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, V. JACOB E. MARKOVITZ, MD, ENGLEWOOD WOMEN'S HEALTH, HUDSON CROSSING SURGERY CENTER, AMSURG HOLDINGS, INC., ENVISION HEALTHCARE CORP., 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, ICAHN SCHOOL OF MEDICINE AT MOUNT SINAI HOSPITAL, MOUNT SINAI DOCTORS, MOUNT SINAI CLINICALLY INTEGRATED NETWORK, MOUNT SINAI INDEPENDENT PRACTICE ASSOCIATION, LABCORP, LABORATORY CORPORATION OF	SUPREME COURT OF NEW JERSEY DOCKET NO.: 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. Civil Action

AMERICA HOLDINGS, LABORATORY CORPORATION OF AMERICA AND STEVEN A. PAGANESSI, M.D., AND ANESTHESIA AND PAIN MANAGEMENT GROUP V. JENNY T. DIEP, M.D., AND RHEUMATOLOGY ASSOCIATES, P.C.

BRIEF and **APPENDIX (**1a-147a) ON BEHALF OF DEFENDANTS/APPELLANTS, STEVEN A. PAGANESSI, M.D., AND ANESTHESIA AND PAIN MANAGEMENT GROUP, IN SUPPORT OF MOTION FOR LEAVE TO FILE AN INTERLOCUTORY APPEAL

RUPRECHT HART RICCIARDULLI & SHERMAN, LLP
Michael R. Ricciardulli, Esq. ID# 002611995
Matthew E. Blackman, Esq. ID# 042062006
53 Cardinal Drive, Suite 1
Westfield, NJ 07090
Telephone: 908-232-4800/Fax: 908 232-4801
Attorneys for Defendants / Third-Party Plaintiffs, Steven A. Paganessi, M.D., and Anesthesia and Pain Management Group

Michael R. Ricciardulli, Esq. (mricciardulli@rhwlawfirm.com) - Of Counsel and On the Brief

Matthew E. Blackman, Esq. (mblackman@rhwlawfirm.com) - On the Brief

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

[1] Plaintiff's motion sought additional relief. Exhibits not relevant to plaintiff's request to bar Dr. Ewald's report and testimony have been redacted.

[2] Defendants' contemporaneous cross-motion and exhibits not relevant to plaintiff's request to bar Dr. Ewald's report and testimony have been redacted. Defendants' brief is not included, pursuant to Rule 2:6-1(a)(2).

[3] Plaintiff's opposition to Defendants'/ Third-Party Plaintiffs' Cross-Motion did not include a supporting certification of affidavit. Plaintiff's letter briefs dated February 7 and 23, 2023, are not included, pursuant to Rule 2:6-1(a)(2). Copies of plaintiff's letter brief of February 7th and Defendants' letter brief of May 19, 2022, submitted by plaintiff as Exhibits 6 and 15, are also not included, pursuant to Rule 2:6-1(a)(2). Plaintiff's Exhibits 1-5 and 12 are medical records and are thus included in Defendants' Confidential Appendix pursuant to Rules 1:38-3, 2:6-1(a)(2).

CONFIDENTIAL APPENDIX TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

TABLE OF AUTHORITIES

CASES CITED — PAGE(S)

STATUTES

COURT RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Defendants / Third-Party Plaintiffs, Steven A. Paganessi, M.D. ("Dr. Paganessi"), and Anesthesia and Pain Management Group (collectively, "Defendants") ask this Court to recognize that this case is one of the rare instances in which an appeal on an interlocutory basis is appropriate. This is a medical malpractice case in which the plaintiff alleges that Dr. Paganessi and codefendants were negligent in the care and treatment provided to Crystal Walcott Spill ("Ms. Spill"), resulting in her death on February 16, 2018. Defendants moved to permit the jury to consider the alleged negligence of Jenny Diep, M.D. ("Dr. Diep"), a New York physician who treated Ms. Spill, in a manner consistent with the Comparative Negligence Act ("CNA") and Joint Tortfeasors Contribution Law ("JTCL"). The plaintiff, Ms. Spill's Estate, had not filed any first party claims against Dr. Diep in New York, and defendants' third party complaint against Dr. Diep was dismissed because New Jersey's courts do not have personal jurisdiction. The Appellate Division's decision of October 11, 2023, affirmed the Law Division's denial of Defendants' request to permit an allocation against Dr. Diep.

