evidential materials* presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Kelsey v. Raymond, No. A-4511-12T2, 2015 WL 1781565, at *2 (N.J. Super. Ct. App. Div. Apr. 21, 2015) (citing Davis v. Brickman Landscaping, Ltd., 219 N.J. 395, 406 (2014)) (emphasis added). "[A] non-moving party cannot defeat a motion for summary judgment merely by pointing to *any* fact in dispute." Brill, 142 N.J. at 529 (emphasis in original).

The New Jersey Supreme Court advises that "trial courts not [] refrain from granting summary judgment when the proper circumstances present themselves [,]" explaining:

> It is critical that a trial court ruling on a summary judgment motion not shut a deserving litigant from his [or her] trial. *At the same time, we stress that it is just as important that the court not allow harassment of an equally deserving suitor for immediate relief by a long and worthless trial.*
>
> [Brill, 142 N.J. at 540-41 (emphasis added) (internal citations and quotation marks omitted).]

Summary judgment "is designed to provide a prompt, businesslike and inexpensive method of disposing of any cause which . . . [does not] present any genuine issue of material fact requiring disposition at a trial." Judson v. Peoples

Bank & Trust Co. of Westfield, 17 N.J. 67, 74 (1954). It serves "to avoid trials which would serve no useful purpose and to afford deserving litigants immediate relief." Warthen v. Toms River Cmty. Mem'l Hosp., 199 N.J. Super. 18, 23 (App. Div. 1985). Summary judgment in a personal injury claim is appropriate where "no reasonable jury could find that the plaintiff's injuries were proximately caused by" the facts alleged. Vega by Muniz v. Piedilato, 154 N.J. 496, 509 (1998) (citing Brill). Appellate courts review the trial court's grant or denial of a motion for summary judgment de novo, applying the same standard used by the trial court. Samolyk v. Berthe, 251 N.J. 73 (2022).

Here, the trial court properly granted PSE&G's motion for summary judgment under the applicable Rule 4:46-2 standards. Its decision should thus be affirmed.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO PSE&G (Raised below at 1T)

A. The Trial Court Properly Held That PSE&G Has No Duty in Connection with the Streetlight

i. PSE&G Does Not Have a Duty to Provide "Adequate Lighting" at the Intersection Where Plaintiff's Accident Occurred.

Plaintiff's argument that PSE&G had a duty to Plaintiff to provide adequate lighting at the intersection in question was considered and properly rejected by the trial court. The same result is warranted here.

First, Plaintiff's reliance on Weinberg v. Dinger, 106 N.J. 469 (1987), is misplaced. Weinberg involved a lawsuit filed by the owner of an apartment building against a water company in which the owner alleged that the water company was negligent in failing to provide adequate water pressure to extinguish a fire. Id. at 472. There, the Supreme Court addressed the narrow issue of whether the "longstanding New Jersey rule immunizing private companies from liability for their negligence in failing to provide to fire hydrants water pressure of sufficient force to extinguish a fire" should be upheld. Id. The Court ultimately ruled that it should not and held "that private water companies are no longer immune from such liability, except with respect to subrogation claims asserted by fire-insurance companies." Id. That holding is entirely inapplicable to the facts of the instant case, where the relevant question is whether a public electric utility has a duty to provide adequate lighting at intersections.

Second, Plaintiff makes no mention of – nor effort to distinguish – the factually similar cases and statute cited by PSE&G in its brief. PSE&G relied primarily upon Sinclair v. Dunagan, 905 F. Supp. 208 (D.N.J. 1995), in support of the proposition that it did not owe a duty to Plaintiff. In Sinclair, plaintiff pedestrian

was hit by a car while crossing an intersection at night where a streetlight was out. Id. Plaintiff brought suit against PSE&G for failure to maintain continuous and uninterrupted street lighting for plaintiff's benefit. Id. at 210. The court found that a duty may be imposed by statute, contract, relationship, or by the common law, but that there is no statute or regulation that imposes upon PSE&G a duty to provide lighting for the streets of that township, "…[n]or is there any New Jersey case which imposes a common law duty on electric companies to repair or replace broken light fixtures within any particular time frame." Id. at 214-15. The court further opined that, "[c]onsidering the vast number of streetlights and the frequency of motor vehicle accidents, this absence of case law is telling." In that case, there was no statutory or common law duty placed upon electric companies to provide street lighting or to repair broken lights within a specific time frame, and the court held that electric companies had no contractual duty to plaintiffs to repair every broken light. Id. at 214.

PSE&G also cited to Cochran v. PSE&G, 97 N.J.L. 480 (E&A 1922), in which the court found that a truck driver who was injured at night by an unlighted obstruction in the street could not recover from defendant electric company because although the electric company contracted with the city for streetlights, it owed no duty to the plaintiff. Id. at 481. In addition, PSE&G noted in its brief that under the New Jersey Tort Claims Act, "immunity from tort liability is the general rule [for a

public entity] and liability is the exception." Polzo v. County of Essex, 196 N.J. 569, 578 (2008).

These cases and the Tort Claims Act are directly on point, and Plaintiff offers no argument or contradictory law to suggest otherwise. These cases – including Plaintiff's efforts to broaden the holding in Sinclair – were also before the trial court when it issued its decision granting summary judgment to PSE&G. The trial court analyzed the competing law cited by both parties before ultimately concluding that "[P]laintiff seeks to expand the law and the potential liability of the … regulated public utility. The Court is unaware of any statute, rule, or case law that requires a public utility providing streetlights to undertake the responsibility to assure their adequacy as distinct from their operation of statute the plaintiff." (1T34). Plaintiff's appeal fails to present any basis for disturbing the trial court's ruling. Its order granting summary judgment to PSE&G should thus be affirmed.

ii. PSE&G Does Not Have a Duty as to Streetlight Design and Placement.

Plaintiff argues that PSE&G seeks to "avoid responsibility" with respect to its alleged duty regarding light design and placement by "relying on its Tariff." (Pb29). This contention was also properly rejected by the trial court, and should one again be rejected here at the appellate level.

As set forth in PSE&G's summary judgment papers, PSE&G is regulated by the New Jersey BPU. The Tariff for electric service is a regulation with the force

and effect of law. (Statement of Facts ("SOF"), Point D, supra). It is well-settled that the rules and regulations established by state agencies, including the BPU, have the force and effect of law. State v. Atl. City Elec. Co., 23 N.J. 259, 270 (1957). The relationship between a utility and its customers is governed by such regulations, which are embodied in the utility's tariffs. Tariffs operate as law, which all parties are deemed to have knowledge of. Essex Cnty. Welfare Bd. v. N.J. Bell Tel. Co., 126 N.J. Super. 417, 421 (App. Div. 1974) (Tariff required to be filed by telephone company is the law); Application of Borough of Saddle River, 71 N.J. 14 (1976). The Tariff is, therefore, the legal standard that governs the provision of electric service by PSE&G to its customers and governs their relationship. The terms and conditions under which a public utility such as PSE&G provides electric service to its customers is the subject of a comprehensive regulatory scheme promulgated by the BPU. The Legislature has vested the BPU with broad authority to regulate rates, to establish standards and quality of service, to define the relationship between the utility and its customers, and to define conditions under which service will be provided. N.J.S.A. 48:2-25. The PSE&G Tariff, dated 10/30/18, Section 2.5, states the following:

> "Selection of Lighting Options: Public Service will assist in the selection of lighting options by making recommendations for the most appropriate option based on the customer's defined illumination needs. However, responsibility for the final selection shall, at all times, rest with the customer. Any advice given by Public Service will be based on the customer's statements and by

> giving such advice, ***Public Service assumes no responsibility, nor shall it incur liability.***
>
> [(Emphasis added).]

There is no language in the Tariff setting or enforcing obligations onto PSE&G for lighting design. Rather, a light is only installed in a municipality at the control, request, and cost to the municipality. (SOF, Point D, supra). The municipality will fill out an order form and indicate to PSE&G the exact locations of the pole and streetlight, as well as the choice of lighting and design of the lighting. (Id.). Additionally, PSE&G does not set requirements for luminance at intersections. (Id.).

Plaintiff's expert, Mr. Balan, confirmed that Lodi provides the illumination needs to PSE&G and PSE&G has no responsibility in determining illumination needs. (SOF, Point E, supra). He also confirmed that PSE&G has no duty as to the selection and design of street lighting pursuant to the Electric Tariff. (Id.).

Mr. Balan also testified that there are no laws or regulations that municipalities in the State of New Jersey have streetlights. (Id.). PSE&G has utility poles that are installed for overhead electrical lines that include primary wires that run parallel with the street and secondary wires that run to individual homes. The placement of these poles is to support the PSE&G electrical distribution system, and the poles are therefore placed accordingly. They are not placed with consideration for placement of streetlights. PSE&G does not conduct illumination studies, nor does

it have any responsibility related to whether a roadway should be illuminated. As part of the distribution system, the BPU requires that electric utilities, including PSE&G, install streetlights on existing utility poles only when requested to do so by a municipality. The discretion of where and what type of streetlights are placed is at the sole control and direction of the municipality or borough. Accordingly, the municipality pays a specific price for each light depending on the light that is chosen.

There was no evidence in the record before the trial court that Lodi asked, or PSE&G provided, any advice or recommendations related to the subject streetlight. In short, there were absolutely no facts in the record that any advice was sought as to the type of light the borough requested and was installed at the subject pole.

