ESTATE OF CRYSTAL WALCOTT SPILL, by Administrator ad Prosequendum and General Administrator DAVID SPILL, and DAVID SPILL, Individually, and ARIA SPILL and COLTON SPILL, surviving heirs and wrongful death beneficiaries, by their Guardian Ad Litem, DAVID SPILL, Plaintiffs-Respondents, v. JACOB E. MARKOVITZ, M.D., ENGLEWOOD WOMEN'S HEALTH, Defendants, and STEVEN A. PAGANESSI, M.D., AND ANESTHESIA AND PAIN MANAGEMENT GROUP, Defendants-Petitioners, and HUDSON CROSSING SURGERY CENTER, et al., Defendants. STEVEN A. PAGANESSI, M.D., and ANESTHESIA AND PAIN MANAGEMENT GROUP, Third-Party Plaintiffs, v. JENNY T. DIEP, M.D. and RHEUMATOLOGY ASSOCIATES, P.C., Third-Party Defendants.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 088764 ON GRANT OF LEAVE TO APPEAL FROM SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-2330-22 SAT BELOW: HON. JACK M. SABATINO, P.J.A.D.; HON. HANY A. MAWLA, J.A.D.; HON. JOSEPH L. MARCZYK, J.A.D.

PROPOSED AMICUS CURIAE NEW JERSEY ASSOCIATION FOR JUSTICE'S MERITS BRIEF AND APPENDIX (NJAJa1-21)

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PRELIMINARY STATEMENT

New Jersey Association for Justice ("NJAJ") seeks leave to appear as Amicus Curiae, because this case affects the rights of the injured and NJAJ's membership. Essentially, Defendants have asked this Court that despite unambiguous statutory language forbidding it, a defendant should be able to point to an empty chair non-party in order to reduce that defendant's liability to an injured party. Because that defendant has a statutory right to contribution while the injured party has no rights to recover if a jury apportions liability to the empty chair, this Court should reject Defendants' position in this matter. NJAJ urges this Court to affirm the lower courts' well-reasoned decisions. If the motion is granted, NJAJ submits this brief in support of its position, and requests that the Court grant it leave to participate at oral argument.

INTEREST OF AMICUS CURIAE

NJAJ is a statewide association of attorneys, lawyers, professors, paraprofessionals, and law students dedicated to protecting the rights of injured persons. (Certification of Christina Vassiliou Harvey Cert. ¶ 1.) NJAJ advances the interests of the injured and the preservation of the constitutional right to a fair jury trial. (Id. at ¶ 3.) NJAJ is dedicated to protecting the jury trial system for the benefit of all litigants. (Id. at ¶ 3.)

NJAJ takes interest in this matter because apportionment affects the rights of litigants and impacts the rights of the injured who have a constitutionally protected right to recover against negligent tortfeasors. (Id. at ¶¶4-5.)

BACKGROUND

NJAJ will rely on the Procedural History and Statement of Facts set forth in Plaintiff-Respondent's brief submitted to this Court. Briefly, Plaintiff was the victim of malpractice that led to her untimely death at the age of thirty-one. Est. of Spill v. Markovitz, No. A-2330-22, 2023 WL 6621094, at *1 (App. Div. Oct. 11, 2023), leave to appeal granted, 257 N.J. 11 (2024). Defendants have alleged that a New York doctor, Dr. Diep and Dr. Diep's practice, were substantial factors in causing Plaintiff's death. Id. at *1. Notably, Dr. Diep "has not been sued in New York, and she . . . has not paid plaintiff a settlement." Id. at *5.

After Defendants filed a third-party action against Dr. Diep, the trial court dismissed Dr. Diep due to lack of jurisdiction. Id. at *1. However, Defendants sought to allocate fault to Dr. Diep over Plaintiff's opposition. Id. at *2. The trial court denied this relief, and the Appellate Division affirmed in an unpublished opinion. Id. at *5. This Court then granted leave to appeal. Spill, 257 N.J. 11. NJAJ now seeks leave to file this merits brief and participate at oral argument as Amicus Curiae.

LEGAL ARGUMENT

POINT ONE

This Court Should Not Permit a Jury to Allocate Fault to an Empty Chair Due to the Plain Language of the Comparative Negligence Act and the Equities.

