

ESTATE OF VICTOR GAZA, JR. by
PURITA GAZA the Administratrix of
the Estate of Victor Gaza, Jr. and
PURITA GAZA, his wife, individually,

Plaintiff(s),

vs.

JOSEPH POPOVICH, M.D.; ANA J.
ICABALCETA, R.N.; ANN MARIE
ALTOONIAN, R.N.; KATHLEEN
O’SULLIVAN, R.N.; DAMARIS
RODRIGUEZ, R.N.; JOHN DOES,
M.D. 1-10 (fictitious names); HUDSON
HOSPITAL OPCO, LLC d/b/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.,

Defendant(s).

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 091401

Civil Action

ON PETITION FOR
CERTIFICATION FOR REVIEW OF
FINAL JUDGMENT OF THE
SUPERIOR COURT OF NEW
JERSEY, APPELLATE DIVISION,
DOCKET NO.: A-2310-22

ENTERED: October 6, 2025

SAT BELOW:

HON. MORRIS G. SMITH, J.A.D.
HON. MARK K. CHASE, J.A.D.
HON. CHRISTINE M. VANEK, J.A.D.

**PLAINTIFF-RESPONDENT’S BRIEF IN OPPOSITION TO
PETITION FOR CERTIFICATION**

BLUME, FORTE, ZERRES, MOLINARI,
MAKOWICZ, ELWOOD, ZENNA & FELDMAN, P.C.
One Main Street
Chatham, New Jersey 07928
Attorneys for Plaintiffs/Respondents

On the Brief:

JONATHAN M. RAWSON (ID # 480232025)

MITCHELL J. MAKOWICZ, JR. (ID # 028621986)

TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii
PRELIMINARY STATEMENT 1
STATEMENT OF FACTS AND PROCEDURAL HISTORY. 3

LEGAL ARGUMENT

I. PETITIONERS HAVE FAILED TO ARTICULATE A BASIS FOR SUPREME COURT REVIEW AS BOTH FIELDER AND TICE WERE FOLLOWED AND THE REVERSAL WAS DUE TO PROCEDURAL ERROR 8

II. PETITIONERS’ ATTEMPT TO RAISE A DISTINCTION BETWEEN RECKLESS AND WILLFUL CONDUCT IS ILL-FOUNDED AND, IN ANY EVENT, CONSTITUTES AND CONSTIUTES A QUESTION OF FACT. 9

III. PETITIONERS FAIL TO RAISE THE APPELLATE DIVISION’S PROCEDURAL BASIS FOR REVERSAL; THUS, THEY HAVE WAIVED ANY OPPORTUNITY TO CHALLENGERTUNITY TO CHALLENGE 11

IV. THE RULING OF THE APPELLATE DIVISION RECOGNIZES AN APPROPRIATE BASIS OF LIABILITY, REGARDLESS OF THE TERM USED BY RESPONDENTS’ EXPERTS 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Brett v. Great Am. Recreation,
144 N.J. 479 (1996) 9

Burt v. W. Jersey Health Sys.,
339 N.J. Super. 296 (App. Div. 2001) *passim*

Carrino v. Novotny,
78 N.J. 355 (1979) 9

Holloway v. State,
125 N.J. 386 (1991) 14

Jones v. Morey’s Pier, Inc.,
230 N.J.142 (2017) *passim*

Lee’s Hawaiian Islanders, Inc. v. Safety First Prods., Inc.,
195 N.J. Super. 493 (App. Div. 1984) 15

Mejia v. Quest Diagnostics, Inc.,
241 N.J. 360 (2020) *passim*

Est. of Spill v. Markovitz,
260 N.J. 146, 159 (2025) 7, 13, 19, 20

Reilly v. AAA Mid-Atlantic Ins. Co. of N.J.,
194 N.J. 474, 496 (2008) 11

Bandel v. Friedrich,
122 N.J. 235, 237 (1991) 12

Mahony v. Davis,
95 N.J. 50, 52 (1983) 17

Statutes and Rules

N.J.S.A. 2A:15-5.3(a) 16, 17

<u>N.J.S.A. 2A:15-5.3(e)</u>	17
<u>N.J.S.A. 2A:53A-41</u>	3
<u>N.J.S.A. 2A:15-59.1</u>	3
<u>R. 1:4-8</u>	3
<u>R. 2:12-3(a)</u>	7, 9
<u>R. 2:12-4</u>	11, 17
<u>R. 4:8-1</u>	14
<u>R. 4:7-5(a)</u>	15
<u>R.P.C. 3.1</u>	3

