SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2330-22

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, STEVEN A. PAGANESSI, M.D., and ANESTHESIA AND PAIN MANAGEMENT GROUP,

Defendants-Appellants,

and

HUDSON CROSSING SURGERY CENTER, AMSURG HOLDINGS, INC., ENVISION HEALTHCARE

CORP., HACKENSACK ANESTHESIOLOGY ASSOCIATES, PA, AMERICAN ANESTHESIOLOGY, AMERICAN ANESTHESIOLOGY OF NEW JERSEY, MEDNAX, INC., MEDNAX SERVICES, INC., HOLLY M. KONCICKI, M.D., 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 AMERICA HOLDINGS, and LABORATORY CORPORATION OF AMERICA,

Defendants.

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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.

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Argued September 18, 2023 – Decided October 11, 2023

Before Judges Sabatino, Mawla and Marczyk.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-0592-20.

Michael R. Ricciardulli argued the cause for appellants Steven A. Paganessi, M.D., and Anesthesia and Pain Management Group (Ruprecht Hart Ricciardulli & Sherman, LLP, attorneys; Michael R. Ricciardulli, of counsel and on the briefs; Matthew E. Blackman, on the briefs).

Ryan T. Gannon argued the cause for appellants Jacob E. Markovitz, M.D., and Englewood Women's Health (Marshall Dennehey Warner Coleman & Goggin, attorneys, join in the brief of appellants Steven A. Paganessi, M.D., and Anesthesia and Pain Management Group).

Dennis M. Donnelly argued the cause for respondents (The Donnelly Law Firm, LLC, attorneys; Dennis M. Donnelly, on the brief).

PER CURIAM

This interlocutory appeal concerns the novel issue of whether a civil verdict form in a multi-defendant medical malpractice case should allow the jury to apportion a percentage of fault to an out-of-state physician who was involved in a plaintiff's care, but who is not a party to the case because the court lacks personal jurisdiction over that doctor.

For the reasons that follow, we affirm the trial court's decision to reject the request by certain co-defendants to allow such apportionment.

I.

The issue before us concerns a pure question of law and trial practice. As such, we need not discuss the factual allegations in depth. We summarize them, mindful this case is in the pretrial phase and no factual disputes have been adjudicated.

In this civil action, the estate of Crystal Walcott Spill and her surviving family members individually (collectively "plaintiffs") are suing various physicians and medical providers for negligently sedating and performing surgery on Spill without first sufficiently examining Spill's recent medical history, thereby causing her death. The named defendants include Steven A. Paganessi, M.D. and the Anesthesia and Pain Management Group (collectively "the anesthesia defendants"), who are the lead appellants in the present appeal. Their brief has been joined by two of the other co-defendants, specifically Jacob E. Markovitz, M.D. and Englewood Women's Health.

Briefly stated, Spill died from cardiac arrest in February 2018 during the course of an elective cervical biopsy procedure performed under anesthesia at a surgical center in New Jersey. Spill, a pregnant thirty-one-year-old mother, suffered from lupus. She was under the care of a New York nephrologist, Holly

Koncicki, M.D., and Jenny T. Diep, M.D. a rheumatologist at Mount Sinai Hospital in New York City. Spill was also under the care of a gynecologist, Dr. Markovitz, and an anesthesiologist, Dr. Paganessi, in New Jersey.

Before the cervical surgery, Dr. Diep had laboratory tests performed in New York City that revealed Spill's serum creatinine level was elevated. Dr. Diep immediately doubled Spill's dosage of a drug named Lisinopril and advised her to see her nephrologist, Dr. Koncicki, as soon as possible. Dr. Koncicki then collected blood specimens from Spill and sent them to a laboratory. Before those lab results came back, the New Jersey doctors performed the surgery. Hours later, the tests ordered by Dr. Koncicki[1] came back and showed that Spill had a critically elevated potassium level.

Plaintiffs' main theory is that the doctors negligently proceeded with the surgery without waiting for the lab results. The anesthesia defendants blame Dr. Diep for the fatality. After taking her deposition they tendered an expert report opining that Dr. Diep negligently increased Spill's dosage of Lisinopril, and that her conduct was a substantial factor in causing Spill's death. Plaintiffs did not

[1] Despite treating Spill in New York, Dr. Koncicki was subject to New Jersey jurisdiction because she lived in New Jersey. Soon after the case was filed, the trial court granted Dr. Koncicki's unopposed motion for summary judgment and dismissed the claims against her with prejudice.

include Dr. Diep as a co-defendant and have never attempted to name her in this action or any other suit.

