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SUPREME COURT OF NEW JERSEY
Docket No.
App. Div. Dkts. A-1374-23; A-2164-23
Ind. No.: 23-07-00473

STATE OF NEW JERSEY, :

Plaintiff-Movant, :

v. :

Thomas DiNapoli :

Defendant-Respondent :

Criminal Action

On Motion for Leave to Appeal
from a Final Order of the
Superior Court of New Jersey,
Appellate Division, Denying
the State's Motion for Reconsideration.

Sat Below:
Hon. Jack M. Sabatino, J.A.D.
Hon. Katie A. Gummer, J.A.D.

BRIEF ON BEHALF OF THE STATE OF NEW JERSEY

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DATED: February 20, 2025

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POINT I

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PRELIMINARY STATEMENT

On June 4, 2019, defendant overmedicated himself with Clonazepam, recklessly drove his vehicle, crossed into oncoming traffic, and crashed his car head-on into the victim vehicle, wherein Michelina Mele was a passenger. Ms. Mele was transported from the scene of the accident to the hospital, where she writhed in pain from her multiple injuries and begged for the mercy of death. Her treatment, palliative care, was foreseeable, consistent with her pre-existing advanced directive, and not out of the ordinary course. A mere twenty-six hours after the accident, Ms. Mele died in her hospital bed. Defendant's reckless conduct risked death and death ensued. Accordingly, the State will prove that defendant is guilty of vehicular homicide.

As this Court recognized in State v. Buckley, 216 N.J. 249 (2013), reckless causation can be proven under two theories or "prongs:" (1) the actual result must be within the risk of which the actor is aware; or (2) the actual result involves the same kind of harm as the probable result and is not too remote, accidental, or dependent on another's volitional act to have a just bearing on the actor's liability. Moreover, the State can elect which prong to utilize, one, two, or both. Furthermore, as applied to vehicular homicide, if the State proves that a defendant understood that the manner in which he or she drove created a risk of a traffic fatality, causation is established under the first

prong and the second prong is deemed irrelevant.

The facts of this case fall squarely into a prong one prosecution. Nonetheless, defendant proffered three experts whose opinions are “all over the place,” but essentially disagree with the victim’s and her family’s choice of treatment, as well as the hospital’s adherence to the victim’s advanced directive. Such testimony is irrelevant and is simply an attempt at jury nullification. Accordingly, prior to trial, the State moved to preclude those experts from testifying or, at the very least, to hold an N.J.R.E. 104 hearing to hear from defendant’s experts. The trial court denied that motion and the request for a hearing. The State then appealed. On appeal, the Appellate Division correctly determined that a victim’s decision to forego life sustaining treatment cannot be considered an intervening act. Nonetheless, instead of finding defendant’s experts’ opinions are therefore irrelevant, the Appellate Division remanded the matter for an N.J.R.E. 104 hearing.

The Appellate Division's erroneous ruling cannot stand and demands judicial intervention. In remanding the case to the trial court, the Appellate Division inexplicably ignored prong one and overturned Buckley. Moreover, defendant’s experts’ opinions are irrelevant under both prongs and, therefore, there is no need for an N.J.R.E. 104 hearing. Thus, the State implores this Court to grant this Motion for Leave to Appeal.

STATEMENT OF THE QUESTION PRESENTED

1. Is the State still permitted to choose its theory of prosecution as set forth in State v. Buckley, 216 N.J. 249 (2013)?
2. Are expert opinions that challenge a victim's choice to receive palliative care relevant when the State proceeds under a prong one prosecution?
3. Are expert opinions that challenge a victim's decision to receive palliative care relevant under a prong two prosecution?

STATEMENT OF PROCEDURAL HISTORY¹

On January 8, 2020, a Union County Grand Jury returned Indictment No. 20-01-00016, charging defendant-respondent Thomas DiNapoli with second-degree Vehicular Homicide, contrary to N.J.S.A. 2C:11-5 (count one); fourth-degree Assault by Auto, contrary to N.J.S.A. 2C:12-1c(2) (count two); and fourth-degree Assault by Auto, contrary to N.J.S.A. 2C:12-1c(2) (count

¹ "Pa" refers to the State's Appendix.

"1T" refers to the Transcript of proceedings on April 24, 2023.

