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IN THE
COURT OF APPEALS OF INDIANA
No. 25A-CT-1683

JENNIFER PENNINGTON and JOSH PENNINGTON,	}	
Appellants/Plaintiffs,	}	Appeal from St. Joseph Circuit Court
v.	}	Trial Court Cause No. 71C01-1804-CT-160
MEMORIAL HOSPITAL OF SOUTH BEND, INC. d/b/a BEACON HEALTH AND FITNESS,	}	The Honorable John E. Broden
Appellees/Defendants.	}	

BRIEF OF *AMICUS CURIAE* DEFENSE TRIAL COUNSEL OF INDIANA IN SUPPORT OF APPELLEE, MEMORIAL HOSPITAL OF SOUTH BEND, INC. d/b/a BEACON HEALTH AND FITNESS

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INTEREST OF AMICUS CURIAE

The Defense Trial Counsel of Indiana ("DTCI") is an association of Indiana lawyers that defends clients in civil litigation, including businesses, professionals, and property owners, throughout the state of Indiana. Many of our members focus their practice on the defense of tort matters.

The consistent application of the Comparative Fault Act ("Act") is critical to the civil justice system and the direct conflict created by the Court of Appeals decision with *Bulldog Battery Corp. v. Pica Investments, Inc.*, 736 N.E.2d 333 (Ind. Ct. App. 2000) and *Nationwide Ins. Co. v. Parmer,* 958 N.E.2d 802 (Ind. Ct. App. 2011), warrants the attention of this Court. Trial courts, litigants and their counsel, for both plaintiffs and defendants, lack much-needed clarity in the face of this conflict currently existing under the Court of Appeals' published decisions under Ind. App. R. 57(H)(1). This Court's voice is critical to address this fundamental issue of whether a former defendant who has obtained summary judgment because the plaintiff (by choice or otherwise) did not come forward with evidence to support the claim against that party can be named as a non-party and allocated fault alongside the named defendants.

As the representative of the organized defense bar in Indiana, DTCI urges this Court to grant transfer, resolve the direct conflict existing among Indiana Court of Appeals' decisions, and ultimately affirm the trial court, clarifying this important issue of Indiana law.

STATEMENT OF THE CASE

Appellee-Defendant Memorial Hospital of South Bend, Inc. d/b/a Beacon Health and Fitness ("Beacon") owned and operated the pool where Appellant-Plaintiff Dr. Jennifer Pennington was injured while swimming backstroke and striking a concrete wing wall adjacent to a pool stairwell. (Appellee's Vol. 2, pp.3-4.) The pool was designed and constructed through the involvement of Panzica Building Corporation and Spear Corporation, and Beacon itself participated in discussions concerning key design features. Following the accident, the Plaintiffs-Penningtons sued Beacon and later added Panzica and Spear, alleging negligent design. (Appellee's Vol. 2, pp.44.)

The Indiana Supreme Court ultimately affirmed summary judgment in favor of Panzica and Spear, concluding that the Plaintiffs-Penningtons had failed to designate admissible evidence creating a genuine issue of material fact that either design professional breached the applicable standard of care. *Pennington v. Memorial Hospital of South Bend, Inc.*, 223 N.E.3d 1086, 1096 (Ind. 2024). At the same time, however, the Court held that factual issues remained regarding Beacon's own conduct and that a jury could find Beacon failed to exercise reasonable care in connection with the design, operation, maintenance, and warning practices associated with the pool. *Id.* at 1099-1101. The Court further emphasized Beacon's participation in the design process and held that Beacon could have an independent duty to identify and address an allegedly dangerous condition. *Id.* at 1101-02.

Following remand, Beacon designated Panzica and Spear as nonparties for purposes of fault allocation. (Appellants' Vol. 13, p. 136.) The Court instructed the jury that fault could be apportioned among Beacon, Dr. Pennington, Panzica, and Spear, and the jury ultimately returned a verdict finding Beacon not at fault. (Appellants' Vol. 14, p. 78.) The Court of Appeals reversed, holding that the prior affirmance of summary judgment necessarily foreclosed any allocation of fault to Panzica and Spear. *Pennington v. Memorial Hospital of South Bend, Inc.*, No. 25A-CT-1683, 2026 WL 1615627, at *7 (Ind. Ct. App. June 5, 2026).