In ruling on this issue, the trial court found the Tariff to be controlling:

> [P]laintiff seeks to impose liability upon Public Service for negligent lighting, design, …. Public Service points out it is regulated by the [Board of] public utilities and is governed by regulations promulgated by the board known as Tariffs.
>
> Pursuant to N.J.S.A. [48]:2-25, the tariff is controlling the PSE&G tariff Section 2.5 provides as follows. Selection of lighting options. Public Service will assist in the selection of lighting options by making recommendations of the most appropriate options based on the customer's defined illumination. However, responsibility for final selection shall at all times rest with the customer. Any advice given by Public Service is based upon the customer's statements and by giving such advice, Public Service assumes no responsibility nor shall it incur liability.
>
> ….
>
> Public Service does not set requests for illuminants at intersections. This was confirmed by plaintiff's expert, Mr. [Balan]. The theory of liability … by the

> plaintiff against Public Service, if accepted by this Court, would dramatically expand liability and countless scenarios. Plaintiff seeks to place a duty upon Public Service to determine design, … [and] the inadequacy of illumination.
>
> As best this Court knows, this is a duty that has not heretofore been imposed upon Public Service by case law or statute.
>
> [(1T34:14-35:19).]

On appeal, Plaintiff does not present any authority suggesting that the Tariff is not controlling as to PSE&G's obligations with respect to assisting municipalities with their streetlights. Accordingly, the trial court's ruling should be upheld.

B. The Trial Court Properly Held That PSE&G Did Not Have Notice of the Alleged Streetlight Outage

Plaintiff makes two arguments with respect to notice on appeal: (1) "Because PSE&G partially created the hazard leading to backlighting in the intersection, plaintiff does not need to establish the element of actual notice of the hazard"; and (2) even assuming Plaintiff was required to establish actual notice, "there exists evidence in the case that PSE&G likely had notice, and most definitely had constructive notice, of the said hazard." (Pb23-24). Both of these contentions were considered – and rejected – by the trial court in its well-reasoned oral decision. Thus, its order granting summary judgment as to PSE&G should be affirmed here.

As set forth at Point I.A., supra, the Sinclair case expressly holds that there is no duty as a matter of law on the part of an electric provider to ensure that every streetlight is operational at all times, irrespective of the issue of whether the provider

had notice of an alleged outage. However, PSE&G did point the trial court to two subsequent unpublished Appellate Division decisions that have since injected "notice" as a legal requisite in the duty analysis. See Press v. Borough of Point Pleasant Beach, No. A-2807-07T3, 2010 WL 307931 (N.J. Super. Ct. App. Div. Jan. 28, 2010) (Pa528); Anderson v. Davoren, No. A- 6430-06T3, 2010 WL 307956 (N.J. Super. Ct. App. Div. Jan. 28, 2010) (Pa536). Although these decisions were not binding on the trial court, PSE&G argued that, assuming the trial court chose to consider them, the court should still grant it summary judgment because Plaintiff had failed to present any evidence that: (1) the streetlight was inoperable at the time of the accident, and (2) PSE&G had notice of the subject streetlight being inoperable prior to Plaintiff's accident.

Press and Anderson, consolidated for appeal, were argued and decided on the same days. In those two unreported cases, the Appellate Division held that there is a duty on the public utility company "to act with reasonable care to avoid harm to those who foreseeably may be harmed by their actions, *after the utility has been notified of the need to act*." Anderson at 6. (Pa536) (emphasis added). The Anderson Court cited to N.J.A.C. 14:5-2.9(b), which provides that "[a]ll routine streetlight repairs are to be made within three business days *after notice that a repair is necessary*." Anderson at 6. (Pa536) (emphasis added).

In Press, plaintiff presented no evidence or witness testimony that JCP&L had notice of the streetlight being inoperable before the accident. In affirming the trial court's granting of summary judgment to JCP&L, the Press court held, "we agree with the trial judge that the plaintiff presented no competent evidence from which a jury could conclude that JCP&L had actual or constructive notice of any problem with the light sufficiently in advance of the accident to have taken steps to remedy the condition." Press at 6. (Pa528). The Press court further noted that "plaintiff offered no witnesses who claimed they had reported the malfunctioning light." Press at 3. (Pa528). Thus, Press and Anderson make it clear that a plaintiff must affirmatively prove that a utility company had notice of the inoperable streetlight sufficiently in advance of the accident date to repair the streetlight.

In light of these holdings, PSE&G argued that even if the trial court was inclined to apply the Press and Anderson analysis, PSE&G must still have had notice of the lights being inoperative. If there is notice of an outage, pursuant to N.J.A.C. 14:5-2.9, PSE&G has within three (3) business days to make routine streetlight repairs after notice. However, there was no evidence that the streetlight was inoperable at the time of the subject accident here. Moreover, there was no evidence of a malfunction of the streetlight prior to the subject accident, and PSE&G had no notice or record of the streetlight in question being reported out prior to the accident on May 31, 2017.

To the contrary, as set forth in the Statement of Facts, supra, the following evidence with respect to the allegedly malfunctioning streetlight was before the trial court at the time of its ruling:

- Officer Nobile arrived at the scene of the accident less than two minutes after receiving the call from dispatch and contemporaneously noted in his report that the "streetlights [are] on, continuous." (SOF, Point B, supra).
- Detective Lanfrank, the second officer on the scene, testified that the streetlights were on when he arrived. (Id.).
- Sergeant Brian Zivkovich, Bergen County Prosecutor's Office, did not indicate that any streetlights were out or that insufficient lighting was a contributing factor in the accident. He also confirmed during his deposition that if lighting had been insufficient, he would have noted this issue in his report. (Id.).
- Sergeant Joseph Savino, who arrived at the scene to document the accident and collect evidence, testified that prior to putting up the crime scene investigation spotlight, he has no recollection of the streetlight being off. (Id.).
- Plaintiff's father, mother, and wife all testified that they had never observed the streetlight being off prior to the accident. (SOF, Point C, supra).
- Plaintiff's father, mother, and wife all testified that they had never reported the streetlight as being out to Lodi or PSE&G. (Id.).

- PSE&G had no record of the streetlight being reported as out before the accident and had records of only two repair jobs and one maintenance job, all of which occurred one to two years ***after*** the accident. (Id.).

The only evidence plaintiff attempts to rely upon is the testimony of Peter Bavagnoli, a borough resident, who lived near the utility pole. He testified that within the last three (3) years he reported the light out once to PSE&G and PSE&G fixed the light the following day. (SOF, Point E, supra). Mr. Bavagnoli confirmed, upon review of the call records, that he reported the light being out on October 4, 2018, a year after the subject accident. (Id.). There is no testimony or reports by any witness that the light was ever inoperable prior to the subject accident.

The Trial Court provided a detailed analysis of the statements and testimony of Mr. Bavagnoli. Following same, the Court succinctly stated:

> Most important to this accident, … neither the recorded statement nor the deposition provide a factual basis for which a fact finder would be able to find that Mr. Bavagnoli called Public Service before the accident.
>
> ….
>
> Its imprecision and speculative nature of such that it cannot afford a fact finder and sufficient basis to rely upon same. By its own admission Mr. Bavagnoli does not know when he made the call. He is certain he made one call. That call is corroborated by the records of Public Service being made after the accident.
>
> [(1T32:3-8, 33:7-13]

Thus, as found by the Court, there are no witnesses, documents or any other evidence presented, including Mr. Bavagnoli's testimony, that would create any issue of fact for a jury in considering whether the light was inoperable prior to the night of the accident and that PSE&G had notice of same. Plaintiff attempts to mischaracterize testimony and create facts that do not exist.

There is also no evidence presented that PSE&G sold defective luminaires to Lodi. There is no evidence PSE&G would have constructive notice of any defect. As the Court found, there is no evidence presented by Plaintiff to show that the light was inoperable prior to the night of the accident. Plaintiff has not established in the record when the light was installed, nor that the light was inoperable at any time prior to the night of incident. There are no complaints related to the subject streetlight until Mr. Bavagnoli's call to PSE&G in October of 2018. Plaintiff directs this Court to no facts to indicate that the light was defective when installed, or that it was not operating properly before and at the time of his accident.

Against this backdrop, the trial court plainly did not err in finding that there were no witnesses, documents, or other evidence that would create an issue of material fact for a jury to consider that the light was inoperable prior to the night of the accident or that PSE&G had notice of same. Its order granting summary judgment to PSE&G should be affirmed.

C. The Trial Court Properly Held That There Were No Material Facts in Dispute

Finally, Plaintiff's contention that the trial court erred in holding that there were no material facts in dispute is equally meritless. In his appellate brief, Plaintiff states that he "disputes" PSE&G's positions regarding whether the streetlight was out and whether PSE&G had adequate notice of the outage. Yet as set forth at length at Point I.B., supra, Plaintiff presented no evidence to support his position that the streetlight was out at the time of his accident, nor that PSE&G had notice of any alleged outage. The trial court gave a detailed analysis as to this issue in its oral opinion, and Plaintiff provides no basis on appeal to overturn it. Plaintiff cannot simply claim that he "disputes" the facts at issue without providing evidence that supports his position. The trial court's decision should thus be affirmed in full. See Brill, 142 N.J. at 529 ("a non-moving party cannot defeat a motion for summary judgment merely by pointing to *any* fact in dispute.") (emphasis in original).

CONCLUSION

For the foregoing reasons, PSE&G respectfully requests that the Court affirm the trial court's decision granting PSE&G's motion for summary judgment.

