

STATE OF NEW JERSEY,

Plaintiff/Movant,

v.

THOMAS DiNAPOLI,

Defendant/Respondent.

SUPREME COURT OF NEW JERSEY

DOCKET NO.: 090381

APP. DIV. DKT NOS.: A-001374-23
A-002164-23

INDICTMENT NO.: 23-07-00473

CRIMINAL ACTION

ON APPEAL FROM:

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..

AMICUS BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF INTEREST OF AMICUS CURIAE	1
PRELIMINARY STATEMENT.....	1
STATEMENT OF FACTS AND PROCEDURAL HISTORY	3
POINT I.....	7
THE STATE’S RELIANCE ON STATE V. PELHAM—FOR THE CONTENTION THAT THE VICTIM’S FAMILY’S DECISION TO PLACE HER ON LIFE SUPPORT CANNOT CONSTITUTE AN INTERVENING CAUSE OF DEATH THAT INSULATES DEFENDANT FROM LIABILITY—IS FLAWED AND UNAVAILING.	7
POINT II	11
THE STATE’S ELECTION TO RELY ON THE FIRST PRONG OF THE CAUSATION STANDARD OF N.J.S.A. 2C:2-3(a)(1) CANNOT PRECLUDE DEFENDANT FROM ATTEMPTING TO PROVE THAT THE VICTIM DID NOT DIE FROM THE INJURIES CAUSED BY THE ACCIDENT	11
CONCLUSION	25

TABLE OF AUTHORITIES

Page(s)

Cases

<u>Matter of J.A.,</u> 258 N.J. 22 (2024)	1
<u>Matter of R.S.,</u> 258 N.J. 58 (2024)	1
<u>State v. Buckley,</u> 216 N.J. 249 (2013)	<i>passim</i>
<u>State v. Eldridge,</u> 388 N.J. Super. 485 (2006)	16, 17, 18, 20
<u>State v. Knight,</u> 259 N.J. 407 (2025)	1
<u>State v. Martin,</u> 119 N.J. 2 (1990)	14, 15, 16
<u>State v. Payne,</u> 259 N.J. 452 (2025)	1
<u>State v. Pelham,</u> 176 N.J. 448 (2003)	6, 7, 8, 10
<u>State v. Parkhill,</u> 461 N.J. Super. 494 (App. Div. 2019)	20

Statutes

N.J.S.A. 2C:2-3	<i>passim</i>
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STATEMENT OF INTEREST OF AMICUS CURIAE

Proposed *amicus curiae*—Association of Criminal Defense Lawyers of New Jersey (ACDL-NJ)—is a non-profit corporation organized under the laws of New Jersey to, among other purposes, “protect and insure by rule of law, those individual rights guaranteed by the New Jersey and United States Constitutions; to encourage cooperation among lawyers engaged in the furtherance of such objectives through educational programs and other assistance; and through such cooperation, education and assistance, to promote justice and the common good.” Founded in 1985, ACDL-NJ has more than 500 members across New Jersey. Our Courts have found that ACDL-NJ has the special interest and expertise to serve as an *amicus curiae* per Rule 1:13-9 in numerous cases throughout the years. See, e.g., State v. Payne, 259 N.J. 452 (2025); State v. Knight, 259 N.J. 407 (2025); Matter of R.S., 258 N.J. 58 (2024); and Matter of J.A., 258 N.J. 22 (2024). Thus, ACDL-NJ has the requisite interest to participate as *amicus curiae* and its participation will be helpful to this Court. Accordingly, ACDL-NJ asks that its motion for leave to participate as *amicus curiae* be granted.

PRELIMINARY STATEMENT

Defendant-Respondent Thomas DiNapoli (Defendant) was indicted for second-degree vehicular homicide and two counts of fourth degree assault by auto. The first trial ended in a mistrial. Before the retrial commenced, Defendant produced

reports from three medical experts prepared to testify that the victim did not die from the injuries she sustained in the motor vehicle accident caused by defendant, but rather from her family's decision to provide the victim with palliative care, including a morphine infusion. In other words, they proposed to testify that the victim would have survived the injuries sustained in the accident. The State—relying on State v. Buckley, 216 N.J. 249 (2013)—moved to preclude the expert's testimony, arguing that pursuant to the statutory requirements for proof of causation, evidence that the victim's death was caused **solely** by her family's decision to place her in palliative care is irrelevant and inadmissible. The trial court disagreed, concluding that a Rule 104 hearing should be conducted to determine the admissibility of the experts' testimony. The Appellate Division affirmed, and this Court granted certification.

