ESTATE OF VICTOR GAZA, JR. by PURITA the Administratrix of the Estate of Victor Gaza, Jr. and PURITA GAZA, his wife Individually Plaintiffs/Respondents, v. JOSEPH POPOVICH, M.D.; Defendant/Appellant, & ANA J. ICABALCETA, RN; ANN MARIE ALTOONIAN, RN; KATHLEEN O'SULLIVAN, RN; DAMARIS RODRIGUEZ, R.N.; HUDSON HOSPITAL OPCO, LLC d/d/a CAREPOINT HEALTH-CHRIST HOSPITAL, PHOENIX HEALTH CARE, INC., ONWARD HEALTHCARE, PETER GOLDSMITH, M.D., JIM NGUYEN, D.O., NILDA A. MARCELO, R.N., and WILBUR MONTANA, D.O. Defendants	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-002310-22 CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY L-3285-15 Sat Below: Honorable ROBERT H. GARDNER, J.S.C.

BRIEF OF APPELLANT, JOSEPH POPOVICH, M.D.

OF COUNSEL & ON THE BRIEF:
Michael Heron, Esquire (#037772003)
Casey Acker, Esquire (#117042014)
Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, LLC
136 Franklin Corner Road, Unit B2
Lawrenceville, New Jersey 08648
(609) 896-2000

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PRELIMINARY STATEMENT

The issue presented by this appeal is simple: whether parties are entitled to rely upon the trial court's pre-trial rulings in formulating their trial strategy and accurately evaluating the potential exposure. Unquestionably, the answer is yes, although that did not hold true in this case.

The trial court reconsidered extremely consequential pre-trial decisions *after* the verdict was rendered, reversing not one but two prior decisions to the contrary, including a decision conveyed to the parties *on the first day of trial.* This post-verdict reconsideration had the effect of retroactively stripping the appellant, Dr. Popovich, of significant rights.

Although the record is large in this protracted litigation, the issue presented is straightforward, and the only parties relevant to this appeal are plaintiffs, Dr. Popovich, and non-party Dr. Goldsmith. The discrete legal question is whether Burt v. West Jersey Health Systems, 339 N.J. Super. 296 (App. Div. 2001) applied to Dr. Popovich's crossclaims against Dr. Goldsmith, in light of plaintiffs' failure to timely join Dr. Goldsmith as a direct defendant. Subsumed therein is whether, even if assuming that plaintiffs were correct on their position that Burt has since been abrogated, the trial court could properly change course and adopt the plaintiffs' position *after* the trial was completed,

when it was too late for Dr. Popovich to take any appropriate action in response to that reconsideration decision.

In Burt, this Court held that, in the context of a medical negligence claim, if co-defendants are invulnerable to claims by the plaintiff through to no fault of the remaining defendants, those remaining defendants are not liable for the amount of damages the jury allocates to those co-defendants, *even* if the remaining defendants are found to be more than 60% at fault. That is, this Court recognized a significant exception to joint and several liability under N.J.S.A. 2A:15-5.3(a) in those circumstances where the plaintiff fails to properly preserve the ability to recover against certain defendants.

The plaintiffs failed to timely assert claims against Drs. Goldsmith and Nguyen, the radiologist and hospitalist, respectively. Thus, they successfully moved for dismissal of plaintiffs' claims on the statute of limitations grounds. Dr. Popovich moved to protect his rights and filed a motion to have these defendants treated as Burt defendants, such that any verdict would be molded to reduce their allocated share of liability. In 2017, the trial judge specifically granted that motion.

That ruling remained *unchanged* between 2017 and trial in December 2022. In fact, it was *reiterated* in 2018 and 2022. At the commencement of trial, plaintiffs' counsel orally renewed his disagreement with the Burt defendant

characterization, seeking reconsideration and, if necessary, an adjournment of the trial so that those non-parties could be re-joined into the case as active defendants. The trial court carefully considered the request and denied it.

The jury returned a verdict finding Dr. Popovich 60% responsible and Dr. Goldsmith, a Burt defendant, 40% responsible for plaintiffs' damages. Consistent with Burt, Dr. Popovich sought a molding of the judgment to reflect a 40% reduction, while plaintiffs submitted, in effect, a *second* reconsideration request, post-verdict, in the form a judgment order abrogating Burt status and imposing 100% of the judgment on Dr. Popovich. At this point, long after the verdict and the completion of argument on Dr. Popovich's post-trial motions, the trial court reversed course and adopted plaintiff's position that Burt actually does not apply.

This was akin to changing the rules of the game *after* the buzzer sounds so as to alter the winner. Dr. Popovich had the right to be aware of the trial court's position in this regard when evaluating both his trial strategy and whether or not the case should be settled. Instead, the trial court specifically ruled that the 2017 order remained in effect, and that Dr. Goldsmith was a Burt defendant at the time trial commenced. Reversing this framework only in the context of a post-trial judgment order is manifestly untenable. Thus, the February 28, 2023 judgment must be reversed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Factual Background.

This is a medical negligence case. Plaintiff's decedent, Victor Gaza, Jr., died on August 4, 2013. (Da2, ¶ 1). Appellant, Dr. Popovich, is a general and vascular surgeon who completed a laparoscopic cholecystectomy on Mr. Gaza. (13T17, 44-45).[2] Plaintiffs initially commenced this action on May 14, 2015, alleging negligence by Joseph Popovich, M.D., Ana J. Icabalceta, RN, Ann Marie Altoonian, RN, Kathleen O'Sullivan, RN, and Damaris Rodriguez. (Da1) Plaintiffs' Complaint was thereafter amended numerous times.

Plaintiffs' First Amended Complaint added Hudson Hospital OPCO, LLC d/b/a Carepoint Health – Christ Hospital. (Da10) Plaintiffs' Second Amended

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[1] The Statement of Facts and procedural History have been combined for efficiency and convenience of the Court.

[2] November 17, 2017 hearing– 1T
November 28, 2022 trial– 3T
November 30, 2022 trial– 5T
December 6, 2022 trial (I) – 7T
December 6, 2022 trial (III) – 9T
December 8, 2022 trial – 11T
December 12, 2022 trial – 13T
December 13, 2022 trial (II) – 15T
December 14, 2022 trial (II) – 17T
December 15, 2022 trial (II) - 19T
December 20, 2022 trial – 21T
March 31, 2023 hearing – 23T
February 2, 2018 trial-2T
November 29, 2022 trial - 4T
December 5, 2022 trial-6T
December 6, 2022 trial (II) – 8T
December 7, 2022 trial – 10T
December 9, 2022 trial – 12T
December 13, 2022 trial (I) – 14T
December 14, 2022 trial (I) – 16T
December 15, 2022 trial (I) – 18T
December 19, 2022 trial – 20T
February 17, 2023 hearing – 22T

Complaint added Phoenix Healthcare, Inc. (Da39). The Third Amended Complaint added Onward Healthcare. (Da57)

In the Fourth Amended Complaint, plaintiffs added Peter Goldsmith, M.D. as a direct defendant. (Da75) By order of April 13, 2017, the court granted Dr. Popovich's motion to file a Third-Party Complaint against Nilda Marcelo, RN, Jim Nguyen, D.O., and Wilbur Montana, D.O. (Da112-13). Accordingly, Dr. Popovich filed a Third-Party Complaint for contribution and indemnity on that same date. (Da114) Plaintiffs then sought leave to amend their Complaint yet again so as to add those same parties (Dr. Nguyen, Dr. Montana, and Nurse Marcelo) as direct defendants, which was granted on May 26, 2017. (Da118).

Dr. Nguyen answered Dr. Popovich's Third-Party Complaint on June 20, 2017. (Da120) On June 23, 2017, consistent with the May 26, 2017 order, plaintiffs submitted a Fifth Amended Complaint adding Dr. Nguyen, Nilda Marcelo, RN, and Wilbur Montana, D.O. as direct defendants. (Da128)

Dr. Nguyen moved to dismiss the Complaint due to plaintiffs' failure to comply with the statute of limitations in that he was joined more than two years after the cause of action accrued. (Da158) The trial court rejected plaintiffs' contentions that the "discovery rule" tolled the statute of limitations, and Dr. Nguyen's motion was granted by order of September 29, 2017. (Da203-04).

Dr. Goldsmith likewise filed a Motion to Dismiss plaintiffs' Complaint against him on statute of limitations grounds. (Da207-08). Dr. Goldsmith noted that plaintiffs were not entitled to any relaxation of the two-year statute of limitations, as he was clearly identified as the radiologist in the medical chart, which was available to plaintiffs well before the expiration of the limitations period. (Da213, ¶¶ 11-13).

Again, the plaintiffs opposed this motion, arguing that they did not have reason to suspect Dr. Goldsmith may be liable until Dr. Popovich's deposition. (1T8-1T9). Plaintiffs took the position that there was no good faith basis for plaintiffs to have included Dr. Goldsmith as a defendant in the initial pleading. (1T8). At this hearing, Dr. Popovich's counsel specifically asserted that the principles in Burt, supra, apply to this statute of limitations dismissal. (1T10)

This Burt defendant characterization was a significant issue for the parties. Under Burt, remaining defendants are entitled to a molding of the verdict to reflect a reduction of the dismissed Burt defendant's share of liability, *even* if a remaining defendant's share of liability exceeds 60%. Thus, the practical significance of this determination was that, notwithstanding Dr. Goldsmith's dismissal, Dr. Popovich would be entitled to a molding of the verdict to reduce any allocated share of liability, even if the Joint Tortfeasor's Contribution Law would otherwise have required Dr. Popovich to satisfy 100% of the verdict.

The trial court rejected plaintiffs' "discovery rule" arguments and granted Dr. Goldsmith's motion. In so doing, the trial court preserved the Burt defendant status of Dr. Goldsmith vis-a-vis the remaining defendants. (1T11). The initial order preserved the crossclaims of certain other co-defendants against Dr. Goldsmith in accordance with Burt, but omitted Dr. Popovich due to oversight; thus, after a December 6, 2017 letter to the trial court noting the issue, the trial court entered a "revised" order of December 11, 2017, which corrected that oversight. (Da235-36).

This December 11, 2017 revised order is the operative order, and it reads:

> It is on this _____ day of December, 2017, hereby:
>
> ORDERED that the Plaintiffs complaint against Defendant Peter Goldsmith, M.D. be and hereby is dismissed with prejudice for failure to comply with the statute of limitations; and it is further;
>
> ORDERED that the cross-claims of Defendants Hudson Hospital Opco, LLC d/b/a/ CarePoint Health-Christ Hospital; Damaris Rodriguez, R.N.; Ana Icabalceta, R.N.; and Joseph Popovich, M.D. **are hereby preserved in accordance with Burt v. West Jersey Health Sys,, 339 N.J. Super. 296 (App. Div. 2001);** []
>
> [(Da236) (emphasis added)].

Thereafter, on December 12, 2017, Dr. Nguyen submitted a Motion to Dismiss Dr. Popovich's Third Party Complaint against him. (Da237) In response, Dr. Popovich cross-moved for an order to "Treat Third-Party Defendants, Nelda Marcelo, RM, Jim Nguyen, D.O. and Wilbur Montana, D.O.

as the Defendants were Treated in Jones v. Morey's Piers and Burt v. West Jersey Hospital Systems." (Da244). The trial court heard oral argument on February 2, 2018. At that time, plaintiffs' counsel reiterated his dissatisfaction with the fact that Drs. Goldsmith and Nguyen would be treated as Burt defendants:

> MR. MAKOWICZ: So, Your Honor, again for clarification, I just want to make sure I understand what's going to happen today. **Nguyen, Montana, Marcelo and Goldsmith are out as defendants. They're out as third-party defendants. Dr. Popovich doesn't have to produce any type of affidavit of merit against those people, yet he can get up at trial and he can talk about everything they did or they didn't do that deviated from the standard of care, and they will be on the verdict sheet and whatever is ascribed to them, the Plaintiff Estate will be unable to recover?** That's --that's essentially, procedurally what's going to occur-- occur?
>
> THE COURT: Mmm hmm, mmm hmm, **yes**.
>
> MR. MAKOWICZ: Okay. Thank you.
>
> THE COURT: You got that? All right. All right.

(2T29-2T30) (emphasis added).

The trial court entered the implementing order on February 9, 2018, stating that the remaining defendants' "sole relief as to claims against Jim Nguyen, DO shall be an allocation of fault at the time of trial pursuant to Burt v. W. Jersey Health Sys., 339 N.J. Super. 296 (App. Div. 2001) []" (Da254-55).

B. Denial of plaintiffs' oral motion for reconsideration at trial.

The trial court addressed preliminaries on the first day of trial.[3] At that time, for the *first time since these 2017-18* orders, plaintiffs' counsel sought an adjournment of the trial or reconsideration of the Burt defendant orders:

> MR. MAKOWICZ: And, I understand law of the case is out there and I get everybody says law of the case. But, the case law is replete with warnings by the Supreme Court. It says you know law of the case is not a strict doctrine. It's not like something that's set in stone. And, what the Court should be doing is looking at the prior rulings if there's an issue. And, then looking at them closely and carefully, and then deciding was this inaccurate? Was it incorrect? Is this the right way to do this? And, the Court has the obligation, if that's the perception of the Court, to then address that and correct that error. Because otherwise you're just compounding the error. Back in December 2017 I -- I vaguely recall having the oral argument with Your Honor. And, I -- I remember saying you don't have to go that road with Burt defendants, because Burt was a brand new case at the time. I think it just came down like a few months before that. And, it was the -- the -- the -- the -- the issue du jour of the defense -- at the time.
>
> But, I think that now, having the benefit of hindsight and seeing what the basis of that was, and what the Court was doing, and why they did it**, I think it's clear that these are not Burt defendants. These are defendants against whom they have cross-claims. And, if that's true, they should be here and represented, and they should have that opportunity.**

[3] By the time of trial, only Dr. Popovich remained as a defendant, secondary to various pre-trial motions and dismissals of the remaining defendants. None of those dismissals are at issue on this appeal and thus are immaterial.

[(3T28-3T30) (emphasis added)].

Thus, according to plaintiffs' counsel, there were two ways to remedy what he characterized as erroneous Burt defendant characterization: 1) an adjournment of the trial for those defendants to participate; or 2) placing *only* Dr. Popovich on the verdict sheet, without Drs. Nguyen or Goldsmith.[4] (3T30)

Plaintiffs' counsel acknowledged that he *could* have sought reconsideration at any point prior to the commencement of trial, but that he felt it would not have been productive. (3T34) ("And, I could have made a motion for reconsideration, but having done this for thirty-six years now, my sense is that motions for reconsideration are useless and it's waste of the Court's time and counsel's time. So, I did not do not. We are not obligated to do that. The ruling is interlocutory. [].").

The trial court rejected plaintiffs' counsel's suggestion that the absent Burt defendants had some right to participate in trial, and held that trial would continue with these individuals being treated as Burt defendants:

> The fact that they are not here is of no moment to me. The Counsel that did represent them at -- obviously

[4] It bears emphasizing that the plaintiffs repeatedly and explicitly agreed, at the outset of trial, these doctors were deemed Burt defendants-they only disputed the soundness of that determination by the trial court. (3T39) ("Judge, once again, no one disputes what Your Honor's Ruling says. I read the Order. No one disputes that. I agree, that's what it says. But, let's think about the reason. Why are they Burt defendants? What's the reason that they're Burt defendants? And, the only think I can think of is there's no reason they're Burt defendants.") (emphasis added).

> there -- at times up through the summary judgment motions, knew what my Order said. If they had wanted to be here to -- to -- to represent on those particular cross-claims, they certainly were – were amenable to do that. They are not here. The case was listed for trial. **And, that being the case, you know I-- I think they -- they're -- they're Burt defendants** and I think they -- the issue -- those issues go to the jury. Assuming there's sufficient -- assuming it survives a motion for a 4:37-2(b) motion and/or a directed verdict motion, assuming there's competent evidence to support the allegation, I think it goes to the jury. For whatever it's worth, the jury may believe it, the jury may not believe it, but I think it's up to the jury to call that. That's what juries do. So, I think that -- that clarifies that particular issue.
>
> [(3T41-3T42) (emphasis added)].

Subsequently, during an evidentiary argument as to whether plaintiffs may properly be impeached by the existence of their pleadings against Drs. Goldsmith and Nguyen, plaintiffs' counsel again acknowledged the ruling imposing Burt defendant status. (14T14) ("Your Honor made a ruling, I have to abide by the ruling. It's an interlocutory ruling, I have to abide by it. That's what I'm doing.").

C. Trial was completed based upon this understanding.

The practical importance of the trial court's pre-trial determination cannot be overstated. Under Burt, there is a significant exception to joint and several liability imposed by N.J.S.A. 2A:15-5.3(a). Although in most instances a defendant which is found 60% or more responsible for plaintiff's injuries can be

held responsible to satisfy 100% of the verdict, under Burt, a non-settling defendant cannot be held responsible for the absent defendant's allocation, *even* if the non-settling defendant's exceeds 60%. Burt, 339 N.J. Super. at 308. Consequently, *all parties* and the Court understood, leading into the trial, that Dr. Popovich would be responsible *only* for his allocated share of negligence, *even* if that exceeded 60%.

Accordingly, plaintiffs attempted to vindicate the Burt defendants' conduct. For example, plaintiffs' expert, Dr. Flynn, testified that Dr. Goldsmith did not misread the relevant CT scan:

> A And later on there were statements made by some individuals that Dr. Goldsmith had made a mistake and that there was a leak. So I wanted to see it myself. I know how to read CTs. And I looked at it, blew up the images in question. And I did not see a leak.
>
> Q Okay, so your opinion based upon your personal review of the CAT scan imaging was that Dr. Goldsmith's interpretation of no leak was accurate?
>
> A Yes.
>
> [(7T44)].

The trial court prevented Dr. Popovich from impeaching plaintiffs with evidence of prior averments regarding the culpability of Drs. Goldsmith and Nguyen. Plaintiffs' counsel's objection to defense counsel's attempt to use the plaintiffs' Complaint as an impeachment device was sustained. (11T63).