PSE&G
Attorney for Defendant, PSE&G

Anthony J. Corino

Dated: August 2, 2024

MARCUS SANCHEZ, BY HIS GUARDIANS AD LITEM, MIGUEL SANCHEZ , MARGEE SANCHEZ, Plaintiff, vs. PUBLIC SERVICE ENTERPRISE GROUP INC., PUBLIC SERVICE ELECTRICTY AND GAS COMPANY A.K.A. PSE&G, BOROUGH OF LODI, MICHAEL MARINO, DOLORES MARINO, JOHN DOES 1-100, JANE DOES 1-100, ABC COMPANIES 1-100, XYZ PARTNERSHIPS 1-100 (being fictitious parties), Defendant(s).	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001189-23 T4 **Civil Action** ON APPEAL FROM SUPERIOR COURT, LAW DIVISION BERGEN COUNTY DOCKET NO. BER-L-6232-19 Hon. John D. O'Dwyer, P.J.Civ. Sat Below

AMENDED BRIEF OF PLAINTIFF/APPELLANT, MARCUS SANCHEZ, BY HIS GUARDIANS AD LITEM, MIGUEL SANCHEZ , MARGEE SANCHEZ

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PROCEDURAL HISTORY

On April 29, 2019, on complaint was filed on behalf of plaintiff (Pa1)[1]. On June 3, 2019, an answer was filed on behalf of defendants Public Service Enterprise Group Inc. and Public Service Electricity and Gas Company a.k.a. PSE&G (hereinafter "PSE&G") (Pa36). On July 1, 2019, an answer was filed on behalf of defendant Borough of Lodi (hereinafter "Lodi" or "the Borough") (Pa48)[2]. The case was transferred to Bergen County by order dated August 16, 2019 (Pa58). After discovery closed, defendants were permitted to file dispositive motions, which were filed on various dates (Pa61, 924, 931). On October 13, 2023, the Trial heard oral argument[3] and granted summary judgment to PSE&G, and it required additional briefing on the issue of net expert opinions before reaching a decision as to Lodi's summary judgment motion. Plaintiff filed a motion for reconsideration of the October 13, 2023 decision (Pa924), which was denied by the Trial Court by order dated November 17, 2023(Pa929) after oral argument[4]. Defendant Lodi refiled a motion to bar the testimony of plaintiff's experts (Pa921. Having heard oral argument on November 16, 2023[5], on December 14, 2023, the Trial Court granted summary judgment in

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[1] "Pa" refers to plaintiff's Appendices.
[2] The pleadings for the dismissed defendants, not part of this appeal, are omitted.
[3] "1T" refers to the October 13, 2023 Transcript.
[4] "2T"refers to the November 16, 2023 Transcript.
[5] "3T"refers to the December 14, 2023 Transcript.

favor of Lodi having barred the testimony of plaintiff's liability experts (Pa995). Thereafter, plaintiff filed Stipulations of Dismissal with Prejudice as to Defendant Michael Marino (Pa997) and all other defendants. (Pa998). On December 19, 2023, plaintiff filed this appeal as to PSE&G and Lodi only. (Pa999).

STATEMENT OF FACTS

A. The Automobile Accident

This case arose from an automobile accident that took place on May 31, 2017 at the intersection of Prospect Street and Central Avenue in the Borough of Lodi (Pa1009). The driver of the vehicle, Michael Marino, a former defendant in the case, stated that he did not see plaintiff, Marcus Sanchez, and thought he had hit a cone (Pa1009). At deposition, Marino testified that he was driving on Prospect Street, he felt something under his car, he could only think it was something on the road, and he backed up not knowing what was under the car. When he got out, he saw it was a person (Pa632). He thought he had hit a barrel, like a plastic garbage pail, or a cone (Pa633).

B. Plaintiff Specifically Recalled How the Accident Took Place.

Plaintiff, Marcus Sanchez, despite brain injury, recalled how the accident happened. He testified that, on the night of the accident, he was on his way back from a store located on Main Street in Lodi, turned left to Lincoln Place (Pa671-72), and walked

up Lincoln. (Pa671). From walking up on Lincoln, Sanchez took a left to cross to the other side of Lincoln onto Prospect Street (Pa673-74). Once on Prospect, he estimated that he walked about one minute to get to the intersection of Prospect and Central where the accident took place. (Pa675-76).

C. The Accident Took Place in the Prospect Street Crosswalk.

As for the location of the accident, Sanchez was shown a photograph taken by Bryan Smith, P.E. (Pa730), one of plaintiff's liability experts, during Smith's site inspection, and the following colloquy took place at deposition:

Q. You're standing in the middle of the street in the crosswalk, correct, in this picture?
A. In the picture, yes.
Q. How do you know that's where the accident took place?
A. Because that's where I got hit. (Pa157).

D. The Intersection of Prospect Street and Prospect Avenue Was Designated a Dangerous Intersection by Lodi.

Defendant Lodi posted "Dangerous Intersection" signs at all four corners of the subject intersection. At deposition, Lodi's Business Administrator, Vincent Caruso, testified that he was aware that there was a "Dangerous Intersection" sign posted at the intersection (Pa686, 687). Yet, he did not know when the sign was put up (Pa 687). He admitted that the sign was barely visible because of tree branches in a picture shown (Pa690). At deposition, Brian Paladino, Lodi's Director of Public Works for

decades, testified that he was aware of the "Dangerous Intersection" sign, but he did not know who requested the sign and when it was installed (Pa687). He did not know anything about the purpose or the placement of the sign at its location in the intersection and why the sign was placed at the intersection (Pa688). He did know, however, that the sign was no longer at the intersection; he acknowledged that it would have been his department that would remove the sign; and he did not know if the sign was removed since the 2017 accident (Pa688). Moreover, two police officers, who ran details frequently on Prospect Street, testified that they also were aware of the sign (Pa710, 156-57).

E. Lodi Officials Have No Familiarity with Their Lighting Systems and Agreement with PSE&G.

Vincent Caruso, the Borough's Administrator, testified that he is aware that the town has an agreement with PSE&G to pay for electricity bills for streetlights (Pa694). Caruso is not aware of any standard for brightness or type of lights that Lodi requires PSE&G to install. Caruso acknowledged that PSE&G does not have the authority to install a streetlight on its own (Pa694). Yet, Caruso does not know who decides on the installation of streetlights in the Borough (Pa694). Caruso has not had any discussion with engineers in the town with regards to streetlights that would be best to installed in particular areas (Pa694). In the end, Caruso

would be responsible for the selection and ordering of what types of lamps to install in the Borough (Pa695).

Lodi did not have a consulting relationship with an engineer who specialized in street lighting. The individual that was produced at deposition by Lodi as its consulting town engineer, Thomas Solfaro, does not have a background in street lighting. Rather, his area of expertise is wastewater, hydraulics and drainage (705). He does not work for Lodi on streetlights and electric poles. (Pa705). He is not an expert on illumination, and Lodi has not consulted him on illumination levels. (Pa705-08)

F. Defective Lighting Led to a Dangerous Condition in the Intersection.

There is evidence that the streetlight near the subject intersection was off during the accident investigation. When Vincent Caruso, the town's Administrator, was shown Photograph DL1-K (Pa730), he could not tell if the streetlight on the electric pole, the one closest to the sidewalk (hereinafter "the streetlight" or "the subject streetlight"), was on or off (Pa691). Lodi's Police Officer Philip Nobile, upon being shown DL1-K (Pa730) testified that the streetlight near the intersection does not appear to be on (Pa152). Sergeant Joseph Savino, a crime scene detective supporting Bergen County, arrived at the accident scene at 10:05 p.m., along with Detective Ryan Magnotta (Pa713). Savino's role was restricted to taking scene photographs (Pa714). Upon being

shown DL1-K (Pa730), Savino testified that the streetlight looks like it is off (Pa714). The photograph refreshed Savino's memory that, in his belief, the streetlight was off on the day of the accident (though he did not know if a photocell was turned off) (Pa 714). Ryan Magnotta, a detective and crime investigator with the Bergen County Sheriff's Office, testified, in turn, that the streetlight appears to be off on the photograph (Pa730) (Pa717).

G. PSE&G Failed to Advise Lodi on an Effective Streetlight for a Dangerous Intersection.

At deposition, Sean Chester, PSE&G's Manager of Central Sales and Services, testified that services PSE&G sells to municipalities include adding or subtracting lighting from their locations (Pa335). Municipalities make choices of what type of lights they want; and PSE&G offers different types of products to service municipalities' needs (Pa335). Chester was presented with the following excerpt from a document entitled "Tariff for Electric Service", precisely a section entitled "Selection of Lighting Option":

> Public Service will assist in the selection of lighting options by making recommendations for the most appropriate option based on the customer's defined illumination needs. However, responsibility for the final selection shall at all times rest with the customer. Any advice given by Public Service will be based on the customer's statements and by giving such advice, Public Service assumes no responsibility, nor shall it incur liability. (Pa366-67).

Chester acknowledged that, consistent with this language, a PSE&G sales representative may offer to replace an obsolete product with the current one "that will fit the customer's needs" (Pa371). Chester also acknowledged that, when a customer is interacting with one of his sales representatives, the customer usually will start with a need. Based on a particular need expressed, the recommendation made by the representative "is specifically detailed to the needs of what the customer is looking for" (Pa371)(emphasis added).

H. "Backlighting" Prevented the Driver from Seeing Sanchez and Caused him to Strike Sanchez.

1. Plaintiff's Liability Experts

On behalf of Plaintiff, Brian Smith, P.E. studied the intersection and came to the conclusion that a dangerous condition at the intersection caused Sanchez to be struck by Marino without him knowing what he struck. In his August 9, 2019 liability report, Smith presents the following facts, data and opinions: he measured the illuminance levels of the subject streetlight to be 0.0 foot candles, and this was not sufficient for the intersection (Pa739); the only available non-vehicular lighting caused Sanchez to be illuminated from behind (Pa739); the absence of adequate lighting in front of Sanchez and illumination behind him caused a "backlight" condition from the driver's point of view (Pa739); the darkened appearance of Sanchez would have readily blended in

with the other dark background items present in the area; the pedestrian said to the police he could not see Sanchez and thought he hit a cone (Pa739); it was also likely that the backlighting condition worked to negate the illuminance afforded by the motor vehicle's own headlights (Pa739); Lodi installed "Dangerous Intersection" signs before the incident (Pa739); PSE&G had been advised of the non-functioning streetlight (Pa739); Lodi was also responsible for trimming trees, as the tree closest to the stop sign was essentially hiding it from the driver's view (Pa740).

