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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-001374-23

THE STATE OF NEW JERSEY,	:	
Plaintiff-Movant,	:	Criminal Action
v.	:	On Leave to Appeal from an Interlocutory Order of the
THOMAS J. DINAPOLI,	:	Superior Court of New Jersey, Law Division, Union County,
Defendant-Respondent.	:	Denying State's Motion to Preclude Expert Testimony
	:	Sat Below: Hon. Thomas K. Isenhour, J.S.C.

BRIEF AND APPENDIX VOL I. ON BEHALF OF PLAINTIFF-MOVANT
(Pa1 to Pa161).

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DATED: February 16, 2024

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STATEMENT OF PROCEDURAL HISTORY[1]

On January 8, 2020, a Union County Grand Jury returned Indictment No. 20-01-00016-I, charging defendant-respondent Thomas J. DiNapoli with second-degree Vehicular Homicide (re: victim Michelina Mele), contrary to N.J.S.A. 2C:11-5 (count one); fourth-degree Assault by Auto (re: victim Maria Murray), contrary to N.J.S.A. 2C:12-1c(2) (count two); and fourth-degree Assault by Auto (re: victim Ana Vasquez-Briones), contrary to N.J.S.A. 2C:12-1c(2) (count three). (Pa1 to 2). On January 21, 2020, the Honorable Candido Rodriguez, Jr., J.S.C., arraigned defendant and a not guilty plea was entered. (Pa3 to 4). On September 26, 2022, defense and the State executed a Trial Memorandum, scheduling trial for February 6, 2023. (Pa5 to 7).

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[1] "Pa" refers to the State's Appendix to this brief. The State has incorporated the appendix attached to defendant's motion for leave to appeal brief into the State's merit's brief appendix for ease of reference.
"1T" refers to the Transcript of proceedings on April 24, 2023.
"2T" refers to the Transcript of proceedings on April 26, 2023.
"3T" refers to the Transcript of proceedings on May 1, 2023
"4T" refers to the Transcript of proceedings on May 11, 2023 (re: Julio Ortiz).
"5T" refers to the Transcript of proceedings on May 11, 2023 (re: Dr. Khan).
"6T" refers to the Transcript of proceedings on May 16, 2023 (re: Dr Khan).
"7T" refers to the Transcript of proceedings on May 30, 2023. (re: Donna Papsun).
"8T" refers to the Transcript of proceedings on June 1, 2023.
"9T" refers to the Transcript of proceedings on June 5, 2023.
"10T" refers to the Transcript of proceedings on June 6, 2023.
"11T" refers to the Transcript of proceedings on December 1, 2023.

On January 5, 2023, defense disclosed an expert report authored by Marc Polimeni, opining Ms. Mele was treated "appropriately" at the hospital and died of natural causes. (Pa8 to 12). On January 13, 2023, the State filed notice of various issues that may arise at trial, including the State's objection to defendant's purported expert(s). (Pa13 to 19).

On January 29, 2023, defense disclosed an expert report authored by Robert Pandina, questioning the findings of the State's toxicology expert, but still opining "that the erratic driving behavior of [defendant] was the major contributing factor in the collision." (Pa21 to Pa39). On April 8, 2023, the State filed a motion to preclude defendant's proffered experts, Marc Polimeni and Robert Pandina. (Pa40). On April 24, 2023, Judge Rodriguez denied the State's motion relative to Robert Pandina, and reserved on Marc Polimeni for want of a N.J.R.E. 104 hearing. (Pa41) (1T21-23 to 22-10).

On April 26, 2023, State's witness Dr. Beverly Leffers testified in an N.J.R.E. 104 hearing relative to defense's motion to preclude the State's medical examiner. (2T). Following Dr. Leffers' testimony, Judge Rodriguez held that the jury would decide the medical issues raised. (2T106-12 to 21). On May 1, 2023, Judge Rodriguez heard additional testimony from Dr. Leffers, as well as argument. (3T). The court denied defense's application to preclude the State's medical examiner. (3T41-13 to 42-2).

Defendant was then tried before Judge Rodriguez and a jury with the State presenting its case-in-chief from May 11, 2023, through May 30, 2023. Following the State resting, defense presented two witnesses, defendant's aunt and uncle.