PRELIMINARY STATEMENT

Petitioner’s framing of the issues is entirely erroneous. The Appellate Division’s decision does not conflict with precedent, nor does it “destabilize[] core doctrines.” Petitioner was granted the opportunity – correctly or incorrectly – to conduct the trial exactly as he wished, with empty chair claims against doctors unrepresented at trial. Petitioner now claims he was deprived of significant rights because even though Petitioner had free rein to blame these doctors for Respondent’s losses as empty chairs, the jury found Petitioner sixty percent (60%) at fault. Accordingly, the Trial Court enforced the entire judgment against Petitioner.

This Court addressed this very issue – how to apply the Joint Tortfeasors Contribution Law (JTCL) when so-called “Burt defendant” status is sought by defendants with viable contribution claims – in Mejia v. Quest Diagnostics, Inc. The Court unequivocally declared that a plaintiff may recover the full measure of damages as laid out in the JTCL in that circumstance. The Appellate Division thus correctly affirmed the Trial Court.

Accordingly, Petitioner’s entire Petition is based on a false premise, as the Appellate Division’s holding does not conflict with existing precedent nor does it visit unfairness upon him.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent relies on the Statement of Facts and Procedural History set forth within its Appellate Division brief, summarized and supplemented as follows: this Petition for Certification stems from the medical malpractice committed by Petitioner Joseph Popovich, M.D. over twelve years ago. On May 15, 2013, Plaintiff/Respondent's¹ decedent, Victor Gaza, Jr. underwent surgery to remove his gallbladder, which was performed by Petitioner. (5T172:19-23). Because Petitioner became concerned during surgery that Mr. Gaza was at risk for potential bowel injury, he ordered Mr. Gaza admitted to the hospital for "close observation." (5T175:3-6; 13T66:18-22). However, Petitioner neither examined Mr. Gaza nor requested that another physician do so, despite signs and complaints consistent with bowel injury and perhaps perforation. (7T51-7T52; 7T59; 8T66). Petitioner's negligence in rendering post-operative care caused Mr. Gaza to go into septic shock at approximately 4:30 in the morning on May 17, 2013. (8T70:2-5). Mr. Gaza died on August 4, 2013. (5T206:5-6).

Respondent filed a medical malpractice complaint against Petitioner on May 15, 2015, alleging that his negligence caused Mr. Gaza's injuries and death. (Da2).² Respondent subsequently amended the Complaint several times, two of which are

¹ References to Plaintiff/Respondent refer to Plaintiffs Estate of Victor Gaza, Jr. and Purita Gaza collectively.

² Respondent cites to the Appellate Division appendices and transcripts, and to the supplemental appendix designated "Sa" in Petitioner's Petition for Certification that contains the Appellate Division decisions.

relevant here. Respondent's Fourth Amended Complaint added as a direct defendant Peter Goldsmith, M.D., a radiologist who read a CT scan of Mr. Gaza on May 17, 2013. (Da75). Petitioner subsequently asserted a crossclaim for contribution against Dr. Goldsmith. (Da155). Then, after Petitioner filed a Third-Party Complaint against three additional doctors, including Jim Nguyen, D.O. (a hospitalist who cared for Mr. Gaza after his surgery), Respondent filed a Fifth Amended Complaint naming the three doctors in the Third-Party Complaint as direct defendants. (Da114; Da128). The reason Respondent did not originally name Drs. Goldsmith or Nguyen as defendants is simple: Respondent did not believe there was evidence that these doctors were at all at fault vis-à-vis Mr. Gaza's injuries. (14T9:14-25). Respondent is duty-bound to refrain from presenting claims that it believes are without merit. See R.P.C. 3.1; Rule 1:4-8; N.J.S.A. 2A:15-59.1; and N.J.S.A. 2A:53A-41. Respondent only sought to amend in response to allegations made by Petitioner during discovery. (14T16-23).