In the end, Smith opined that the intersection was not kept free from hazards due to the "backlight" condition created there, as well as the blocking of the stop sign by the tree; having received notice of the non-operational streetlight PSE&G should have taken measures to repair the light; PSE&G failed to maintain the light in a timely fashion; and these failures (in addition to actions taken by the driver) were the direct causes of the accident. (Pa739-40). At deposition, Smith defined "backlighting" as follows: "When you have background of a particular scene brightly lit and the foreground is dark and basically the foreground that is dark is lost in the well lit background..." (Pa470).

In his December 23, 2021 report, Smith reviewed eleven deposition transcripts and offered additional analyses and opinions (Pa455). In this report, he expresses the view that the

various accident investigators did not take into consideration Sanchez's version of the accident. As for him, he continued to rely on Sanchez's and his family's version of the accident as the documents he reviewed did not dissuade him from his initial opinions (Pa456).

Even after viewing the video showing the subject streetlight on at the time of arrival of the first Lodi officer[6], Smith opines that the streetlight "was likely not operating at the time of the subject incident, though it was operating when at least one police vehicle arrived onto the scene" (Pa459). This is because Marino could not see what he struck (Pa458-59); an individual (Peter Bavagnoli) testified that that the light was off more than it was on and the area was dark most of the time (Pa459); and a photograph (Pa730) of the investigation of the accident showed the light off. He opined at deposition that there was a 51% likelihood that the streetlight was out at the time of the accident (Pa471-72). Smith further stated that, although the streetlight was on when the first officer arrived at the scene, that does not mean it was on during the time when the officer had not yet responded to the scene (Pa487). Further, regardless of whether the streetlight was on or off, it was blocked off by tree branches. In fact, even if the

[6] Plaintiffs' experts, until receiving a video in discovery, initially believed that the streetlight was off at the time of the accident based on photographs received from plaintiff's family.

streetlight was on, a backlight situation would have been created due to the 0.0 light candle illuminance (Pa472).

In the end, Smith summarized at deposition his opinion of negligence of Lodi and PSE&G as follows:

> Q. In determining the negligence of Lodi or PSE&G what did you find with respect to their contribution to hazardous conditions at the scene of the accident?
>
> A. Neither party had any type of program where they would go out to see if the street lights in the Borough of Lodi were operational or not requiring repair and neither party gave proper consideration, professional engineering consideration to the selection and placement of the illumination and the type and size of the fixture involved. So both parties were negligent in that.
>
> The town of -- the Borough of Lodi should have engaged either PSE&G by asking them some specific questions like what are your professional recommendations and how about location and placement of that kind of thing. Apparently they didn't do that because the light was not the proper illumination level and it was not located properly in my opinion in accordance with -- not in accordance with, but due to the consideration of where the tree was between the light pole and the crosswalk and that PSE&G had a requirement to provide professional advice to their customer expecting that the customer was not a professional in knowing what they actually were asking was specifically type and placement of lighting fixture. (Pa522-23).

On behalf of plaintiff, in his August 9, 2019 report, Jeffrey Balan, P.E., an electrical engineer, presents the following facts and opinions: the recommended IESNA[7] illumination level is 9 lux or 0.9 foot candles for local roadways, when the measurements

[7] IESNA is an acronym for Illuminating Engineering Society of North America.

taken on May 23, 2018 were 0.0 foot candles (Pa380); tree branches obscured the stop sign (Pa381); the subject streetlight was reported out several times to PSE&G prior to the incident (Pa381); the only working streetlight was at the northeast corner of the intersection, which would have been behind Sanchez (Pa381); the untrimmed tree blocking the stop sign would make it difficult for the driver to stop even going at 25 MPH, as it would take approximately 85 feet to stop allowing for human reaction time (Pa381); the light operating in the northeast corner of the intersection "would create a back-lighting effect which would be observed as a shadow from the vehicle's perspective" (P381); "[b]ased on criteria Lighting Form 7, intersection lighting is required at the intersection (Pa381); these factors "caused a significant decrease in the ability to observe obstacles, hazards or objects such as pedestrians within the intersection" (Pa382); the overgrown trees "interfered with the required sight distance required under New Jersey DOT" (Pa382); "[t]he only light available at the intersection would backlight the pedestrian causing the pedestrian to become a shadow from the perspective of the vehicle operator (Pa382);" and the lights were not property maintained by PSE&G after requests that they be maintained (Pa382).

In his report dated December 22, 2021, Balan after reviewing many deposition transcripts, notes that the incident area was quite dark, and tree branches were overgrown and obstructing the stop sign. He is of the view that Lodi should have been more proactive regarding street lighting and tree trimming to provide a safer area for residents (Pa384). Moreover, the Borough should have retained full engineering support for lighting designs to ensure calculations, layouts, specifications for the type of lighting systems they had (Pa384). Furthermore, PSE&G could have been more proactive in making recommendations, consistent with section 2.5 of the Tariff, to Lodi to make improvements to the lighting systems located on Prospect Street. Balan further states: "Although PSE&G did not have adequate staffing to drive at night to determine any potential inadequacies in light levels and other maintenance relate[d] issues, knowing the performance of their own lighting systems, seeing "Dangerous Intersection" signs, and tall trees that would obscure and block light levels on the car driven surfaces, they should have at least made recommendations to the Borough" (Pa386).

In his January 14, 2022 report, Balan states that he reviewed additional documents, including a video (Pa387). While the video shows the light was on, it "shows the area around the scene of the accident being quite dark at the street level and its surrounding" (Pa387). Although the light was on from the officer's dashcam, the

"history of this light indicates on-going issues with it going in and out," including when Sgt. Savino observed the light being in the off position at the scene of the accident (Pa387). "Therefore, it is uncertain if the light was truly operational at the time of the accident or not" (Pa387-88). Balan further observes:

> The video also shows the area of incident being quite dark. Aside from the uncertain with the operation of streetlight, and lack of adequate lighting to being with, overgrown tree branches are also evident from this video. This issue contributes to the obstruction of the stop sign. Even if the streetlight was functioning at the time of the accident, the over grown tree branches clearly show reduced illumination levels at the street level where the accident occurred and within the intersection (Pa388).

2. Defendants' Liability Experts

Defendants' liability experts disagreed with essentially all facts and opinions offered by Smith and Balan, thereby creating a high degree of dispute of material facts between the experts on both sides. Some of the disputes presented by John A. Desch, P.E. (and colleague Robert Sinnaeve) (hereinafter "Desch"), liability experts for Lodi, are the following: Balan applied the wrong lux/foot illumination standards (Pa797) (Pa797, 855); he disagrees with Balan that the streetlight had been reported to be out several times prior to the accident (Pa797, 856); he rejects as "meaningless" Balan's consideration of the untrimmed tree as a factor in the accident (Pa797-98, 856-57); he rejects as "baseless" Balan's application of NJDOT guidelines to the subject

intersection (Pa797). In the end, Desch states brazenly: "We disagree with all the conclusions provided in Mr. Balan's report of August 9, 2019 and his addendum reports of December 22, 2021 and January 14, 2022, as there is no scientific, evidential or any other factual basis to support his conclusions" (Pa798, 854)(emphasis added). Yet, Desch admitted that Smith and Balan did offer opinions about "backlighting", and he did not (Pa862).

Stephen N. Emolo, PSE&G's expert, also disagrees with all of Smith's and Balan's factual analyses and opinions, as shown by the following: Balan is incorrect that that the streetlight was not functioning at the time of the accident (Pa125); the light was out because of lighting coming from the investigation trucks at the accident scene (Pa126); there is no evidence presented to suggest that PSE&G was ever notified that the subject streetlight was not properly functioning (Pa126); Sanchez was not walking in the crosswalk as his body would have been thrown forward at impact (Pa127); Sanchez was riding his skateboard trying to cross Prospect Street (Pa865); and Emolo disagrees with Smith's backlight theory in that the backlight would make the pedestrian more visible to the approaching motorist (Pa868).

I. Dispute of Material Facts As to Notice to PSE&G.

In a private investigation report dated February 1, 2021, Christopher O'Brien reported the following based on a conversation with Peter Bavagnoli, whose house is located near the streetlight:

> Mr. Bavagnoli recalled he had called PSE&G several times to report the overhead light is never on. Under questioning he offered that he called before the May 31, 2017 accident. He advised the light kept going out. The light had been a continuing problem and he had called several times. (Pa875).

Bavagnoli then gave a recorded statement to the same investigator on March 8, 2021 in which he essentially stated that he could not recall if the call to PSE&G was made before or after the May 31, 2017 accident (Pa878-79). At deposition, Bavagnoli testified that he made the call to PSE&G in the last three to four years (Pa885). Upon being shown a record of when the call was made to PSE&G indicating he made a call on October 4, 2018, Bavagnoli was satisfied that the record refreshed his recollection and was consistent with his estimation that the call was made within the range of three to four years (Pa885). However, measuring from when the call was reported on the PSE&G spreadsheet to the date of the deposition, the call did not fall within the three-to-four-year range, but well before the date of the accident. When confronted with this inconsistency, Bavagnoli simply stated:

> Well again, all I was able to provide was a window. Now, if my window is off by three months, four months, you know, that's due to, you know I couldn't recall the date at the time. But at the time of the questioning when it was posed to me, I felt that three to four years was accurate. (Pa887).