Defendant is relying on the medical experts' testimony to prove that the victim would have survived the injuries caused by the accident and that her death was caused instead by the decision to institute palliative care, including a substantial infusion of morphine. By charging the Defendant with vehicular homicide the State, whether implicitly or explicitly, is accusing Defendant of *causing* the victim's death. It would thus be manifestly unjust to deny Defendant the right to prove, through his medical experts, that the victim would have survived the injuries caused by the accident and that her death was proximately caused by her family's decision to initiate palliative care accompanied by a large infusion of morphine.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus adopts the Counterstatement of Facts and Procedural History set forth in Defendant's Letter Brief in opposition to the State's Motion for Leave to Appeal the Appellate Division's Order denying the State's Motion for Reconsideration.

An essential supplement to Defendant-Respondent's Counterstatement of Facts is a summary of the content of the reports of the three medical experts whose testimony the State seeks to exclude. The expert report of Dr. Henry Velez dated July 20, 2023, described the victim—Michelina Mele—using hospital records, as a 94-year-old woman with a history of severe Alzheimer's dementia. (Pa307). On admission, she complained of intense chest wall pain, shortness of breath and right knee pain. *Id.* She was diagnosed with hypoxia, pulmonary contusions, patella fracture and multiple rib fractures. *Id.* Dr. Valez also noted that hospital testing showed results consistent with chronic kidney disease. (Pa308). A hospital note on June 5, 2019 indicated that Ms. Mele's family had requested "hospice and comfort care," consistent with Ms. Mele's "Advance Directive for Healthcare." *Id.*

Hospital records indicated that on June 5, 2019 at 5 P.M., Ms. Mele was receiving a morphine sulfate drip of 2 mg. per hour, and that she received 142 morphine milligram equivalents over a 22-hour period. (Pa309). She was pronounced dead shortly thereafter at 5:45 P.M., less than an hour after receiving the morphine drip. (Pa310). Dr. Velez's report noted that the medical examiner

concluded that “blunt trauma” was the proximate cause of Ms. Mele’s death, but Dr. Velez disagreed with that conclusion, and explained the basis for his disagreement in his Report:

In summary, the decedent was admitted to the hospital with multiple rib fractures, a sternal fracture, and a fracture of the patella. Her hospital course was marked by severe pain, which was adequately controlled by opioids. Initial chest x-ray showed mild vascular congestion consistent with autopsy findings. Subsequent chest x-ray and CT scan of the chest were both suggestive of lung contusion. However, the known complications of a lung contusion, which would be a proximate cause of death was not supported by autopsy findings and not supported by the decedent’s hospital course.

At one point, the patient was placed under palliative care. Sometime thereafter, it was the wishes of the family that she be enrolled in hospice care. The reason being was that if she were to survive her injuries, she still would not have any quality of life due to her severe Alzheimer’s disease. Additionally, her prognosis for survival was presented to the family as being extremely poor, which again in my opinion was overestimated. Once enrolled in hospice, dosage of opioids was accelerated. Documented above, is the progression of her vital signs. Prior to her pronouncement, clearly noted was respiratory depression with arterial desaturation.

Accordingly, I will further opine, that it was more probable than not, that if Ms. Mele had not been placed on hospice care, and if she had not suffered respiratory depression and hypoxia due to the use of opioids, that the medical records provided showed that she always remained stable throughout her hospitalization, and most probably would have survived the injuries of her accident. Therefore, it is my professional medical opinion, that her motor vehicle accident was not the proximate cause of her death.

[(Pa310-321).]

A second expert report was submitted by Dr. Marc Polimeni of Oradell, New Jersey. (Pa8-Pa12). Based on the hospital reports, he described Ms. Mele's injuries from the accident as follows:

Multiple bruises of the skin consistent with the location of seatbelt on a passenger side; multiple right and left rib fractures with soft tissue bleeding. . . . Most notably, however, there is no presence of pulmonary contusions, pneumonia, fibrosis, or other pulmonary compromise caused by the accident or concomitant with the accident.

[(Pa301).]

Dr. Polimeni noted that Ms. Mele sustained right femur and patella fractures, and that she suffered from cirrhosis of the liver, unrelated to the accident. (Id.).

Dr. Polimeni concluded his report with the following discussion:

MEDICAL OPINION:

It is my opinion, within a reasonable degree of medical certainty, that Michelina Mele did not die of orthopedic injuries, blunt trauma force, blood loss, from the impact of the motor vehicle, or complication related to same, but rather from very potent narcotics, which were administered under the auspices of palliative hospice care. According to Dr. Remolina's note at 12:00 on June 5, 2019, the decision for palliative care was made not due to Ms. Mele's injuries, but due to her "dementia and Alzheimer's disease making her nonfunctioning."

