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STATE OF NEW JERSEY

Plaintiff-Appellant

v.

THOMAS J. DINAPOLI

Defendant-Respondent.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 090381

INDICTMENT NO. 23-07-00473

ON APPEAL FROM AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT, APPELLATE DIVISION, AFFIRMING AN INTERLOCUTORY ORDER OF THE SUPERIOR COURT, LAW DIVISION, UNION COUNTY, CRIMINAL DIVISION, DENYING THE STATE'S MOTION TO PRECLUDE DEFENSE EXPERT TESTIMONY

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

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENT

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PRELIMINARY STATEMENT

Defendant's experts are poised to testify that even if he was responsible for the auto accident that injured Ms. M., those injuries did not cause her death. Defendant's experts will opine that she would have fully recovered from those injuries with routine medical care, and she died only because her son decided to euthanize her. He assumedly chose that outcome because a recovery would have meant her resumption of her previous status as an elderly woman suffering from debilitating dementia. But the consequence of that difficult choice should not fall upon defendant. Rather, law, logic, and morality -- because it is immoral to convict a man of a crime he did not commit -- require this Court to reject the State's effort to prevent defendant from proving his innocence.

COUNTERSTATMENT OF PROCEDURAL HISTORY[1]

The defendant, Thomas DiNapoli (Mr. DiNapoli) was initially indicted on January 8, 2020. (Pa 1-2). The first trial in this matter took place from May 11, 2023 through June 6, 2023. During the first trial, the defense discovered that the State had failed to provide exculpatory discovery to the defendant, and the State's omission in this regard led to the trial court granting a mistrial. (10T 6:15-20).

On June 26, 2023, Mr. DiNapoli was indicted on superseding indictment number 23-07-00473 which alleged that he was guilty of one count vehicular homicide in violation of N.J.S.A. 2C:11-5, two counts of fourth degree assault by auto in violation of N.J.S.A. 2C:12-1c(2), one count of third-degree strict liability vehicular homicide in violation of N.J.S.A. 2C:11-5.3a, and one count of third degree witness tampering in violation of N.J.S.A. 2C:28-5a. (Pa 292-294).

[1] "Pa" refers to the State's appendix on its motion for leave to appeal; "Da" refers to the defendant's appendix in its opposition to the State's leave for appeal; "Dma" refers to the defendant's appendix to his merits brief; 1T refers to the April 24, 2023 transcript; 2T refers to the April 26, 2023 transcript; 3T refers to the May 1, 2023 transcript; 4T refers to the May 11, 2023 transcript of Julio Ortiz testimony; 5T refers to the May 11, 2023 transcript of Dr. Khan testimony; 6T refers to the May 16, 2023 transcript of Dr. Khan testimony; 7T refers to the May 30, 2023 transcript of Donna Papsun testimony; 8T refers to the June 1, 2023 transcript; 9T refers to the June 5, 2023 transcript; 10T refers to the June 6, 2023 transcript; and 11T refers to the December 1, 2023 transcript.

On August 1, 2023, Mr. DiNapoli offered three expert opinions from Dr. Robert Pandina, Marc Polimeni, and Henry Velez. (Pa 259-312). The State moved to preclude these experts from testifying on September 29, 2023, and the Court denied the State's motion on December 1, 2023. (Pa 315-316; 11T 70:24-25; 71:1-3). The State moved to appeal the issue to the Appellate division on December 19, 2023, and the motion was granted on January 8, 2023. (Pa 415; 421-423). The Appellate Division ordered that a Rule 104 hearing should be held on the issues presented. (Pa 424-445). The State's motion for reconsideration to the Appellate Division was denied on February 13, 2025. (Pa 448).

On February 20, 2025, the State asked this Court for leave to appeal the Appellate Division's denial of its motion for reconsideration. (Pa 449). This Court granted leave to appeal on May 8, 2025. (Pa 452). This brief is submitted in opposition to the State's merits brief in this matter.

COUNTERSTATEMENT OF FACTS

Causation

On June 4, 2019, Defendant was involved in a motor vehicle accident after his automobile went across the line of traffic and collided with another automobile in which the alleged victims were traveling. (Pa 23-25). The alleged victim was transported to Trinitas Hospital in Elizabeth, New Jersey where she received treatment for her injuries. (Pa 289-291). The following day, she was placed under hospice care and died. Id. The precise cause of her death is one which is vehemently disputed by the Parties in this case. Two other passengers in the alleged victim's automobile were also injured and would also be treated for their injuries. Id.