Defendants respectfully submit that the decision below – prohibiting them from seeking to allocate fault against a physician not subject to New Jersey's jurisdiction – should be reversed. In reaching its determination, the Appellate

Division failed to apply its own reasoning, from Kranz v. Schuss, 447 N.J. Super. 168 (App. Div. 2016), to the circumstances of this case. Notwithstanding Kranz and other prior and subsequent decisions that have enabled the finder of fact to apportion negligence to tortfeasors from whom a plaintiff is unable to recover, the Appellate Division declined to permit Dr. Diep on the verdict form absent a published opinion matching the unique circumstances of this case. The Appellate Division highlighted the need for this Court's guidance, stating that, "Given our limited role as an intermediate appellate court, we decline appellants' invitation to extend the law in a direction that has yet to be endorsed by our state's highest Court." (16a.)

Defendants respectfully submit that Dr. Diep's status as a joint tortfeasor and inclusion in the jury's apportionment of fault should be defined by the facts of her involvement in the patient's care, and in the injury for which the plaintiff alleges Defendants are liable. The court's lack of jurisdiction over Dr. Diep, a factor entirely beyond Defendants' control, should not prevent these Defendants from seeking the same apportionment that our Courts have permitted in other contexts. Without interlocutory review and reversal of the ruling below, Defendants will be irreparably harmed at the time of trial. Any finding of liability against these Defendants will be unjustly issued because all tortfeasors potentially responsible for the claimed injury will not be included in the jury's

apportionment. The interests of justice and fairness require extending and applying the Appellate Division's reasoning in Kranz to this case, so that Defendants will have a fair opportunity to argue that they should only be held liable for that portion of the claimed injuries they may be found to have proximately caused.

RELEVANT PROCEDURAL HISTORY

This lawsuit was commenced with the filing of the plaintiff's initial Complaint on January 27, 2020. The Complaint was amended twice to name additional party defendants. (20a.)

In March of 2022, Defendants served the expert report of Edward A. Ewald, M.D. ("Dr. Ewald"), a board-certified rheumatologist, who opined that Ms. Spill's treating rheumatologist, Dr. Diep, deviated from accepted standards of care, and that the deviation by Dr. Diep caused the plaintiff's claimed injury, i.e., Ms. Spill's death. (33a.) On May 5, 2022, the plaintiff filed a motion regarding expert discovery and opinions, including among several requests that the court below bar Dr. Ewald's report and testimony, because Dr. Diep had not been named as a defendant, and because no defendant had filed a third party complaint against her. (35a.)

After briefing by the parties, and oral argument on August 5, 2022, the Hon. John D. O'Dwyer, P.J.Cv., entered an Order dated August 23, 2023,

permitting the plaintiff to serve a rebuttal report from an expert rheumatologist (55a); and an Order dated August 26, 2023, which stated that "[i]f defendants wish to apportion fault to the non-party Dr. Jenny Diep at trial they must file a third party complaint to name Dr. Jenny Diep as a third party defendant within thirty (30) days." (58a-59a.) The Order dated August 26th further stated that "[i]f defendants fail to file a third party complaint within that time frame, defendants and their experts are barred at trial from any allocation of a percentage of fault to the nonparty, Dr. Jenny Diep." (59a.)

Pursuant to the Order filed August 26, 2022, Defendants filed a third-party complaint, naming Dr. Diep and her practice, Rheumatology Associates, P.C., as third-party defendants. (60a.) In November 2022, plaintiff served the rebuttal report of an expert rheumatologist, Angela M. Stupi, M.D. (70a.) On January 17, 2023, Dr. Diep moved to dismiss the third-party complaint for lack of personal jurisdiction. (73a.) Defendants did not contest the issue of jurisdiction. On February 9, 2023, Defendants filed a cross-motion to permit them to pursue an allocation of responsibility against the third-party defendants at trial. (116a.) Defendants' cross-motion was opposed by the plaintiff. (125a, 1ca.) Following oral argument on March 1, 2023, the Hon. John D. O'Dwyer, P.J.Cv., filed an Order granting Dr. Diep's motion to dismiss the third party complaint (143a), and an Order denying Defendants' cross-motion to permit Defendants to seek

an allocation against Dr. Diep at trial. (18a.) Defendants moved for leave to appeal the Order denying Defendants' cross-motion, which was granted on April 6, 2023. (146a). Following briefing, oral argument, and supplemental briefing, the Appellate Division's decision was issued on October 11, 2023, affirming the Law Division's Order. (1a.) This motion for leave to appeal the Appellate Division's decision followed.