Dr. Nguyen moved to dismiss Respondent's Amended Complaint for failure to comply with the statute of limitations. (Da158). The Trial Court granted Dr. Nguyen's motion on September 29, 2017. (Da203-04). Dr. Goldsmith then filed a motion to dismiss Respondent's Amended Complaint on statute of limitations grounds, which the Trial Court likewise granted on December 11, 2017. (Da235-36). Over Respondent's objection, this Order provided that although Respondent's

direct claim was dismissed as to Dr. Goldsmith, Petitioner would be permitted to assert claims against this non-represented, non-party physician at trial pursuant to Burt v. W. Jersey Health Systems, 339 N.J. Super. 296 (App. Div. 2001). (Da236). Dr. Nguyen next moved to dismiss Petitioner's Third-Party Complaint, and despite having every right and ability to pursue his third-party contribution claims, Petitioner instead chose to file a cross-motion seeking to again treat these third-party defendants as the defendants were treated in Jones v. Morey's Pier and Burt. (Da244). Over Respondent's objections, the Trial Court ruled that Drs. Goldsmith and Nguyen would be treated as so-called "Burt defendants." (2T29-2T30).

By the time trial commenced in November 2022, Petitioner was the only direct defendant remaining in the case. Respondent again objected to the so-called "Burt defendant" status of Drs. Goldsmith and Nguyen at a pre-trial conference. (3T19). Respondent argued that unlike the defendants in Burt and Jones, Petitioner had viable contribution claims against Drs. Goldsmith and Nguyen because Respondent had done nothing that prevented Petitioner from moving forward with the claims. (3T22). Even though Respondent's claims were barred by the statute of limitations, no such impediment applies to a defendant's contribution claims. (3T36). Therefore, the proper procedure would have been for Petitioner to pursue contribution from the doctors pursuant to Mejia v. Quest Diagnostics. To avoid compounding error, Respondent argued that only Petitioner should appear on the verdict sheet, or that

the trial should be adjourned to give Drs. Goldsmith and Nguyen an opportunity to appear with counsel. (3T30). Over vehement opposition by Petitioner, the Trial Court ruled that Drs. Goldsmith and Nguyen were to be treated as so-called “Burt defendants,” meaning they were not active parties in the case (i.e., they were without representation of counsel), but would appear on the verdict sheet. (2T29). Therefore, as Petitioner’s counsel conceded, no one could recover anything directly against either Dr. Goldsmith or Dr. Nguyen as a result – not Respondent, because they were not direct defendants, and not Petitioner, because of the dismissals Petitioner requested. (2T29-2T30) This was a calculated legal stratagem urged by Petitioner and accepted by the Trial Court. Hence, the trial was conducted exactly as Petitioner sought, and he was permitted to argue Drs. Goldsmith and Nguyen’s negligence to the jury with the benefit of those doctors not being represented by counsel.

After deliberation, on December 20, 2022, the jury found both Petitioner and Dr. Goldsmith liable, and allocated sixty percent (60%) fault to Petitioner, the only direct defendant, and forty percent (40%) fault to Dr. Goldsmith. (21T7). After the Trial Court entered judgment in the amount of \$1,922,834.71, which included the stipulated lien and pre-judgment interest, Respondent submitted a Proposed Form of Order of Judgment providing that Respondent was entitled to recover the full measure of damages from Petitioner because he was a direct defendant found by the jury to be sixty percent (60%) at fault. (Pa24-26). Petitioner objected and asserted

that forty percent (40%) of the verdict should be deducted due to the so-called “Burt-defendant” designation of Dr. Goldsmith. (Da336). After extensive briefing and oral argument, the Trial Court executed the Order of Judgment submitted by Respondent on February 28, 2023. (Da347).

Two weeks later, Petitioner moved to “revise” the Order of Judgment. (Da352). On March 31, 2023, the Trial Court denied Petitioner’s motion and ruled that the JTCL provides that Respondent is permitted to recover the entire judgment from Petitioner. (23T16-23T17).