"2T" refers to the Transcript of proceedings on April 26, 2023.

"3T" refers to the Transcript of proceedings on May 1, 2023

"4T" refers to the Transcript of proceedings on May 11, 2023 (re: Julio Ortiz).

"5T" refers to the Transcript of proceedings on May 11, 2023 (re: Dr. Khan).

"6T" refers to the Transcript of proceedings on May 16, 2023 (re: Dr Khan).

"7T" refers to the Transcript of proceedings on May 30, 2023 (re: Donna Papsun).

"8T" refers to the Transcript of proceedings on June 1, 2023.

"9T" refers to the Transcript of proceedings on June 5, 2023.

"10T" refers to the Transcript of proceedings on June 6, 2023.

"11T" refers to the Transcript of proceedings on December 1, 2023.

three). (Pa1 to 2).

On April 8, 2023, the State filed a motion to preclude defendant's proffered experts, Marc Polimeni and Robert Pandina. (Pa40). On April 24, 2023, the Honorable Candido Rodriguez, Jr., J.S.C., denied the State's motion relative to Robert Pandina, and reserved on Marc Polimeni for want of a N.J.R.E. 104 hearing. (Pa41) (1T21-23 to 22-10).

Defendant was tried before Judge Rodriguez and a jury, but that trial ultimately ended in a mistrial. (10T4-19 to 24). Thereafter, the case was transferred to the Honorable Thomas K. Isenhour, J.S.C.

On July 26, 2023, a Union County Grand Jury returned superseding Indictment No. 23-07-00473, adding the lesser-included/related third-degree Strict Liability Vehicular Homicide, as well as third-degree Witness Tampering for facts discovered immediately prior to trial and testified to at trial by Julio Ortiz. (Pa292 to 294).

On August 1, 2023, counsel provided the State an expert report of Robert Pandina, dated August 1, 2023 (Pa259 to 300); an expert report of Marc Polimeni, dated July 31, 2023 (Pa301 to 306); and an expert report of Henry Velez, dated July 20, 2023 (Pa307 to 312).

On September 29, 2023, the State filed a motion to preclude defendant's experts on the grounds that their opinions are factually unsupported, contrary

to accepted medical standards, and legally impermissible under the model jury charge for causation. (Pa315). On December 1, 2023, the parties argued the State's motion to preclude before Judge Isenhour. (11T). The court denied the State's motion. (Pa316). In denying the State's motion, the court opted to reserve until such time that the experts are offered and qualified. (11T70-22 to 71-3; 11T72-16 to 18). The State requested that any such hearing be scheduled prior to trial, to properly plan for opening statements and trial strategy. (11T71-6 to 71-11). The court denied the State's request. (11T71-20 to 72-15).

On December 19, 2023, the State filed a Motion for Leave to Appeal. (Pa415 to 416). On January 8, 2024, the Appellate Division granted the State's Motion and set a briefing schedule. (Pa421). On January 28, 2025, this Court issued an unpublished opinion, State v. Dinapoli, Nos. A-1374-23, A-2164-23 (App. Div. January 28, 2025), affirming the trial court's order granting defendant's motion to preclude Donna Papsun's testimony regarding defendant's alleged use or impairment by cocaine,² vacating the trial court's order denying the State's motion to preclude defendant's experts, and

² The State is not challenging the Appellate Division's ruling about Ms. Papsun and, therefore, the procedural history and facts related to Docket No. A-2164-23 have been removed from this filing.

remanding for an N.J.R.E. 104 hearing. (Pa424 to 445).

On February 5, 2025, the State filed a Motion for Reconsideration. (Pa446 to 447). On February 13, 2025, the Appellate Division denied the State's motion. (Pa448).

This Motion for Leave to Appeal follows.

STATEMENT OF FACTS³

On June 4, 2019, at about 3:44 p.m., defendant drove in the right most lane eastbound on Morris Avenue, drifted into the right westbound lane on Morris Avenue, and crashed head-on into the vehicle driven by Maria Murray and further occupied by Michelina Mele and Ana Vasquez Briones. (Pa317 to 326).

