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.	**SUPREME COURT OF NEW JERSEY** CIVIL ACTION Docket No.: 091401 Submitted: May 5, 2026 On Appeal From SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-2310-22 Sat Below: The Honorable Morris Smith, J.A.D., The Honorable Mark K. Chase, J.A.D., The Honorable Christina M. Vanek, J.A.D.

BRIEF OF APPELLANT JOSEPH POPOVICH, M.D.

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[1] Pursuant to R. 2:12-6, the record on appeal if certification is granted is comprised of the "briefs, appendices and transcripts filed in the Appellate Division []." Thus, Dr. Popovich cites to "Da" in connection with the appendices in the Appellate Division, and to the transcripts as filed with the Appellate Division briefing. R. 2:6-8.

PRELIMINARY STATEMENT

This is a case about fundamental fairness. Between 2017 and the trial in December 2022, the trial court held that two defendant doctors, dismissed *with prejudice* based on the plaintiff's failure to join them within the statute of limitations, would be treated as the dismissed defendant in Burt v. West Jersey Health Systems, 339 N.J. Super. 296 (App. Div. 2001). Under Burt, defendants dismissed from the action due a procedural failing of the plaintiff remain on the verdict sheet and, *crucially*, the remaining defendant is entitled to a reduction of liability based on any fault attributed to the dismissed defendants, *even* if the remaining defendant is found more than 60% at fault, notwithstanding N.J.S.A. 2A:15-5.3 (a). Thus, Burt provides protection to *both* the remaining defendant and the dismissed defendant, by: 1) vitiating joint and several liability for any fault allocated to the dismissed defendant; and 2) therein, mooting the possibility of any subsequent contribution claim against the dismissed defendant.

In this case, the trial court repeatedly held that the belatedly joined defendants were dismissed pursuant to the principles in Burt. Those defendants obtained dismissals with prejudice, and Dr. Popovich, the sole defendant remaining at trial, had the assurance that he would not be responsible for any liability allocated to those Burt defendants, even if he were found 60% or more at fault. Indeed, the very day trial started, plaintiffs' counsel urged the trial court

to reconsider its prior rulings that Burt applied to the trial, and the trial court refused. (3T41-3T42) So, Dr. Popovich tried the case under the Burt framework.

The jury then returned a verdict finding Dr. Popovich 60% responsible and dismissed Burt defendant Peter Goldsmith, M.D. 40% at fault. Only *after* the verdict did the trial court decide it would abrogate Burt and hold Dr. Popovich 100% responsible for the verdict. Even worse, the trial court-and the Appellate Division-held that there is no harm to this *post-hoc* change, because Dr. Popovich can (allegedly) just bring a *new* contribution action against Dr. Goldsmith for the 40% allocated share. Neither of the lower courts grappled with the reality that Dr. Goldsmith was dismissed *with prejudice* about five (5) *years* prior to trial and thus cannot be bound by the 40% allocation against him.

The Appellate Division *sub-silentio* overruled Burt and created an exception to the entire controversy doctrine. In fact, the Appellate Division *specifically invited* serial litigation and held the entire controversy doctrine does not apply, expressly stating that "Popovich's path to proceed against Goldsmith for contribution in a separate action pursuant to the Joint Tortfeasors Contribution Law (JTCL), N.J.S.A. 2A:53A-1 to -5, is evident." (Sa21)

Left unexplained by the Appellate Division was how the two Burt defendants could properly appear on the verdict sheet if in fact Burt is a nullity. Instead, the lower courts applied Burt *a la carte*, hewing to its directive that the

dismissed defendants remain on the verdict sheet for allocation but abrogating its corresponding promise of a commensurate reduction of liability.