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., the alleged victim 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, the alleged victim was administered another four milligrams of morphine intravenously. Id.

Within a half hour, the alleged victim 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, the alleged victim 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 the alleged victim's report of knee pain. Id. Examination of her CT scan revealed fractures in three ribs (the State erroneously claimed it was twelve), which was consistent with the alleged victim'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 the alleged victim, 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, the alleged victim 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, the alleged victim'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. the alleged victim 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, the alleged victim 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 the alleged victim'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). The alleged victim 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, the alleged victim 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 the alleged victim reportedly suffered from hypersensitive lung disease (HLD), hypertension (HTN), microscopic colitis, diabetes, dementia, and Alzheimer's disease.[2] (Da 68). The record is barren of any indication that the alleged victim 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.

[2] It should be noted that the alleged victim was also determined (by way of autopsy) to suffer from cirrhosis of the liver, which was undoubtedly known by the alleged victim's son, a medical doctor, but apparently not reported to the treating medical physicians.

- **The patient has no other significant complaints.**
- **Apparently, the patient has been demented for quite some time.**
- **… 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 the alleged victim 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 the alleged victim'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. As Dr. Polimeni opined, "when narcotic doses exceed what the body can process, CO2 levels begin to rise and acid builds up in the blood. [The alleged victim] clearly had this occur as seen in the 23:47 arterial blood gas. Nevertheless, she was administered more morphine and ultimately fentanyl was added, which compounded the problem of acidosis." (Pa 11).

Additionally, "the dose, combination and frequency of narcotics suppressed her breathing and lowered her blood pressure…" (Pa 12). Thus, instead of remaining on high flow oxygen to combat the alleged hypoxemia, the alleged victim was given potent narcotics that suppressed her breathing. Id.

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, the alleged victim 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). The alleged victim 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 the alleged victim was hesitant in whether to even contact the medical examiner or if the alleged victim "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 the alleged victim 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 the alleged victim'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 the alleged victim's lungs, Dr. Leffers reported "the lungs are slightly edematous **without other abnormalities."** Id. It cannot be disputed that if the alleged victim 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. Indeed, the treating physician, Sabeen Khan, M.D., admitted when testifying at trial, that "a medical examiner's ability to observe anatomical abnormalities exceeds that which can be seen on an x-ray, a CAT scan, an MRI or an ultrasound." (6T 96:18-22). Thus, the State's own witness admitted, at trial, that the treating doctors' findings and observations with respect to alleged victim's supposed "lung contusions" were inferior to that of the medical examiner. Id.

However, the autopsy report indicates another distinctive finding – the alleged victim 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, the alleged victim 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 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 the alleged victim died of natural causes. In addition, the defense expert outlined the dosages of morphine given to the alleged victim and found them to be "liberal." (Pa 304).

Specifically, the alleged victim 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" (dilaudid) 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 the alleged victim is just that – an order not to resuscitate the alleged victim when there is "no meaningful expectation of recovery." (Pa 336). To the extent that the State argues that the alleged victim would have no meaningful quality of life, this allegation stems from the alleged victim'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 the alleged victim's son requested palliative care. (Pa 384). As such, the DNR was not triggered by the alleged victim'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, the alleged victim'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, the alleged victim's injuries from the automobile accident were treatable. Even the autopsy report confirms that the alleged victim 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 the alleged victim 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 the alleged victim did not die from the injuries she received from the automobile accident. Dr. Marc Polimeni, after reviewing the records and discovery, opined that the alleged victim 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, the alleged victim'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.

Indeed, after reviewing the alleged victim's medical records, Dr. Polimeni found that she did not die from the injuries she received as a result to the automobile accident. Specifically, Dr. Polimeni opined:

> it is [his] opinion, within a reasonable degree of medical certainty, that [the alleged victim] 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." (Pa 11-12). In addition, "the decision for palliative care was made not due to [the alleged victim's] injuries,

> but due to her 'dementia and Alzheimer's disease making her nonfunctioning.'" Id.