On June 1, 2023, defense moved for a continuance/mistrial, alleging newly discovered evidence materially altered their experts' opinions. (6T4-10 to 8-8; 6T5-16 to 24). Judge Rodriguez granted defendant's request for a mistrial and dismissed the jury. (9T4-19 to 24).

On June 9, 2023, the State filed a motion to compel those expert opinions that served the basis for the defense's mistrial application. (Pa284). On June 12, 2023, the Honorable Thomas Isenhour, J.S.C., ordered defense to turn over all expert reports by August 1, 2023. (Pa285)

On July 18, 2023, defense filed a letter seeking additional time and discovery, annexing to it a supplemental report of Robert Pandina, Ph.D. (not M.D.), also dated July 18, 2023, undermining the defense's mistrial argument and opining that he cannot make a determination relative to the alleged new evidence impacting his cause of death analysis without further discovery. (Pa286 to 291).

On July 26, 2023, a Union County Grand Jury returned superseding Indictment No. 23-07-00473, keeping the original charges and adding the

lesser-included/related third-degree Strict Liability Vehicular Homicide, contrary to N.J.S.A. 2C:11-5.3a, as well as third-degree Witness Tampering, contrary to N.J.S.A. 2C:28-5a, for facts discovered immediately prior to trial and testified to at trial by Julio Ortiz. (Pa292 to 294).

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

On September 29, 2023, the State filed a motion to preclude defendant's experts on the grounds that their opinions are contrary to accepted medical standards and legally impermissible under the model jury charge for causation. (Pa315). On December 1, 2023, the parties argued the States' motion to preclude before Judge Isenhour. (10T). The court denied the State's motion. (Pa316). In denying the State's motion, the court opted to reserve until such time that the experts are offered and qualified. (11T70-22 to 71-3; 72-16 to 18). The State requested that any such hearing be scheduled prior to trial, to properly plan for opening statements and trial strategy. (11T71-6 to 11). The court denied the State's request. (11T71-20 to 72-15).

On December 19, 2023, the State filed a Motion for Leave to Appeal. (Pa415). The State also filed a Motion for Leave to File excerpts of

transcripts. (Pa417). On December 29, 2023, defendant filed a brief and appendix in opposition to the State's motion. Defendant also filed a Motion for Leave to File an excerpt of a transcript. (Pa419). On January 8, 2024, this Court granted the State's Motion for Leave to Appeal and both parties' Motion for Leave to File an excerpt of a transcript. (Pa421 to 423). This brief follows.

STATEMENT OF FACTS[2]

On June 4, 2019, at about 3:44 p.m., defendant drove at about forty miles per hour in the right eastbound lane on Morris Avenue when he drifted across the four lanes of traffic into the right westbound lane and crashed head-on into the vehicle driven by Maria Murray and further occupied by Michelina Mele and Ana Vasquez Briones. (Pa317 to 326).

At the scene, defendant stated that he fell asleep and did not know what happened. Id. At the hospital, defendant said he lost control of his vehicle. (Pa327). In subsequent statements, defendant again admitted that he fell asleep. (Pa317 to 326). Defendant's blood was drawn at the hospital about one hour after the crash and contained cocaine metabolites, as well as Clonazepam (an anti-anxiety, muscle relaxer, Benzodiazepine) in an amount far-exceeding any therapeutic dosage/purpose. Id.; (Pa328 to 335).

Ms. Murray sustained bruising commensurate with her seatbelt positioning during the crash, with pain in her left shoulder and across her chest. (Pa30). As a result of the crash, Ms. Vasquez sustained a laceration requiring stitches to her left hand, as well as bruising and pain commensurate

[2] Because this is an appeal from a pretrial motion and the trial has not occurred, the "Statement of Facts" are derived from police reports and investigative reports and are the facts that the State intends to prove at trial.

with her seatbelt positioning during the crash. (Pa30). Ms. Mele, who was the front seat passenger, was transported to Trinitas Hospital, where, approximately twenty-six hours later, she died. (Pa14). Dr. Beverly Leffers conducted an autopsy of Ms. Mele and ruled the cause of death to be blunt impact injuries, and the manner of death to be an accident. (Pa13).