The significance of this sea change in the medical malpractice litigation context cannot be overstated. Now, defendant doctors holding dismissals *with prejudice* based on a plaintiff's procedural failures cannot be confident that the dismissal means what it says and may potentially face contribution claims nearly a decade after the fact. Relatedly, under the Appellate Division's new rule of law, doctors holding a potentially dispositive statute of limitations or similar defense must now be very hesitant to invoke it, lest they procure a dismissal with prejudice at the outset only to be subject to a potentially massive contribution claim exposure in a subsequent action, given the Appellate Division's abrogation of the entire controversy doctrine in this context.

If a precedential decision of the Appellate Division is to be abrogated and a new exception to the entire controversy doctrine recognized, it must emanate from this Court. Further, if this Court were to accept the plaintiffs' contention that Burt is no longer good law, the entire trial was conducted under an improper legal framework, and a new trial must be ordered. Fundamentally, a litigant cannot be (repeatedly) promised that one legal framework applies when making pre-trial and trial decisions, only to have the trial court pull the proverbial rug from under that litigant *after* the verdict.

CONCISE PROCEDURAL HISTORY & STATEMENT OF FACTS[2]

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).[3] 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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[2] Because the procedural and factual history in this matter are inextricably intertwined, they have been combined for clarity and the convenience of the Court.

[3] 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 is 60% or more. 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.[4] 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).

[4] Dr. Goldsmith was never a third-party defendant. This is an important distinction, as discussed fully below. See infra note 8.

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.[5] 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 --

[5] 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.

> 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.**
>
> [(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.[6] (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

[6] 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).

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 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 allocated share meets or 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 share met or 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).[7]

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)].

[7] 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).

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.[8]

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

[8] 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.

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 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).

E. Opinions and decisions of the Appellate Division.

The Appellate Division affirmed. According to the Appellate Division, because Dr. Goldsmith's dismissal on statute of limitations grounds does not affect Dr. Popovich's right to contribution, he can be held responsible for 100% of the verdict, without the Burt reduction. The dismissed Burt defendant, in turn, will now ostensibly be responsible to Dr. Popovich for 40% of the judgment, despite having been dismissed with prejudice. The Appellate Division reasoned:

> On these facts, where Popovich's answers **timely placed the third-party defendants, including**

> **Ngyuen and Goldsmith**,[9] on notice of the potential claims against them, they suffered no prejudice in preparing their defenses. Like the Quest defendants, Popovich's statutory right of contribution is not constrained or limited by the viability of plaintiffs' direct claims. It follows that the trial court's order was proper, and we find no error in the court's interpretation of the law and its application of the facts to it.
>
> [Sa17 (emphasis added)]

Dr. Popovich timely moved for reconsideration of the Appellate Division decision. Dr. Popovich asserted that the Appellate Division has now abrogated Burt, created a new exception to the principles underlying the entire controversy doctrine, and that the opinion did not provide any clarity as to how Dr. Popovich can enforce the 40% allocation against a dismissed party.

The Appellate Division denied reconsideration, but explained that its holding contemplates Dr. Popovich filing a ***new*** action against Dr. Goldsmith to recoup 40% of the judgment:

> When we view the record before us through the lens of the Spill Court's holding, Popovich's **path to proceed against Goldsmith for contribution in a separate action pursuant to the Joint Tortfeasors Contribution Law** (JTCL), N.J.S.A. 2A:53A-1 to -5, is evident. Dr. Goldsmith was on notice, as he was originally sued by plaintiff. Dr. Goldsmith was a party to the litigation until his dismissal; his counsel was

[9] The Appellate Division was factually in error when it classified Dr. Goldsmith as a third-party defendant. He was a direct defendant belatedly joined by plaintiffs. As discussed more fully below, this was a material distinction in terms of the inapplicability of Mejia, 241 N.J. 360.

> involved through discovery and pretrial. He was on notice as to the claims against him, and he had time to prepare his defenses.
>
> [Sa21 (emphasis added)][10]

As detailed below, this outcome conflicts with no less than three principles of law codified in prior Appellate Division decisions. This Court granted Dr. Popovich's petition for certification by order dated March 24, 2026.

