In addition to adequate notice, there must be evidence at trial allowing the factfinder to draw a conclusion with respect to the settling party's percentage of fault; that is, the fault of a settling codefendant "must be proven" before the trier of fact can be asked to assess that party's responsibility. *Mort v. Besser Co.*, 287 N.J. Super. 423, 431-432 (App. Div. 1996), certif. den. 147 N.J. 577 (1997). *See also Johnson v. American Homestead Mortg.*, 306 N.J. Super. 429, 437 (App. Div. 1997), stating that the fault of a settling defendant is subject to allocation by the trier of fact only if the issue of the settling party's liability is adjudicated at trial; *Young v. Latta*, 233 N.J. Super. 520, 526 (App. Div. 1989), aff'd 123 N.J. 584 (1991), observing that "if no issue of fact is properly presented as to the liability of the settling defendant, the fact finder cannot be asked . . . to assess any proportionate liability against the settler." *And see Cockerline v. Menendez*, 411 N.J. Super. 596, 618 (App. Div.), certif. den. 201 N.J. 499 (2010), stating that the nonsettling defendant's right to apportion liability is dependant on his proving the settling defendant's liability; "[t]he fact of settlement does not prove the liability of the settling defendant."

Mort v. Besser Co., supra, was a product liability case in which the plaintiff sued the manufacturer of a machine, an engineering company that designed a new control panel for the machine, the manufacturer of the control panel, and the electrical contractor who installed the control panel. The engineering company and the electrical contractor settled with the plaintiff prior to trial. Over the plaintiff's objection, the trial judge permitted the jury to assign fault percentages to the two settling parties.

The Appellate Division reversed, holding that the lack of evidence at trial demonstrating the fault of the two settling defendants precluded an allocation of fault to them. *Id.* at 433. The court stated that the mere "fact of settlement does not prove the settlor's liability." *Id.* at 431. With respect to the engineering company, the court noted that it was a member of the chain of distribution of the control panel. Thus, although it could be held strictly liable in tort, the only fault attributable to it on that basis would be identical to the fault assigned to the manufacturer of the control panel on the same theory. In response to a specific interrogatory, the jury had determined that the control panel manufacturer was liable on a negligence theory, but not on a strict liability theory. *Id.* at 427. Therefore, the court reasoned, the engineering company could be subject to a separate fault allocation only if it had been guilty of negligence beyond that attributed by the jury to the panel manufacturer. Since none of the expert witnesses had identified any independent negligent conduct by the engineering company, the court concluded that there was no factual basis supporting the jury's allocation of fault to it. *Id.* at 433. Similarly, the court decided that the issue of the electrical contractor's fault should not have been sent to the jury because there was no testimony that it had performed its services negligently. *Id.*

See also Sullivan v. Combustion Engineering, 248 N.J. Super. 134, 144 (App. Div.), certif. den. 126 N.J. 341 (1991), an asbestos exposure case in which the court held that the non-settling defendants could not introduce the interrogatory answers of settling codefendants to support an allocation of fault to the settlers. The court reasoned that the answers provided no basis from which an assessment of percentages could be derived because they failed to indicate the length of time the plaintiff had been exposed to each defendant's products.

But see Young v. Latta, 123 N.J. 584, 598 (1991), noting that a non-settling defendant had proven the fault of a settling defendant "on the basis of the testimony and written report of plaintiff's own expert"; *Theobald v. Angelos*, 44 N.J. 228, 232-233 (1965), concluding that a jury's finding that a settling defendant was not a tortfeasor was binding on the non-settling defendants because the issue of the settling party's liability was "fairly litigated."

Cf. Green v. General Motors Corp., 310 N.J. Super. 507, 543 (App. Div.), certif. den. 156 N.J. 381 (1998), suggesting that the plaintiff's testimony that a settling defendant had operated her vehicle improperly would have been sufficient to support an allocation of fault to the settling party if the non-settling defendant had provided sufficient notice to the plaintiff that the settling defendant's fault would be an issue at trial. *Cf. also Higgins v. Owens-Corning Fiberglas*, 282 N.J. Super. 600, 606 (App. Div. 1995), in which the evidence presented at trial was sufficient to convince the jury to assign 30% fault to a non-party. The court in that case ultimately rejected any allocation of fault to a non-party. *See also, Mahoney, Current N.J. Personal Injury Recovery (GANN)* at 15:2-3. And see Benson v. Brown, 276 N.J. Super. 553, 555 (App. Div. 1994), in which the settling defendant was an intoxicated driver who struck a pedestrian after leaving the defendant dram shop.