Pre-Trial Testimony Relevant to Issue on Appeal

On April 26, 2023, Dr. Beverly Leffers testified in an N.J.R.E. 104 hearing relative to defense's motion to preclude the State's medical examiner. (2T). Dr. Leffers testified that she is a board-certified forensic pathologist with over forty years of experience and explained that pathology "is the study of the effect of injury and illness on the body." (2T7-24 to 8-2; 2T8-12 to 16). Dr. Leffers further explained that "[f]orensic pathology is a subspecialty in which the cases that are studied are the ones that have legal importance." (2T7-25 to 8-2). Dr. Leffers explained forensic pathologists perform autopsies to determine a cause of death, as well as the manner of death. (2T8-5 to 11). Dr. Leffers is a member of the National Academy of Medical Examiners and the American Academy of Forensic Science. (2T8-17 to 22). In order to continue her practice as a medical examiner, offering opinions on deaths that have legal importance, Dr. Leffers must complete continuing education regarding forensic pathology. (2T9-5 to 12). Dr. Leffers also testified about

the difference between general pathologists, who may perform autopsies in the hospital, and forensic pathologists, who conduct examinations "that have legal importance." (2T49-4 to 21). Dr. Leffers acknowledged that most deaths are not of legal importance and that an attending physician, in those not legally important circumstances, may certify the death and note the cause. (2T50-18 to 51-14).

Dr. Leffers testified that she determined Ms. Mele's death to be the result of blunt impact injuries. (2T25-15 to 20; 2T37-13 to 25). Dr. Leffers explained how she made her expert forensic pathological medical examiner findings, relying on national standards. (2T37-13 to 25; 2T40-16 to 41-3; 2T42-1 to 19). The national standards Dr. Leffers referenced and espoused are contained and publicly available in the Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, Medical Examiners' and Coroners' Handbook on Death Registration and Fetal Death Reporting (the "Handbook") (Pa42 to 179), as well as the National Association of Medical Examiners, A Guide for Manner of Death Classification (the "Guide") (Pa180 to 208), and The American Board of Pathology, 2023 Booklet of Information (the "Booklet") (Pa209 to 258). The national standards Dr. Leffers referenced and espoused are reflected in Ms. Mele's Autopsy Report and Death Certificate. (Pa259 to 263; Pa264).

On May 1, 2023, defense continued cross-examination of Dr. Leffers, who testified she did not observe chronic lung disease or contusions. (3T15-10 to 16). Dr. Leffers testified that the decision for end of life care was made considering Ms. Mele's injuries and comorbidities and that Ms. Mele's injuries were life-threatening for her. (3T19-15 to 23; 3T21-22 to 22-2). Dr. Leffers explained that Ms. Mele had a number of rib fractures and fracture of her sternum, which would make breathing difficult and painful for her and she had preexisting medical problems that also would make her more susceptible to death. (3T22-3 to 8). Dr. Leffers testified that Ms. Mele died due to her injuries and the consequences of those injuries. (3T29-17 to 30-20; 3T33-21 to 35-16).

Testimony from First Trial Relevant to Issue on Appeal

On May 11, 2023, defendant's coworker, Julio Ortiz, testified that, on June 4, 2019, at about noon, he went to lunch with defendant at a pizzeria. (4T4-18 to 6-7). Defendant drove, as he usually did. (4T5-19 to 25). During their lunch break, Mr. Ortiz observed defendant to be driving "erratical[ly]"; defendant was "swerving" to and from the pizzeria and "almost got into an accident." (4T7-8 to 8-9; 4T9-9 to 11; 4T10-17 to 22). More specifically, defendant almost struck a parked vehicle while exiting the pizzeria parking lot. (4T9-9 to 10-8). When Mr. Ortiz inquired to defendant about defendant's

condition, defendant admitted to taking medication, "muscle relaxers," in an amount "more than prescribed." (4T8-7 to 21; 4T9-12 to 22; 4T10-17 to 22). Defendant further stated that "he wasn't feeling well" and was "leaving early that day." (4T10-17 to 22). When they got back to work from lunch around 1:00 p.m., Mr. Ortiz "advise[d] [defendant] that he should not be driving in the condition [he] observed." (4T10-23 to 11-5). Mr. Ortiz "told [defendant] that he should call an Uber. Call someone to come pick him up." Id.