QUESTIONS PRESENTED

Whether the lower courts' decisions irreconcilably conflict with precedent limiting joint and several liability under Burt, the rationale and purposes of the entire controversy doctrine, and principles of fundamental fairness?

Suggested Answer: Yes.

Whether a civil defendant's right to rely on numerous rulings that he is not exposed to joint and several liability and thus has no need for contribution can be retroactively stripped from him and substituted for a speculative, uncertain right to bring a successive contribution action?

Suggested Answer: No.

[10] Importantly, the Appellate Division was **factually incorrect** in its assertion that Dr. Goldsmith "was involved through discovery and pretrial." He was dismissed on a Rule 4:6-2(e) Motion to Dismiss in December 2017, about five *years* before trial. (Da207, 236) In fact, because of that dismissal, Dr. Goldsmith's attorney wrote to the trial court to be removed from the e-filing notifications. (Da271).

LEGAL ARGUMENT

POINT I

The trial court erred in accepting plaintiffs' proposed order of judgment and abrogating Dr. Goldsmith's Burt defendant status, and the Appellate Division compounded that error by *sub silentio* overruling Burt while simultaneously creating a new exception to the entire controversy doctrine. (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 was a post-verdict reconsideration of the trial court's December 2017 order deeming Dr. Goldsmith a Burt defendant, after initially denying plaintiffs' 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.

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). This statute works in tandem with the Joint Tortfeasors Contribution Law, N.J.S.A. 2A:53A-1 to -5, which prevents the plaintiff from arbitrarily selecting a victim defendant. See Glassman v. Friedel, 249 N.J. 199, 217 (2021).

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,[11] not the legal consequences of that third-party defendant's invulnerability to liability to the plaintiff and the corresponding need to mold the verdict. In this case, Dr. Goldsmith was *never* a third-party defendant, although the Appellate Division inexplicably premised its reliance on Mejia on the factually erroneous predicate that Dr. Goldsmith was a third-party defendant. (Sa17)

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 the judgment in accordance with the Appellate Division's analysis in Burt. In

[11] In this case, Dr. Goldsmith was never a third-party defendant. He was a direct defendant belatedly joined by plaintiffs and dismissed shortly thereafter.

On this point, the Appellate Division was simply factually incorrect when it classified Dr. Goldsmith as a third-party defendant to equate this case to Mejia. (Sa17) ("On these facts, where Popovich's answers **timely placed the third-party defendants**, including Ngyuen and **Goldsmith**, on notice of the potential claims against them, they suffered no prejudice in preparing their defenses.") (emphasis added).

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. The trial court was obligated to hew to Burt. 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.

4. The Appellate Division expanded the error by recognizing an unworkable exception to the entire controversy doctrine and implicitly abrogating Burt.

a. The Appellate Division's conclusion was necessarily predicated on the incorrect assumption that Burt is a nullity.

Put simply, there is no way to square the Appellate Division's holding with Burt. Equally, the Appellate Division made no effort to address the manifest logistical difficulties in bringing a *new* contribution action against a party dismissed, with prejudice five years before the trial, contrary to the principles underlying the entire controversy doctrine. Perhaps most troubling, the Appellate Division did not

assign any weight to the fundamental fairness violations when a trial court repeatedly assures the litigants, from 2017 through 2022, that one legal framework controls, only to completely reverse course *after* the trial was completed.

