ESTATE OF CRYSTAL WALCOTT SPILL, by Administrator ad Prosequendum and General Administrator DAVID SPILL, and DAVID SPILL, Individually, and ARIA SPILL and COLTON SPILL, surviving heirs and wrongful death beneficiaries, by their Guardian Ad Litem, DAVID SPILL, vs. JACOB E. MARKOVITZ, MD, ENGLEWOOD WOMEN'S HEALTH, HUDSON CROSSING SURGERY CENTER, STEVEN A. PAGANESSI, MD, HACKENSACK ANESTHESIOLOGY ASSOCIATES, PA, ANESTHESIA AND PAIN MANAGEMENT GROUP, AMERICAN ANESTHESIOLOGY, AMERICAN ANESTHESIOLOGY OF NEW JERSEY, MEDNAX, INC., MEDNAX SERVICES, INC., HOLLY M. KONCICKI, MD, MOUNT SINAI HEALTH SYSTEM, MOUNT SINAI HOSPITAL, ICHAN SCHOOL OF MEDICINE AT MOUNT SINAI HOSPITAL, MOUNT SINAI DOCTORS, MOUNT SINAI CLINICALLY INTEGRATED NETWORK, MOUNT SINAI INDEPENDENT PRACTICE ASSOCIATION, LABCORP, LABORATORY CORPORATION OF AMERICA HOLDINGS, LABORATORY CORPORATION OF AMERICA, DEF HOSPITAL (a fictitious name representing a class of fictitious defendants), XYZ SURGERY CENTER (a fictitious name representing a class of fictitious defendants), ABC GROUP (a fictitious name representing a class of fictitious defendants), GHI LABORATORY (a fictitious name representing a class of fictitious	: SUPREME COURT OF NEW JERSEY : DOCKET NO.: 088764 : ON MOTION FOR LEAVE TO APPEAL FROM: : SUPERIOR COURT OF NEW JERSEY : APPELLATE DIVISION DOCKET NO.: A-2330-22 : SAT BELOW: HON. JACK M. SABATINO, P.J.A.D.; HON. HANY A. MAWLA, J.A.D.; HON. JOSEPH L. MARCZYK, J.A.D.

defendants), JOHN DOE, MD (a fictitious name representing a class of fictitious defendants), JANE DOE (a fictitious name representing a class of fictitious nurses or other employees of the defendant-hospital, defendant-physicians, defendant-surgery center and/or the defendant-groups), JOHN ROE (a fictitious name representing a class of fictitious defendant laboratory directors and/or other supervisory employees of the defendant-hospital, defendant-laboratory, defendant-physicians and/or defendant-groups), MARY ROE (a fictitious name representing a class of fictitious defendant pathologists or other employees of the defendant-hospital, defendant-laboratory, defendant-physicians and/or defendant-groups), DOE PHYSICIAN GROUP, PA or DOE PHYSICIAN GROUP, PC or DOE MANAGED CARE COMPANY (a fictitious designation representing the class of as yet unknown corporate entities affiliated or connected in any manner with the individual defendants in this matter or with plaintiff's care and vicariously, directly or administratively responsible for the other medical providers' actions or failures or plaintiff's injury),

AND

STEVEN A. PAGANESSI, MD AND ANESTHESIA AND PAIN MANAGEMENT GROUP,

vs.

JENNY T. DIEP, MD AND RHEUMATOLOGY ASSOCIATES, PC.,

REPLY BRIEF AND APPENDIX ON BEHALF OF PLAINTIFFS/RESPONDENTS IN OPPOSITION TO DEFENDANTS/APPELLANTS, STEVEN A. PAGANESSI, M.D. AND ANESTHESIA AND PAIN MANAGEMENT GROUP'S MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL

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PRELIMINARY STATEMENT

Four experienced Judges, the motion Judge and three (3) appellate Judges, carefully considered and properly rejected Appellants' attempt to totally rewrite the legislature's limitation in N.J.S.A. 2A:15-5.2(a)(2) of juror comparative negligence apportionment to parties to the suit. Although seduced into granting interlocutory review, the appellate panel below after a full review agreed that the motion Judge had correctly concluded that no prior New Jersey case applying the Comparative Negligence Act (hereinafter CNA) or the Joint Tortfeasors Contribution Law (hereinafter JTCL) had permitted juror apportionment of fault to a non-party outside of New Jersey jurisdiction who was neither sued by the Plaintiffs nor previously settled the same dispute in any jurisdiction.