SUMMARY OF ARGUMENT

This Court should not only grant transfer to resolve this important issue of Indiana law, but affirm the trial court's holding, which aligns with the Indiana Comparative Fault Act and its underlying public policies. This Court's affirmance of summary judgment in favor of the non-parties, Spear Corporation and Panzica Building Corporation, was not an affirmative finding of no fault by those parties, but instead constituted a finding that the plaintiff had failed to come forward with evidence to create a question of fact as to whether their conduct fell below the professional standard of care. See *Pennington*, 223 N.E.3d at 1096 ("The Penningtons' evidence fails to create an issue of fact over whether Spear or Panzica's work fell below their professional standard of care. For this reason, we affirm summary judgment in favor of Spear and Panzica.")

The Court of Appeals' decision allows a plaintiff to fail to oppose a summary judgment against one defendant in order to prevent that defendant from being named as a non-party in the case as plaintiff progresses against the other defendants. Such a result is not supported by Indiana's Comparative Fault Act, which allows nonparties to be named for the purpose of allocating ***fault***, even if those nonparties cannot be held ***liable*** to plaintiff. *See Santelli v. Rahmatullah*, 993 N.E.2d 167, 178 (Ind. 2013) ("It would be incongruous to permit Rahmatullah to be held jointly liable for damages caused by Pryor but not to permit Rahmatullah to seek contribution from Pryor.") If allowed to stand, the Court of Appeals' decision will have far-reaching implications and work an injustice in tort cases where there is more than one potentially at-fault party and, in particular, in professional liability and construction defect cases where this is typically the context.

The Court of Appeals decision will place defense counsel in the untenable position of both defending against plaintiffs' claims and forcing defense counsel to disclose evidence and advance arguments against co-defendants (which may be to the detriment of their own clients). In the instant case, that is the exact scenario playing itself out. It would have meant disclosing experts against the co-defendants (which plaintiff failed to disclose to oppose summary judgment) to testify that the condition was unsafe and the conduct of design professionals fell below the standard of care. Then, if successful in creating a question of fact to defeat summary judgment against the co-defendants, defense counsel would have had to make the Hobson's choice of either: (1) unifying its defense with the co-defendants against the plaintiff or (2) being forced to make the plaintiffs' argument against the co-defendants at trial (i.e., the design professionals failed to meet the standard of care), while at the same time also asserting that the condition was safe and the design met the standard of care. If the defendant chooses the second option, the defendant then risks a missing evidence instruction, if as happened here, the co-defendant is dismissed and the remaining defendant does not call a witness to support the now abandoned theory.

The Act does not require such an untenable result, which would force the defendant to take diametrically opposed positions. The plaintiffs bear the burden of proving their case against each defendant and, in this case, the plaintiffs failed to bring forward evidence against the design professionals freeing the remaining defendant, Beacon, to name Spear and Panzica as non-parties. Indiana public policy favors jury determinations based upon the full universe of potentially responsible actors, not a truncated fault allocation driven by a plaintiff's failure of proof as to one participant at the summary judgment stage. See *Bulldog Battery Corp. v. Pica Investments, Inc.*, 736 N.E.2d at 338 (noting that the nonparty defense is not limited to instances where the nonparty is or may be liable to the plaintiff, and that it would be "unfair" to require a defendant alone to bear the cost of damages if not solely responsible for the injury) *Cf. Koziol v. Vojvoda*, 662 N.E.2d 985, 989 (Ind. Ct. App. 1996) (concluding our legislature did not intend to mandate that named parties in comparative fault cases cannot revert to nonparty status after being dismissed following settlement). This Court should grant transfer to clarify that Indiana remains committed to a comparative-fault system that allocates responsibility based on actual fault, promotes fairness to all litigants, and ensures that juries are able to determine the true causes of a plaintiff's injuries.

