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|----------------------|---|------------------------------------|
| STATE OF NEW JERSEY, | : | SUPREME COURT OF NEW JERSEY        |
| Plaintiff-Movant     | : | DOCKET NO.: 090381                 |
|                      | : | APP. DIV. DOCKET NOS.: A-001374-23 |
|                      | : | A-002164-23                        |
| V.                   | : | INDICTMENT NO.: 23-07-00473        |
|                      | : | CRIMINAL ACTION                    |
|                      | : | ON MOTION FOR LEAVE TO APPEAL      |
| THOMAS J. DINAPOLI,  | : | FROM A FINAL ORDER OF THE COURT    |
| Defendant-Respondent | : | OF NEW JERSEY, APPELLATE DIVISION, |
|                      | : | DENYING THE STATE'S MOTION FOR     |
|                      | : | RECONSIDERATION                    |

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SAT BELOW: HONORABLE JACK M. SABATINO, J.A.D.  
HONORABLE KATIE A. GUMMER, J.A.D.

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**LETTER BRIEF ON BEHALF OF DEFENDANT-RESPONDENT**

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Dear Honorable Judges:

Pursuant to Rule 2:6-2(b), please accept this letter brief in lieu of a more formal brief in opposition to the State's Motion for Leave to Appeal the Order of the Appellate Division Denying its Motion for Reconsideration.

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## **COUNTERSTATEMENT OF PROCEDURAL HISTORY**

The defendant, Thomas DiNapoli, adopts the procedural history set forth in the State's brief in support of its motion for leave to appeal brief in this matter.

## **COUNTERSTATEMENT OF FACTS**

On June 4, 2019, Mr. DiNapoli was involved in a motor vehicle accident with the alleged victim who was a passenger in the front seat of the other involved automobile. (Da 3). The alleged victim was treated at Trinitas Regional Medical Center. (Da 4-77). On page 1 of the permanent medical record with a starting date of June 4, 2019, the alleged victim's condition is listed as "airway open and patient breathing normal and circulation normal." (Da 5). She was "alert and awake." (Id.) On page 5 of that same report, the alleged victim's respiratory condition is listed as "breathing spontaneous and unlabored, breath sounds clear and equal bilaterally with regular rhythm, chest movement is symmetrical." (Da 9). The alleged victim was given four milligrams of morphine intravenously on June 4, 2019. (Da 10). On Page 7 of the report, the alleged victim is listed as having "no complaint of pain or distress" and was given a high flow of oxygen without explanation of why. (Da 11).



Approximately one hour later, at 9:41p.m., Ms. Mele was evaluated by Dr. James Hakim, who reported “normal breath sounds... and no murmur,” relating to her pulmonary and circulatory functions. (Da 17-20). The doctor reported “multi trauma with multiorgan injury,” yet failed to provide any specificity as to the impacted organs or extent of injury. (Id.). Around this time, Ms. Mele was administered another four milligrams of morphine intravenously. (Id.).

Within a half hour, Ms. Mele was reassessed by a treating nurse who reported her condition had improved and pain had subsided. (Da 24). At approximately 11:27 p.m. on June 4, 2019, Ms. Mele was evaluated for approximately the fifth or sixth time since admission, underwent blood work, and full body x-ray and CT scans. (Da 27). Importantly, the blood work reflected “leukocytosis and elevated creatinine,” which is indicative of, and commonly associated with, cirrhosis of the liver. (Id.). The x-ray revealed fractures to her patella, which was consistent with Ms. Mele’s report of knee pain. (Id.). Examination of her CT scan revealed fractures in three ribs, which was consistent with Ms. Mele’s report of chest pain. (Id.). The resident doctor also noted that an observed opacity in the scan “suggested” pulmonary contusions. (Id.). However, that suggestion was drastically in contrast to the

evaluations of every preceding treating physician, who noted no abnormal respiratory function. (Id.).