Defendants have not identified a basis for ignoring the plain language of the Comparative Negligence Act. The cases cited by Defendants each pose unique equitable or statutory circumstances that are unrelated to the matter at bar where Defendants seek to allocate damages to a non-party over whom the court does not have jurisdiction. This Court should affirm the two lower courts' decisions holding that because the doctor here was beyond the reach of the court's jurisdiction, a jury should not be able to allocate fault to it.

A. This Court Should Construe the Comparative Negligence Act to Limit its Applications to the Parties at Trial.

This Court should construe the plain language of the Comparative Negligence Act ("CNA") to hold that a jury cannot allocate fault to a non-party over whom the court does not have personal jurisdiction. Defendants conceded below that there was no authority for including a non-party on a verdict sheet for the purpose of allocation when the non-party is "outside the reach of a court's jurisdiction." Spill, 2023 WL 6621094 at *2.

As recognized by the Appellate Division, the plain language of the CNA permits a jury to allocate fault only among "each party's negligence or fault." Spill, 2023 WL 6621094 at *3 (quoting N.J.S.A. 2A:15-5.2(a)(2)). This Court

has further noted that the comparative negligence system in New Jersey is based on allocating "the respective faults of the parties causing that loss." Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 114 (2004)(quoting Blazovic v. Andrich, 124 N.J. 90, 107 (1991)).

The CNA remedied the unjust doctrine of contributory negligence precluding it from being a bar "if such negligence was not greater than the negligence of the person against whom recovery is sought." N.J.S.A. 2A:15-5.1; see Governor's Statement on signing A.665 (May 24, 1973)(NJAJa17). The CNA provides in relevant part:

> a. In all negligence actions and strict liability actions in which the question of liability is in dispute, including actions in which any person seeks to recover damages from a social host as defined in section 1 of P.L.1987, c. 404 (C.2A:15-5.5) for negligence resulting in injury to the person or to real or personal property, the trier of fact shall make the following as findings of fact:
> (1) The amount of damages which would be recoverable by the injured party regardless of any consideration of negligence or fault, that is, the full value of the injured party's damages.
> (2) The extent, in the form of a percentage, of each party's negligence or fault. The percentage of negligence or fault of each party shall be based on 100% and the total of all percentages of negligence or fault of all the parties to a suit shall be 100%.

N.J.S.A. 2A:15-5.2.

The CNA further provides:

> Except as provided in subsection d. of this section, the party so recovering may recover as follows:
>
> a. The full amount of the damages from any party determined by the trier of fact to be 60% or more responsible for the total damages.
> . . .
> c. Only that percentage of the damages directly attributable to that party's negligence or fault from any party determined by the trier of fact to be less than 60% responsible for the total damages.
> . . .
> e. Any party who is compelled to pay more than his percentage share may seek contribution from the other joint tortfeasors.

N.J.S.A. 2A:15-5.3. Importantly, the CNA limits the calculation of fault to "the total of all percentages of negligence or fault of all parties to a suit," and grants all parties held responsible to a right of "contribution from the other joint tortfeasors." Thus, the Legislature expressly gave to a defendant a right to seek contribution from a non-party, such as Dr. Diep, but not to allocate fault.

Unlike the CNA, the Joint Tortfeasor's Contribution Law ("JTCL"), N.J.S.A. 2A:53A-1, *et seq.*, is not limited to parties to an action. Instead, the JTCL defines "joint tortfeasors" as "two or more persons jointly or severally liable in tort for the same injury to person or property, whether or not judgment has been recovered against all or some of them. A master and servant or principal and agent shall be considered a single tortfeasor." N.J.S.A. 2A:53A-1. The JTCL

gives joint tortfeasors a "right of contribution." N.J.S.A. 2A:53A-2. This right of contribution means:

> Where injury or damage is suffered by any person as a result of the wrongful act, neglect or default of joint tortfeasors, and the person so suffering injury or damage recovers a money judgment or judgments for such injury or damage against one or more of the joint tortfeasors, either in one action or in separate actions, and any one of the joint tortfeasors pays such judgment in whole or in part, he shall be entitled to recover contribution from the other joint tortfeasor or joint tortfeasors for the excess so paid over his pro rata share; but no person shall be entitled to recover contribution under this act from any person entitled to be indemnified by him in respect to the liability for which the contribution is sought.