Alzheimer's Dementia is a terminal disease that is progressive and debilitating robbing individuals of their personhood right in front of the eyes of the family who

love them. Ms. Mele's son, a physician, had in place a DNR/DNI status for his mother prior to this unfortunate accident. It was for the reasons of her dementia, her loss of quality of life, that corrective surgery and medical care to her orthopedic injuries were cancelled and hospice comfort measures set into place. Had Hospice not been ordered, any reasonable physician would not order such liberal use of narcotics. The dose, combination and frequency of narcotics suppressed her breathing and lowered her blood pressure while making her unconscious. This caused her CO2 levels to rise and acid levels in the blood to go to an extreme causing her to die.

Alzheimer's Disease was the decision for hospice. During hospice care, maintaining comfort and dignity are the only goals. Hence, there are no restrictions on dose, combination, or frequency or comfort medication such as narcotics. Based upon my review of all medical records and the autopsy report, it is my opinion, within a reasonable degree of medical certainty, that Ms. Mele died from terminal disease, Alzheimer's Dementia. It is a NATURAL CAUSE OF DEATH.

[(Pa306).]

Dr. Robert Pandina of Greensboro, Georgia submitted two reports, dated July 18 (Pa289-291) and August 1, 2023. (Pa289-300). In neither report did Dr. Pandina express an unequivocal opinion about Ms. Mele's cause of death. (See id.). However, his August 1, 2023 report includes strong language suggesting that, in his opinion, Ms. Mele's ability to survive the injuries she sustained in the automobile accident allegedly caused by defendant was significantly compromised by the large doses of narcotic analgesic medication that was administered to her after her family decided to place her in hospice care. Dr. Pandina's August 1, 2023 Report, although

not definitively attributing her death to the high dosage of morphine, strongly suggested that it was the morphine – not the accident – that caused her death:

Hence, in conclusion, given the available hospital records documenting the pattern of narcotic analgesic medication administration provided to Michelina Mele from June 4, 2019, to the time of her death on June 5, 2019, and assuming that the orders noted in Ms. Mele's chart was executed, it is my opinion that Michelina Mele's physiological processes and functionality, particularly pulmonary, cardiological and central nervous system functioning were significantly compromised because of the actions of narcotic medications administered to her during her treatment at Trinitas hospital on June 4 and June 5, 2019. As such, it is probable that Ms. Mele was at heightened risk of vital organ system failures (e.g., pulmonary, cardiac, and central nervous system components) such that her life sustaining functions were seriously compromised as a result of the actions of narcotic medications administered during her treatment on June 4 and 5, 2019.

[(Pa299).]

POINT I

THE STATE'S RELIANCE ON STATE V. PELHAM—FOR THE CONTENTION THAT THE VICTIM'S FAMILY'S DECISION TO PLACE HER ON LIFE SUPPORT CANNOT CONSTITUTE AN INTERVENING CAUSE OF DEATH THAT INSULATES DEFENDANT FROM LIABILITY—IS FLAWED AND UNAVAILING.

The critical difference between the facts in State v. Pelham, 176 N.J. 448, 467-68 (2003) and the facts of this case is that it was undisputed that the victim in Pelham would have died from the injuries he sustained in the accident, and that the victim

was kept alive only because he had been placed on a respirator. In that context, this Court held in Pelham that:

Removal of life-sustaining treatment is a victim's right. It is thus foreseeable that a victim may exercise his or her right not to be placed on, or to be removed from, life support systems. Because the exercise of the right does not break unexpectedly, or in any extraordinary way, the chain of causation that a defendant initiated and that led to the need for life support, it is not an intervening cause that may be advanced by the defendant.

[Id. at 466].

But the Court qualified its holding to make clear that the rule excluding evidence that withdrawal of life support was an intervening cause of death applied only in cases in which “defendant’s actions set in motion the victim’s need for life support without which death would naturally result.” Id. at 467. As the facts in Pelham made clear, the victim’s condition was critical immediately after the accident caused by defendant, and remained critical until his death:

Patrick's condition was critical on his arrival at Robert Wood Johnson. He had suffered a constellation of injuries, including a spinal column fracture that left him paralyzed from the chest down and a “flailed chest,” a condition in which the ribs are broken in multiple places causing uneven chest wall movement during each breath. Other injuries included a contusion and puncture of his lung, a head injury, fractured sinuses, and a broken hip. The catastrophic injuries Patrick experienced made it virtually impossible for him to breathe on his own. Paralysis rendered him unable to use his abdominal muscles and he had aspirated contents of his stomach that were now lodged in his airway despite an implanted nasal gastric

tube. He was placed on a ventilator. Within five days of the accident, Patrick experienced “Adult Respiratory Distress Syndrome,” a diagnosis indicating that his lungs had begun to fail. His heart beat was rapid and irregular, and his blood pressure was dropping because of the turmoil within his body. Low blood pressure triggered the start of kidney failure.