There is a third legislative comparative negligence apportionment statute which Appellants deliberately take great pains to obscure in its brief, and which it omits from its list of statutes in its Table Of Authorities. Appellants' Br. at 16-17, viii. Appellants' Brief mistakenly claims that the Appellate panel's approval of apportionment of fault to the "unidentified passenger" in Maison v N.J. Transit, 460 N.J. Super. 222, 238-242 (App. Div. 2019) was "explained as a requirement of the CNA and JTCL." Appellants' brief also cryptically adds that "the defendants' liability was also limited by a (unspecified) provision of the Tort Claims Act." Appellants' Br. at 16. While that Appellate decision is not

a model of clarity and blends general statements with its specific holding, Justice Albin's controlling explication of the statutory reason why a non-party was subject to apportionment in that tort claims case was crystal clear:

> The 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. N.J.S.A. 59:9-3.1 provides for apportionment of fault between public-entity and public-employee tortfeasors and "one or more other tortfeasors" -- not "one or more other tortfeasors named as defendants or third-party defendants." [Maison v. N.J. Transit Corp., 245 A.3d 536, 558 N.J. (2021) (emphasis added)].

N.J.S.A. 59:9-3.1 not only explains why a non-party was subject to Apportionment in Maison, it also in its plain language shows that our Legislature recognized that their CNA and the JTCL statutes do not allow such apportionment:

> Notwithstanding the provisions of [the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 to -5, and the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8] or any other law to the contrary, in any case where a public entity or public employee acting within. [Maison v. N.J. Transit Corp., 245 A.3d 536, 557 N.J. (2021) (emphasis added)].

So, although Appellant suppressed it, Maison shows that our legislature knew how to write a pure comparative negligence where apportionment would apply exclusively in a tort claims case to a non-party such as the unidentified

bottle thrower, but when they did so, they also recognized that version of comparative negligence apportionment was contrary to the CNA and JTCL.

Undeterred by that plain meaning legislative roadblock, Appellants continue to seek interlocutory review by repeating two (2) erroneous arguments for judicial rewriting of the CNA and JTCL already rejected below:

1. Incorrectly arguing that definitional language from the JTCL, an act where contribution only occurs after a defendant takes a consent or verdict judgment, somehow applies to this case or helps their argument for review.

2. Citing dictum from distinguishable cases where the CNA's limits of apportionment only to parties was present since jury apportionment was only permitted against parties either still present or previously present in the New Jersey suit, or parties who settled the same dispute with the plaintiff in a case the plaintiff split between New Jersey and another state.

Finally, as frosting on their rewarmed, second motion for interlocutory stale cake, Appellants make a false claim that they will suffer irremediable harm if you don't accept their incorrect arguments.

False equivalency and whataboutism may be unavoidable in modern politics. However, the plain meaning of the two (2) statutes Appellant does cite, as well as the third statute Appellant declines to cite, forbids the apportionment of fault to Dr. Jenny Diep which they seek and shows there is no legislative or case law support for what Appellants' request in Supreme Court review.

RELEVANT COUNTER PROCEDURAL HISTORY

Plaintiffs' complaint was filed on January 27, 2020 and also named Holly Koncicki, M.D., a New York nephrologist (kidney) specialist as a defendant who lives in New Jersey and was subject to our jurisdiction. Pa1.

In Answers filed respectively on March 16, 2020 and April 6, 2020, neither Appellants nor the co-defendant gynecological surgeon, Dr. Jacob Markovitz, claimed contribution against anyone but parties to this litigation. Pa14 and Pa22.

In his August 11, 2020 Answer to Form C interrogatory number 7 inquiring whether he alleged any other person caused or contributed to causing the Plaintiff's death, which was never amended until Dr. Edward Ewald's 2022 report, the Appellant surgeon did not identify Dr. Diep. Pa30 and 33a.