Thus, the defense has produced ample evidence to show that Mr. DiNapoli was not at fault for the alleged victim's death.

Alleged Intoxication

Despite this Court's review being solely with respect to the issue of causation, the State has pointed to manifestly irrelevant allegations about the defendant's supposed intoxication. As the defense believes that these references exist only to paint a prejudicial (and inaccurate) portrait of the defendant, he is compelled to alert this Court to the below facts.

At the scene of the accident, Defendant was examined by law enforcement who did not administer standardized field sobriety tests and released him. (7T 77:16-25; 78:1-3). Defendant would attempt to go to a physician's appointment, to which he was traveling prior to the crash, but would instead travel to the hospital when his injuries worsened in route to his other appointment. (Dma 16). Questions about Defendant's impairment would continue to remain unasked by the healthcare providers at the hospital. Id. Defendant is recorded as having been alert and orientated and there are no mentions of signs of impairment relative to central nervous system depression or sedation. Id. Moreover, the hospital records available indicate that Defendant was negative for drugs and alcohol and no tests were ordered

relative to the detection of drugs in blood or urine, rather other routine tests were requested and conducted. Id. Specifically, the report indicates that he was negative for: nausea, vomiting, diarrhea, trauma, dizziness, diaphoresis, paraesthesias, slurred speech, and/or drug or EtoH use. Id.

While it is true that during the course of his treatment at the hospital, two blood samples were taken from Defendant for ordinary medical testing purposes, the first blood draw was made at about 5:52 p.m. and a second was taken at about 8:31 p.m. (7T 38:25; 39:1-25; 40:1-6). It should be noted that five hours had elapsed from the time that the police released Mr. DiNapoli form custody to the time that his blood was drawn. It was entirely unclear which sample was in fact tested and, as the State's own expert testified, the lab received two lavender vials both dated June 4, 2019 and bearing 8:31p.m. as the time of collection. Id. In addition, per hospital records, the Defendant was administered morphine at 7:46 p.m. (Dma 22).

Despite this medication presumably being present in the Defendant's system by the time of the second draw, there are no positive findings for morphine or its metabolites by NMS Laboratory. (Pa 328-335). This, in addition to the absence of records as to what happened between the date of the samples collection by hospital staff and their being obtained by the State, the results themselves beg the question of whether the samples at issue are even of

Defendant's blood. Indeed, as defense expert Dr. Pandina opined, the morphine was administered forty-five minutes prior to blood being taken from Mr. DiNapoli. (Pa 28). According to Dr. Pandina, the morphine "would have been distributed in [Mr. DiNapoli's] blood in approximately 10 minutes and would have been effective for 2 to 3 hours. Hence, morphine should have been detected in the samples of blood supplied to NMS laboratory." Id.

For these reasons, Dr. Pandina opined that it was impossible to determine whether clonazepam played any role in the automobile accident. Specifically, Dr. Pandina stated that:

> [T]he information contained in the observations of police at the scene, the observations and actions of hospital personnel who treated Thomas DiNapoli post-collision, and anomalous results obtained by NMS laboratory are sufficient to raise serious doubts about the contribution that clonazepam played in the collision. Hence it is [Dr. Pandina's] opinion that it is not possible to determine, with scientific accuracy, the role, if any, that clonazepam played in the collision occurring at 3:44 p.m. on June 4, 2019.

While the State attempted to prejudice the jury with evidence that inactive cocaine metabolites were allegedly in Mr. DiNapoli's blood at the time of the accident, the trial court and Appellate Division correctly ruled that such evidence was inadmissible as having little probative value in comparison to the great prejudice that it would pose to the defendant, and that ruling has not been disturbed. (Pa 424-445). In addition, Mr. DiNapoli's expert, Dr.

Pandina, opined that the evidence presented by the State is insufficient to conclude that Mr. DiNapoli was intoxicated or otherwise impaired while driving on June 4, 2019 due to his lack of symptoms, the implausible conclusions reached by the laboratory with respect to Mr. DiNapoli's alleged blood sample, and the improper manner in which the samples were taken, stored, transported, and tested. (Pa 38-39).

LEGAL ARGUMENT

POINT I. THE DEFENDANT HAS A RIGHT TO A COMPLETE DEFENSE INCLUDING THE RIGHT TO PRESENT EVIDENCE THAT THE ALLEGED VICTIM'S DEATH WAS NOT HIS FAULT. (Pa 488).

