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| 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,<br><br>V.<br><br>JACOB E. MARKOVITZ, MD, ENGLEWOOD WOMEN'S HEALTH, HUDSON CROSSING SURGERY CENTER, AMSURG HOLDINGS, INC., ENVISION HEALTHCARE CORP., STEVEN A. PAGANESSI, MD, HACKENSACK ANESTHESIOLOGY ASSOCIATES, PA, ANESTHESIA AND PAIN MANAGEMENT GROUP, AMERICAN ANESTHESIOLOGY, AMERICAN ANESTHESIOLOGY OF NEW JERSEY, MEDNAX, INC., MEDNAX SERVICES, INC., HOLLY M. KONCICKI, MD, MOUNT SINAI HEALTH SYSTEM, MOUNT SINAI HOSPITAL, ICAHN SCHOOL OF MEDICINE AT MOUNT SINAI HOSPITAL, MOUNT SINAI DOCTORS, MOUNT SINAI CLINICALLY INTEGRATED NETWORK, MOUNT SINAI INDEPENDENT PRACTICE ASSOCIATION, LABCORP, LABORATORY CORPORATION OF | SUPREME COURT OF NEW JERSEY<br><br>DOCKET NO.: 088764<br><br>ON MOTION FOR LEAVE TO APPEAL FROM:<br><br>SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION<br><br>DOCKET NO.: A-2330-22<br><br>Sat Below: Hon. Jack M. Sabatino, P.J.A.D.; Hon. Hany A. Mawla, J.A.D.; Hon. Joseph L. Marczyk, J.A.D.<br><br>Civil Action |

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| AMERICA HOLDINGS, LABORATORY CORPORATION OF AMERICA<br><br>AND<br><br>STEVEN A. PAGANESSI, M.D., AND ANESTHESIA AND PAIN MANAGEMENT GROUP<br><br>V.<br><br>JENNY T. DIEP, M.D., AND RHEUMATOLOGY ASSOCIATES, P.C. |

**BRIEF** ON BEHALF OF DEFENDANTS/APPELLANTS, STEVEN A. PAGANESSI, M.D., AND ANESTHESIA AND PAIN MANAGEMENT GROUP, IN REPONSE TO AMICUS CURIAE

RUPRECHT HART RICCIARDULLI & SHERMAN, LLP
Michael R. Ricciardulli, Esq. ID# 002611995
Matthew E. Blackman, Esq. ID# 042062006
53 Cardinal Drive, Suite 1
Westfield, NJ 07090
Telephone: 908-232-4800/Fax: 908 232-4801
Attorneys for Defendants / Third-Party Plaintiffs, Steven A. Paganessi, M.D., and Anesthesia and Pain Management Group

Michael R. Ricciardulli, Esq. (mricciardulli@rhwlawfirm.com) - Of Counsel and On the Brief

Matthew E. Blackman, Esq. (mblackman@rhwlawfirm.com) - On the Brief

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

CASES CITED — PAGE(S)

## PRELIMINARY STATEMENT

Defendants / Third-Party Plaintiffs, Steven A. Paganessi, M.D. ("Dr. Paganessi"), and Anesthesia and Pain Management Group (collectively, "Defendants") submit this brief in response to Amicus Curiae, New Jersey Association for Justice ("NJAJ").

There is a joint tortfeasor, Dr. Diep, against whom the plaintiff did not pursue a claim, and against whom Defendants cannot pursue third party or contribution claims due to New Jersey's lack of jurisdiction. Just as the Appellate Division permitted a jury to consider the negligence of persons beyond New Jersey's jurisdiction in Kranz v. Schuss, 447 N.J. Super. 168 (App. Div. 2016), and just as our courts have permitted apportionment in other circumstances where a tortfeasor could not be, or no longer was a party, the jury in this case should be permitted to hear all the evidence, and to consider the negligence of Dr. Diep. The same equitable remedy reached by the Appellate Division in Kranz should be employed here. A jurisdictional issue, beyond Defendants' ability to control, should not deprive them of their rights under New Jersey law, or the opportunity for apportionment to be determined in a single action.

## LEGAL ARGUMENT

### POINT I

### THE COURT SHOULD PERMIT THE JURY TO ALLOCATE FAULT TO DR. DIEP BECAUSE THE CIRCUMSTANCES OF THIS CASE DO NOT PERMIT DEFENDANTS TO SEEK CONTRIBUTION.

