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STATE OF NEW JERSEY Appellant-Movant v. THOMAS J. DINAPOLI Respondent-Defendant.	SUPREME COURT OF NEW JERSEY DOCKET NO. 090381 APP. DIV. DOCKET NOS. A-001374-23 A-002164-23 INDICTMENT NO. 23-07-00473 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: THE HONORABLE JACK M. SABATINO, J.A.D.
THE HONORABLE KATIE A. GUMMER, J.A.D.

REPLY TO ATTORNEY GENERAL'S AMICUS BRIEF ON BEHALF OF DEFENDANT

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COUNTERSTATMENT OF PROCEDURAL HISTORY

The defendant, Thomas DiNapoli (Mr. DiNapoli) relies upon his previously submitted counterstatement of procedural history as stated in his prior supplemental brief.

COUNTERSTATEMENT OF FACTS

Mr. DiNapoli relies upon his previously submitted counterstatement of facts as stated in his prior supplemental brief.

LEGAL ARGUMENT

POINT I. IT IS NOT IMMORAL FOR THE DEFENDANT TO PRESENT EVIDENCE THAT THE ALLEGED VICTIM'S DEATH WAS NOT HIS FAULT. (Pa 488).

The Attorney General asserts that defendant's proposed defense is "morally bereft" and "abhorrent." (AG brief at 26-27). He accuses defendant of blaming the alleged victim's family. But defendant's defense is fact-based. It has nothing to do with the morality of the son's choice. And defendant has never sought to pass moral judgment on that decision. Was the Appellate Division's remand potentially allowing the proposed defense an immoral decision? While a prosecutor is allowed to strike hard blows, a prosecutor is not at liberty to strike foul ones. Calling defendant's effort to show that he did not actually cause Ms. M's death a "morally bereft" and "abhorrent" endeavor is a foul blow.

Once again, the State misconstrues the rulings in State v. Pelham. The Attorney General's office would have the Court strip criminal defendants of their constitutional right to defend themselves and would label such attempts as immoral. The Attorney General's office mischaracterizes Mr. DiNapoli's defense as victim blaming and claims that his evidence would mislead the jury when, in fact, Mr. DiNapoli's expert evidence sheds light on the truth

surrounding Ms. M's death. This includes the fact that Ms. M was given a full recovery plan and scheduled to be released to a rehabilitation center. (Da 46).

Thus, the instant matter is not one in which a victim succumbing to injuries she received from an automobile accident was given palliative care to make her more comfortable. Instead, this is a case in which, as Dr. Carlos Remolina's report unequivocally states, a patient's recovery plan was revoked because "even if the patient got better, she would still have dementia and Alzheimer's disease which is making her nonfunctioning." (Da 66). These doctors' notes in conjunction with the hospital's plan to release Ms. M. to a rehabilitation center prove that Ms. M. would have recovered from her injuries which consisted of bruises, scratches, a fractured patella, and three fractured ribs (contrary to the State's claims that she had twelve fractured ribs). (Da 27). However, Ms. M's son decided to cancel this treatment plan and place his mother on palliative care due to her numerous preexisting conditions which included hypersensitive lung disease (HLD), hypertension (HTN), microscopic colitis, diabetes, dementia, and Alzheimer's disease. (Da 68). Placement on palliative care **can** be an intervening cause of death when "there was an intervening volitional act of another." Pelham, 176 N.J. 448, 467 (2003).

Palliative care can be considered an intervening cause when the alleged victim's death was not the natural result of the defendant's actions. Id.

As such, a criminal defendant such as Mr. DiNapoli has every right to a presenting a complete defense including proof that he actually was not the cause of the victim's death. State v. Budis, 125 N.J. 519, 531 (1991); State v. Cotto, 182 N.J. 316, 332 (2005). Hence, the Attorney General's position is untenable. For these reasons, the Court should hold that Mr. DiNapoli's proposed defense is legally viable and should be presented to the jury without the need for a 104 hearing. Alternatively, should such a hearing be held, the Court should direct on remand that the defense experts' testimony should be admitted if, after giving the defense all reasonable inferences, their testimony could rationally raise a reasonable doubt in the mind of a single juror on the issue of causation. Stated otherwise, the only issue on any such remand should be whether the defense, through its experts, has set forth facts which suffice to present a legally viable defense to the jury. It is imperative that the trial court be directed that on any such remand the court need not itself be convinced of the persuasiveness of the defense, but only that the elements of a defense have been established.

Conclusion

For the foregoing reasons, the Court should hold that Mr. DiNapoli's proposed defenses in this regard are legally viable and should be presented to the jury without the need for a 104 hearing. Alternatively, should such a hearing be held, the Court should direct on remand that the defense experts' testimony should be admitted if, after giving the defense all reasonable inferences, their testimony could rationally raise a reasonable doubt in the mind of a single juror on the issue of causation.

Respectfully submitted,
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September 18, 2025