Dr. Popovich presented the expert testimony of Seth Glick, M.D., a diagnostic radiologist, who opined that the films read by Dr. Goldsmith did show a perforation:

> Q Okay. Do you uphold an opinion to a reasonable degree of medical probability that Dr. Peter Goldsmith deviated from the standard of care with regard to his reading of this abdominal study?
>
> A I do, and he did deviate from the standard of care. There's an equivocal -- unequivocal leak of contrast on this study.
>
> [(18T147-18T148)].

In Dr. Glick's opinion, Dr. Goldsmith's failure to call the operating doctor resulted in an approximately seven hour delay of the surgical procedure. (18T148, 18T152).

Dr. Popovich moved for a directed verdict as to Dr. Goldsmith's liability based on the absence of expert opinion contradicting Dr. Glick's opinion. (19T233) Plaintiffs opposed the motion, noting that their expert, Dr. Flynn, opined that Dr. Goldsmith read the scan appropriately; the trial court denied the motion, finding there was a factual question for the jury. (19T234).[5]

[5] Although ultimately rendered immaterial by the jury's allocation, the parties cross-moved for a directed verdict as to Dr. Nguyen; Dr. Popovich sought a directed verdict as to Dr. Nguyen's liability, and plaintiffs moved for a dismissal of Dr. Nguyen. The trial court denied both motions. (19T233).

Leading into the deliberations, plaintiffs' counsel reiterated his understanding that he was at a disadvantage given the Burt defendant status of Dr. Goldsmith and the corresponding inapplicability of "joint and several" liability to Dr. Popovich:

> MR. MAKOWICZ: Your Honor ruled on this already. **Your Honor's ruling was clear and unequivocal and you reinforced that ruling yesterday**. This morning counsel said nothing about this before closing. I said nothing in closing that was inappropriate or un -- unwarranted by the evidence. I have no burden of proof against these doctors. I'm not making claims against them. I didn't do that. And Your Honor knows because I have already said this many times on the record. The only reason that I sued them was because Dr. Popovich, after the statute of limitations have run pointed his finger at them. So I have a choice -- a Hobson's (phonetic) choice. Neither one's a good choice. []
>
> [(20T124) (emphasis added)].

The jury was instructed that it was Dr. Popovich's burden to establish any allocation of fault as to these Burt defendants. (20T133). The jury was specifically instructed that Drs. Nguyen and Goldsmith were *not* parties to the case, but had indeed been "procedurally dismissed." (20T137)

The jury concluded that Dr. Popovich proved that Dr. Goldsmith deviated from the standard of care, by a vote of 6-0, and that Dr. Goldsmith's deviation was a proximate cause of the injuries sustained by plaintiffs. (21T6) Dr. Popovich did not establish that Dr. Nguyen deviated from the standard of care.

By a vote of 5-1, the jury allocated 60% of fault to Dr. Popovich, and 40% of fault to Dr. Goldsmith. (21T7, Da333-35). After molding for a stipulated Medicaid lien, the jury's award represented a gross recovery of $1,568,897.80.

D. Opinion and decisions of the trial court.

After having completed the trial guided by multiple rulings of the trial court regarding the applicability of Burt, plaintiffs' counsel again requested that the trial court abrogate Burt and hold Dr. Popovich responsible for the entire verdict. On December 21, 2022, plaintiffs submitted a proposed "5 day" order of judgment, pursuant to R. 4:42-1 (c), which would hold Dr. Popovich responsible for the *entire* judgment, contrary to the Burt defendant status of Dr. Goldsmith; in turn, on December 22, 2022, Dr. Popovich's counsel objected to this proposed 5-day order as inconsistent with Burt, and requested plaintiffs submit a corrected order or, alternatively, that Dr. Popovich be permitted to submit an order that reflects the offset required by Burt. (Da336).

In response, plaintiffs' counsel submitted a letter of December 22, 2022, re-hashing the same arguments against the application of Burt that had been rejected by the trial court from 2017 through the outset of trial. (Da338-40). The sum and substance of plaintiffs' position was that the 2020 decision in Mejia v. Quest Diagnostics, Inc., 241 N.J. 360 (2020) constituted a *sub-silentio* overruling of Burt's application to this matter. In Mejia, the New Jersey Supreme

Court held that a *third party* defendant facing only contribution and indemnity claims by the original defendant, was not entitled to a dismissal from participation at the trial. Id. at 365.[6]

Dr. Popovich submitted a Motion for a New Trial on January 9, 2023. (Da341-42). This was argued before the trial court on February 17, 2023. At that time, the trial court simultaneously heard argument on the parties' competing positions as to the proper amount for the judgment order. The trial court denied Dr. Popovich's R. 4:49-1 motion for a new trial. (22T23-22T24, Da351). The trial court reserved in ruling on the issue of the appropriate amount of the judgment given the Burt issue, permitting Dr. Popovich to submit a competing order for consideration and allowing supplemental briefs on the issue:

> THE COURT: All right, by next week fellows if you want -- just send me a letter brief, nothing complicated, nothing long. Just write out and send me something by a week from today and I'll – and sign one way or the other.
>
> * * *
>
> MR. HERON: Yeah, Your Honor, would you like me to submit what I think would be the appropriate order

[6] Notably, Dr. Goldsmith was a *direct* defendant, *not* a third-party defendant; he obtained a statute of limitations dismissal, with preservation of Burt status vis-à-vis all co-defendants. Dr. Nguyen was joined on a third party Complaint filed by Dr. Popovich. Thus, to the extent Mejia had any application to the matter, it was in as applied to Dr. Nguyen's claimed right to dismissal of the Third-Party Complaint, which is a moot point given the jury's allocation of no liability to Dr. Nguyen.

> allocating the 60 percent against Dr. Popovich with the appropriate interest as I figured out up and --
>
> THE COURT: Yes, absolutely.
>
> MR. HERON: Okay. Okay. And I'm --
>
> THE COURT: Mr. Makowicz, -- we'll figure it out.
>
> [(22T11, 22T25)]

The parties then submitted supplemental briefing and, on February 28, 2023, the trial court entered plaintiffs' proposed judgment order *holding Dr. Popovich 100% responsible for the judgment*, which, with interest, exceeded $1.9 million:

> Pursuant to the provisions of the New Jersey Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 – 2A:53A-5, Defendant Joseph Popovich, M.D. has been found by the jury to be 60% at fault for the injuries sustained by plaintiffs and, therefore, plaintiffs shall be and are entitled to recover the full measure of damages from defendant, Joseph Popovich, M.D. in the amount of $1,929,411.19.

(Da349).

On March 13, 2023, Dr. Popovich moved to alter or amend the judgment, under R. 4:49-2 so as to apply Burt, consistent with the law of the case *through the time of the verdict.* (Da352-53). Dr. Popovich asserted that the trial court must either: 1) mold the judgment to 60% given that the case litigated to verdict under the legal framework of Burt, and retroactively stripping Dr. Popovich of

his right to allocation under Burt *after* the matter is concluded is untenable; or 2) if the trial court believed that it erred in denying plaintiffs' motion for reconsideration at the start of the trial on the applicability of Burt, order a new trial.

The trial court heard argument on that motion on March 31, 2023. The trial court held that any request for a new trial was "out of time," under R. 4:49, despite the fact that decision on the judgment allocation was not made until *well after* the post-trial motions had been fully briefed and decided. (23T7).

The trial court denied Dr. Popovich's motion to amend judgment, reasoning that joint and several liability applies notwithstanding Burt:

> THE COURT: All right, thank you, Mr. Makowicz. All right as I've said I've read counsel's extensive briefing on it and the Court does appreciate the good briefing on both sides on this particular case. Although I appreciate Mr. Heron's position, I don't agree. I think the Court to take the defendant's position in this case basically vitiates the Joint Tortfeasor Contribution Liability Law which I think I have to read all the laws in --there was a verdict in this case. It was for more than 60 percent in this particular case or more which by the way triggers that statute which says that the plaintiff can recover the 100 percent of the amount from the 60 percent defendant. **And the defendant obviously has further rights to pursue the contribution from the -- from the other defendants in the case. That's for another day.** But in this particular day in reading Moheda [sic] which I believe Mr. Makowicz is quoted as saying that I think – I think that's how the system has to work in order to have make otherwise I have to ignore or not apply the Joint Tortfeasor Contribution Liability Act

> which is clear I have to. So that being the case the Court will deny the application to amend the judgement and will file an appropriate order later today.
>
> [(23T16-23T17) (emphasis added)].

The trial court entered a corresponding order of that same date. (Da354-55).

LEGAL ARGUMENT

I. The trial court erred in accepting plaintiffs' proposed order of judgment and abrogating Dr. Goldsmith's Burt defendant status. (Da336; 22T11,25).

1. Legal standard.

The entry of the judgment imposing joint liability implicates a purely legal determination. Interpretation of the interplay between the Comparative Negligence Act and the Joint Tortfeasors Contribution Law is a statutory interpretation determination subject to *de novo* review. See Liberty Ins. Corp. v. Techdan, LLC, 253 N.J. 87, 103 (2023), as revised (Mar. 23, 2023); Mejia, 241 N.J. at 463. Thus, this Court reviews the decision without deference to the trial court's legal conclusions. See Manalapan Realty, L.P. v. Twp. Comm. of Twp. of Manalapan, 140 N.J. 366, 378 (1995).

For all practical purposes, the trial court's resolution of the competing judgment orders[7] was a post-verdict reconsideration of the trial court's December 2017 order deeming Dr. Goldsmith a Burt defendant, after initially denying plaintiff's first oral application to reconsider made *at the start of trial*.

2. Overview of joint and several liability under Burt and its progeny.

Decisions on the interplay between the Comparative Negligence Act and the Joint Tortfeasors Contribution Law are nuanced. Yet, one overarching principle, undisturbed since 2001, is that a remaining defendant may not be jointly liable with an absent would-be defendant, if that absence was attributable *to the plaintiff.* Here, Dr. Goldsmith' absence as a direct defendant was due to *plaintiffs'* failure to assert their claims against him within the statute of limitations.

[7] As stated, Dr. Popovich moved to amend this judgment, pursuant to R. 4:49-2, after it was entered. The relevant standard for such a motion to amend judgment is whether the trial court expressed its decision on a "palpably incorrect or irrational basis" or it "is obvious that the Court either did not consider, or failed to appreciate the significance of probative, competent evidence." Cummings v. Bahr, 295 N.J. Super. 374, 384 (App. Div. 1996) (citation omitted). While Dr. Popovich maintains that the trial court's abrogation of Burt post-verdict is palpably incorrect, for purposes of this appeal of the order, itself, the inquiry is whether the trial court properly applied the law to the adjudicated facts, and no showing of "palpable" unreasonableness or irrationality is required.

The jury assigns each party on the verdict sheet a percentage of fault, for a total of 100%, with the judge thereafter molding the judgment accordingly. Under N.J.S.A. 2A:15-5.3(a.), if a defendant's allocated share is 60% or more, the plaintiff typically can recover the entire award from that defendant. See Town of Kearny v. Brandt, 214 N.J. 76, 97 (2013). Generally, the "CNA requires the allocation of fault to defendants who may be responsible for the injury without regard to whether those defendants are, for other reasons, invulnerable to recovery by the plaintiff." Krzykalski v. Tindall, 232 N.J. 525, 537 (2018). Indeed, "[t]he plain language of the statute requires an apportionment of fault between tortfeasors, without exception, and regardless of whether a tortfeasor is named as a party in the action." Maison v. New Jersey Transit Corp., 245 N.J. 270, 307 (2021).

In 2001, this Court imposed a significant limitation on N.J.S.A. 2A:15-5.3(a.). In Burt, 339 N.J. Super. at 303, a medical negligence case, the plaintiff's claims against South Jersey Anesthesia Associates, Dorothy Petracci, C.R.N.A., and Tomas Manalo, M.D., collectively referenced as the "anesthesiology defendants," were dismissed for plaintiff's failure to comply with the Affidavit of Merit requirement. The remaining hospital defendants were deemed to be entitled to a reduction in the award as to any amount allocated to the

anesthesiology defendants, *even* if the Hospital defendants were found 60% or more at fault:

> Although not briefed by the parties, we raised at oral argument the impact of N.J.S.A. 2A:15–5.3(a), which allows a plaintiff to recover the full amount of damages from any party determined by the trier of fact to be sixty percent or more responsible for the total damages. Since the parties were permitted to address the issue at oral argument, we elect to address it in this opinion for the sake of completeness and for guidance of the parties at trial. We conclude that a plaintiff who fails to file an Affidavit of Merit against a licensed professional is not entitled to recover the full amount of damages from a remaining licensed professional who is deemed to be sixty percent or more responsible for the total damages. To hold otherwise would deprive the Hospital defendants of their right to seek contribution from the Anesthesiology defendants, even though the Hospital defendants are found to be sixty percent or more responsible for the total damages. Again, the Hospital defendants should not be prejudiced by the failure of plaintiff to file the required Affidavit of Merit. []
>
> [Id. at 308.]

Subsequent to Burt, the interplay between the CNA and the Joint Tortfeasors Contribution Law was addressed in Jones v. Morey's Pier, Inc., 230 N.J. 142 (2017). In Jones, the plaintiffs failed to timely serve a notice of claim under the Tort Claims Act, N.J.S.A. 59:8–8, against the plaintiff's decedent's charter school. The original defendants likewise did not serve a notice of tort claim in connection with any contribution claim. Id. at 147-48.

The Supreme Court of New Jersey held that the defendants, like the plaintiff, were required to timely serve a notice of tort claim for a viable claim against the charter school association public entity defendants. Id. at 148. Nevertheless, although the charter school association defendants could not be named in the case, the Supreme Court concluded that, if the original defendants presented evidence of the association defendants' negligence, the issue should be submitted to the jury, and, if the jury found liability on those absent defendants, the verdict should be molded in accordance with N.J.S.A. 2A:15-5.2(d). Id. at 149.

In Mejia, another medical negligence matter, the plaintiffs declined to bring affirmative claims against the decedent's gynecologist, although the laboratory defendants filed a third-party claim for contribution and indemnification against the gynecologist, Dr. Fernandez. Mejia, 241 N.J. at 364. In turn, Dr. Fernandez sought to be dismissed from participation in the trial, and the trial court denied that request; on appeal, he maintained that he should be treated as the defendants in Burt and Jones. Id. at 369. The Supreme Court rejected this, observing that "the fact that plaintiff cannot recover from Fernandez directly does not mean that his participation is not necessary to enable the trier of fact to allocate fault." Id. at 374.

The Supreme Court specifically and explicitly distinguished Burt:

> In so holding, we reject Fernandez's reliance on Jones and Burt. In Jones, the relevant defendant was a public entity dismissed pursuant to a statutory time bar not applicable here. See N.J.S.A. 59:8-8; Jones, 230 N.J. at 164, 165 A.3d 769. In Burt, one of two defendants against which a plaintiff brought suit was dismissed from the case because the plaintiff failed to serve on it an affidavit of merit. See 339 N.J. Super. at 301, 771 A.2d 683. The other defendant had filed a cross-claim against the dismissed defendant seeking contribution or indemnity. Id. at 302, 771 A.2d 683. The Appellate Division held that the other defendant's claim should not be vitiated by the plaintiff's failure to comply with the Affidavit of Merit Act. Id. at 304, 771 A.2d 683. The appellate court therefore held that fault should be allocated to the dismissed defendant even though the plaintiff could not recover from that defendant. Id. at 307, 771 A.2d 683. As a result, only the plaintiff was penalized for her failure to comply with the Affidavit of Merit Act. []
>
> [Id. at 375].

In Carbajal v. Patel, 468 N.J. Super. 139 (App. Div. 2021), this Court considered the foregoing principles in the context of a plaintiff asserting claims against both an identified tortfeasor and a "phantom" vehicle uninsured motorist claim. The jury found the identified tortfeasor (Patel) to be 60% responsible, the unidentified "phantom" vehicle to be 40% at fault, and awarded $200,000. Id. at 145. The trial court molded the verdict such that judgment was entered against Patel in the amount of $120,000, commensurate with the 60% allocation, and plaintiff's uninsured motorist carrier was ordered to pay its $15,000 policy limits, thereby shortchanging the plaintiff by $65,000 in the judgment. Id. at

146. This Court reversed, holding that the full judgment must be imposed against Patel, subject to a $15,000 offset for the uninsured motorist coverage payments. Ibid. Here, again, Burt was distinguished by the Court:

> Patel relies on Jones and Burt for the proposition that the judge correctly molded the verdict to reduce plaintiff's full recovery. **But in Jones and Burt, unlike in Brodsky, those *plaintiffs' own mistakes* disrupted the allocation scheme.** In Jones, the Court permitted a reduction of damages by the percentage of fault allocated to a public entity, acknowledging the plaintiff had failed to file a timely notice of tort claim under the Tort Claims Act (TCA). 230 N.J. at 170, 165 A.3d 769. And in Burt, we ruled that the plaintiff's recovery must be reduced by any fault attributed to the dismissed anesthesiologist defendants because the plaintiff had failed to obtain an affidavit of merit (AOM). 339 N.J. Super. at 302-03, 308, 771 A.2d 683. **We reached that conclusion even though the jury allocated sixty percent fault to the remaining defendants**. Id. at 308, 771 A.2d 683. []
>
> [Id. at 156 (emphasis added)].

3. Pursuant to the foregoing legal principles, the trial court committed an error of law by refusing to mold the judgment against Dr. Popovich in accordance with Burt, and the judgment order must be reversed.

Both this Court and the Supreme Court have *distinguished*, rather than disavowed or overruled, Burt. The Supreme Court has never cast doubt on the continuing viability of Burt. Subsequent panels of the Appellate Division were not obligated to adhere to Burt and could have repudiated it; panel decisions are

not binding on other panels. See David v. Gov't Employees Ins. Co., 360 N.J. Super. 127, 142 (App. Div. 2003). Yet, this has not happened.