Petitioner filed his appeal on April 5, 2023, arguing that the Trial Court erroneously “abrogated” Dr. Goldsmith’s so-called “Burt-defendant” status when it accepted Respondent’s proposed Order of Judgment. (Da356). Respondent opposed Petitioner’s application, arguing the Trial Court properly entered judgment against Petitioner for the full measure of the verdict, as mandated by this Court’s decision in Mejia v. Quest Diagnostics, Inc. and by the Joint Tortfeasors Contribution Law. On October 6, 2025, the Appellate Division rendered its decision, agreeing with Respondent and affirming the Trial Court’s Order. (Sa1). The Appellate panel reasoned that like the defendants in Mejia, “Popovich’s statutory right of contribution is not constrained or limited by the viability of [Respondent’s] direct claims” against Drs. Goldsmith and Nguyen, which were dismissed on statute of

limitations grounds. (Sa17). Therefore, reasoned the Appellate Division, it follows that Mejia is controlling, and the Trial Court's Order was proper. (Sa17).

Unsatisfied with the result, Petitioner filed a Motion for Reconsideration of the Appellate Division's decision and, in addition to rehashing the same arguments, argued this Court's recent decision in Est. of Spill v. Markovitz militated in support of reconsideration. The Appellate Court denied Petitioner's Motion. (Sa19). The panel noted that while Spill was decided by the Supreme Court after oral argument in this matter, Petitioner did not amend his submissions while the Appellate Court's decision was pending. (Sa20). More importantly, the panel rejected Petitioner's arguments on the merits, distinguishing Spill from the facts here. (Sa20).

This Petition for Certification of the Appellate Division's final judgment followed.

The Appellate Division's Order denying reconsideration was dated October 27, 2025, but it was not published on the Appellate Division portal until October 30th. Per Rule 2:12-3(a), Petitioner had twenty (20) days from October 6, 2025 – the date of the Appellate Division's decision – to file a Notice of Petition for Certification. However, the time for filing notice is tolled pending a timely motion for reconsideration. R. 2:4-3. Given the amount of time tolled by his motion for reconsideration, Petitioner's Notice of Petition was due by November 10, 2025.

Petitioner never served a copy of his Notice of Petition for Certification on Respondent. The first time this office became aware of this Petition is when defense counsel sent the actual Petition by email on November 20, 2025, ten days after the notice was due. The notice was not sent via email to anyone in this office, including Respondent's attorney, his paralegal or legal secretary upon its filing, though the Petition was sent by email ten days later. Moreover, the notice was not received by anyone in this office in the form of physical mail, though defense counsel claims it was sent through this medium. This office is equipped with a mailroom managed by Canon. All incoming mail received from the United States Postal Service and other private mail delivery services, including New Jersey Lawyers Service, is sorted and scanned into the individual attorney folders each day for access by the attorney and staff. All hard copies of incoming mail are given to the specific attorney's legal assistant shortly after the mail has been scanned. We employ several professionals from Canon whose sole responsibility is to make sure that the mail is processed and distributed properly. No notice by mail or by electronic means was received from defense counsel's firm regarding notice of this Petition.

LEGAL ARGUMENT

- I. **THIS PETITION SHOULD BE SUMMARILY DISMISSED BECAUSE PETITIONER FAILED TO SERVE TIMELY NOTICE AS REQUIRED BY RULE 2:12-3(a).**

Respondent incorporates by reference the arguments made in its pending Cross Petition to summarily dismiss this Petition for failure to serve timely notice, filed separately. Suffice it say to here, Petition did not serve a copy of notice of this Petition, in contravention of Rule 2:12-3(a).

II. THE DOCTRINE OF INVITED ERROR BARS PETITIONER FROM ARGUING ON APPEAL THAT THE SO-CALLED “BURT DEFENDANT” DESIGNATION, AND ALL ITS ATTENDANT CONSEQUENCES, WAS ERROR.

It is a well-settled principle of law that parties who apply to a court to take certain actions or adopt certain theories may not later complain about the court’s adoption of those actions or theories. Indeed, the “doctrine of invited error operates to bar a disappointed litigant from arguing on appeal that an adverse decision below was the product of error, when that party urged the lower court to adopt the proposition now alleged to be error.” Brett v. Great Am. Recreation, 144 N.J. 479, 503 (1996). Thus, “where error was advanced to secure a tactical advantage at trial, the party responsible will not be permitted to complain on appeal.” Id.