STATEMENT OF RELEVANT FACTS

Case Background[4]

This is a medical malpractice lawsuit brought by plaintiff David Spill, both individually and as the Administrator ad Prosequendum of the estate of his late wife, Crystal Walcott Spill ("Ms. Spill"). (20a.) The lawsuit arises from treatment and care provided to Ms. Spill on or about February 16, 2018. On that date, Ms. Spill underwent a "LEEP" cervical excisional biopsy procedure at codefendant Hudson Crossing Surgery Center. The procedure was performed by codefendant, Jacob E. Markovitz, M.D. Defendant, Dr. Paganessi, was the anesthesiologist for the procedure. During the LEEP procedure, Ms. Spill was noted to have a cardiac arrhythmia and experienced a cardiac arrest. She was

[4] Facts and allegations regarding the case background are offered for the purpose of providing the Court with additional context regarding the underlying claims and allegations. They are set forth in a limited fashion here, summarized from information available in the materials submitted on the underlying motions, and included in the Appendix and Confidential Appendix.

treated with resuscitative measures and transported to the Englewood Hospital Emergency Department for treatment, but despite resuscitation efforts she died on the afternoon of February 16, 2018. (See 20a, 60a, 125a.)

Ms. Spill had a preexisting medical history including Lupus Erythematosus and Lupus nephritis, and she had been treating with rheumatologist Dr. Diep for several years. (See 33a, 70a, 88a.) On February 8, 2018, Dr. Diep noted that laboratory testing performed on February 7, 2018, revealed that Ms. Spill's serum creatinine level was elevated. Dr. Diep spoke with Ms. Spill, advising her to see "renal" (*i.e.*, a nephrologist) as soon as possible. Dr. Diep also increased the dosage of one of Ms. Spill's medications, Lisinopril, from 10mg to 20 mg daily. (See 60a, 33a, 70a.)

On February 15, 2018, Ms. Spill saw a nephrologist, codefendant Dr. Holly Koncicki,[5] for worsening renal function. (See 13ca.) Various lab studies were ordered, including a basic metabolic panel, and specimens were collected on February 15, 2018. (See 13ca, 70a, 141a.) The results of the basic metabolic panel, including a critically elevated potassium level of 6.6, were first reported on the night of February 16, 2018, ***after*** Ms. Spill had died. (See 11ca, 141a.)

[5] The plaintiff's claims against codefendant Dr. Koncicki have been dismissed. (131a.)

The plaintiff alleges, via the opinions of his experts, that the defendants in this case deviated from applicable standards in various respects, including but not limited to failing to confer with Ms. Spill's treating physicians Drs. Diep and Koncicki prior to the procedure on February 16, 2018; performing the LEEP procedure under sedation without obtaining preoperative labs independently; and performing the LEEP procedure before the results of the labs ordered on February 15th were known. (See, e.g., 70a, 125a.)

Defendants' expert rheumatologist, Dr. Ewald, opines in his report that Dr. Diep deviated from the standard of care by not rechecking Ms. Spill's potassium level before increasing Ms. Spill's Lisinopril dosage, because it is known that patients with preexisting renal insufficiency have an increased propensity to develop hyperkalemia (elevated serum potassium) when starting or increasing Lisinopril. (33a.) Dr. Ewald further opines that the increased Lisinopril dosage was the most likely cause of Ms. Spill's elevated potassium level on February 15, 2018, which led to her arrhythmia and death. (34a.) The plaintiff's expert rheumatologist, Dr. Stupi, opines in her report that Dr. Diep's actions were reasonable, and that Dr. Diep was not at fault for Ms. Spill's demise. (71a.)

Background to Motion

Additional facts relevant to this motion for leave to appeal are set forth in the Relevant Procedural History, *supra*, and are incorporated here by reference.

LEGAL ARGUMENT

POINT I

INTERLOCUTORY REVIEW SHOULD BE GRANTED TO AVOID IRREPARABLE INJURY TO DEFENDANTS, AND BECAUSE IT IS IN THE PUBLIC INTEREST, AND THE INTEREST OF THE COURTS AND THE TRIAL BAR, TO ADDRESS THE ISSUE OF APPORTIONMENT.