NJAJ's argument and invocation of the equities is based upon a flawed assumption that, if Defendants are found liable to plaintiff, they would be able to file a new, separate action for contribution from Dr. Diep. (See ABr[1] at 5, 7, 9, 18-19.) However, no such remedy is available to Defendants in New Jersey's courts, because it has already been established that New Jersey's courts do not have personal jurisdiction over Dr. Diep. The relief sought by Defendants thus cannot be resolved within the existing statutory scheme, as NJAJ mistakenly alleges. Any attempt by Defendants to pursue a contribution claim against Dr. Diep in New Jersey would be futile due to the same lack of jurisdiction that led to the dismissal of Defendants' third party claim.

NJAJ's additional contention that Defendants will be able to bring a claim for contribution in New York (ABr 14, 20) is, at best, highly speculative. Although New York's CPLR § 1401 sets forth a right to contribution in broad terms, it must be noted that New York's Court of Appeals, when interpreting

[1] "ABr" refers to NJAJ's amicus brief.

their own state's statutory scheme, has described the right to contribution as one belonging to the defendants in a New York lawsuit. See, e.g., Mowczan v. Bacon, 703 N.E.2d 242, 244 (N.Y. 1998) (citing Alexander, Practice Commentaries, McKinney's Cons.Laws of N.Y., Book 7B, CPLR C1401:1, at 502) ("[A]rticle 14 refined and particularized the procedural calibrations to ensure that defendants would have their own rights of apportionment among tortfeasors based on their actual degrees of fault")); Sommer v. Fed. Signal Corp., 593 N.E.2d 1365, 1372 (N.Y. 1992) ("a defendant may implead another wrongdoer and claim contribution in the main action, or may seek contribution in a separate action").

The Practice Commentaries on New York's CPLR §§ 1401 and 1403 provide further explanation of how the right to contribution is understood in New York.

> CPLR 1401 contains the basic rule governing the substance of the right of contribution. CPLR 1402 provides that contribution is to be determined by equitable shares of culpability, and CPLR 1403 sets forth the methods by which contribution may be sought, i.e., impleader, separate action, cross-claim or counterclaim.

[Alexander, Practice Commentaries, McKinney's Cons.Laws of N.Y. CPLR C1401:1.]

> CPLR 1403 facilitates the resolution of contribution claims in one action by specifically allowing ***the***

> ***defendants*** to seek contribution by cross-claims and counterclaims against the original parties and by impleading additional parties. In these circumstances, the contribution claim is a permissible hypothetical cause of action (see CPLR 3014)[2], in which ***the defendant*** contends that if he or she is held liable to the plaintiff, then the other party is liable for contribution.
>
> The statute also recognizes that contribution may be sought in a separate action … Resolution of all contribution claims in the original action obviously is more expeditious; but there may be occasions when the existence of other wrongdoers does not become known until it is too late to implead them, or jurisdictional limitations may preclude their joinder.

[Alexander, Practice Commentaries, McKinney's Cons.Laws of N.Y. CPLR C1403:1 (emphasis added; citations omitted).]

New York's case law and the Practice Commentaries indicate that the right of contribution is one available to the defendants in a primary or underlying action. There is no indication that CPLR §§ 1401 and 1403 have ever been construed to permit a separate action for contribution where there was no primary or underlying lawsuit in New York. NJAJ fails to identify any New York precedent in which a defendant from a lawsuit filed in another jurisdiction has been permitted to seek contribution in New York, rather than seeking contribution in the same jurisdiction where their claim arose.

[2] This civil practice rule permits, *inter alia*, causes of action or defenses to be stated alternatively or hypothetically. CPLR § 3014 (New York).

The New York Appellate Division's decision in Vermont Const., Inc. v. Johnson Indus. Painting Contractors, Inc., 435 N.Y.S.2d 376 (App. Div. 1981), is instructive, and indicates how New York's courts would treat a hypothetical contribution lawsuit filed by Defendants. Vermont Construction Co., Inc. ("VCCI") had been a defendant in a lawsuit filed against it in the United States District Court for the District of Vermont. Vermont Const., Inc. v. Johnson Indus. Painting Contractors, Inc., 435 N.Y.S.2d at 376-77. After a verdict was rendered against VCCI in the District of Vermont, VCCI sought contribution from Johnson Industrial Painting Contractors, Inc. ("Johnson") in New York "on the ground of apportioned negligence" pursuant to CPLR 1401, *et seq*. Id. at 377. New York's Appellate Division explained that VCCI's right to maintain an action in New York for contribution must be resolved by the application of the doctrine of *lex loci delicti*, *i.e.*, "the law of the place of the wrong." Ibid. "[C]ontrolling effect would be given to the law of the jurisdiction which, because of its relation or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation." Id. at 378. The Appellate Division noted that VCCI sought contribution from Johnson pursuant to New York law, and that no such right to contribution existed in Vermont. Ibid. Since Vermont had the "greater relationship and contact with the