Criminal Defendants have the right to a "meaningful opportunity to present a complete defense." State v. Budis, 125 N.J. 519, 531 (1991). Indeed, a criminal defendant's right to present a "complete defense" includes the right to present evidence that a third party's actions led to the victim's alleged harm. State v. Cotto, 182 N.J. 316, 332 (2005). Because there is ample evidence on the record to support the defendant's assertion that the victim would have recovered from the injuries she sustained as a result of the automobile accident were it not for her son's decision to, effectively, euthanize her, the defendant has the right to present expert testimony that his actions were not the cause of the alleged victim's death.

A court's discretion is abused when "relevant evidence offered by the defense and necessary for a fair trial is kept from the jury." State v. Cope, 224 N.J. 530, 554-55 (2016). In Cope, the trial court excluded testimony that a third party had committed the crime for which the defendant was being tried because it found the evidence to be irrelevant and factually impossible. Id. at 553. However, this Court overturned this decision on the basis that it is for the jury, and not the court, to determine the credibility of the defense's evidence.

Id. at 554-55. When evidence is presented that a third party's actions caused the harm alleged by the State, that evidence should be presented to the jury even if the court finds the evidence to be implausible. Id.

In the present matter, the alleged victim was scheduled to be released to a rehab facility and expected to recover from her injuries. (Da 46). However, her son, a medical doctor, asked that she be put on palliative care instead. (Da 61). The treating physician who ordered the lethal dosage of morphine that led to the alleged victim's death noted that the alleged victim was placed on palliative care because "even if the patient got better, she would still have dementia and Alzheimer's disease which is making her nonfunctioning." (Da 66). Thus, even though the medical staff treating the alleged victim had a plan in place to allow the alleged victim to fully recover from her injuries, the alleged victim's son, a medical doctor, interfered with this plan and instead asked that she be given lethal amounts of morphine.

If the Court were to hold that the State is correct in asserting that the defense may not challenge causation via expert testimony, it would create an overbroad rule that effectively precludes defendants from refuting the State's expert evidence. If the defendant may not challenge causation simply because the State has alleged strict liability vehicular homicide due to reckless driving, it would effectively mean that the State would be allowed to present its own

medical examiner to the jury unchallenged, and the jury would thus have to accept the medical examiner's testimony. Not only would this mean that defendants could not present expert evidence to refute the State's medical examiner, the defense would not even be able to effectively cross-examine the medical examiner because of this overbroad rule that causation may not be challenged. This is contrary to this State's mandate that defendants are presumed innocent unless the prosecution has proven every element of the offense. N.J.S.A. 2C:1-13a.

Since Mr. DiNapoli is offering valid and credible evidence corroborated by an expert that the alleged victim did not die from the injuries she received from the automobile accident, the trial court and Appellate Division did not err in refusing to automatically exclude this evidence. For these 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.

POINT II. THE STATE'S DECISION TO CHARGE A DEFENDANT WITH VEHICULAR HOMICIDE ON THE THEORY OF RECKLESS DRIVING DOES NOT CREATE THE LEGAL ASSUMPTION THAT THE DEFENDANT WAS RECKLESS OR THAT HE CAUSED THE DEATH OF THE VICTIM. (Pa 488).

The state has the burden of proving, beyond a reasonable doubt that the defendant (1) was driving a vehicle, (2) that the defendant caused a death, and (3) that the death was caused by driving the vehicle recklessly. State v. Buckley, 216 N.J. 249, 262 (2013). In the present matter, the defendant disputes that he either caused the death or that he was driving recklessly. Despite this, the State has taken the untenable position that because it alleges that the defendant was driving recklessly, that the defendant does not have the right to present any defenses or expert testimony as to the second and third prongs of the Buckley analysis. As the Appellate Division correctly held, because the present matter "involves more than an unquestioned application of a [do not resuscitate ("DNR")] order and challenges the decision to abandon life-sustaining efforts," it is for the jury to conclude whether an intervening cause existed to break the chain of causation between the automobile accident and the alleged victim's ultimate death.

