

<p>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, &amp;</p> <p>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.</p>	<p><b>SUPREME COURT OF NEW JERSEY</b></p> <p>CIVIL ACTION</p> <p>Supreme Court Docket No.: 091401</p> <p>On Appeal From</p> <p>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION</p> <p>Docket No.: A-2310-22</p> <p>Sat Below:</p> <p>The Honorable Morris Smith, J.A.D., The Honorable Mark K. Chase, J.A.D., The Honorable Christina M. Vanek, J.A.D.</p>
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**PETITION FOR CERTIFICATION OF APPELLANT/PETITIONER  
JOSEPH POPOVICH, M.D.**

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**TABLE OF CONTENTS**

**Contents**

TABLE OF JUDGMENTS AND ORDERS ..... ii

    Trial Court Orders..... ii

    Appellate Court Orders..... ii

TABLE OF AUTHORITIES ..... iii

PRELIMINARY STATEMENT ..... 1

SHORT STATEMENT OF THE MATTER ..... 4

    A. Factual Background. .... 4

QUESTIONS PRESENTED..... 13

LEGAL ARGUMENT ..... 13

    1. Errors complained of..... 13

    2. Reasons certification should be allowed & comments regarding the  
    Appellate Division decision. .... 14

CONCLUSION..... 20

**TABLE OF JUDGMENTS AND ORDERS**

**Trial Court Orders**

- A. December 11, 2017 order deeming Dr. Goldsmith a Burt defendant.....Da235-26
- B. February 28, 2023 Order denying Motion for new trial.....Da351
- C. February 28, 2023 Order of Judgment.....Da347-50
- D. March 31, 2023 Order denying Motion to Amend Judgment.....Da354-55

**Appellate Court Orders**

- A. October 6, 2025 Order Affirming Judgment.....(Sa1)
- B. October 30, 2025 Order Denying Reconsideration.....(Sa19)

## TABLE OF AUTHORITIES

### Cases

<u>Brodsky v. Grinnell Haulers, Inc.</u> , 181 N.J. 102 (2004) .....	16
<u>Buck v. MacDonald</u> , 300 N.J. Super. 158 (App. Div. 1997) .....	15
<u>Burt v. West Jersey Health Sys.</u> , 339 N.J. Super. 296 (App. Div. 2001) .. passim	
<u>Carbajal v. Patel</u> , 468 N.J. Super. 139, 156 (App. Div. 2021).....	19
<u>Estate of Spill by Spill v. Markovitz</u> , 260 N.J. 146 (2025) .....	15, 16
<u>Highland Lakes Country Club &amp; Cmty. Ass’n v. Nicastro</u> , 201 N.J. 123 (2009) .....	18
<u>Hoelz v. Bowers</u> , 473 N.J. Super. 42 (App. Div. 2022) .....	17
<u>Jones v. Morey’s Pier, Inc.</u> , 230 N.J. 142 (2017) .....	16, 19
<u>Kent Motor Cars, Inc. v. Reynolds &amp; Reynolds, Co.</u> , 207 N.J. 428 (2011) .....	17
<u>Mejia v. Quest Diagnostics</u> , <u>Inc.</u> , 241 N.J. 360 (2020) .....	9, 19
<u>Town of Kearny v. Brandt</u> , 214 N.J. 76, 103 (2013) .....	16
<u>Young v. Latta</u> , 123 N.J. 584 (1991) .....	16

### Other Authorities

<u>R. 2:12-3</u> .....	13
<u>R. 2:12-4</u> .....	13, 14, 15
<u>R. 2:12-7</u> .....	4
<u>R. 4:7-1</u> .....	15
<u>R. 4:30A</u> .....	15
<u>R. 4:42</u> .....	9
<u>R. 4:49</u> .....	10

## PRELIMINARY STATEMENT

This case presents an issue of exceptional importance to the administration of justice in New Jersey. The Appellate Division’s decision not only conflicts with its own long-standing precedent in Burt v. West Jersey Health Sys., 339 N.J. Super. 296 (App. Div. 2001), but destabilizes core doctrines that anchor fairness in civil litigation—most notably the Entire Controversy Doctrine, the law of contribution, and the meaning of a dismissal with prejudice. This decision disrupts two decades of reliance by litigants, trial courts, insurers, and the medical community. It calls for this Court’s immediate supervisory review in the interest of justice and public policy.