In Carrino v. Novotny, 78 N.J. 355 (1979), a defendant sought the involuntary dismissal of crossclaims against another defendant in a personal injury lawsuit. Id. at 367. This is exactly what Petitioner did here with regard to Drs. Goldsmith and Nguyen. The trial court granted the application, just as this Trial Court did. Ibid. Later, after an unfavorable outcome, that same defendant appealed the Trial Court’s order of dismissal. Id. at 366. This Court held that a defendant who induced the

erroneous involuntary dismissal of another defendant was bound by that error and could not later contest the amount of the co-defendant's liability. Id. at 368-69. Here, Petitioner sought the order dismissing Drs. Goldsmith and Nguyen and instead designating them as so-called "Burt defendants," and an order relieving them of any financial responsibility to anyone. Consequently, Petitioner cannot now complain that his tactical decisions may bar a subsequent contribution action to which he may have been entitled under the JTCL or that he otherwise lacks the remedy of contribution provided by that statute. While Petitioner's remedy – or lack thereof – of contribution against Dr. Goldsmith is of no moment to Respondent, Petitioner cannot complain about the consequences of court rulings that his counsel urged the court to adopt, especially where, as here, counsel was well aware of the settled law and chose to deploy a dubious legal strategy.

It bears emphasis: the so-called "Burt defendant" status of Drs. Goldsmith and Nguyen was requested by Petitioner. Petitioner repeatedly sought that the so-called "Burt defendants" not be represented by counsel at trial, and the Trial Court so ordered. Though Respondent opposed each of these applications, as a result, the trial was conducted under the exact terms sought by Petitioner. Now, after Petitioner has received an unfavorable outcome and the JTCL has been properly applied as mandated by the Supreme Court in Mejia, Petitioner seeks relief claiming ignorance or misunderstanding of the consequences of the rulings he sought. Under the invited

error doctrine, this Petition must be denied. This is especially true where, as here, the defense firm knew the consequences associated with their calculated legal strategy.³ The fact that Petitioner’s legal stratagem did not work as planned, or because Petitioner misunderstood the effects of the rulings, is not a basis for Certification, let alone reversal.

III. PETITIONER HAS FAILED TO DEMONSTRATE SUFFICIENT GROUNDS TO WARRANT THIS COURT’S REVIEW OF THE APPELLATE DIVISION’S OPINION, AS THIS COURT’S RECENT DECISION IN *MEJIA v. QUEST DIAGNOSTICS, INC.* DISPOSES OF THE ISSUES IN THIS CASE.

Petitioner fails to demonstrate sufficient grounds to warrant certification of this matter to the Supreme Court. “Certification should be granted only in limited instances,” and Rule 2:12-4 sets forth “the high hurdle a petition for certification must vault in order to justify Supreme Court review.” Reilly v. AAA Mid-Atlantic Ins. Co. of N.J., 194 N.J. 474, 496 (2008) (Rivera-Soto, J., dissenting). Rule 2:12-4 provides that:

Certification will be granted *only* if the appeal presents a question of *general public importance which has not been but should be settled* by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; *if the decision under review is in conflict with any other decision* of the same or a higher court or calls for an exercise of the Supreme Court’s supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons. Rule 2:12-4 (emphasis added).

³ This matter was originally defended by the Law Office of William L. Brennan until that office closed. Mr. Kilbride, of that firm, attempted the exact same tactic in Mejia. The succeeding attorney at the Brennan Firm, Mr. Heron, later became associated with the law firm of Lenox, Socy, Formidoni, Giordano, Lang, Carrigg & Casey before trial. Mr. Heron has since retired and Mr. Acker is the succeeding attorney at the same firm.

None of the aforementioned grounds are present in this case. As a whole, the Appellate Division's decision to affirm the Trial Court's order of judgment for the total amount of damages against Defendant Popovich is legally unexceptional. The application of settled principles of law to a unique factual situation, such as was conducted by the Appellate Division here, does not implicate any "unsettled question of general public importance." See Bandel v. Friedrich, 122 N.J. 235, 237 (1991) (citing In re Route 280 Contract, 89 N.J. 1 (1982)) The Appellate Division's ruling is consistent with Mejia v. Quest Diagnostics, Inc., 241 N.J. 360 (2020) and breaks no new ground.