While Rule 2:2-2 states that "[a]ppeals may be taken to the Supreme Court by its leave from interlocutory orders of the Appellate Division where necessary to prevent irreparable injury," the Supreme Court will entertain interlocutory appeals without traditional notions of irreparable harm when important issues are presented in interlocutory rulings. This Court has held that the Rule 2:2-2 standard is similar to the "in the interest of justice" standard of Rule 2:2-4. Brundage v. Estate of Carambio, 195 N.J. 575, 598-99 (2008). In this case, to deny Defendants the ability to seek apportionment at trial would not serve the interest of justice, because it would undermine the well established principle that defendants should only be held liable for that portion of the claimed injuries they may be found to have proximately caused. See, Jones v. Morey's Pier, Inc.,

230 N.J. 142, 159 (2017) (citing and quoting Fernandes v. DAR Dev. Corp., 222 N.J. 390, 407 (2015)). The jury would be denied the ability to consider and incorporate all of the relevant facts and opinions bearing upon the proximate cause of the plaintiff's injuries, and Defendants would be denied the ability to present a meritorious argument, supported by a qualified expert's opinion, that Ms. Spill's death was caused at least in part, if not entirely, by something other than their own alleged negligence.

We further respectfully submit that in any system that requires the parties to bear their own litigation costs, any time the parties may have to redo litigation because of court error, there has been an irreparable injury. It is a certainty that if the instant case is required to be tried absent further review, the parties will have experienced enormous costs that will never be reimbursed. Awareness of this latter factor by the Supreme Court is probably among the reasons it has, in the past, granted leave for interlocutory appeals. In Ginsberg v. Quest Diagnostics, 227 N.J. 7 (2016), leave to take an interlocutory appeal was granted to settle a choice-of-law issue. There was no apparent exigency or need for an immediate resolution of the issue; it simply made good sense to resolve the issue in a timely manner. In Nicholas v. Mynster, 213 N.J. 463 (2013), after the Appellate Division denied leave to take an interlocutory appeal concerning a "same specialty" issue in a medical malpractice case, this Court granted leave,

obviously recognizing that there was an important issue that was needful of resolution, and that not to grant leave would likely result in wasteful litigation. In Brugaletta v. Garcia, 234 N.J. 225 (2018), this Court granted leave to appeal an interlocutory order of the Appellate Division which entitled a hospital to prevent the release of a privileged report. Again, the issue was important to the public and the bar, though the only "irreparable injury" would have been the possibility that the parties would have wasted money on trial costs and the courts would have wasted judicial resources. As the hospital had prevailed below, there was no fear that an improper disclosure might be made if leave was not granted.

We respectfully submit that the existence of an important legal issue, and the potential for needless litigation absent interlocutory review, are reasons enough for the Supreme Court to entertain this appeal. Where the principle of fairness underlying the Comparative Negligence Act, N.J.S.A. 2A:15-5.1 to -5.8 ("CNA"), and the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 to -5 ("JTCL"), has not been preserved, and the Appellate Division has said that the issue is one for this Court to address (see 16a), it is appropriate for the Supreme Court to give its guidance to the bench, the bar, and the public. To do otherwise will run the risk that one or both sides in this litigation will be economically

injured without any recourse for reimbursement. As noted below, the issue presented is uniquely suited for the Supreme Court's attention.

POINT II

STANDARD OF REVIEW.

Review of purely legal issues is *de novo*. See, e.g., Liberty Ins. Corp. v. Techdan, LLC, 253 N.J. 87, 103 (2023), as revised (Mar. 23, 2023) (review of the Appellate Division's interpretation of the CNA was a legal determination); Kranz v. Schuss, 447 N.J. Super. at174 (citing Town of Kearny v. Brandt, 214 N.J. 76, 96 (2013)). As noted below, the issue here is a "pure question of law and trial practice." (4a.)

POINT III

DEFENDANTS SHOULD BE PERMITTED TO HAVE THE JURY CONSIDER DR. DIEP'S NEGLIGENCE, EVEN IF SHE CANNOT BE A PARTY TO THIS NEW JERSEY LAWSUIT DUE TO A LACK OF PERSONAL JURISDICTION. (Raised below. Ruling below at 1a)

"The [CNA] was designed to further the principle that '[i]t is only fair that each person only pay for injuries he or she proximately caused.'" Jones v. Morey's Pier, Inc., 230 N.J. at 159 (citation omitted). Numerous situations exist in which our courts have accordingly ruled that defendants have the right to limit their responsibility to the harm they actually caused by having non-present potential tortfeasors' conduct determined by a jury.

> [T]his Court and the Appellate Division have permitted a factfinder to allocate fault to an individual or entity, notwithstanding the fact that at the time of trial that individual or entity is not liable to pay damages to the plaintiff, and the allocation may reduce the amount of damages awarded to the plaintiff.