Under Burt, when a medical malpractice defendant is dismissed because the plaintiff failed to perfect the claim—whether through the statute of limitations or another procedural lapse—the remaining defendants retain two critical protections:

1. the right to an allocation of fault against the dismissed defendant, and
2. a proportionate reduction in their own liability corresponding to that allocation, *even* where their percentage of fault exceeds 60%.

This framework prevents inequitable joint-and-several liability and avoids the very contribution litigation that Burt was designed to eliminate. It ensures that defendants are not punished for a plaintiff’s or attorney’s failure to timely join a culpable party.

Here, plaintiffs failed to sue radiologist Peter Goldsmith, M.D. within the statute of limitations. Dr. Goldsmith secured a dismissal *with prejudice* in 2017. That

order preserved defendants' allocation rights "in accordance with Burt." For years—including at the outset of trial—the court reaffirmed that Burt governed.

Then, in an astonishing reversal, only *after* the jury allocated 40% fault to Dr. Goldsmith, the trial court abruptly abandoned Burt, imposed 100% liability on the remaining defendant, Dr. Popovich, and even directed that Dr. Popovich serve as the conduit for recovery of Dr. Goldsmith's adjudicated share. This eleventh hour departure from settled law produced profound, retroactive unfairness.

The Appellate Division compounded the error by asserting that Dr. Popovich could simply file a separate contribution action to recoup Dr. Goldsmith's 40%. But Dr. Goldsmith—dismissed five years before trial—had no counsel, no experts, no participation, and no opportunity to defend himself in the allocation that is now being used against him. The suggestion that he can simply be sued now ignores a dispositive fact: Dr. Goldsmith possesses a dismissal *with prejudice* and every defense arising from the Entire Controversy Doctrine. He cannot be bound to a judgment rendered in his total absence. No mechanism exists to revive him as a party or to override the doctrines that protect him. The Appellate Division never grappled with this reality—*because it cannot be squared with its holding*.

The consequence is the exact injustice Burt was crafted to prevent: a remaining defendant forced to shoulder another physician's adjudicated share of fault, with no viable contribution remedy. Further, the decision exposes dismissed

physicians to devastating, unforeseen monetary liability—years after their dismissal, with no insurer-provided counsel, no defense, and no opportunity to participate. The notion that a physician dismissed with prejudice is “safe” is now false. If Burt’s proportionate-reduction rule is no longer operative, then dismissed physicians must be kept in litigation, as parties, through trial. That reality upends every expectation on which medical malpractice litigation in this State has relied for 20 years.

Litigants depend on Burt when consenting to dismissals and determining strategy. Physicians rely on it when dismissed with prejudice—believing, correctly until now—that they are no longer at risk. This destroys that reliance and invites serial litigation that this Court’s jurisprudence and public policy long rejected.

If Burt is to be eliminated—if the bedrock rule governing allocation and proportionate reduction is to be undone—only this Court may do so, and only with a clear articulation that protects fairness and reliance interests statewide. At the very least, Dr. Popovich is entitled to a new trial conducted with the proper governing framework.

The Appellate Division’s decision destabilizes settled law, threatens severe consequences for physicians and hospitals, and invites litigation chaos for years to come. This Court’s intervention is necessary not merely to correct error, but to restore coherence, fairness, and predictability to New Jersey’s medical-malpractice allocation regime.

## SHORT STATEMENT OF THE MATTER<sup>1</sup>

### 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).<sup>2</sup> Plaintiffs commenced this action on May 14, 2015, alleging negligence by Joseph Popovich, among others. (Da1) Plaintiffs' Complaint was thereafter amended numerous times.

Relevant to this appeal, plaintiffs did not join Peter Goldsmith, M.D. until their Fourth Amended Complaint, which was beyond the two-year statute of limitations to sue Dr. Goldsmith. (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

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<sup>1</sup> Because the procedural and factual history in this matter are inextricably intertwined, they have been combined for clarity and the convenience of the Court into the Short Statement of the Matter. R. 2:12-7.

<sup>2</sup> Pursuant to R. 2:12-6, the record on this petition is the record 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. For the Court's convenience, Dr. Popovich includes a supplemental appendix, designated "Sa," including the Appellate Division decisions.

indemnity on that same date. (Da114). On June 23, 2017, plaintiffs submitted a Fifth Amended Complaint adding Dr. Nguyen, Nilda Marcelo, RN, and Wilbur Montana, D.O. as direct defendants. (Da128)

Dr. Nguyen successfully 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, 203-04). 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 identified as the radiologist in the medical chart, which was available to plaintiffs well before the expiration of the limitations period. (Da213, ¶¶ 11-13).