The Appellate Division decided this case in an unpublished decision. Yet, there is no way that the outcome in this matter can be reconciled with Burt, a published decision. The Appellate Division's conclusion was substantially informed by the 2020 decision in Mejia, 241 N.J. at 365 (2020):

> On these facts, where Popovich's answers timely placed the third-party defendants, including Ngyuen and Goldsmith, on notice of the potential claims against them, they suffered no prejudice in preparing their defenses. Like the Quest defendants, Popovich's statutory right of contribution is not constrained or limited by the viability of plaintiffs' direct claims. It follows that the trial court's order was proper, and we find no error in the court's interpretation of the law and its application of the facts to it.
>
> [Sa17][12]

[12] Here, the Appellate Division again erred in one of its predicates. In Mejia v. Quest Diagnostics, the contribution rights were not impaired *because the third-party defendant was maintained as a party to the case*, such that the third party contribution claim could be prosecuted to judgment in the same action. In the instant case, Dr. Goldsmith was *dismissed with prejudice* in 2017, such that Dr. Popovich's contribution rights were very much constrained or limited.

Dr. Popovich cannot enforce a contribution judgment against a non-party, and he was assured he would not need to enforce any such claim because he would receive the Burt reduction. Only after the fact, once he was told that he would now need to prosecute a subsequent contribution action, did the lower courts suggest that this type of serial litigation is somehow appropriate in this context, without discussing

However, in Mejia, this Court merely held that a *third-party* defendant joined after the statute of limitations was not entitled to a dismissal from the action. Id. at 374-75. The Mejia Court did not even address, much less overrule, the continuing viability of Burt for those scenarios where the belatedly joined defendant obtained a dismissal, with prejudice. In fact, Mejia distinguished, but pointedly did not overrule, Burt. Id.

Further underscoring the continuing validity of Burt is this Court's citation to it as recently as 2025. See Estate of Spill by Spill v. Markovitz, 260 N.J. 146, 162 (2025). In Spill, a defendant doctor was dismissed due to lack of personal jurisdiction in New Jersey, such that there were no entire controversy doctrine or dismissal with prejudice concerns. In turn, the dismissed defendant could not appear on the verdict sheet, but the remaining defendants were free to prosecute a contribution claim against the dismissed defendant in New York, where personal jurisdiction could be obtained. Id. at 163. In reaching this conclusion, this Court specifically referenced Burt as articulating a valid legal proposition:

> In other cases, New Jersey courts have found that it would be inequitable to preclude the allocation of fault -- even when the actual contribution was not possible -- because an omission by the plaintiff, whether inadvertent or strategic, deprived the defendant of the opportunity to bring third-party claims. **See, e.g., Burt, 339 N.J. Super. at 301-02, 304-05, 771 A.2d 683** (holding that the

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the necessary abrogation of the entire controversy doctrine and the validity of Dr. Goldsmith's dismissal, with prejudice.

> remaining defendants were entitled to an allocation of fault against the defendants that were dismissed due to the plaintiff's failure to timely file the notice required by the Affidavit of Merit Act because to hold otherwise would "deny [the defendants] the protection afforded under the [CNA]" "through no fault of their own"); []
>
> [Id. at 159 (emphasis added)]

This Court has had multiple opportunities to expressly overrule Burt, and it declined to do so. Instead, it cited to it for the legal principle it espoused, roughly three years *after* the trial court granted post-verdict reconsideration and abandoned its numerous pre-trial Burt orders. Simply put, Burt stood as binding precedent of the Appellate Division at the time of trial, and continues to so stand unless and until overruled by this Court.

b. The Appellate Division created a new-and unworkable-exception to the entire controversy doctrine.

The Appellate Division directed to Dr. Popovich to sue Dr. Goldsmith for a 40% contribution in a new contribution action. In so doing, the Appellate Division necessarily presumed that the entire controversy doctrine would not bar this serial litigation, and that Dr. Goldsmith's dismissal with prejudice can properly be nullified years after the fact, without his participation or input. The Appellate Division's newly created path for contribution claims ignores procedural and

logistics difficulties for all parties, to say nothing of the fundamental unfairness to *both* Drs. Popovich and Goldsmith.[13]

A serial action to recover contribution is beset with practical difficulties and pitfalls. See Hoelz v. Bowers, 473 N.J. Super. 42, 66 (App. Div. 2022). In Hoelz, the Appellate Division observed that, since a non-party joint tortfeasor does not consent to the settlement, "fairness and due process demand he be permitted to contest the amount of the judgment as well as the parties' comparative fault." Id.