Petitioner's argument that the Appellate Division decision is in "irreconcilable conflict with Burt" has no merit whatsoever. Crucially, it is this Court's decision in Mejia that is controlling in this matter, not the Burt decision. The Appellate Division was required to follow Mejia, not Burt.

In Burt, one of the two defendants the plaintiff sued was dismissed because the plaintiff failed to file an Affidavit of Merit. Id. at 302. The remaining defendant had filed a crossclaim against the dismissed defendant seeking contribution, so the Appellate Division held that the defendant's contribution claim should not be vitiated by the plaintiff's failure to comply with the Affidavit of Merit Act. Id. at 302, 304. The Burt Court held that the fault of the dismissed defendant would be allocated to the jury, even though the plaintiff could not recover directly from that

dismissed defendant. Id. at 307. This Court has since articulated the logic of Burt as it being “inequitable to preclude the allocation of fault [to the dismissed defendant] – even when the actual contribution was not possible – because an omission by the plaintiff . . . deprived the defendant of the opportunity to bring third-party claims.” Est. of Spill v. Markovitz, 260 N.J. 146, 159 (2025). The Burt Court also concluded, *sua sponte*, 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.” Ibid. It must be noted that this ruling was essentially dicta as the issue had not been briefed, was instead raised *sua sponte* by the appellate panel and was not necessary to determine the issue on appeal.

Here, it is improper to rely upon Burt because the so-called “Burt defendant” designations were not the product of Respondent’s failure to file Affidavits of Merits; rather, the designations came from Petitioner’s deliberate, tactical, and strategic effort to exploit the Burt ruling. Respondent did not name Drs. Goldsmith and Nguyen as defendants in the original complaint because it was determined – after expert review – that there were no viable claims against them. It was not until – and because of – Petitioner’s allegations of fault against the doctors in discovery that Respondent sought to amend. The Trial Court then dismissed the claims on statute of limitations grounds, and Petitioner sought to exploit those dismissals by

obtaining an order designating Drs. Goldsmith and Nguyen as so-called “Burt defendants.” This designation was entirely inappropriate because Petitioner still had every right and ability to file and prosecute third-party claims against both Drs. Goldsmith and Nguyen, irrespective of whether Respondent could assert direct claims against them. See R. 4:8-1(a). The statute of limitations was no impediment to Petitioner’s contribution claims against Drs. Goldsmith and Nguyen. The only reason Petitioner’s claims against Drs. Goldsmith and Nguyen were no longer active was because Petitioner explicitly asked the Trial Court to extinguish those claims and to declare them so-called “Burt defendants.” (1T10:9-17).

The appellate panel correctly concluded that Mejia is controlling here, as the Mejia Court directly addressed the application of the JTCL in the circumstances of a so-called “Burt defendant” designation. The first issue in Mejia was whether the so-called “Burt defendant” designation was valid and/or available to a provider who was not a direct defendant but was subject to a third-party contribution claim. Id. at 371. This Court held that, absent culpable conduct by the plaintiff that precluded a contribution claim, direct defendants may collect contribution via a third-party claim. Id. at 372-73. Thus, the so-called “Burt defendant” designation was not permitted. Ibid. The Court cited Holloway v. State, 125 N.J. 386 (1991) in reaching the conclusion that “contribution should not depend upon whether a defendant is sued as a third-party defendant pursuant to R. 4:8-1, or as a direct defendant subject

to a cross-claim for contribution pursuant to R. 4:7-5(a).” Id. at 372. Put simply, a “defendant’s right to contribution from a joint tortfeasor cannot be controlled by plaintiff’s unilateral decision not to join all tortfeasors.” Lee’s Hawaiian Islanders, Inc v. Safety First Prods, Inc., 195 N.J. Super. 493, 506 (App. Div. 1984). “Thus, a defendant may file a claim for contribution against a third party that was not sued by the plaintiff.” Mejia, 241 N.J. at 372 (citing R. 4:8-1(a)). Petitioner undoubtedly knew of this right and there was no reason – other than gamesmanship – why he did not pursue contribution from those defendants believed to be joint tortfeasors, regardless of what Respondent did or did not do, or could or could not do.

