NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0052-22

SCOTT W. ADAMS, individually
and as Administrator and Executor
of the ESTATE OF NANCY ADAMS,

Plaintiff-Respondent,

v.

STEVEN YANG, M.D., and
DIAGNOSTIC IMAGING, INC.,

Defendants,

and

HERVE BOUCARD, M.D.,
and HAMILTON
GASTROENTEROLOGY
GROUP, PC,

Defendants-Appellants.

APPROVED FOR PUBLICATION

February 21, 2023

APPELLATE DIVISION

Argued February 6, 2023 – Decided February 21, 2023

Before Judges Haas, DeAlmeida[1] and Mitterhoff.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Mercer County, Docket No. L-1903-15.

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[1] Judge DeAlmeida did not participate in oral argument. He joins the opinion with counsel's consent. R. 2:13-2(b).

Jeremy P. Cooley argued the cause for appellants (Buckley Theroux Kline & Cooley, LLC, attorneys; Jeremy P. Cooley, of counsel and on the brief).

Jeffrey A. Krawitz argued the cause for respondent (Stark & Stark PC, attorneys; Jeffrey A. Krawitz and Michael C. Ksiazek, of counsel and on the brief; Catherine A. Foley, on the brief).

The opinion of the court was delivered by

MITTERHOFF, J.A.D.

In this medical malpractice matter, defendants Herve Boucard, M.D. and Hamilton Gastroenterology Group, PA appeal from a July 26, 2022 order, which denied defendants' motion to bar the standard of care opinions of plaintiff's expert, Dr. Andrew Bierhals, at trial. On appeal, defendants argue that Glassman v. Friedel, 249 N.J. 199 (2021), which precludes a plaintiff from disavowing the negligence of an initial tortfeasor after settlement in a later action against a successive tortfeasor, should be extended to cases involving a settling joint tortfeasor. We disagree and affirm, substantially for the reasons articulated in Judge Douglas H. Hurd's well-reasoned oral opinion.

We discern the following facts from the record. In November 2010, plaintiff's decedent, Nancy Adams, was admitted to Robert Wood Johnson University Hospital, Hamilton ("RWJUH") with complaints of abdominal pain, vomiting and diarrhea. On November 14, 2010, while still at RWJUH, decedent

underwent a computerized tomography ("CT") scan of the abdomen and pelvis. The imaging was reviewed, analyzed, and reported on by Steven Yang, M.D., a radiologist. Dr. Yang's report of the CT scan stated no acute findings.

Due to her abdominal and gastrointestinal complaints, decedent's care team at RWJUH included a gastroenterologist, Dr. Boucard of Hamilton Gastroenterology Group ("HGG"). At that time, Dr. Boucard recommended that decedent follow up with him at HGG to undergo an endoscopy and colonoscopy as an outpatient.

On December 6, 2010, decedent was seen by Dr. Boucard at HGG for continued abdominal pain, constipation, diarrhea, and left lower quadrant pain. On January 18, 2011, decedent underwent a colonoscopy performed by Dr. Boucard. The colonoscopy results, according to Dr. Boucard, demonstrated an entirely normal colon. Despite Dr. Boucard indicating a need for an outpatient endoscopy and colonoscopy in November 2010, only a colonoscopy was performed in January 2011.

On July 13, 2012, Dr. Boucard finally attempted an endoscopy of decedent, which was ultimately aborted due to a large amount of food in decedent's stomach. Despite continuing to care for decedent for worsening complaints from November 2010 through October 2012, Dr. Boucard never attempted to perform the procedure again.

In December 2012, decedent underwent a gastric biopsy and a CT scan of the thorax, abdomen, and pelvis at Temple University Hospital. At that time, decedent was identified as having a gastric mass, which was found to be adenocarcinoma, stage IV. Decedent ultimately died of gastric cancer on August 17, 2013.

On August 17, 2015, plaintiff, individually and as administrator and executor of the estate of Nancy Adams, filed a complaint alleging negligence in the care and treatment of decedent. In addition to defendants, plaintiff also initially brought claims against Dr. Yang and his practice, Diagnostic Imaging, Inc.

To support his claims against Dr. Yang, plaintiff served the expert report of Dr. Kevin Mennitt, a radiologist. After reviewing the November 14, 2010 CT scan himself, Dr. Mennitt's report concluded that Dr. Yang deviated from the applicable standard of care by "missing a gastric mass suspicious for malignancy or misinterpreting the mass and not providing a full differential diagnosis as well as recommending additional follow-up such as with endoscopy." In addition, plaintiff served the expert report of Dr. Reed Phillips, a causation expert. In his report, Dr. Phillips opined that, based on Dr. Mennitt's radiological findings, decedent had a stage I tumor when Dr. Yang read the CT scan in question and,

therefore, decedent was deprived of a sixty percent clinically estimated chance of cure and an eighty-eight percent chance of survival.

In response, Dr. Yang retained and served the report of Dr. Andrew Bierhals, a radiologist. In his report, Dr. Bierhals concluded that Dr. Yang's interpretation of the November 14 CT scan was "well within the standard of care." In defending Dr. Yang's decision to not comment on decedent's gastric thickening, Dr. Bierhals opined that "gastric thickening . . . without any associated findings . . . would be a normal potentially expected finding," and that "[e]ndoscopy[,] not CT[,] is the method to diagnose gastric cancer (particularly early cancer)." Finally, Dr. Bierhals stated that, even if a malignant tumor were evident on the CT scan, it would have already been at an advanced stage as of that date. During the four years of discovery, the parties and expert witnesses were all deposed, with the exception of Dr. Bierhals.

On October 30, 2019, plaintiff settled their claims against Dr. Yang and his practice. Defendants have since pled crossclaims for contribution and indemnification against Dr. Yang.

After several adjournments, a trial date was finally scheduled for February 22, 2022. On February 16, 2022, however, plaintiff served a pretrial exchange, identifying Dr. Bierhals as an expert witness to be called at trial, along with Drs. Mennitt and Phillips. Prior to that date, plaintiff had never identified Dr.

Bierhals as a potential witness, nor had they amended interrogatories to name Dr. Bierhals as a potential witness.

In a February 21, 2021 letter to the trial court, plaintiff's counsel stated that he intended to call Dr. Bierhals at trial to offer the opinions "that Dr. Yang did not deviate from the standard of care in his interpretation and reporting of the November 14, 2010 CT scan," and "that endoscopy, not CT scan, is the 'gold standard' for diagnosing gastric cancer." On February 22, 2022, the trial court held a pretrial conference to address plaintiff's intention to call Dr. Bierhals as an expert witness at trial. Over defendants' objection, the court adjourned the February 22, 2022 trial date and allowed plaintiff to adopt Dr. Bierhals's opinions; discovery was then re-opened to allow defendants to depose Dr. Bierhals.

Defendants then moved to bar the standard of care opinions of Dr. Bierhals, relying on the Supreme Court's opinion in Glassman. The issues were fully briefed, and oral argument was held on the matter on July 26, 2022.

In an oral opinion, Judge Hurd denied defendants' motion, finding that Glassman does not extend its application of judicial estoppel to cases involving only joint tortfeasors. In addition, the judge suggested that plaintiff should not be judicially estopped from reversing position with respect to the negligence of a settling joint tortfeasor at trial because, unlike claims against successive

tortfeasors, damages are not divisible between multiple tortious events. Specifically, Judge Hurd reasoned:

> I've read the [Glassman] case many times and . . . other cases . . . that deal with the Glassman case since it came out. And it's a very helpful case at least from a trial court perspective in terms of explaining what happens in successive tortfeasor cases.
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> But, . . . in reading it again last night and again this morning, I just don't see any language here that would allow a trial court to extend . . . the methodology that the Court uses in there to a joint tortfeasor situation.
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> . . . .
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> [L]ooking at judicial estoppel and when it's applied; it's applied rarely, we know that[,] but it has to be applied at least in a joint tortfeasor situation . . . when the Court has adopted the position that would prevent plaintiff from . . . changing their position.

An order reflecting the same was memorialized the same day. On August 12, 2022, defendants moved for leave to appeal the trial court's July 26, 2022 order, contending that Glassman's invocation of judicial estoppel to bar plaintiff from reversing position as to the negligence of a settling defendant at trial should apply to joint tortfeasors. By way of an order dated September 8, 2022, we granted the motion and this appeal followed.

On appeal, defendants argue that "Glassman's application of judicial estoppel should apply equally to joint tortfeasors." It is well established that a "'trial court's interpretation of the law and the legal consequences that flow from

established facts are not entitled to any special deference.'" Rowe v. Bell & Gossett Co., 239 N.J. 531, 552 (2019) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)). Therefore, where—as here—"issues on appeal turn on purely legal determinations, our review is plenary." State v. Monaco, 444 N.J. Super. 539, 549 (App. Div. 2016) (citing State v. Adubato, 420 N.J. Super. 167, 176 (App. Div. 2011)).

As framed by the parties, we must determine a purely legal issue: whether judicial estoppel, as applied in Glassman, should also apply to prevent a plaintiff from reversing position as to the negligence of a settling joint tortfeasor at trial. Therefore, our review of the trial court's July 26, 2022 order is de novo.

We begin our analysis by considering the doctrine of judicial estoppel. In order to protect the integrity of the court system, "[w]hen a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events." Kress v. La Villa, 335 N.J. Super. 400, 412 (App. Div. 2000), 168 N.J. 289 (2001). The doctrine has been summarized as follows: "'[t]o be estopped [a party must] have convinced the court to accept its position in the earlier litigation. A party is not bound to a position it unsuccessfully maintained.'" Kimball Int'l, Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 606-07 (App. Div. 2000) (quoting In re Cassidy, 892 F.2d 637, 641 (7th Cir. 1990)) (second alteration in original).

Stated differently, "[t]he principle is that if you prevail in Suit #1 by representing that A is true, you are stuck with A in all later litigation growing out of the same events." Id. at 607 (quoting Eagle Found., Inc. v. Dole, 813 F.2d 798, 810 (7th Cir. 1987)).

However, judicial estoppel is not a favored remedy, because of its draconian consequences. It is to be invoked only in limited circumstances:

> It is . . . generally recognized that judicial estoppel is an "extraordinary remedy," which should be invoked only "when a party's inconsistent behavior will otherwise result in a miscarriage of justice." Ryan Operations G.P. v. Santiam-Midwest Lumber Co., 81 F.3d 355, 365 (3d Cir. 1996) (quoting Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 424 (3d Cir.) (Stapleton, J., dissenting), cert. denied, 488 U.S. 967 (1988)) . . . Thus, as with other claim and issue preclusion doctrines, judicial estoppel should be invoked only in those circumstances required to serve its stated purpose, which is to protect the integrity of the judicial process.
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> [Id. at 608 (footnote omitted).]

Our decision in Kimball echoed language from Ryan Operations, in which the Third Circuit Court of Appeals rejected a claim of judicial estoppel based on the bankruptcy's debtor's failure to disclose a lawsuit:

> [Judicial estoppel] is not meant to be a technical defense for litigants seeking to derail potentially meritorious claims, especially when the alleged inconsistency is insignificant at best and there is no evidence of intent to manipulate or mislead the courts. Judicial estoppel is not a sword to be wielded by

> adversaries unless such tactics are necessary to "secure substantial equity."

In Ali v. Rutgers, 166 N.J. 280, 288 (2000), our Supreme Court quoted the above language with approval, and confirmed the Court's view that judicial estoppel is an "extraordinary remedy." Ali, 166 N.J. at 288.

Traditionally, because the doctrine of judicial estoppel only applied when a court has accepted a party's position,[2] a party was ordinarily not barred from taking an inconsistent position in successive litigation if, as here, the first action was concluded by way of settlement. See e.g., Bhagat v. Bhagat, 217 N.J. 22, 27 (2014) ("[W]e emphasize that the doctrine of judicial estoppel may be invoked only when a position advanced in the prior litigation concerning the subject matter of the current litigation has been accepted by a court and led to a judgment in favor of that party. If the matter is resolved by settlement . . . the circumstances warranting application of the bar do not exist.").

However, our Supreme Court extended the doctrine of judicial estoppel in Glassman, where the Court—as a matter of first impression—specifically addressed "the allocation of damages in cases in which a plaintiff asserts claims against successive tortfeasors and settles with the initial tortfeasors before trial."

[2] Ordinarily, courts are deemed to have accepted a party's position when the position has helped form the basis of the court's final decision. See Cummings v. Bahr, 295 N.J. Super. 374, 387-88 (App. Div. 1996).

Glassman, 249 N.J. at 209 (emphasis added). There, the Court ultimately overruled Ciluffo v. Middlesex General Hospital, 146 N.J. Super. 476, 481-84 (App. Div. 1997), and replaced the pro tanto credit[3] scheme established therein with a two-step apportionment procedure applicable in successive-tortfeasor cases. Id. at 210. Glassman's "equitable method" of apportioning damages is as follows:

> In the first step of that apportionment process, the non-settling defendant alleged to be responsible for the second causative event may present proof of the damages suffered by plaintiff as a result of the first causative event. Among other evidence, the defendant may rely on the plaintiff's previous assertions in pleadings or discovery about the alleged fault of the initial tortfeasor and the damages resulting from the first causative event. A plaintiff who previously asserted in pleadings or discovery that the initial tortfeasor was negligent may not take the opposite position at trial. In such a setting, however, the plaintiff may urge the jury to apportion only a minor component of the damages -- or none at all -- to the first causative event.
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> Next, the trial court should instruct the jury to quantify the damages resulting from the first causative event. In a case such as this, in which the first causative event alleged is [decedent's] accident at Juanito's, the court should instruct the jury to decide what amount of damages, if any, the plaintiff suffered as a result of that accident. To prevent a double recovery, the damages that the jury attributes to the first causative event --

[3] A "pro tanto credit" is "a credit in the amount of the settlement with the settling tortfeasor." Restatement (Third) of Torts: Apportionment of Liability § 6 cmt. c (Am. Law Inst. 2000).

here, the plaintiff's accident at Juanito's -- should not be included in any judgment entered against the Medical Defendants.

The trial court should not disclose to the jury the amount paid by the initial tortfeasor to settle with the plaintiff; the settlement amount has no bearing on the jury's inquiry. Nor should the trial court charge the jury to assign a percentage of fault to any settling tortfeasor involved in that initial causative event, or to make any other determination regarding that event. The plaintiff's settlement with the tortfeasors allegedly responsible for that initial causative event obviates the need for any further inquiry regarding that event.

The trial court should also instruct the jury to determine the amount of damages that resulted from the second causative event. In this case, if the jury determines that the plaintiff has proven his claim that one or more of the Medical Defendants committed medical malpractice, it should be directed to then decide what amount of damages, if any, the plaintiff suffered as a result of that malpractice. The amount of damages that the jury attributes to the second causative event -- the medical malpractice -- would constitute the total damages awarded to plaintiff in the judgment to be entered by the trial court.

In the second stage of the apportionment process, the trial court should instruct the jury to apportion fault among the non-settling defendants as joint tortfeasors, in accordance with N.J.S.A. 2A:15-5.2(a). In this case, if the jury were to conclude that plaintiff proved the liability of one or more of the Medical Defendants for medical malpractice, the jury would assign a percentage of fault to any such defendant, with the percentages adding up to one hundred percent. The court would then mold the total judgment -- the amount of damages attributed by the jury to the medical malpractice -- in

> accordance with the percentage of fault allocated to each defendant.
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> [Id. at 231-33 (internal citations and quotations omitted) (emphasis added).]

Here, defendants do not argue that they are a successive tortfeasor, nor do they argue that the two-step apportionment procedure of Glassman expressly applies to joint tortfeasors. Rather, defendants argue in favor of expanding Glassman to joint tortfeasor cases, contending that the same principles relied on by the Court in that case motivate the application of the judicial estoppel doctrine in the joint tortfeasor context.

We disagree. As Judge Hurd found, Glassman does not extend its application of judicial estoppel to cases involving only joint tortfeasors. The Court made explicit that the Glassman two-step apportionment procedure only applies in "successive-tortfeasor cases" in which the plaintiff "has settled with the initial tortfeasor prior to trial." Id. at 230-32 (emphasis added). Here, plaintiff initially alleged that two physicians failed to diagnose decedent's cancer—an indivisible injury—thus making both tortfeasors "jointly or severally liable in tort for the same injury to person or property, . . ." N.J.S.A. 2A:53A-1 (emphasis added). Therefore, defendants fail the first step of the Glassman analysis, as they are unable to "present proof of the damages suffered

by plaintiff as a result of the first causative event." Glassman, 249 N.J. at 231 (emphasis added).