The resident also conducted yet another physical examination of Ms. Mele, and his reported findings as to her condition remained consistent with all prior evaluations. (Da 28). Of note, he reported bruising on the chest and knees, but “no acute respiratory distress,” clear lungs with “no wheezing,” and “no evidence of flail chest.” (Id.).

Nonetheless, Ms. Mele was transferred to the Intensive Care Unit (“ICU”) for further monitoring of the “suggested pulmonary contusion.” (Da 39-42). Minutes later, at approximately 12:08am, Ms. Mele’s condition was assessed and reported for a seventh time. (Id.). At which time, the ICU nurse noted that all “cardiovascular checks reported normal” with “clear lungs.” (Id.). Utilizing the Respiratory Distress Observation Scale, the ICU nurse reported low scores signaling “little or no distress.” (Id.). Ms. Mele was continued on high oxygen intake, but her morphine intake was significantly decreased, from four milligrams via intravenous as needed, to “one milligram via intravenous every four hours,” seemingly due to her subsiding pain and improved condition. (Id.).

Thirty minutes later, on June 5, 2019, at approximately 12:15am, an eighth physical examination was conducted by yet another resident physician.



(Da 44-45). Regarding her lungs, there was a report of “no increased work of breathing, no accessory muscle use, bilateral breath signs.” (Id.).

Confusingly, the resident then suggested the pulmonary contusion was worsening. (Id.). Yet, despite that “suggestion” another resident completed a Medicare Inpatient Certification at approximately 5:21am that same morning, of which provided a post-hospital care plan and anticipated date of discharge of June 10, 2019 (five days later) to a rehab facility. (Da 46). In other words, Ms. Mele was scheduled to be discharged from the hospital without any life-threatening condition resulting from the subject motor vehicle accident. (Id.).

At approximately 11:07 a.m., it was reported that Ms. Mele’s family, specifically her son - a medical doctor – requested palliative care for her and placement in an inpatient hospice facility notwithstanding the hospital’s intention to prepare a discharge plan for her. (Da 61). Ms. Mele was then administered fentanyl, the purpose for same unclear, while staying on the decreased morphine intake for pain management. (Id.).

The Palliative Care Assessment conducted less than thirty minutes later reflected that, upon referral from the treating physician, Ms. Mele was admitted into palliative care with “a diagnosis of closed fractures of multiple ribs.” (Da 63). Glaringly absent from such referral was any mention of the suggested “pulmonary contusion,” despite the unquestionable importance of

including same, were it to be true. (Da 64). Upon further evaluation, it was reported that she suffered from “extensive disease” and “multiple comorbidities.” (Id.). Specifically, the medical records indicate that Ms. Mele reportedly suffered from hypersensitive lung disease (HLD), hypertension (HTN), microscopic colitis, diabetes, dementia, and Alzheimer’s disease.<sup>1</sup> (Da 68). The record is barren of any indication that Ms. Mele was transferred to palliative and/or hospice care due to anything but her pre-existing and extensive comorbidities, including terminal diseases such as Alzheimer’s and cirrhosis, and the specific request of her family. (Da 66). In fact, a consultation with yet another doctor at approximately 12:00 p.m. that day reported the following confirmatory impressions:

- The patient also has x-rays which show multiple fractures on the right side.
- The patient also has had a fracture of the knee and there are other multiple fractures secondary to the accident.
- **The patient has no other significant complaints.**
- **Apparently, the patient has been demented for quite some time.**

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<sup>1</sup> It should be noted that Ms. Mele was also determined (by way of autopsy) to suffer from cirrhosis of the liver, which was undoubtedly known by Ms. Mele’s son, a medical doctor, but apparently not reported to the treating medical physicians.



- At this time, **the family has requested** Hospice and Comfort Care, and I have spoken to the family at length and I certainly think that the best approach for this poor lady who is in a lot of pain and her pain should be controlled with Morphine.
- **... Even if the patient got better, she would still have dementia and Alzheimer's disease which is making her nonfunctioning.**  
(Id.).