The second issue addressed by this Court in Mejia was whether, under the JTCL, a plaintiff could collect the entire verdict against any direct defendant found sixty percent (60%) or more at fault. Id. at 374. When the issue was presented to the Appellate Division, the panel ruled in the affirmative, explaining that the direct defendants “were entitled to implead [another provider] and prove his responsibility as a joint tortfeasor so as to limit any allocation of its own fault for plaintiff’s damages, and thereby limit any award against it.” Id. at *2 (Pa83). Of course, doing so would entitle the third-party defendant to have counsel at trial to oppose those claims (i.e., not receive so-called “Burt defendant” status).

This Court “agree[d] with the Appellate Division panel in Mejia that if the trier of fact determines [direct defendants] to be sixty percent or more at fault, then

plaintiff can recover the full amount of damages from that party, N.J.S.A. 2A:15-5.3(a).” Mejia, 241 N.J. at 374. This is because, when the trier of fact determines that a party is sixty percent (60%) or more responsible for the total damages, “[t]he claim is governed by the Joint Tortfeasors Contribution Law.” Id. at 372.

The Appellate Division dutifully applied the logic of Mejia to the facts of this case. The panel held that:

The record shows that [Petitioner] timely answered plaintiffs’ complaint, and it further shows that he answered every amended complaint filed by plaintiffs. The record also shows that each answer by [Petitioner] pled third party claims for contribution against various other providers. When plaintiffs successfully moved to amend their complaint to directly add the various third-party defendants identified by [Petitioner], those newly added direct defendants in turn moved for dismissal with prejudice against plaintiffs on statute of limitations ground. Ultimately, the direct defendants’ dismissals based on the statute of limitations do not adversely affect [Petitioner’s] right to contribution, which derives solely from the JTCL. [Mejia], 241 N.J. 360, 372-73. Using the [Mejia] Court’s approach, we can analogize the impact of the statute of limitations on plaintiff’s direct claim here to the impact of the Affidavit of Merit Act on the plaintiff’s claim in Burt. Like the Supreme Court in [Mejia], we conclude there is none. . . . Like the Mejia defendants, [Petitioner’s] statutory right of contribution is not constrained or limited by the viability of plaintiff’s direct claims. [Est. of Gaza v. Popovich, M.D., A-2310-22 (App. Div. Oct. 6, 2025) (Sa16-17).]

The Appellate Division’s logic is unassailable. The dismissal of Respondent’s direct claims against Drs. Goldsmith and Nguyen had no impact whatsoever on Petitioner’s ability to bring or further prosecute claims against them. Petitioner improperly sought the so-called “Burt defendant” designations. As such, Mejia controls the outcome of this matter—not Burt. The Trial Court, then, properly

executed Respondent's proposed Order of Judgment because the JTCL and Mejia mandate that Respondent is entitled to recover the full amount of damages from Petitioner.

Petitioner gestures vaguely at the catch-all provision found in Rule 2:12-4, i.e., in "the interest of justice." But the invocation of the "interests of justice" standard for Certification is properly reserved only for those decisions that this Court finds to be "palpably wrong, unfair, or unjust." Mahony v. Davis, 95 N.J. 50, 52 (1983) (Handler, J., concurring). While Petitioner makes much of his "speculative, uncertain right to bring a successive contribution action," he fails to demonstrate, given the Mejia decision and the JTCL, how the Appellate Division erred whatsoever, let alone how such alleged errors rise to the level of a "palpable wrong."

Again, the JTCL clearly and unequivocally states that a plaintiff is entitled to recover the full amount of damages from "any party determined by the trier of fact to be 60% or more responsible for the total damages." N.J.S.A. 2A:15-5.3(a). Any party "who is compelled to pay more than his percentage share may seek contribution from other joint tortfeasors." N.J.S.A. 2A:15-5.3(e). Crucially, this Court in Mejia pointedly addressed whether a plaintiff could recover an entire verdict under the JTCL in a situation where the jury allocated between direct defendants and so-called "Burt defendants." Having identified the exact same,

specific issue as is in dispute here, the Mejia Court held that a plaintiff in such circumstances shall recover the full amount of damages as laid out in the JTCL against any direct defendant found sixty percent (60%) or more at fault. Id. at 371-72.