In Buckley, the defendant drove a sports car at such a high velocity that the automobile severely damaged and partially uprooted a guardrail and displaced a utility pole by five inches. Id. at 257. The accident led to the death

of the passenger of the automobile. Id. In that case, the Court defined the first prong of N.J.S.A 2C:2-3(c) in cases of motor vehicle fatalities such that the state had to prove that "the defendant understood that the manner in which he or she drove created a risk of a traffic fatality." Id. at 264. The Buckley Court further defined the "actual result" as "[the victim's] death in the motor vehicle accident." Id. at 267.

The State has thus impermissibly broadened the definition of the "actual result" such that it is defined simply as "the victim's death." This would mean that the jury would be instructed that it is irrelevant how the victim died as long as (1) there was an automobile accident and (2) the victim died. Neither the Buckley Court nor the legislature intended for such a broad definition of N.J.S.A. 2C:2-3(c).

In the present matter, the actual result was not "[the victim's] death in the motor vehicle accident" but rather the alleged victim's death in the hospital after her son asked the hospital staff to abandon the victim's recovery plan from her non-fatal injuries and instead place her on palliative care and inject her with fatal quantities of morphine because "even if the patient got better, she would still have dementia and Alzheimer's disease which is making her nonfunctioning." (Da 66). This case is distinct from Buckley in that the alleged victim did not die on the scene or, indeed, on the date of the accident. The

alleged victim had been given a recovery date and plan until her son decided to alter that plan. While the State complains that the defense has not alleged "gross negligence" on the part of the hospital staff, the defense has submitted ample evidence that the alleged victim was on a full recovery plan until her son and caretakers decided that her dementia and other health conditions (which were unrelated to the automobile accident) made it necessary to abort that plan.

Instead, Mr. DiNapoli simply wishes to assert a valid defense – the "actual result" was not the alleged victim's death due to the automobile accident. Mr. DiNapoli has the right, pursuant to Buckley and N.J.S.A. 2C:2-3(c) to present expert evidence that he was not the "but for" cause of the alleged victim's death and that she would not have died if her son had not elected to place her on palliative care due serious health conditions that had nothing to do with the automobile accident.

Indeed, as the Court in State v. Pelham held, the alleged victim's placement on palliative care cannot be considered as an intervening cause of death if, and only if, "**the death was the natural result of defendant's actions.**" 176 N.J. 448, 467 (2003) (emphasis added). Placement on palliative care **can** be an intervening cause of death when "there was an intervening volitional act of another." Id. In Pelham, the victim's injuries and the deterioration of his health all stemmed solely from injuries he received in the

automobile accident. Id. at 452-54. The decision to remove him from life support was due solely to these injuries. Id.

In the present matter, the alleged victim was expected to recover and was scheduled to be moved to a rehabilitation center. It was only her son's volitional act – his cancellation of her recovery plan and decision to place her on palliative care due to her dementia and other health conditions – that led to her ultimate death. As such, Mr. DiNapoli's expert evidence is relevant to show that there were intervening causes to the alleged victim's death as well as that his actions were not the "but for" cause of her death.

For these 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.

POINT III. THE ADMISSION OR EXCLUSION OF EXPERT TESTIMONY IS THE DOMAIN OF THE TRIAL COURT, AND THE APPELLATE COURT DID NOT ERR IN ORDERING THAT A 104 HEARING BE HELD AS TO THE DEFENDANT'S EXPERTS. (Pa 488).

As the State correctly notes, "the admission or exclusion of expert testimony is committed to the sound discretion of the trial court." State v. Cotto, 471 N.J. Super. 489, 531 (App. Div. 2022). Thus, the trial court is the "gatekeeper" that determines whether expert testimony is relevant and should be allowed. State v. Covil, 240 N.J. 448, 465 (2020). For these reasons, the appellate courts may only issue rulings as to expert admissibility if the trial court's ruling "was so wide of the mark that a manifest denial of justice resulted." State v. Kuropchak, 221 N.J. 368, 385-86 (2015).

In the present matter, the Appellate Division ordered that a 104 hearing be held as to the admissibility of Mr. DiNapoli's expert testimony. Despite it being undisputed that the trial court is the gatekeeper when it comes to experts, the State opines extensively on the admissibility of expert testimony and asks this Court to substitute its own judgment for that of the trial court even though the trial court has not yet had an opportunity to hold a Rule 104 hearing on the issue. In other words, the State is asking the New Jersey Supreme Court to insert itself into this case before the trial court has issued a ruling and, effectively, take away the trial court's ability to exercise its discretion. This is contrary to law.