Patrick's paralysis rendered him at an increased risk for pulmonary thromboemboli, or blood clots. Accordingly, doctors implanted a vena cava filter through the major vein in the groin area and into the major blood vessel to the heart. The filters were intended to trap clots that form in the lower extremities. A ventilator tube inserted through Patrick's throat was converted to a surgical airway through his neck and into his windpipe. Because Patrick was unable to feed himself, he was fed initially by a tube inserted through his nose to the stomach, and later by a tube directly into the stomach. In addition, because paralysis left him unable to control his bladder or bowels, a Foley catheter was inserted.

During his hospitalization, Patrick continually had bladder and urinary tract infections as a result of the catheter, and sepsis occurred. He also experienced antibiotic-resistant infections common to hospital settings, as well as numerous bouts with pneumonia.

On March 13, 1996, Patrick was transferred to the Kessler Institute for Rehabilitation (Kessler), because it specialized in the care of patients with spinal cord injuries. When he arrived, Patrick was unable to breathe on his own, and was suffering from multi-organ system failure. Medication was required to stabilize his heart rhythm. He was extremely weak, with blood-protein levels that placed him at high risk of death. He was unable to clear secretions in his airways, and thus his oxygen levels would drop requiring medical personnel repeatedly to clear the secretions. Complications from the ventilator caused pneumonia to recur due to his inability to cough or to

protect himself from bacteria. Bowel and urinary tract infections continued.

While at Kessler, Patrick also was monitored by psychiatric staff. He presented as depressed, confused, uncooperative, and not engaged psychologically. At times he was “hallucinating,” even “psychotic.” The staff determined that he was “significantly” brain injured. Nonetheless, Patrick was aware of his physical and cognitive disabilities. During lucid moments, he expressed his unhappiness with his situation, and, on occasion, tried to remove his ventilator.

Patrick improved somewhat during the month of April, but then his condition rapidly regressed. By early May, severe infections returned, as well as pneumonia. It was undisputed at trial that Patrick had expressed to his family a preference not to be kept alive on life support. Because of his brain damage, his lack of improvement, and his severe infections Patrick's family decided to act in accordance with his wishes and remove the ventilator. He was transferred to Saint Barnabas Medical Center and within two hours of the ventilator's removal on May 30, 1996, he was pronounced dead. The Deputy Middlesex County Medical Examiner determined that the cause of death was sepsis and bronchopneumonia res

[Id. at 452-54].

In stark contrast to the victim in Pelham, the combined opinions of Defendant's medical experts make clear that Ms. Mele was highly likely to have survived the injuries she sustained in the accident caused by Defendant's reckless driving, and that her death was caused instead by the high doses of morphine administered to her after her family elected to remove her from life support and initiate hospice care.

Accordingly, the States' reliance on this Court's decision in Pelham as a basis for excluding the testimony of Defendant's experts clearly is inappropriate. The holding in Pelham applies only in prosecutions in which the Defendant's actions would inevitably have resulted in the victim's death, and while confronted with the fact that death was inevitable, the victim, or his or her family, exercised their lawful right to terminate life support. The holding does not apply to cases like the one at bar where the victim would most likely have survived from the injuries caused by the accident but death was precipitated by the victim's removal from life support.

POINT II

THE STATE'S ELECTION TO RELY ON THE FIRST PRONG OF THE CAUSATION STANDARD OF N.J.S.A. 2C:2-3(c) CANNOT PRECLUDE DEFENDANT FROM ATTEMPTING TO PROVE THAT THE VICTIM DID NOT DIE FROM THE INJURIES CAUSED BY THE ACCIDENT

The State vehemently contends that expert testimony tending to prove that the accident instigated by Defendant's recklessness did not cause the victim's death is inadmissible because the State's prosecution theory relies on the first, and not the second, prong of N.J.S.A. 2C:2-3(c). Reference to the statutory language is essential to an understanding of the State's argument, and why it fails.

N.J.S.A. 2C:2-3 provides as follows:

- a. Conduct is a cause of a result when
 - (1) It is an antecedent but for which the result in

question would not have occurred; and

(2) The relationship between the conduct and result satisfies any additional causal requirements imposed by the code or by the law defining the offense.