Mr. Ortiz further testified that, a few weeks after the crash, defendant approached him and told Mr. Ortiz, "if [the police] come interviewing people, don't say anything." (4T12-5 to 7; 4T63-12 to 21). After Mr. Ortiz spoke to police and learned of Ms. Mele's death, he confronted defendant. (4T12-17 to 13-10). Mr. Ortiz asked defendant why he omitted Ms. Mele's death when requesting him to not speak to police. (4T12-25 to 13-10). Defendant responded with the opinions now espoused by his experts: "the lady was an old lady anyway. So she was gonna die anyway." Id.

Ms. Mele's treating physician, Dr. Sabeen Khan, also testified at the first trial on May 11, 2023. (5T). Dr. Khan testified that Ms. Mele arrived by emergency medical services to the emergency room of the hospital with chest wall trauma. (5T16-6 to 12; 17-11 to 18). Dr. Khan testified that Ms. Mele's pulse oximetry was normal upon admission, but, as Ms. Mele breathed-in less

and less due to her injuries, her pulse oximetry went down. (5T20-3 to 24). Dr. Khan testified how the integrity of Ms. Mele's chest wall was compromised by the injuries she sustained in the crash. (5T20-25 to 22-19). Dr. Khan explained that the inability to breathe causes death. (5T22-16 to 21). Dr. Khan testified that Ms. Mele's inability to breathe caused her death. (5T23-7 to 24-8; 30-12 to 14; 34-24 to 37-23). Dr. Khan testified that, but for the crash, Ms. Mele would not have died when she did. (5T41-1 to 42-6).

During defense's cross, Dr. Khan made clear that Ms. Mele's injured condition was not going to improve. (5T52-1 to 4). Dr. Khan explained that Ms. Mele was in extreme pain, unable to take deep breaths, and without the possibility of recovery within the bounds of Ms. Mele's advance health directive. (5T54-20 to 55-5; 23-7 to 24-8; 57-13 to 58-22; Pa336 to 337)

Defense continued with cross of Dr. Khan on May 16, 2023. (6T). Dr. Khan testified that palliative care was implemented because the injuries Ms. Mele sustained in the crash was a death sentence, with a calculable mortality rate of 100%, and no reasonable expectation of her recovery or regaining a meaningful quality of life. (6T93-15 to 95-5; 6T104-23 to 105-6; 6T117-2 to 118-1; 6T121-8 to 122-4; 6T123-21 to 125-12; 6T162-7 to 163-17). Dr. Khan explained that Ms. Mele's preexisting advanced directive was noted in her medical records and referenced by her family at the time of treatment. (6T87-

21 to 88-2; 6T124-23 to 125-12; Pa336 to 337). Dr. Khan testified Ms. Mele's injuries compromised her ability to breath-in, reducing her oxygen levels, increasing her carbon-dioxide levels, and causing her death. (6T121-8 to 128-3). Dr. Khan observed Ms. Mele's condition was deteriorating despite oxygenation treatment, that Ms. Mele would have to be intubated, and that she had an advanced directive to not be intubated. (6T46-11 to 48-10; 6T52-11 to 53-10).

Victim Medical Records Relevant to Issue on Appeal

Ms. Mele's medical records reveal that, upon arrival by ambulance on June 4, 2019, at about 4:47 p.m., nursing staff noted Ms. Mele's airways were not blocked and, while she appeared to be breathing normal, she was complaining of, inter alia, severe "midsternal chest pain" and was "disorientated." (Pa342 to 344). Ms. Mele was "quivering," "uneasy," "tense," "squirming," "crying steadily" with "screams or sobs," and "frequent[ly] complain[ing]" of her severe pain. (Pa343 to 344). Ms. Mele received 4mg of Morphine "immediately" and underwent a "Head to Toe Assessment." (Pa346 to 347). With the Morphine administered, Ms. Mele "calm[ed]," became "orientated to person, place and time," and her breathing appeared "spontaneous and unlabored." Id.