Following the exchange of expert reports, plaintiffs moved to bar the anesthesia defendants from presenting evidence at trial that Dr. Diep was negligent and a causal factor in Spill's demise. They noted that Dr. Diep had not been named as a direct defendant, nor had she been named by any defendants in a third-party complaint. That prompted the anesthesia defendants to cross-move for an order permitting them to pursue an allocation of responsibility against Dr. Diep at trial. They argued that allowing a fault allocation for the absent doctor, who they contend was negligent, is justified under the Comparative Negligence Act ("CNA"), N.J.S.A. 2A:15-5.1 to -5.8, and the Joint Tortfeasors Contribution Law ("JTCL"), N.J.S.A. 2A:53A-1 to -5.

Upon its initial review of these issues, the trial court issued an order directing the anesthesia defendants to file a third-party complaint against Dr. Diep if they "wish to apportion fault to the non-party." The anesthesia defendants complied, by pleading a third-party complaint and serving it upon Dr. Diep. Thereafter, Dr. Diep moved to dismiss the claims against her, asserting the New Jersey courts lack personal jurisdiction over her. In a supporting affidavit, Dr. Diep attested that she resides and practices medicine in New York and has never seen or treated a patient in New Jersey, either remotely

or in person. See Pullen v. Galloway, 461 N.J. Super. 587, 599 (App. Div. 2019) ("[A] doctor's out-of-state treatment of a New Jersey resident does not, in and of itself, establish personal jurisdiction."); see also Bovino v. Brumbaugh, 221 N.J. Super 432, 437 (App. Div. 1987) (holding it to be fundamentally unfair to subject an out-of-state physician to jurisdiction in New Jersey when treatment is provided exclusively in another state).

When the trial court heard oral argument on the jurisdictional motion, counsel for Dr. Diep appeared. However, that attorney did not need to present any argument because all parties, including the anesthesia defendants, orally agreed on the record that the court did not have personal jurisdiction over Dr. Diep.

The motion judge then inquired if there was any precedent that the movants' counsel could cite in which a person such as Dr. Diep—who was not a party to a suit and outside the reach of a court's jurisdiction—had been included on a verdict sheet for the purpose of apportioning liability. The movants' counsel conceded that they had not found any such case. The judge stated that, based on his own research "[t]here's no support for that anywhere." The judge accordingly denied the request for apportionment and dismissed the third-party complaint. The judge memorialized his oral decision in an order dated March 1, 2023.

The anesthesia defendants moved for leave to appeal, which we granted. As noted, co-defendants Dr. Markovitz and Englewood Women's Health have submitted a letter joining in appellants' arguments.

II.

We review de novo a trial court's legal determination respecting which parties and claims should be presented for potential allocation of fault on a civil verdict form. Liberty Ins. Corp. v. Techdan, LLC, 253 N.J. 87, 103 (2023). Upon performing that de novo review, we agree with the trial court that the law of New Jersey presently does not authorize the allocation of fault on a verdict form to a person such as Dr. Diep over whom the court lacks personal jurisdiction.

The issues before us involve the CNA, the JTCL, and associated case law. The CNA "codifies the principle of comparative negligence, which 'represents a more just and socially desirable distribution of loss than that ever achieved by the application of the long-standing rule of contributory negligence.'" Liberty Ins. Corp., 253 N.J. at 104 (quoting Blazovic v. Andrich, 124 N.J. 90, 97 (1991)). Meanwhile, the JTCL "affords contribution rights to joint tortfeasors." Liberty Ins. Corp., 253 N.J. at 104. Among other things, the JTCL prescribes that only defendants who are found sixty percent or more liable for a plaintiff's harm are jointly and severally liable for the entire damages. Id. at 105.

In combination, the CNA and JTCL "prescribe[] 'the statutory framework for the allocation of fault when multiple parties are alleged to have contributed to the plaintiff's harm.'" Id. at 104 (quoting Town of Kearny v. Brandt, 214 N.J. 76, 96 (2013)) (emphasis added). The CNA and JTCL together

> enable "the distribution of loss in proportion to the respective faults of the parties causing that loss" and "ensure that damages are ordinarily apportioned to joint tortfeasors in conformity to the factfinder's allocation of fault." When the two statutes are applied together, "the percentage of a total judgment assessed against a joint tortfeasor is determined not by pro rata allocation of damages, but by the factfinder's determination of the fault of each tortfeasor and, in cases involving contributory negligence, the fault of the plaintiff."
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> [Id. at 104-05 (first quoting Jones v. Morey's Pier, Inc., 230 N.J. 142, 160 (2017); and then quoting Glassman v. Friedel, 249 N.J. 199, 219-20 (2021)).]

Notably, the CNA requires the court to instruct the factfinder to find "in the form of a percentage . . . each party's negligence or fault." N.J.S.A. 2A:15-5.2(a)(2) (emphasis added). The statute makes no mention of non-parties. See also Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 114 (2004) ("The guiding principle of our State's comparative fault system has been the distribution of loss 'in proportion to the respective faults of the parties causing that loss.'") (quoting Blazovic, 124 N.J. at 107) (emphasis added).