More broadly, the entire controversy doctrine exists to minimize such serial litigation. R. 4:30A. The doctrine has generally operated broadly to bar subsequent contribution and indemnification claims. See Mettinger v. Globe Slicing Mach. Co., Inc., 153 N.J. 371, 387 (1998) (known contribution and indemnity claims should be asserted in the original action, pursuant to the entire controversy doctrine). This is based upon the "long-held preference that related claims and matters arising among related parties be adjudicated together rather than in separate, successive, fragmented, or piecemeal litigation." See Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co., 207 N.J. 428, 443 (2011).

The supposed "remedy" the Appellate Division has given Dr. Popovich as consolation for having his Burt allocation rights retroactively stripped from him is

[13] Again, the Appellate Division's holding was premised, in part, on its determination that Dr. Goldsmith participated in discovery and pre-trial. (Sa21) This is not correct. He was dismissed in 2017 via motion to dismiss, over five years before the trial.

no remedy at all. It is a theoretical right to litigate the case a *second* time, with all the delay, expense, and uncertainty that entails. This is antithetical to the "long-held preference that related claims and matters arising among related parties be adjudicated together rather than in separate, successive, fragmented, or piecemeal litigation." Kent Motor Cars, Inc. v. Reynolds & Reynolds, Co., 207 N.J. 428, 443 (2011). Among other things, the possibility of inconsistent or conflicting results is inherent in serial litigation over the same underlying facts. See Highland Lakes Country Club & Cmty. Ass'n v. Nicastro, 201 N.J. 123, 127 (2009).

Here, the trial court reconsidered its pre-trial Burt rulings and held Dr. Popovich 100% responsible after the jury rendered its verdict. The lower courts instructed Dr. Popovich that he should simply recoup that 40% from Dr. Goldsmith in a serial contribution action:

> When we view the record before us through the lens of the Spill Court's holding, Popovich's **path to proceed against Goldsmith for contribution in a separate action pursuant to the Joint Tortfeasors Contribution Law** (JTCL), N.J.S.A. 2A:53A-1 to -5, is evident. Dr. Goldsmith was on notice, as he was originally sued by plaintiff. Dr. Goldsmith was a party to the litigation until his dismissal; his counsel was involved through discovery and pretrial. He was on notice as to the claims against him, and he had time to prepare his defenses.
>
> [(Sa21) (emphasis added)]

The Appellate Division was silent as to whether this new approach and rule of law also binds Dr. Goldsmith to the 40% allocation found against him by the jury. Dr. Goldsmith held a 2017 dismissal, with prejudice, and his attorney relied on that dismissal when requesting to be removed from the e-service list in the case in October 2018. (Da236, Da271)

Under these circumstances, existing case law would prevent Dr. Goldsmith from being bound by a finding when he was a non-party at the time of the trial, and for some five (5) years prior to trial. See Allen v. V & A Bros., Inc., 208 N.J. 114, 137 (2011) (observing that 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."); Mettinger, 153 N.J. at 389 (due process requires that a party being bound by a judgment have notice and an opportunity to be heard).[14]

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[14] On the issue of notice and an opportunity to be heard, it bears reiterating the Appellate Division's decision was animated, at least in part, by its assessment that Dr. Goldsmith's counsel "was involved through discovery and pretrial" and "had time to prepare his defenses." (Sa21).