The decisions in Jones and Mejia were not inconsistent with the outcome in Burt. In Jones, the Court was addressing three related issues: the application of public-entity immunity to a contribution and indemnity crossclaim, permitting the jury to allocate negligence to an otherwise invulnerable public-entity, and the effect of that allocation on plaintiff's ability to recover. Jones, 230 N.J. at 148.

In Mejia, the Court was deciding the narrow question of "whether a third-party defendant, facing only claims for contribution and common-law indemnification from an original defendant that did not file an affidavit of merit against him, must participate in the trial establishing the underlying liability." Mejia, 241 N.J. at 364. The issue was the participation of a *third party* defendant,[8] not the legal consequences of that third-party defendant's invulnerability to liability to the plaintiff and the corresponding need to mold the verdict. The Jones decision is particularly informative, in that it *reinforced* the logical underpinning of Burt. Jones, 230 N.J. at 168 ("This Court has not previously decided a case in which a party has requested that the trial court mold

[8] In this case, Dr. Goldsmith was not a third-party defendant in any event. Dr. Nguyen was joined by Dr. Popovich as a third party defendant and subsequently dismissed, subject to Burt.

the judgment in accordance with the Appellate Division's analysis in Burt. In the circumstances of this case, **we consider the Appellate Division's analysis in Burt to effectively reconcile the governing statutes**.") (emphasis added).

In short, Burt remains a published and viable decision from the Appellate Division. Although this panel is not obligated to follow the panel's decision in Burt, the trial court *was* so obligated. See Weir v. Mkt. Transition Facility of New Jersey, 318 N.J. Super. 436. 448 (App. Div. 1999) ("The trial court may disagree with our published decisions but it is obligated to comply with the procedures we mandate within them.").

If plaintiffs believe that Burt should be modified or overruled, the proper mechanism for that to occur was for the trial court to adhere to Burt, as it did from 2017 through the trial, and allow plaintiffs to pursue that argument *to this Court* on appeal. The trial court remained obligated to follow Burt unless and until this Court were to reach the opposite conclusion.

The equitable logic of Burt remains sound. If a plaintiff fails to exercise due diligence in ensuring that all potential defendants are properly and timely named as direct defendants, the consequences of that failure fall *on the plaintiff*, rather than a defendant. This exception principle was recognized despite the acknowledged reality that those consequences may indeed be "harsh." Burt, 339 N.J. Super. at 308.

Plaintiffs submit that the failure to timely sue Dr. Goldsmith was due to the inability to procure the necessary expert support:

> In essence the argument is, well they knew who Dr. Goldsmith was, they knew who Dr. Montana was, so they should have sued them within the two years. But, the problem with that is Plaintiffs are caught in a whipsaw. We have an obligation to only file suit when we have a good faith basis to do so. **And, when we have the case reviewed and our experts tell us there's no basis to claim against people, we aren't permitted to file suit against them**. In addition we would not be able to get affidavits of merit against them, so it would be useless and fruitless to do so.

(1T8) (emphasis added). This proves the point: the plaintiffs' failure to properly assert and preserve their claims against Dr. Goldsmith should not inure to the detriment of Dr. Popovich. The post-verdict decision to the contrary was legally erroneous, and the judgment order should be reversed.

II. Even if *assuming* that Burt should not control in this matter, the trial court's post-hoc reconsideration of its two prior decisions on Burt defendant status was a manifest injustice that unduly and unjustifiably penalizes Dr. Popovich. (23T6)

1. The trial court's post-verdict reconsideration of its pre-trial rulings was neither supported by good cause nor in service of substantial justice.

Trial courts may properly revisit interlocutory orders *if* intervening factual or legal changes so warrant. At the same time, any such change that affects a litigant's substantive rights must be done *before* that litigant-and, for that matter,

all involved-detrimentally rely on the court's legal determinations. Even if one *assumes* that Burt is no longer viable under the circumstances of this case, the trial court's decision of December 2017, reiterated on November 28, 2022, defined the "rules of the game" leading into the December 2022 trial. Changing those rules in February 2023, after the completion of trial, was palpably unjust.

Under R. 4:42-2(b), a trial court has the authority to reconsider interlocutory rulings "in the interests of justice." See Lawson v. Dewar, 468 N.J. Super. 128, 134-35 (App. Div. 2021). However, that power should be exercised "only for good cause shown and in the service of the ultimate goal of substantial justice." Lombardi v. Masso, 207 N.J. 517, 536 (2011) (quoting Johnson v. Cyklop Strapping Corp., 220 N.J. Super. 250, 263-64 (App. Div. 1987), certif. denied, 110 N.J. 196 (1988)). Put another way, revising an interlocutory order must be "consonant with the interests of justice." Ford v. Weisman, 188 N.J. Super. 614, 619 (App. Div. 1983).

In this case, despite having five *years* within which to bring a R. 4:42-2(b) motion, plaintiffs' counsel *opted* to wait until the first day of trial to raise the issue:

> MR. MAKOWICZ: It is cake and eating it, too. No one has disputed that's what Your Honor ruled. I -- I understand it's what Your Honor ruled. **And, I could have made a motion for reconsideration, but having done this for thirty-six years now, my sense is that motions for reconsideration are useless and it's**

> **waste of the Court's time and counsel's time. So, I did not do not**. We are not obligated to do that. The ruling is interlocutory. I have no right to an appeal. I don't think the Appellate Division would intervene. Again, from thirty-six years experience I think I've had one interlocutory appeal in all that time granted. So, as a result I didn't go do those things.
>
> [(3T34) (emphasis added)].

Perhaps most compelling, plaintiffs' counsel *acknowledged* that, if the Burt defendant status of Drs. Goldsmith and Nguyen were to be reconsidered, it would require an adjournment of the trial:

> As I see it **the only two ways are that only Dr. Popovich is on the verdict sheet, it's whether he was negligent or not, and then -- or the other thing is we have to adjourn the trial.** We have to give Goldsmith and -- and Nguyen an opportunity to appear and have their counsel appear. What I suspect those defendants would do -- those attorneys would do, is they would say hey no expert has said that they caused the harm, and I presume they'd move for summary judgment. I presume it would be granted. If so, then we're going to be back here again without the nonsense of these Burt defendants. **We'll have a clean case, the way it should be. I think that's the only way that this can proceed,** one -- that one way or the other way. []
>
> [(3T30-3T31) (emphasis added)].

Despite this argument, the trial court *still* maintained the Burt defendant status of the absent defendants, and held that trial would go forward *under that framework*:

> The fact that they are not here is of no moment to me. The Counsel that did represent them at -- obviously there -- at times up through the summary judgment motions, knew what my Order said. If they had wanted to be here to -- to -- to represent on those particular cross-claims, they certainly were – were amenable to do that. They are not here. **The case was listed for trial. And, that being the case, you know I-- I think they -- they're -- they're Burt defendants and I think they -- the issue -- those issues go to the jury.**
>
> [(3T41-3T42) (emphasis added)].

Those issues did indeed "go to the jury," but the jury was specifically instructed that the Burt defendants *had been dismissed on procedural grounds* and, for that reason, were not represented at trial. (20T137).

Dr. Popovich's trial strategy and settlement posture were informed by the imposition of Burt defendant status on these two defendants. As Burt defendants invulnerable to liability to plaintiffs, their allocated share of liability could not be imposed on Dr. Popovich, *even* if Dr. Popovich was found 60% or more responsible (as happened).

Then, the trial court reversed course and removed the Burt defendant status for Dr. Goldsmith. The trial court did not state its reasoning when selecting plaintiffs' judgment order over Dr. Popovich's,[9] but, thereafter, during

[9] The trial court heard argument and considered the parties' supplemental briefing in support of their respective proposed judgment orders, but did not render specific legal conclusions in support of the acceptance of plaintiffs' judgment order over Dr. Popovich's. R. 1:7-4(a) applies to motions, rather than judgment orders, and, as

the hearing on Dr. Popovich's Motion to Amend Judgment, provided the basis for its post-verdict reconsideration:

> Although I appreciate Mr. Heron's position, I don't agree. I think the Court to take the defendant's position in this case basically vitiates the Joint Tortfeasor Contribution Liability Law which I think I have to read all the laws in --there was a verdict in this case. It was for more than 60 percent in this particular case or more which by the way triggers that statute which says that the plaintiff can recover the 100 percent of the amount from the 60 percent defendant. **And the defendant obviously has further rights to pursue the contribution from the -- from the other defendants in the case**. **That's for another day. But in this particular day in reading Moheda [Mejia] which I believe Mr. Makowicz is quoted as saying that I think – I think that's how the system has to work in order to have make otherwise I have to ignore or not apply the Joint Tortfeasor Contribution Liability Act which is clear I have to**. So that being the case the Court will deny the application to amend the judgement and will file an appropriate order later today.
>
> [23T16-23T17 (emphasis added)].

Thus, the trial court concluded that Mejia compelled the *post-verdict* abrogation of Burt defendant treatment of Dr. Goldsmith. But, under Burt, there is a significant exception to the way the joint and several "system has to work," in that it is an exception to joint liability. Essentially, the trial court converted Dr. Goldsmith from a Burt defendant to a *standard* defendant post-verdict.

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noted, the trial court provided its reasoning in connection with the R. 4:49-2 Motion to Amend.

For the reasons detailed above, Mejia did not explicitly or implicitly abrogate Burt. Even if one were to accept that Mejia *did* affect the continuing viability of Burt, however, the *process* followed by the trial court in this case is untenable. Dr. Popovich held orders from 2017 and 2018 that *explicitly* imposed the framework of Burt to this case. Again, as excerpted above, during oral argument in 2018, the trial court specifically affirmed plaintiffs' counsel's inquiry that Burt treatment would apply to these defendants and plaintiffs would be unable to recover "whatever is ascribed" to the Burt defendants.(2T29-2T30).

Mejia was decided on March 16, 2020, about two years after that exchange. This case was not reached for trial until November 28, 2022, almost three *years* after Mejia. Plaintiffs' counsel did not file any type of motion for reconsideration based on Mejia in the approximately 32 *months* between the Mejia decision and the November 28, 2022 start of trial. Instead, he appeared on that first day of trial and suggested that the trial must be adjourned because the Burt defendant orders from 2017-18 were, according to plaintiffs, incorrect.

The practical consequences of the post-verdict reconsideration were tremendous, resulting in the imposition of approximately $800,000 in *additional* exposure. In no sense was this process "consonant with the interests of justice," and the trial court's post-verdict reconsideration was unfounded.

2. The trial court's post-hoc abrogation of Burt unfairly prejudices Dr. Popovich in exercising his statutory contribution rights, forcing him to re-litigate Dr. Goldsmiths' allocated share of liability with uncertain prospects of success.

a. Dr. Goldsmith, as a non-party to the trial, cannot be bound to the 40% allocation.

The trial court's March 31, 2023 oral decision indicates that the prejudice to Dr. Popovich flowing from abrogation of Burt defendant status is vitiated by his rights to pursue a contribution claim. However, Dr. Goldsmith cannot be bound to this 40% allocation. Thus, Dr. Popovich was saddled with the *burden* of litigating a contribution action to recoup this 40%, with the distinct possibility that a subsequent contribution action may yield an inconsistent finding as against Dr. Goldsmith that nevertheless leaves Dr. Popovich responsible for the 40% allocated in this trial.

A putative joint tortfeasor who was not a party to the litigation cannot be bound to the allocation of negligence in the judgment. Relevantly, the doctrine of offensive collateral estoppel requires, among other things, that "the party against whom the doctrine is asserted **was a party to or in privity with a party** to the earlier proceeding." Allen v. V & A Bros., Inc., 208 N.J. 114, 137 (2011) (quoting Olivieri v. Y.M.F. Carpet, Inc., 186 N.J. 511, 521 (2006)) (emphasis added). This is consistent with the principle that due process allows a party to

be held liable for a judgment only if it had notice of the proceedings to participate or had an opportunity to be heard. See Mettinger v. Globe Slicing Mach. Co., Inc., 153 N.J. 371, 389 (1998).

Here, Dr. Goldsmith successfully moved for his dismissal as a party on statute of limitations grounds. Nevertheless, Dr. Popovich timely and properly asserted contribution crossclaims. See R. 4:7-5(b). This resulted in a court order dismissing the plaintiffs' claims while simultaneously providing that Dr. Popovich's cross-claims are "preserved in accordance with Burt v. West Jersey Health Sys,, 339 N.J. Super. 296 (App. Div. 2001)." (Da236). Under Burt, the moving defendant is *dismissed* as a party, and the remaining defendant's liability is molded to account for any apportionment to that defendant.

After that dismissal, Dr. Goldsmith's attorney, Kenneth M. Brown, Esquire, wrote to the Court to request that he no longer receive court notifications:

> Dear Judge Gardner,
>
> I am writing to inform you that **we no longer represent any parties in the above-referenced matter**. I respectfully request to be removed from case list.
>
> Thank you for your continued courtesies in this matter.

(556a.) (emphasis added). The jury was instructed that both Drs. Nguyen and Goldsmith had been *dismissed* from the case on procedural grounds. (20T137).[10]

Thus, Dr. Popovich would be required to initiate a *new* contribution action against Dr. Goldsmith. The trial court observed this was the mechanism by which Dr. Popovich's contribution rights could be vindicated. (23T16). However, as discussed below, burdening Dr. Popovich with the necessity to initiate *and prevail upon* a subsequent action is a manifest unfairness.

b. The practical burdens and obstacles to pursuing contribution in a new action are not properly visited upon Dr. Popovich.

Any contribution action would be a re-litigation of the medical negligence issues already tried, with Dr. Goldsmith being given the opportunity to participate and present a defense on his own behalf. Thus, it is distinctly possible a contribution action would result in an allocation to Dr. Goldsmith that is inconsistent with the 40% found herein. For example, the jury may find Dr. Goldsmith was not negligent, *at all*, or was culpable in some allocation *less than* 40%. Yet, Dr. Popovich would remain liable for Dr. Goldsmith's full 40%, under the existing judgment order.

[10] During oral argument on an evidentiary issue at trial, the trial court likewise reiterated that the Burt defendants were "out" of the case: "I think -- I think my prior ruling -- I'm certain my prior ruling with regard to the ability to cross-examine based upon -- it was of no moment, **because the statute of limitations defendants are out**. They're out **and they stay out**." (14T16) (emphasis added).

A claim for contribution requires a money judgment against the contribution claimant. See Hoelz v. Bowers, 473 N.J. Super. 42, 63 (App. Div. 2022). The statute requires that a contribution claimant make payment on the judgment in excess of his allocated share so as to hold a right of contribution against the tortfeasor whose share has been paid by the contribution claimant. N.J.S.A. 2A:53A-3 (providing for a right of contribution when there is a judgment against the joint tortfeasors and "any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors **for the excess so paid over his pro rata share** [].") (emphasis added).

By order of April 28, 2023, the trial court stayed execution of the judgment against Dr. Popovich upon the posting of a $1,155,673.79 by Dr. Popovich's liability insurer. (Da365-66). Thus, for practical purposes, the 40% allocation against Dr. Popovich is stayed pending the outcome of this appeal.

It follows that Dr. Popovich's damages on a contribution claim will not fully ripen *unless* and until the stay of the judgment is lifted, which in turn would not occur *unless* and until this appeal is decided adversely to Dr. Popovich. Accordingly, this putative right to pursue a contribution claim is a speculative and unduly burdensome right, at best. It would require Dr. Popovich to: 1) unsuccessfully litigate these issues to conclusion; 2) "front" approximately

$800,000 to cover Dr. Goldsmith's share, with no guarantee of recoupment; 3) prosecute a medical negligence action against Dr. Goldsmith and prove *both* Dr. Goldsmith's deviation from the standard of care *and* Dr. Goldsmith's allocation of responsibility; and 4) successfully collect on any judgment against Dr. Goldsmith.

Separate from those burdens, there is a real possibility that Dr. Popovich is unable to recover the 40% allocation based on the outcome of a potential contribution action. For example, if Dr. Goldsmith was found to be not liable in such a trial, then there would be no recoupment, but Dr. Popovich would *still* be responsible for 40% that this jury has already assigned to Dr. Goldsmith, and would be unable to recoup approximately $800,000 he was required to "front."

This procedural quagmire is precisely what the rules and decisional law seek to avoid when possible. See, e.g., Sklodowsky v. Lushis, 417 N.J. Super. 648, 655 (App. Div. 2011) ("The purpose of the [entire controversy] doctrine is to prevent piecemeal decisions, promote fairness to the parties, and advance the goal of judicial efficiency.") (citation omitted). It is true that, under the circumstances of this claim, the entire controversy doctrine could not properly be invoked to bar Dr. Popovich's contribution claim, as was observed by the trial court when denying the Motion to Amend the judgment. See Hoelz, 473 N.J. Super. at 63 (observing that "neither the plaintiff nor the defendant need name a

potential joint tortfeasor as a party in the underlying suit to preserve a contribution claim.") (citation omitted). Nevertheless, the process followed by the trial court in this matter was not in the interests of the parties to this case specifically or judicial efficiency generally, in that it generates duplicative, successive, costly, *and potentially inconsistent* litigation.

Ironically, plaintiffs' counsel was *correct* in that, if the trial court was inclined to accept the legal position that Burt was undermined by Mejia, an adjournment of the trial was *required.* That would have enabled Drs. Nguyen and Goldsmith to be properly represented at trial, and Dr. Popovich to accurately assess his trial strategy and potential exposure. Plaintiffs' counsel urged that the trial should be adjourned to allow for the trial to proceed in that fashion, and the trial court *rejected* the request, maintaining that the absence of those *non*-parties was not significant. (3T41-3T42).

The trial court's conclusion makes perfect sense *if* Burt was to be applied to the judgment in this case, as *all* parties expected given the trial court's rulings. Had he known in advance that Burt defendant status would be stripped from Drs. Goldsmith and Nguyen, Dr. Popovich obviously would have joined in plaintiffs' counsel position that an adjournment was required for those parties to be re-joined and participate. If his contribution rights were going to be implicated by the outcome of the trial, Dr. Popovich was entitled to litigate all of the relevant

issues in one proceeding, rather than be forced to "front" hundreds of thousands of dollars and suffer the uncertainty of litigation in a successive contribution action merely to assert his statutory rights. This situation is a consequence of the *plaintiffs'* failure to exercise due diligence and timely bring suit against Dr. Goldsmith, yet the process followed by the trial court punishes *Dr. Popovich* with the burden and uncertainty of a second, redundant action. Thus, the trial court should be reversed.