Despite being more orientated, Ms. Mele's complaints of "localized,

non-radiating chest pain" persisted and bruising appeared thereat. Id. Staff administered a non-rebreather mask ("NRB") to increase Ms. Mele's oxygen levels. (Pa347). When it proved insufficient, high flow oxygen was administered in an effort "to maintain satisfactory oxygenation." (Pa348; Pa357). Ms. Mele did not complain when it was administered. (Pa349). Still, Ms. Mele maintained complaints of "severe chest wall pain [and] shortness of breath" and she "appear[ed] to be in severe pain." (Pa354).

CT Scans revealed "scattered areas of ground glass opacity anteriorly," indicating "multiple areas of pulmonary contusion with multiple rib fractures." (Pa364; Pa357). Ms. Mele "require[ed] high-flow oxygen via nasal cannula," was "critically ill with a high probability of imminent or life[-]threatening deterioration" attributable to "Multi trauma, multiorgan injury." (Pa357). X-rays revealed a "comminuted patellar fracture with suprapatellar joint effusion." (Pa364; Pa387). Comparing the chest images, doctors observed Ms. Mele's "worsening lung condition" with "[i]ncreased density [in] both lower lungs consistent with pulmonary contusions" and appreciated that Ms. Mele would eventually require a ventilator/intubation. (5T35-17 to 36-22).

Ms. Mele was ordered to the Intensive Care Unit ("ICU") due to and with the following diagnoses: "Hypoxia," "Pulmonary contusion," "Patella fracture," "Multiple rib fractures," and "motor vehicle accident." (Pa357 to

Pa358; Pa364; Pa368; Pa384; Pa387; Pa396). Ms. Mele's family history was "non-contributory" and the aforementioned "multitrauma [was] secondary to [the] M[otor] V[ehicle] A[ccident]." (Pa365; Pa366; Pa387; Pa396).

Doctors noted that Ms. Mele's family was bedside and consulted relative to their administering high flow oxygen in an effort to stay the imminent/life-threatening deterioration. (Pa357; Pa364). In response, the Mele family asked that Ms. Mele's advanced directive be respected; Ms. Mele was then and thereafter ordered "DNR/DNI" (i.e., "Do Not Resuscitate/Do Not Intubate," referring to what would otherwise be the necessary life-saving procedures), which was "reviewed/validated by [the] patient, [Ms. Mele]." (Pa357; Pa364; Pa367; Pa369; 6T29-19 to 30-9). This document was created on December 27, 2007, twelve years prior to the incident that caused her death, and in it, Ms. Mele executed the Somerset Medical Center Advanced Directive Form, setting forth her health care wishes and designating her three sons, Joseph P. Mele, M.D., Michael J. Mele, and Patrick D. Mele, as health care representatives. (Pa336 to 337). As noted therein, Ms. Mele did not want "all life support measures be provided to sustain [her] life, regardless of [her] physical or mental condition." Id. Rather, Ms. Mele requested that, "If [she was] experience[ing] extreme mental or physical deterioration such that there is no reasonable expectation of recovery or regaining a meaningful quality of life,

then life-prolonging measures should not be initiated; or if they have been, they should be discontinued," including but not limited to "respiratory support (ventilator)." Id. Further therein, Ms. Mele requested that she be "given the appropriate medical care to alleviate pain and keep [her] comfortable." Id. Ms. Mele discussed her health care wishes with her sons and "trust[ed] their judgment on [her] behalf." Id.

Ms. Mele was transferred from the Emergency Room to the Intensive Care Unit and treated with pain control/comfort care. (Pa364; Pa368; Pa375 to Pa379; Pa381; Pa382; Pa384; Pa392; Pa394). Nearing midnight on June 4, 2019, nursing staff noted that Ms. Mele was responding to the medication administered and, "at [that] moment," was sleeping, with her sons at bedside. (Pa361; Pa379 to Pa382). Ms. Mele was ordered nil per os ("NPO") or "nothing by mouth" unless and until her "respiratory status improved," indicating that, while she was ordered oral medication, same was never administered. (Pa382). Ms. Mele continued to receive a low dose of morphine intravenously; though, there is "[n]o max dose for palliative care." (Pa3794). Shortly after midnight, again awake, Ms. Mele continued to complain of chest pain, "difficulty breathing," and "[s]hortness of breath." (Pa380). She continued to receive "high flow nasal cannula" and "pain control." Id. In the morning on June 5, 2019, the Chaplin provided Ms. Mele

her Sacrament of the Sick, as well as counseling to her family. (Pa393).