occurrence of the event and the issues raised thereby," Vermont law applied, and barred the claim for contribution in New York. Ibid.

Given the precedent in Vermont Const., Inc., supra, we can anticipate that if New Jersey's courts determine that Defendants do not have a right of contribution under New Jersey law, because Dr. Diep is not a party to this lawsuit, then New York's courts will again apply the doctrine of *lex loci delicti*, and rule that Defendants do not have a right to contribution in New York either. New Jersey clearly has a greater relationship and contact with both the underlying event, Ms. Spill's death, and the issues raised thereby. Therefore, New Jersey law, as interpreted by New Jersey's courts, will control. Affirmations of the New Jersey decisions below would render futile any effort by Defendants to seek contribution in New York.

Furthermore, New York's case law indicates that, even where a separate lawsuit for contribution is permitted pursuant to CPLR 1403, "it is to be discouraged whenever possible." Meckley v. Hertz Corp., 388 N.Y.S.2d 555, 557 (Civ. Ct. 1976). See also, Cooney v. Osgood Mach., Inc., 612 N.E.2d 277, 283 (N.Y. 1993) (applying the law of the place of the injury eliminates forum shopping by defendants who might invoke CPLR 1403 to bring a separate contribution action in New York if sued elsewhere). Both legal and policy considerations would thus warrant the dismissal of a New York contribution suit

by these Defendants. Accordingly, NJAJ's contention that Defendants would be able to initiate a lawsuit for contribution in New York, absent a primary New York lawsuit, has no apparent basis in the relevant New York statutes or case law.

Policy considerations are especially prominent here, and weigh against the New York courts permitting defendants from lawsuits in other jurisdictions to initiate separate contribution lawsuits in New York after the conclusion of a lawsuit elsewhere. Such practice would severely tax the time and resources of New York's courts, requiring the foreign defendants to re-litigate issues of liability and causation. The New York defendant in a contribution lawsuit would effectively be forced to defend herself against claims of malpractice many years after the underlying events, well beyond the two years and six months limitations period in New York's relevant statute. See, CPLR 214-A. The New York defendant would also be required to conduct substantial further discovery beyond that conducted in the underlying lawsuit, including re-depositions of out of state witnesses. The interests of judicial economy, and conservation of both the courts' and litigants' time and money, favors resolution in a single lawsuit, rather than an incomplete determination of comparative negligence in New Jersey, followed by a redetermination of comparative negligence in New York.

## POINT II

### THE EQUITIES OF THIS UNIQUE CASE SUPPORT PERMITTING APPORTIONMENT.

Because Defendants cannot seek contribution in either New Jersey or New York, the equities of the case favor permitting apportionment of fault to Dr. Diep in the existing New Jersey lawsuit. While, unlike the circumstances in Kranz v. Schuss, 447 N.J. Super. 168 (App. Div. 2016), there was no prior lawsuit and settlement between plaintiff and Dr. Diep, we respectfully submit that this distinction does not change the equities of the case. As noted by the Appellate Division below, affording defendants a *pro tanto* credit in Kranz was deemed inequitable to the New Jersey defendants, who might be required to pay more than their share of damages, and because it might provide the plaintiffs with a double recovery and windfall. Estate of Spill by Spill v. Markovitz, No. A-2330-22 (App. Div. Oct. 11, 2023) (slip op. at 14). Although the absence of settlement between the plaintiff and Dr. Diep here removes the prospect of a double recovery and windfall to the plaintiff, the Defendants are still confronted with the inequity of being required to pay more than their share of damages.