In matters where the plaintiff settled claims against one defendant, the remaining defendants have the burden to prove that the settling defendant was negligent. *Shatz v. TEC Technical Adhesives*, 174 N.J. Super. 135, 145-46 (App. Div. 1980). Plaintiff settling with one defendant does not release the remaining defendants, unless there is full satisfaction. *Id.* If a remaining defendant asserts culpability on a settling defendant, they have the burden to prove the settling defendant's conduct to be negligent, as they would have if they were sued for contribution from another party. *Id*. This promotes settlements in multi-party litigation, and not place an advantage on the remaining defendants. If one or more remaining defendants are found negligent, the fact finder must determine whether the settling defendant's conduct was also negligent, in order to apportion fault in percentages between the remaining defendants and the settling defendants.

Info From:
Shatz v. TEC Technical Adhesives, 174 N.J. Super. 135, 145-46 (App. Div. 1980).

October 19, 2012

VIA HAND DELIVERY
Attention: Chambers of Hon. Jamie S. Perri, J.S.C.
Monmouth County Superior Court
71 Monument Park

Freehold, New Jersey 07728

Re: Marc J.Comer as administrator ad prosequendum of the Estate of Adalto De Lima; Estate of Alexandre Martinez v. Cilene Caixeta
Docket No.: MON-L-5838-07
Our File No.: 287-0

Dear Judge Perri:

As Your Honor is aware, this firm represents plaintiff in the above referenced consolidated matters. Kindly accept the following in lieu of more formal briefing on the issue of the law applicable when a matter proceeds to jury where there is a settling defendant.

Of course, it is well settled that law and strong public policy in this state favor settlements. *Pascarella v. Bruck*, 190 N.J. Super. 118, 125 (App. Div.1983), *certif. den*. 94 N.J. 600 (1983); *Nolan ex rel. Nolan v. Lee Ho*, 120 N.J. 465, 472 (1990) (*quoting Jannarone v. W.T. Co.*, 65 N.J.Super. 472, 476,(App.Div.), *certif. denied*, 35 N.J. 61 (1961)). As such, nonsettling tort-feasor against whom a verdict is rendered is entitled under the Compartive Negligence Act to offset the amount equal to the settling tort-feasor's proportionate share of liability; expressed another way, a non-settling joint tort-feasor will be liable to plaintiff only for that percentage of negligence attributed to him. *Dimogerondakis v. Dimogerondakis*, 197 N.J. Super. 518 (Law Div. 1984). See generally, *N.J.S.A.* 2A:15-5.2

Consistent with the above, where the plaintiff settled claims against one defendant, the remaining defendants have the burden to prove that the settling defendant was negligent. *Shatz v. TEC Technical Adhesives*, 174 N.J. Super. 135, 145-46 (App. Div. 1980). Plaintiff settling with one defendant does not release the remaining defendants, unless there is full satisfaction. *Id.* If a remaining defendant asserts culpability on a settling defendant, they have the burden to prove the settling defendant's conduct to be negligent, as they would have if they were sued for contribution from another party. *Id*. This promotes settlements in multi-party litigation, and there for does not place an advantage on the remaining defendants. See generally, *Kiss v. Jacob*, 138 N.J. 278 (1994); *Theobald v. Angelos*, 44 N.J. 228 (1965); *Cartel Capital Corp. v. Fireco of New Jersey*, 81 N.J. 548 (1980).

If one or more remaining defendants are found negligent, the fact finder must determine whether the settling defendant's conduct was also negligent, in order to apportion fault in percentages between the remaining defendants and the settling defendants. This burden rests with defendant as stated in Model Civil Jury Charge, 1.17, which provides in part:

> If you find that one or more of the remaining defendants were negligent and that such negligence was a proximate cause of the accident, you must next consider the conduct of the settling defendant. You will have to determine whether or not the settling defendant *[name]* was negligent and a proximate cause of the accident. The

burden of proving that the settling defendant was at fault is on the remaining defendant(s).

In the event that you find that a settling defendant was negligent and a proximate cause of the accident, you must apportion fault in terms of percentages among/between the settling defendant(s) and the remaining defendant(s). (Emphasis added).

Respectfully submitted,

SARAH K. DELAHANT
For the Firm

cc: Stephen Rudolph, Esq. (Via Fax- 732-974-9252)
S:\Bank- Briefs, Forms, Other\settling defendants.wpd

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