N.J.S.A. 2A:53A-3.

The JTCL was enacted to remedy the common law inequity that "each joint tortfeasor was jointly and severally liable for all the damage caused by their wrongful acts." Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 183-84 (1986) (citing W. Keeton, D. Dobbs, R. Keeton, D. Owen, Prosser & Keeton on Torts § 52 at 345, 347–48 (5th ed. 1984) (Prosser & Keeton); F. Harper and F. James, Law of Torts § 10.1 at 692 (1956)).

Pursuant to this scheme, if Defendants are found liable to Plaintiff, they may then file a completely separate action to seek contribution from other tortfeasors for the amount that they must pay Plaintiff. N.J.S.A. 2A:53A-3. Thus, any claim that Defendants face prejudice in this matter is simply untrue;

their claims for contribution are not extinguished as the CNA directly preserves their rights under the JTCL. N.J.S.A. 2A:15-5.3. Thus, the relief sought in this case is expressly resolved in the statutory scheme with a defendant's right to contribution; reversal of the two lower courts' decisions would result in a harsh unfairness because Defendants would be able to allocate fault to an empty chair leaving Plaintiff without a remedy as the empty chair was beyond the reach of the court's jurisdiction.

The relevant cases have applied this scheme whereby the jury will not allocate damages to a non-party. See Ramos v. Browning Ferris Indus. of S. Jersey, Inc., 103 N.J. 177, 184 (1986) (there is no right to apportionment against an employer immune from liability under the Workers' Compensation Act); Bencivenga v. J.J.A.M.M., Inc., 258 N.J. Super. 399, 406–07 (App. Div.) (no right to apportionment against a fictitiously-named defendant not identified or served prior to trial), certif. denied, 130 N.J. 598 (1992). For instance, in interpreting whether fault should be allocated to an employer, who was immune under the Worker's Compensation Act, the Court held that because the employer is not a party, it could not be allocated fault under the statute. Ramos, 103 N.J. at 193-94.

In Bencivenga, 258 N.J. Super. at 406, the Appellate Division found fault should not be apportioned to an unknown intentional tortfeasor because the

statute applied only to "the person or persons against whom recovery is sought" and only required apportionment to "[t]he percentage of negligence of each *party*." Id. (citing N.J.S.A. 2A:15-5.1 and -5.2)(emphasis in original). The Appellate Division further explained a fictitious person is not a party because

> [i]t is at the point of service on the true defendant that a court gains jurisdiction, consonant with due process, and a person becomes a party to the suit. It is at that point when the Act requires the person's conduct be compared for the purposes of apportioning liability and not before.

Id. at 407. The court further explained a settling defendant is different because the settling defendant had been a party, and the non-settling defendant has a right to a credit. Id. at 408. Thus, here, the Appellate Division's analysis supports why it would be unfair to permit a jury to allocate fault to a person over whom the court has no jurisdiction because plaintiff has not and will not recover against that person.

The Court Rule pertaining to a claim for contribution likewise limits contribution to a party. R. 4:7-5; see Harley Davidson Motor Co. v. Advance Die Casting, Inc., 150 N.J. 489, 498 (1997)(noting Rule "applies to joinder of *claims* against parties already present in the action")(emphasis in original). In fact, the Rule limits the allocation to a "settling defendant," which does not include Dr. Diep, who did not settle any claim. R. 4:7-5(c). The New Jersey Civil Rules Committee noted that this Rule was proposed "to reflect the holding

in Young v. Latta[, 123 N.J. 584 (1991)]." (NJAJa19.) The Court explained in Young that the right to contribution from a settling defendant by allocating fault in the trial was to encourage settlements so that a defendant had incentive to settle so as to obtain relief from the JTCL contribution rights of the non-settling defendant. 123 N.J. at 591.

