

<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/Petitioner, &</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>SUPREME COURT OF NEW JERSEY</p> <p>CIVIL ACTION Docket No. 091401 Submitted: <u>December 15, 2025</u></p> <p>On Appeal From SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION</p> <p>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.</p>
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**REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIFICATION OF
APPELLANT/PETITIONER, JOSEPH POPOVICH, M.D.**

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PRELIMINARY STATEMENT

FACTUAL AND PROCEDURAL HISTORY¹

Dr. Popovich respectfully incorporates by reference his “Short Statement of the Case” set forth in his Petition for Certification, and adds the following.

First, plaintiffs filed a purported cross-petition for certification, in which plaintiffs sole requested relief is the summary dismissal of this petition on the alleged basis of a lack of timely notice. Procedurally, a cross-petition was not the appropriate filing, as plaintiff does not seek any affirmative relief in connection with the Appellate Division judgment. See R. 2:12-3(b). Dr. Popovich filed an appropriate motion to strike plaintiffs’ defective cross petition.

To the extent that plaintiffs claim some inability to present the Court with a cross-petition that they wished to file, Dr. Popovich has already indicated that he has no objection to the plaintiffs submitting an appropriate cross-notice, seeking certification on a substantive issue implicated by the Appellate Division judgment, within any extended deadline the Court may deem reasonable and appropriate. See R. 2:4-4(c). As plaintiffs have never made any such motion to submit an appropriate cross-petition, Dr. Popovich presumes that plaintiffs do not have any substantive bases for certification that they wish this court to consider via a cross-petition.

¹ The factual and procedural background in this matter are inextricably intertwined and have been combined for efficiency and convenience of the Court.

LEGAL ARGUMENT

POINT I – THE PETITION FOR CERTIFICATION ADDRESSES THE FUNDAMENTAL ISSUE OF WHETHER TRIAL COURT DECISIONS MAY BE RELIED UPON BY LITIGANTS.

A fundamental issue in this case is whether any litigant in New Jersey may rely upon the decisions of the trial court in formulating pre-trial and trial strategy, or if, instead, the proverbial “rules of the game” can be changed after the game is over, leaving a party with no ability to adapt its approach to conform with the ruling *because the trial is already complete*. Plaintiffs imply some type of nefarious behavior by Dr. Popovich, or his counsel, for their reliance on the trial court’s repeated pre-trial rulings upholding the viability and applicability of Burt v. West Jersey Health Sys., 339 N.J. Super. 296 (App. Div. 2001). Under plaintiffs’ framework, no civil litigant, ever, could reasonably rely on the pre-trial rulings of a trial judge when choosing a trial strategy and approach.

It is axiomatic that parties-justifiably-rely on a trial court’s pre-trial decisions in evaluating the potential exposure, strengths and weaknesses of their respective positions, and trial strategy. In recognition of this truism, the law of the case doctrine protects the reasonable expectations of the parties by counseling that a decision of a trial court generally should be preserved by a co-equal trial court. See Lanzet v. Greenberg, 126 N.J. 168, 192 (1991) (observing that “decisions of law made in a case should be respected by all other lower or equal courts during the pendency of

that case.”) (citation omitted). Reconsideration of an interlocutory order is proper only if “consonant with the interests of justice to do so.” See Ford v. Weisman, 188 N.J. Super. 614, 619 (App. Div. 1983); R. 4:42-2(b).

In this case, in **2018**, the trial judge expressly stated that, due to the Burt defendant characterization, any fault allocated to the absent Burt defendants would *not* be allocable to the remaining 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.

MR. MAKOWICZ: Okay. Thank you.

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

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

Dissatisfied with this framework, **on the very day trial started in 2022**, plaintiff’s counsel orally moved for reconsideration of the prior Burt defendant

orders and, therein, to adjourn the trial so that Drs. Goldsmith and Nguyen would participate *as parties*:

[PLAINTIFFS' COUNSEL]: [] 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 was unmoved, standing by its determinations that Burt applied to these facts and the doctors would not be re-joined as parties:

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)].