At the hearing on Dr. Goldsmith's Motion to Dismiss, Dr. Popovich's counsel specifically asserted that the principles in Burt apply to this statute of limitations dismissal. (1T10) The importance of Burt defendant characterization cannot be overstated. Under Burt, remaining defendants are entitled to a molding of the verdict to reflect a reduction of the dismissed Burt defendant's share of liability, *even* if a remaining defendant's share of liability exceeds 60%, notwithstanding N.J.S.A. 2A:15-5.3(a.). The Burt Court *specifically* held that the plaintiff could not recover the full amount from a remaining defendant held 60% or more responsible, in part because this could render the dismissed

defendants “potentially responsible for damages notwithstanding the dismissal of the case against them with prejudice,” as this would allow the possibility of a contribution claim. Burt, 339 N.J. Super. at 308. Accordingly, the *sine qua non* of Burt defendant status is a dismissal, with prejudice, and a commensurate reduction in liability that renders contribution a moot point. The trial court in this case repeatedly classified Dr. Goldsmith as a Burt defendant, through trial.

The first Burt defendant classification was rendered via order of December 11, 2017, granting Dr. Goldsmith’s Motion to Dismiss:

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)].

At the February 2018 hearing on Dr. Nguyen’s similar motion to dismiss, plaintiff’s counsel protested the application of Burt, and the trial court *reaffirmed* that these were Burt defendants:

[PLAINTIFFS’ COUNSEL]: 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.

[PLAINTIFFS' COUNSEL]: Okay. Thank you.

THE COURT: You got that? All right. All right.

(2T29-2T30) (emphasis added). The trial court entered the implementing order on February 9, 2018. (Da254-55).

The *third* reiteration of Burt defendant status was at the trial in 2022. The trial court addressed preliminaries on the first day of trial.<sup>3</sup> At that time, for the first time since these 2017-18 orders, plaintiffs' counsel orally moved for adjournment of the trial or reconsideration of the Burt defendant orders:

**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.****

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<sup>3</sup> By the time of trial, only Dr. Popovich remained as a defendant, secondary to various pre-trial motions and dismissals of the remaining defendants.

[(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. (3T30)

Here, again, the trial court *denied* plaintiffs' request, and reaffirmed 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. []

[(3T41-3T42) (emphasis added)].

The parties, and the Court, understood that Dr. Popovich would be responsible *only* for his allocated share of negligence, *even* if that exceeded 60%, per Burt.

The jury concluded that Dr. Popovich proved that Dr. Goldsmith deviated from the standard of care, 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. The jury allocated

60% of fault to Dr. Popovich, and 40% of fault to Dr. Goldsmith. (21T7, Da333-35). After molding the award represented a gross recovery of \$1,568,897.80.

After the verdict, the plaintiff's counsel renewed the previously denied requests to abrogate Burt. 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. Dr. Popovich's counsel objected to this proposed 5-day order as inconsistent with Burt. (Da336).

Plaintiffs' counsel submitted a letter of December 22, 2022, re-hashing the arguments against the application of Burt that had been rejected by the trial court from 2017 through the 2022 trial. (Da338-40). At bottom, plaintiffs' counsel urged that Mejia v. Quest Diagnostics, Inc., 241 N.J. 360 (2020) constituted a *sub-silentio* overruling of Burt.<sup>4</sup>

Dr. Popovich timely moved for a new trial. (Da341-42). This was argued before the trial court on February 17, 2023, simultaneously with argument on the 5-day order seeking to abrogate Burt and hold Dr. Goldsmith 100%

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<sup>4</sup> In Mejia, the Supreme Court held that a *third-party* defendant facing contribution and indemnity claims by the original defendant was not entitled to a dismissal from participation at the trial. Id. at 365. Here, Dr. Goldsmith was *granted* a dismissal from participation at trial. Mejia did not imply, let alone hold, that under those circumstances Burt can no longer be applied.

responsible for the verdict. The trial court denied Dr. Popovich's R. 4:49-1 motion for a new trial. (22T23-22T24, Da351). The trial court reserved decision on the Burt issue, permitting Dr. Popovich to submit a competing order for consideration and allowing supplemental briefs on the issue. (22T11, 22T25)

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. (Da349). Dr. Popovich moved to alter or amend the judgment, under R. 4:49-2 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; 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, and denied the motion. (Da354-55). The trial judge reasoned:

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. [].