At the scene, defendant stated that he fell asleep and did not know what happened. Id. At the hospital, defendant said he lost control of his vehicle. (Pa327). In subsequent statement(s), defendant admitted again that he fell asleep. (Pa317 to 326). Defendant's blood was drawn at the hospital about one hour after the crash and contained cocaine metabolites, as well as Clonazepam in an amount far-exceeding any therapeutic dosage/purpose. (Pa317 to 335).

³ This is an interlocutory appeal and, therefore, these are the facts that the State intends to prove at trial.

Ms. Mele was transported by emergency medical services to the emergency room of the hospital with chest wall trauma. (5T16-6 to 12; 17-11 to 18). Ms. Mele's pulse oximetry was normal upon admission, but, as Ms. Mele breathed-in less and less due to her injuries, her pulse oximetry went down. (5T20-3 to 24). Ms. Mele "require[ed] high-flow oxygen via nasal cannula," was "critically ill with a high probability of imminent or life[-]threatening deterioration" attributable to "Multi trauma, multiorgan injury." (Pa357). Comparing the chest imagings, doctors observed Ms. Mele's "worsening lung condition" with "[i]ncreased density [in] both lower lungs consistent with pulmonary contusions" and appreciated that Ms. Mele would eventually require a ventilator/intubation. (5T35-17 to 36-22; Pa390).

Ms. Mele was ordered to the Intensive Care Unit ("ICU") due to and with the following diagnoses: "Hypoxia," "Pulmonary contusion," "Patella fracture," "Multiple rib fractures," and "motor vehicle accident." (Pa357 to Pa358; Pa364; Pa368; Pa384; Pa387; Pa396). Ms. Mele's family history was "non-contributory" and the aforementioned "multitrauma [was] secondary to [the] M[otor] V[ehicle] A[ccident]." (Pa365; Pa366; Pa387; Pa396).

Doctors noted that Ms. Mele's family was bedside and consulted relative to their administering high flow oxygen in an effort to stay the imminent/life-threatening deterioration. (Pa357; Pa364). In response, the Mele family asked

that Ms. Mele’s advanced directive be respected; Ms. Mele was then and thereafter ordered “DNR/DNI” (i.e., “Do Not Resuscitate/Do Not Intubate,” referring to what would otherwise be the necessary life-saving procedures), which was “reviewed/validated by [the] patient, [Ms. Mele].” (Pa357; Pa364; Pa367; Pa369; 6T29-19 to 30-9). Ms. Mele sustained twelve fractured ribs, inter alia, and died about twenty-six hours after defendant crashed his car, head-on, at where she was seated as the front seat passenger. (Pa14; Pa260).

Dr. Khan explained that Ms. Mele was in extreme pain at the hospital, unable to take deep breaths, and without the possibility of recovery within the bounds of Ms. Mele’s advance health directive. (5T54-20 to 55-5; 23-7 to 24-8). Dr. Khan further testified that, but for the crash, Ms. Mele would not have died when she did. (5T41-1 to 42-6). Dr. Khan explained that the inability to breathe causes death and that Ms. Mele’s inability to breathe caused her death. (5T22-16 to 22-21; 5T23-7 to 24-8; 30-12 to 14; 34-24 to 35-7; 35-17 to 37-23). Dr. Beverly Leffers conducted an autopsy of Ms. Mele, ruled the cause of death to be blunt impact injuries, and the manner of death to be an accident. (Pa13).

LEGAL ARGUMENT

POINT I

THE STATE’S MOTION FOR LEAVE TO APPEAL MUST BE GRANTED IN THE INTEREST OF JUSTICE BECAUSE THE APPELLATE DIVISION FAILED TO ADDRESS PRONG ONE OF RECKLESS CAUSATION, EFFECTIVELY OVERTURNED THIS COURT’S RULING IN STATE V. BUCKLEY, 216 N.J. 249 (2013), AND INCORRECTLY ANALYZED THE RELEVANCE OF DEFENDANT’S PROFFERED EXPERTS’ OPINIONS. (Pa424 to 445).