Bavagnoli added: "Year three, year four - six of one, half a dozen of the other here. I mean, aren't we mincing words? Aren't we splitting hairs here. I mean three and a half, three years, three and a half, four years" (Pa887-88). Moreover, Bavagnoli did not

know who generated the call report he was shown and when it was generated. He did not even know it existed until it was shown to him (Pa889). In the end, Bavagnoli admitted the following:

> Q. My question is, as long as that date [October 4, 2018] fell in the period of three to four years, even if it was a different date than you were shown, you would have adopted that date as the date when you made the call; am I correct?
>
> * * *
>
> A. The document is being provided by PSE&G and they're telling me this is the records we show. I can't challenge it without doing research with my own research. So if they would have shown a date maybe of three years ago and two months I would have believe that. If they would have shown three years and four months, I would have to believe that. (Pa889).

J. The Trial Court's Decisions.

On October 13, 2023, the Trial Court heard oral argument on the defendants' summary judgment motions and entered summary judgment in favor of PSE&G. Although the Trial Court acknowledged that there were conflicting facts on the operability of the streetlight (1T:30), it was not persuaded that there were conflicting facts as to the issue of notice. First, it observed that various members of the Sanchez family never reported the light being out. Second, PSE&G had no notice of the light being out prior to the date of the accident. (1T:30). Third, "Plaintiff alleged [sic] upon information provided by Mr. Bagdagnoli [sic] to raise a material issue of disputed fact as to the notice issue" (1T:31). In their underlying brief, plaintiff had presented a succinct analysis as to how a jury could conclude from the

statements and deposition testimony of Mr. Bavagnoli ("the Bavagnoli materials") that notice could have been given before the accident, but the Court did not discuss much of this analysis before arriving at its final conclusion.

Next, the Trial Court found no duty in statute or case law on the part of PSE&G. The Trial Court distinguished Weinberg, infra, from the facts of this case and stated that that case dealt with a water company's failure to provide adequate water pressure, as opposed to a public electric utility's responsibility to assure the adequacy of streetlights. Accordingly, the Trial Court granted summary judgment to PSE&G.

On November 16, 2023, the Trial Court heard oral argument on plaintiff's motion for reconsideration of the summary judgment entered as to PSE&G (2T). The motion was denied because the Trial Court did not view that anything new was raised in this motion. It did not find that there was either actual or constructive notice to PSE&G of the defective lighting, and there is no case law that imposes a requirement on PSE&G to fix the lighting (2T:12-13).

On December 14, 2023, the Trial Court delivered its decisions on Lodi's summary judgment motion and on its motion to bar the testimony of plaintiff's liability experts on the basis of "net opinions" (3T). On the issue as to where the accident occurred, i.e., inside of the crosswalk or before the crosswalk, the Trial Court found that there was a dispute of the facts between Sanchez's

testimony that he was impacted in the crosswalk as against the defense liability experts' analyses and opinions to the contrary (3T:11-12). The Trial Court also found that the issue as to whether the streetlight was in operation also was in dispute. (3T:12). Moreover, summary judgment was precluded on the issues of whether a tree blocked a stop sign at the intersection and whether Sanchez was riding his skateboard when he was struck (3T:12).

Then, the Trial Court tackled the issues as to whether there was a dangerous condition in the intersection and whether Lodi's conduct was palpably unreasonable. Despite having decided that there were various disputed issues raised by plaintiff, the Trial Court nevertheless took the approach that the issue of palpable unreasonableness must be established "in this case, in large part, by the expert opinion of plaintiff's liability expert" (3T:13). The Trial Court then proceeded to bar the testimony of plaintiff's liability experts on the following grounds: neither of plaintiff's experts provided standards or statute placing a duty on Lodi (3T:20); Smith's determination that the stop sign was hidden was not relevant since the driver was aware of the sign (3T:21); there was no actual notice of the inoperability of the streetlight (3T:21); there was no evidence of constructive notice with regard to the inoperability of the streetlight (3T:21); improper trimming of the tree was of no consequence given the driver's knowledge of the intersection (3T:21, 22) (the Trial Court did not discuss the

fact that the tree blocked lighting to the crosswalk, a key fact in the case); there is no "customary practice" that the Borough had the responsibility "to check on the functionality of the street lights" (3T:22); there is no history of prior complaints of inadequate lighting, incidents or injuries (3T: 24, 25); the experts offered no support as to why the Borough should have engaged a qualified lighting expert (3T:25); the experts failed to "provide any information demonstrating the prevalence" of backlighting (3T:26). Accordingly, the Trial Court granted Lodi's dispositive motions.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO PSE&G SINCE ALMOST ALL MATERIAL FACTS PSE&G RELIED UPON TO SEEK SUMMARY JUDGMENT WERE DISPUTED.

(Raised below: Pa1021-1066; 1T14-35; 2T4-13)

Because many of the material facts PSE&G relied upon to purport to establish lack of duty to Sanchez, absence of a dangerous condition or hazard in the incident intersection, and lack of notice to PSE&G are disputed, this defendant was not entitled to summary judgment as a matter of law.

A. PSE&G Had the Duty to Provide Adequate Lighting in a Dangerous Intersection.

PSE&G had the duty not to install ineffective lighting presenting a hazard in a dangerous intersection. A property owner

has the duty to maintain a property free from danger that can cause harm to others. See Clohesy v. Food Circus Supermarkets, 149 N.J. 496, 503 (1997) (citation omitted). The risk as viewed here is actually foreseeability, that is, a duty of care imposed based on a defendant's knowledge. See Robinson v. Vivirito, 217 N.J. 199, 208-209 (2014).

In the seminal case of Weinberg v. Dinger, 106 N.J. 469 (1987), the owner of an apartment building brought suit against a water company for failing to provide enough water pressure to abate a fire. The water company claimed immunity, under existing case law, against such a cause of action. The matter was appealed to the New Jersey Supreme Court. The Court held that a water company is not immune from liability for its negligence to provide adequate water pressure. In its analysis, the Court observed, not unlike PSE&G, that the water company was regulated by the Board of Public Utility ("BPU") and was required through regulation to provide adequate water pressure. Yet, despite this obligation, the Court abrogated the extant immunity under the common law by stating that "[a]lthough agreement and the regulation it adopts could serve as an independent basis for the water company's liability, we choose to rely primarily on settled principles of tort law as a basis for our decision." Id. at 483-84. The Court described the relationship between a water company and others in those simple terms:

> Today a property owner stands in the same relation to a water company as a traveler does to a bus company; he accepts the service that is offered and pays the price that is fixed by the Board of Public Utility Commissioners. Such a situation is inherent in the very nature of a public utility which enjoys a public monopoly and is subject to public regulation. [Id. at 477.]

The Court, in holding in this fashion, espoused a public policy:

> In addressing these arguments, we must keep in mind the central goals of the law of torts. As we said in People Express, supra, 100 N.J. at 255, the primary purpose of the tort law is "that wronged persons should be compensated for their injuries and that those responsible for the wrong should bear the cost of their tortious conduct." Moreover, forcing tortfeasors to pay for the harm they have wrought provides a proper incentive for reasonable conduct. A rule that denies water consumers a right of recovery for water-company negligence diminishes the incentive for water companies to perform maintenance that would prevent large fire losses. [Id. at 487]

The Court took the extraordinary step, in imposing negligence liability on the water utility, of overruling existing case law that had imposed the immunity: "Accordingly, we impose on private water companies the duty to act with reasonable care in providing water for extinguishing fires, and overrule *Reimann v. Monmouth Consolidated Water Co.* and cases decided in reliance on it." Id. at 495.

In this case, PSE&G is not immune from liability to plaintiff for contributing to the installation of defective lighting in the subject intersection, which created a hazard, which was foreseeable and could have been remedied with proper inspection. Consistent with the holding in Weinberg, supra, PSE&G had the duty

to pedestrians like plaintiff to provide streetlights with sufficient illumination for a crosswalk, especially one that is designated a dangerous intersection. That duty is not based on regulation alone, the applicable Tarriff, or any contractual relationship between PSE&G and Lodi; and it is not based on opinions of experts. Rather, as seen in Weinberg, supra, it is based on the common law of negligence.

Consistent with Weinberg, supra, PSE&G breached its duty to provide adequate lighting in the subject intersection. It was known or should have been known by PSE&G, which performed services all over Lodi, and undoubtedly at or near the subject intersection that the intersection was designated a dangerous intersection by the Borough. Minimal inquiry and efforts by PSE&G could have ensured that illumination in the area was adequate.

That duty was breached by PSE&G that relegates all responsibility for sufficient lighting to Lodi. PSE&G's representative engineer admitted at deposition that PSE&G takes no steps whatsoever to ensure adequate lighting anywhere in Lodi until it is called upon to do so by someone in the Borough. Any reasonable inspection of an area classified as dangerous would have led PSE&G to realize, as testified by Bavagnoli, that the subject streetlight had a poor history of continuous operation. He testified that, even before the accident, regardless of complaints made to PSE&G, the light was more off than on. Even after repair by PSE&G, until

the time of Bavagnoli's deposition, the light coverage continued to be erratic at best.

PSE&G's duty is further enhanced by its own obligation under its agreement with Lodi. Section 2.5 of the PSE&G Tariff obligates it to recommend "appropriate option based on the customer's needs." A simple inquiry would have led PSE&G to the knowledge that the "need" for lighting in this scenario was to illuminate an intersection deemed a dangerous intersection. As such, PSE&G would not, could not, recommend a streetlight with 0.0 foot candle illumination!

Furthermore, PSE&G cannot escape liability for hiding behind the Tarriff, which placed the ultimate selection of lamps on the customer, with the language that PSE&G "assumes no responsibility, nor shall it incur liability." This is because, pursuant to Weinberg, supra, liability is not based on contract, Tariff, or even regulation, but it is based on the common law of negligence.

B. Because PSE&G Partially Created the Danger in the Intersection, No Notice of the Danger Was Required Although It Is Likely That It Had Actual Notice, and Should Have Had Constructive Notice of the Danger.

