

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4856-08T2

MADELINE MUISE, INDIVIDUALLY
AND AS OWNER AND OPERATOR OF
MEDIATION AND THERAPY ASSOCIATES,
ON BEHALF OF HERSELF AND ALL
OTHER INDIVIDUALS AND BUSINESS
ENTITIES SIMILARLY SITUATED,

Plaintiff-Appellant,

v.

GPU, INC., ITS SUBSIDIARIES,
AGENTS, SERVANTS, AND/OR
EMPLOYEES,

Defendants,

and

JERSEY CENTRAL POWER & LIGHT
COMPANY, F/D/B/A GPU ENERGY,
ITS AGENTS, SERVANTS, AND/OR
EMPLOYEES,

Defendants-Respondents.

GEORGE J. TZANNETAKIS AND
PAULA R. ZACCONE-TZANNETAKIS,
HUSBAND AND WIFE, ANNA JACOUBS,
GERALD HOY AND KATHLEEN HOY,
HUSBAND AND WIFE, LLOYD VACCARELLI
AND DOROTHY VACCARELLI, HUSBAND
AND WIFE, FRANK CRACOLICI, MARMOL,
INC., D/B/A UMBERTO RESTAURANT,
WARREN ABRAHAMSEN, D/B/A FAIRWINDS

CATERING, C.K. SEAFOOD, INC.,
D/B/A BAYSHORE FISHERY, CHARLES
KURICA, JR. AND JANICE KURICA,
HUSBAND AND WIFE, FOREIGN CARS OF
MONMOUTH, INC., RAD ENTERPRISES,
INC., D/B/A KRAUSZER CONVENIENCE
STORE, and FAIR HAVEN HARDWARE,
INC., ON BEHALF OF THEMSELVES
AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

GPU, INC., AND ITS SUBSIDIARY
COMPANIES, GPU GENERATION,
INC., and GPU SERVICE, INC.,

Defendants,

and

JERSEY CENTRAL POWER & LIGHT
COMPANY, F/D/B/A GPU ENERGY,

Defendant-Respondent.

Argued January 5, 2010 - Decided July 29, 2010

Before Judges Fuentes, Gilroy and Simonelli.

On appeal from Superior Court of New Jersey,
Law Division, Monmouth County, Docket No.
L-3587-99.

Bruce D. Greenberg and Frank S. Gaudio
argued the cause for appellants (Lite, DePalma,
Greenberg & Rivas, L.L.C. and Miller &
Gaudio, attorneys; Mr. Greenberg, Mr. Gaudio,
and Katrina Carroll, on the briefs).

Gavin J. Rooney and Natalie J. Kraner argued
the cause for respondents (Lowenstein Sandler,
attorneys; Mr. Rooney and Ms. Kraner on the brief).

PER CURIAM

By leave granted, plaintiffs Madeline Muise and George J. Tzannetakis, on behalf of themselves and those similarly situated, appeal from the March 30, 2009 order of the trial court decertifying the class that formed the basis for this litigation against defendant GPU, Inc., its subsidiaries, and its suppliers.¹

This is the fourth appeal taken by plaintiffs related to this consolidated class action suit to recover damages caused by a power outage that occurred in Red Bank, New Jersey in July 1999. This latest appeal stems from the most recent grant of defendant's motion to decertify the class. Judge Perri ruled that plaintiffs have not demonstrated a class-wide injury, which is necessary to show a class claim that predominates over the class members' individual claims. Judge Perri also found that manageability issues precluded a class action suit as the superior form of adjudicating this matter.

We affirm. We add the following comments in the interest of clarity.

In lieu of reciting the lengthy procedural history of this litigation, we incorporate by reference the recitations of this

¹ Because GPU is the lead defendant, we will refer to all defendants by using the singular "defendant."

history as reported in Muise v. GPU, Inc. (Muise I), 332 N.J. Super. 140, 147-48 (App. Div. 2000), Muise v. GPU, Inc. (Muise II), 371 N.J. Super. 13, 19-20 (App. Div. 2004), and Muise v. GPU, Inc. (Muise III), 391 N.J. Super. 90, 93-96 (App. Div. 2007).

In Muise II, we upheld the decertification of the class based upon the predominance of individual causation issues. Muise II, supra, 371 N.J. Super. at 37. However, we remanded for the trial court to consider whether a smaller class, defined by those customers affected by the equipment failures that occurred at the Red Bank substation only, could be a viable alternative for class certification. Id. at 37, 46.