Mr. DiNapoli challenges two aspects of the criminal homicide statute: that he caused the death, and that he drove recklessly. N.J.S.A. 2C:11-5(a). He has submitted expert testimony that refutes the State's claims that he had toxic levels of clonazepam in his system. (Pa 38-39). Mr. DiNapoli also submitted expert evidence that the alleged victim died from natural causes and not from any injuries that she received from the car accident. (Pa 11-12). He refutes whether the DNR was properly triggered and, even if it was properly triggered, that it was triggered as a result of the alleged victim's injuries from the automobile accident. (Pa 11-12; 336). These are valid defenses based upon expert testimony reached after review and analysis of both the alleged victim's and Mr. DiNapoli's medical records. (Pa 11-12; 38-39; 336).

Thus, since Mr. DiNapoli's experts will provide testimony that is based upon "scientific, technical, or other specialized knowledge" and "will assist the trier of fact to understand the evidence or determine a fact in issue," it is likely that the trial court will include the evidence after a 104 hearing is held. N.J.R.E. 702. Regardless, the ultimate decision as to a Rule 702 and Rule 403 analysis of Mr. DiNapoli's expert evidence is the domain of the trial court.

For these 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.

POINT IV. BECAUSE THE ALLEGED VICTIM'S DEATH FROM NATURAL CAUSES WAS NOT A RISK THE PERPETRATOR WOULD BE AWARE OF IN A RECKLESS HOMICIDE CASE, A PRONG TWO ANALYSIS IS WARRANTED. (Pa 488).

If the actual result of the automobile accident was not within the risk that the actor was aware of, then the State must prove whether "the actual result [involved] the same kind of injury or harm as the probable result." N.J.S.A. 2C:2-3(c). As the Buckley Court defined it, the "actual result" is "[the victim's] death in the motor vehicle accident." 216 N.J. at 267. In the present matter, Mr. DiNapoli's defense is that he was unaware that the victim would have died from his actions for two reasons. First, he asserts that he was not aware that his actions would have caused anyone's death because he was not intoxicated and/or did not drive recklessly. Second, he asserts that the alleged victim did not die from injuries related to the automobile accident but due to her son's decision to place her on palliative care due to her dementia and other preexisting health conditions. Thus, since the defense has provided valid expert testimony that the actual harm is outside the realm of the risked harm, the State must prove 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 the gravity of his offense." N.J.S.A. 2C:2-3(c).

As the Appellate Division correctly held, "when the actual result [of the automobile accident] occurs in the same character, but occurred in a different manner from that [risked], the jury must consider the second prong [of the evidence rule]." N.J.S.A. 2C:2-3(c). In such instances, the jury must determine if intervening causes led to the alleged victim's death and whether the defendant was the proximate cause of the death. Buckley, 216 N.J. at 265. "An 'intervening cause' occurs when an event 'comes between the initial event in a sequence and the end result, thereby altering the natural course of events that might have connected a wrongful act to an injury." Pelham, 176 N.J. at 461.

In the present matter, the natural course of events was that the alleged victim was going to be released to a rehabilitation center where she was anticipated to make a full recovery. (Da 46). The alleged victim's son decided that the alleged victim should be removed from that recovery plan and instead placed on palliative care because, as her treating doctor put it, "even if [the alleged victim] got better, she would still have dementia and Alzheimer's disease which is making her nonfunctioning." (Da 66). This intervening cause disconnected the alleged victim's death from Mr. DiNapoli's actions.

In addition, although the State alleges that Mr. DiNapoli had overdosed on clonazepam, the State's own expert agreed that if Mr. DiNapoli had had the amount of clonazepam in his system that the State is alleging, he would have had life-threatening symptoms up to and including cardiac arrest. (7T 64:19-25; 65:1-7). Despite this, Mr. DiNapoli was not symptomatic of being impaired in any fashion after the accident, and he was not even given field sobriety tests at the scene. (7T 77:16-25; 78:1-3). In addition, the hospital that tested the blood gave Mr. DiNapoli morphine which would have been fatal if he had had such a toxic level of clonazepam in his system. (Dma 22). Despite this, the lab that analyzed Mr. DiNapoli's blood afterwards did not find any trace of morphine or its metabolites in his system. (Pa 328-335). This begs the question not only of whether Mr. DiNaopoli's blood was tested properly but whether the blood tested was even his. Given this evidence, Mr. DiNapoli has asserted a valid defense that he was not driving recklessly on the date in question.