[(23T16-23T17) (emphasis added)].

The trial court was correct in that reducing the verdict would vitiate application of joint and several liability-that is *exactly* what Burt defendant status means. Burt, 339 N.J. Super. at 308. Holding otherwise, as the trial court did, nullifies Burt, despite years of decisions specifically applying Burt to this case.

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, 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]

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 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)]<sup>5</sup>

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<sup>5</sup> 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. (Da556).

As detailed below, this outcome conflicts with no less than three principles of law codified in prior Appellate Division decisions.

### **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.**

### **LEGAL ARGUMENT**

#### **1. Errors complained of.**

The Appellate Division abrogated the continuing viability of Burt and, in so doing, undermined the principles of the entire controversy doctrine. Dr. Popovich submits this Petition for Certification of a Final Order of the Appellate Division, under R. 2:12-3(a). The Appellate Division's decision is in irreconcilable conflict with Burt, together with this Court's jurisprudence under the CNA and the rationale of the entire controversy doctrine. Unto itself, this merits certification. R. 2:12-4.

Dr. Popovich timely moved for reconsideration of the Appellate Division order on October 15, 2025, pursuant to R. 2:11-6. The Appellate Division denied reconsideration on October 30, 2025. (Sa19). Pursuant to R. 2:4-3(b), the 20 day period for Dr. Popovich to file a Notice of Petition was tolled during the pendency of the Motion for Reconsideration. Dr. Popovich's Notice of Petition for Certification was timely filed on November 10, 2025. See R. 2:12-3(a). (Sa22).

As an additional basis for certification, the *sub silentio* abrogation of Burt, as well as the necessary corollary that defendants holding Burt dismissals now face new, open-ended contribution liability, is an issue of general public importance for both medical negligence plaintiffs and defendants. R. 2:12-4. Clarity and certainty are required. The interest of justice requires intervention by this Court.

**2. Reasons certification should be allowed & comments regarding the Appellate Division decision.**

The Appellate Division held that, notwithstanding the holding in Burt and the trial court's assurances that Dr. Goldsmith would be treated as a Burt defendant, Dr. Popovich may be liable for 100% of the verdict under principles of joint liability. There is no way to square that outcome with the Burt decision.

This was especially egregious since the trial court *repeatedly* ruled that Burt defendant status would be applied to Dr. Goldsmith, with the commensurate reduction of liability. Were that not the case, of course Dr. Popovich would have

wanted Dr. Goldsmith to be a party at trial so that he could bind him to the contribution allocation and all relevant judgments could be entered in one proceeding. Dr. Popovich relied on the trial court's assurances that Burt defendant status was imposed on Dr. Goldsmith, and proceeded accordingly.

This is manifestly unfair to both Dr. Popovich and Dr. Goldsmith. As to Dr. Popovich, it goes without saying that a party to a lawsuit may reasonably rely on the trial court's *repeated* rulings on an issue when determining his litigation strategy and settlement posture. Dr. Popovich is now forced into a position where he must bring a new contribution action against Dr. Goldsmith to recover 40% of over \$2 million. Dr. Goldsmith will no doubt invoke both: 1) his dismissal with prejudice; and 2) the entire controversy doctrine as it bears on mandatory crossclaims. Either may provide him defenses. See R. 4:7-1; R. 4:30A; Buck v. MacDonald, 300 N.J. Super. 158, 160 (App. Div. 1997). The Appellate Division was silent as to how Dr. Popovich may overcome these barriers to successfully recouping contribution from Dr. Goldsmith.

Recently, this Court recognized the propriety of seeking contribution via a subsequent action against a doctor that *unlike* in this case- *could not be included into the case* due to the lack of personal jurisdiction. Estate of Spill by Spill v. Markovitz, 260 N.J. 146, 162 (2025) The Markovitz decision underscores the point that the Appellate Division conflicted with precedent. See R. 2:12-4. Dr. Goldsmith *could have* been a party to this case through trial, but was dismissed and excused

based on Burt. In Markovitz, there were no entire controversy or dismissal with prejudice concerns, because the doctor from whom contribution was to be sought was *not* a proper party to the New Jersey action and could not be on the verdict sheet.

Markovitz proves the conflict between this panel's decision and existing precedent. The Markovitz Court held that the defendants were free to pursue a subsequent contribution claim against the non-party doctor in *New York*, and took no position on the merits of such an action. Id. at 163. Here, Dr. Popovich *already* brought, and prevailed upon, his claim against Dr. Goldsmith. The Appellate Division has directed him to do so in *New Jersey* a *second* time.