* * *

c. When the offense requires that the defendant recklessly or criminally negligently caused a particular result, the actual result must be within the risk of which the actor is aware or, in the case of criminal negligence, of which he should be aware, or, if not, the actual result must involve the same kind of injury or harm as the probable result and 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. . . .

The State argues that it has made an election in this case to proceed under the first clause of N.J.S.A. 2C:2-3(c), and that therefore it is required to prove only that the actual result—which it describes simply as the death of the victim—was within the risk of which Defendant is aware. The State contends that only in prosecutions under clause two of N.J.S.A. 2C:2-3(c) is evidence of intervening causes admissible, but that because it elected to base its prosecution on clause one of the statute, evidence of intervening causes is barred. For that contention, the State relies on this Court's decision in State v. Buckley, 216 N.J. 249, 268-69 (2013), holding that the victim's failure to wear a seat belt is not relevant to "but for" causation or the first prong of N.J.S.A. 2C:2-3(c).

The State's argument clearly is an overreach and, if adopted, would prevent

the jury from deciding the critical issue of whether the victim's death was caused by the accident or by the administration of high doses of morphine. As Justin Albin observed in his dissenting opinion in Pelham, 176 N.J. at 471-72:

Our jurisprudence and the legislative histories of our Code and *Model Penal Code* (MPC) provision upon which our criminal causation provision was patterned do not support the path taken by the majority. A defendant is not guilty of vehicular homicide unless death "is caused by driving a vehicle . . . recklessly." N.J.S.A. 2C:11-5a (emphasis added). Causation is a material element that must be proved by the State beyond a reasonable doubt. N.J.S.A. 2C:1-13a, -14(1)(a), -14; N.J.S.A. 2C:3-2.

As the facts of this case plainly demonstrate, the critical and indispensable issue that must be determined by the jury is whether the victim's death was caused by the accident precipitated by Defendant's allegedly reckless driving, or whether—as asserted by Defendant's expert witnesses—the victim would have survived the accident, but her death actually was caused by high doses of morphine administered after the victim's family decided to place her palliative care. The State's theory of the case would deny Defendant his constitutional right to a jury trial and remove from the jury's consideration the critical question of causation by requiring the trial court to instruct the jury that, on the basis of the State's reliance on the first prong of N.J.S.A. 2C:2-3(c), the jury was not permitted to consider whether the high morphine dosage actually caused the victim's death. That result obviously would be both logically and constitutionally impermissible and unacceptable.

The Buckley case clearly is distinguishable, and the State misrepresents its holding. In Buckley, defendant, a New Brunswick police officer, borrowed a high-performance sports car from his brother. He saw Zerby, a fellow officer, who asked for a ride in the car. Defendant consented, and the two drove off, with Zerby in the passenger seat of the Dodge Viper. The convertible top was down. The vehicle was traveling south on Route 130, when it veered off the road and collided with a utility pole. According to the Court's opinion,

Following impact, the Dodge Viper came to rest on the asphalt berm adjacent to the road, facing in a nearly northward direction. A guardrail was severely damaged and partially uprooted. The utility pole that had been installed in the berm was displaced approximately five inches, and a portion of the pole was embedded in the rear of the car. The vehicle sustained severe damage, with the right front and right rear wheels dislodged.

Defendant emerged from the driver's side and was able to walk without assistance following the crash. Zerby was unresponsive when emergency aid arrived on the scene. He was transported by ambulance to Robert Wood Johnson Medical Center in New Brunswick and pronounced dead at 11:44 a.m.

[Id. at 257].

Defendant was indicted for second-degree vehicular homicide, and also indicted on two counts of official misconduct, which were tried separately. Id. 254. At trial, the State moved to exclude two categories of evidence from the jury's consideration: first, evidence that Zerby, the victim, was not wearing a seat belt when

he was killed while riding in the car driven by defendant; and second, evidence that the utility pole hit by the vehicle driven by defendant was positioned in a location that was contrary to recommendations set forth in the New Jersey Department of Transportation Roadway Design Manual. Id. at 255. The trial court denied the State's Motion, holding that both categories of evidence were relevant to the jury's determination of the issue of causation. Id. The Appellate Division affirmed. Id. This Court granted the State's Motion for Leave to Appeal and reversed. Id. The Buckley Court held that in a vehicular homicide prosecution, the "actual result," as that term is used in N.J.S.A. 2C:2-3(c), denotes the harm inflicted on the victim, and that in a case in which the State alleges that defendant caused a fatality, the "actual result" is the victim's death. Id. at 264. In the case at bar, the actual result was the victim's death as a result either of the accident or of the administration of high doses of morphine after the victim was placed on life support.