Again, glaringly absent is mention of any “pulmonary contusion,” the alleged reason of which Ms. Mele was first introduced to the ICU, where she was first given fentanyl. (Id.). Further, this doctor reported that the patient “developed shortness of breath and was found to have hypoxemia,” or low blood oxygen, which was the reason for the high flow oxygen. (Id.). Such a statement is directly in contrast to the numerous prior reports of “clear lungs,” “little or no distress” on the Respiratory Distress Observation scale, and “no increased work of breathing.” (Da 39-42). Additionally, if such a statement were to be true, it would be contrary to Ms. Mele’s best care to remove her from the high flow oxygen and implement a fentanyl patch, which is what was done upon her entry into Palliative Care.

Less than four hours later, seemingly in furtherance of discharge, a social work psychosocial assessment was conducted, which contemplated

discharge to a hospice facility, with an expected outcome date of the very next day, June 6, 2019. (Da 70). The reason for discharge was changed to a “new diagnosis” of “adjustment to end of life issues”, wildly different from her initial diagnosis of “closed fractures of multiple ribs.” (Id.). Seemingly during this time without further detail as to when, why, or by whom, Ms. Mele was administered an exorbitant amount of morphine, as she was switched from a morphine intravenous to a morphine **infusion** “after having discussion with the patient’s family.” (Da 75). Ms. Mele was pronounced hours later at 5:45pm, with a reported cause of death as “severe lung contusion.” (Id.). The records indicate that the resident that pronounced Ms. Mele was hesitant in whether to even contact the medical examiner or if Ms. Mele “met the criteria” for same. (Id.)

On June 6, 2019, in the early morning hours, a Medical Examiner Investigative Data Sheet was completed by Investigator Ernesto Hernandez of the Union County Medical Examiner’s Office (hereinafter “UCME”). (Da 1-3). Within the report, the investigator inaccurately noted that “CT scans and x-rays showed... lung contusions,” despite the medical records indicating a mere suggestion of same due to “scattered areas of groundglass opacity.” (Da 29). Importantly, the investigator notes “family made her comfort care only.” (Da 1-3). The case was ultimately accepted for examination upon said information.



Approximately ten hours later, Beverly Leffers, M.D., J.D., Designated Forensic Pathologist of the UCME, performed the postmortem examination and autopsy of Ms. Mele for over an hour. (Pa 259-263). In her Autopsy Report, Dr. Leffers carefully detailed her observations of injury including, but not limited to, various surface level contusions across her shoulders, chest, hip, hand, knees, and fractures to her sternum and ribs. (Id.). However, the autopsy did not reveal evidence of injury, i.e., contusions, to any vital organs, specifically Ms. Mele's lungs. (Id.).

Such omission was not an oversight or mistake, but an intentional representation of Dr. Leffers' findings, as further evidenced by her detailed observations of each and every vital organ system as described in her report. (Id.). After examination of Ms. Mele's lungs, Dr. Leffers reported "the lungs are slightly edematous **without other abnormalities.**" (Id.). It cannot be disputed that if Ms. Mele suffered pulmonary contusions as "suggested" by treating hospital physicians, or as listed as the alleged cause of death within the hospital records, the alleged contusions would be apparent upon postmortem examination. (Id.). Further, the alleged contusions would undoubtedly be reflected in a carefully detailed autopsy report to be submitted for a pending criminal matter. (Id.).



Irrespective of same, Dr. Leffers determined the cause of death to be “blunt impact injuries.” (Id.). Importantly, Dr. Leffers clarified same as “A. Contusions and abrasions of body surfaces” and “B. Fractures of sternum and ribs.” (Id.). The autopsy report is unambiguous that the blunt impact injuries and apparent cause of death were nothing more than superficial, surface-level bruises and cuts to the body and broken sternum and ribs. (Id.).

However, the autopsy report indicates another distinctive finding – Ms. Mele suffered from cirrhosis of the liver – a terminal disease. (Id.). This finding was consistent with the Palliative Care Assessment, which determined that, prior to the accident, Ms. Mele suffered from pre-existing “extensive disease” and “multiple comorbidities.” (Da 63).