Therefore, there is nothing inequitable about applying the law and allowing full recovery against this culpable, direct defendant. That Petitioner argues he lacks a remedy, or is at risk of lacking a remedy, is entirely irrelevant to the issues before this Court and of no moment whatsoever to the innocent Respondent. The author of the alleged harm to Petitioner is Petitioner himself – it was Petitioner who sought the Burt designation, not Respondent. It was Petitioner who sought dismissal of his claims against Drs. Goldsmith and Nguyen, not Respondent. If there is harm to Petitioner occasioned by bringing a successive contribution action, the burden falls on him – the party that sought the rulings – not the innocent Respondent here who argued against the rulings. Petitioner’s argument that his “Burt allocation rights [were] retroactively stripped from him,” and therefore his remedy of contribution is “no remedy at all” is both inaccurate and entirely unavailing. Petitioner knew that Mejia stood for the proposition that if Respondent proved he was sixty percent (60%) or more at fault, Petitioner would be responsible for the entire judgment. Yet he chose to pursue the so-called “Burt defendant” designation so he could argue the negligence of the dismissed doctors without them being represented by counsel.

Assuming Petitioner is now burdened with the expense of having to argue the negligence of Dr. Goldsmith again in a successive contribution action, that is the fault of Petitioner alone.

As such, this Court must deny Certification.

IV. THE APPELLATE COURT’S DECISION IS NOT IN CONFLICT WITH THIS COURT’S OPINION IN *SPILL* v. *MARKOVITZ*.

Petitioner’s argument that Spill “proves the conflict” between the Appellate Division’s decision and existing precedent is unavailing. In Estate of Spill v. Markovitz, the plaintiff brought a wrongful death suit against several doctors, one of whom filed a third-party complaint against Dr. Jenny Diep, a New York doctor whose treatment of Spill allegedly contributed to her death. Id. at 150. After the third-party complaint was dismissed for lack of personal jurisdiction, the direct defendant doctor filed a motion to pursue an allocation of fault against Dr. Diep at trial. Id. at 152. This Court held that an allocation of fault under the CNA against Dr. Diep, a non-party whose exclusion from the lawsuit was not the result of any act or failure to act by the plaintiff, was not permissible. Id. at 162. However, the Court also held that if judgment was rendered in the matter against the direct defendants, they may pursue available contribution claims under the JTCL in New York against Dr. Diep. Id. at 163.

Nothing in this Court’s decision in Spill militates in favor of granting Certification. As the Appellate Division noted, Spill was decided on March 11, 2025,

after oral argument in this case but long before the panel’s October 6, 2025 decision. Petitioner had seven months to amend his submissions while the Appellate Division’s decision was pending, yet chose not to. Now, in a last-ditch effort before this Court, he argues that Spill somehow mandates that this Court grant Certification. Spill is not in conflict with the Appellate Court’s decision. On the contrary, the Spill Court emphasizes that, like in Mejia, Dr. Diep’s exclusion from the lawsuit was not the result of any act, or failure to act by the plaintiffs. Id. at 162. The Court noted: “In other cases, the plaintiff’s litigation strategies caused the defendants’ inability to pursue contribution from potential joint tortfeasors. But here, defendants are unable to make any such allegation.” Ibid. Therefore, the so-called “Burt defendant” designation was unwarranted. The same is true here. Petitioner’s claims against Drs. Goldsmith and Nguyen were not impacted by anything Respondent did or did not do. Therefore, Spill is consonant with Mejia, which controls the outcome here.

CONCLUSION

For the reasons set forth above, Respondent respectfully requests that This Court deny this Petition for Certification.

BLUME, FORTE, ZERRES, MOLINARI,
MAKOWICZ, ELWOOD, ZENNA & FELDMAN
A Professional Corporation
Attorneys for Plaintiff/Respondent

BY: *Jonathan M. Rawson*

JONATHAN M. RAWSON

Dated: December 5, 2025