[Id. at 161 (2017).]

In Young v. Latta, 123 N.J. 584 (1991), this Court held that a non-settling tortfeasor was entitled to a credit based on the allocation of fault to a settling defendant who was no longer in the litigation. Young v. Latta, 123 N.J. at 596; see also, Carter by Carter v. Univ. of Med. & Dentistry of New Jersey-Rutgers Med. Sch., 854 F. Supp. 310, 315 (D.N.J. 1994) (holding that New Jersey jury should be entitled to consider relative fault of settling defendant in Washington D.C. lawsuit arising from same sequence of events). Non-settling defendants have also been entitled to have jury awards reduced by the percentage of fault allocated to tortfeasors who were not present or dismissed for a variety of other reasons. See, Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 116, (2004) (non-settling defendant entitled to have award reduced by the percentage of fault attributable to a joint tortfeasor dismissed due to a discharge in bankruptcy); Town of Kearny v. Brandt, 214 N.J. at 103-04 (non-settling defendants entitled to have the jury allocate fault as to defendants dismissed because of the statute of repose); Burt v. West Jersey Health Systems, 339 N.J.Super. 296, 307–08 (App.Div.2001)) (holding that the plaintiff's recovery should be reduced by the

percentage of fault allocated to defendants dismissed due to the plaintiff's failure to comply with the Affidavit of Merit Statute); Krzykalski v. Tindall, 232 N.J. 525, 541-43 (2018) (holding that the CNA mandated allocation of fault to unidentified "John Doe" driver of a "phantom vehicle"); Kranz v. Schuss, 447 N.J. Super. at 178, 181-82 (holding that defendants could have judgment against them reduced by the amount of fault a jury attributed to New York defendants where New Jersey lacked personal jurisdiction); Jones v. Morey's Pier, Inc., 230 N.J. at 164-66, 169-70 (2017) (permitting allocation of fault to defendant against whom claims were barred by the Tort Claims Act); Maison v. NJ Transit, 460 N.J. Super. 222, 240-42 (App. Div. 2019) aff'd as modified sub nom. Maison v. New Jersey Transit Corp., 245 N.J. 270 (2021) (permitting allocation of fault to unidentified tortfeasor).

The interests of justice require this Court to reverse the decision below because the ruling of the Court below conflicts with the rationale of these cases, and in particular with the holding in Kranz v. Schuss, 447 N.J. Super. 168 (App. Div. 2016). In Kranz, the Appellate Division addressed apportionment where a New Jersey infant plaintiff sued, through her guardian, doctors in both New York and New Jersey for medical malpractice for failing to diagnose a hip condition. Kranz, 447 N.J. Super. at 171-72. The plaintiffs first filed a lawsuit against the New York physicians and reached a settlement. Id. at 172. The

plaintiffs then sued New Jersey physicians on an identical theory of liability. Ibid. The New Jersey defendants sought a *pro tanto* credit for the amount of the settlement by the New York physicians, which was initially granted by the trial court. Id. at 173-74. Acknowledging the case as a matter of first impression, the Appellate Division held that, ***even though the New York defendants were never parties to the New Jersey suit at its inception***, nor could they have been because New Jersey lacked personal jurisdiction, the equitable result was to permit defendants to have any judgment that plaintiffs may secure against them reduced by the amount of fault a jury attributed to the New York defendants. Id. at 178, 181-82. A key consideration in Kranz was that there was an opportunity for the New Jersey defendants to prove that the New York defendants were in fact negligent. Id. at 181-82.

Since Kranz, this Court has observed that allocation of fault to an individual or entity who is ***not*** liable to pay damages to the plaintiff, first recognized in Young, supra, has been held to govern a range of circumstances beyond that of a settling defendant. Jones v. Morey's Pier, Inc., 230 N.J. at 161-164 (2017).

> Our courts have … held in several settings that even if the claims against a defendant are dismissed by virtue of the operation of a statute, apportionment of fault to that defendant is required by the [CNA] and the [JTCL] … As those decisions recognize, allocation of a percentage of fault to a joint tortfeasor that is not a

> defendant at trial may afford to a remaining defendant the practical benefit of the contribution claim to which it is entitled …

[Id. at 164 (citations omitted).]