Because PSE&G partially created the hazard leading to backlighting in the intersection, plaintiff does not need to establish the element of actual notice of the hazard. Notwithstanding, there exists evidence in the case that PSE&G

likely had notice, and most definitely had constructive notice, of the said hazard. It is well established that a property owner will be liable for a dangerous condition that caused injury when it had actual or constructive notice of the said condition. See Jeter v. Sam's Club, 250 N.J. 240, 251 (App. Div. 2022) (citations omitted). "A defendant has constructive notice when the condition existed 'for such a length of time as reasonably to have resulted in knowledge and correction had the defendant been reasonably diligent.'" Constructive notice can be inferred from eyewitness testimony or from "[t]he characteristics of the dangerous condition," which may indicate how long the condition lasted. Id. However, there is an exception to the rule requiring actual or constructive notice in that "[w]hen a proprietor creates a dangerous condition, notice, actual or constructive, of that dangerous condition is not required." Prioleau v. Kentucky Fried Chicken, Inc., 434 N.J.Super. 558, 564 (App. Div. 2014)

In this case, plaintiff does not need to establish that PSE&G had actual notice of the hazard existing in the intersection at the time of the accident since it installed the 0.0 foot candle lamp which gave rise to the backlight condition there. Moreover, PSE&G had constructive notice of the hazard since testimony evidence exists in the case to show that its employees worked all the time all over Lodi and on Prospect Street to have noticed the

dangerous intersection signs at the subject intersection, the feeble of lighting emitting 0.0 foot candles, and the streetlight being more off than on over the years.

Notwithstanding, assuming without conceding that plaintiff must establish actual notice of the danger, the Trial Court erred in not letting a jury decide this issue based on the evidence in the case. At trial, a jury would be tasked to consider whether there was actual notice, from the call Bavagnoli made to PSE&G, even though there was some confusion on his part about the timing of the call. A jury can decide what weight to give to this confusion. Although Bavagnoli was confused about the timing of the call, his statements to the private investigator and testimony would provide a jury with enough evidence to make a decision about when the call was made.

What is important at this stage of litigation is not whether a jury would definitely believe plaintiff's evidence presentation that the call was likely made before the accident. What is important is that there is sufficient evidence from the Bavagnoli materials for or against the timing of the call for a jury to be the appropriate finder of fact to reach a decision on that issue. The minute a jury is in the position to answer in the affirmative or negative about the timing of the call, which clearly is the case here, the evidence is not "imprecise or speculative," and the finder of fact must the jury.

What is even more important is that, in weighing the numerated facts above, in the context of a summary judgment motion, the Trial Court must view any fact in the light most favorable to plaintiff, i.e., the Trial Court must find that a jury could well believe each fact in the light presented by plaintiff, and not more. More specifically, the Trial Court should have viewed that a jury could conceivably adopt only the first statement Bavagnoli gave to the private investigator (i.e, he made several calls before the accident); the Trial Court should have viewed that a jury could believe that Bavagnoli (despite his vacillation) did not ultimately say that the call was not made before the accident; the Trial Court should have viewed that a jury could believe that the call was made before the accident since the date range provided by Bavagnoli in his deposition testimony took the call six months to eighteen months before the accident. The Trial Court should even have viewed that a jury could believe that Bavagnoli made the call before the accident since he was motivated to do so sooner than later due to the streetlight being more off than on in front of his house and due to his motivation to protect his vintage vehicles. In the end, when there is any doubt surrounding facts that can go in two separate directions, in the context of a summary judgment motion, a court must resolve the doubt in favor of the nonmovant, the plaintiff in this case. Even if the Trial Court weighed only one of the facts in favor of plaintiff, summary

judgment could not be granted. Better yet, all of these enumerated facts should have been weighed by the Trial Court in the light most favorable to plaintiff and preclude summary jugment.

C. Almost All Material Facts PSE&G Relied Upon to Seek Summary Judgment Are Disputed.

Plaintiff disputes PSE&G's assertion below that it has proven with certainty that the streetlight was out by virtue of the fact that the first officer arrived within minutes of the accident. As seen, Smith gave the opinion that the streetlight was likely out due to the history of the light being more off than on, that Marino did not see what he struck, and the fact that the light was out during the investigation. Plaintiff also disputes that the floodlight at the investigation scene caused the streetlight to be out. Here again, Smith and Balan opined that the floodlight at the scene was pointed down to illuminate the incident scene. They disagreed at deposition that training a light beam from a flashlight at the light pole's photocell recreated the ambient lighting scenario at the scene of the accident.

Plaintiff also disputes PSE&G's assertion that there was no notice given to PSE&G by Bavagnoli of the street light being out. As seen in great detail above, a jury could conclude more likely than not, in plaintiff's favor, that Bavagnoli had given notice to PSE&G prior to the accident.

Plaintiff also disputes PSE&G's contention that the streetlight it sold Lodi was not defective so as to constitute a hazard in the intersection. Plaintiff disputes this defendant's contention that no witnesses reported the light being out, as seen above. Plaintiff further disputes PSE&G's contention that Balan agreed that the streetlight was not defective since, along with Smith, Balan is headstrong that the defective streetlight caused a backlight effect in the intersection. Plaintiff also disputes PSE&G's argument that Smith agreed that there was no evidence of notice to PSE&G since Smith reiterated, in various parts in his deposition, that he is aware, as discussed above, that Bavagnoli changed his statement or testimony on the call he made to PSE&G.

Plaintiff also disputes PSE&G's assertion that, even if the light was on, it would not illuminate the crosswalk. Rather, what Balan and Smith are adamant about in their reports and their testimony is that the tree branches prevented lighting from reaching the crosswalk. Balan also made it clear at deposition that some light would have illuminated the driver's path as he approached the crosswalk. Therefore, because the tree branches were in the way, in addition to 0.0 foot candle lighting, the crosswalk could not be illuminated, thereby causing the backlight effect.

Plaintiff disputes PSE&G's contention that it has no duty with regard to light design and placement. Consistent with Weinberg, supra, and under the general negligence theory it espouses, PSE&G had the duty not to sell a hazardous 0.0 foot candle lamp to Lodi. That duty trumps any opinion that a sales manager may hold or PSE&G's attempt to avoid responsibility by relying on its Tariff.

In the end, the Trial Court erred in granting summary judgment to PSE&G. The Trial Court essentially treated as "imprecision and speculative" Bavagnoli's statement that he could not recall if he made the call to PSE&G before or after the accident. The Trial Court did acknowledge that, at least once, Bavagnoli indicated to plaintiff's private investigator that he made the call before the date of the accident. Because that statement was later conflicted, it is up to a jury to determine which statement to believe. At trial, a jury would be asked to determine whether there was actual notice, from the call Bavagnoli made to PSE&G, even considering his confusion about when he called. That would not be the first time a jury would be called upon the weigh the credibility of a witness where the evidence leads to different directions; or for a jury yet to make a decision about accepting or not one or more facts where the evidence displays a witness' confusion.

If a trial were to take place today in this matter, a jury would be presented with the following facts favorable to plaintiff:

(1) Bavagnoli gave a non-recorded statement closest to the time of the accident that he called about the nonfunctioning light before the accident; the private investigator will testify to this fact at the time of trial; (2) when Bavagnoli gave a recorded statement to the same investigator he had the opportunity to state the call was made after the accident but instead he stated that he could not recall if the call was made before or after the accident; (3) even after Bavagnoli was shown a date, which he adopted at first as the date of the call, upon cross-examination he agreed, within a date range he adopted, that he could have made the call anywhere from six months to one and a half years before the accident and that he would adopt any date shown to him that falls withing that range, which range, as stated, took us to before the accident! (4) the light had a history of being more off than on, a fact that would have prompted Bavagnoli to make his complaints to PSE&G sooner than later; (5) Bavagnoli was highly motivated that his vintage vehicles parked in the vicinity of the nonfunctioning streetlight not be damaged, also a fact that would have prompted him to call PSE&G sooner than later. Given these facts that can be put forth to a jury, a likelihood exists that a jury could conceivably resolve the issue of "actual notice" in favor of plaintiff, i.e., Bavagnoli made the call about the nonfunctioning streetlight before the accident. On the other hand, PSE&G would present contrary facts to challenge.

Yet, what is important in the context of a summary judgment motion is not whether a jury would definitely believe plaintiff's evidence presentation that the call was likely made before the accident. What is important is that there is sufficient evidence from the Bavagnoli materials for or against the timing of the call for a jury to be the appropriate finder of fact to reach a decision on that issue.

Moreover, the Trial Court erred in not finding that PSE&G had constructive notice of the hazard leading to accident, or in not specifically ruling on the issue of "constructive notice." As seen above, since Weinberg, supra, a public utility enjoys no immunity from liability and is subject to liability in the same way any commercial entity is. In this case, PSE&G, upon creating the hazard by selling useless luminaires, had plenty of time to find out how the streetlight it sold Lodi was working in the intersection. Its own engineer admitted at deposition that PSE&G technicians performed services all the time, all over Lodi. PSE&G also had the opportunity to see that the intersection was designated a dangerous intersection. As expressed by plaintiff's experts, PSE&G was required to be more proactive in seeking to determine if the luminaires they sold to PSE&G were adequate to provide coverage at the intersection.

Lastly, the Trial Court erred in that no actual, or even constructive, notice of the hazard existing in the intersection at

the time of the accident was required to be given where PSE&G created, or contributed to, the existence of the hazard. In this case, at some point PSE&G was approached about the placement of luminaires by Lodi at an intersection. It sold Lodi a streetlight of 0.0 foot candles that did not effectively illuminate the intersection. In doing so, it created, or contributed to, the hazard that came to exist in the intersection, which gave rise to the blacklight condition, and which caused Marino not to see Sanchez in the process of crossing the intersection. Therefore, although plaintiff has established that there is evidence to establish actual or constructive notice, no notice actually was required to be given to PSE&G, as one of the originators of the hazard.