The CNA's language explicitly presumes that all persons and entities listed on the verdict sheet have been parties to the suit: "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(a)(2) (emphases added).

The JTCL, meanwhile, 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." N.J.S.A. 2A:53A-1 (emphases added). This definition encompasses persons who could be "liable in tort" and who could have faced a "judgment" against them.

We recognize that the JTCL, unlike the CNA, does not literally contain the word "party." Even so, the two statutes should be construed in pari materia, so as to foster a coherent scheme of comparative fault and liability allocation. Liberty Ins. Corp., 253 N.J. at 103-04. When reviewing two separate, but related, statutes, "the goal is to harmonize the statutes in light of their purposes." Am. Fire & Cas. Co. v. N.J. Div. of Tax'n, 189 N.J. 65, 79-80 (2006) (citations omitted); see also State v. Gomes, 253 N.J. 6, 15-16 (2023) (quoting In re Gray-Sadler, 164 N.J. 468, 485 (2000) ("When interpreting different statutory

provisions, we are obligated to make every effort to harmonize them, even if they are in apparent conflict.")).

Case law has recognized the general principle that our statutes are designed to enable the fair allocation of fault to the parties in a lawsuit, and generally to not apportion fault to non-parties.

For example, in Bencivenga v. J.J.A.M.M., Inc., 258 N.J. Super. 399, 409 (App. Div. 1992), a personal injury action, we held that an "absent or unnamed tortfeasor" should not be included in a fact finder's negligence apportionment. The alleged tortfeasor had not been identified or served before trial. Id. at 410. We observed that defendants have a significant incentive to name and join multiple tortfeasors as additional parties to the case, thereby creating "the potential for diminishing [each] defendant's percentage of liability to a level that avoids contribution." Ibid. We concluded that "in [the] absence of [statutory] language demonstrating a contrary legislative purpose, we are satisfied the most equitable result . . . is to preclude [an] unnamed . . . tortfeasor's conduct from the fault comparison for purposes of allocating liability." Ibid.

Later, in Steele v. Kerrigan, 148 N.J. 1, 33 (1997), a Dram Shop case, the Supreme Court cited our holding in Bencivenga with approval, reiterating that "the obligation to apportion fault applies only to tortfeasors that are defendants in the litigation."

This general principle was stated succinctly in Ramos v. Browning Ferris Industries of South Jersey, Inc., 194 N.J. Super. 96, 106 (App. Div. 1984), rev'd on other grounds, 103 N.J. 177 (1986), a case involving a defendant's contentions of fault on the part of an immune employer, as follows:

> A truer verdict is more likely to be returned where the fact finder's attention is ultimately fixed on the conduct of the parties who will be affected by the verdict. . . . [T]here is no more reason to have a fact finder assign a percentage of negligence to someone who is not affected by the verdict than to assign a percentage of negligence to acts of God (such as the snow in this case) or a myriad of other causative factors that may have contributed to the happening of an accident.
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> [Ramos, 194 N.J. Super. at 106.][2]

That said, we recognize that in certain discrete situations, the Supreme Court (and in sparing instances, this court) has adopted exceptions to this general principle. We discuss a few of them here.

Most prominently, in Young v. Latta, 123 N.J. 584, 596-97 (1991), the Court held that if one tortfeasor has settled and is no longer party to a suit, the remaining defendants may still have the settling party listed on the verdict sheet. In its analysis in Young, the Court reaffirmed principles from prior case law

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[2] Although our decision in Ramos was reversed, this passage was quoted favorably by both the majority and concurrence in Krzykalski v. Tindall, 448 N.J. Super. 1 (App. Div. 2016), aff'd, 232 N.J. 525 (2018). See id. at 7 (Fisher, P.J.A.D., majority) (quoting Ramos); id. at 12 (Leone, J., concurring) (same).

"important to [the] implementation of the [JTCL]," including a recognition of "a non-settling defendant's right to a credit reflecting the settler's fair share of the amount of the verdict." Id. at 591.

In another exception crafted by the Supreme Court as a matter of first impression, if "claims against a defendant are dismissed on statute of repose grounds, fault may be apportioned to the dismissed defendant." Brandt, 214 N.J. at 83. As a further exception, if a joint tortfeasor's identity is unknown, a fictitious name representing that person may be included on the verdict sheet even though the unknown person is not a "party" to the suit. Krzykalski v. Tindall, 232 N.J. 525, 538-42 (2018) (describing how these situations are common in hit-and-run cases). And the Supreme Court has held if a tortfeasor is dismissed from a suit due to a bankruptcy discharge, the remaining defendants may still have the dismissed party included on the verdict sheet for apportionment. Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 116 (2004).