Because R. 4:7-5 discusses joinder, it bears noting that mandatory claims must be joined under the entire controversy doctrine. R. 4:30A. Importantly, a claim is not barred under the entire controversy doctrine when the party is not subject to jurisdiction. Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co., 142 N.J. 336, 344 (1995)(citing Kimmins Abatement Corp. v. Conestoga–Rovers & Assocs., Inc., 253 N.J. Super. 162 (Law Div.1991) ("holding that entire controversy doctrine did not bar second lawsuit against defendant who was not party to first lawsuit in another state")). This principle provides further evidence that within the scheme for comparative negligence of this State, a person over whom the Court has no jurisdiction should not be allocated fault at trial because the plaintiff will have no way to recover while a defendant maintains the right to contribution against that foreign person. Because the plain language of the CNA does not extend to non-parties, Dr. Diep should not be on the verdict sheet.

B. The Equities Do Not Support this Court Ignoring the Legislature's Plain Language Limiting Allocation to Parties.

While there are exceptions to the Ramos and Bencivenga line of cases, they fall into three main categories where:

1. there has been a settlement with the foreign defendant;
2. there is a separate statutory right that must be harmonized with the CNA and the JTCL; or
3. there is a specific equitable factor that compels allocation.

None of these three exceptions exist in the case at bar, and thus, this Court should not adopt a new rule permitting allocation to a foreign non-party empty chair.

Defendants rely upon cases that are all distinguishable from the case at bar for the proposition that they are entitled to an empty chair defense. Because all of the cases relied upon by Defendants have unique equitable or statutory elements that do not apply to the case at bar, this Court should not extend the rationale of those cases to instances where a person is dismissed for lack of jurisdiction.

1. Because There Was No Settlement with Dr. Diep, the Equities Do Not Favor Creating a New Rule to Apportion Liability to a Foreign Non-Party Empty Chair.

Following Young, this Court adopted R. 4:7-5 that permits allocation to a settling defendant. However, since that case, courts have extended the doctrine

beyond the Rule and the CNA but only when there has been a settlement with the non-party. Kranz v. Schuss, 447 N.J. Super. 168, 178 (App. Div. 2016). Because in this case, the foreign non-party did not settle with Plaintiff, there is no reason to extend the Kranz doctrine beyond the facts of that case.

In Kranz v. Schuss, 447 N.J. Super. 168, 178 (App. Div. 2016), the Appellate Division permitted a defendant to allocate fault to a settling out-of-state tortfeasor. Although the tortfeasor was not a party, the Appellate Division was concerned with the effect of the settlement and the equities that result when plaintiff settles with a party not subject to jurisdiction in this Court. Id. at 182. That unique posture is not the issue in this case where Plaintiff reached no settlement with the non-party against whom Defendants seek to allocate fault. The equities here, on the other hand, are that Plaintiff's verdict may be diminished since plaintiff had no ability to pursue a claim against that doctor. The unfairness is made worse because the Legislature did not provide Defendants with any rights to allocate against this non-party. N.J.S.A. 2A:15-5.2.

The JTCL only applies if a plaintiff "recovers a money judgment." N.J.S.A. 2A:53A-3. Thus, the holding in Krauss follows the legislative intent of the JTCL but is inconsistent with the case at bar where there was no recovery against the non-party and no statutory authority permits allocation to non-

parties. See N.J.S.A. 2A:15-5.2. As a result, this Court should not extend the holding in Krauss to cases where a foreign person is dismissed for lack of jurisdiction and there is no settlement with that person.

2. Because There Is No Competing Statutory Scheme, Fault Should Not Be Allocated to A Foreign Non-Party Empty Chair.

The second exception is when a statutory scheme, such as the Tort Claims Act, statute of repose, or affidavit of merit statute, require allocation to a non-party due to the equities presented within those schemes. Because there is no statutory framework that applies to the non-party over whom the court does not have jurisdiction, this Court should not extend those lines of cases to the facts at bar.

When there are other statutory considerations, the court will attempt to harmonize the statutes and only if appropriate, grant allocation, such as rights under the Tort Claims Act or Uninsured Motorist Insurance ("UM"). See e.g., Cockerline v. Menendez, 411 N.J. Super. 596, 618–19 (App. Div. 2010) (concluding that, based on public policy concerns, apportionment was appropriate as against fictitious phantom drivers who allegedly caused the accident). In Cockerline, the Appellate Division found that the jury should allocate fault to the John Doe driver since the plaintiff had settled with her UM insurer, but that fault should not be allocated to another driver with whom plaintiff had settled where the defendant abandoned that argument at trial. Id. at

610, 619. The Court explained, "the law governing UM coverage and the law governing comparative negligence and contribution among joint tortfeasors serve different goals and purposes." Cockerline, 411 N.J. Super. at 618–19 (citing Riccio v. Prudential Property and Cas. Ins. Co., 108 N.J. 493, 503 (1987)).