3. Even if this Court were to agree with plaintiffs' contention that Burt is no longer viable, the appropriate solution is a new trial with adequate notice to all parties.

As discussed above, Burt has not been abrogated or overruled by the appellate courts in New Jersey, and its logical underpinnings remain sound. Thus, the proper outcome in this appeal is straightforward: a reversal of the trial court's judgment order, with instructions to enter Dr. Popovich's judgment order reflecting the proper molding to 60% of the award. However, if this Court were to conclude that Burt is inapplicable to the facts of this matter, then the entire trial was tainted, with the jury being incorrectly instructed and Dr. Goldsmith being deprived of the opportunity to defend the allegations which resulted in a 40% allocation against him.

The plaintiffs' second reconsideration request to abrogate Burt was made in conjunction with the submission of judgment orders, and was granted via the February 28, 2023 judgment order-*after* Dr. Popovich's Motion for a New Trial had been fully briefed and argued. Thus, this was not an issue that had ripened by the time Dr. Popovich submitted his post-trial motion under R. 4:49-1.

At the time of supplemental briefing on the judgment issue, Dr. Popovich apprised the Court of its ability, under R. 4:49-1(c), to order a new trial up to 20 days after the entry of judgment, "for any reason for which it might have granted a new trial on motion of a party." Under R. 4:49-1(c), if the trial court had concluded, by that point, that it erred in its pre-trial rulings as to Dr. Goldsmith's Burt status, the opportunity to correct the error and rectify the tainted trial was inherently available to it at any time between the February 28, 2023 final judgment and March 20, 2023. Instead, the trial court denied relief to Dr. Popovich, on the basis that Dr. Popovich's remedy existed in the form of a successive contribution action against Dr. Goldsmith. Such remedy is insufficient, if not illusory, and does not remove the insurmountable injustice to retroactively forcing over $800,000 in additional exposure to Dr. Popovich.

It is axiomatic that a trial must be conducted under the correct legal framework. See generally Velazquez ex rel. Velazquez v. Portadin, 163 N.J. 677, 688 (2000) (observing that "appropriate and proper" charges to the jury are

fundamental to a fair trial). Similarly, the Supreme Court of New Jersey has concluded that a party entering trial misled by reliance on false information was entitled to a mistrial. See McKenney ex rel. McKenney, 167 N.J. 359, 376 (2001) (holding that the prejudice to the plaintiffs flowing from their lack of advance notice that a key witness's trial testimony deviated from the deposition testimony; the matter was remanded for a new trial, with leave granted to the plaintiffs to vacate the earlier dismissal of that witness based on the changed trial testimony).

If the controlling legal standards and liability framework are going to be changed *after* conclusion of the matter, then fundamental fairness-and due process-require a retrial. See L.W. ex rel. L.G. v. Toms River Reg'l Sch. Bd. of Educ., 189 N.J. 381, 410 (2007) (holding that the matter must be remanded to the Director on Civil Rights after the Supreme Court articulated the proper standard under which a public school's liability under the LAD can be established, as a matter of fundamental fairness, because the parties were unaware of the standard the Court adopted and must be afforded an opportunity to be heard on that standard). Put simply "the opportunity to be heard contemplated by the concept of due process means an opportunity to be heard **at a meaningful time and in a meaningful manner**." Klier v. Sordoni Skanska Const. Co., 337 N.J. Super. 76, 84 (App. Div. 2001) (emphasis added).

These circumstances are more compelling than in McKenney. Dr. Popovich learned of the Court's abrupt change in position *after* the conclusion of the trial and briefing was completed on post-trial motions, with no fair opportunity to move for a mistrial or new trial on that basis. By definition, there was no opportunity for him to be heard on the controlling legal framework "at a meaningful time and in a meaningful manner." Klier, 337 N.J. Super. at 84.

Dr. Popovich maintains that the Burt framework applied to the trial was indeed correct and must apply to mold the judgment. However, if this Court were to accept plaintiffs' position that Burt does not apply to this matter secondary to Mejia, then the matter must be remanded for a new trial,[11] with active participation of Drs. Nguyen and Goldsmith as parties to the case.

III. The trial court erred in precluding Dr. Popovich from impeaching the plaintiffs with their own pleadings. (11T64, 14T5 through 15, Da341)

The plaintiffs attempted to proceed against Drs. Goldsmith and Nguyen, but their failure to timely assert those claims resulted in statute of limitations dismissals. After properly preserving Burt defendant status, Dr. Popovich then offered evidence to inculpate Drs. Goldsmith and Nguyen, including by way of

[11] Plaintiffs did *not* file a protective cross-appeal to seek a new trial in the event that this Court agreed that this fundamentally unfair process could not be sustained and the pre-trial Burt rulings must stand. R. 2:4-2(a). Thus, this appeal can be resolved with simple reversal of the judgment order, without consideration of the merits of plaintiffs' position that Burt is no longer valid precedent.

impeaching of plaintiffs through their own pleadings, given their trial efforts to vindicate those two doctors. This was prejudicial error.

In Glassman v. Friedel, 249 N.J. 199, 231 (2021) the Supreme Court held that a defendant may utilize the plaintiff's initial pleadings for purposes of allocation in successive tortfeasor situations. The Glassman case involved a plaintiff's decedent who initially sustained injuries in a fall at a restaurant, fracturing her ankle. Id. at 209. Thereafter, allegedly due to negligence by treating physicians and nurses, the plaintiff's decedent sustained a fatal pulmonary embolism. Ibid. Thus, the claim was that the injuries were caused by distinct sets of tortfeasors. Ibid.

The plaintiff settled the claim against the initial restaurant tortfeasors. Ibid. The trial court granted the non-settling medical negligence defendants a *pro tanto* credit, and the Appellate Division reversed; the Supreme Court then affirmed the Appellate Division, with modification. Id. at 210. In so doing, the Court stated that the "initial" allocation step is the jury's apportionment to each causative event:

> Among other evidence, the defendant may rely on the plaintiff's previous assertions in pleadings or discovery about the alleged fault of the initial tortfeasor and the damages resulting from the first causative event. **A plaintiff who previously asserted in pleadings or discovery that the initial tortfeasor was negligent may not take the opposite position at trial.**

[Id. at 231 (emphasis added) (citation omitted)].

More recently, in Adams v. Yang, 475 N.J. Super. 1 (App. Div. 2023), a panel of this Court held that Glassman does not apply to joint tortfeasor situations. In Adams, another medical negligence matter, the defendant asserted that the plaintiff was judicially estopped from disavowing the negligence of a settling joint tortfeasor, and the trial court rejected that assertion. Id. at 7. This Court affirmed, holding that, in the context of joint tortfeasors, damages are not divisible between multiple tortious events, and the allocation methodology in Glassman would not be possible in claims of a single, indivisible injury. Id. at 13. Importantly, this Court's rationale was informed by the availability of a contribution claim:

> Equally important is the fact that, unlike a successive tortfeasor, joint tortfeasors are not left without remedies against a settling codefendant. Whereas Glassman expressly prohibits an allocation of fault against an initial tortfeasor, a joint tortfeasor may seek an allocation of liability against the settling codefendant at trial. Any percentage of fault thus allocated "operates as a credit to the remaining defendants." **In addition, the right of contribution assures that a joint tortfeasor can seek a remedy for the fault allocated to settling codefendants. It is plain that the equitable concerns underpinning Glassman do not exist in the joint tortfeasor context**.
>
> [Id. (emphasis added)].

At the outset of the trial, defense counsel raised the issue of impeachment of the plaintiffs by virtue of their claims against Drs. Nguyen and Goldsmith. (5T86) ("And, yet, I think by his opening, which I thought he would probably do, I think I'm entitled to tell the jury that he sued these doctors. Because we weren't the ones that blamed them. He was the one who originally blamed them.").

During trial, plaintiffs' counsel attempted to vindicate Dr. Nguyen by initiating a line of questioning about the fact that Dr. Nguyen was being "sued":

> Q Are you aware that there's someone who's making an allegation that you committed malpractice --
>
> MR. HERON: Objection, Your Honor.
>
> THE COURT: Come.
>
> MR. HERON: He's -- no, Your Honor.
>
> THE COURT: Come.
>
> MR. HERON: -- go to sidebar.
>
> (sidebar discussion)
>
> THE COURT: (Indiscernible.) Shoot.
>
> MR. HERON: Your Honor (indiscernible). The case was dismissed procedurally, which (indiscernible) I didn't think we would go down this line of questioning. I'm surprised we're here. So now (indiscernible) the doctor. He's the doctor. He's the one (indiscernible) doctor.
>
> THE COURT: Where are we going?

> MR. MAKOWICZ: Judge, he's a defendant in this case and the only allegations are coming – of malpractice aren't coming from (indiscernible), they're coming from him. And he can certainly answer the question, I'm a defendant. (Indiscernible.) Let Mr. Heron ask him if I've sued him. Go ahead. Let him ask that. That would be fine. He may not like the answer he gets because the only -- him would be Mr. Heron, not me. So if he wants to go down that road–
>
> THE COURT: Then why are you asking the question, then?
>
> MR. MAKOWICZ: Well, it's important because his integrity -- his professional (indiscernible) --
>
> THE COURT: Yeah. You -- **on a rebuttal issue**, not on a direct issue.

[(11T59-11T60) (emphasis added)]. The objection was then sustained, with an instruction to disregard. (11T61) ("The objection is sustained. The jury will disregard the last question. It **may be established later**, but it's certainly not been established now. Proceed.") (emphasis added).

On cross-examination, defense counsel then attempted to establish those issues, including by showing Dr. Nguyen a copy of the plaintiffs' Fifth Amended Complaint, which named him as a defendant. (11T63).

> MR. HERON: He said that I blame him. That's (indiscernible). People testify in depositions all the time. He went out and filed a lawsuit against me. He (indiscernible). He's the one who filed the lawsuit.
>
> THE COURT: No. It was based on your client -- something that one of your client's said.

MR. HERON: But he filed a lawsuit --

THE COURT: Which ultimately was dismissed.

MR. HERON: For statute of limitations. It wasn't dismissed for -- for -- that there wasn't an expert or it's not (indiscernible).

THE COURT: It's not -- it's a nullity. It's not in the case anyway.

MR. HERON: But -- but he made it in the case. He's making it in his case.

THE COURT: And I kicked it out.

MR. HERON: But they already heard it, Your Honor. And (indiscernible).

THE COURT: Yes. And you just created your own problem.

MR. HERON: -- that I created a problem? I'm addressing what he said. He said that my client –

THE COURT: No. We're not going -- we're not doing this.

MR. HERON: I wouldn't have went here, Your Honor –

THE COURT: It's out of the case. It's out of the case. It's out of the case. It stays out of the case. It's not probative. It doesn't – it doesn't reasonably calculate to lead to anything.

[11T64-11T65]

Subsequently, defense counsel revisited the issue with the trial court, based on the Glassman v. Friedel, 249 N.J. 199 (2021) decision. (14T4-14T5). Based upon Glassman, defense counsel reiterated that pleadings from the plaintiffs should be a permissible method of impeachment as to the claims against Drs. Goldsmith and Nguyen. (14T6-13). The trial court took a brief recess then ruled that Glassman did not apply because it involved successive tortfeasors. (14T15).

Here, the "equitable concerns underpinning Glassman," recognized in Adams, *do* exist. Dr. Popovich does not have a practically viable contribution right, for the reasons extensively discussed above. That is, in retroactively stripping Dr. Popovich of the Burt defendant protections applicable to Drs. Nguyen and Goldsmith, two non-parties, the trial court imposed nearly insurmountable practical burdens to exercising his contribution rights.

The rationale of Adams is inapposite to a case in which the plaintiffs belatedly and unsuccessfully attempted to sue two doctors, then changed course to disavow any basis for liability on those doctors while *simultaneously* seeking to impose joint liability on Dr. Popovich. The Adams panel framed the issue as whether judicial estoppel applies "to prevent a plaintiff from reversing position as to the negligence of a **settling** joint tortfeasor at trial." Adams, 475 N.J. Super. at 8 (emphasis added). This case is distinguishable in that it involves a *dismissed*

joint tortfeasor, absent based on the plaintiffs' failure to comply with the statute of limitations.

In essence, the plaintiffs' lack of diligence and timeliness is *rewarded* by allowing them the benefit of both disavowing those doctors negligence *and* imposing joint and several liability, *retroactively* via a reconsideration motion, after learning that their disavowal was unsuccessful. Thus, the trial court erred in precluding Dr. Popovich from offering evidence as to the plaintiffs' pleadings against Drs. Goldsmith and Nguyen in this matter.

CONCLUSION

For the foregoing reasons, defendant, Joseph Popovich, M.D., respectfully requests that the February 28, 2023 judgment order be reversed, with instructions to enter a molded judgment in conformity with Burt or, in the alternative, that a new trial be ordered.

Respectfully Submitted,

Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, LLC

BY: s/ Michael Heron

Michael Heron, Esq. (#037772003)
Casey Acker, Esq. (#117042014)
136 Franklin Corner Road, Unit B2
Lawrenceville, New Jersey 08648
(609) 896-2000

Dated: 9/28/2023

ESTATE OF VICTOR GAZA, JR. by PURITA GAZA the Administratrix of the Estate of Victor Gaza, Jr. and PURITA GAZA, his wife, individually,

Plaintiffs,

vs.

JOSEPH POPOVICH, M.D.; ANA J. ICABALCETA, R.N.; ANN MARIE ALTOONIAN, R.N.; KATHLEEN O'SULLIVAN, R.N.; DAMARIS RODRIGUEZ, R.N.; JOHN DOES, M.D. 1-10 (fictitious names representing physicians, medical care providers and nurses, whose respective identities are not contained within the records and/or whose identities are unknown and/or whose signatures are illegible at present, who cared for decedent, Victor P. Gaza, Jr. on or about May 15, 2013, May 16, 2013 and/or May 17, 2013 at Christ Hospital); HUDSON HOSPITAL OPCO, LLC d/b/a CAREPOINT HEALTH-CHRIST HOSPITAL, PHOENIX HEALTH CARE, INC., ONWARD HEALTHCARE, PETER GOLDSMITH, M.D., JIM NGUYEN, D.O., NILDA A.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-002310-22

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: ESSEX COUNTY
DOCKET NO.: ESX-L-3285-15

SAT BELOW:

HON. ROBERT H. GARDNER, J.S.C.

Civil Action

MARCELO, R.N. and WILBUR MONTANA, D.O.,

Defendant.

BRIEF OF PLAINTIFFS/RESPONDENTS ESTATE OF VICTOR GAZA, JR. AND PURITA GAZA

BLUME FORTE FRIED ZERRES & MOLINARI
A Professional Corporation
One Main Street
Chatham, NJ 07928
(973) 635-5400

On the brief:
Mitchell J. Makowicz, Jr., Esq. (#028621986)
mmakowic@njatty.com

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PRELIMINARY STATEMENT

The Appellant's statement of the issue presented is based on a false premise. The Trial Court did not "change the rules of the game" in the post-trial proceedings. Appellant was granted the opportunity – correctly or incorrectly – to conduct the trial exactly how he wished, with empty chair claims against third-party defendant doctors without representation present at trial. Nevertheless, the jury found in favor of Plaintiff/Respondent and determined that Appellant was sixty percent (60%) at fault. Since his trial strategy did not lead to his desired outcome, Appellant now claims he was deprived of significant rights.

In 2017, Appellant obtained a ruling from the Trial Court to treat two treating doctors as so-called "Burt defendants" at trial, despite having every ability and right to bring contribution claims against these doctors. Burt. v. W. Jersey Health Systems speaks to the procedure when a plaintiff's conduct deprives a direct defendant of the ability to obtain contribution. Drs. Goldsmith and Nguyen were not so-called "Burt defendants," because Appellant was able to prosecute claims of contribution had he chosen to do so. Nevertheless, the Trial Court designated the doctors as so-called "Burt defendants" at trial. Appellant thus had free rein to blame these doctors for Plaintiff/Respondent's losses as empty chairs, but the jury found direct defendant Appellant sixty

percent (60%) at fault. Appellant does not challenge the jury's determination in this regard nor argue that the jury's verdict was against the weight of the credible evidence.

In post-trial proceedings, the Trial Court correctly enforced the entire judgment against Appellant consistent with the Joint Tortfeasors Contribution Law (hereinafter "JTCL"). The statute provides that a plaintiff may collect all damages from any direct defendant found to be at least sixty percent (60%) negligent. Moreover, the New Jersey Supreme Court addressed this very issue – how to apply the JTCL when so-called "Burt defendant" designation was sought or applied – in Mejia v. Quest Diagnostics, Inc. The Court clearly and unequivocally declared that a plaintiff may recover the full measure of damages as laid out in the JTCL in that circumstance. The Trial Court, then, did precisely what the Supreme Court and the JTCL required it to do.

Appellant attempted to exploit the Burt decision to obtain a more favorable trial posture and liability outcome. He invited the very error that he now claims severely prejudiced him. Should this Court rule in Appellant's favor, the Legislature's intent in enacting the JTCL will be severely undercut, and defendants will have free license to manufacture procedural "missteps" and "traps" for plaintiffs to frustrate viable claims. It is difficult to imagine how the

Trial Court committed error by applying the statute as written and the law as pronounced by our State's highest court.

The designation of the so-called "Burt defendants" occurred in 2017, before Mejia in 2020. Regardless of whether the Trial Court's designation was correct in 2017, it was no longer correct after Mejia. The Trial Court therefore should not have molded the judgment to only sixty percent (60%) and contrary to the JTCL and Mejia. The law of the case principle is not absolute, see Lombardi v. Masso, 207 N.J. 517, 538-39 (2011) (explaining that the law of the case doctrine is "a non-binding rule", has a "discretionary nature", and is entirely inapposite where "in trial court proceedings, the same judge is reconsidering his own interlocutory ruling"), and it certainly cannot be invoked to suggest that a Trial Court should compound error. The Mejia case was decided two years before this matter went to trial in 2022. Despite this fact, the Trial Court still conducted the trial under its prior ruling, to the detriment of Plaintiff/Respondent.