In Jones, where New Jersey's Tort Claims Act barred the defendants' third-party claims against the decedent's school, this Court held that if the defendants presented *prima facie* evidence of the school's negligence at trial, the trial court should instruct the jury to consider whether the defendants had proven that the school had been negligent, and that its negligence was a proximate cause of the decedent's injuries and death. Id. at 166. This Court noted that the procedural posture allowed for a fair determination of the third-party defendant's alleged fault because the parties had been on notice of the defendants' intention to seek apportionment, and the plaintiff would have the opportunity to oppose the defendant's proofs. Id. at 165-66.

Although Defendants' claims against Dr. Diep in this case have been barred due to a lack of jurisdiction, and not the operation of the Tort Claims Act as in Jones, we respectfully submit that this distinction does not make a practical difference. Apportionment of fault against Dr. Diep would afford Defendants the practical benefit of the contribution claim to which they are entitled but cannot pursue due to jurisdictional factors beyond their control. The procedural posture here, as in Jones, permits a fair determination of Dr. Diep's alleged fault

because the parties have been on notice of Defendants' intention to seek apportionment, and the plaintiff has had, and will have at trial, the opportunity to oppose Defendant's proofs. Because Defendants are able to present *prima facie* evidence of Dr Diep's negligence at trial, the jury should be allowed to consider whether Defendants have proven that Dr. Diep was negligent, and whether her negligence was a proximate cause of Ms. Spill's injuries and death. See, Jones v. Morey's Pier, Inc., 230 N.J. at 165-66.

Allocation of fault involving a non-party was addressed again by the Appellate Division in Maison v. NJ Transit, 460 N.J. Super. 222 (App. Div. 2019) aff'd as modified sub nom. Maison v. New Jersey Transit Corp., 245 N.J. 270 (2021). In Maison, the plaintiff sought damages for injuries she sustained when an unidentified bus passenger struck her in the head with a thrown glass bottle. The Appellate Division held that the CNA required the jury to allocate percentages of negligence among joint tortfeasors "based on the evidence, not based on the collectability or non-collectability of the tortfeasors' respective shares of the damages." Id. at 240 (emphasis added) (citing Brodsky, supra, 181 N.J. at 121). While the Appellate Division noted in Maison that the defendants' liability was also limited by a provision of the Tort Claims Act, Id. at 239, its decision permitting apportionment of fault to the unidentified passenger was explained as a requirement of the CNA and JTCL and New Jersey case law. Id.

at 238-42. "Our courts have also apportioned fault to known but unidentified tortfeasors … [f]rom these cases, it becomes clear that persons known to be at least partly liable should be allocated their share of the fault …" Id. at 240-41.

There are situations where a non-present tortfeasor may not have their negligence submitted to a jury, but such situations are distinguishable. For example, apportionment is disallowed where that tortfeasor is immune from liability under any circumstances under the Workers Compensation Act, N.J.S.A. 34:15–1 to –146. Ramos v. Browning Ferris Indus. Of S. Jersey, Inc., 103 N.J. 177, 181, 193-94 (1986). Dr. Diep has no such statutory immunity here. Apportionment may be disallowed due to a policy justification, such as creating an incentive for a known defendant to identify an unidentified tortfeasor. Bencivenga v. J.J.A.M.M., Inc., 258 N.J.Super. 399, 410-11 (App.Div.) certif. denied, 130 N.J. 598 (1992) (conduct of unnamed tortfeasor precluded from allocation where defendant ignored opportunity to identify that tortfeasor). In this case, the Defendants are not seeking allocation of fault to an unidentified tortfeasor whom they chose not to identify, but rather to a tortfeasor whose identity is known, but who cannot be party to the lawsuit due to jurisdictional circumstances beyond Defendants' control.

Defendants respectfully submit that equity and the principles previously discussed by this Court and the Appellate Division require that the fact finder

be allowed to consider Dr. Diep's negligence. While the language of the CNA admittedly refers to apportionment among the "parties," N.J.S.A. 2A:15-5.2(a)(2), the JTCL defines "joint tortfeasors" as two or more ***persons*** jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. N.J.S.A. 2A:53A-1 (emphasis added). The Appellate panel below sought to harmonize the language of these statutes by reading a requirement that tortfeasors be "parties" into the JTCL, defining tortfeasors narrowly as those who could be liable in tort and face a judgment. (10a.) We respectfully submit that this was in error, because it produces a result inconsistent with several precedents, i.e., Young, Burt, Brodsky, Town of Kearny, Krzykalski, Kranz, Jones, and Maison, in which the jury was permitted to allocate fault against persons who faced neither liability nor a judgment against them, and even against tortfeasors who remained unidentified.