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. See N.J.S.A. 2A:15-5.2(a.)(2). Burt was the exception that placed him on the verdict sheet.<sup>6</sup> If Burt is invalid, then so was the entire trial. That is, if Burt is a nullity, Dr. Goldsmith *could not* appear on the verdict sheet unless he was a *party*, such that Dr. Popovich's contribution judgment would have issued *in this action*.

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<sup>6</sup> Other recognized exceptions 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 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).

Importantly, the Appellate Division simply erred as to a factual predicate for its conclusion when it stated that Dr. Goldsmith participated in discovery and pre-trial. (Sa21). In 2022, the Appellate Division discussed the numerous practical difficulties in bringing a contribution action secondary to a consent judgment against one joint tortfeasor. See Hoelz v. Bowers, 473 N.J. Super. 42, 66 (App. Div. 2022). In that case, 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.

The same would appear to hold true here for Dr. Goldsmith. Thus, the supposed “remedy” the Appellate Division has given Dr. Popovich as consolation for having his Burt allocation rights retroactively stripped from him is *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). Further, there is no assurance of a consistent outcome. If the future jury in a contribution action were to allocate more, less, or nothing at all to Dr. Goldsmith, this will skew the outcome of the contribution action to be unfair and disproportionate for one or the other. This is contrary to the policies underlying the entire controversy doctrine. See Highland

Lakes Country Club & Cmty. Ass'n v. Nicastro, 201 N.J. 123, 126 (2009) (observing that the principles of the entire controversy doctrine militated against “forcing [the parties] into serial litigation with possible inconsistent results” and observing that such serial litigation arising from the “same nucleus of operative facts” would “render null any concept of fundamental fairness.”).

No rational litigant in Dr. Popovich’s position would opt to be forced into the uncertainty, risk, and expense of a serial contribution action to recoup amounts paid over his share. 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. Again, in the procedural posture of this case, it was Dr. Popovich’s burden to establish Dr. Goldsmith’s liability. (20T133) He *already* did so, such that the jury allocated 40% to Dr. Goldsmith. Yet, unless dismissed party Dr. Goldsmith could somehow be bound to that allocation in a subsequent contribution action, all that the Appellate Division has done is force two serial trials. This is visiting the consequences of the *plaintiffs’* failure to timely sue Dr. Goldsmith on Dr. Popovich. 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).<sup>7</sup>

Here, plaintiffs’ own mistake in failing to timely sue Dr. Goldsmith was the predicate for the trial court’s Burt orders. Accordingly, the trial court correctly applied Burt through trial phase. Had the trial court not reversed course *post-verdict*, Dr. Popovich would have been aware of these costs and risks and advocated to maintain Dr. Goldsmith’s status as a *party* to this trial,<sup>8</sup> so that the contribution allocation could be enforced against him as a judgment on the crossclaim.

The Appellate Division could only reach this outcome by nullifying Burt. Yet, this Court has never done so. In fact, it cited *favorably* to Burt:

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 the circumstances of this case, **we consider the Appellate Division’s analysis in Burt to effectively reconcile the governing statutes.**

[Jones, 230 N.J. at 168 (emphasis added).]

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<sup>7</sup> 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 this panel-have declared the operative aspect of Burt a nullity.

<sup>8</sup> 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. Under the Appellate Division’s new framework, his mere knowledge that he was, at one time in 2017, a defendant in the case is sufficient to revive his exposure to a contribution claim *circa* 2025.

Notwithstanding, the trial court and the Appellate Division have (necessarily) decided, for the first time, that Burt is no longer good law. Even if assuming this outcome were to be correct, it occurred in the context of *post-verdict* reconsideration, to the profound detrimental reliance of Dr. Popovich.

Every dismissed Burt defendant in pending and future medical negligence cases now faces open-ended exposure for contribution claims years later, based on trials and allocations in which they did not participate. Under the Appellate Division's judgment in this case, those orders are nullities, leaving both the remaining defendant and the dismissed defendant exposed. The interests of justice warrant intervention by this Court to reconcile the outcome with precedent and provide prospective certainty to medical malpractice litigants statewide.

### **CONCLUSION**

For the reasons set forth above, petitioner, Joseph Popovich, M.D., respectfully requests that this Court grant his petition for certification and reverse the judgment of the Appellate Division.

Respectfully submitted,  
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Date: December 9, 2025