In addition, this matter has already ended in a mistrial due to the State’s failure to produce relevant, exculpatory evidence to the defense in the form of the complete set of the alleged victim’s medical records. In its statement of facts and accompanying brief, the State again hides and mischaracterizes facts in its attempt to deprive the defendant of the right to defend himself. These missing records included nursing notes which highlight the doctors’ decision to give Ms. Mele, the alleged victim, a “morphine infusion,” instead of controlling the dosage, and the nurse’s incredulity at the doctors’ orders in this regard. The State should not have hidden these relevant and highly

exculpatory facts, particularly when an expert opined that Ms. Mele died of natural causes. In addition, the defense expert outlined the dosages of morphine given to Ms. Mele and found them to be “liberal.” (Pa 304).

Specifically, Ms. Mele was given 10 mg of morphine orally at 12:03, another 20mg of morphine orally at 12:04 and, was switched to a “morphine infusion” of 2 mg of morphine per hour intravenously at 13:03. (Pa 304). That dosage was to be “increased by 1-2 mg per hour” thereafter. Id. She was then switched over to “hydromorphone” which, according to the expert’s notes, equates to 7 mg of morphine for every 1 mg of hydromorphone given. Id.

Second, the “do-not-resuscitate” directive (“DNR”) in place for Ms. Mele is just that – an order not to resuscitate Ms. Mele when there is “no meaningful expectation of recovery.” (Pa 336). To the extent that the State argues that Ms. Mele would have no meaningful quality of life, this allegation stems from Ms. Mele’s preexisting state (she had dementia, cirrhosis of the liver, and a host of other ailments that were not caused by the automobile accident). (Pa 364). The treating medical staff had a treatment and recovery plan, as well as a planned discharge date, in place before Ms. Mele’s son requested palliative care. (Pa 384). As such, the DNR was not triggered by Ms. Mele’s injuries from the accident. Indeed, one treating doctor’s



impression stated as follows: “even if the patient got better, she would still have dementia and Alzheimer’s disease which is making her nonfunctioning.” (Pa 403). Thus, Ms. Mele’s medical record shows that palliative care was given despite her ability to recover from the injuries she received from the accident.

Finally, and most importantly, Ms. Mele’s injuries from the automobile accident were treatable. Even the autopsy report confirms that Ms. Mele only showed surface level abrasions and bruising as well as broken bones. (Pa 263). The hospital responded to those injuries with a treatment plan and planned discharge date. (Pa 384). Palliative care was given because the family requested it, and the doctors determined that Ms. Mele would still be demented and nonfunctioning even if her injuries were treated. (Pa 403). Indeed, the defendant successfully obtained an expert report that opined that Ms. Mele did not die from the injuries she received from the automobile accident. Dr. Marc Polimeni, after reviewing the records and discovery, opined that Ms. Mele died from Alzheimer’s dementia which would be classified as death from natural causes. (Pa 11-12). While the State ignores and/or hides these incontrovertible facts, Ms. Mele’s cause of death and the reasons for her receipt of palliative care constitute the heart of the defendant’s defense, and he has a right to explore them at trial.



## LEGAL ARGUMENT

### Point I

**This Court Should Not Grant Interlocutory Review Because the State Has Not Even Attempted to Show That This Court's Intervention is Necessary to Prevent Irreparable Injury.**

Foremost, for this Court to review an interlocutory order, the State must make a showing that doing so is necessary to "prevent irreparable injury." See R. 2:2-2(b). The State has not even attempted to make this showing. Instead, in an effective confession that it cannot, it has argued only the lesser "in the interest of justice" standard.

Of course, in the absence of any such argument by the State, it is not this Court's job to scour the record in search of a justification that the party seeking this Court's review has failed to provide.

Moreover, in the present matter, the State is asking this Court to disallow the trial court from conducting an N.J.R.E. 104 hearing to determine the relevancy of expert testimony. It is unfathomable that irreparable harm could be caused to the State by the trial court conducting an N.J.R.E. 104 hearing to determine the underlying facts that are necessary to determine the relevancy of the Defense's experts. Beyond that, this Court cannot

knowledgeably analyze the legal issue that the State seeks to present to it without a record that settles the facts.