As to proof of damages, we agreed that plaintiffs' proposed damages model did not adequately demonstrate class-wide injury. Id. at 54-55. Writing for the panel, Judge King explained the problem with plaintiffs' approach as follows:

Here, it might be reasonable to presume that all class members, merely by losing power, suffered some damage, if only the inconvenience of having to reset clocks. Even so, departure from the general preference for individualized proof would be warranted only if plaintiffs provided a reliable mathematical formula for calculating aggregate damages. However, in contrast to the plaintiffs in the cases discussed above, plaintiffs here did not offer a formula for calculating, or even estimating, actual damages suffered by class members. Instead they offered analogous

reliability value estimates from other utility customers at other times and places[,] estimates not of actual damages, but of projected damages which might have been suffered in hypothetical circumstances. Judge Perri did not abuse her discretion by rejecting this approach.

[Id. at 52.]

With these cautionary instructions in mind, we remanded the case for possible certification of the smaller Red Bank class with the following directions:

With respect to proof of damages on the remand, as to the "Red Bank" class, the proof or disproof of damages in individual cases should be feasible through use of customer claim forms and surveys, judicious use of interrogatories and demands for admission, reasonable investigative efforts, and perhaps statistical interpretation of sampling data from the relevant universe, established based on competent data. We do not in any sense intend to limit the demonstrated thoughtful creativity of the trial judge, and the manifest energy of the parties in this regard.

We affirm the orders decertifying the class and denying the motions to permit expert testimony on proposed class-wide damages[,] but we remand for certification on the more limited Red Bank class, i.e., that class of customers whose outages directly resulted from the alleged negligence in delaying the replacement of the transformers at the Red Bank substation.

[Id. at 64.²]

Defendant filed another motion for summary judgment and a second motion for decertification of the class on August 4, 2005, arguing that the class had become "unmanageable" and that "inconvenience damages" could not be the sole basis used to establish a class-wide injury for predominance purposes. Muise III, supra, 391 N.J. Super. at 95. The trial judge then decertified the class for the second time. Id. at 96.

On appeal, we again reversed holding that "[a]t the time of the motion [for decertification], plaintiffs had not presented their damage model for the Red Bank class." Id. at 101. Thus, "the individual proof of damages as potentially acceptable proof of injury as a result of defendant['s] alleged negligence . . . was neither presented nor considered by the motion judge." Ibid. We reversed the decertification and remanded the case yet again to permit plaintiffs adequate time to present such proofs. Ibid. We cautioned, however, that only after the end of such a time period

would it be appropriate for the trial court to consider a motion to decertify or maintain the class with respect to the liability issue only, under [Rule] 4:32-2(d), on a showing that plaintiffs'

² On September 8, 2004, the Supreme Court denied both parties' motions for leave to appeal. Muise III, supra, 391 N.J. Super. at 95.

individual damage issues are so significant when compared to those that are common to the class as a whole.

[Ibid.]

The following events have transpired since this remand. On March 14, 2008, plaintiffs advised the trial court that a new class-wide damages model would be presented to it within ninety to one hundred twenty days. On July 31, 2008, plaintiffs presented the trial court with a "proffer with regard to plaintiffs' position in bifurcating the trial[.]" Through this proffer, plaintiffs asked the court to determine the question of liability on a class basis and thereafter ascertain damages on an individual basis. Through this approach, plaintiffs abandoned a class-wide damages model.


On December 18, 2008, Judge Perri heard defendant's third motion to decertify the class. At the hearing to consider defendant's motion, plaintiffs again asked the trial court to conduct bifurcated proceedings. Under the proposed procedure, the court would first resolve the issue of liability, then at a later stage, the court could determine damages questions on an individual, case-by-case basis. In rebuttal, defendant argued that a class-wide damages model was necessary to prove that the class suffered an injury and that the class claim predominated over individual claims.

On March 30, 2009, Judge Perri granted defendant's application to decertify the class. Judge Perri found that plaintiffs had once again failed to demonstrate class-wide damages, a showing necessary to establish injury to the class. Without such proof, the class could not fulfill the predominance or superiority requirements of Rule 4:32-1(b)(3). Plaintiffs' approach would require the court to conduct potentially thousands of individual hearings, requiring testimony from each class member to establish the fact of damage to the class. This undertaking would present the court with numerous manageability issues.

Judge Perri issued a comprehensive memorandum of opinion in support of her ruling. We affirm substantially for the reasons expressed by Judge Perri in her well-reasoned opinion.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION