

IN THE SUPERIOR COURT OF PENNSYLVANIA

KEITH SPENCER,	:	No. 2040 EDA 2019
Plaintiff-Appellant/Cross-Appellee,	:	
	:	Consolidated With Nos. 2011 EDA
v.	:	2019, 2036 EDA 2019, and 2080
	:	EDA 2019
CLEVELAND JOHNSON, TINA	:	
GARNER JOHNSON, and	:	
PHILADELPHIA JOINT BOARD	:	
WORKERS UNITED, SEUI,	:	
Defendants-Appellees/Cross-	:	
Appellants.	:	

ORDER

AND NOW, on this _____ day of _____, 2021, upon consideration of *Amici Curiae* Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Chamber of Business and Industry, Chamber of Commerce of the United States of America, Greater Pittsburgh Chamber of Commerce, Einstein Healthcare Network, Main Line Health, Inc., St. Luke’s University Health Network, UPMC, Hospital and Healthsystem Association of Pennsylvania, Insurance Federation of Pennsylvania, Inc., Pennsylvania Association of Mutual Insurance Companies, Pennsylvania Health Care Association, Pennsylvania Institute of Certified Public Accountants, Pennsylvania Manufacturers’ Association, Pennsylvania Medical Society, American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, Curi, and The

Doctors Company’s Partially Concurred-In Application for Leave to File *Amicus Curiae* Brief in Support of Defendants-Appellees/Cross-Appellants’ Application for Reargument *En Banc* and in Excess of 3,000 Words, and any response thereto, it is hereby **ORDERED** that the Application is **GRANTED**. The Prothonotary shall file the proposed Brief attached as “Exhibit A” to the *Amici*’s Application.

BY THE COURT:

J.

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Defendants-Appellees/Cross-	:	
Appellants.	:	

**PARTIALLY CONCURRED-IN APPLICATION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANTS-
APPELLEES/CROSS-APPELLANTS' APPLICATION FOR
REARGUMENT *EN BANC* AND IN EXCESS OF 3,000 WORDS**

Pursuant to Pennsylvania Rules of Appellate Procedure 105 and 531, *Amici Curiae* Pennsylvania Coalition for Civil Justice Reform, Pennsylvania Chamber of Business and Industry, Chamber of Commerce of the United States of America, Greater Pittsburgh Chamber of Commerce, Einstein Healthcare Network, Main Line Health, Inc., St. Luke's University Health Network, UPMC, Hospital and Healthsystem Association of Pennsylvania, Insurance Federation of Pennsylvania, Inc., Pennsylvania Association of Mutual Insurance Companies, Pennsylvania Health Care Association, Pennsylvania Institute of Certified Public Accountants, Pennsylvania Manufacturers' Association, Pennsylvania Medical Society, American Property Casualty Insurance Association, National Association of

Mutual Insurance Companies, Curi, and The Doctors Company (collectively “*Amici*”) file the within Partially Concurred-In Application for Leave to File *Amicus Curiae* Brief in Support of Defendants-Appellees/Cross-Appellants’ Application for Reargument *En Banc* and in Excess of 3,000 Words, averring as follows:

1. *Amici* collectively represent the interests of the business and healthcare communities within Pennsylvania.
2. On March 18, 2021, a two-judge panel of this Court issued a published opinion, *sua sponte* concluding that, “for the Fair Share Act to apply, the plaintiff’s negligence must be an issue in the case.” *Spencer v. Johnson*, ___ A.3d ___, 2021 WL 1035175, at *22 (Pa. Super. Ct. 2021).
3. On April 1, 2021, Defendants-Appellees/Cross-Appellants Tina Garner Johnson (“Defendant Tina”) and Philadelphia Joint Board Workers United, SEI (“Defendant Union”) each filed an Application for Reargument *En Banc*. (Docket).
4. Pennsylvania Rule of Appellate Procedure 531 states that an *amicus curiae* may file a brief: (a) during merits briefing; (b) in support of or against a petition for allowance of appeal, if the *amicus curiae* participated in the underlying proceeding as to which the petition for allowance of appeal seeks review; or (c) by leave of court. Pa.R.A.P. 531(b)(1).

5. In accordance with Rule 531, *Amici* respectfully request leave to file an *amicus curiae* brief in support of the Applications for Reargument. Pa.R.A.P. 531(b)(1)(iii).

6. As the entities that are most directly impacted by the panel's decision to judicially amend the Fair Share Act, *Amici* are ideally suited to explain to the Court the public importance of the central issue raised in the Applications for Reargument.

7. To the extent that it is argued that Rule 2544 precludes the filing of an *amicus curiae* brief in support of reargument, this is incorrect because, when read in context, Rule 2544's prohibition against filing a supporting brief only pertains to one filed by a party. Pa.R.A.P. 2544(b).

8. Even assuming, *arguendo*, Rule 2544's prohibition extends to *amicus curiae* briefs, Rule 105 provides that, "for good cause shown," a court "may disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion." Pa.R.A.P. 105(a).

9. Here, good cause exists to permit *Amici* to file an *amicus curie* brief, given that the panel's *sua sponte* ruling "blows a hole" in the Fair Share Act, as correctly noted by a past president of the Pennsylvania Association for Justice. Max Mitchell, *Pa. Superior Court Ruling Opens Door for Plaintiffs to Avoid Fair Share Act Application, Attorneys Say*, THE LEGAL INTELLIGENCER (Mar. 24, 2021).

10. The proposed brief attached hereto as “**Exhibit A**” is 4,287 words in length.

11. While *Amici* are cognizant that applications for reargument are limited to 3,000 words, Pa.R.A.P. 2544(c), the “Statement of Interest of *Amici Curiae*” section of the proposed brief is 1,289 words, due to the extraordinary number of *amici* who joined the brief (19).

12. The proposed brief is consistent with the spirit of Rule 2544(c), in that the substantive sections of the brief are less than 3,000 words (2,998 words to be exact).

13. For all of these reasons, *Amici* respectfully seeks leave of Court to file, as *amicus curiae*, the proposed brief attached as “**Exhibit A.**”

14. On April 1, 2021, the undersigned counsel contacted appellate counsel for the parties, requesting the parties’ concurrence with the instant Application.

15. Defense counsel responded that Defendant Tina and Defendant Union concurred in the Application, while plaintiffs’ counsel responded that Plaintiff did not.

WHEREFORE, *Amici* respectfully request that this Court grant their Partially Concurred-In Application for Leave to File *Amicus Curiae* Brief in Support of Defendants-Appellees/Cross-Appellants' Application for Reargument *En Banc* and in Excess of 3,000 Words, and enter the form of Order submitted herewith.

Respectfully submitted,

/s/ Casey Alan Coyle

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Date: April 1, 2021

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: April 1, 2021

/s/ Casey A. Coyle

Casey A. Coyle, Esquire

Exhibit A

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 2040 EDA 2019
Consolidated With Nos. 2011 EDA 2019, 2036 EDA 2019, and 2080 EDA 2019

KEITH SPENCER,
Plaintiff-Appellant/Cross-Appellee,
v.
CLEVELAND JOHNSON, TINA GARNER JOHNSON, and PHILADELPHIA
JOINT BOARD WORKERS UNITED, SEUI,
Defendants-Appellees/Cross-Appellants.

BRIEF OF *AMICI CURIAE* PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, GREATER PITTSBURGH CHAMBER OF COMMERCE, EINSTEIN HEALTHCARE NETWORK, MAIN LINE HEALTH, INC., ST. LUKE’S UNIVERSITY HEALTH NETWORK, UPMC, HOSPITAL AND HEALTHSYSTEM ASSOCIATION OF PENNSYLVANIA, INSURANCE FEDERATION OF PENNSYLVANIA, INC., PENNSYLVANIA ASSOCIATION OF MUTUAL INSURANCE COMPANIES, PENNSYLVANIA HEALTH CARE ASSOCIATION, PENNSYLVANIA INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, PENNSYLVANIA MANUFACTURERS’ ASSOCIATION, PENNSYLVANIA MEDICAL SOCIETY, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, CURI, AND THE DOCTORS COMPANY IN SUPPORT OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS’ APPLICATION FOR REARGUMENT *EN BANC*

On Application for Reargument *En Banc* from the March 18, 2021 Opinion Affirming, Reversing, Vacating, and Remanding the May 17, 2019 Judgment of the Philadelphia County Court of Common Pleas, No. 2136, August Term, 2016

Date: April 1, 2021

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Coalition for Civil Justice Reform (“PCCJR”) is a statewide, bipartisan organization representing businesses, health care, and other perspectives. PCCJR is dedicated to improving Pennsylvania’s civil justice system by elevating awareness of problems and advocating for legal reform in the legislature and fairness in the courts.

The Pennsylvania Chamber of Business and Industry (“PA Chamber”) is the largest broad-based business association in Pennsylvania. The over 10,000 current members of the PA Chamber range from sole proprietors to Fortune 100 companies, and employ nearly 50% of the private sector workforce. The PA Chamber is not affiliated with any political party and is not a part of government. The PA Chamber’s mission is to act as a statewide voice of business and to advocate on those public policy issues that expand private sector job creation and lead to a more prosperous Commonwealth.

The Chamber of Commerce of the United States of America (the “U.S. Chamber”) is the world’s largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the U.S.

Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Greater Pittsburgh Chamber of Commerce is the advocacy affiliate of the Allegheny Conference on Community Development. Representing over 300 businesses and organizations in Southwestern Pennsylvania, our mission is to help improve the economy and quality of life in our 10-county footprint. The Greater Pittsburgh Chamber of Commerce is not affiliated with any political party and is not a part of government.

Einstein Healthcare Network ("Einstein") is a healthcare system with approximately 1,000 beds and more than 8,700 employees serving the communities of Philadelphia and Montgomery County. Einstein has three acute care hospitals: Einstein Medical Center Philadelphia, the largest independent academic medical center in the Philadelphia region training over 3,500 health professional students each year with more than 450 residents and fellows in over 35 accredited programs; Einstein Medical Center Elkins Park; and Einstein Medical Center Montgomery. The Network also includes MossRehab, a rehabilitation hospital, Willowcrest, a skilled nursing facility, outpatient care

centers, and a network of more than 900 primary care physicians and specialists throughout the region.

Founded in 1985, Main Line Health, Inc. (“MLH”) is a not-for-profit health system serving portions of Philadelphia and its western suburbs. MLH includes four acute care hospitals—Lankenau Medical Center, Bryn Mawr Hospital, Paoli Hospital, and Riddle Hospital—as well as a rehabilitation hospital, Bryn Mawr Rehabilitation Hospital. MLH also includes Mirmont Treatment Center for drug and alcohol recovery; Main Line Health HomeCare & Hospice, which includes skilled home health care, hospice, and home infusion services; Main Line Health Centers, primary and specialty care, lab, and radiology, and other outpatient services; Lankenau Institute for Medical Research, a biomedical research organization; and Main Line HealthCare, a large multispecialty physician network. A team of more than 2,000 physicians and 10,000 employees care for patients throughout MLH’s continuum of care.

St. Luke’s University Health Network (“SLUHN”) is a fully integrated, regional, non-profit network of more than 16,000 employees providing services at 12 hospital sites and 300+ outpatient sites. The Network’s service area includes 11 counties in central-eastern Pennsylvania and Warren and Hunterdon counties in New Jersey. In partnership with Temple University, St. Luke’s established the

Lehigh Valley's first and only regional medical school campus. It also operates the nation's longest continuously operating School of Nursing.

The University of Pittsburgh Medical Center ("UPMC") is a world-renowned health care provider and insurer, inventing new models of patient centered, cost effective, accountable care. UPMC provides more than \$1 billion a year in benefits to its communities. UPMC is the largest nongovernmental employer in Pennsylvania with approximately 87,000 employees, 40 hospitals, 700 doctors' offices and outpatient sites, and a 3.5-million-member Insurance Services Division.

The Hospital and Healthsystem Association of Pennsylvania ("HAP") is a statewide membership services organization that advocates for nearly 240 Pennsylvania acute and specialty care, primary care, subacute care, long-term care, home health, and hospice providers, as well as the patients and communities they serve.

The Insurance Federation of Pennsylvania, Inc. ("Federation") is the Commonwealth's leading trade organization for commercial insurers of all types. The Federation consists of nearly 200 member companies and speaks on behalf of the industry in matters of legislative and regulatory significance. It also advocates on behalf of its members and their insureds in important judicial proceedings.

The Pennsylvania Association of Mutual Insurance Companies (“PAMIC”) is a trade association formed in 1907 that represents the Pennsylvania mutual insurance industry. PAMIC fosters greater understanding and recognition of the unique alignment of interests between insurer management and policyholders, and represents 119 property and casualty insurers licensed to do business in Pennsylvania with a national premium totaling \$28.6 billion.

The Pennsylvania Health Care Association (“PHCA”) represents nursing facilities, assisted living, and personal care communities throughout the Commonwealth of Pennsylvania. PHCA advocates on behalf of more than 81,000 Pennsylvanians in long-term care communities and the nearly 40,000 caregivers who provide compassionate, high quality care each day. PHCA and its members are dedicated to serving and protecting our frailest and most vulnerable populations. Our number one priority is the safety of the residents entrusted to our care.

The Pennsylvania Institute of Certified Public Accountants (“PICPA”) is the second-oldest and the fourth-largest CPA organization in the United States. Membership includes more than 20,000 practitioners in public accounting, business and industry, government, and education. PICPA’s expressed goal is to speak on behalf of members when such action is in the best interest of the CPA profession in Pennsylvania and the public interest.

The Pennsylvania Manufacturers' Association ("PMA") is the statewide non-profit organization representing the manufacturing sector in the state public policy process in Harrisburg.

The Pennsylvania Medical Society (the "Society") represents physicians of all specialties and is the largest physician organization in the Commonwealth. The Society regularly participates as *amicus curiae* in Pennsylvania appellate courts in cases raising important issues affecting health care organizations and their businesses.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the U.S. and across the globe.

The National Association of Mutual Insurance Companies ("NAMIC") is the largest property/casualty insurance trade group with a diverse membership of more than 1,400 local, regional, and national member companies, including seven of the top 10 property/casualty insurers in the United States. NAMIC members lead the personal lines sector representing 66% of the homeowner's insurance market and 53% of the auto market.

Curi is a mutual company dedicated to helping physicians in medicine, business, and life, and covers nearly 2,000 Pennsylvania healthcare providers with medical professional liability insurance.

The Doctors Company is the largest physician-owned medical malpractice insurer in the nation and insures over 1,000 healthcare providers in the state.

Pursuant to Pa.R.A.P. 531(b)(2), PCCJR, PA Chamber, U.S. Chamber, Greater Pittsburgh Chamber, Einstein, MLH, SLUHN, UPMC, HAP, Federation, PAMIC, PHCA, PICPA, PMA, Society, APCIA, NAMIC, Curi, and The Doctors Company (collectively “*Amici*”) each file this *amicus* brief in their own right and on behalf of their respective members. *Amici* state that no person, other than their respective members, and their respective counsel, paid for or authored this brief, in whole or in part.

INTRODUCTION

The doctrine of joint and several liability is a relic of the English common law dating back to the 18th Century. Pursuant to the doctrine, when the tortious acts of multiple defendants combine to cause an indivisible injury to a plaintiff, each defendant is liable for the full extent of the injury regardless of the percentage of liability assessed by the jury. The doctrine thus allows the plaintiff to satisfy an entire judgment against any one of the defendants—even if the wrongdoing of a defendant contributed only a small part of the harm.

Until a few years ago, Pennsylvania was only one of eight states that had yet to alter or repeal joint and several liability. That changed on June 28, 2011, when Governor Corbett signed the Fair Share Act, 42 Pa.C.S. §7102, into law. Hailed by many at the time as restoring fairness to the law, the Act abolished joint and several liability in most negligence cases.

The statute accomplished that objective by clearly and unambiguously stating that, apart from a limited class of excepted cases, “a defendant’s liability shall be several and not joint, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant’s liability.” *Id.* §7102(a.1)(2). In its place, the Act adopted a proportionate liability model that permits a jury to award damages based on a percentage of fault. *Id.* §7102(a.1)(1).

In the decade since its passage, courts, scholars, and commentators universally have agreed that the Fair Share Act eliminated joint and several liability for multi-defendant cases, unless the defendant has been held liable for 60% or more of the total liability apportioned to all parties, or one of the other four statutory exceptions apply. This includes actions for strict liability, which do not even involve negligence.

However, on March 18, 2021, a two-judge panel of this Court *sua sponte* concluded that, “for the Fair Share Act to apply, the plaintiff’s negligence must be an issue in the case.” *Spencer v. Johnson*, ___ A.3d ___, 2021 WL 1035175, at *22 (Pa. Super. Ct. 2021). By limiting the Act for the first time solely to instances of comparative negligence, the ruling “blows a hole” in the Fair Share Act, as correctly noted by a past president of the Pennsylvania Association for Justice (“PAJ”). Max Mitchell, *Pa. Superior Court Ruling Opens Door for Plaintiffs to Avoid Fair Share Act Application, Attorneys Say*, *THE LEGAL INTELLIGENCER* (Mar. 24, 2021).

If permitted to stand, the panel’s published opinion will wreak havoc on Pennsylvania jurisprudence, causing a split of authority and forcing state trial courts and federal courts applying Pennsylvania law to choose between following a decade of precedent or the panel’s new, novel reading of the statute. But the real victims if this miscarriage of justice is not corrected will be Pennsylvania’s

business and healthcare communities, and the Pennsylvania citizens they serve. This is because the panel’s ruling restores the antiquated rule where a defendant found liable for 1% of the harm can be forced to pay 100% of the verdict in all non-comparative negligence cases—which constitute the vast majority of all negligence cases.

Now, plaintiffs will be incentivized once again to sue deep pocket defendants like hospitals, healthcare providers, and other businesses to bankroll a much larger verdict than a jury might expect them to have to pay. That perversion of the judicial system—finding a deep pocket, any deep pocket, and constructing a case to have the jury assess even minimal fault against that deep pocket—is what led to the passage of the Fair Share Act in the first place. Two judges of a 20-member Court should not be permitted to repeal the public policy established by the Legislature, through a judicial amendment of the Act disguised as statutory interpretation.

Accordingly, *Amici* urge this Court to grant the Applications for Reargument *En Banc* filed by Defendants-Appellees/Cross-Appellants Tina Garner Johnson (“Defendant Tina”) and Philadelphia Joint Board Workers United, SEI (“Defendant Union”), respectively.

GROUND FOR REARGUMENT *EN BANC*

Reargument is permitted only when there are “compelling reasons therefor.” Pa.R.A.P. 2543. Such reasons include where a panel decision “may be inconsistent with a decision of a different panel of the same court on the same subject” or a court has “overlooked or misapprehended . . . a controlling or directly relevant authority.” Pa.R.A.P. 2543, Note. Each of these reasons is present in this appeal and provide a separate basis for reargument. Taken together, they provide a compelling justification for this Court to exercise its discretionary review and grant reargument, especially considering that the panel’s published opinion is binding upon other panels and lower courts.

A. The Panel Engaged in *Sua Sponte* Decision-Making, Violating a Central Tenet of Appellate Law

The panel held that the trial court erred in failing to grant Plaintiff’s motion to mold the verdict pursuant to the Fair Share Act, because the jury’s general verdict warranted a finding that Defendant Union was vicariously liable for Defendant Tina’s negligence, and their combined liability exceeded the 60% liability. *Johnson*, 2021 WL 1035175, at *20. The panel concluded that, assuming, *arguendo*, the verdict did not demonstrate that the Union was vicariously liable, the trial court still erred in applying the Act, because the plaintiff was never alleged or found to have contributed to the accident. *Id.* at *20-22.

However, neither the parties nor *Amicus Curiae* PAJ raised that alternative argument, meaning that the panel did so *sua sponte*.

Sua sponte decision-making is highly disfavored, because it flies in the face of the core principles underlying appellate law. *See, e.g., Danville Area Sch. Dist. v. Danville Area Educ. Ass'n, PSEA/NEA*, 754 A.2d 1255, 1259 (Pa. 2000) (explaining that, when an appellate court decides issues *sua sponte*, it exceeds its proper function and unnecessarily disturbs the process of orderly judicial decision-making); *see also Freed v. Geisinger Med. Ctr.*, 5 A.3d 212, 221-23 (Pa. 2010) (Saylor, J., dissenting) (“The need to grant reargument in the present case to permit Petitioners actually to be heard on a legal basis invoked on the majority’s own initiative to justify overturning a favorable judgment—despite never having been raised by Petitioners’ opponent—illustrates the difficulties occasioned by this irregular practice.”).

This appeal presents a stark example of why that irregular practice should be used sparingly, if at all. Without the benefit of either the valuable insight of the trial court or the developed arguments of the parties, the panel judicially amended the Fair Share Act on its own initiative and abrogated nearly a decade of precedent. Reargument is warranted to permit the parties to be heard on this important issue. Pa.R.A.P. 2543, Note.

B. The Panel’s Conclusion that the Fair Share Act Applies Only in Comparative Negligence Cases Conflicts With a Wealth of Caselaw

In setting forth its alternative reasoning, the panel purported to undertake a statutory analysis of the Fair Share Act and determined that the Act applies only “where a plaintiff’s own negligence may have or has contributed to the incident.” *Johnson*, 2021 WL 1035175, at *20-22. *Amici* agree with Defendant Tina that this conclusion is contrary to the plain language of the statute. (Def. Tina Application for Reargument at 9-11). In addition, the panel’s decision conflicts with a wealth of caselaw.

First, the panel’s finding is incompatible with two decisions from the Pennsylvania Supreme Court: (1) *Roverano v. John Crane, Inc.*, 226 A.3d 526 (Pa. 2020); and (2) *Rost v. Ford Motor Co.*, 151 A.3d 1032 (Pa. 2016). *Roverano* and *Rost* are both strict liability asbestos cases, which, by their very nature, do not involve negligence. *See, e.g., Phillips v. Cricket Lighters*, 841 A.2d 1000, 1007 (Pa. 2003) (repeating the oft-stated mantra that “negligence concepts have no place in strict liability law”). In *Roverano*, the Supreme Court applied the Fair Share Act, holding that “the Act’s plain language is consistent with per capita apportionment in asbestos cases, the Act does not specifically preempt Pennsylvania common law favoring per capita apportionment, and percentage apportionment in asbestos cases is impossible of execution.” 226 A.3d at 527; *see*

id. at 535-43. In *Rost*, the Court did not apply the Act, because the plaintiffs' claims accrued prior to the effective date. However, consistent with the plain text of the statute, the Court noted: "Pennsylvania has now eliminated joint and several liability in most cases through amendment of the Fair Share Act." 151 A.3d at 1044 n.7 (citation omitted).

The panel's non-textual reading of the statute is also at odds with at least four rulings from this Court—all of which held or recognized that the Fair Share Act is not limited to a subset of negligence cases despite the differing composition of each panel. *Adams v. Rising Sun Med. Ctr.*, ___ A.3d ___, 2020 WL 7705969, at *14 (Pa. Super. Ct. 2020) (Bowes, J., joined by McCaffery, J. & Ford Elliot, P.J.E.) (observing that the Fair Share Act "abolished joint and several liability in most negligence cases" and "requires that damages be apportioned in negligence cases beyond the relative casual negligence of the parties," and then vacating the judgment, setting aside the verdict, and remanding for a new trial with instructions to apportion liability under the Act); *Veneesa, Inc. v. Stevenson*, 237 A.3d 491 (Table), at *6 n12 (Pa. Super. Ct. 2020) (Bowes, J., joined by Shogan, J. & Strassburger, J.) (noting that "Pennsylvania has now eliminated joint and several liability in most cases through the legislative enactment of the Fair Share Act. However, Appellants' claims accrued prior to the June 28, 2011 effective date of that Act. As such, Pennsylvania's pre-amendment joint and several liability

paradigm applies in this case.” (citation omitted)); *Roverano v. John Crane, Inc.*, 177 A.3d 892, 905 (Pa. Super. Ct. 2017) (*per curiam*, joined by Ford-Elliott, P.J.E.; Solano, J., filed a concurring and dissenting opinion) (“One of the main purposes of the Fair Share Act was to make joint and several liability inapplicable to most tort cases.”), *rev’d in part on other grounds*, 226 A.3d 526 (Pa. 2020); *Fratz v. Gorin*, No. 969 EDA 2012, 2013 WL 11266146, at *2 n.3 (Pa. Super. Ct. Apr. 10, 2013) (Lazarus, J., joined by Ott, J. & Strassburger, J.) (explaining that the Fair Share Act “virtually eliminates joint and several liability in Pennsylvania”). It bears noting that in none of those cases was there an allegation that the plaintiff or plaintiffs were negligent for his/her/their injuries.

Because the panel’s finding that the Fair Share Act does not extend beyond comparative negligence cases conflicts with multiple decisions from the Supreme Court and this Court, reconsideration is justified. Pa.R.A.P. 2543, Note.

C. The Panel’s Novel Reading of the Fair Share Act Cannot be Reconciled With the Statute’s Legislative History

The panel asserted that, in enacting the Fair Share Act, “there is no indication the legislature intended to make universal changes to the concept of joint and several liability outside of cases where a plaintiff has been found to be contributorily negligent.” *Spencer*, 2021 WL 1035175, at *22. The panel’s novel

reading of the Act, however, cannot be reconciled with the statute’s legislative history¹—which is noticeably absent from the opinion.

In 2002, the Legislature amended the Comparative Negligence Act, 42 Pa.C.S. §7102(b) (deleted), to curtail joint and several liability. Act of June 19, 2002, P.L. 394. However, the Commonwealth Court found the legislation violative of the single-subject rule, and therefore, unconstitutional. *DeWeese v. Weaver*, 880 A.2d 54, 61-62 (Pa. Commw. Ct. 2005), *aff’d sub nom. DeWeese v. Cortes*, 906 A.2d 1193 (Pa. 2006). In 2005, the Legislature passed the Fair Share Act again, but Governor Rendell vetoed it. SB 435, Session of 2005; *see, e.g.*, Stephanie Phillips Taggart, “Fair is fair; or is it?” NE. PA. BUSINESS JOURNAL, VOL. 21, ISSUE 4 (Apr. 1, 2006).

In 2011, the Fair Share Act was reintroduced in the Legislature for a third time. The members of the House and Senate debated the legislation over the course of four days. While the proponents and opponents of the legislation disagreed on its merits, they all agreed on one thing—*that the Act abolished joint and several liability except for five classes of cases.*

¹ *Amici*’s references to the legislative history of the Fair Share Act should not be construed as suggesting that the Act is ambiguous, thus requiring this Court to resort to the rules of statutory construction. To the contrary, *Amici* believe that the language of the statute is clear and unambiguous, thereby making it the best evidence of the Legislature’s intent. The legislative history merely reinforces that intent.

For instance, Representative Hanna, an opponent of the legislation, stated on the first day of floor debate in the House that “this bill that we are looking at today does away with joint and several liability except for those five enumerated exceptions that we talked about in section (3).” House Legislative Journal (“HLJ”), Apr. 11, 2011, at 563. Representative Hanna also remarked: “This bill repeals joint and several liability, which is a legal concept that has been in place in Pennsylvania for more than 200 years.” HLJ, June 27, 2011, at 1553.

In this same vein, Senator Greenleaf, another opponent of the legislation, remarked on the first day of floor debate in the Senate: “If you look at the bill itself, and all of the bills, what they do is repeal joint and several liability and then provide certain exceptions” Senate Legislative Journal (“SLJ”), June 20, 2011, at 692. “[T]his amendment and the original bill go too far,” he said, “because it, in effect, has a de facto repeal of joint and several liability.” *Id.* at 691.

Other instances of legislators remarking on the floor of the House or Senate that the Fair Share Act eliminated joint and several liability include:

- Representative Schroder (Proponent): “Just as we abandon[ed] the harsh law of contributory negligence, so too must we abandon the harsh, unfair doctrine of joint and several liability.” HLJ, Apr. 11, 2011, at 546;

- Senator Costa (Opponent): “What this amendment would do is essentially eliminate the doctrine of joint and several liability[.]” SLJ, June 20, 2011, at 693;
- Representative Marsico (Proponent): “Today we send a message to everyone that Pennsylvania will no longer be one of a small handful of States that cling to a strict system of joint and several liability, which has long been antiquated and decades past its usefulness. No longer will defendants who are found to be minimally liable for the injuries to the plaintiff be required to pay for the damages that others have influenced.” HLJ, Apr. 11, 2011, at 549;
- Representative Harper (Opponent): “By abolishing joint liability and joint responsibility, we also abolish the incentives for a joint defense and joint payment of damages. . . . And to those who believe that abolishing joint and several liability will somehow lead to fewer parties being sued, I think that will also have unintended consequences. . . . Abolishing joint liability and joint responsibility for damages sets up a scenario where the defendants will be incentivized to fight with one another.” *Id.* at 557; and
- Senator Piccola (Proponent): “Fairness is not, if you are a handful of a percent liable, that you could be responsible for paying 100 percent of the damages. That is not fair, and that is what we are doing in this bill, changing what we perceive to be the definition of fairness.” SLJ, June 21, 2011, at 721.

At no time during the four days of floor debate did any legislator ever maintain that the Fair Share Act was limited only to instances of comparative negligence. HLJ, Apr. 11, 2011, at 544-567; SLJ, June 20, 2011, at 691-700; SLJ, June 21, 2011, at 719-722; HLJ, June 27, 2011, at 1553-1562. Presumably, this is because every member of the House and Senate read the phrase “including actions

for strict liability” to mean that the Act applied to *all* multi-defendant actions—which is consistent with the plain terms of the statute.

Regardless, the legislative history flatly refutes the panel’s unsupported contention that the Legislature intended to limit the Fair Share Act to only a subset of negligence cases. Reargument is appropriate on this independent basis.

Pa.R.A.P. 2543, Note.

**D. The Panel’s Judicial Amendment of the Fair Share Act
Usurped the Legislature’s Function of Setting Public Policy**

In proper recognition of the separation of powers, the Pennsylvania Supreme Court has repeatedly delineated the distinction between the respective roles of the General Assembly and the courts in terms of establishing public policy. *See, e.g., Wilson v. El-Daief*, 964 A.2d 354, 367 & n.15 (Pa. 2009). The Supreme Court has often stated that “it is the Legislature’s chief function to set public policy and the courts’ role to enforce that policy, subject to constitutional limitations.” *Program Admin. Servs., Inc. v. Dauphin Cnty. Gen. Auth.*, 928 A.2d 1013, 1017-18 (Pa. 2007); *see also Parker v. Children’s Hosp. of Phila.*, 394 A.2d 932, 937 (Pa. 1978) (explaining that “the power of judicial review must not be used as a means by which the courts might substitute [their] judgment as to the public policy for that of the legislature”); *Weaver v. Harpster*, 975 A.2d 555, 563 (Pa. 2009) (“[T]he power of the courts to declare pronouncements of public policy is sharply restricted.

Rather, it is for the legislature to formulate the public policies of the Commonwealth.” (citation omitted); *Naylor v. Twp. of Hellam*, 773 A.2d 770, 777 (Pa. 2001) (recognizing the General Assembly’s superior ability to examine social policy issues and determine legal standards so as to balance competing concerns).

Because the shift from joint and several liability to proportionate liability constitutes the enactment of the public policy established by the Legislature, the panel’s partial repeal of the Fair Share Act cannot be permitted to stand.

Otherwise, this Court will be sanctioning the usurpation of the Legislature’s public-policy function by the courts.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court grant the Applications for Reargument *En Banc*.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of *Amici Curiae* PCCJR, PA Chamber, U.S. Chamber, Greater Pittsburgh Chamber, Einstein, MLH, SLUHN, UPMC, HAP, Federation, PAMIC, PHCA, PICPA, PMA, Society, APCIA, NAMIC, Curi, and The Doctors Company complies, in spirit, with the word-count limit set forth in Rule 2544(c). Based on the word-count function of the word processing system used to prepare the Brief, the substantive portions of the Brief (as required under Rule 2544(d)), contain 2,998 words. Because the Brief exceeds 3,000 words when adding in the “Statement of Interests of *Amici Curiae*,” *Amici* have simultaneously sought leave to exceed the 3,000 word-limit.

I further certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: April 1, 2021

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