Conversely, the irreparable injury to a Defendant whose experts are precluded from testifying without being at least allowed to show at a hearing that their testimony would present an admissible defense is manifest.

## **Point II**

### **The Defense Experts Are Relevant to Show That the Accident Did Not Cause the Victim's Death.**

#### **A. Introduction**

The State's motion seeks to prevent defendant from proving his innocence. Defendant's experts will testify that Ms. Mele would have recovered from her injuries if her son had not chosen to euthanize her, apparently because her recovery would have meant a return to the debilitated state she was in before the accident. Hence, that expert testimony will show, as a matter of logic, common sense, and the law of causation, that even if defendant was at fault for the accident that injured Ms. Mele, her injuries from that accident did not cause her death. It follows, as stated, that the State's motion aims at stopping Defendant from proving his innocence of the charge of vehicular homicide.

Furthermore, instead of allowing Defendant the opportunity to have a jury decide this issue of the utmost importance, the State wishes to proceed in a way which only provides the jury with half of the story. In support of its position, the State relies on two misguided theories. The first being that causation has been established due to the “first prong” of State v. Buckley, 216 N.J. 249 (2013) and the second being that electing for palliative care is not an intervening cause pursuant to State v. Pelham, 176 N.J. 448 (2003). But in relying on these cases, the State presents straw man arguments. Defendant does not seek to show that his conduct, assuming he was culpable for the accident, did not cause the death of Ms. Mele on the basis that she was ultimately given palliative care. He, as already stated, is seeking to show that there was no need to give her such care based on her injuries from the accident. Rather, she would have recovered from those injuries if given normal and routine medical care. She was not given such care not because doing so would have been fruitless. Instead, she was deprived of such care because a full recovery for her would have meant a return to a debilitated state of health, and her son determined, for his own reasons, which defendant does not seek to impugn, to end her life—that is to face the inevitable at that point,



while she was already hospitalized—rather than return her to her previous state.<sup>2</sup>

In addition, for the sake of completeness, defendant will demonstrate that the State’s straw man arguments based on Buckley and Pelham miss the mark.

**B. The court below did not err by not applying the first prong of Buckley.**

The State relies heavily on the argument that the court below erred by not using the first prong of State v. Buckley, 216 N.J. 249 (2013), in which this Court clarified the application of N.J.S.A. 2C:2-3. The State argues that the lower court is infringing on its ability to choose which theory of N.J.S.A. 2C:2-3 it may present to the jury. (State brief, pages 16-17). The State’s argument actually demonstrates the weaknesses of its case. The State suffers from a gap in its proofs. It is asking this Court to fill that gap by legislating a presumption of causation in cases in which it alleges reckless conduct, contrary to the legislative directive of N.J.S.A. 2C:1-13a. Through that provision, the Legislature has mandated that “in the absence of . . . proof [of each element of an offense], the innocence of the defendant is assumed.”

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<sup>2</sup> It should be noted that even though defendant references the son’s reasons, defendant’s argument is not dependent upon proving that it is correct in its assertion as to the son’s motivation. All defendant needs to show is proofs, through his experts, as to the absence of a causal connection between his actions and the death of the alleged victim.

The facts of this case simply do not support a “prong one” theory. In a “prong one” prosecution for reckless behavior, “the actual result must be within the risk of which the actor is aware.” N.J.S.A. 2C:2-3(c). The State wishes to prove this through evidence that Defendant “overmedicate[ed] himself prior to driving. Defendant was warned not to drive by a coworker before the crash, but he ignored that warning and drove anyway. Defendant was so inebriated/tired that he fell asleep while driving on a major roadway... .” (State brief, page 17).

Importantly, in Buckley, 216 N.J. at 256-57, the defendant drove a Dodge Viper into a utility pole with enough force to displace the pole by five inches, with a portion embedded in the rear of the car. The defendant in that case wanted to argue at trial that the victim not wearing a seatbelt and the placement of the utility pole were intervening causes of the death. Id. at 258.