POINT II

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO LODI SINCE, PURSUANT TO N.J.S.A. 59:4-2, LODI'S CONDUCT WAS PALPABLY UNREASONABLE IN PROVIDING 0.0 FOOT CANDLE LIGHTING IN A DANGEROUS INTERSECTION AND HAVING NO KNOWLEDGE WHATSOEVER ABOUT THE LIGHTING SELECTION PROCESS WITH PSE&G.

(Raised below: Pa1021-1066; 1T42-52; 2T21-33; 3T)

Lodi's conduct in this case was palpably unreasonable. N.J.S.A. 59:4-2 provides the following:

> A public entity is liable for injury caused by a condition of its property if the plaintiff establishes that the property

> was in dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either:
>
> a. a negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or
>
> b. a public entity had actual or constructive notice of the dangerous condition under section 59:4-3 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.
>
> Nothing in this section shall be construed to impose liability upon a public entity for a dangerous condition of its public property if the action the entity took to protect against the condition or the failure to take such action was not palpably unreasonable.

A municipality has the duty to protect individuals from dangerous conditions. It is necessary for a "plaintiff to prove that a condition constituted a dangerous condition; that the dangerous condition proximately caused the injury; that the dangerous condition created a reasonably foreseeable risk that the harm would occur; a public employee of the municipality created the dangerous condition; and that the municipality had actual or constructive notice of the dangerous condition." See Furey v. County of Ocean, 273 N.J.Super. 300, 310 (App Div. 1994). As seen above, where the public employee creates the hazard, no form of notice is required.

Palpable unreasonableness connotes a "more obvious and manifest breach of duty" than mere negligence, and "implies behavior that is patently unacceptable under any given circumstance." Gaskill v. Active Environmental Technologies, Inc., 360 N.J.Super. 530, 536-537 (App. Div. 2003).

As for notice, N.J.S.A. 59:4-3 provides:

> a. A public entity shall be deemed to have actual notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 if it had actual knowledge of the existence of the condition and knew or should have known of its dangerous character.
>
> b. A public entity shall be deemed to have constructive notice of a dangerous condition within the meaning of subsection b. of section 59:4-2 only if the plaintiff establishes that the condition had existed for such a period of time and was of such an obvious nature that the public entity, in the exercise of due care, should have discovered the condition and its dangerous character.

A. The Conduct of Lodi's Officials and Employees Were Palpably Unreasonable.

In this case, Lodi's conduct was palpably unreasonable. Sanchez was struck in the crosswalk of the subject intersection due to backlighting created by a defective streetlight emitting 0.0 foot candles. Whatever feeble lighting existed was blocked by tree branches, which Lodi failed to trim. While PSE&G was responsible for the placement and maintenance of the streetlight, Lodi's officials were the actual decisionmakers in light purchases. Not a single witness who testified on behalf of Lodi knew anything whatsoever about the light purchase process. Key Lodi officials, who worked for the Borough for decades, had no knowledge about the streetlight purchase process. Moreover, these officials failed to retain proper engineering expertise to ensure that competent guidance was obtained from PSE&G about the suitability of street lighting near an intersection that Lodi deemed a dangerous intersection. The engineer retained by Lodi for

various services in the Borough testified that he was never called upon to provide any lighting service to Lodi.

Furthermore, the same officials, as well as various police officers who testified on behalf Lodi, had no knowledge whatsoever about why the intersection was designated a dangerous intersection by the Borough although all of them were familiar with the dangerous intersection signs placed at every corner of the subject intersection. In addition, Lodi took no steps to ensure continuous light coverage at a dangerous intersection, judging the history of the streetlight, which was more off than on, according to Bavagnoli.

The actions or omissions of Lodi are palpably unreasonable in that the behavior of its public employees is likely to be deemed unacceptable under any given circumstance by a jury. It is highly unacceptable that the Administrator of a town has no clue about the lighting process that exists under an agreement that the town entered into with PSE&G. It is even shocking that no official knows anything about the purchase of effective lighting, especially for an intersection that was deemed dangerous. Lastly, it cannot be acceptable under any circumstance that no Lodi official or police officers knows why the intersection came to be designated a dangerous intersection. It behooves all officials, including the

police officers, to have this knowledge in order to protect members of the public.

The acts or omissions on the part of the Lodi officials and employees proximately caused plaintiff's injuries. It is because Lodi purchased a defective streetlight for an intersection it deemed dangerous that the intersection was not properly illuminated, thereby causing a backlight effect, and causing the driver, Marino, to strike Sanchez in the crosswalk at the intersection without knowing what he had struck.

As for notice Lodi, at least, had constructive notice of the hazard since it had existed for a very long time. Both the Borough Administrator and the Public Works Director had decades to uncover that street lighting was not adequate in the intersection the Borough itself designated a dangerous intersection. The Lodi police officers themselves testified that they were familiar with the dangerous intersection signs and had occasion to see them over a long period of time during their various details through the streets of the municipality.

B. Almost All Material Facts Lodi Relied Upon in Seeking Summary Judgment Are Disputed.

Lodi argued to the Trial Court that Sanchez's version of the accident should be jettisoned by virtue of his brain injury. Even if Lodi could prove that complicated fact, it would take a jury to

determine the credibility of Sanchez's version of the accident. Though with some difficulty in recalling very abstract facts at deposition, Sanchez did his very best to recall his trip to and from the store he went to, up to the point at which he was struck by the Marino vehicle in the crosswalk on Prospect Street on his way back. He testified that, on the night of the accident, he left his house, crossed Prospect Street, then made a left to cross Central Avenue, then walked along Prospect Street, up to Lincoln Place, where he made a right turn, and went down Lincoln to one of the stores on Main Street. In returning home, he came up Lincoln, made a left onto Prospect, and walked to the crosswalk on Prospect. His version of the accident was reiterated by Heather Garcia, his then fiancée and now wife, with whom Sanchez had communication over the months after the accident about what happened. This version of the accident disputes the fact "recreated" by defendants' experts and the driver, Marino, that Sanchez was not struck in the crosswalk and was skateboarding instead of walking.

Plaintiff disputes Lodi's assertion below that there is no evidence of the subject streetlight being defective. Bavagnoli was clear in his deposition that the streetlight was more off than on historically and was in the same state of disrepair even at the time of the deposition. Moreover, a streetlight emitting 0.0 foot candles in a dangerous intersection is de facto defective!

Lodi, not unlike PSE&G, took the position below that the streetlight was operating at time of the accident. As seen, this statement was disputed by Smith that the light was likely not operating at the time of the accident, for the reasons he gave and enumerated above.

Lodi and its experts speculate that it was the sensor that caused the subject streetlight to be turned off. Both Smith and Balan disputed this contention since, after studying the photograph DL1-K (Pa730), they could see that the floodlight mounted on the truck was below the streetlight and was meant to be pointed down to light up the investigation scene. The experiment conducted by the Resch team likewise is disputed by Smith and Balan in that they trained the flashlight beam directly at the sensor tricking it into turning itself off. Balan explained that, in real life, it is the sun from above hitting the sensor from the top and sides that trigger the deactivation of the sensor.

In the end, the Trial Court erred in granting summary judgment to Lodi. The Trial Court, in its December 14, 2023 Opinion, was correct in acknowledging that there existed many issues of disputed facts from the parties' positions. However, in order to grant summary judgement to Lodi, the Trial Court, despite the severe dispute of almost all material facts in the case, took the approach of barring plaintiff's expert reports and testimony. The Trial

Court should have let a jury decide, on the strength of the disputed facts alone, whether or not Lodi's conduct was palpably unreasonable. As seen above, Lodi's officials had no clue whatsoever about how its streetlight system operated and how to maintain an intersection it deemed dangerous. Moreover, as will be discussed in detail, plaintiff's experts provided extremely useful and competent factual analyses and opinions that would aid a jury in understanding plaintiff's position that there was a hazard created in the intersection due backlighting, which caused the driver not to see Sanchez cross the intersection and to be impacted at that location.

POINT III

THE TRIAL COURT ERRED IN BARRING THE TESTIMONY OF PLAINTIFF'S LIABILITY EXPERTS FOR NET OPINIONS AND GRANTING SUMMARY JUDGMENT TO LODI ON THAT BASIS SINCE THESE EXPERTS BASE THEIR OPINIONS, AMONG OTHER THINGS, ON FACTS, DATA, PHYSICAL EVIDENCE, EXPERIENCES, SCIENTIFIC KNOWLEDGE, PERSONAL OBSERVATIONS, AND DEPOSITION TRANSCRIPTS.

(Raised below: Pa1021-1066; 1T42-52; 2T21-33; 3T)

The opinions offered by Bryan Smith, P.E. and Jeffrey Balan, P.E. in their various expert reports do not constitute "net opinions". N.J.R.E. 702 provides the following:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Relevant to this rule, "[t]he true test of admissibility of such testimony is not whether the subject matter is common or uncommon or whether many persons or few have knowledge of the matter; but it is whether the witnesses offered as experts have peculiar knowledge or experience not common to the world which renders their opinions founded on such knowledge or experience and aid to the court or jury in determining the questions at issue." Indeed, "an expert must 'be suitably qualified and possessed of sufficient specialized knowledge to be able to express [an expert opinion] and to explain the basis of that opinion.'" State v. Moore, 122 N.J. 420, 458-59 (1991) (citations omitted). Furthermore, the admissibility of expert testimony will depend on the facts and on the expert's qualifications. More particularly, the expert "must possess a demonstrated professional capability to assess the scientific significance of the underlying data and information, to apply the scientific methodology, and to explain the bases for the opinion reached." Clark v. Safty-Kleen Corp., 179 N.J. 318, 338 (2004) (citation omitted). In this regard, N.J.R.E 703 provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

In the present case, neither the testimony of Bryan Smith, P.E. nor that of Jeffrey Balan, P.E. should have been barred.