Simply stated, this is factually wrong. Dr. Goldsmith was dismissed on a R. 4:6-2(e) motion in 2017. Trial was reached five years later, and his attorney requested that the Court remove him from the e-service list on October 1, 2018, over four *years* before trial. (Da271)

Under the Appellate Division's new rule of law, the bare fact that a party knows it was, at one point in time, a party to a lawsuit, notwithstanding its subsequent dismissal from that case, justifies holding that party to all of the subsequent

If Dr. Goldsmith can be bound by the 40% allocation against him, then then this new rule of law will upend civil litigation, particularly medical malpractice litigation, in New Jersey. All doctors and entities holding prior dismissal orders who do not participate in discovery and trial will now be left to wonder if and when some party may seek to bind them to a trial outcome. Assessment of risk, litigation strategy, insurance underwriting, and risk management certainty will be on a completely new and different playing field.

If Dr. Goldsmith is *not* bound by the 40% allocation and a new medical negligence contribution action is to be brought, this implicates similar concerns. A physician, and his lawyer, holding a potentially successful dispositive motion at the outset of a case must now either forego those rights to avoid some unknown exposure many years in the future via a contribution claim, or seek a dismissal and then be left to wonder if subsequent developments and trial-*in which that doctor plays no role*-may give rise to serial contribution litigation.[15]

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outcomes in that suit, regardless of whether it participated, was represented, or was even aware of the developments over a course of years. This cannot be the law.

[15] Notably, the impact of this new approach on the insurance industry will also be considerable. Many medical negligence policies are "claims made," which allows the insurer to assess the risk based on the year in which a claim is asserted. See Med. Inter Ins. Exch. of New Jersey v. Health Care Ins. Exch., 278 N.J. Super. 513, 518 (App. Div. 1995) ("'Claims made' policies, which have become a popular means for insuring against professional malpractice, see Zuckerman v. National Union Fire Ins. Co., 100 N.J. 304, 310, 495 A.2d 395 (1985), differ from traditional "occurrence" policies primarily in the scope of the risk against which they insure [].")

Of course, there is no assurance of a consistent outcome in a serial litigation that is, for practical purposes, a re-trial of the underlying medical malpractice claims. If a contribution action results in the jury finding Dr. Goldsmith more than 40% responsible, less than 40% responsible, or not responsible at all, this will result in an inequity, either to Dr. Popovich or Dr. Goldsmith. This type of serial, fragmented, and potentially conflicting litigation is exactly what the entire controversy doctrine seeks to avoid.

At the risk of stating the obvious, no rational litigant in Dr. Popovich's position would voluntarily opt to be forced into the uncertainty, risk, and expense of a serial contribution action to recoup amounts paid over his share. Instead, the litigant would seek to maintain the dismissed doctor as a party so as to be capable of prosecuting any contribution crossclaim to judgment within the same trial. See R. 4:7-1.[16]

If New Jersey courts are now allowing medical negligence contribution claims to be asserted many years after the initial litigation and jettisoning the entire controversy doctrine in this context, the retroactive risks being assumed by medical malpractice carriers increase exponentially.

[16] Again, the issue of a contribution crossclaim was mooted by the trial court's Burt ruling that accompanied the dismissal of the doctor. The need for contribution was a moot point because the verdict was to be molded for Dr. Goldsmith's share, regardless of whether Dr. Popovich's allocated share exceeded 40%.

It was only in *specific reliance* on the trial court's *repeated* pre-verdict rulings that Burt controlled this case, rendering contribution a moot point, that the trial was held without Dr. Goldsmith as a party. Essentially, the Appellate Division's new approach undermines the very harmony that exists between the Comparative Negligence Act and the Joint Tortfeasor's Contribution Law, in that it allowed the plaintiffs to "arbitrarily" select a victim (Dr. Popovich) after failing to sue Dr. Goldsmith in time, and prevented Dr. Popovich from exercising his contribution rights in the same action. See Glassman, 249 N.J. at 217; see also Magic Petroleum Corp. v. Exxon Mobil Corp., 218 N.J. 390, 403 (2014) ("The basic purpose in creating the right of contribution was to achieve a sharing of the common responsibility [among tortfeasors] according to equity and natural justice.") (citation and quotations omitted).