The Appellate Division explained the allocation scheme of the CNA and JTCL as "those responsible for injury to an innocent victim should share equally the burden of recompense. The purpose is to relieve tortfeasors of an injustice among themselves." Id. at 619 (quoting Riccio, 108 N.J. at 504). The Appellate Division found to advance the statutory goals of UM, CNA, and JTCL laws, defendant should have been able to allocate fault to the phantom vehicle. Id. at 619. However, here, there is no statute like the UM statute that must be harmonized with the CNA, whose plain language is limited to parties. As to a dismissed party over whom the trial court had no jurisdiction, there is no reason to permit allocation that would only harm the already injured party.

In Krzykalski v. Tindall, 232 N.J. 525, 536 (2018), another UM case, this Court permitted allocation to a John Doe. The Court distinguished Bencivenga on the basis that the defendant-night club in that case had an incentive to identify the intentional tortfeasor in a manner that did not exist for the defendant-driver

in Krzykalski. Id. at 542. It bears noting that the allocation to the unidentified driver in Krzykalski was paid by the UM carrier. Id. at 542.

In Mejia v. Quest Diagnostics, Inc., 241 N.J. 360, 372–73 (2020), this Court held that the third-party defendant had to participate at trial and the jury would allocate any fault to that party even though Plaintiff had not directly brought a claim against the third-party defendant. The impact of Plaintiff's failure was the potential for the liability to be reduced by any allocation of fault to the third-party defendant. Id. at 374. However, this Court's decision in Mejia is radically different because here the trial court did not have jurisdiction over the third-party defendant, and thus, it would be unfair to Plaintiff to have her damages reduced when Defendants are able to bring a claim for contribution in New York. It bears further noting that this Court held "the fact that plaintiff cannot recover from [third-party defendant] directly does not mean that his participation is not necessary to enable the trier of fact to allocate fault." Id. at 374. In this case, Dr. Diep has been dismissed, and thus, will not be at trial for the allocation, providing yet another inequity inherent in Defendants' position.

Likewise in Burt, the court harmonized the CNA, the JTCL, and the affidavit of merit statute finding fault could be allocated to a defendant when plaintiff failed to serve that defendant with an affidavit or merit. Burt v. W. Jersey Health Sys., 339 N.J. Super. 296, 304 (App.Div.2001). The Appellate

Division's concern in Burt was balancing plaintiff's fault in failing to perfect the claim against defendant-anesthesiologists by not serving an affidavit of merit and the lack of fault of defendant who had no responsibility for the anesthesiologists no longer being parties. Id. at 304. This Court explained the Burt holding stating, "in a case in which a plaintiff fails to meet a statutory requirement to file a claim against a particular defendant, our comparative fault statutes do not require that the remaining defendants be penalized when the factfinder allocates fault." Town of Kearny v. Brandt, 214 N.J. 76, 103 (2013). Unlike the plaintiff in Burt who was at fault, this Plaintiff, and those similarly situated, had no control over the court's lack of jurisdiction over Dr. Diep.

In Jones v. Morey's Pier, Inc., 230 N.J. 142, 158 (2017), the Court found that a charter school was entitled to summary judgment on a defendant's third-party claim for contribution because the Tort Claims Act ("TCA") notice requirement was not met. The Court explained it did not matter that it was the defendant's claim for contribution rather than plaintiff's own claim because otherwise the purpose of the TCA's early notification to permit governmental entities to prepare their defense would be undermined. Id. at 157. In finding the defendant was entitled to allocate fault to the charter school at the trial, the Court held the equities weighed against the plaintiffs, who had delayed the New Jersey action by first filing in Pennsylvania, and by which time, the one-year

extraordinary circumstances period under the TCA had run. Id. at 165. Here, the equities do not weigh against Plaintiff, because the court's lack of jurisdiction over Dr. Diep was beyond Plaintiff's control.