Reckless causation can be proven utilizing one of two prongs: (1) by showing that the actual result is within the risk of which the actor is aware or (2), when the actual harm exceeds the risk harm, by showing the actual result is of the same kind of harm as the probable result and it is not too remote, accidental in its occurrence, or dependent on another’s volitional act to have a just bearing on the actor’s liability or on the gravity of his offense. These prongs are separate and distinct theories and the State has the option of which prong to utilize. Despite recognizing the differing theories, the Appellate Division inexplicably conducted only a “prong two” analysis. By doing so, the Appellate Division effectively overturned this Court’s holding in State v. Buckley, 216 N.J. 249 (2013), and eliminated the State’s ability to

choose its theory of prosecution. The Appellate Division then compounded that error by remanding the case for an N.J.R.E. 104 hearing to determine whether defendant's experts' opinions support a conclusion of an intervening cause. However, defendant's experts challenge the victim's decision to be placed on palliative care, a decision that, according to the Appellate Division, cannot be considered an intervening act as a matter of law. Thus, even if the State chose to utilize a "prong two" prosecution, defendant's experts' opinions are irrelevant to the case and, therefore, there is no reason to hold an N.J.R.E. 104 hearing. As such, the Appellate Division's ruling cannot stand and the State's Motion for Leave to Appeal should be granted.

Parties do not have a right to appeal an interlocutory order under the Rules of Court. In re Pa. R.R. Co., 34 N.J. Super. 103, 107-08 (App. Div. 1955), aff'd, 20 N.J. 398 (1956). Rather, leave to file an interlocutory appeal of a trial court's order only is permitted "in the interest of justice." R. 2:2-4; Brundage v. Estate of Carambio, 195 N.J. 575, 598-99 (2008). See R. 2:2-2(b) (providing that this Court may take appeals from interlocutory orders to "prevent irreparable injury"). An interlocutory appeal is not appropriate to "correct minor injustices [...]." Romano v. Maglio, 41 N.J. Super. 561, 567 (App. Div.), certif. denied, 22 N.J. 574 (1956), cert. denied, 353 U.S. 923 (1957). When leave is granted, it is because there is the possibility of "some

grave damage or injustice” resulting from the trial court’s order. Id. at 568.

The moving party must establish, at a minimum, that the desired appeal has merit and that “justice calls for [an appellate court’s] interference in the cause.” Romano, 41 N.J. Super. at 568.

The errors in this case are great and call out for judicial intervention. The Appellate Division’s ruling effectively reverses this Court’s opinion in State v. Buckley, 216 N.J. 249 (2013), which held that the State can select which theory of causation it seeks to utilize in its prosecution and that evidence defendant seeks to admit may be limited by same. Instead, the Appellate Division evaluated the relevancy of defendant’s experts’ opinions based on defendant’s theory of the case and failed to address how those opinions are relevant under a “prong one” prosecution. Moreover, the Appellate Division’s ruling is internally inconsistent, finding that palliative care cannot be considered an intervening cause as a matter of law, while simultaneously finding defendant’s experts’ opinions may support a conclusion of an intervening cause, despite the fact that their opinions are a challenge to the victim’s choice to receive palliative care. Stated differently, even if this were a “prong two” case, defendant’s experts’ opinions would be irrelevant and, therefore, there is no need to remand the matter for an N.J.R.E. 104

hearing. These errors cannot stand. As such, the State's Motion for Leave to Appeal should be granted in the interests of justice.

Criminal homicide constitutes reckless vehicular homicide when it is caused by driving a vehicle . . . recklessly." N.J.S.A. 2C:11-5(a). The State has the burden of proving beyond a reasonable doubt three elements: (1) that "defendant was driving a vehicle"; (2) that "defendant caused the death"; and (3) that the death was caused by driving a vehicle recklessly. State v. Eldridge, 388 N.J. Super. 485, 494 (App. Div. 2006), certif. denied, 189 N.J. 650 (2007). The first element, that defendant was driving at the time of the collision, cannot be disputed, and therefore, the other elements will determine what proofs are relevant at trial.

The third element, what it means to act recklessly under the vehicular homicide statute, is clearly defined in the Criminal Code. State v. Buckley, 216 N.J. 249, 262 (2013).

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard

of conduct that a reasonable person would observe in the actor's situation.

[N.J.S.A. 2C:2-2(b)(3).]