The defendant anesthesiologist and defendant gynecological surgeon both served expert reports conceding the indisputable fact that neither one of them contacted either of the two New York specialists (Dr. Koncicki and Dr. Diep) and each blaming their co-defendant for that negligent failure. 137a (March 7, 2022 report of gynecologist Jay Goldberg, M.D.) and Pa31 (June 20, 2022 report of anesthesiologist Thomas E. McDonnell, M.D.).

After Dr. Koncicki appeared for her deposition, on February 23, 2022 her counsel served one (1) report from nephrologist David Goldfarb, M.D. 140a.

That report relied on the Plaintiffs' experts and criticized Dr. Paganessi's failure to request either a consult or surgical clearance before subjecting her long term lupus patient to anesthesia.

After discovery was completed, on March 17, 2022 Dr. Koncicki moved for dismissal of all claims against her, including the cross claims of the Appellant. Pa36. That motion was granted on April 14, 2022 without opposition by the Plaintiffs or the Defendants. 131a.

STATEMENT OF RELEVANT MEDICAL AND LEGAL FACTS

Appellants' dehydrated Statement of Facts obscures both undisputable facts and their concrete significance.

Crystal Walcott Spill's autopsy confirmed the three (3) reasons why she died on February 16, 2018 during an elective, non-emergent surgical biopsy: "sudden cardiac death while under anesthesia for gynecological procedure in a patient with systemic lupus Nephritis class 4." Pca1.

Since long-term lupus patients such as Crystal often suffer kidney disease (lupus nephritis) and rheumatoid arthritic complaints from that auto-immune disease, it is common medical knowledge that two medical specialties, nephrology and rheumatology, have special expertise with lupus. The co-defendants had to know that one such specialist, Crystal's nephrologist, Dr. Koncicki, had specific knowledge of the extent and severity of this patient's

kidney damage since their surgical record contained a notation that she was planning a likely kidney biopsy. 2ca.

Since the co-defendant surgeon's chart for Crystal contained Dr. Diep's phone number and a note of a prior consult with her, they also knew that Dr. Diep, a rheumatologist, likewise had similar expert knowledge of specific risks from exposing this patient to anesthesia. 3ca.

An expert anesthesiologist, Thomas E. McDonnell, M.D., for the co-defendant gynecologist listed the five (5) medical facts the Appellant anesthesiologist would have learned if only he had contacted either Dr. Koncicki or Dr. Diep before subjecting Crystal to anesthesia:

> With no medical description or laboratory profile of his patient's comorbidity, Dr. Paganessi was obligated to call Dr. Koncicki. He would have learned the following: 1) Dr. Koncicki's qualitative assessment of the renal dysfunction; 2) the most recent labs she had on file, namely those from Dr. Jenny Diep, showing a rise in creatinine from 1.6 in October, 2017, to 1.9 on 2/7/2018; 3) the labs of 2/15/2018 were still pending; 4) a renal biopsy would be performed in a month's time if further deterioration of renal function was documented; and 5) Mrs. Walcott Spill complained of chest pain for a few weeks, for which Dr. Koncicki felt an echocardiogram was warranted.
>
> [Pa31 and 14-15ca (Dr. Koncicki's comprehensive exam note of Crystal's February 15, 2018 visit, the day before her death.)]

It is undisputed that neither New Jersey defendant doctor sought either an informal or formal consult clearance before February 16, 2018, and that deliberate choice deprived both New York specialists of knowledge of their plans to subject Crystal to the elective surgical biopsy under anesthesia which caused her death.

Whether because the Appellant obscured that critical fact below, or because my own explanation below wasn't clear enough, the Appellate opinion below missed that critical medical-legal fact. The Appellate opinion mistakenly states that "Plaintiff's main theory is that the doctors (in New Jersey) negligently proceeded with the surgery without waiting for the lab results." 5a. However, the undisputed fact is instead that the New Jersey doctor defendants did not know that Dr. Koncicki's blood work was pending because they both failed to get a necessary informal or formal clearance consult from either Dr. Koncicki or Dr. Diep. The Appellate opinion also mistakenly describes Dr. Diep as "a doctor who was involved in a patient's care." Tragically, Dr. Diep and Dr. Koncicki were actually prevented from being involved in the New Jersey defendants' careless decision from being involved or even aware of the New Jersey doctors' "care" decision which caused plaintiff's death.