Similar to Jones, in another case where plaintiff was hit in the head by a bottle by an unidentified assailant while riding New Jersey Transit, this Court found due to the TCA's requirement for allocation, allocation was required against the intentional tortfeasor, New Jersey Transit, and the New Jersey Transit employee. Maison v. New Jersey Transit Corp., 245 N.J. 270 (2021). The Court noted "to ensure that defendants' duty to protect their passenger is not unfairly diluted or diminished, the trial court must give the jury clear guidance on the factors to consider in allocating degrees of fault." Id. at 276. Justice Albin writing for the Court explained that distinct and unique "plain language of the [Tort Claims Act] requires apportionment of fault between tortfeasors, without exception, and regardless of whether a tortfeasor is named as a party in the action." Id. at 307 (citing N.J.S.A. 59:9-3.1). However, in the case at bar, no statute requires allocation. Moreover, the CNA's plain language is limited to allocation among parties. N.J.S.A. 2A:15-5.2(b).

This Court held that when the statute of repose barred a claim against engineers, the equities favored permitting allocation against those engineers. Town of Kearny v. Brandt, 214 N.J. 76 (2013). While Defendants rely upon this

case, it is factually dissimilar to the case at bar because Dr. Diep was dismissed for lack of jurisdiction but the parties in Brandt were dismissed under the statute of repose. The Court explained that in harmonizing the purposes to the CNA, the JTCL, and the statute of repose meant fault could be allocated to the engineers because the engineers had the "right not to have to defend ancient claims or obligations." Id. at 104 (citing Cyktor v. Aspen Manor Condo. Ass'n, 359 N.J. Super. 459, 470 (App.Div.2003); accord Russo Farms, Inc. v. Vineland Bd. of Educ., 144 N.J. 84, 116 (1996); Trinity Church v. Lawson-Bell, 394 N.J. Super. 159, 175-76 (App. Div. 2007)). The statute of repose is an equitable doctrine "to protect architects and other construction professionals from the potential 'liability for life' posed by the discovery rule." Trinity Church, 394 N.J. Super. at 176 (citing Russo, 144 N.J. at 116 and Greczyn v. Colgate–Palmolive, 183 N.J. 5, 10 (2005)).

In explaining the basis for permitting allocation against the engineers protected by the statute of repose in Brandt, the Court noted allocation cannot be made against a person with statutory immunity, such as the employer in Ramos. Brandt, 214 N.J. at 104 (contrasting Ramos from Brodsky finding allocation appropriate when "the bankrupt defendant in Brodsky, were 'not statutorily immune from a negligence suit at the time of the accident'")(citing Brodsky, 181 N.J. at 115 (quoting Brodsky v. Grinnell Haulers, Inc., 362 N.J.

Super. 256, 277 (App.Div.2003)). Dr. Diep's circumstances are more like the employer in Ramos than the engineers in Brandt because it is not a matter of plaintiff violating some procedure, like the statute of repose, but rather the elements of due process that prevent this claim from being brought in this State.

In Brodsky, the Court analyzed that as to environmental torts, the Legislature expressly granted a plaintiff the right to seek the percentage of fault attributable to an insolvent party from the financially sound defendants." 181 N.J. at 111 (citing N.J.S.A. 2A:15-5.3d). Thus, because the Legislature did not include a similar provision for non-environmental torts, the Court applied the canon of *expression unius est exclusion alterius* to find the exclusion was intentional. Id. at 112 (explaining "[t]he Legislature clearly knew how to impose full responsibility on a defendant joined with an insolvent tortfeasor"). In Brodsky, both plaintiff's ability to fully recovery from all of the tortfeasors and defendant's related right to contribution from that defendant were extinguished because the bankruptcy court discharged the plaintiff's claim against a defendant-debtor.

This Court in reviewing the equities noted both parties were prejudiced, and thus, the Court found the jury should allocate fault to that bankruptcy defendant. Id. at 111. However, here, if Dr. Diep is on the verdict sheet, Plaintiff will be left without a remedy due to the lack of jurisdiction while Defendants

have a right to seek contribution from Dr. Diep after a jury's verdict. Importantly, a claim for contribution does not accrue until a defendant incurs a judgment or pays as a joint tortfeasor. Holloway v. State, 125 N.J. 386, 399–400 (1991) (citing McGlone v. Corbi, 59 N.J. 86, 94–95 (1971); Pennsylvania Greyhound Lines v. Rosenthal, 14 N.J. 372, 382 (1954); Sattelberger v. Telep, 14 N.J. 353, 366 (1954).