Thus, the focus of this appeal is the second element: the definition of causation. The State must establish that the recklessness caused the death. Ibid. "Causation" is a term of art, the meaning of which varies with the mental state of the actor. State v. Martin, 119 N.J. 2, 11 (1990). It means one thing when an offense is committed knowingly or purposely, N.J.S.A. 2C:2-3b, something else for strict or absolute liability, N.J.S.A. 2C:2-3e, and something else when an offense is committed recklessly, N.J.S.A. 2C:2-3c. "Thus, 'causation' assumes a different meaning from its use in ordinary discourse. Martin, 119 N.J. at 11 (citing State v. Smith, 210 N.J. Super. 43, 55 (App. Div. 1986), certif. denied, 105 N.J. 582 (1986)).

First, the State must establish that a defendant's conduct was "an antecedent but for which the result in question would not have occurred." N.J.S.A. 2C:2-3(a)(1). In other words, the State need prove "the 'result' would not have occurred without the 'conduct.'" Buckley, 216 N.J. at 267; see also State v. Jamerson, 153 N.J. 318, 336 (1998).

In addition, the State must prove "[t]he relationship between the conduct and result satisfies any additional causal requirements imposed by the code or

by the law defining the offense.” N.J.S.A. 2C:2-3. In a case based on reckless behavior, the State must prove one of two forms of causation: (1) “the actual result must be within the risk of which the actor is aware”; or (2) “if not, the actual result must involve the same kind of injury or harm as the probable result.” N.J.S.A. 2C:2-3(c) (emphasis added). Only in the latter case, one in which the actual harm exceeds the risked harm, the State must also show that “the actual result . . . must not be too remote, accidental in its occurrence, or dependent on another’s volitional act to have a just bearing on the actor’s liability or on the gravity of his offense.” N.J.S.A. 2C:2-3(c) (emphasis added).

In a vehicular homicide case, the “actual result” is “the victim’s death in the accident.” Buckley, 216 N.J. at 264. “[W]hen the actual result occurs in the same manner and is of the same character as the . . . [risked] result, the causation element is satisfied.” Martin, 119 N.J. at 12 (analyzing prong one of purposely/knowingly causation under N.J.S.A. 2C:2-3b). On the other hand, “[w]hen the actual result is of the same character, but occurred in a different manner from that [risked],” then the jury must consider the second prong. Martin, 119 N.J. at 13 (analyzing prong two of purposely/knowingly causation under N.J.S.A. 2C:2-3b). That is, when the actual harm exceeds the risked harm, the jury must then “determine whether intervening causes or unforeseen conditions lead to the conclusion that it is unjust to find that the defendant’s

conduct is the cause of the actual result.” Ibid.; see also State v. Pelham, 176 N.J. 448, 461 (2003) (following Martin in a vehicular homicide case).

However, as the Buckley Court recognized, prongs one and two are alternate theories, and if the State proved that a “defendant understood that the manner in which he or she drove created a risk of a traffic fatality,” causation was established under the first prong and the second prong is deemed irrelevant. Id. at 264.

Moreover, the decision whether to present the case to the jury as a prong one or prong two case rests with the State. See State v. Buckley, 216 N.J. 249, 266 (2013); State v. Parkhill, 461 N.J. Super. 494, 501 (App. Div. 2019). If the State chooses to restrict its prosecution to the first prong, admissible evidence is limited to evidence that is relevant to the narrower issue of causation. See Buckley, 216 N.J. at 267 (“As we noted in Pelham, ‘the jury may consider only that which the law permits it to consider.’” (quoting Pelham, 176 N.J. at 466)). Accordingly, evidence only would be admissible under a first prong analysis if it was relevant to the “but for” test or “whether ‘the actual result’ was ‘within the risk of which the actor is aware.’” Ibid. (quoting N.J.S.A. 2C:2-3(c)). Stated differently, where the State intends to prosecute a defendant utilizing solely a prong one analysis, intervening causes are irrelevant.