While none of those facts are required to enforce the plain meaning of all three (3) relevant New Jersey contribution statutes to deny review of Appellant's

apportionment claim, they are relevant to the medical and legal inequity in Appellant even making such a request which is discussed in Point III.

LEGAL ARGUMENT

POINT 1

NO CASE APPLYING THE CNA OR THE JTCL HAS PERMITTED JURY APPORTIONMENT TO SOMEONE WHO WAS NOT A PARTY TO THAT SUIT OR ANOTHER SUIT BASED ON THE SAME TORT, OR HAD NEVER SETTLED THE SAME DISPUTE WITH THE PLAINTIFF IN THE SAME NEW JERSEY LAWSUIT OR ANY OTHER LAWSUIT FOR THE SAME INJURY.

As both courts below noted, even the Appellants conceded that no published New Jersey opinion has ever extended jury apportionment under the CNA or JTCL to a person "who was not a Party to the suit and outside the reach of a Courts' jurisdiction." 5a and 15a. Although the appellate opinion does not reach that distinction, the exception in the Kranz v Schuss, 447 N.J. Super. 168 (App. Div. 2016) case also literally only allowed contribution against a "party" to one half of the split cause of action who settled that half of the same dispute with the plaintiff. See also 1T9:7-24 where the motion Judge below correctly recognized that the settlement in Kranz made it a "different animal."[1]

[1] "There's another case Carter where the plaintiff brought two lawsuits and that clearly makes that a different animal than what we have here." 1T21:2-5.

Appellants' arguments based on the definition section of the Joint Tortfeasor's Contribution Law (N.J.S.A. 2A:53A-1) also ignores clear contradictory language in that statute. N.J.S.A. 2A:53A-3 of that statute makes it clear that the contribution the JTCL permits any defendant only comes after they either take a consent or jury judgment:

> Where injury or damage is suffered by any person as a result the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, 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.

The JTCL's express legislative purpose was to permit contribution after a plaintiff "recovers a money judgment." Thus the only New Jersey statute addressing jury allocation of comparative fault percentages between multiple defendants is the CNA. In essence, the JTCL would allow a defendant who paid a full judgment to then seek contribution against someone else who, although they were a joint tortfeasor, was not subject to apportionment under the CNA. Such a contribution right in New Jersey or New York has a critical difference the Appellants also fail to disclose. Where a plaintiff secures a judgment without any default or failure to include any party subject to New Jersey jurisdiction as a defendant, a judgment defendant's subsequent contribution act does not

deplete or subtract from plaintiff's one hundred (100) percent judgment. However, it does potentially allow one (1) defendant to recoup that percentage attributable to a joint tortfeasor whether or not they were a party and subject to juror apportionment. Of course, as explained further below in Point III, there is another critical difference Appellants deliberately overlook: the contribution allowed in an action after a verdict is only "earned" by a face to face dispute between the judgment defendant and someone else they allege contributed to the ultimate injury.

Appellants rarified theory of liability against Dr. Diep not discovered even by them until four (4) years after their surgical biopsy under anesthesia caused her death. Thus it could have been the basis for timely, viable contribution claim even if it took Appellants ten (10) years rather than the four (4) it took to find a willing expert to support it. Appellants' theory is that a New York specialist can nonetheless be at fault for not testing Plaintiff's blood before increasing one of her medications eight (8) days before, even though the New Jersey doctor defendants excluded the same doctor from knowing about what proved to be their fatal plan to operate without obtaining a consult or clearance. However, since defendants are not bound by the same statute of limitations for joint tortfeasor contribution claims after a judgment, they could have filed a timely contribution claim any time up until six (6) years past taking a judgment by

consent or verdict. Ideal Mut. Ins. Co. v. Royal Globe Ins. Co., 511 A.2d 1205 (N.J. Super. App. Div. 1986); N.J.S.A. 2A:14-1.