As noted by Dr. Carlos Remolina, Ms. Mele sustained significant trauma in the subject crash, was experiencing a lot of pain, that her comorbidities further impeded the possibility of recovery, and that Ms. Mele should be made comfortable on hospice. (Pa275; Pa399; Pa403; Pa405). In concert with all the treating physicians, Ms. Mele's son and health proxy, Joseph P. Mele, M.D., an internist, requested his mother be discharged to an inpatient hospice facility and the hospital began planning accordingly. (Pa398; Pa402 to403; Pa406 to Pa408). As noted by Dr. Ricardo Cedeno, and discussed in Frequently Asked Questions for Practitioners Licensed by the Board of Medical Examiners, there is no max dose for comfort care pain medication for a patient receiving palliative care. (Pa265; Pa266 to 274; Pa399).

Ms. Mele was "completely disabled," "immobile" and "unresponsive"; she was "without capacity." (Pa400 to 401; Pa405). Dr. Khan continued the medication to address Ms. Mele's "tremendous," "excessive" pain. (Pa398; Pa414). At about 3:30 p.m. on June 5, 2019, the Chaplin prayed with Ms. Mele and provided counseling to Ms. Mele's family. At 5:45 p.m., Ms. Mele's pain subsided and she succumbed to her injuries, with her sons at her bedside. (Pa412; Pa414). According to the Autopsy Report, Ms. Mele had actually sustained twelve fractured ribs, inter alia. (Pa260).

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING THE STATE'S MOTION TO PRECLUDE DEFENDANT FROM INTRODUCING IRRELEVANT EVIDENCE, AND IT COMPOUNDED ITS ERROR BY DENYING THE STATE'S REQUEST FOR AN N.J.R.E. 104 HEARING. (Pa316; 11T70-22 to 71-3; 11T72-16 to 18).

This case presents an issue of first impression, namely, whether a pre-existing advanced directive that leads to the implementation of palliative care should be treated as an intervening act that breaks the causal chain between a motor vehicle accident and the death of a victim of the accident. It is respectfully submitted that there is no legal difference between the implementation of palliative care and the removal of life sustaining machines, the latter of which already has been deemed insufficient to constitute an intervening act when evaluating causation. Accordingly, the State submits the trial court abused its discretion by denying the State's motion to preclude defense's experts from arguing the victim's palliative care, and not the car accident, caused her death. Such an opinion is inappropriate because it addresses an irrelevant topic and only would be used to confuse the issue and unduly prejudice the State's presentation of the case. As such, the trial court's

order denying the State's motion was an abuse of discretion.

The trial court then compounded its error and further abused its discretion by denying the State's request for a pretrial N.J.R.E. 104 hearing to question defendant's experts and further litigate this matter. Defense experts are unqualified and provided inadmissible net opinions. Thus, their opinions not only should be barred because they are irrelevant, they also should be barred because they are unreliable.

Moreover, although the State maintains defendant's experts' testimony should be completely barred, the trial court's decision to deny the State's motion and reserve its ultimate ruling on admissibility until the middle of trial, instead of at a pretrial N.J.R.E. 104 hearing, deprives the parties of knowing what evidence will be admissible and has great potential to result in a mistrial. This ruling will fundamentally alter the parties' presentation of the case and, therefore, a firm ruling is needed. As such, the court's denial of this request was an abuse of discretion that cannot stand.

And, finally, further establishing the trial court's ruling was an abuse of its discretion, the court failed to provide any explanation for its ruling in violation of R. 1:6-2(f). As this Court has recognized, the record, or lack thereof, in explaining why the court rules on a motion clearly establishes the trial court abused its discretion. See Cardell, Inc. v. Piscatelli, 277 N.J. Super.

149, 155 (App. Div. 1994). These errors, considered individually and together clearly establish the trial court's ruling was an abuse of discretion and, thus, it should be reversed on appeal.

A trial court's ruling on the admissibility of evidence is "subject to limited appellate scrutiny." State v. Buda, 195 N.J. 278, 294 (2008). A trial court's findings based on the testimony of witnesses is afforded deference, State v. Elders, 192 N.J. 224, 244 (2007), a trial court's "interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." State v. Handy, 206 N.J. 39, 45 (2011); Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995); State v. Mann, 203 N.J. 328, 337 (2010). Here, where there was no evidentiary hearing or testimony and the trial court made purely a legal determination, review is de novo.