When reviewing two separate but related statutes, "the goal is to harmonize the statutes in light of their purposes. Am. Fire & Cas. Co. v. N.J. Div. of Tax'n, 189 N.J. 65, 79-80 (2006) (citations omitted). The Appellate Division's decision failed to uphold the purpose of the CNA: "to further the principle that '[i]t is only fair that each person only pay for injuries he or she

proximately caused.'" Jones v. Morey's Pier, Inc., supra, 230 N.J. at 159 (citation omitted).

The question of whether Dr. Diep is considered a joint tortfeasor in this case is a matter that can and should be determined by the jury, based on the facts before them. It should not be predetermined by factors beyond Defendants' control: jurisdictional happenstance and the plaintiff's choice to forego any potential claims against Dr. Diep that might have been pursued in the New York courts. The plaintiff had the opportunity to sue Dr. Diep in New York. His failure to do so should not work a detriment to Dr. Paganessi. The plaintiff also cannot reasonably claim to be unduly prejudiced if the jury is permitted to hear the evidence regarding Dr. Diep at trial. The plaintiff has known from the outset that Dr. Diep was involved in Ms. Spill's treatment and care. The plaintiff has been put on notice of Defendants' intent to prove that Dr. Diep was negligent, and that such negligence proximately caused Ms. Spill's death, given the service of Dr. Ewald's report in March 2022, and the filing of Defendants' Third-Party Complaint. The plaintiff has been given a fair opportunity to meet Defendants' evidence and has in fact served the report of an expert rheumatologist, Dr. Stupi, to counter Dr. Ewald's opinions. We therefore respectfully submit that New Jersey's case law requires the objective of the CNA to be met and protected by

permitting Defendants to present evidence of Dr. Diep's negligence at trial, and by permitting the jury to apportion fault to her.

The decision below denied Defendants the ability to seek an apportionment among all those potentially responsible for the plaintiff's claimed injury. Reversal of the decision below is the only way to avoid an incomplete determination by the jury, who will otherwise be prevented from considering all of the relevant facts and opinions regarding the cause of Ms. Spill's death. Any verdict reached at trial would not be made in accordance with New Jersey's statutory framework for apportionment of fault, which our courts have applied when multiple parties are alleged to have contributed to the harm. See, Jones v Morey's Pier, 230 N.J. at 160-64; Kranz v. Schuss, 447 N.J. Super. at 170-71, 174-75, 177-78, 181-82. Although Dr. Diep's contacts with New Jersey were insufficient to establish personal jurisdiction for purposes of Defendants' third party complaint, Defendants submit that they remain entitled to pursue an allocation.

POINT IV

PERMITTING DR. DIEP'S INVOLVEMENT TO BE CONSIDERED BY THE JURY ADVANCES THE PURPOSES UNDERLYING THE CNA AND JTCL. (Issue discussed below at 17a.)

Permitting allocation in this instance would not unduly dilute the principles and purposes underlying the CNA and JTCL (see 17a), but rather

reinforce them. The jurisdictional circumstances here are rare, as demonstrated by the absence of any prior decision addressing this unique scenario. Allocation of a percentage of fault to a joint tortfeasor who is not a defendant at trial due to lack of jurisdiction will provide no more incentive for defendants to investigate and prove the liability of non-parties or dismissed parties than has already been created by our courts' precedents in Young v. Latta, Burt v. W. Jersey Health Sys., Town of Kearny v. Brandt, Kranz v. Schuss, and other cases. Permitting allocation to an out of state defendant would not unduly prejudice future plaintiffs, whose right and duty to timely investigate and assert first-party claims against those potential tortfeasors will remain unaffected. Permitting Dr. Diep's liability to be considered by the jury will encourage plaintiffs to seek recovery against all tortfeasors, including those in New York and other jurisdictions, rather than requiring New Jersey defendants bear the liability of out of state defendants' negligence.

The potential reputational harm that a jury finding of fault on a verdict form may cause to an out of state physician is also *de minimis*. If the physician's contacts with New Jersey do not even meet the minimal level necessary to warrant personal jurisdiction and inclusion a New Jersey lawsuit, it seems unlikely that a verdict sheet from a New Jersey lawsuit would be publicized in the state(s) where the physician practices. But even assuming, *arguendo*, that

the jury's allocation is made known to, or discovered by, persons other than those present in the courtroom, the fact remains that no judgment against the out of state physician will ever be entered, and no party to the case will ever recover from them. In the absence of a judgment or settlement on their behalf, no report to the National Practitioner Data Bank will ever be required or made. See, 42 U.S.C. § 11131(a).