If Dr. Diep were a New Jersey doctor, the dispute Appellants allege against her would have been part of a timely claim under the JTCL. However, that dispute would be litigated between the two (2) people with an actual stake in that result. The Plaintiff Estate believed and still believes that neither Dr. Diep nor Dr. Holly Koncicki could have foreseen the New Jersey doctors' reckless decision not to involve both New York doctors in a pre-surgical consult or formal clearance and would lose such a dispute. So, Appellants' alleged dispute only belongs to a traditional contribution after judgment claim and here that claim could be brought by both New Jersey defendant doctors in New York after taking a consent or verdict judgment in New Jersey. In such a case, Dr. Diep or Dr. Koncicki (if defendants had kept her in the case) would have defense counsel and defense experts to emphasize why the New Jersey doctors were the sole cause of Plaintiff's death and neither New York doctor was at fault. Appellants instead demand what is their tactical preference for an "empty chair" defense and juror apportionment where the CNA does not permit it. Permitting what they seek could not only subtract a percentage of Plaintiffs' verdict against them, but also subtract of Dr. Diep, her experts and defense counsel opposing such contribution against a non-party. However, neither legislation nor the

common law nor common sense or case law supply any justification to permit such a tactical preference. Although Appellants cite Bencivenga v. J.J.A.M.M., Inc., 258 N.J. Super. 399 (App. Div. 1992) certif. denied, 130 N.J. 595 (1992) and concedes that decision barred contribution against a non-party (Appellants' Br. at 17) they leave out the reason why:

> With [the] necessary exception [of assessing the negligence of a settling tortfeasor with that of a non-settling tortfeasor for contribution purposes] there is no more reason to have a fact finder assign a percentage of negligence to someone who is not affected by the verdict than to assign a percentage of negligence to acts of God (such as the snow in this case) or a myriad of other causative factors that may have contributed to the happening of an accident.
>
> [Bencivenga v. J.J.A.M.M., Inc., 258 N.J. Super. 399, 407 (App. Div. 1992) citing Ramos v. Browning Ferris Ind. of So. Jersey, Inc., 194 N.J. Super. 96, 106 (App. Div. 1984) rev'd on other grounds, 103 N.J. 177, 510 A.2d 1152 (1986). Id. 197 N.J. Super. at 106, 476, A.2d 304]

POINT II

ALL OF APPELLANTS' ARGUMENTS THAT THIS CASE IS ANALAGOUS TO PRIOR CASES WHERE OUR COURTS HAVE ALLOWED NARROW EXPANSIONS OF COMPARATIVE FAULT APPORTIONMENT FOR EQUITABLE REASONS ARE BASED ON FALSE EQUIVALENCE ARGUMENTS.

Appellants claim the Appellate panel below erred in requiring that tortfeasors be parties before juror apportionment be permitted under both the

JTCL and CNA. Appellants' Br. at 18. In support, Appellants allege that requirement is inconsistent with eight (8) opinions they cite. However, all the cases Appellants cite as if they supported your review show it is Appellants who err. As shown below, six (6) of those cases only permitted apportionment against persons who, though absent from the suit at its conclusion for various reasons including settlement, had previously been a party defendant. In Kranz, apportionment was only permitted in the New Jersey case against a defendant in an analogous position who was a party to a parallel suit based on the same allegations of fault and overlapping injuries and who settled that claim. That result also prevented an inequitable double recovery by the plaintiff's splitting their cause of action between two (2) jurisdictions. The inaccuracy in Appellant's reliance on the last case, Maison, has been discussed above.

A. Apportionment Cases Cited by Appellants Where the Remaining Defendants Retained Apportionment Rights Against a Former Party Who Was Dismissed for Miscellaneous Reasons or Settled.

Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102 (2004)	Former defendant dismissed due to bankruptcy.
Burt v. West Jersey Health Systems, 339 N.J. Super. 296 (App. Div. 2001)	Former medical defendant dismissed due to plaintiff's failure to serve a required Affidavit of Merit.
Jones v. Morey's Pier, Inc., 230 N.J. 142 (2017)	Former public entity defendant dismissed due to failure to file a timely tort claims notice.

Krzykalski v. Tindall, 232 N.J. 525 (2018)	Fictitious defendant named by plaintiff and a party required to resolve the uninsured motorist issue.
Town of Kearny v. Brandt, 214 N.J. 76 (2013)	Former co-defendant dismissed based on ten (10) year statute of repose.
Young v Latta, 123 N.J. 584 (1991)	Non-settling defendants are entitled to contribution against former party co-defendant who settled with the plaintiff.

B. Cases Cited by Appellants Where the Remaining Defendants Retained Apportionment Rights Against Parties to that Suit or to a Parallel Suit Based on the Same Tort and Identical or Overlapping Injury Based on Plaintiff's Settlement of that Parallel Claim.