ARGUMENT

I. Summary Judgment for Spear and Panzica was Based on Plaintiffs-Penningtons' Failure of Proof, Not an Adjudication That They Were Free From Fault.

Spear and Panzica – the nonparties in this case – have never been determined to be free of fault as a matter of law. Rather, this Court held that the Plaintiffs-Penningtons failed to meet their burden of coming forward with evidence to create a question of fact as to whether or not they are free of fault based on their actions. *Pennington*, 223 N.E.3d at 1096 (Ind. 2024). Summary judgment in Spear's and Panzica's favor is based on a failure of evidence by the Plaintiffs-Penningtons to meet the affirmative evidence tendered by Spear and Panzica in support of their motion for summary judgment.

In such circumstances, where one defendant is dismissed on summary judgment due to the plaintiff's failure to bear its burden to create a genuine issue of material fact, nothing in the Comparative Fault Act, IC 34-51-2 *et seq*, precludes a jury instruction on the non-party status of the dismissed defendants and a finding by the jury that those parties, pursuant to the evidence tendered by the remaining defendant and the plaintiff, are at fault for the plaintiffs' injuries. See *Nationwide Ins. Co. v. Parmer*, 958 N.E.2d at 808.

The decision in this case has far-reaching impact and is not supported by other decisions of this Court and the Court of Appeals. See *Santelli*, 993 N.E.2d at 178; *Osterloo v. Wallar ex rel. Wallar*, 758 N.E.2d 59, 63-65 (Ind. Ct. App 2001); *Waldridge* *v. Futurex Industries, Inc.*, 714 N.E.2d 783, 786 (Ind. Ct. App. 1999); and *Gilliam v. Contractors United, Inc.*, 648 N.E.2d 1236, 1240-41 (Ind. Ct. App. 1995).

The Indiana Supreme Court's decision in *Santelli* is particularly instructive as it confirms that Indiana's Comparative Fault Act is concerned with the allocation of fault among all actors who contributed to an injury, even where those actors cannot be held liable in the same proceeding. 993 N.E.2d at 178. In *Santelli*, a motel guest was robbed and murdered by a former maintenance employee who had retained a master key card after leaving his employment. *Id*. at 169. The decedent's estate sued the motel owner for negligent security, while the motel designated the murderer as a nonparty. *Id*. The estate argued that the intentional criminal conduct of the murderer should not be considered in the allocation of fault because the motel's very duty was to protect guests from that criminal conduct. *Id.* at 176-78.

The Court rejected that argument, holding that the Comparative Fault Act requires juries to consider "the fault of all persons who caused or contributed to cause the alleged injury" and that the statutory definition of fault expressly includes intentional conduct. *Id.* at 177-78. This Court emphasized that fault allocation and liability are distinct concepts, explaining that comparative fault focuses on assigning responsibility among all contributing actors, regardless of whether they are parties or could be held liable in the action. *Id.* at 177-79. This Court further recognized that it would be "incongruous" to impose liability without permitting consideration of the responsibility of other actors whose conduct contributed to the harm. *Id.* at 178.

That same principle applies here. Just as the intentional tortfeasor in *Santelli* could be considered in fault allocation despite not being subject to liability in the action, Spear and Panzica may properly be considered by the jury for purposes of fault allocation even though the Plaintiffs-Penningtons failed to sustain their claims against them. The Court of Appeals' decision is incompatible with *Santelli*'s broad construction of the Comparative Fault Act and its directive that juries consider the fault of all actors who contributed to the plaintiff's injury.

Similarly, *Osterloo*, *Waldridge*, and *Gilliam* each recognize that comparative fault and liability are separate inquiries and that fault may be allocated to actors who cannot be held liable in the action. In *Osterloo*, the Court of Appeals held that a father who had been dismissed from the case based on parental immunity could nevertheless be designated as a nonparty for fault-allocation purposes. 758 N.E.2d at 64-65.