Smith is a well trained mechanical engineer, who had a long career with the U.S. Armed Forces in large-scale construction projects and who, for decades, has been an expert in construction and premises liability matters related to personal injury cases. As such, his testimony would aid a jury in understanding the issues of this case at the time of trial. He has a deep foundation in physics, as part of his training; he has participated as an expert in hundreds of cases on premises liability; and he has experience in about a couple of dozen cases in which lighting conditions were hazardous and in determining whether lighting was the cause of causation of an incident. Lastly, Smith relied on Balan's expertise, as an electrical engineer, for more in-depth lighting issues.

The following are factual and data evidence, as well as scientific opinions, that Smith offers in his reports followed by the recognized evidence categories (in bold parentheticals) provided in evidence rules and case law: Smith measured the illuminance levels of the streetlight preceding the intersection to be 0.0 foot candles, and this was not sufficient coverage for this location **(data collected)**; this does not mean that the area was pitch-black "but below the level of illumination given by one candle at a foot away" **(scientific knowledge)**; "the only available non-vehicular lighting caused Mr. Sanchez to be illuminated from behind. . ." **(scientific knowledge)**; the absence of adequate

lighting in front of Sanchez and illumination behind him caused a "backlight" condition from the driver's point of view **(scientific knowledge)**; Smith offers Photographs 11, 12, 13 in his report to illustrate the "backlight" condition **(photographs, demonstrative evidence)**; "the darkened appearance of Mr. Sanchez would have readily blended in with the other dark background items present in the area, and would have been easier for a driver to see and avoid a pedestrian with no streetlights at all, when compared to those which resulted in backlit pedestrians" **(scientific knowledge, demonstrative evidence)**; the motorist said to the police he could not see Sanchez and thought he hit a cone **(deposition testimony, police reports, recorded insurance statement)**; "it was also likely that the backlighting condition worked to negate the illuminance afforded by the motor vehicle's own headlights **(scientific knowledge)**; Lodi installed "Dangerous Intersection" signs before the incident **(deposition testimony, photographs)**; PSE&G had been advised of the non-functioning streetlight **(deposition testimony, private investigation, and recorded statement)**; and Lodi was also responsible for trimming trees, as the tree closest to the stop sign was essentially hiding it from the driver's view **(personal observations, video, photographs)**.

Later opinions offered by Smith likewise are based on deposition transcripts that he reviewed. Indeed, after reviewing eleven deposition transcripts, Smith offered these opinions:

> I further believe that both the Borough of Lodi and PSE&G were negligent in that both parties likely had either actual or constructive knowledge of the streetlight seen in Exhibit DL-K as being non-functional on the incident date. This was due to the mutual failure of both parties to take any measures whatsoever to routinely check on the functionality of the streetlights anywhere in Lodi. I believe that the Borough of Lodi's failures were palpably unreasonable because: 1) they were fully aware that the incident intersection was dangerous (due to the signage they posted there before the incident occurred); 2) they failed to consult a qualified electrical engineer to determine necessary and proper illumination levels and equipment at the incident location; 3) they failed to trim the tree adjacent to the incident stop sign such that vehicle operators were aware of the need to stop there; 4) they failed to conduct any type of regular evaluations of streetlight functionality within their municipality whatsoever; and 5) they had no knowledge of their agreement with PSE&G with regard to their own responsibilities in selecting appropriate lamps, etc. and coverage. Even a simple twice a year lighting survey could be considered a minimal and necessary safety measure to ensure the safety of their residents. Lodi alleged that they did not know why the intersection was originally identified as being dangerous nor who removed the "dangerous" signs. Lodi's actions/inactions were palpably unreasonable. All of the opinions contained in my 8/9/19 report, as potentially modified above, remain unchanged. All of these conclusions were made to a reasonable degree of professional engineering certainty. (Pa1036).

Smith's opinion that the streetlight was likely not operable is based purely on actual discovery evidence, as the following demonstrate: a history of the streetlight being more off than on **(deposition testimony, photograph)**; the streetlight being to be out during the accident investigation **(deposition testimony, photograph)**; and Marino could not see what he struck **(deposition testimony, police reports, recorded insurance statement)**. Moreover, Smith's opinion about that streetlight was likely off at the time of the accident is supported by much lay and expert

testimony, as seen above. Furthermore, Smith's opinion that, regardless of whether the light was on at the time of the accident, it was ineffective as it was blocked by the tree branches is based on the very video produced by defendants.

Smith was criticized by defendants in their motions for basing some of his opinions on the International Property Maintenance Code (IPMC). What the defendants failed to understand is that, as pointed out by Smith and Balan, any construction standard is better than no standard at all in a situation where Lodi followed no construction standards and hired not one specialist to guide it in its streetlight placement, design and light coverage at an intersection, especially a dangerous intersection.

The defendants took the position below that Smith is not an accident reconstruction expert. What they failed to realize is that the crux of Smith's (and Balan's) opinions is based on lighting and premises liability theories. In those domains, as seen, both experts are highly qualified to render their opinions.

Not unlike Smith, Balan bases his opinions on the aforesaid evidence categories. He opined that the intersection illumination, based on IESNA recommendations, should have been 0.9 foot candles, instead of 0.00 foot candles **(scientific knowledge and data)**. It is immaterial that Lodi is a municipality since construction standards are good guides for any municipality, especially since

Lodi has no guidance from any engineering source for lighting. He further observes that tree branches blocked the stop sign and the streetlight itself **(photograph, video)**; the streetlight was reported out to PSE&G **(deposition testimony)**; there was a working streetlight in the background of Sanchez **(Smith's site observations)**; the two light sources created a backlight condition **(scientific knowledge)**; "[t]he only light available at the intersection would backlight the pedestrian causing the pedestrian to become a shadow from the perspective of the vehicle operator" **(scientific knowledge)**; Lodi should have retained a firm to guide it in lighting selection" and should have been proactive in determining lighting inadequacies **(industry standard, experience)**.

Balan further elaborates on his theory of negligence at his own deposition. Here too, his opinions are based on the usual evidence categories, as the following demonstrate: with sufficient lighting from the streetlight, the driver's reaction time would have been quicker **(scientific knowledge)**; Balan relied on illuminance data collected by Smith during his site inspection **(data)**; the most important factor that Balan considered was that overgrown trees obstructed the streetlight **(video)**; point-by-point measurements would be ideal but would be of no consequence where there were 0.0 foot candles at the pole **(scientific knowledge, experience, site data)**; IESNA does not take into consideration a driver's headlights **(scientific knowledge, experience)**; some

municipalities rely on IESNA and DOT standards **(experience, industry standards and practice)**; Balan has hesitation about stating the light was on at the time of the accident since it was off during the investigation **(photograph, deposition testimony)**; the light beam trained at the pole in the Desch experiment caused the streetlight to turn off **(photographs, scientific knowledge, experience)**; backlighting is to be avoided so that a positive contrast can be kept on pedestrians, and backlighting is a scientific approach **(scientific knowledge, experience)**; although backlighting is based on a scientific approach, Balan relied on Smith's findings in his field study **(site data collected by Smith)**; PSEG should have made recommendations to Lodi about lighting at the intesection **(experience, industry standard)**; Balan stated that even if the light was off, that would not necessarily affect backlighting (**scientific knowledge, experience)**; and finally, in a situation in which in a municipality does not have internal guidelines and regulations for an engineering consultant to follow, then standards by IESNA or the New Jersey DOT would be heavily relied upon **(industry standard, experience)**.

Because Balan and Smith have unassailable education, training and experiences in construction, premises liability, lighting and lighting design, and their opinions are based on the evidence categories provided in the bold parentheticals, their opinions are not net opinions by any stretch of the imagination and should not

have been barred. The Trial Court erred in barring their testimony and using that decision to grant summary judgment to Lodi.

POINT IV

THE TRIAL ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS BECAUSE EVERY MATERIAL FACT IN THIS COMPLEX MATTER WAS DISPUTED BY THE PARTIES AND THEIR EXPERTS.

(Raised below: Pa1021-1066; 1T42-52; 2T21-33; 3T)

Rule 4:46-2(c) provides, in relevant part:

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

In determining whether or not to grant summary judgment, "the court must look at the evidence and inference which may be reasonably deduced therefrom in the light most favorable to the non-moving party." Brill v. Guardian Life Inc. Co., 143 N.J. 520, 535 (1995). Indeed, "[t]he essence of the inquiry. . .is. . .whether the evidence presents sufficient disagreement to require a submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id.

In this case, due to a severe dispute of almost all material facts the defendants relied upon to make to seek summary judgment, the Trial Court erred in granting their motions.

CONCLUSION

For the foregoing reasons, the defendants were not entitled to summary judgment, and the Appellate Division should reverse the Trial Court's decisions and orders.

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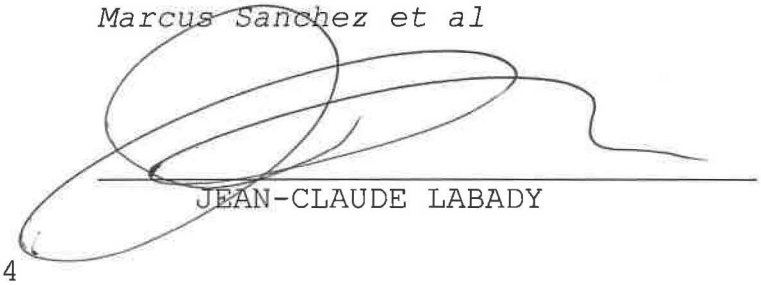

JEAN-CLAUDE LABADY

DATED: April 29, 2024