The Court noted that its prior jurisprudence had focused on only the second prong of the statutory test – that "the actual result must involve the same kind of injury or harm as the probable result and must not be too remote, accidental in its occurrence, or dependent on another's volitional act have a just bearing on the actor's liability or on the gravity of his offense[,]" N.J.S.A. 2C:2-3(c). Buckley, 216 N.J. at 265-66.

The Court then added the following comment:

Because the State relies exclusively on the first prong of N.J.S.A. 2C:2-3C, we do not consider the potential import of defendant's arguments with regard to the statute's second prong. Based on the state's representations, the second prong is not part of the pending proceeding, and the State may not rely on it as a basis to convict defendant.

[Id. at 266].

The Court added that Zerby's failure to wear a seat belt was not relevant to the first component of N.J.S.A.'s two-pronged test for causation: whether the "actual result" was "within the risk of which the actor is aware." Under that component, the jury must determine if Defendant was aware that, because of the way he drove the vehicle, he created a "risk of a fatal collision." Id. at 267-68. Accordingly, the Court concluded, whether or not Zerby wore a seat belt is irrelevant to the jury's determination under the first prong of N.J.S.A. 2C:2-3(c). Id. at 268.

Nevertheless, the Court permitted the admissibility of evidence that Zerby was not wearing a seat belt so that the jury had a "thorough understanding of all of the circumstances of the accident." Id. at 268. The Court added that if that evidence is admitted, the trial court must instruct the jury that Zerby's failure to wear a seat belt is not relevant to "but for causation . . . or to the first prong of N.J.S.A. 2C:2-3(c)." Id. at 268 (internal quotation marks omitted). Nevertheless, the Court added, the trial court must make clear to the jury that the issue of causation is to be decided only by the jury. Id. at 268. The Court also held that the claimed discrepancy between "the utility pole placement and the guidelines in the DOT Roadway Design

Manual is inadmissible on the issue of causation under N.J.S.A. 2C:2-3(c).” Id. at 269.

The prior jurisprudence of this Court and the Appellate Division on causation issues would not have permitted the State, by electing which clause of 2C:2-3(c) to proceed under, to preclude a defendant from proving that an intervening cause, and not the defendant’s purposeful or reckless act, was the cause of the adverse result. For example, in State v. Martin, 119 N.J. 2, 5 (1990), defendant Daniel Martin was found guilty of knowing and purposeful murder, felony murder, arson, and aggravated arson based on the death of a woman in a building that he set on fire. The Appellate Division affirmed his convictions, but the Supreme Court reversed because the trial court’s jury charge on the issue of causation was flawed. Id. The trial court failed to instruct the jury that “even if it found defendant intended to cause serious bodily injury, defendant was not guilty of knowing or purposeful murder if [the victim’s] death occurred in a different manner or was too remotely related to defendant’s conduct . . . for her death to have a just bearing on his culpability.” Id. at 17.

The relevant facts in Martin were that defendant and several friends from Keyport attended a party at the apartment of Lois Baker on the third floor of a three-story wood-framed building in Keansburg. Defendant was intoxicated, and because one of his friends got involved in altercations with other guests, Baker asked

defendants and his friends to leave.

Shortly after they left the building, a fire broke out. All inhabitants of the building exited safely, except for Barbara Quartz, who had consumed alcoholic beverages at the party, fell asleep and died of asphyxiation due to smoke and carbon monoxide inhalation. Defendant admitted starting the fire by igniting a paper bag with trash that he found in the hallway near the door to Baker's apartment. He admitted to dumping the trash from the bag on the stairway and lighting the bag on fire, stating that he intended only to "make a mess" and that he "didn't mean to hurt nobody." Id. at 6-7.

The State's witnesses testified that the fire had been started by spreading kerosene between the ground floor and the second floor, and that testing of wood samples revealed the presence of kerosene. Id.

At trial, the defense contended that the victim's death was not a foreseeable consequence of his actions, but, rather, intervening events or conditions were responsible for the death. Id. at 9-10. Defense experts testified that astroturf carpeting on the stairway facilitated the spread of the fire, that the door to Baker's apartment and the front door were open, allowing a rush of air to stoke the fire; the defense argued that the kerosene was hidden on the third floor and that the inoperability of fire detectors and the absence of fire doors helped spread the fire. Id. Defendant contended "that the death of Quartz was too remotely related to his

conduct to permit a finding that he was the cause of her death”. Id.