Appellants urge that we extend these exceptions and authorize a jury to allocate fault to a tortious actor who is outside of the territorial reach of the New Jersey courts. They point to our reasoning in Kranz v. Schuss, 447 N.J. Super. 168 (App. Div. 2016).

In Kranz, a minor New Jersey plaintiff sued through her guardian doctors in both New York and New Jersey for medical malpractice for failing to

diagnose the minor's hip condition. 447 N.J. Super. at 171-72. Plaintiffs filed suit against the New York doctors in New York, and they filed a separate suit against the New Jersey doctors in New Jersey. Id. at 172. The New York defendants settled for $2 million. Ibid..

The plaintiffs in Kranz sought to have the court afford the New Jersey defendants only a pro tanto credit for the $2 million, and require those defendants to pay the balance of whatever damages the jury found. Id. at 181-82. We deemed that outcome inequitable to the New Jersey defendants, who might pay more than their share of the damages. We further noted it could provide the plaintiffs with a windfall. Ibid. To prevent such inequity and double recovery, we directed the trial court to include the New York defendants on the verdict sheet in accordance with the CNA and JTCL, reinstate the complaint, and re-open discovery. Ibid.

Even so, we expressly acknowledged in Kranz that "[i]n some cases, however, the joint tortfeasor's absence from the suit at its inception has barred a defendant's right to apportionment." Id. at 178 (emphasis in original). In that regard, we cited to the Supreme Court's opinion in Ramos, 103 N.J. at 177, disallowing apportionment against an immune employer, and our opinion in Bencivenga, 258 N.J. Super. at 406-07, denying apportionment against an unnamed actor, although we also noted a contrary ruling in Cockerline v.

Menendez, 411 N.J. Super. 596, 617-19 (App. Div. 2010) (in which apportionment was deemed appropriate as against a fictitious phantom driver who allegedly caused an accident, because of public policy concerns).

Based on the current state of the law, the trial court did not err in declining the anesthesia defendants' request to include Dr. Diep on the verdict form for possible allocation of her alleged fault. Appellants continue to acknowledge that no published opinion in this state has extended apportionment under the CNA and JTCL to a person whom all parties have conceded is beyond the territorial reach of the New Jersey courts. Although Dr. Diep has appeared in this case for a deposition, she will not be a party at trial. Her brief status as a third-party defendant terminated quickly, by consent of all counsel, once her uncontested jurisdictional affidavit was submitted. She has not been sued in New York, and she apparently has not paid plaintiff a settlement.

The asserted unfairness to appellants in omitting Dr. Diep from the verdict form may be abated by the model civil jury instructions on causation. Subject to the development of the actual proofs at trial and the outcome of a jury charge conference, the trial court might allow the anesthesia defendants to argue that they were not "a substantial factor in bringing about the . . . injury" because there was "another cause of the . . . injury" and their "negligence was [not] a proximate cause of the . . . injury." Model Jury Charges (Civil), 6.12,

"Proximate Cause -- Where There Is Claim That Concurrent Causes of Harm Were Present" (approved May 1998). In accordance with such a charge, it could be left to the jury to decide whether Dr. Diep's actions or inactions contributed to Spill's fatal injury to such an extent that it would make the anesthesia defendants "remote, trivial or inconsequential cause[s]" who are not liable in tort. Ibid.

Hence, the anesthesia defendants may have the ability to prove at trial that they used all reasonable care under the dangerous circumstances Dr. Diep allegedly created, as they and their experts contend. We agree with defendants that such "empty chair" evidence or argument should not be preemptively barred, subject to further developments that may emerge as the case progresses under the trial court's oversight.[3]

Given our limited role as an intermediate appellate court, we decline appellants' invitation to extend the law in a direction that has yet to be endorsed by our state's highest Court. Lake Valley Assocs., LLC v. Twp. of Pemberton, 411 N.J. Super 501, 507 (App. Div. 2010) ("Because we are an intermediate appellate court, we are bound to follow the law as it has been expressed by a

[3] Although appellants have suggested, as another claim of inequity, that they may be unable to pursue contribution or other recovery from Dr. Diep in the New York courts under the laws and procedures of that state, we decline to speculate on that subject, which was not decided by the trial court.

majority of the members of our Supreme Court.") (citing State v. Hill, 139 N.J. Super. 548, 551 (App. Div. 1976)).

The Supreme Court is in a superior position to consider the policy ramifications of whether the exception advocated here would unduly dilute the general principles of requiring party status for allocation, and whether such a new rule would create untoward incentives and consequences. Other policy considerations include the potential reputational harm that a jury finding of fault on a verdict form may cause to a physician who is licensed out of state and whose conduct that doctor is not present in our courts to defend.

Affirmed, and remanded to the trial court for further proceedings. We do not retain jurisdiction.