Foremost, the Appellate Division's ruling must be reversed because it effectively overturns State v. Buckley, 216 N.J. 249 (2013), and eliminates the State's ability to choose its theory of prosecution. As previously stated, the Buckley Court recognized that prongs one and two of reckless causation are two distinct theories that differ based on whether the actual result was within the harm risked by the reckless conduct. Id. at 263. Moreover, as the Buckley Court found, the State decides which theory or theories it intends to utilize and defendant's ability to introduce evidence may be limited by the theory the State chooses. Id. at 267-68. The Buckley Court further held that if the State proved that a "defendant understood that the manner in which he or she drove created a risk of a traffic fatality," causation was established under the first prong and the second prong is deemed irrelevant. Id. at 264. Thus, if the State utilizes a prong one theory of reckless causation to prosecute a defendant, intervening causes under prong two are irrelevant.

Here, the Appellate Division remanded this case for an N.J.R.E. 104 hearing to permit defendant's experts to substantiate their opinions that the victim's choice of medical treatment was an "intervening act." Inexplicably, in reaching its decision, the Appellate Division only conducted a "prong two" analysis. Perhaps the Appellate Division's use of solely a "prong two" analysis would be appropriate if this appeal occurred after a trial wherein the

State utilized a “prong two” theory to convict the defendant. However, this is an interlocutory appeal and the State has not provided any indication that it intended to utilize a “prong two” prosecution. Indeed, the facts of this case epitomize a “prong one” theory. Thus, in order for defendant’s experts’ opinions to be relevant, they needed to be relevant under a “prong one” prosecution. Yet, the Appellate Division failed to provide any analysis of the facts under “prong one,” let alone explain how defendant’s experts’ opinions are relevant under such a theory. Respectfully, it cannot do so because intervening causes are irrelevant to a “prong one” prosecution and, thus, defendant’s experts’ opinions, which allegedly attempt to establish an intervening cause, are irrelevant.

The State has alleged, and intends to prove, that defendant recklessly drove his vehicle and caused a fatal motor vehicle accident. Specifically, defendant drove recklessly by overmedicating 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, failed to maintain his lane, and caused a head-on collision without slowing into the victim’s vehicle. Defendant’s conduct was the “but for” cause of the accident and the risk of death was within the risk contemplated by defendant’s recklessness. If the

jury finds the State proved these facts, causation has been established under prong one. The jury does not need to look any further, nor does it need to consider intervening acts or allegations of superseding causes. Thus, defendant's experts' opinions are irrelevant to a prong one causation analysis.

Relevant evidence has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401; see also State v. Coruzzi, 189 N.J. Super. 273, 302 (App. Div. 1983). Notably, defense counsel's experts do not claim that defendant's driving was not reckless or that the fatal accident would have been avoided had defendant not driven in the manner in which he did. Defendant's experts do not challenge whether defendant's reckless driving risked a fatal crash. Defendant's experts do not challenge that the victim died. Moreover, the decision to place the victim on palliative care has no bearing on why the accident in this case occurred and, thus, it is irrelevant to the "but for" analysis. Their opinions are likewise irrelevant to whether defendant was aware that the manner in which he operated his vehicle created a risk of fatality and, therefore, defendant's experts' opinions are irrelevant to a prong one prosecution.

Indeed, it does not matter what defendant's experts will testify to at an N.J.R.E. 104 hearing because their opinions do not address any relevant considerations. "Remoteness, fortuity, and another's volitional act do not

come into play if the State relies only on the first prong of N.J.S.A. 2C:2-3(c).” Parkhill, 461 N.J. Super. 494, 503 (App. Div. 2019) (citing Buckley at 264-66). Accordingly, had the Appellate Division conducted a “prong one” analysis, it would have found that defendant’s experts’ opinions are irrelevant. Thus, the Appellate Division’s order remanding this matter for an N.J.R.E. 104 hearing was improper.

This error is particularly troubling because the State highlighted the Appellate Division’s failure to analyze the relevancy of the expert opinions in the State’s Motion for Reconsideration, but the Appellate Division denied the State’s motion. Thus, the Appellate Division’s error was not inadvertence or oversight, but rather a clear finding by the Appellate Division that this case presents a “prong two” prosecution. However, according to Buckley, the State decides which theory to utilize, not the defense, trial court or, in this case, an appellate court. As such, the Appellate Division’s ruling, which implicitly found this was a “prong two” case, thereby depriving the State from choosing its theory of prosecution, effectively overturned this Court’s holding in Buckley. Such a ruling cannot stand.