In addition, the Glassman Court specifically recognized that the apportionment process it had established for successive tortfeasors "is more complex than the familiar procedure conducted in joint-tortfeasor cases involving settling defendants." Id. at 233. That "familiar procedure" is prescribed by the Comparative Negligence Act ("CNA"), N.J.S.A. 2A:15-5.1 to -5.8, which provides in part that:

> [i]n all negligence actions and strict liability actions in which the question of liability is in dispute, . . . the trier of fact shall make the following as findings of fact:
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> > (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%.
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> [N.J.S.A. 2A:15-5.2(a).]

After the factfinder assesses each tortfeasor's percentage of fault, the judge then "mold[s] the judgment from the findings of fact made by the trier of fact." N.J.S.A. 2A:15-5.2(d).

As amended, the CNA then authorizes the plaintiff to recover:

> 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 percentages 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.
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> [N.J.S.A. 2A:15-5.3(a), (c).]

The right of contribution prescribed by the Joint Tortfeasors Contribution Law, 2A:53A-1 to -5, which has been incorporated into the CNA's fault-based allocation scheme, allows "any party who is compelled to pay more than his percentage share [to] seek contribution from the other joint tortfeasors." Glassman, 249 N.J. at 219 (quoting N.J.S.A. 2A:15-5.3(e)).

Although neither the Joint Tortfeasors Contribution Law nor the CNA address the effect of a settling joint tortfeasor, our Supreme Court has "implicitly recognized 'that a defendant who settles and is dismissed from the action remains a 'party' to the case for the purpose of determining the non-settling defendant's percentage of fault.'" Town of Kearny v. Brandt, 214 N.J. 76, 100 (2013) (quoting Brodsky v. Grinnell Haulers, Inc., 181 N.J. 102, 113 (2004)). As the Court explained:

> [W]hen a defendant ceases to participate in the case by virtue of a settlement, a non-settling defendant who meets the relevant requirements as to notice and proof may obtain an allocation of fault to the settling defendant. The settling defendant does not pay any portion of the judgment; any percentage of fault allocated to the settling defendant operates as a credit to the benefit of the defendants who remain in the case.
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> [Ibid. (citing Young v. Latta, 123 N.J. 584, 596-97 (1991)).]

"The credit . . . is based on the factfinder's allocation of fault to the settling defendant at trial, with the non-settling defendant bearing the burden of proving the settling defendant's fault." Glassman, 249 N.J. a 221 (citations omitted).

Guided by these well-established procedures, we find that plaintiff is not judicially estopped from reversing position with respect to the negligence of a settling joint tortfeasor at trial because, unlike claims against successive tortfeasors, damages are not divisible between multiple tortious events. Glassman sets forth the method of fixing damages in a successive tortfeasor action for the first, independent source of injury to afford a credit to a successive tortfeasor who would otherwise have no remedy against the settling tortfeasor. This assignment of damages to a preceding event is not possible where, as here, plaintiff seeks to establish fault as to a single, indivisible injury where two or more persons are subject to common liability.

Equally important is the fact that, unlike a successive tortfeasor, joint tortfeasors are not left without remedies against a settling codefendant. Whereas Glassman expressly prohibits an allocation of fault against an initial tortfeasor, a joint tortfeasor may seek an allocation of liability against the settling codefendant at trial. Any percentage of fault thus allocated "operates as a credit to the remaining defendants." In addition, the right of contribution assures that a joint tortfeasor can seek a remedy for the fault allocated to settling codefendants. It is plain that the equitable concerns underpinning Glassman do not exist in the joint tortfeasor context.

Finally, we are unpersuaded by defendant's argument that it would be unfair to allow plaintiff to disavow its prior position that Yang was negligent. Defendant bears the burden of proving Yang's negligence for purposes of an allocation. That plaintiff will not assist him in that endeavor does not evince any intent to manipulate or mislead the court; rather, we find it to be sound trial strategy. Given the remedies available to defendant, we conclude it is unwarranted to invoke the extraordinary remedy of judicial estoppel as we conclude it is not "necessary to secure substantial equity." Ryan Operations, 81 F.3d at 365.

Affirmed.