Explaining the reasons for reversal of defendant’s convictions because of an inadequate jury charge on the issue of causation, the Supreme Court observed:

When the actual result is of the same character, but occurred in a different manner from that designed or contemplated, it is for the jury to 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. Although the jury may find that the defendant's conduct was a “but-for” cause of the victim's death under N.J.S.A. 2C:2-3a(1), it may nevertheless conclude under N.J.S.A. 2C:2-3b that the death differed in kind from that designed or contemplated or that the death was too remote, accidental in its occurrence, or dependent on another's volitional act to justify a murder conviction..

[Id. at 13].

The Court added:

The import of the charge was that the jury had a choice of finding, in accordance with the State's version of the facts, either that the death of Quartz was within defendant's design or contemplation in setting the fire and, therefore, he was guilty of murder, or that defendant should be found not guilty. The charge did not instruct the jury, for example, that even if it found defendant intended to cause serious bodily injury, defendant was not guilty of knowing or purposeful murder if Quartz's death occurred in a different manner or was too remotely related to defendant's conduct. If the jury had been properly charged, it might have found that the death of Quartz was too remotely related to defendant's design or contemplation for her death to have a just bearing on his culpability. Consistent with defendant's version of the facts, the jury might have found that Quartz would not have died but for

the absence of working smoke detectors, the flammability of the astroturf carpeting, the doors of the apartment and building being left open, and Quartz's voluntary consumption of alcoholic beverages. The point is not that those alternatives are compelled by the evidence, but that the jury should have had the opportunity to consider them under proper instructions. The failure to provide those instructions compels a reversal.

[Id. at 17].

Relying on Martin, the Appellate Division in State v. Eldridge, 388 N.J. Super. 485, 487 (2006), reached a similar result. Defendant Amy Eldridge was convicted of two counts of second-degree vehicular homicide for recklessly operating a vehicle while intoxicated, crashing into a tree and causing the death of her two passengers. Id. The Appellate Division reversed her convictions because of the trial court's failure adequately to instruct the jury on the significance of evidence of an intervening cause of the accident. Id. at 488.

The accident occurred on November 11, 1999, at about 2:30 AM. Id. Defendant, then 18 years old, was the driver of a car that collided with a tree on Asbury Road in Howell Township. The car went off the road, traveled eighty-six feet and struck a tree. Id. The two passengers, Vasil Green in the front seat, and Waylon Biernacki in the rear seat, were killed by the impact. Defendant sustained serious injuries, including a fractured hip and jaw. Id.

The officer who responded to the crash observed that Eldridge's vehicle had hit a tree and was in the southbound lane of traffic facing north. Both passengers

were unconscious. Id. He detected an odor of alcohol from defendant's breath. Id. Another officer found a five liter box of wine in the trunk of the vehicle. Id.

Defendant admitted at trial that beginning at 1 AM on the morning of the crash, she had consumed about 28 ounces of wine in a five-minute period. Id. at 491. An expert for the State testified that her blood alcohol content would have been between .16% and .19% at the time of the accident. Id. at 489. An expert for defendant estimated that defendant's blood alcohol content at the time of the crash would have been within the then legal limit, or about .09%. Id.

At trial, defendant testified that she, Green and Biernacki, on the day in question, had visited the home of defendant's friend, Crystal Pullen, which was where defendant drank the wine. Id. at 490. From there they went to a bowling alley for a short time, and then drove to Bradley Beach. Id. 491. Because the weather was cold, they stayed only twenty minutes before driving home. It was during the drive home that the fatal accident occurred. Id.

Defendant testified that just before the accident, Vasil Green, sitting in the front passenger seat, was tickling her while she was driving, and she told him to stop. Id. She then testified that he put his hand on her face, and turned her face. Her testimony is quoted in the court's opinion:

At trial, defense counsel requested the court to instruct the jury on intervening causation, referring to the second prong of N.J.S.A. 2C:2-3(c), and adding that

without that instruction, “the jury would have no guidance as to how to interpret Vasil Green’s conduct in the particular facts of the case.” Id. at 494.

The trial court declined to give the jury the charge requested by defense counsel. Id. As noted, the jury convicted defendant on two counts of second-degree vehicular homicide. The Appellate Division reversed, holding that it was reversible error for the trial court to refuse to instruct the jury on intervening causation, and that that failure left the jury without adequate guidance on the use of causation and had the capacity to bring about an unjust result. The court noted:

Here, in contrast to the defendant in Martin, defendant Eldridge's recklessness would not be the cause of the crash or of the deaths if her account of the events preceding the crash is accepted. Stated differently, if the jury accepted defendant's contentions, it would have made the following finding: no matter how reckless defendant's conduct was in operating her car while intoxicated to the extent described by Dr. Brick, any such recklessness on her part did not cause the accident, because the accident would not have occurred but for the actions of Green.