Because there is nothing preventing these Defendants from seeking a claim for contribution if they are found liable, but any allocation to the empty chair potentially bars Plaintiff from full recovery, the equities favor affirming the two lower courts' decisions. Pursuant to the statutory schemes of the CNA and JTCL, the Legislature has offered these Defendants a remedy – contribution. Unlike the other cases where competing statutes affected those rights, there is no other statutory scheme that requires allocation to an empty chair over whom the court has no jurisdiction.

3. Because The Equities Weigh In Favor of Denying Allocation to an Empty Chair Over Whom the Court Does Not Have Jurisdiction, this Court Should Affirm.

Defendants have cited to no other equitable factors that would apply in this case to permit allocation of a person beyond the reach of the court's jurisdiction. Defendants further overlook the equitable factor weighing in favor of affirming the two lower court's decisions – that they have a right to

contribution that may be brought in New York if they are found liable in this matter. N.J.S.A. 2A:15-5.3. This Court has applied the equities in comparable circumstances in order to explain that allocation against a foreign person is not permitted while permitting allocation against a foreign municipality due to the application of the TCA. Yousef v. General Dynamics Corp., 205 N.J. 543, 548 (2011).

In Yousef, New Jersey residents were injured on a business trip in South Africa. They sued a Florida business in New Jersey, but they did not have jurisdiction over the South African municipality or other South African driver. Id. at 554. The Florida defendants, who were subject to jurisdiction in New Jersey, argued New Jersey was an inconvenient forum arguing the case should have been filed in South Africa. Id. The trial court noted that defendants were denied the ability to pursue contribution or indemnification against the South African municipality or other driver but denied the motion to dismiss based on an inconvenient forum. Id. at 554-55. After weighing the public and private equitable factors, this Court found New Jersey was not a "demonstrably inappropriate" forum. Id. at 562. To remedy any prejudice to defendant, the Court noted the possibility of conducting de bene esse depositions of cooperative witnesses in South Africa. Id. at 569. The Court did not, however,

remedy any prejudice by adding the South African driver to the verdict sheet. Id. at 570.

In fact, its analysis as to adding the South African municipality to the verdict sheet was only because under New Jersey's Tort Claims Act, the municipality's liability would have limited a plaintiff's recovery. Id. at 570, n.15. The Court explained, "[a]lthough no judgment can be rendered against the municipality, a damages award against defendants could be reduced in accordance with how the statute would work if the municipality were a party." Id. at 571, n. 16. Because the Court's holding was specific to the municipality, and did not address the issue of the South African driver, it is clear that the equities do not favor permitting these Defendants to allocate to a non-party not subject to jurisdiction in New Jersey who has not settled any claim with Plaintiff. Given this analysis, this Court should extend Yousef so that a non-governmental defendant who is beyond the reach of this Court's jurisdiction should not be listed on the verdict sheet. The public policy serves this right because Plaintiff was unable to bring that foreign person into the litigation while Defendants have the right to pursue that person for contribution.

This Court should reject Defendants' attempt to allocate to a doctor over whom the Court does not have jurisdiction. The statutory plain language does not support this interpretation. The cases upon which Defendants rely

demonstrate that there must either be a statute or an equitable factor, such as a settlement in a different jurisdiction, to require that allocation. Because no statute requires allocation given Plaintiff did not settle with Dr. Diep, and Plaintiff did nothing to harm Defendants' rights to contribution, this Court should not permit the jury to allocate fault to Dr. Diep.

CONCLUSION

NJAJ is concerned about limiting a Plaintiff's ability to fully recover for injuries by adding a person to the verdict sheet who is not subject to jurisdiction in this State. The plain language of the CNA is not furthered when this party is added to the verdict sheet. The equities favor affirming the two lower courts' decisions because Defendants maintain their right to contribution against this non-party, while if the non-party is added to the verdict sheet, it only serves to limit Plaintiff's ability to a full recovery.

Respectfully submitted,

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