Likewise, in *Waldridge*, the Court of Appeals acknowledged that the 1995 amendments to the Comparative Fault Act permit employers to be named as nonparties and to have fault attributed to them even though the exclusive-remedy provisions of the Worker's Compensation Act bar civil liability to the employee. 714 N.E.2d at 786. The decision reflects the legislature's deliberate choice to appropriately separate fault allocation from liability.

II. The Court of Appeals' Ruling Creates an Impossible Conflict for Defense Counsel and Undermines the Adversarial Process.

The Court of Appeals' decision places defense counsel in the untenable position of effectively requiring a defendant to prove the plaintiff's case against a co-defendant in order to preserve the ability to allocate fault to that party later. Such a rule fundamentally contravenes the adversarial process and contradicts the structure of Indiana's Comparative Fault Act.

Under the Court of Appeals' approach, a defendant who identifies another potentially responsible actor faces a dilemma. If the plaintiff fails to develop evidence sufficient to survive summary judgment against that actor, the defendant must either remain silent and risk being prohibited from allocating fault to that actor at trial, or affirmatively marshal evidence and expert testimony to defeat summary judgment on the plaintiff's behalf, even when it may be detrimental to defendant's own individual position. The latter course would require a defendant to advocate against its own litigation interests and to assume a burden the Act, as plainly written by the Indiana General Assembly, does not impose.

This case illustrates the problem – one that would likely arise in future cases in multiple contexts. The Plaintiffs-Penningtons asserted claims against Spear and Panzica but failed to designate admissible evidence establishing that either design professional breached the applicable professional standard of care. As a result, summary judgment was entered in their favor. Beacon, however, had consistently maintained that if the pool design was defective, responsibility rested ***at least in part*** with the entities that designed it (i.e., Spear and Panzica). Yet under the Court of Appeals' reasoning, Beacon could preserve that position only by effectively taking over the Penningtons-Plaintiffs' burden and supplying the proof necessary to keep Spear and Panzica in the case (i.e., proof that the pool design was defective). Such a position directly contravenes Beacon's own position as it had some involvement in the design of the pool.

Forcing a defendant into such a position runs contrary to basic principles governing civil litigation. A defendant owes no duty to prosecute the plaintiff's claims against another defendant. Nor should a defendant be required to retain experts, develop theories of liability, and present evidence designed to establish another party's negligence at the summary judgment stage merely to protect its own right to seek allocation of fault against potentially at-fault nonparties. And nothing in the Indiana Comparative Fault Act requires it to do so. The burden of proving a claim remains with the plaintiff, and the failure to satisfy that burden should not extinguish a remaining defendant's statutory right to argue that others contributed to the alleged injury, even if they may not be held liable to plaintiff for such conduct. This is a fundamental underpinning of Indiana's Comparative Fault Act. See *Santelli*, 993 N.E.2d at 177.

The practical consequences are equally troubling. If the Court of Appeals' rule stands, defense counsel would be incentivized to develop and disclose evidence supporting claims against co-defendants simply to preserve a future, nonparty defense. Counsel would be forced to choose between advancing evidence harmful to another defendant during the summary-judgment phase or forfeiting the ability to argue comparative fault later. Such a framework invites conflicting litigation positions, distorts discovery, and discourages coordinated defenses.

Indeed, the rule would create an untenable choice and one not required by the law or the Act. A defendant could either help the plaintiff defeat summary judgment against a co-defendant and then spend the remainder of the litigation attempting to assign fault to that same party, or refrain from doing so and lose the opportunity to have the jury consider that party's role altogether. Nothing in the Comparative Fault Act suggests the General Assembly intended such an irrational result; indeed, as the holdings in *Santelli*, *Osterloo*, *Waldridge*, and *Gilliam* show, Indiana law holds to the contrary.

The better rule – the one fully aligned with the ICFA – and the rule reflected in *Nationwide Insurance Co. v. Parmer*, 958 N.E.2d at 802, is that the plaintiff's inability to carry its burden against a former defendant does not prevent a remaining defendant from asking the jury to consider that actor's fault. Transfer is necessary to clarify that this principle articulated in the *Parmer* case prevails and to prevent Indiana defendants from being forced into the contradictory role of simultaneously defending against a plaintiff's allegations while litigating the plaintiff's claims against others.