Had the jury accepted defendant's contentions and found that any recklessness which resulted from her intoxication was not the cause of the crash, the State would not have been able to prove beyond a reasonable doubt that her recklessness was an antecedent but for which the result in question (the deaths of Green and Biernacki) would not have occurred. The “but-for” causation test would exonerate defendant if the jury accepted her testimony concerning Green's conduct.

That distinction between defendant's relation to the “but-for” test as compared to Martin's in no way changes our conclusion that the charge below was faulty. We so

conclude because, in keeping with the teaching of Martin . . . whenever causation is in dispute and whenever the State and defendant offer contrasting theories of causation, the court's charge to the jury must explain the legal consequences of accepting not only the State's theory, but also the defendant's theory of causation.

Here, our conclusion that the trial judge's charge failed in its obligation to provide the “road map,” without which a jury “can take a wrong turn in its deliberations,” is buttressed by the specific language of the causation statute. Indeed, N.J.S.A. 2C:2-3c requires the State to prove that in addition to recklessly causing death, the actual result must not be too accidental in its occurrence or too dependent on another's volitional act to have a just bearing on the actor's liability. The alleged conduct of Vasil Green was the type of conduct that a jury might conclude was another's volitional act or an accidental cause of the crash. This aspect of the causation statute was therefore a material point, where the failure to have provided the jury with controlling legal instructions constitutes reversible error.

We conclude that the failure to have instructed the jury that the State was required to prove that the deaths of Eldridge's passengers were not the result of another's volitional conduct or accidental, pursuant to N.J.S.A. 2C:2-3(c), had the clear capacity to bring about an unjust result. Because that defect in the charge is sufficient to raise a reasonable doubt as to whether that omission led the jury to a result it might not otherwise have reached, the error was not harmless.

[Id. at 499-500.] (emphasis added)

As this Court’s decision in State v. Martin, *supra*, and the Appellate Division’s decision in State v. Eldridge make clear, the “not too remote, accidental in its occurrence, or dependent on another’s volitional act” language of N.J.S.A. 2C:2-3(c)

is an integral part of the statute, and there is no basis whatsoever for this Court to accept the State's argument that because the State purports to rely only on the first clause of subparagraph c, a defendant is precluded from relying on the second clause.

Clearly, the Buckley Court did not adopt the position advanced by the State in this case. Its comment on the contention now being advanced by the State was as follows:

Because the State relies exclusively on the first prong of N.J.S.A. 2C:2-3C, we do not consider the potential impact of defendant's arguments with regard to the statute's second prong. Based on the State's representations, the second prong is not part of the pending prosecution, and the State may not rely on it as a basis to convict defendant.

Id. at 266.

Of course, the Buckley Court did not hold that the defendant could not rely on the second prong as a defense to the vehicular homicide prosecution, although the State in the case at bar infers that it did. This Court should make crystal clear that irrespective of the State's allegedly exclusive reliance on the first prong of the statute, that reliance cannot logically or legally preclude a defendant from relying on the second prong - - an integral element of the statute - and attempting to prove that a cause other than the defendant's reckless driving was responsible for the victim's death. Accord State v. Parkhill, 461 N.J. Super. 494,504 (App. Div. 2019) (noting that "we presume that even if the State expressly limits its contention as in Buckley, the jury must still be informed that the State, to meet its burden, must persuade the

jury beyond a reasonable doubt that “the actual result [was]...within the risk of which the actor is aware, N.J.S.A 2C:2-3(c); and if it is not the State has not met its burden” (alterations in original).

As noted, that conclusion is particularly compelling in the case at bar in which the reports of three medical experts assert that, in their opinion, the victim’s death was not caused by the injuries she sustained in the accident, but instead was caused by her family’s decision - - motivated by her Alzheimer’s, liver and kidney disease and injuries from the accident - - to provide palliative care that included high doses of morphine. Notwithstanding the State’s insupportable contentions, the statute and controlling caselaw mandates that that issue must be decided by the jury.

CONCLUSION

For the reasons stated, this Court should affirm the Appellate Division decision, and in the process modify its opinion in State v. Buckley, 216 N.J. 249 (2013) to clarify that the State’s theory of prosecution cannot bar a defendant in a reckless driving prosecution from attempting to prove that an intervening cause, and not defendant’s reckless driving, was responsible for the victim’s death.

Respectfully submitted,

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