The Appellate Division’s opinion also must be reversed because the Appellate Division erred by finding that defendant’s experts’ opinions may support an intervening cause and be relevant if this were a “prong two”

prosecution. In reaching its decision, the Appellate Division acknowledged that the removal of life-support is not an intervening act that relieves an individual of culpability. State v. DiNapoli, Nos. A-1374-23, A-2164-23 (App. Div. January 28, 2025) (slip op. at 17 to 18). The Appellate Division also found that that there is “no legal basis to distinguish between a decision to take someone off a ventilator and a decision to not put someone on a ventilator.” Ibid.

The Appellate Division then described defendant’s experts as follows:

Dr. Pandina disputes the existence of a DNR order and challenges the decision to abandon life-sustaining efforts. Dr. Polimeni does not seem to dispute the existence of a DNR order and opines Mele was “treated appropriately” for end-of-life care but asserts the need for that care was not caused by the crash. Dr. Velez concedes the existence of a DNR order but finds that order was followed based on an “overstated poor prognosis.”

[State v. Dinapoli, Nos. A-1374-23, A-2164-23 (App. Div. January 28, 2025) (slip op. at 18)].

The longstanding, clear policy of this State recognizes the constitutional, common-law, and now statutorily based right of an individual to accept, reject, or discontinue medical treatment in the form of life supporting devices or techniques. State v. Pelham, 176 N.J. 448, 462 (2003). An ill or injured person has that personal right and is free to exercise it, at his or her discretion,

directly or through a family member or guardian acting in accordance with the person's wishes. Ibid. (emphasis added). In other words, a person's choice to have himself or herself removed from life support cannot be viewed as unexpected or extraordinary. Ibid. Thus, while gross malpractice may be deemed an intervening cause, merely differing opinions are insufficient to be considered an intervening cause. See State v. Pelham, 176 N.J. 448, 467 (2003) (That is, if defendant's actions set in motion the victim's need for life support, without which death would naturally result, then the causal link is not broken by an unforeseen, extraordinary act when the victim exercises his or her right to be removed from life support and thereupon expires unless there was an intervening volitional act of another, such as gross malpractice by a physician.). Thus, it is clear that the experts' opinions, which challenge the victim's decision to receive palliative care, are irrelevant and, thus, there was no reason to remand the matter for an N.J.R.E. 104 hearing.

Here, Dr. Pandina, Dr. Polimeni, and Dr. Velez do not allege that malpractice, let alone gross malpractice, occurred, but rather disagree with the treatment that was provided and speculate why the victim decided as she did. However, mere disagreement is not enough to be considered an "intervening cause." Stated differently, defense cannot establish the existence of an intervening act by simply alleging the victim received "erroneous advice" or

contending that another unrelated condition existed. Rather, an intervening cause only exists if the defense can actually establish that “erroneous advice” constituted gross malpractice and was the reason for the victim’s decision or that the unrelated condition was the only reason why the victim was placed on palliative care. However, defendant’s experts fail to set forth such an opinion. Moreover, the “why” the victim chose to receive the treatment she did is a factual question that should be addressed to the decision makers, not speculative expert opinions. Accordingly, even if this were a prong two case, the proffered expert opinions would still be irrelevant.

In sum, the Appellate Division’s decision must be overturned because it reverses Buckley. The Appellate Division disregarded Buckley’s recognition that the State can elect which theory of reckless causation to utilize in its prosecution, that “prong one” does not consider intervening acts, and that by choosing to pursue a “prong one” theory, defendant cannot introduce evidence pertaining to intervening causes. The Appellate Division’s opinion also must be reversed because it is internally inconsistent. Despite recognizing that a victim’s decision to receive palliative care is no different from a victim’s decision to be removed from life support and, thus, cannot be considered an intervening cause as a matter of law, the Appellate Division nevertheless found that defendant’s experts’ opinions, which challenge the victim’s decision to

receive palliative care, may support a conclusion that an intervening cause exists. These errors cannot stand in the interests of justice and, therefore, the State's Motion for Leave to Appeal should be granted.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the State's Motion for Leave to Appeal be granted.

Respectfully submitted,

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JCB/bd

CERTIFICATION

I hereby certify that this motion presents a substantial question and is made in good faith and not for the purposes of delay.

James C. Brady

James C. Brady

DATED: February 20, 2025