Kranz v. Schuss, 447 N.J. Super. 168 (App. Div. 2016) See also Carter v. University of Medicine and Dentistry of New Jersey, 854 F. Supp. 310 (D.N.J. 1994) in accord.	Apportionment against party who settled one (1) of two (2) parallel malpractice cases alleging identical negligent delayed diagnosis malpractice by different doctors causing ongoing and overlapping injuries over several years in two (2) different states was necessary to prevent an inequitable double recovery by plaintiff in the remaining New Jersey case.

Thus Appellants strained argument from dictum in all those cases nowhere nullifies contrary statutory law so as to permit apportionment against a party who never could have been made a defendant in a New Jersey case and never was sued by or made a party by the plaintiff to any case wherein an integral part of the same controversy was then settled with plaintiff.

Although Appellants also obscure their right to the same post judgment contribution claim in New York, like New Jersey, New York allows persons subjected to a verdict to then file a traditional contribution claim to recoup any percentage of fault they can prove against a person in that claim.

POINT III

THE ONLY PERSONS WHO WOULD BE UNFAIRLY IRREMEDIABLY HARMED BY ALLOWING APPORTIONMENT AGAINST DR. DIEP ARE PLAINTIFFS AND DR. DIEP.

Appellants' dehydrated statement of facts, much like many of its legal citations, obscures both undisputable facts and their concrete significance. One such absurd false equivalency in Appellants' argument is their comparison of this Plaintiff Estate to the plaintiffs in Kranz and argument that Plaintiffs were on "notice" of a potential claim or had the option to file a suit in New York against Dr. Jenny Diep. Appellants' Br. at 18-19. Appellants' Answer to this suit only asserted a contribution claim against parties (Pa14) and their interrogatory answer in August of 2020, unamended for almost two (2) years, also never identified Dr. Diep as a person who "caused or contributed" to Plaintiff's injuries. Pa30. So, even the defendants only asserted an alleged basis for blaming a non-party four (4) years after the Plaintiff's death by serving Dr. Ewald's report in March of 2022. 33a. Thereafter, believing they could blame a non-party in absentia, the Appellants tactically allowed the dismissal of their

cross claim against Dr. Koncicki, the other New York specialist they had deliberately excluded from knowing about their fatal plan for a surgical biopsy under anesthesia. 131a. Unlike Dr. Diep, Dr. Koncicki was subject to jurisdiction in New Jersey since she lived in New Jersey.

Unlike the defendant gynecological surgeon and anesthesiologist, Dr. Koncicki and Dr. Diep jointly and carefully managed their common patient's care and communicated with each other. 14ca. The timeline and detailed histories in their notes show that neither New York specialist was at fault for Plaintiff's death. On the February 9, 2018 visit, Dr. Diep increased this patient's lisinopril as part of a comprehensive plan to monitor and manage her Lupus complications. 1ca. That plan also called for Dr. Koncicki's comprehensive nephrology exam on February 15th, which among other things would secure current blood work after the drug lisinopril (twenty (20) milligrams) was on board for five days. Id. On February 12, 2018, three days after Dr. Diep's exam and the start of that plan was initiated, the Decedent called Dr. Markovitz's office and scheduled this non-emergent biopsy which resulted in her untimely death four (4) days later. Because both New Jersey defendants did not contact either New York specialist during that seven (7) day interval, both of those specialists were unaware of the planned surgical biopsy under anesthesia. Both New York specialists knew that the single item Dr. Ewald would later solely

focus on to blame Dr. Diep - increasing her lisinopril dosage from ten (10) to twenty (20) milligrams - was one among many aspects of her diagnostic work up. However, it was the New Jersey doctors' surgery under anesthesia that caused plaintiffs death on February 16. If, instead, the two (2) New York specialists had been made aware of the plan for surgical biopsy in an informal or formal clearance request from either New Jersey doctor, they would have had a reason to expedite blood testing and/or warn the reckless New Jersey doctors that the elective surgical biopsy had to be postponed.