Conditioning Defendants' relief on the existence of a prior settlement between plaintiff and Dr. Diep is inequitable because the plaintiff's strategic decisions as to whether he would investigate, pursue, or settle any claims against Dr. Diep were clearly beyond Defendants' control. NJAJ's contention that

plaintiff had no ability to pursue a claim against Dr. Diep (see ABr at 11) is plainly mistaken. The plaintiff had the opportunity to investigate and pursue a claim against Dr. Diep in New York, where Ms. Spill sought treatment. Defendants had no control over the plaintiff's choice to forego those claims, and thus no ability to control whether there would be any settlement with the out of state party.

Notwithstanding the absence of a settlement between plaintiff and Dr. Diep, the underlying principles remain the same. As this Court has previously observed, "our courts recognize that under some circumstances 'a defendant is allowed to prove that a non-party was the sole proximate cause of the plaintiff's harm—the so-called 'empty chair' defense in which a defendant shifts blame to a joint tortfeasor who is not in the courtroom.'" Krzykalski v. Tindall, 232 N.J. 525, 543 (2018) (citing and quoting Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 114 (2004)). "It is only fair that each person only pay for injuries he or she proximately caused." Jones v. Morey's Pier, Inc., 230 N.J. 142, 159 (2017) (citing and quoting Fernandes v. DAR Dev. Corp., 222 N.J. 390, 407 (2015)). The apportionment of fault does not turn on the plaintiff's ability to recover. See, Town of Kearny v. Brandt, 214 N.J. 76, 103 (2013). The Comparative Negligence Act requires the jury to allocate percentages of negligence among joint tortfeasors based on the evidence, not the collectability or non-

collectability of a judgment. Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 121 (2004).

The plaintiff's failure to investigate or pursue claims in New York should not work a detriment to Defendants, who have no ability to change either the jurisdictional circumstances or the plaintiff's strategic decisions. The circumstances are thus analogous to those in Burt v. W. Jersey Health Sys., 339 N.J. Super. 296 (App.Div.2001), in which the Appellate Division held that fault could still be allocated to a defendant despite a plaintiff's failure to perfect her claim. Burt v. W. Jersey Health Sys., 339 N.J. Super. at 304. The circumstances are also analogous to those in Jones v. Morey's Pier, Inc., 230 N.J. 142 (2017), in which this Court held that authorizing defendants to seek an allocation of fault was an equitable result, because the plaintiffs' choice of strategy had deprived the defendants of an opportunity, under the Tort Claims Act, to preserve their rights to file a cross-claim. Jones v. Morey's Pier, Inc., 230 N.J. at 165-66.

The opportunity to seek apportionment of fault at trial would afford Defendants, like the defendants in Burt and Jones, the practical benefit of the contribution claim to which they would ordinarily be entitled but cannot pursue in this case due to factors beyond their control. The current procedural posture of this case permits a fair determination of Dr. Diep's alleged fault, without undue prejudice to the plaintiff, because the plaintiff has received due notice of

Defendants' intention to seek apportionment, and the plaintiff has had, and will have at trial, the opportunity to oppose Defendant's proofs via the testimony of his own expert.

## POINT III

### NJAJ'S ARGUMENTS RELY IN PART UPON DISTINGUISHABLE AND INAPPOSITE AUTHORITIES.

As discussed in Defendants' initial brief, this Court's decision in Ramos v. Browning Ferris Indus. Of S. Jersey, Inc., 103 N.J. 177 (1986), relied upon by NJAJ, is distinguishable. In Ramos, apportionment was specifically disallowed because a tortfeasor, the plaintiff's employer, was immune from liability under any circumstances pursuant to New Jersey's Workers Compensation Act, N.J.S.A. 34:15–1 to –146. Ramos, 103 N.J. at 181, 193-94. No such statutory immunity applies to Dr. Diep in this case.

Bencivenga v. J.J.A.M.M., Inc., 258 N.J. Super. 399 (App.Div.) certif. denied, 130 N.J. 598 (1992), also relied upon by NJAJ, is also distinguishable. In Bencivenga, the Appellate Division specifically noted that the defendant nightclub had "failed to protect the plaintiff in the manner the law requires" by ignoring an opportunity to identify a fictitiously named tortfeasor who had assaulted the plaintiff. Bencivenga, 258 N.J. Super at 409-410. Considering the unique circumstances, the Appellate Division held that the most equitable result

was to preclude the unnamed tortfeasor's conduct from the apportionment of negligence. Id. at 410. In this case, by contrast, Defendants did not fail to protect the plaintiff by ignoring an opportunity to identify a tortfeasor. Dr. Diep's identity, and involvement in Ms. Spill's care, was always known by the plaintiff. Accordingly, these defendants should not be subject to the same preclusion as the defendant in Bencivenga.