For the reasons set forth herein, the Trial Court's Order enforcing the jury's determination – when combined with the application of the JTCL – rendered any error in so ruling in 2017 and at trial in 2022 harmless.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

At 74 years old, Plaintiff/Respondent's decedent Victor Gaza, Jr. became a patient of Appellant Joseph Popovich, M.D., and underwent surgery on May 15, 2013, to remove his gallbladder. (5T172:19-23). Plaintiff/Respondent[2] was initially advised that it would be a same-day procedure and would take about one-half hour. (5T168:11-22). During this surgery, however, Appellant became concerned that Mr. Gaza may have been at risk for potential bowel injury due to abdominal adhesions and the difficulty of performing the surgery. (8T23:14-20). For this reason, he ordered Mr. Gaza admitted to the hospital for "close observation." (5T175:3-6; 13T66:18-22). Despite signs and complaints consistent with a bowel injury and perhaps perforation – no passing of flatus, a hard and distended abdomen – Appellant neither examined the patient nor requested that another physician do so. (7T51-7T52; 7T59; 8T66). Plaintiff/Respondent's liability expert, Dr. William Flynn, M.D., testified at great length and offered opinions regarding deviations from accepted standards of care by Appellant. (7T42; 7T51-7T52; 7T59; 8T23-8T24; 8T66). He testified that Mr. Gaza had developed an ileus, and that the most common cause of ileus was bowel perforation. (7T49-7T50; 8T41; 8T46; 9T18:8-12). A bowel

[1] The Statement of Facts and Procedural History have been combined for the convenience of the Court due to the complex procedural and factual background of this matter.
[2] References to Plaintiff/Respondent refers to Plaintiff Estate of Victor Gaza, Jr. and Plaintiff Purita Gaza, in this case collectively.

perforation can cause peritoneal infection and lead to sepsis and death. (7T68-7T70). Thus, he explained that it is essential under the standard of care that the cause of ileus is identified and – if a perforation is present – treated urgently. (7T51:4-18; 7T69:22-25; 8T23:21-8T24:15). He further testified that Appellant deviated by not evaluating the patient himself upon the onset of symptoms and by not educating the hospitalist as to how to proceed if such symptoms arose. (7T51-7T52). This negligence caused Mr. Gaza to go into septic shock at about 4:30 in the morning on May 17, 2013. (8T70:2-5). From that point, Mr. Gaza's fate was unfortunately sealed. (8T82:2-9). In sum, during Mr. Gaza's recovery over the next two days, Appellant was negligent in rendering post-operative care to Mr. Gaza by failing to respond to signs that Mr. Gaza indeed had a perforation. (8T66:11-23). After enduring numerous additional procedures, an open abdomen and months of excruciating pain, Mr. Gaza died on August 4, 2013. (5T206:5-6).

On May 15, 2015, Plaintiff/Respondent filed a medical malpractice complaint against Appellant, alleging that his negligence caused Mr. Gaza's injuries and subsequent death on August 4, 2013. (Da2, ¶ 1). Four nurses were also initially named as defendants in this Complaint, as well as Christ Hospital on the basis of respondent superior. (Da1). Those claims were eventually dismissed, and no party alleged negligence of any nurse at trial.

Plaintiff/Respondent subsequently amended the Complaint at various points; two of the amendments are relevant to this appeal. Plaintiff/Respondent's Fourth Amended Complaint added Peter Goldsmith, M.D. (a radiologist who read a CT scan of Mr. Gaza on May 17, 2013) as a direct defendant. (Da75; 7T43:21-25). Then, on April 13, 2017, the court granted Appellant's motion for leave to file a Third-Party Complaint against three additional doctors, one of them being Jim Nguyen, D.O. (a hospitalist who cared for Mr. Gaza after his surgery on May 15, 2013) (Da112-13; 8T28:7-11). Appellant subsequently filed the Third-Party Complaint that same day. (Da114). Accordingly, Plaintiff/Respondent sought leave to file an amended complaint asserting direct claims against the three additional doctors pursuant to R. 4:8-1(b), which was granted. (Da118). Plaintiff/Respondent thereafter filed the Fifth Amended Complaint on June 23, 2017, naming the three doctors in the Third-Party Complaint (including Dr. Nguyen) as direct defendants. (Da128). Plaintiff/Respondent originally did not name any of these doctors as direct defendants because Plaintiff/Respondent did not believe there was evidence that these doctors were at fault or that any fault was a proximate cause of Mr. Gaza's injuries and/or death. (14T9:14-25). Rather, Plaintiff/Respondent sought to amend in response to the allegations made by Appellant in his discovery responses. (14T:16-23).

Thereafter, Dr. Nguyen moved to dismiss Plaintiff/Respondent's Amended Complaint for failure to comply with the statute of limitations. (Da158). Plaintiff/Respondent opposed this motion based on Discovery Rule grounds: since Dr. Nguyen's alleged negligence was undiscoverable to Plaintiff/Respondent until additional discovery revealed potential fault, Plaintiff/Respondent was entitled to name him as a defendant on the survival claim. (Pa1). The Trial Court granted Dr. Nguyen's motion to dismiss all claims on September 29, 2017. (Da203-04). After that, Dr. Goldsmith filed a similar Motion to Dismiss Plaintiff/Respondent's Amended Complaint on statute of limitations grounds. (Da207-08). Plaintiff/Respondent similarly opposed this motion on Discovery Rule grounds, at least as to the survival claim. (Pa9). On December 11, 2017, the Trial Court likewise granted Dr. Goldsmith's motion to dismiss all claims. (Da235-36).

In this Order and over Plaintiff/Respondent's objection, the Order as to Dr. Goldsmith provided that Plaintiff/Respondent's direct claim was dismissed, but that the cross-claims against other defendants were preserved in accordance with Burt v. W. Jersey Health Systems. (Da236). Dr. Nguyen then moved to dismiss Appellant's Third-Party Complaint. (Da237). Despite having every right and ability to pursue his third-party claims, Appellant instead filed a cross-motion seeking to again treat these third-party defendants as the defendants were

treated in Jones v. Morey's Pier and Burt. v. W. Jersey Health Systems. (Da244). This position is entirely illogical since Appellant would then gain the benefit of a third-party claim but without the necessity to contend with counsel defending those doctors. Plaintiff/Respondent opposed the motions, arguing that Burt and Jones apply only when a plaintiff's conduct destroys a defendant's ability to pursue third-party claims – in other words, action or inaction that prevents a direct defendant from asserting or prosecuting a third-party claim for contribution. (Pa20-21). Nonetheless, the Trial Court ruled that Drs. Goldsmith and Nguyen would be treated as so-called "Burt defendants." (2T29-2T30).

By the time the trial commenced in November 2022, Appellant was the only direct defendant remaining in the case. During a pre-trial conference, Plaintiff/Respondent again raised objection to the designation of Drs. Goldsmith and Nguyen as so-called "Burt defendants." (3T19). While acknowledging that Plaintiff/Respondent was bound by the court's order from December 2017, Plaintiff/Respondent reiterated that Appellant had earlier asserted cross- and/or third-party contribution claims against Drs. Goldsmith and Nguyen, and had every ability to pursue them inasmuch as nothing Plaintiff/Respondent did or did not do had any bearing or preclusive effect on such claims. (3T20-3T21). As such, Plaintiff/Respondent argued those doctors should not have been designated as so-called "Burt defendants" because contribution claims against them

pursuant to Mejia by Appellant would have been the proper procedure. (3T21). Unlike the facts in Burt and Jones, Appellant had viable contribution claims against Drs. Goldsmith and Nguyen because Plaintiff/Respondent had done nothing that prevented Appellant from moving forward with claims against Drs. Goldsmith and Nguyen. (3T22). Even though Plaintiff/Respondent's claims were barred by the statute of limitations, no such impediment applies to a defendant's claims for contribution. (3T36). It was therefore still Plaintiff/Respondent's position that putting Drs. Goldsmith and Nguyen on the verdict sheet without any representation during the trial was an attempt from defense counsel to improperly exploit the ruling in Burt. (3T23).

To rectify the error rather than compounding it, Plaintiff/Respondent thus argued that either only Appellant appear on the verdict sheet alone, or that the matter be adjourned to give Drs. Goldsmith and Nguyen an opportunity to appear with counsel. (3T30). Furthermore, Plaintiff/Respondent explained that it had no automatic right to seek appellate review of the interlocutory ruling. (3T34). Nevertheless, the Trial Court ruled that Drs. Goldsmith and Nguyen were to be treated as so-called "Burt defendants" and that the issue would go to the jury if there was enough evidence to support an allegation of negligence against them. (3T42). Therefore, regardless of Plaintiff/Respondent's application, it was denied in any event, and the trial was conducted exactly as

Appellant sought. (14T14:12-15). By upholding the so-called "Burt defendant" designation, Drs. Goldsmith and Nguyen were not active parties in the case (i.e., they were without representation of counsel) but appeared on the verdict sheet. (2T29). Appellant's counsel also conceded that as a consequence, no one could recover anything directly against either Dr. Goldsmith and/or Dr. Nguyen as a result – not Plaintiff/Respondent (because they were not direct defendants) and not Appellant either (because of the dismissals Appellant had requested). (2T29-2T30).

Given Appellant's burden to prove that Dr. Goldsmith and/or Dr. Nguyen were at fault, Appellant's expert witness, Dr. Seth Glick, testified that Dr. Goldsmith deviated from the standard of care by misreading Mr. Gaza's CT scan. (18T148:3-9). Appellant's expert witness, Dr. Neil Skolnik, testified that Dr. Nguyen deviated from the standard of care in his hospital treatment of Mr. Gaza. (14T41:22-14T42:18). Conversely, Plaintiff/Respondent's expert witness, Dr. William Flynn, testified that his reading of the CT scan was consistent with Dr. Goldsmith's, and that Dr. Nguyen's care for Mr. Gaza was what would have been expected from a hospitalist such as Dr. Nguyen without specific guidance from a general surgeon. (7T44:2-18; 8T73:22-25; 8T74:1-2). Both Dr. Goldsmith and Dr. Nguyen testified at trial, each describing the care provided to Mr. Gaza.

The Trial Court ruled that Drs. Goldsmith and Nguyen were only to be referred to as treating doctors. (5T18:12-14). In line with that ruling, the Trial Court also instructed counsel that, at most, they could tell the jury that Drs. Goldsmith and Nguyen had been procedurally dismissed, and that the jury would be told not to speculate as to why. (5T17:8-11). The Trial Court ruled that information beyond the doctors being procedurally dismissed was irrelevant to the case. (5T17:11-13). When defense counsel attempted to go beyond this very clear instruction during cross-examination, the Trial Court re-affirmed its prior ruling that any information beyond Drs. Goldsmith and Nguyen being procedurally dismissed was out of the case. (11T65:1-8). During the charge conference, the Trial Court again ruled that the jury would not hear any information about the Plaintiff/Respondent's Complaint because, during the trial, it was Appellant who had made allegations of deviation against Drs. Goldsmith and Nguyen. (18T14:6-18T15:22).

The jury was instructed in accordance with the Trial Court's ruling, (20T137:21-20T138:7), and Drs. Goldsmith and Nguyen were included on the verdict sheet. (20T155:12-20T156:10). After deliberation, on December 20, 2022, the jury found both Appellant and Dr. Goldsmith liable, and allocated sixty percent (60%) fault to direct Appellant, the only direct defendant, and forty percent (40%) fault to Dr. Goldsmith. (21T7:3-11). The jury awarded

Plaintiff/Respondent $1,568,897.80 in damages. (21T7:15-21T8:1). The Trial Court entered judgment in the amount of $1,922,834.71, consisting of the full measure of damages and including the stipulated lien and pre-judgment interest. (Da349). In the post-judgment proceedings, Plaintiff/Respondent submitted a Proposed Form of Order of Judgment providing that Plaintiff/Respondent was entitled to recover the full measure of damages from Appellant because he was a direct defendant found by the jury to be sixty percent (60%) at fault for the losses sustained by Plaintiff/Respondent. (Pa24-26). Appellant objected and asserted that forty percent (40%) of the verdict must be deducted from the Order of Judgment because – due to the so-called "Burt defendant" designations – Appellant should only pay sixty percent (60%) of the damages. (Da336). Plaintiff/Respondent responded by asserting that the JTCL entitled Plaintiff/Respondent to recover fully pursuant to Mejia v. Quest Diagnostics, Inc. (Da 338-339).

Before the Trial Court executed an Order of Judgment, Appellant moved for a new trial on January 9, 2023, asserting trial error distinct from the JTCL issue. (Da341). Plaintiff/Respondent opposed this motion for the reasons articulated above, (Pa27-63), and further that there was clearly no miscarriage of justice in the outcome of this case. (Pa51). Oral argument was conducted on February 17, 2023. (22T). The Trial Court denied Appellant's Motion for a New

Trial. (Da351). The Trial Court granted Appellant's request to submit additional briefing regarding the Order of Judgment issue. (22T11; 22T25). After considering this supplemental briefing, the Trial Court executed the Order of Judgment submitted by Plaintiff/Respondent on February 28, 2023. (Da347).

Two weeks later, Appellant moved to "revise" the Order of Judgment, or, for the first time, suggest that a new trial was necessary due to the Trial Court's legal ruling regarding the JTCL. (Da352). Plaintiff/Respondent opposed this motion on the grounds that Appellant was out of time to seek a new trial on this basis because it was more than twenty (20) days after the return of the jury's verdict, and further that Mejia v. Quest Diagnostics, Inc. obligated such a result. (Pa64-82). On March 31, 2023, the Trial Court denied Appellant's motion and ruled that the JTCL provides that Plaintiff/Respondent is permitted to recover the entire judgment from Appellant. (23T16-23T17).

On April 5, 2023, Appellant filed this appeal. (Da356).

LEGAL ARGUMENT

I. THE TRIAL COURT PROPERLY ENTERED JUDGMENT AGAINST APPELLANT FOR THE FULL MEASURE OF THE VERDICT AS MANDATED BY THE JOINT TORTFEASORS CONTRIBUTION LAW AND THE SUPREME COURT'S DECISION IN MEJIA V. QUEST DIAGNOSTICS, INC.

A. This Court's review of the Order of Judgment is de novo.

"'When no issue of fact exists, and only a question of law remains, [appellate courts afford] no special deference to the legal determinations of the Trial Court.'" Mejia v. Quest Diagnostics, Inc., 241 N.J. 360, 370-71 (2020) (quoting Cypress Point Cono. Ass'n, Inc. v. Adria Towers L.L.C., 226 N.J. 403, 415 (2016)). Because there is no genuine issue of material fact before this Court, de novo review applies to the Trial Court's ruling executing the Order of Judgment.

Furthermore, the issue of whether Plaintiff/Respondent is entitled to the full measure of damages or to merely sixty percent (60%) is solely an issue of law, not one of fact. Thus, there is no justification for a new trial in this matter on that basis.

B. Appellant incorrectly relies upon Burt for determining the proper Order of Judgment.

In Burt v. W. Jersey Health Sys., 339 N.J. Super. 296 (App. Div. 2001), one of two defendants that a plaintiff sued was dismissed from the case because the plaintiff failed to file and serve an Affidavit of Merit. Burt, 339 N.J. Super. at 302. The remaining defendant had filed a cross-claim against the dismissed defendant seeking contribution or indemnity, so the Appellate Division held that the defendant's contribution claim should not be vitiated by the plaintiff's failure to comply with the Affidavit of Merit Act. Id. at 302, 304. The Burt Court therefore reasoned that, at the trial to occur in the future, the fault of the dismissed defendant would be allocated by the jury. This was so, even though the plaintiff could not recover directly from that dismissed defendant. Id. at 307. The Burt Court concluded that "a plaintiff who fails to file an Affidavit of Merit against a licensed professional is not entitled to recover the full amount of damages from a remaining licensed professional who is deemed to be sixty percent or more responsible for the total damages." Ibid. It must be noted that this ruling was essentially dicta, since the issue had not been briefed, was raised by the appellate panel sua sponte, and was not necessary to determine the issue raised.

Here, it is improper to rely upon Burt because the so-called "Burt defendants" were not the product of this Plaintiff/Respondent's failure to file

Affidavits of Merit against Drs. Goldsmith and Nguyen; rather, the designation as so-called "Burt defendants" came from Appellant's deliberate, tactical, and strategic effort to exploit the Appellate Division's ruling in Burt. In this case, Plaintiff/Respondent did not name Drs. Goldsmith and Nguyen as defendants in the original Complaint because it was determined that there were no viable claims against them. It was not until – and because of – Appellant's allegations of the fault of Drs. Goldsmith and Nguyen in discovery that Plaintiff/Respondent sought to amend. When Appellant alleged that Drs. Goldsmith and Nguyen were at fault for the harm sustained, Plaintiff/Respondent was confronted with two options under the Court Rules: (1) to seek to amend the Complaint to assert a direct claim against Drs. Goldsmith and Nguyen; or (2) to not seek to amend the Complaint to assert direct claims. See R. 4:9-1; R. 4:9-3. If Plaintiff/Respondent had chosen the latter course, Plaintiff/Respondent would have been at risk of Appellant asserting third-party claims against Drs. Goldsmith and Nguyen. If that had occurred, the claimed negligence would be presented to the jury, but Drs. Goldsmith and Nguyen would have been represented by counsel at trial and would have been on the verdict sheet. Plaintiff/Respondent would not be able to recover directly from Drs. Goldsmith and/or Nguyen, but the JTCL would undoubtedly apply. Instead, Plaintiff/Respondent chose the course seeking to amend in an effort to present direct claims based upon Appellant's allegations.

When Plaintiff/Respondent did so, the Trial Court dismissed the claims against Drs. Goldsmith and Nguyen on statute of limitations grounds.