Thus, as the Appellate Division correctly found, "this case involves more than an unquestioned application of a DNR order." (Pa 441). The "defendant's experts suggest evidence that potentially could support a conclusion [that] an intervening cause … broke the chain of causation from defendant's actions." Id. Based upon this reasoning, the Appellate Division correctly held that a 104

hearing would be held, and a decision as to the defense expert's admissibility would be made at the discretion of the trial court. (Pa 442).

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 motion 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."

Another 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. For these 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.

POINT V. MR. DINAPOLI'S PROPOSED EXPERT TESTIMONY QUALIFIES ON ITS FACE UNDER THE TEST FOR THE ADMISSION OF SUCH TESTIMONY CORRECTLY SET FORTH BY THE APPELLATE DIVISION. (Pa 488).

Pursuant to N.J.R.E 702, "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." This Court further defined what assists the trier of fact in State v. Olenowski in which the Court held that evidence that is relevant to issues to be determined by the fact finder and which are based on reliable foundation are admissible. 253

N.J. 133, 148 (2023). Such evidence may only be barred if "the probative value is substantially outweighed by the risk of: (a) undue prejudice, confusion of issues, or misleading the jury; or (b) undue delay, waste of time, or needless presentation of cumulative evidence. N.J.R.E. 403. However, to justify exclusion, the prejudicial, confusing, and/or misleading nature of the evidence must outweigh its probative value so significantly that it has "a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the issues." State v. Cole, 229 N.J. 430, 448 (2017).

As the Appellate Division correctly held, "the State must also establish that the [alleged] recklessness caused the death." (Pa 436); State v. Parkhill, 461 N.J. Super. 494, 501 (App. Div. 2019). Thus, in the present matter, causation is relevant to the issues before the jury. Id. Similarly, the Appellate Division found that the State must prove that Mr. DiNapoli was reckless. (Pa 435); Buckley, 216 N.J. at 262. Therefore, whether the defendant was reckless is relevant to the issues before the jury. Id.

As the Appellate Division correctly found, "this case involves more than an unquestioned application of a DNR order. Dr. Pandina … challenges the decision to abandon life-sustaining efforts. Dr. Polimeni … asserts that the need for [palliative] care was not caused by the [automobile] crash." (Pa 441). The Appellate Division also correctly found that "the reports of defendant's experts

suggest evidence that potentially could support a conclusion [of] an intervening cause – a decision to place the alleged victim on comfort care that was based on erroneous advice about her condition or that was not related to a condition caused by the crash – broke the chain of causation from defendant's actions." Id. Thus, the Appellate Division correctly found that the defendant's experts gave evidence based on foundation (analysis of the alleged victim's medical records) and that were relevant to an issue before the jury (causation). There was nothing to suggest that this evidence would confuse or mislead the jury. As such, under N.J.R.E. 703 and 403, the evidence was admissible. In addition, nothing suggested that the evidence had "a probable capacity to divert the minds of the jurors from a reasonable and fair evaluation of the issues." Cole, 229 N.J. at 448. Therefore, the evidence is admissible and does not require a pretrial hearing to determine its admissibility.

However, the Appellate Division erred when it found that it "cannot determine solely from the reports of defendant's expert witnesses whether their testimony would support the existence of an intervening cause…" (Pa 442). Having found that the expert opinions at least suggested that an intervening cause existed, the Appellate Court should have ended its analysis there and held that the expert testimony was admissible under the applicable standards. Indeed, it is for the *jury* to determine whether causation exists. N.J.S.A. 2C:11-5;

N.J.S.A. 2C:2-3(c). Thus, once the Appellate Division held that the defendant's experts brought up valid points about whether the defendant caused the alleged victim's death, it should have affirmed the trial court's decision to include the testimony at trial. After all, "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." Pelham, 176 N.J. at 461 (emphasis added).

For these 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.

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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