NJAJ's reliance upon Rule 4:7-5, a procedural rule regarding claims and cross-claims among parties to a case, is plainly inapposite. This Rule does explicitly address claims against, or allocation of fault to tortfeasors who are beyond the reach of New Jersey's courts. Nor does the text of the Rule mention, let alone preclude, an allocation of a percentage of negligence against a non-party. Curiously, NJAJ's contention that this Rule "limits contribution to a party" (ABr at 8) undermines NJAJ's essential argument, *i.e.*, that even if apportionment is not permitted in the instant case, Defendants are not prejudiced because they can still file a contribution action against Dr. Diep. (See ABr at 5, 7, 9, 18-19.)

NJAJ's citation to Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co., 142 N.J. 336 (1995), Rule 4:30A, and New Jersey's entire controversy doctrine is also misplaced. The specific question addressed in Mortgagelinq was "whether New Jersey courts are obliged to entertain claims against parties that

could have been joined with substantially similar claims pursued ***by the same plaintiffs*** against other parties elsewhere." Mortgagelinq Corp. v. Commonwealth Land Title Ins. Co., 142 N.J. at 338 (emphasis added). Because it has already been established that the plaintiff did not pursue any claim against Dr. Diep in any jurisdiction, and that New Jersey's courts do not have personal jurisdiction over Dr. Diep, the question of whether the entire controversy doctrine would bar a contribution claim by Defendants in New Jersey is moot.

NJAJ's citation to Mejia v. Quest Diagnostics, Inc., 241 N.J. 360 (2020), is also misplaced, because in Mejia, this Court did not address the question of whether a defendant may seek to prove that a non-party's actions or inactions were a proximate cause of the plaintiff's injuries. The issue in Mejia was whether a third-party defendant who was an active party was required to participate in the trial to establish underlying liability, or whether he should be dismissed, because no direct claim was asserted against him by the plaintiff, and no party had served him with an affidavit of merit. Mejia v. Quest Diagnostics, Inc., 241 N.J. at 371. This Court held that, because the third party defendant was an active party, his participation remained necessary to enable the trier of fact to allocate fault. Id. at 374-75. This Court did not address what would have been a hypothetical question in Mejia, *i.e.*, whether the jury would be permitted to allocate fault to a person who was ***not*** an active party.

NJAJ's analysis of this Court's holding in Yousef v. General Dynamics Corp., 205 N.J. 543 (2011), is mistaken. The holding in Yousef addressed application of the doctrine of *forum non conveniens*, and the question of whether a New Jersey court was an appropriate forum for a personal injury lawsuit arising from an accident in South Africa. Yousef v. General Dynamics Corp., 205 N.J. at 548. Having concluded that the trial court's determination was proper, this Court discussed the equitable powers available to the trial court to ensure that defendants would receive a fair trial in New Jersey. Id. at 548-49, 567-71. Notwithstanding the language New Jersey's Comparative Negligence Act, N.J.S.A. 2A:15–5.2(a)(2) (*i.e.*, "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…") this Court suggested that the trial court may consider allowing the jury to consider apportioning fault between defendants and the South African municipality, to diminish the disadvantage to defendants in trying the case in New Jersey, where the municipality could not be impleaded as a third-party defendant. Id. at 570-71.

Defendants' situation is clearly analogous, as Dr. Diep could not be impleaded as a third-party defendant. This Court's discussion of New Jersey's Tort Claims Act in Yousef did not create any distinction between governmental and non-governmental tortfeasors, as NJAJ implies (see ABr at 21). In Yousef,

this Court merely noted that apportionment could be considered if the defendants had met the procedural steps to preserve their right against the South African municipality, and that the defendants had not challenged the Appellate Division's ruling that, if New Jersey was the appropriate forum, New Jersey law would apply, including the Tort Claims Act. Id. at 570, n.14, n.15.

## CONCLUSION

Therefore, for the reasons set forth herein, and in Defendants' prior brief, it is respectfully requested that the Appellate Division's decision should be reversed.

Respectfully submitted,

RUPRECHT HART RICCIARDULLI & SHERMAN, LLP
Attorneys for Defendants / Third-Party Plaintiffs
Steven A. Paganessi, M.D., and
Anesthesia and Pain Management Group

By: /s/ Matthew E. Blackman
mblackman@rhwlawfirm.com

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