Dr. Koncicki had already produced an expert report from a nephrologist, Dr. David Goldfarb, which focused like a laser beam on why both New Jersey defendants were solely at fault for the plaintiff's death. 140a. All of his opinions reinforced why Plaintiffs had never sued Dr. Diep, and why after discovery Plaintiffs could not in good conscience fairly continue to include Dr. Koncicki (who was in the same position and knew only what Dr. Diep knew) as a defendant. However the defendants had a different reason for dismissing their cross claims against Dr. Koncicki: they did not want a specialist who gave excellent care and her experts explaining in person at a trial why the defendants did not.

Dr. Goldfarb, like all of Plaintiffs' experts, focused on the single disastrous failing by both New Jersey doctors as the cause of Plaintiff's death.

> I also understand from the deposition of Dr. Paganessi, the anesthesiologist, that he did not consider her recent visit with Dr. Koncicki to be relevant to the plans for anesthesia for the LEEP procedure. Dr. Peter Salgo reports that "The failure of Dr. Paganessi to contact Dr. Koncicki preoperatively was a deviation from acceptable anesthetic practice." Despite Ms. Walcott's history of kidney disease, Dr. Paganessi did not obtain information about her most recent lab values, including her creatinine and her serum potassium concentration. Dr. Salgo notes that "Dr. Paganessi's failure to appreciate the implication of Dr. Koncicki's plan for a renal biopsy was a deviation from acceptable anesthetic practice."
>
> I note from Mr. Hawkins' report that the pre-operative history and physical exam for Ms. Walcott completed by Dr. Markovitz "was inadequate as to the review of systems and contained blanks." This finding was in violations of the Hudson Surgical Center's policies and procedures.
>
> Dr. Koncicki's records, and her EBT (deposition), indicate that neither Dr. Markovitz nor Dr. Paganessi contacted her about the patient's recent history or lab values. Dr. Koncicki was not asked to clear the patient for the surgical procedure by either Dr. Markovitz or Dr. Paganessi**.** Dr. Koncicki was not consulted for pre-operative clearance. She did not consider her visit with Ms. Walcott-Spill a pre-operative clearance procedure.
>
> [141a-142a (emphasis added)]

Although Appellants fail to address it in their brief, they would still have a contribution claim under New York law against Dr Diep after the likely verdict against them in New Jersey. However, Appellants instead seek to blame Dr. Diep for the same reason they dismissed their cross claims against Dr. Koncicki.

That way, neither New York doctor with experts and defense counsel could explain to the fact finder in person why the New Jersey defendant doctors were solely at fault for deliberately excluding them from knowing their reckless plan to subject their long-term lupus patient to surgical biopsy under anesthesia. While Appellants would prefer to avoid such a fair fight, that is no reason to grant their wish. That is why here as the Bencivenga court recognized, "there is no more reason to have a fact finder assign a percentage of negligence to someone who is not affected by the verdict than to assign a percentage of negligence to acts of God (such as the snow in this case) or a myriad of other causative factors that may have contributed to the happening of an accident." Id at 407. (emphasis added).

Both New Jersey treating doctor Defendants submitted expert reports that likewise focused on the other's separate failure which is the core of this tragedy: their failure to follow standard medical practice before surgery and get either an informal or formal clearance from one or both New York specialists. However, in the curious practice defendants euphemistically call a "pocket" report, Defendants would maintain that barring a settlement by one of them they can keep those reports, perhaps in the same pocket they may have kept Dr. Ewald's opinion, until March of 2022. The Appellant anesthesiologist served such a "pocket" report from a board certified gynecologist, Dr. Jay Goldberg,

concluding that Dr. Markowitz, the surgeon doing the biopsy, was obligated to contact Dr. Diep and if he had, her elective surgical biopsy under anesthesia would have been cancelled and the patient's death would have been averted:

> At the time of her death, Crystal Walcott Spill was a 31-year-old woman. She had a past history of lupus, lupus nephritis class IV, hypertension, abnormal pap smears, and HPV infection. Her medications included Plaquenil, Cellcept, ibuprofen, and lisinopril. Her lupus was managed by a nephrologist, Holly Koncicki, MD, and rheumatologist, Jenny Diep, MD.
> ….
>
> Jacob Markovitz, MD, should have postponed the LEEP, rather than schedule it on a few days notice, and ordered bloodwork. Additionally, Jacob Markovitz, MD, should have obtained medical clearance prior to her surgery, which would have included bloodwork including a potassium level.
> ….
>
> Due to her chronic kidney disease and medications she was at increased risk for hyperkalemia. If bloodwork results, including her potassium level, had been obtained and resulted prior to her surgery and then properly addressed, Ms. Spill would not have developed a cardiac arrythmia, gone into cardiac arrest, and died.
>
> [137a-139a (emphasis added)]