III. The Court of Appeals' Rule Cannot Be Reconciled with Indiana Decisions Arising in the Legal Malpractice and Construction Defect Contexts.

The practical consequences of the Court of Appeals' decision are illustrated by reflecting on Indiana cases arising in the legal malpractice and construction defect settings. In both contexts, Indiana courts have recognized that fault allocation focuses on whether an actor caused or contributed to the plaintiff's injury, not whether that actor remains liable to the plaintiff or can be subjected to a judgment.

In *Bulldog Battery Corp. v. Pica Investments, Inc.*, a property owner sued an adjoining landowner for flooding allegedly caused by site improvements and a drainage system. 736 N.E.2d 333, 336 (Ind. Ct. App. 2000). The defendant designated its architect as a nonparty, asserting that the architect's design contributed to the damage. *Id.* at 337. The plaintiff argued that the designation was improper because the architect owed no duty to the plaintiff and therefore could not be held directly liable. *Id*. at 337-38.

The Court of Appeals rejected that argument, emphasizing that the 1995 amendment to the Comparative Fault Act replaced the prior focus on liability with a focus on causation. *Bulldog Battery Corp.*, 736 N.E.2d at 338-39. The court explained that "whether or not the nonparty may be liable to the plaintiff is no longer a consideration" and that a nonparty defense may be asserted whenever the designated actor "caused or contributed to cause the alleged injury." *Id.* at 338. Because the architect may have contributed to the plaintiff's damages through the design of the drainage system, fault could be allocated to him even though he could not be held directly liable to the plaintiff. *Id*. at 338-39, see also 21 Ind. Law Encyc. Negligence § 72 ("While it may seem 'unfair' to deprive the plaintiff of recovering the full amount of their damages due to the allocation of fault to a nonparty, it would be equally 'unfair' to require the defendant alone to bear the cost of the plaintiff's damages if the defendant was not solely responsible for the injury.").

That reasoning applies with equal force here. If an architect who cannot be liable to the plaintiff may nevertheless remain in the fault-allocation process, then design professionals dismissed after the plaintiff failed to (or chose not to) establish a claim against them cannot be categorically excluded from that same process.

Likewise, *Dennerline v. Atterholt,* 886 N.E.2d 582, 597-99 (Ind. Ct. App. 2008) demonstrates that Indiana courts distinguish between a plaintiff's ability to recover against a particular actor and the jury's responsibility to consider all potentially responsible causes of an injury. In *Dennerline*, a legal malpractice defendant designated numerous nonparties and argued that others had contributed to the losses at issue. *Id.* at 599. In discussing Indiana's comparative-fault framework, the court reiterated that the purpose of fault allocation is to ensure that "each person whose fault contributed to cause injury bears his or her proportionate share of the total fault contributing to the injury." *Id.* at 598 (quoting *Palmer v. Comprehensive Neurologic Servs., P.C.*, 864 N.E.2d 1093, 1098 (Ind. Ct. App. 2007)). The court further recognized that apportionment of fault is "uniquely a question of fact" ordinarily reserved for the jury. *Id*. at 598-99. Although the jury ultimately allocated all fault to the defendant-attorney based on the evidence presented, the court's analysis rested on the premise that fault allocation turns on causation and comparative responsibility, not on whether another actor remains subject to liability in the litigation. *Id*. at 598-603.

These decisions confirm a central principle of Indiana comparative-fault law: fault allocation and liability are separate concepts. The Comparative Fault Act requires consideration of all persons who caused or contributed to the plaintiff's

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injury, regardless of whether those persons remain defendants or can ultimately be held liable to the plaintiff. The Court of Appeals' decision departs from that settled principle and therefore warrants transfer.

IV. The Court of Appeals' Ruling, If Allowed to Stand, Invites Missing-Witness Disputes, Forces Defendants Into Contradictory Litigation Positions, and Undermines the Jury's General Verdict.