The lower courts are implicitly, but necessarily, imposing a nonsensical requirement that a remaining defendant must re-join a dismissed defendant via third-party complaint *after* the dismissed defendant procures a dismissal *with prejudice*. Especially egregious in this case is that the dismissal, with prejudice, included verbiage that Dr. Popovich retained the remedy outlined in Burt. (Da236) Yet, the lower courts retroactively held that Dr. Popovich lost that remedy.

Any suggestion that the remaining Defendant is mandated to file a Third-Party Complaint to preserve the right to contribution is antithetical to the right of

contribution itself. The Uniform Contribution Among Tortfeasors Act, at N.J.S.A. 2A:53A-3, provides a right of contribution to a defendant who is "compelled to pay more than [his] percentage share" of the damages has a contribution claim against joint tortfeasors. Jones, 230 N.J. at 159. This right of contribution springs from being compelled to *pay* more than a defendant's share of damages and is statutorily protected and guaranteed. In a case in which the *plaintiff* fails to meet a statutory requirement to file a claim against a defendant, the comparative fault statutes do not require the remaining defendants to be penalized when the factfinder allocates fault. Town of Kearny, 214 N.J. at 103. It is a nonsensical argument to suggest that there is a mandate obligating the remaining defendant to file a Third-Party Complaint against a defendant who was dismissed from the case, in tandem with a dismissal of all cross-claims, *with prejudice*. This is particularly underscored by the fact that, in this case, the Court specifically references the right to Burt credits on the face of the dismissal order.

The same concerns apply to a dismissed party, such as Dr. Goldsmith. Presumably, had Dr. Goldsmith been aware that he may be exposed to a 40% contribution claim some five years later, after a trial he did not attend to defend himself in reliance on a dismissal order, he, too, would have opted to remain a party to offer evidence on his own behalf. *At a minimum*, doctors in Dr. Goldsmith's position are entitled to notice of a new rule of law, imposed some five years after the

operative rulings, before being bound by outcomes with significant financial consequences.

The Appellate Division's approach imposes the consequences of the plaintiffs' failure to timely sue Dr. Goldsmith on Dr. Popovich *on those same doctors*. However, Burt compels the *opposite* result because, as the Appellate Division recognized in 2021, the Burt holding is animated by the fact that the "plaintiffs' own mistakes disrupted the allocation scheme." Carbajal v. Patel, 468 N.J. Super. 139, 156 (App. Div. 2021).[17]

POINT II

If this Court concludes that Burt should be modified or overruled, then such a ruling must be applied prospectively, only, and an entirely new trial must be ordered in this case. (Da352)

A new rule of law affecting the substantive rights of parties *after* the determinative decisions have been made should be applied prospectively, only. Thus, if this Court is inclined to overrule or abrogate Burt, it should either: 1) vacate the entirety of the judgment due to the trial court's repeated assurances that Burt

[17] As in this Court's Mejia and Jones decisions, Carbajal discusses and distinguishes Burt as continuing valid precedent. No appellate decisions-other than that of the Appellate Division panel in this case-have declared the operative aspect of Burt a nullity.

controlled the parties' rights and liabilities; or 2) apply Burt to this case so as to mold the judgment against Dr. Popovich, with any change in the law applying prospectively, only.

This Court has acknowledged the sound public policy grounds for applying new decisions, which overrule precedent, prospectively, only:

> (1) justifiable reliance by the parties and the community as a whole on prior decisions, (2) a determination that the purpose of the new rule will not be advanced by retroactive application, and (3) a potentially adverse effect retrospectivity may have on the administration of justice.
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> [Coons v. Am. Honda Motor Co., Inc., 96 N.J. 419, 426 (1984) (citations omitted)].