Appellant then sought to exploit those dismissals by obtaining an order designating Drs. Goldsmith and Nguyen as so-called "Burt defendants," with the same benefit of seeking potential fault against these physicians but without them being represented by counsel. It should be noted that Appellant did not even have the burden and expense of filing and serving Affidavits of Merit had he pursued his third-party claims because the Courts of New Jersey since Burt have made clear that when defendants file third-party claims for contribution in professional negligence claims, they are not required to file and serve Affidavits of Merit. See Diocese of Metuchen v. Prisco & Edwards, AIA, 374 N.J. Super. 409, 418 (App. Div. 2005) (holding that "where a defendant subject to the Affidavit of Merit statute asserts a third-party claim in the nature of contribution or joint tortfeasor liability as against another professional also subject to the statute, no Affidavit of Merit is required"). This designation was entirely inappropriate because Appellant still had every right and ability to file and prosecute third-party claims against both Drs. Goldsmith and Nguyen, irrespective of whatever Plaintiff/Respondent did and even given the fact that Plaintiff/Respondent could not assert direct claims against them. See R. 4:8-

1(a). The statute of limitations was no impediment to Appellant's contribution claims against Drs. Nguyen and Goldsmith. (3T36).

Consequently, it is curious why the Court in Burt decided to essentially punish a plaintiff when defendants had no impediment to assert third-party claims. Contextually, the Burt decision was ruling and commenting upon the then only-recently enacted Affidavit of Merit statute, when the contours of the law and its consequences were not firmly established. See N.J.S.A. § 2A:53A-27 (originally enacted and effective on June 29, 1995). In any event, it is improper to rely upon Burt for the Order of Judgment here because, unlike the plaintiff's failure to comply with the Affidavit of Merit Act in Burt, the procedural context that led to dismissal of Plaintiff/Respondent's amended claims against Drs. Goldsmith and Nguyen here did not vitiate Appellant's ability to assert contribution claims. Appellant's potential claims against Drs. Goldsmith and Nguyen were not extinguished by the dismissal of Plaintiff/Respondent's direct claims. In fact, as instructed in Mejia v. Quest Diagnostics, Inc., 241 N.J. 360 (2020), the asserted cross-claims against Drs. Goldsmith and Nguyen should have remained, and those doctors should have been represented by counsel. In Mejia, the Supreme Court ruled that the defendant, Quest Diagnostics, had viable claims against a third-party defendant against whom the plaintiff did not have a direct claim. Mejia, 241 N.J. at 366.

"Third-party defendants are subject to the contribution claims filed against them by joint tortfeasors, unless there exists a right to a dismissal of the claims against them." Ibid. As such, the Supreme Court ruled that the third-party defendant must participate at trial with counsel. Ibid. In other words, the Supreme Court confirmed that defendants and/or third-party defendants against whom cross-claims or third-party claims have been brought are still parties even though the plaintiff may not have direct claims nor recover damages from such a third-party defendant directly.

In this case, there was no reason why Appellant could not have pursued the contribution claims he had already asserted and/or was free to assert against Drs. Goldsmith and Nguyen. Had Appellant done so, there would have been no reason or basis to seek the so called "Burt defendant" designation. In seeking this tactical advantage – essentially, pursuing third-party claims against empty chairs without the benefit of counsel – Appellant created a true Hobson's choice for Plaintiff/Respondent, with an eye towards exploiting the ruling at trial. The only reason why Appellant's claims against Drs. Goldsmith and Nguyen were no longer active was because Appellant asked the Trial Court to extinguish those claims and to declare them so-called "Burt defendants." (1T10:9-17). This was not the intent of the Appellate Division's ruling in Burt. That court emphasized that the rationale for the ruling was that a defendant was not to be penalized by

preclusion of contribution claims due to the plaintiff's conduct. Burt, 399 N.J. Super. at 308. But here, Appellant was not in any way precluded from pursing contribution claims by anything that Plaintiff/Respondent did or did not do.

Despite the inapplicability of Burt, this matter proceeded to trial under that ruling, exactly as Appellant had requested of the Trial Court. Even though it is submitted that this was not a Burt case and the Trial Court's ruling in 2017 so finding was erroneous, it would not matter even if the ruling was correct. Appellant got exactly the trial for which he asked.

The essential problem, and the entire reason for this appeal, is that Appellant did not like the result.

C. The JTCL clearly states that a Plaintiff/Respondent shall recover the full amount of damages from any direct Defendant determined to be sixty percent (60%) at fault, as was Appellant.

The Joint Tortfeasors Contribution Law (N.J.S.A. 2A:53A-1, *et seq.* was enacted in 1952, and became effective June 18, 1952. See Markey v. Skoq, 129 N.J. Super. 192, 199 (Law Div. 1974). The statute was enacted due to the perceived inequity of the existing law, which permitted a plaintiff to recover the full measure of any judgment against any culpable defendant – the "one-percent rule." See Kennedy v. Camp, 14 N.J. 390, 399 (1954). Under that existing scheme, a tangential defendant with very little liability but significant insurance coverage or assets would be at risk of paying far in excess of its proportional

share. Despite the ability to seek contribution, that remedy was of little benefit when remaining co-defendants had little or no assets or insurance coverage.

Due to this perception, the Legislature set about to craft a new scheme that would ensure that plaintiffs would be able to recover an entire verdict from a direct defendant whose liability was not insubstantial or trivial. See, Erny v. Estate of Merola, 171N.J. 86, 98-99 (2002). The resulting statute, as a result, logically reflects a policy determination that it would be reasonable to require that any direct defendant sixty percent (60%) at fault or greater pay the full measure of damages, again with the remedy of contribution from other co-defendants. Id.; See also Lee's Hawaiian Islanders, Inc. v. Safety First Food Prods., Inc., 195 N.J. Super. 493, 505-06 (App. Div. 1984).

As a logical imperative, then, there is nothing inequitable or offensive about applying the statute allowing full recovery against this culpable, direct defendant. That Appellant here should argue that he lacks a remedy, or is at risk of lacking a remedy, is entirely irrelevant to the issues before this Court and of no moment whatsoever to the innocent Plaintiff/Respondent. The author of the alleged harm to this Appellant is this Appellant himself – it was Appellant who sought the Burt designation, not Plaintiff/Respondent. Also, it was Appellant who sought the dismissal of his claims against Drs. Goldsmith and Nguyen –

not Plaintiff/Respondent. If there is harm to Appellant occasioned by the application of the law and its consequences, the burden falls on the party that sought the ruling and not the innocent Plaintiff/Respondent here who argued against the rulings.

The JTCL clearly and unequivocally states that a Plaintiff/Respondent is entitled to recover the full amount of damages from "any party determined by the trier of fact to be 60% or more responsible for the total damages." N.J.S.A. 2A:15-5.3(a). Any party "who is compelled to pay more than his percentage share may seek contribution from the other joint tortfeasors." N.J.S.A. 2A:15-5.3(e). Notably, the statute does not articulate any exceptions or circumstances under which this mandate may or should be modified. Id. There is no reason, then, to deviate from the clear legislative mandate in favor of Plaintiff/Respondents against defendants found to be primarily at fault.

Despite this very clear and unequivocal statutory mandate, Appellant relies upon the decision of the Appellate Division in Burt. Burt merely stands for the proposition that a prior party-defendant dismissed for the failure of a plaintiff to file an Affidavit of Merit is "still a fault-allocable party under the Comparative Negligence Act." Id. at 305. Despite recognizing the unequivocal mandate in the JTCL, the Burt Court – without briefing by the parties – raised

the prospective issue of the plaintiff's recovery sua sponte. Id. at 308. The Appellate Division ruled that it would be inequitable to force dismissed parties, not represented by counsel at trial, to participate at trial and potentially be responsible for damages. Ibid. For this reason, that Court determined that the legislative intent of the JTCL – although clearly expressed without exception or qualification – would somehow be advanced by preventing a plaintiff from recovering the full measure of damages against a direct defendant found by a factfinder to be 60% or more at fault. Id. at 309. What the Burt opinion lacks is an explanation as to why the direct defendants in that case should have been so rewarded when there was no impediment to them pursuing contribution claims against the dismissed defendants, since the dismissal of the plaintiff's direct claims would not have distinguished the defendants' rights to seek contribution against those dismissed defendants. The legislative intent of the JTCL, however, should not be disregarded as the Burt Court apparently did. Rather, the "overall intent of the Legislature is clear from the plain text of N.J.S.A. 2A:15-5.3(a): a plaintiff is entitled to full recovery from any joint tortfeasor found to be at least sixty present liable." Carbajal v. Patel, 468 N.J. Super. 139, 154 (App. Div. 2021). This is also "supported by the statute's legislative history." Id. at 155. Although the Legislature enacted the JTCL to "relieve the inequity of imposing the entire burden on one of several joint tortfeasors," the law "does not diminish

the liability of a joint tortfeasor to the plaintiff." Ramos v. Browning Ferris Industries, Inc., 103 N.J. 177, 183 (1986). Thus, the Legislature created a scheme where "a plaintiff who is injured by two defendants may collect all his damages from any direct defendant found to be sixty percent or more negligent." Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 110 (2004). Then, a "defendant compelled to pay more than his percentage may seek contribution from a joint tortfeasor." Ibid.; see N.J.S.A. 2A:15-5.3(e).

More importantly, the issue in this case is not Burt; it is the application of the JTCL. Under Mejia, the Supreme Court specifically and pointedly addressed a split that arose in the Appellate Division regarding whether a plaintiff could recover an entire verdict under the JTCL in a situation where the jury allocated between defendants – specifically, when direct defendants and so-called "Burt defendants." The Supreme Court framed the dispute as being the effect of a finding of 60% fault against a direct defendant: the Burt Court ruling a plaintiff could not recover the full measure, but the Appellate Division panel below in the Mejia case ruling that a plaintiff could recover the full measure. Having identified the exact same, specific issue as is in dispute here, the Supreme Court unequivocally declared that a plaintiff in such a circumstance shall recover the full amount of damages as laid out in the JTCL against any direct defendant found sixty percent (60%) or more at fault. Mejia, 241 N.J. at 371-72.

D. Appellant is not a public entity and therefore is not a beneficiary of the Tort Claims Act's pro rata limitation provision.

Appellant's reliance on Jones v. Morey's Pier, Inc. and Maison v. N.J. Transit Corp. is misplaced because there is no public entity in this matter. In Jones v. Morey's Pier, the Plaintiff/Respondents originally sued private parties, and these private-party defendants filed a third-party claim for contribution and common-law indemnification against a public entity. Jones v. Morey's Pier, Inc., 230 N.J. 142, 147-48 (2017). However, the plaintiffs never served a timely tort claim notice on the public entity "within the ninety-day period prescribed by the notice of claims provision of the Tort Claims Act, N.J.S.A. 59:8-8." Id. at 148. The Supreme Court held that the failure of the plaintiff to serve a timely tort claim notice in accordance with the Tort Claims Act barred any claims against the public entity by any party, including defendants. Id. at 164. However, the Court ruled that defendants were permitted to present evidence about the public entity's alleged negligence and have the jury assess the negligence (if any) of the public entity. The basis of that ruling was that the failure of the plaintiff to serve a proper Tort Claims Notice deprived all defendants of any opportunity of seeking contribution directly from the public entity. The Trial Court on remand was instructed to "mold the judgment to reduce the [private party defendants'] liability to plaintiffs in accordance with the percentage of fault allocated to the [public entity]." Id. at 170.

This is not what occurred here.

In Maison v. N.J. Transit Corp., the Supreme Court similarly dealt with treatment of public entities protected by the Tort Claims Act and the JTCL. The plaintiff in Maison sued N.J. Transit and a bus driver, alleging negligence that caused her harm while she was a passenger on the bus. Maison v. N.J. Transit Corp., 246 N.J. 270, 274 (2021). Addressing the interaction between the Tort Claims Act and the JTCL, the Court explained that the Tort Claims Act gives "public entities and public employees – unlike private companies and their employees – [the benefit] of multiple immunities that shield them from liability." Id. at 289. However, the Court emphasized that the Tort Claims Act does establish a comparative-fault scheme that "strictly [limits] the liability of public entities and public employees to the percentage of fault directly attributable to them." Id. at 306. Thus, when a public entity or public employee "is determined to be a tortfeasor in any cause of action along with one or more other tortfeasors, the public entity or public employee shall be liable for no more than that percentage share of the damages which is equal to the percentage of the negligence attributable to that public entity or public employee." Ibid. As such, the Tort Claims Act overrides the JTCL to protect public entities in that specific context.

This is not what occurred here, either.

Here, Appellant cannot rely on case law defining the contours of the Tort Claims Act for protection, because there are no public entities or public employees involved. Jones does not apply because – unlike the plaintiff in Jones that destroyed the private-party defendants' third-party claim against the public entity – Plaintiff/Respondent did nothing to destroy any contribution claims that Appellant may have had against Drs. Goldsmith and Nguyen. The fact that Plaintiff/Respondent did not originally sue Drs. Goldsmith and Nguyen did not affect that right. Amending the Complaint would not affect that right. Not amending the Complaint would not affect that right. Appellants right to seek contribution was unaffected by anything Plaintiff/Respondent did or did not do. Furthermore, the limitation of the JTCL in Maison was due to a controlling statutory provision in the Tort Claims Act that is not relevant here.

Appellant had every right and every ability to file and pursue contribution claims. Drs. Goldsmith and Nguyen were not public employees, so Plaintiff/Respondent was not obligated to serve tort claim notices, and did not thereby deprive Appellant in any way. Furthermore, Maison is inapplicable because Appellant is not a public entity nor public employee protected by the comparative-fault scheme in the Tort Claims Act like the defendants in Maison.

While public entities are liable only for the percentage of fault directly attributable to them, Appellant cannot claim that this protection also applies to him. Jones and Maison are narrow holdings that only apply in the context of public entities and the Tort Claims Act. Appellant, then, cannot assert that he is liable for less than 100% of the full measure of damages based on rules that apply to public entities.

E. The Supreme Court's decision in Mejia – not the Appellate Division's decision in Burt – controls the measure of damages Plaintiff/Respondent may recover from Appellant.

The Supreme Court's decision in Mejia is controlling in this matter because it directly addresses the application of the JTCL in the circumstance of a so-called "Burt defendant" designation. The first issue in Mejia was whether the so-called "Burt defendant" designation was valid and/or available to a provider who was not a direct defendant but was subject to a third-party contribution claim. Id. at 371. The Supreme Court held that, absent culpable conduct by the plaintiff that precluded a contribution claim, direct defendants may collect contribution via a third-party claim. Id. at 372-73. Therefore, designation as a so-called "Burt defendant" was not permitted. Ibid. The Court relied upon Holloway v. State, 125 N.J. 386 (1991) in reaching the conclusion that "contribution should not depend upon whether a defendant is sued as a third-party defendant pursuant to R. 4:8-1, or as a direct defendant subject to a cross-

claim for contribution pursuant to R. 4:7-5(a)." Id. at 372. "'[T]he procedural status of a defendant-in-contribution . . . neither alters nor modifies the rule that the injured party's negligence should be compared with that of each joint tortfeasor. How the tortfeasors arrive at the litigation should not affect the substantive right of contribution.'" Id. at 372-73 (quoting Holloway, 125 N.J. at 402). "Clearly a defendant's right to contribution from a joint tortfeasor cannot be controlled by plaintiff's unilateral decision not to join all tortfeasors." Lee's Hawaiian Islanders, Inc., 195 N.J. Super. at 506. "Thus, a defendant may file a claim for contribution against a third party that was not sued by the plaintiff." Mejia, 241 N.J. at 372 (citing R. 4:8-1(a)).

Having so ruled clearly and unequivocally, with precedent dating back decades, there was no reason why Appellant would not have known of this right and no reason why he could not have pursued contribution from those defendants believed to be joint tortfeasors, regardless of whether Plaintiff/Respondents chose to sue them or not to sue them.

The second issue addressed by the Supreme Court in Mejia was whether, under the JTCL, a plaintiff could collect the entire verdict against any direct defendant found sixty percent (60%) or more at fault at trial. Id. at 374. When this issue was presented to the Appellate Division in Mejia v. Quest Diagnostics,

Inc., Nos. A-5708-17T2, A-0450-18T2, 2019 N.J. Super. Unpub. LEXIS 483, at *1 (App. Div. Mar. 4, 2019) (Pa83), that Court ruled that if a plaintiff succeeded in obtaining a finding of sixty percent (60%) or greater against any direct defendant, that defendant would be responsible for all the damages pursuant to the JTCL. Id. at *11-12. The Appellate Division further explained that the direct defendants "were entitled to implead [another provider] and prove his responsibility as a joint tortfeasor so as to limit any allocation of its own fault for plaintiff's damages, and thereby limit any award against it." Id. at *12. Of course, doing so would entitle the third-party defendant to have counsel at trial to oppose those claims (i.e., not receive a so-called "Burt defendant" designation). In this sense, the Mejia panel called into question the very impetus and rationale for the ruling in Burt. The Mejia Appellate Division opinion observes that defendants have an independent right and ability to bring third-party claims, which is not dependent on the plaintiff's conduct.

Presumably, this conflict between these two rulings prompted certification of the Mejia matter to the Supreme Court.

The Supreme Court in Mejia "agree[d] with the Appellate Division panel in Mejia that if the trier of fact determines [direct defendants] to be sixty percent or more at fault, then plaintiff can recover the full amount of damages from that

party, N.J.S.A. 2A:15-5.3(a)." Mejia, 241 N.J. at 374. This is because, when the trier of fact determines that a party is sixty percent (60%) or more responsible for the total damages, "[t]he claim is governed by the Joint Tortfeasors Contribution Law." Id. at 372 (quoting Jones, 230 N.J. at 160). This ruling by the Supreme Court resolves the Appellate Division's split regarding application of the JTCL. As such, Mejia controls the outcome of this matter – not Burt. The Trial Court, then, properly executed Plaintiff/Respondent's proposed Order of Judgment because the JTCL and Mejia mandate that Plaintiff/Respondent is entitled to recover the full amount of damages from Appellant.