The Court of Appeals' ruling creates another practical problem that will repeatedly arise in complex litigation: it encourages disputes over missing-witness inferences and instructions by forcing defendants to take positions that are inconsistent with their own defense.

Indiana recognizes that "[t]he unexplained failure of a party to produce a witness within its control may give rise to an inference that had such witness testified, the testimony of such witness would have been unfavorable to that party's case." Indiana Pattern Jury Instruction 3.13. Similarly, Indiana's model instruction provides that when a party fails to produce a witness under its exclusive control, the jury "may conclude" that the witness's testimony would have been unfavorable to that party. The premise underlying both instructions is that a party's failure to call an available witness may justify an inference that the witness would not have supported that party's position.

Under the Court of Appeals' approach in this case, however, a defendant seeking to preserve the ability to allocate fault to a co-defendant would be incentivized to oppose that co-defendant's motion for summary judgment and develop evidence showing the co-defendant's responsibility for the plaintiff's injuries. In many cases, that evidence would necessarily come from witnesses aligned with the co-defendant itself—employees, former employees, corporate representatives, consultants, or experts uniquely familiar with the conduct at issue.

Once the co-defendant is dismissed, however, the remaining defendant faces a new problem. If the defendant does not call those same witnesses at trial, plaintiffs will have every incentive to argue that the defendant previously asserted those witnesses possessed critical information but elected not to present them to the jury. The litigation would then devolve into collateral disputes over why the witnesses were not called, whether they remained available, whether they were uniquely within another party's control, and whether their absence supports an adverse inference.

The Court of Appeals' rule here would manufacture these disputes in cases where they otherwise would not exist. Defense counsel would be pressured at the summary-judgment stage to develop evidence from witnesses associated with a co-defendant in order to keep that party in the case. Later, if those witnesses are not called at trial, counsel would be forced to explain their absence and defend against arguments that the witness was withheld because the testimony would have been unfavorable. What began as an effort to preserve comparative-fault rights would become a trial over witness availability, control, and strategic decision-making.

The result is particularly unfair because the defendant's position is internally contradictory. The defendant must first argue that evidence exists from which a jury could find the co-defendant at fault, while simultaneously maintaining its own defense that it was not negligent. The Court of Appeals' ruling then layers onto that dilemma the risk of adverse-inference arguments if the defendant chooses not to call every witness it previously identified as relevant to the co-defendant's conduct.

Nothing in the Comparative Fault Act requires defendants to assume that burden. Nor should Indiana law compel a defendant to litigate the plaintiff's claims against a co-defendant merely to preserve fault allocation and then justify, at trial, why it did not call witnesses associated with that co-defendant.

Further, if allowed to stand, the approach adopted by the Court of Appeals' opinion undermines the jury's verdict, creating a roadmap for discounting defense verdicts by merely arguing that evidence relevant to a nonparty defense somehow infected the jury's threshold finding of fault on the part of defendant. Such a ruling dangerously second guesses the jury's verdict, despite the jury being directed to first determine whether a defendant was at fault, and if not, to deliberate no further. *See, e.g.,* Indiana Pattern Jury Instruction 941 ("First, if [defendant] is not at fault, return your verdict for [defendant] and against [plaintiff]; and deliberate no further."). It also improperly presupposes the jury disregards the Court's jury instructions and does not follow the law. Such challenges lack merit and should not be invited. Consequently, the Court should reject a rule that invites such unnecessary collateral disputes and undermines the efficient and fair administration of trials.

CONCLUSION

Amicus Curiae respectfully requests this Court grant transfer, affirm the trial court, and provide clarity and predictability to litigants and courts under Indiana's Comparative Fault Act.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 44(E)

I verify that this brief complies with the type volume limitation of Appellate Rule 44(E). The brief does not exceed 4,200 words. The brief contains 4142 words (including those used in footnotes) based upon the count of the word processing system used to prepare the brief, Microsoft Word for Office 365.

Respectfully submitted,

/s/Lucy R. Dollens

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2026, a copy of the foregoing was filed electronically and served on the following parties electronically through IEFS (Indiana Electronic Filing System):

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