Put simply, "[t]he primary concern with retroactivity questions is with "considerations of fairness and justice, related to reasonable surprise and prejudice to those affected." Accountemps Div. of Robert Half of Philadelphia, Inc. v. Birch Tree Grp., Ltd., 115 N.J. 614, 628 (1989) (citation and quotation marks omitted); see also Montells v. Haynes, 133 N.J. 282, 295 (1993) ("Prospective application is appropriate when a decision establishes a new principle of law by overruling past precedent or by deciding an issue of first impression.") (citation omitted).

In this case, the trial was conducted under a framework prescribed by precedent which stood since 2001. This Court could have, but did not, overrule that precedent, but instead cited Burt in Jones (2017), Mejia (2020) and Spill (2025).

The reliance interests in this case cannot be overstated. In 2018, the trial judge specifically advised the parties that there would be a Burt molding of the eventual verdict:

> 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).

Then, some four (4) *years* later, and two years *after* the Mejia decision, as the trial commenced, the trial court denied plaintiffs' motion for reconsideration and reaffirmed its adherence to Burt. The plaintiffs' attorney argued that Drs. Goldsmith and Nguyen were not Burt defendants but instead should be there at the trial and represented:

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

The trial court rejected this request:

> **<u>The fact that they are not here is of no moment to me.</u>** 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. 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)].

Thus, it was of "no moment" to the trial court that the Burt defendants were not present or represented to the trial court at that time, presumably because Burt insulated them from contribution exposure. The jury specifically instructed that Drs. Nguyen and Goldsmith were ***not*** parties to the case, but had indeed been "procedurally dismissed." (20T137) Then, in a complete about-face after the verdict, the trial court retroactively granted the plaintiffs' counsel's request, and specifically opened the door to suing these unrepresented, not present defendants for contribution by abrogating Burt.

The course taken by the trial court cannot be reconciled with New Jersey law. Dr. Goldsmith was a dismissed party at the time of trial, and accordingly would *not* be allowed on the verdict sheet absent a recognized exception. [18] See N.J.S.A 2A:15-5.2(a.)(2). Burt *was* the exception that placed him on the verdict sheet.

[18] Recognized exceptions, other than Burt, include settling defendants, defendants dismissed due to a discharge in bankruptcy, defendants dismissed based upon statute of repose, and public entity defendants against whom plaintiffs did not timely serve a notice of tort claim. Young v. Latta, 123 N.J. 584, 596 (1991); Brodsky v. Grinnell

If Burt is invalid, as the trial court concluded *after the verdict*, then so was the entire trial. That is, if Burt is a nullity, then there was no basis for Dr. Goldsmith to appear on the verdict sheet at all, and the jury was not presented with the proper legal or factual framework for the case. 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). Logic and fairness dictate that, if a new standard is to govern the parties rights and liabilities at trial, the trial must actually be conducted under that standard. 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).[19]

Haulers, Inc., 181 N.J. 102, 116 (2004); Town of Kearny v. Brandt, 214 N.J. 76, 103-04 (2013); Jones v. Morey's Pier, Inc., 230 N.J. 142, 168 (2017).

[19] Plaintiffs did not file a protective cross-appeal from any of the trial court's numerous pre-trial rulings that Burt controlled the trial. R. 2:4-2 (a) Thus, they have waived any argument that Burt is a nullity. Nevertheless, should this Court so conclude, then the entire trial was incorrectly held, including in particular the absence of the Burt defendants, such that a new trial under the correct legal standard is required.

CONCLUSION

For the reasons set forth above, petitioner, Joseph Popovich, M.D., respectfully requests that this Court reverse the judgment of the Appellate Division and remand this matter to the trial court with instructions to either: 1) enter a revised judgment against Dr. Popovich reflecting responsibility for 60% of the verdict, or 2) vacate the judgment entirely with instructions to complete a new trial with the participation of the Burt defendants, should this Court opt to modify, limit, or overrule Burt.

Respectfully submitted,

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

BY: */s/ Casey Acker*

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