A jury's finding of fault against a defendant who has been dismissed due to a lack of jurisdiction, such as Dr. Diep, would thus not create any significant potential for reputational harm. The risk would be no more than that created when apportionment is permitted against a party who are dismissed on other grounds. Potential reputational harm to defendants dismissed pursuant to a statute of repose or statute of limitations does not prevent apportionment of fault against them. See, e.g., Town of Kearny v. Brandt, supra. Nor does it prevent apportionment of fault to defendants who have been dismissed due to a plaintiff's failure to provide an appropriate affidavit of merit. See, e.g., Burt v. W. Jersey Health Sys., supra. Nor does it prevent apportionment of fault to defendants who have opted to settle the plaintiff's claims. See, e.g., Young v. Latta, supra. Nor did it prevent apportionment of fault to the New York physicians who remained beyond New Jersey's jurisdiction in Kranz v. Schuss, supra.

Any risk of reputational harm is also offset, as it has been here, through the requirement that the defendants seeking apportionment first set forth admissible evidence of a joint tortfeasor's negligence, such as the testimony of a qualified expert witness. See, Young v. Latta, 123 N.J. at 597. Moreover, while an out of state physician may not personally be present at trial to defend their actions and reputation, as in any situation where an "empty chair" argument is asserted by a defendant, the plaintiffs still have the incentive and the opportunity, as did the plaintiff here, to set forth their own proofs that the non-party physician's actions were ***not*** negligent. Therefore, permitting apportionment in this case will not create any significant or undue threat of reputational harm to Dr. Diep.

POINT V

THE MODEL JURY INSTRUCTIONS DO NOT ABATE THE UNFAIRNESS TO DEFENDANTS. (Issue discussed below at 15-16a.)

We respectfully submit that the ability of Defendants to argue that their alleged negligence was not a "substantial factor" in bringing about the plaintiff's injury would not abate the unfairness produced by the decision below. The arguments that (1) Defendants' alleged negligence was not a substantial factor in bringing about the injury, and (2) Dr. Diep's alleged negligence was a proximate cause of the injury, are not mutually exclusive. Subject to

presentation of the proofs at trial, the "substantial factor" argument may already be available to Defendants, as in any case were multiple factors, such as the negligence of multiple defendants and/or a pre-existing condition, are alleged to have proximately caused the injury.

But the two arguments also differ fundamentally. As previously noted by the Appellate Division, "We have rejected the argument that the substantial factor test for proximate causation is linked to the percentage of negligence attributed to a particular defendant." Velazquez ex rel. Velazquez v. Jiminez, 336 N.J. Super. 10, 31 (App. Div. 2000), aff'd, 172 N.J. 240 (2002) (citing Dubak v. Burdette Tomlin Mem'l Hosp., 233 N.J. Super. 441, 452 (App. Div. 1989)). The "substantial factor" argument, where available, is offered to avoid liability altogether. Accordingly, Defendants must prove that all other concurrent causes were sufficient to render any negligence on their part "remote, trivial or inconsequential." See, Model Jury Charges (Civil), 6.12, "Proximate Cause -- Where There Is Claim That Concurrent Causes of Harm Were Present" (approved May 1998). The "substantial factor" argument is an all-or-nothing approach which fails to promote the distribution of loss in proportion to the respective faults of those who caused the loss. See, Town of Kearny v. Brandt, supra, 214 N.J. at 102. It does not replace the ability of a defendant to potentially reduce a plaintiff's recovery to the percentage of damages directly attributable

to their negligence, as permitted and intended via the CNA. See, N.J.S.A. 2A:15-5.3(c).

CONCLUSION

It is therefore respectfully requested that the Appellate Division's decision should be reversed. The interests of justice, New Jersey's statutory framework for allocation of fault, and the prior decisions of our courts require that these Defendants be allowed the opportunity to prove, and that the jury be permitted to determine, if Dr. Diep was negligent, and whether some percentage of fault should be allocated to her in a manner consistent with the CNA.

Respectfully submitted,

RUPRECHT HART RICCIARDULLI & SHERMAN, LLP
Attorneys for Defendants / Third-Party Plaintiffs
Steven A. Paganessi, M.D., and
Anesthesia and Pain Management Group

By: /s/ Matthew E. Blackman
mblackman@rhwlawfirm.com

Dated: October 30, 2023