By (repeatedly) deeming these defendants Burt defendants, the trial court made clear that any amounts allocated to the dismissed Burt defendants would *not* be collectible from Dr. Popovich, *even* if Dr. Popovich is found 60% or more at fault. Such an outcome is the essence of the Burt decision. Burt, 339 N.J. Super. at 306.

After the jury found Dr. Popovich 60% responsible, the trial judge reversed course and held Dr. Popovich 100% responsible. The “consolation prize” for stripping Dr. Popovich of his justified reliance on years of (correct) law of the case is a hollow assertion that he might somehow be able to bring a contribution action against Dr. Goldsmith for a contribution judgment of 40%. Meanwhile, Dr. Goldsmith was dismissed from the case, with prejudice, roughly five (5) *years* prior to trial. Neither plaintiffs’ brief, nor the lower courts, made any effort to grapple with the reality that any new contribution action against Dr. Goldsmith to collect the 40% allocated to him *in his absence* faces almost insurmountable barriers due to the dismissal with prejudice and the entire controversy doctrine.

To re-state the obvious, if a litigant will face exposure in excess of his allocated share, he is entitled to prosecute a contribution crossclaim to judgment. Here, Dr. Popovich was promised he *would not* face such exposure in conjunction with Dr. Goldsmith being dismissed as a party, so further prosecuting the crossclaim to judgment was a moot point. *After* the verdict, Dr. Popovich was then told he faces additional exposure of 40% for Dr. Goldsmith’s share, with *no ability* to enter

judgment on a crossclaim against a co-party. According to the Appellate Division, he should just file a brand-new contribution action against non-party Dr. Goldsmith, leaving aside Dr. Goldsmith's defenses as well as the distinct possibility that an inconsistent result may be reached when there is serial litigation over the same medical negligence allegations. (Sa21) There is nothing "consonant with the interests of justice" about granting a motion for reconsideration, post-verdict, which radically curtails a civil defendant's rights. See Ford, 188 N.J. Super. at 619.

One of two things is required. If this Court reaffirms the validity of Burt, as discussed below, then the lower courts' entry of judgment must be reversed, and a molded judgment of 60% of the total liability may be entered against Dr. Popovich. Alternatively, if this Court accepts plaintiffs' position that the Burt decision is no longer good law, then the trial court's error was in applying Burt and denying plaintiff's trial-time motion for reconsideration, such that a new trial, with the Burt defendants present as parties, must be ordered.

The importance of this issue is not confined to this case and the present parties. Either parties can reasonably and justifiably rely on trial courts' pre-trial rulings to govern trial expectations and strategy, or they cannot and any prospective deference to the law of the case as defining the issues for the parties is misplaced. One way or the other, the interests of justice require clarification from this Court. R. 2:12-4.

POINT II – BURT REMAINS VIABLE AND APPLICABLE PRECEDENT.

The foundation of the Appellate Division’s judgment rests on the premise that Burt has been abrogated. There is no other way to square its decision with Burt, because Burt expressly provides a “carve out” of joint and several liability when it applies. This is alone sufficient to warrant certification, under Rule 2:12-4.

This Court has had numerous opportunities to evaluate Burt and, if it believed that Burt was inconsistent with intervening precedent, to expressly overrule or abrogate it. Instead, this Court *cites* Burt as continuing precedent, including as recently as this year. See Estate of Spill by Spill v. Markovitz, 260 N.J. 146, 159 (2025) (“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 [].”)

Either Burt remains good law, or it does not. Ultimately, that is a decision for this Court. This Court has continued to cite Burt into 2025. The Appellate Division judgment in this case sub-silentio overruled Burt, without reconciling that *ex post facto* determination with the reality that the trial was held under the Burt framework.