In a case proceeding under a “prong one” theory the jury must “determine whether defendant was aware that, by virtue of the manner in which he drove the vehicle, he created a risk of a fatal collision.” Buckley, 216 N.J. at 267 (citations omitted). Significantly, this Court did not bar all evidence of the victim’s failure to wear a seat belt, noting that causation is still an element for the jury to decide. Id. at 268. The Court also barred the evidence regarding the utility pole since “defendant's awareness that his



driving posed a risk of a fatal accident bears no nexus to the precise placement of a single utility pole ... .” Id. at 270.

In Buckley, the reckless conduct was the manner in which the defendant drove the car; however, in this case, the State alleges that Defendant was “so inebriated/tired.” (State brief, page 17). Aside from this argument being inherently ambiguous due to the State using neither a conjunct nor disjunct, the State’s argument is in regard to Defendant’s condition, not the manner in which he drove the car. In Buckley, the question was whether the defendant understood that by driving recklessly, he risked a “traffic fatality. ” Buckley at 264. That is, the ultimate harm caused by that defendant, which result ought to have been within his contemplation, was a traffic death. In our case— and this difference is fundamental— the ultimate harm, or actual result, was an act of euthanasia based on the conscience choice of Ms. Mele’s guardian to end her life despite her ability to recover from her injuries from the accident. It would stretch reason and fairness beyond the breaking point to conclude that such a consequence ought to have been within the contemplation of the defendant.

The State's view of Buckley errs in its simplicity. The State's narrow view is this: Defendant drove recklessly. Reckless driving can cause death. Ms. Mele died. Therefore, says the State, under Buckley, defendant killed her. And this Court, the State contends, should wear blinders as to the



circumstances actually leading to her death. This Court should have no concern that, in truth, her death would have been avoided if not for her son's deliberate choice to not allow her to recover from her actually non-life-threatening injuries. Patently, that view of Buckley is an illogical overextension.

A glaring weakness in the State's argument is that the Legislature clearly did not intend for allegations of someone driving recklessly or while intoxicated to create a *de facto* risk of death. Both N.J.S.A. 2C:11-5, death by auto, and N.J.S.A. 2C:12-1(c), assault by auto, have a *mens rea* of reckless, yet the assault by auto statute differentiates the degree of crime based on the extent of injury. Clearly, the Legislature did not intend for all prosecutions of driving recklessly or while in violation of N.J.S.A. 2C:4-50 to include a presumption of a risk of fatal accident.

It is clear that in these cases, the Legislature intended for "prong two" prosecutions, intending for "the actual result must involve the same kind of injury or harm as the probable result" to apply more broadly to car accidents in general.

**C. The State's reliance on Pelham is similarly unavailing.**

The State also argues that the Defense experts should be precluded based on this Court's holding in State v. Pelman, 176 N.J. at 462. The State is confusing palliative care with deciding to end life support.

This Court's holding in Pelham is sound. If the injury causes someone to be placed on life support and then passes away after making the choice to end life support, the injuries caused the person's body to be unable to sustain itself. Otherwise, the person would not have died after being removed from life support.

This case is different. The Defense experts will testify that the victim, a 94 year old female with dementia and cirrhosis of the liver, only suffered broken ribs without any injuries to the organs. Indeed, a discharge plan to a rehabilitation center had been provided. But, instead of permitting Ms. Mele. be discharged, the victim's son made the election to begin end of life care which included multiple injections of morphine, an unlimited morphine drip, and a final cocktail which included morphine and fentanyl.

Unlike cases where someone is removed from life support and then succumbs to injuries, the victim in this case would have recovered. As such, the holding in Pelham is unavailing, and the State's motion for leave to appeal should be denied.



**CONCLUSION**

For the foregoing reasons and authorities cited in support thereof, the defendant respectfully submits the State's motion for leave to appeal should be denied.

Respectfully submitted,

**CARUSO SMITH PICINI, P.C.**

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DATED: 04/08/2025