II. UNDER THE INVITED ERROR DOCTRINE, APPELLANT CANNOT ARGUE ON APPEAL THAT THE "BURT DEFENDANT" DESIGNATION WAS ERROR WHEN APPELLANT URGED THE TRIAL COURT TO MAKE THAT RULING.

A. Appellant sought and obtained the Trial Burt ruling, which he now claims was unfairly prejudicial.

It is well-established that parties who apply to a court to take certain actions or adopt certain theories may not later complain about the court's adoption of those actions or theories. "The doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error." Brett v. Great Am. Recreation, 144 N.J. 479, 503 (1996). A defendant "cannot beseech and request the Trial Court to take

a certain course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought . . . claiming it to be error and prejudicial." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 340 (2010) (quoting State v. Jenkins, 178 N.J. 347, 358 (2004)). Thus, "where error was advanced to secure a tactical advantage at trial, the party responsible will not be permitted to complain on appeal." Brett, 144 N.J. at 503; see also State v. Munafo, 222 N.J. 480, 487 (2015) (quoting State v. A.R., 213 N.J. 542, 561 (2013)) (affirming that, under the invited error doctrine, "trial errors that were induced, encouraged or acquiesced in or consented to by defense counsel ordinarily are not a basis for reversal on appeal"); State v. Williams, 219 N.J. 89, 100 (2014) (explaining that the "invited-error doctrine is intended to prevent defendants from manipulating the system and will apply when a defendant in some way has led the court into error while pursuing a tactical advantage that does not work as planned").

In Carrino v. Novotny, 78 N.J. 355 (1979), a defendant sought the involuntary dismissal of cross-claims against another defendant in a personal injury lawsuit. Carrino, 78 N.J. at 367. This is exactly what Appellant did here with regard to Drs. Goldsmith and Nguyen. The trial court granted the application, just was this Trial Court did. Ibid. Later, after an unfavorable outcome, that same defendant appealed the Trial Court's order of dismissal. Id.

at 366. The Supreme Court held that a defendant who induced the erroneous involuntary dismissal of another defendant was bound by that error and could not later contest the amount of the co-defendant's liability. Id. at 368-69. Here, Appellant sought the order dismissing them and instead seeking the designation of Drs. Goldsmith and Nguyen as so-called "Burt defendants", and an order relieving them of any financial responsibility to anyone. Consequently, Appellant cannot now complain that his actions may bar any contribution to which he may have been entitled under the JTCL or that he lacks the remedy of contribution.

The so-called "Burt defendant" status of Drs. Goldsmith and Nguyen was requested by Appellant. Plaintiff/Respondent opposed that application. (1T9:7-1T10:1). Appellant sought the so-called "Burt defendant" designation at trial, and the Trial Court so ordered. Appellant sought that the so-called "Burt defendants" not be represented by counsel at trial, and the Trial Court so ordered. Appellant sought an Order relieving the so-called "Burt defendants" of any and all financial responsibility upon trial of the case, and the Trial Court so ordered. Plaintiff/Respondent opposed each of these applications, but was bound by the Trial Court's rulings. As a result, the trial was conducted under the exact terms sought by Appellant. Now that Appellant has received an unfavorable outcome and the JTCL has been properly applied as mandated by the Supreme Court in

Mejia, Appellant seeks relief, claiming ignorance or misunderstanding of the consequences of those rulings. Under the invited error doctrine, this appeal cannot succeed. The fact that Appellant's legal stratagem did not work as planned, or because Appellant misunderstood the effects of the ruling and other statutes, is not a basis for reversal. In no event should Plaintiff/Respondent be made to suffer or receive less due to Appellant's poor tactical choice, ignorance or misunderstanding of the law. Again, "trial errors that were induced, encouraged or acquiesced in or consulted to by defense counsel ordinarily are not a basis for reversal or appeal." Williams, 219 N.J. at 100.

B. The Trial Court's decisions were not unfairly prejudicial because defense counsel undoubtedly knew the potential risks of that calculated legal strategy.

Appellant was not unfairly prejudiced by the Trial Court's decisions because defense counsel knew or ought to have known of the consequences associated with their deliberate legal strategy. The tactic to exploit Burt and have empty chair claims was not novel to this defense firm in this case. In fact, the Brennan Firm and Mr. Kilbride of that office attempted the exact same tactic in Mejia. In April 2018, Mr. Kilbride of the Brennan Firm – the same attorney representing Appellant in this case at the same time – "filed a motion seeking to have the court treat [his client] as the defendants were treated in [Burt] and

[Jones]."[3] Mejia v. Quest Diagnostics, Inc., Nos. A-5708-17T2, A-0450-18T2, 2019 N.J. Super. Unpub. LEXIS 483, at *7 (App. Div. Mar. 4, 2019). The Trial Court denied the motion because the third-party defendants in Burt and Jones were "dismissed meritoriously" from the contribution claims while there was "no basis for dismissal of movant here." Id. at *8. After the Court denied the motion, the Brennan Firm sought leave for interlocutory review, which the Appellate Division granted. Ibid. The Appellate Division affirmed the Trial Court's ruling and explained that the direct defendants were "entitled to implead [the Brennan Firm's client] and prove his responsibility as a joint tortfeasor so as to limit any allocation of its own fault for Plaintiff/Respondent's damages, and thereby limit any award against it." Id. at *12-13. Rather than treating the Brennan Firm's client as a so-called "Burt defendant," the direct defendants could assert a third-party claim "even though Plaintiff/Respondent, having declined to name [him] as a direct defendant, is not in a position to recover damages from the defendant at issue." Id. at *12.

Unsatisfied with the Appellate Division's decision, the Brennan Firm petitioned the Supreme Court for relief. As explained above, the Supreme Court affirmed the Appellate Division's ruling. Mejia, 241 N.J. at 377. Obviously,

[3] The Gaza matter was defended by the Law Office of William L. Brennan until that office closed in approximately 2021. The succeeding attorney at the Brennan Firm, Mr. Heron, later became associated with the firm of Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey before trial.

given the holding in Mejia, there is no logical reason not to apply the Supreme Court's reasoning to this case. There can be no doubt that defense counsel at the Brennan Firm was well-aware of the Mejia ruling and its effects – a case decided two years before this matter went to trial. Curiously, when the Mejia decision was addressed with the Trial Court in this matter before commencing trial – with Plaintiff/Respondent's concern being that the so-called "Burt defendants" were not represented by counsel – defense counsel never raised the issue of the JTCL. Appellant's trial counsel, instead, opposed Plaintiff/Respondent's application despite the clear mandate of Mejia and reiterated his desire for application of the Trial Court's 2017 ruling. Now, however, defense counsel claims to have been ignorant of, or to have not understood the effects of, the Supreme Court's ruling in Mejia. This claim simply is not credible. Defense counsel's assertion that Plaintiff/Respondent was somehow obligated to seek, or was entitled to, interlocutory appellate review as a matter of right is clearly without basis. Interlocutory appellate relief is not a right, and this assertion ignores the fact that Appellant likewise could have sought clarification prior to trial in light of the Mejia decision but chose not to do so. Defense counsel unsuccessfully attempted this very tactic to exploit the Burt decision in Mejia; defense counsel therefore knew the potential risks of this calculated legal strategy in this matter. Defense counsel "cannot beseech and request the Trial Court to take a certain

course of action, and upon adoption by the court, take his chance on the outcome of the trial, and if unfavorable, then condemn the very procedure he sought . . . claiming it to be error and prejudicial." N.J. Div. of Youth & Fam. Servs., 201 N.J. at 340 (quoting State v. Jenkins, 178 N.J. at 358).

III. THE TRIAL COURT PROPERLY PRECLUDED APPELLANT FROM READING PLAINTIFF/RESPONDENT'S AMENDED COMPLAINT TO THE JURY BECAUSE DOING SO WOULD HAVE BEEN MISLEADING, CONFUSING, AND UNDULY PREJUDICIAL.

A. The standard of review of the Trial Court's evidential rulings is abuse of discretion.

When a Trial Court admits or excludes evidence, its determination is "'entitled to deference absent a showing of an abuse of discretion, i.e., [that] there has been a clear error of judgment.'" Griffin v. City of E. Orange, 225 N.J. 400, 413 (2016) (quoting State v. Brown, 170 N.J. 138, 147 (2001)); see Hisenaj v. Kuehner, 194 N.J. 6, 16 (2008) (explaining that a Trial Court's admissibility determinations are to be reviewed for an abuse of discretion); Carey v. Lovett, 132 N.J. 44, 64 (1993) (recognizing that a Trial Court's admissibility determinations are usually reviewed for abuse of discretion); State v. McDuffie, 450 N.J. Super. 554, 574 (App. Div. 2017) (stating that an evidentiary decision is reviewed for an abuse of discretion). Thus, an appellate court "will reverse an evidentiary ruling only if it was so wide off the mark that a manifest denial of justice resulted." Griffin, 225 N.J. at 413 (emphasis added). Under N.J.R.E.

403(a), a Trial Court has discretion to exclude relevant evidence if its probative value is substantially outweighed by the risk of undue prejudice, confusion of issues, or misleading the jury.

B. The exclusion of portions of Plaintiff/Respondent's Amended Complaint was not an abuse of discretion due to the risk of misleading or confusing the jury, and because it would have been unduly prejudicial.

Here, the Trial Court did not abuse its discretion because the jury – without any knowledge or understanding of the full procedural context, Court Rules, and prevailing case law – would be confused and misled by inferences (both legitimate and inappropriate) if read only selected portions of the pleadings in this case. As explained in detail above, Plaintiff/Respondent sought to amend in response to the allegations of Appellant against Drs. Goldsmith and Nguyen in discovery. If Plaintiff/Respondent had chosen not to seek to amend, Plaintiff/Respondent would have been at risk of Appellant asserting third-party claims against Drs. Goldsmith and Nguyen. If that occurred, the claimed negligence would still have been presented to the jury, but with Drs. Goldsmith and Nguyen represented at trial and on the verdict sheet. Plaintiff/Respondent chose instead to amend to make them direct defendants, but the Trial Court dismissed those claims against Drs. Goldsmith and Nguyen. Putting aside whether those rulings were correct on discovery rule grounds,

Plaintiff/Respondent's effort to amend – in this context – is not proof or evidence of any fault by the so-called "Burt defendants." Any allegation in a complaint is nothing more than that – an allegation. Moreover, the effort was made necessary due to Appellant's assertions in discovery targeting Drs. Goldsmith and Nguyen. If Appellant had been permitted to read the Amended Complaint to the jury without the added procedural context, it would have the clear capacity to mislead the jury to interpret Plaintiff/Respondent's effort to amend as evidence of fault by the so-called "Burt defendants." If Appellant had been permitted to read the Amended Complaint to the jury, there would have been the potential for confusion about the issues because of the complicated procedural history that led to the effort to amend and the so-called "Burt defendant" designations. If Appellant had been permitted to read the Amended Complaint to the jury, it would have been unduly prejudicial to Plaintiff/Respondent because the jury would not have the knowledge or understanding of the full procedural context, Court Rules and prevailing case law. All these rulings are rational and logical, and certainly within the purview of the Trial Court's discretion to determine. This ruling is not so wide off the mark as to cause a manifest denial of justice. Griffin, 225 N.J. at 413. As such, the Trial Court did not abuse its discretion when it precluded Appellant from reading the Amended Complaint to the jury, and it most certainly did not create a miscarriage of justice.

To the extent that Appellant cites to Glassman v. Friedel, 249 N.J. 199 (2021), and Adams v. Yang, 475 N.J. Super. 1 (App. Div. 2023), neither is of any benefit to Appellant here. Both of these cases deal with the effect of settlements before trial, and whether plaintiffs may comment upon or take positions at trial with respect to settling defendants. The heart of these rulings dealt with whether plaintiffs – having served expert reports and having settled based upon those allegations – were permitted to assert the non-culpability of the settling defendants. But Drs. Goldsmith and Nguyen, the so-called "Burt defendants" in this case, were not settling defendants. Plaintiff/Respondents served no expert reports during discovery opining that either Dr. Goldsmith or Dr. Nguyen deviated from any accepted standard of care. Appellant's assertion in attempting to come within the purview of Glassman and Adams – the bizarre claim that Drs. Goldsmith and Nguyen were "akin" to settling defendants – borders on the absurd. Settling defendants who have purchased their peace with a plaintiff are not the same, similar, or akin to dismissed defendants. This Court should not treat Drs. Goldsmith and Nguyen as settling defendants, for their procedural posture in this matter is completely different from settling defendants.

Moreover, the ruling in Glassman was that it was permissible – not required – to read the pleadings to a jury in certain circumstances when the equities so demand. The circumstances there bear no resemblance to the equities

here. It is most certainly not a mandatory rule. Glassman, 249 N.J. at 231 (explaining that "[a] defendant *may* rely on [a] plaintiff's previous assertions in pleadings or discovery about the alleged fault of the initial tortfeasor") (emphasis added). Such a permissive rule certainly does not take precedence over the Trial Court's discretionary function regarding introduction of appropriate evidence pursuant to N.J.R.E. 104, nor does it take precedence over a Court's determination of whether proposed evidence would be misleading, confusing and/or unduly prejudicial.

Finally, the Appellate Division in Adams held in any event that there is no impediment to a plaintiff challenging defense assertions of culpability of settling defendants at trial. Adams, 475 N.J. Super. at 14. Plaintiff/Respondent here never changed its position on whether Drs. Goldsmith and Nguyen were negligent. Plaintiff/Respondent's Complaint was amended solely in response to Appellant's allegations in discovery. Regardless of Plaintiff/Respondent's position before versus during trial, it was Appellant's burden to prove Drs. Goldsmith and/or Nguyen's negligence. It was not Plaintiff/Respondent's responsibility "to assist him in that endeavor." Id. The Trial Court thus properly exercised its discretion in precluding Appellant from reading the Amended Complaint to the jury, and Appellant has not established any abuse of discretion resulting in a manifest denial of justice.

CONCLUSION

For the reasons set forth above, Plaintiff/Respondents respectfully request that the Trial Court's Order of Judgment be affirmed and enforced against Appellant.

Respectfully submitted,

BLUME FORTE FRIED
ZERRES & MOLINARI, P.C.
Attorneys for Plaintiff/Respondent

BY: _____
MITCHELL J. MAKOWICZ, JR.
Attorney I.D.: 028621986

DATED: November 20, 2023

ESTATE OF VICTOR GAZA, JR. by PURITA the Administratrix of the Estate of Victor Gaza, Jr. and PURITA GAZA, his wife Individually Plaintiffs/Respondents, v. JOSEPH POPOVICH, M.D.; Defendant/Appellant, & ANA J. ICABALCETA, RN; ANN MARIE ALTOONIAN, RN; KATHLEEN O'SULLIVAN, RN; DAMARIS RODRIGUEZ, R.N.; HUDSON HOSPITAL OPCO, LLC d/d/a CAREPOINT HEALTH-CHRIST HOSPITAL, PHOENIX HEALTH CARE, INC., ONWARD HEALTHCARE, PETER GOLDSMITH, M.D., JIM NGUYEN, D.O., NILDA A. MARCELO, R.N., and WILBUR MONTANA, D.O. Defendants	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No. A-002310-22 CIVIL ACTION On Appeal From: SUPERIOR COURT OF NEW JERSEY LAW DIVISION ESSEX COUNTY L-3285-15 Sat Below: Honorable ROBERT H. GARDNER, J.S.C.

REPLY BRIEF OF APPELLANT, JOSEPH POPOVICH, M.D.

OF COUNSEL & ON THE BRIEF:
Michael Heron, Esquire (#037772003)
Casey Acker, Esquire (#117042014)
Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, LLC
136 Franklin Corner Road, Unit B2
Lawrenceville, New Jersey 08648
(609) 896-2000

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PRELIMINARY STATEMENT

Plaintiffs' premise in opposing reversal requires that this Court assume the Supreme Court effectuated a *sub-silentio* overruling of the Burt decision via the 2020 Mejia opinion. If Mejia did not overrule or abrogate Burt, then it is inescapable that the trial court was bound by the process outlined in Burt when entering judgment, but failed to do so. As detailed below, Mejia arose in a distinguishable procedural posture and, further, if the Supreme Court had intended for its holding to be a sweeping abdication of Burt as a legal proposition, it certainly knew how to so state in its opinion. It did not.

More fundamentally, however, plaintiffs' contention that that the trial court could properly reconsider its numerous pre-trial rulings to revoke Burt defendant status of Drs. Goldsmith and Nguyen leaves an obvious and unanswerable question: if these doctors were not Burt defendants, then what were they? The CNA and the interpretive case law provide no answer.

These defendants *appeared on the verdict sheet*, while the jury was nonetheless informed they had been dismissed on procedural grounds. The trial court repeatedly reaffirmed that these two doctors were out of the case throughout the trial.

There are limited exceptions to the requirement that the jury's allocation under the Comparative Negligence Act ("CNA") be completed among *parties* to

the action. One of those exceptions is articulated in Burt. Case law has also provided exceptions for settling defendants, bankrupt defendants, defendants protected by the statute of repose, and "John Doe" fictitious party defendants.

Drs. Nguyen and Goldsmith were *not* settling defendants, bankrupt, immunized by a statute of repose, or fictitiously pled "John Does." So, if, as plaintiffs (and the trial court) now suggest, Burt is no longer a viable characterization, they were *required* to be present and participate at trial. Absent Burt defendant classification, there was no proper basis for the trial to proceed with the jury allocating fault among the absent doctors as "empty chair" defendants. Yet, the trial court's post-verdict reconsideration of Burt characterization did exactly that.

Plaintiffs' counsel acknowledged this legal reality on the first day of trial, when he argued that Burt is no longer good law and an adjournment of trial to allow Drs. Nguyen and Goldsmith to be active parties. The trial court unequivocally denied that request. Thus, by retroactively converting those doctors to "empty chair" defendants, the trial court created a new, undefined exception to the CNA, permitting non-parties to be considered in allocation of responsibility notwithstanding any precedent, *other than Burt*, that would allow this outcome. On its face, this requires a reversal for either a molded judgment or the conduct of a new trial under the proper framework.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Dr. Popovich respectfully incorporates by reference the facts and procedural history set forth in his Amended Brief of October 3, 2023. On November 13, 2023, plaintiffs/respondents submitted their Answering Brief. This is Dr. Popovich's Reply Brief.