From the beginning, the trial court applied Burt to this case, allowing non-parties to appear on the verdict sheet absent *any* other recognized exception to

N.J.S.A. 2A:15-5.2(a.) for their presence. Then, post-verdict, the trial judge refused to apply Burt with regard to the allocation of liability. Put simply, the trial judge applied half of Burt.

The Burt decision cannot be applied *a la carte*. The *only* way these non-party doctors could properly appear on the verdict sheet was by applying Burt. But, the necessary corollary to proceeding with these non-parties on the verdict sheet is that there is a reduction of any allocated share of their liability, even if the remaining defendant is 60% or more at fault. The trial court, and the Appellate Division, effectively created a *new* category of quasi-Burt defendants, who can be on the verdict sheet but are not subject to reduction of liability.

While the implicit intent may have been to avoid an outcome that left plaintiffs unable to recover the 40% allocated share and raised questions as to why plaintiff did not join the Burt defendant sooner, the immutable fact is that this hybrid outcome fashioned by the trial court and affirmed by the Appellate Division is irreconcilable with existing precedent. If Burt is invalid, then so too was the entire trial.

POINT III – BURT SQUARELY APPLIES TO THE FACTS OF THIS CASE, AS PLAINTIFFS’ FAILURE TO TIMELY SUE DR. GOLDSMITH IS THE REASON FOR HIS DISMISSAL.

Remarkably, plaintiffs suggest that, even if Burt remains viable precedent, it does not apply to them because nothing they did, or failed to do, impacted Dr. Popovich’s claims against Dr. Goldsmith. It was the plaintiffs’ failure to timely sue

Dr. Goldsmith in the first place that resulted in Dr. Goldsmith obtaining a dismissal order under Burt.

Plaintiffs now claim that they were somehow restricted or prohibited from suing Dr. Goldsmith because they lacked any meritorious basis to do so (though he was ultimately found 40% at fault). See Pb. at 6. In so doing, they analogize themselves to the plaintiffs in Estate of Spill, wherein the plaintiffs could not sue the absent doctors because they were not subject to personal jurisdiction in New Jersey.

Quite the contrary, Estate of Spill provides plaintiffs with no refuge. It proves Dr. Popovich's point. In Estate of Spill, it was not any act, or failure to act, on their part which rendered the absent doctors outside the jurisdiction of the New Jersey Court. Estate of Spill, 260 N.J. at 159.

Here, the opposite is true. Plaintiffs failed to timely sue a doctor who was otherwise within the jurisdiction of the New Jersey court. At the November 2017 hearing on Dr. Goldsmith's motion to dismiss, plaintiffs' counsel argued that plaintiffs had the case reviewed by their experts, and were told there was "no basis" to sue Dr. Goldsmith, and plaintiffs were unable to secure an Affidavit of Merit within the limitations period. (1T8) In granting the motion to dismiss, the trial judge observed that the plaintiffs "may very well have an argument for the Appellate Division and perhaps they could clear up that particular issue," but that plaintiffs' claims against Dr. Goldsmith were time-barred by the statute of limitations. (1T11)

Plaintiffs had two years to review the medical records and sue potentially culpable defendants. They did not sue Dr. Goldsmith within two years, and the jury ultimately found that he was 40% responsible. This failure to sue him within that period is the *singular* reason that he was dismissed from the case pursuant to Burt. The Estate of Spill case proves the point by its contrast with the present facts.

CONCLUSION

The trial court and the Appellate Division have overruled Burt, or at least *half* of Burt. Absent correction and clarification of this important issue, there is now a new category of non-parties who can now appear on the verdict sheet. As this is irreconcilable with Burt, as well as a plethora of decisions from this Court, the question should be squarely addressed and resolved by this Court. Further, the interests of justice merit this Court's intervention when a civil defendant justifiably relies on five (5) years of trial court decisions to determine his trial position, only to have that completely undone *after* the verdict.

Respectfully submitted,

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BY: /s/ Casey P. Acker

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Dated: December 15, 2025