The defendant gynecological surgeon returned fire in the June 20, 2022 report of his own pocket expert, Thomas E. McDonnell, M.D., a board certified anesthesiologist also conceding surgical clearance was needed and not done, but blaming the Appellant anesthesiologist. Pa31. Clearly, neither defendant would

call those experts, but if Dr. Koncicki had remained in the case she could have adopted defendant's expert reports in her own defense. That and only that inequitable gamesmanship was the defendant's reason for inconsistently letting Dr. Koncicki out of the case while insisting on an empty chair liability attack on Dr. Diep, who would be absent from the trial of this case.

Therefore, Appellants' argument that Plaintiffs' straightforward, compelling evidence of reckless malpractice by both defendants would not be prejudiced by adding the tangential issue of Dr. Diep's fault to a jury and saddling Plaintiff with disproving her fault is absurd. Appellants' Br. at 19. Once again, a defendant otherwise bereft of real defenses in a high exposure case surely would prefer as much whataboutism and distraction as they can get. However, that is no reason to permit impermissible jury apportionment.

Appellants also wrongly claim Dr. Diep's reputational damage from the apportionment they seek is *de-minimas.* Hospitals and health insurance companies routinely require affiliated doctors to report past or future potential malpractice claims. Dr. Diep's malpractice carrier has already provided her with a defense lawyer for the appearance required to dismiss Appellants' third party claim due to lack of New Jersey jurisdiction. So, Appellants' misbegotten and mistaken contribution claim against her is already part of her malpractice insurance profile. Should defendants recklessly insist on a trial to verdict, in our

internet age the death of a young mother of two (2) small children proven to be caused by two (2) doctors at an ambulatory medical center with a verdict commensurate with the economist expert's opinion that her Estate suffered $7,446,094.00 in wrongful death damages (Pa73) would almost certainly be publicized on the internet. It's also presumptuous to even suggest that Dr. Diep would instead not insist that if she were to be accused of causing her patient's death it be done in a New York contribution case after a verdict in New Jersey where she, her defense counsel and experts could disprove such a claim.

The same liability facts and damage exposure are the real reason Appellants' counsel and his silent partner, Dr. Paganessi's medical malpractice carrier, have appealed to two (2) Appellate courts for inequitable interlocutory relief. What they so urgently and persistently seek is an inequitable advantage through apportionment against an empty chair as a distraction in this and every case with blatant malpractice. Under Appellants' apportionment scheme, every malpractice carrier nervous about exposure from clear malpractice by its insured need only troll through the plaintiff's records and find an earlier or even a later treater beyond New Jersey jurisdiction in New York City or Philadelphia, which is a common event in neighboring New Jersey. Then all they need to do is cycle through experts to find one willing to blame a foreign treating defendant and

they can rely on that distracting the jury at trial. Of course, that would be a terrible abuse of the justice system.

CONCLUSION

New Jersey's three (3) contribution schemes as well as case law make it clear that normally jury apportionment of comparative negligence is exclusively limited to a party or a person who remains a party or was previously a party to the pending cause of action and either settled or was dismissed due to a procedural default, but remains on defendant's cross claims. However, where a plaintiff splits their cause of action over the same tort and overlapping injuries between New Jersey and a foreign jurisdiction, and thus makes a person normally not subject to our jurisdiction a party to the combined claim for damages sought in the New Jersey, and then settles that foreign claim, contribution is also permitted against the foreign defendant. Finally, N.J.S.A. 59:9-3.1 creates a special exception contrary to contribution limitations only in tort claims cases whereby non-parties may also be subject to juror apportionment.

Not only do Appellants fail that statutory bar, but its efforts under the facts in this case would also make a contribution claim inequitable.

For all those reasons Appellants motion for leave to appeal the decisions below barring their contribution claim against Dr. Diep should be denied.

Respectfully submitted,
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