LEGAL ARGUMENT

1. Burt controlled the trial court on the facts of this case, and Mejia was not a sub-silentio overruling or abrogation of Burt.

A. The holding in Burt controlled this issue, and the trial court was bound by Burt.

According to plaintiffs, Dr. Popovich's reliance on the trial court's multiple and unequivocal pre-trial and trial rulings was somehow "exploit[ative]." (Pb. 2). Both as a legal matter and under basic notions of fairness and due process, plaintiffs' position is untenable.

Litigants and lower courts rely on appellate precedent to guide and control their cases. R. 1:36-2; S. P. Dunham's & Co. v. Dzurinko, 125 N.J. Super. 296, 301 n.1 (App. Div. 1973). Trial courts are "obligated to comply with the procedures"

[1] The Statement of Facts and Procedural History have been combined for the convenience of the Court.

mandated in published Appellate Division opinions. Weir v. Mkt. Transition Facility of New Jersey, 318 N.J. Super. 436, 448 (App. Div. 1999).

In Burt v. W. Jersey Health Sys., 339 N.J. Super. 296, 308 (App. Div. 2001), the Court held that a joint tortfeasor found more than 60% responsible for plaintiff's injuries is nevertheless entitled to a *pro rata* reduction for the jury's potential allocation of fault to a defendant dismissed due to plaintiff's failure to procure an Affidavit of Merit. This court concluded that the remaining defendant should not be penalized for the plaintiff's failure in this regard. Ibid.

Plaintiffs stress that Dr. Popovich could have maintained a contribution claim against those doctors notwithstanding the statute of limitations dismissal. (Pb. 17) At the same time, plaintiffs acknowledged that, in Burt, the remaining defendant *likewise* could have maintained a contribution claim notwithstanding the Affidavit of Merit based dismissal of the plaintiffs' direct claims. (Pb. 23)

Plaintiffs essentially concede that the rationale and holding of Burt are transferable to this case, they just disagree with the *fairness* of the Burt decision. The immutable fact remains, however, that the trial court was bound by Burt, as it (correctly) recognized from 2017 through the trial in 2022.

The trial court was obligated to hew to Burt and mold the judgment to 60% of the verdict, with the *plaintiffs* then bearing the obligation to appeal that issue to this Court if they believed the rationale for Burt was unsound. Yet, plaintiffs filed no

protective cross-appeal to preserve that issue should this Court reverse the trial court's *post-verdict* reconsideration and abrogation of Burt.

B. The Mejia Court pointedly failed to overrule Burt, and there is no basis to infer a sub-silentio overruling.

i. Burt remains applicable on the facts of this case.

The binding effect of Burt on the trial court can only be vitiated if Burt was repudiated or overruled by subsequent appellate precedent. Yet, plaintiffs cannot point to a single instance in which the appellate courts of New Jersey analyzed the logical and equitable underpinnings of Burt and rejected its viability.

Plaintiffs submit that: 1) Burt was wrongly decided; and 2) Mejia v. Quest Diagnostics, Inc., 241 N.J. 360 (2020) was a *sub silentio* overruling of Burt. As to the first point, it was not the trial court's prerogative to abrogate Burt absent a subsequent appellate overruling of the case. As to the second point, Mejia does not provide appellate support for completely abrogating the Burt opinion.

Plaintiffs aver that the Mejia decision "specifically and pointedly addressed a split that arose in the Appellate Division regarding whether a plaintiff could recover an entire verdict under the JTCL in a situation where the jury allocated between defendants – specifically, when direct defendants and so called "Burt defendants [sic]." (Pb24) Respectfully, Mejia did no such thing.

Notwithstanding plaintiffs' mischaracterization that the Mejia court "identified the exact same, specific issue as in dispute here," ibid, the text of the

Mejia opinion, itself, undermines the premise that this specific issue was properly and fairly before the Supreme Court. The Mejia case involved a *third-party* defendant, Dr. Fernandez, who did not wish to participate in the trial; that third-party defendant was himself requesting dismissal and treatment commensurate with the defendants in Burt and Jones v. Morey's Pier. Id. at 365. The third-party plaintiffs advancing the claims against Dr. Fernandez requested and received an unopposed order of court declaring that they were not obligated to serve an Affidavit of Merit in connection with their third-party claims against Dr. Fernandez. Id. at 366. The trial court held that Dr. Fernandez nevertheless must participate at trial in connection with those third-party claims; in ultimately affirming that determination, the Supreme Court observed that Dr. Fernandez "fails to present a meritorious right to dismissal" and thus was an active third-party defendant obligated to participate at trial. Ibid.

The Supreme Court did observe that the direct defendants could be responsible to plaintiffs for the entire verdict if found more than 60% at fault but, *crucially*, that framework contemplated Dr. Fernandez being bound by that outcome as a third-party defendant:

> While plaintiff cannot recover from Fernandez directly, see Sattelberger, 14 N.J. at 363, 102 A.2d 577, we agree with the Appellate Division that if the trier of fact determines defendants Quest or Santos to be sixty percent or more at fault, then plaintiff can recover the full amount of damages from that party, N.J.S.A. 2A:15-5.3(a), and if

> Fernandez is found to be between one and forty percent at fault, **then he would be liable for his percentage of fault in contribution to the party that paid the full amount of damages to plaintiff,** N.J.S.A. 2A:15-5.3(e). []
>
> [Id. at 374 (emphasis added)].

This was consistent with this Court's unpublished opinion Mejia. Mejia v. Quest Diagnostics, Inc., 2019 WL 1012532, at *4 (App. Div. Mar. 4, 2019) (Pa.83).

Mejia stands for the proposition that a third-party defendant, properly joined by a defendant on a contribution claim, is not *entitled* to a dismissal of the third-party complaint merely because the plaintiff cannot recover directly from the third-party defendant. Had the Supreme Court wanted to broaden its pronouncement to hold that Burt defendant allocation for non-public entity defendants is *per se* improper and disallowed, it could easily have so stated.

Conversely, Burt addresses the *molding* of a judgment *after* trial if the trial court has dismissed a joint tortfeasor as a party, which is not something that the Supreme Court has addressed. Jones v. Morey's Pier, Inc., 230 N.J. 142, 168 (2017) ("This Court has **not previously decided a case** in which a party has requested that the trial court **mold the judgment** in accordance with the Appellate Division's analysis in Burt.") (emphasis added).

The distinction is key. Mejia expressly contemplates that, if present during the trial as an active party, the third-party defendant will be bound by the outcome such

that the original defendant's contribution rights are adjudicated within that same case. In situations such as those found in Burt, Jones, and the instant case, the joint tortfeasor was *not present at trial*. Thus, any contribution right is purely contingent and hypothetical, requiring the "fronting" of Dr. Goldsmith's 40% allocated share and the uncertainty necessitated by the need to prevail in a successive contribution trial. Such a procedure is not contemplated or countenanced by the case law or the entire controversy doctrine.

ii. Plaintiffs' contention that the Comparative Negligence Act prohibits any departure from imposing full responsibility for tortfeasor's deemed 60% or more at fault is belied by longstanding legislative acquiescence.

Relatedly, plaintiffs submit that N.J.S.A. 2A:15-5.3(a) requires a party who is determined to be 60% or more at fault to pay for the total damages, with no "exceptions or circumstances under which this mandate may or should be modified." (Pb. 22). Yet, Burt has stood as a published decision of this Court since 2001, and, in 2017, the Supreme Court explicitly endorsed the allocation method articulated in Burt when recognizing a similar "exception" for when one of the joint tortfeasors is an immune public entity. Jones, 230 N.J. at 166-67.

If the Legislature took issue with judicially recognized exceptions to the imposition of joint liability for tortfeasors found over 60% at fault, it could have modified the statute in response to these decisions; it never did so. See Tonelli v. Bd. of Educ. of Twp. of Wyckoff, 185 N.J. 438, 448 (2005) ("The Legislature is

presumed to be aware of the judicial construction placed on an enactment, and such a construction, supported by lengthy legislative acquiescence or failure to amend the statute should be viewed as dovetailing with legislative intent.") (citation omitted).

Plaintiffs have a philosophical disagreement with Burt as it relates to the statutory terms of the Comparative Negligence Act. Be that as it may, Burt stood as precedent as of the trial and entry of judgment in this case. The trial court adhered to Burt, rightly so, until *after* the completion of trial. Its stated reasoning for abrogating Burt was that allocating liability would be in contravention of the statute:

> I think the Court to take the defendant's position in this case basically vitiates the Joint Tortfeasor Contribution Liability Law which I think I have to read all the laws in --there was a verdict in this case. It was for more than 60 percent in this particular case or more which by the way triggers that statute which says that the plaintiff can recover the 100 percent of the amount from the 60 percent defendant.
>
> [23T16-23T17]

Thus, taken at face value, the trial court's rationale is irreconcilable with both Burt *and* Jones, in that those cases contemplate an allocated reduction of liability *even* for a defendant found more than 60% at fault.

2. Dr. Popovich asked for-*and was promised*-a Burt defendant trial, but actually received an "empty-chair" defendant trial.

In 2018, roughly four *years* prior to trial, the trial court explicitly stated that Dr. Popovich's liability would be reduced by any allocation of fault to the Burt

defendants. (2T29-2T30). Plaintiffs' counsel sought to lift that designation at the very start of trial, and the trial court refused. (3T41-3T42)

Consequently, Drs. Nguyen and Goldsmith were *not* parties, but remained on the verdict sheet. By *subsequently* reconsidering this Burt defendant status, the trial court converted them to "empty chair" defendants despite the absence of *any* recognized basis for trial to proceed against these doctors as "empty chair" parties. This left Dr. Popovich both: 1) responsible for the entirety of the verdict, with no allocation; and 2) unable to bind Dr. Goldsmith to the allocation for purposes of his contribution rights. Self-evidently, Dr. Popovich did not ask for this outcome. [2]

The CNA speaks to allocation among *parties* to the action. N.J.S.A. 2A:15-5.3. A joint tortfeasor is entitled to a percentage allocation as to all such potential tortfeasors, regardless of how those tortfeasors were joined as parties the action. Lee's Hawaiian Islanders, Inc. v. Safety First Products, Inc., 195 N.J. Super. 493, 506 (App. Div. 1984).

[2] On this point, plaintiffs' statement that Dr. Popovich "got exactly the trial for which he asked" is inapposite. The issue in this case is not whether the trial was properly conducted under the Burt framework (it was), but whether, *after the verdict*, the trial court imposed a *different* legal framework when entering judgment (*i.e.*, the "empty chair" defendant) framework.

However, the decisional law has recognized exceptions to allow inclusion of non-parties on the verdict sheet.[3] In Young v. Latta, 123 N.J. 584, 596 (1991), the Supreme Court held that a non-settling defendant is entitled to an allocation, pursuant to the CNA, based upon the fault assigned to settling defendants who have been dismissed from the action by virtue of a settlement. In Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 116 (2004), the Supreme Court held that the remaining defendants were entitled to an allocation based upon the percentage of fault of a defendant dismissed from the action by virtue of that party's discharge in bankruptcy. On a similar note, in Town of Kearny v. Brandt, 214 N.J. 76, 103-04 (2013), the Court concluded that the remaining defendants were entitled to an allocation based upon the fault found as against defendants dismissed from the case based upon the statue of repose, N.J.S.A. 2A:14-1.1. Of course, in Jones, the Supreme Court held that the remaining defendant was entitled to a Burt allocation for the liability of a

[3] Plaintiffs' brief wrongly suggests that such exceptions are relevant only in the case of public entity defendants who are otherwise immune from liability on a contribution claim. (Pb. 25-27). Of course, it is true that there is a separate statutory provision applicable to public entities regarding the allocation of fault among all tortfeasors, including non-parties. N.J.S.A 59:9-3.1; Maison v. New Jersey Transit Corp., 245 N.J. 270, 307 (2021).

However, the exceptions discussed in Young, Brodsky, Town of Kearney, and Krzykalski did not turn on public entity status. Most importantly, Burt did not involve a public entity. The determinative question is not whether a public entity is involved in this case, but rather, the legal basis on which the trial court could place Drs. Goldsmith and Nguyen on the verdict after they were dismissed.

public entity dismissed based on failure to comply with the Tort Claims Act. Finally, a fictitiously pled "John Doe" defendant is properly on the verdict sheet under the CNA when it is alleged that the John Doe defendant operated an unidentified "phantom vehicle" that was responsible for the accident. Krzykalski v. Tindall, 232 N.J. 525, 542-43 (2018).

Here, none of the recognized exceptions to the CNA-*other than that found in Burt*-would allow for Drs. Goldsmith and Nguyen to be on the verdict sheet. They did not settle with plaintiffs, had no defenses based on bankruptcy discharge or the statute of repose, and were not fictitiously pled "John Doe" defendants. The jury was instructed that they were "procedurally dismissed." (210T137), If they are *not* Burt defendants, with the allocation consequences that flow from Burt, then Drs. Nguyen and Goldsmith must be "empty chair" defendants, which occurs when "a defendant shifts blame to a joint tortfeasor who is not in the courtroom." Brodsky, 181 N.J. at 114. There is no recognized basis for "empty chair" treatment of these doctors.

Drs. Nguyen and Goldsmith were deemed Burt defendants because they *were* Burt defendants. They were not deemed "empty chair" defendants or otherwise subject to any of the exceptions allowing an absent, dismissed party to appear on the verdict sheet. The trial court made this explicitly clear when rejecting plaintiffs' counsel's request to adjourn the trial so that the doctors could appear. (3T41-3T42).

This was reiterated by the trial court *during trial*, stating "the statute of limitations defendants are out. They're out and they stay out." (14T16).

Given the above, plaintiffs' contentions regarding invited error barely merit response, other than to note that plaintiffs fundamentally misunderstand (or misstate) the doctrine, or misunderstand this appeal. The doctrine "operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, **when that party urged the lower court to adopt the proposition now alleged to be error**." Brett v. Great Am. Recreation, Inc., 144 N.J. 479, 503 (1996) (emphasis added). Dr. Popovich has *never* argued that the Burt defendant characterization was error-quite the opposite.

Dr. Popovich is *not* claiming the Burt rulings were "unfairly prejudicial," as plaintiffs' incorrectly state. (Pb. 31). The error was not in classifying Drs. Nguyen and Goldsmith as Burt defendants, but in entering judgment on the jury's verdict. The trial court heard argument on the parties' competing positions as to the applicability of Burt on February 17, 2023, simultaneous with hearing argument on Dr. Popovich's Motion for a New Trial. (22T11, 22T23-22T25) At that time, Dr. Popovich requested and received the Court's leave to submit supplemental briefing and a competing judgment order on this issue. Id. Once the Court accepted plaintiffs' proposed judgment order, over Dr. Popovich's objection, Dr. Popovich timely moved to alter or amend the judgment. (Da352-53). It is unfathomable that plaintiffs can

suggest that Dr. Popovich somehow urged the Court to take the action at issue on this appeal.[4]

The belated granting of plaintiffs' second *de facto* reconsideration request came at a time when it was too late for Dr. Popovich to do anything about it. By definition, this is a miscarriage of justice such that, even if this Court were to accept the proposition that Burt is no longer viable, requires a new trial with the participation of Drs. Nguyen and Goldsmith and corresponding jury instructions. Cf. Liberty Ins. Corp. v. Techdan, LLC, 253 N.J. 87, 117 (2023), as revised (Mar. 23, 2023) (holding that the trial court's failure to follow the procedure mandated by the Comparative Negligence Act when it did not charge the jury to allocate fault

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[4] Facially, the invited error doctrine is inapplicable. Still, it should be noted that plaintiffs flatly misstated the holding in Carrino v. Novotny, 78 N.J. 355 (1979) in service of the misguided contention that Dr. Popovich "invited" the rulings challenged on appeal. Plaintiffs stated the Supreme Court found an "induced error" when one defendant sought dismissal of *another* defendant at trial, contrary to the terms of R. 4:37-2. This was not the fact pattern of Carrino.

In actuality, in Carrino, one defendant, Choo-Choo Club, obtained an involuntary dismissal after openings, and a co-defendant, Mellone, challenged that dismissal on appeal given that the terms of R. 4:37-2 required a request for dismissal to be held in abeyance until the close of the evidence. Carrino, 78 N.J. at 367. The Supreme Court held that, on retrial of the cross-claim, *the Choo-Choo* club would be bound by the jury's earlier determination of joint tortfeasor status and the amount of liability. Id. at 368-69. Carrino held that the Choo Choo club was bound by the jury's findings based upon its procurement of a defective dismissal *on its own behalf*. In this case, Drs. Nguyen and Goldsmith filed their own motions for dismissal, and Dr. Popovich (properly) requested Burt defendant treatment as a component of that dismissal. Contrary to plaintiffs' characterization, the circumstances are not comparable.

consistent with the act in an Insurance Fraud Prevention Act matter was a miscarriage of justice, requiring a new trial in which a new jury allocated the percentages).[5]

CONCLUSION

Defendant Joseph Popovich, M.D., respectfully requests that the February 28, 2023 judgment order be reversed, with instructions to enter a molded judgment in conformity with Burt or, in the alternative, that a new trial be ordered.

Respectfully Submitted,

Lenox, Socey, Formidoni, Giordano, Lang, Carrigg & Casey, LLC

BY: *s/ Michael J. Heron*

Michael Heron, Esq. (#037772003)
Casey Acker, Esq. (#117042014)
136 Franklin Corner Road, Unit B2
Lawrenceville, New Jersey 08648
(609) 896-2000

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[5] Again, Dr. Popovich obviously had no opportunity to move for a new trial based on a judgment order that had not yet been entered, but the trial court had an opportunity to remedy the inherent injustice in its post-verdict reconsideration by ordering a new trial up to 20 days after the judgment order. R. 4:49-1(c).