A. The Trial Court Abused Its Discretion In Denying The State's Motion Because the Expert Opinions Are Irrelevant.

The application under review consisted in part of a motion in limine, governed by N.J.R.E. 401's definition of relevancy. Evidence is relevant if it has "a tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Relevancy consists of probative value and materiality. State v. Hutchins, 241 N.J. Super. 353, 359 (App. Div.

1990). Probative value "is the tendency of the evidence to establish the proposition that it is offered to prove." State v. Wilson, 135 N.J. 4, 13 (1994). "A material fact is one which is really in issue in the case." Hutchins, 241 N.J. Super. at 359.

The offense at issue in this case is vehicular homicide, N.J.S.A. 2C:11-5. The statute provides that "[c]riminal homicide constitutes vehicular homicide when it is caused driving a vehicle or vessel recklessly," which in this case is a crime of the second degree. N.J.S.A. 2C:11-5(a), (b). The State has the burden of proving beyond a reasonable doubt three elements: (1) that "defendant was driving a vehicle"; (2) that "defendant caused the death"; and (3) that the death was caused by driving a vehicle recklessly. State v. Eldridge, 388 N.J. Super. 485, 494 (App. Div. 2006), certif. denied, 189 N.J. 650 (2007). That defendant was driving at the time of the collision cannot be disputed and, thus, the issue in this case is defendant's recklessness and causation. Therefore, the remaining issues are whether defendant "caused the death" and whether the death was caused by driving the vehicle recklessly.

The mental state of recklessness is defined in N.J.S.A. 2C:2-2(b)(3). N.J.S.A. 2C:2-2(b)(3) provides:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material

> element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

Evidence of a "defendant's driving while intoxicated may by itself support a determination of recklessness." State v. LaBrutto, 114 N.J. 187, 204 (1989) (quoting State v. Casele, 198 N.J. Super. 462, 472 (App. Div. 1985); see also, State v. Radziwil, 235 N.J. Super. 557, 563 (App. Div. 1989) (holding, "a jury may infer that an individual who drives while intoxicated is consciously disregarding the risk of an accident and acting with extreme indifference to human life.").

Under N.J.S.A. 2C:2-3, the issue of causation is determined by a multi-step analysis:

> a. Conduct is the 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 . . . cause a particular result, the actual result must be within the risk of which the actor is 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.
> [N.J.S.A. 2C:2-3.]

Although "[c]ausation is a factual determination for the jury to consider . . . the jury may consider only that which the law permits it to consider." State v. Pelham, 176 N.J. 448, 466, cert. denied, 540 U.S. 909 (2003).

The jury initially determines whether the State has established "but for" causation by demonstrating that the event would not have occurred absent the defendant's conduct. N.J.S.A. 2C:2-3(a). Under this "but-for" test, the defendant's conduct is deemed a cause of the event if the event would not have occurred without that conduct. Conversely, a defendant's conduct is not considered a cause if the event would have occurred without it. See W.P. Keeton, D. Dobbs, R. Keeton, & D. Owens, Prosser & Keeton on The Law of Torts § 41 at 266 (5th ed. 1984).

In cases involving the mens rea of recklessness, the jury then conducts a "culpability assessment" under N.J.S.A. 2C:2-3(c). Pelham, 176 N.J. at 460 (citing State v. Martin, 119 N.J. 2, 11-13 (1990)). As the drafters of the Code noted, N.J.S.A. 2C:2-3(c) "deal[s] explicitly with variations between the actual result" and the result risked in a recklessness case, and "stat[es] when the variation is not material." Final Report, commentary to § 2C:2-3, at 50.

The "actual result," as the term is used in N.J.S.A. 2C:2-3(c), denotes the harm inflicted on the victim. Specifically, in a case in which the State alleges that the defendant's reckless conduct caused a fatality, the "actual result" is the victim's death in the accident. The Code's drafters limited N.J.S.A. 2C:2-3 to "offenses which are so defined that causing a particular result is a material element of the offense." Id. at 49. Thus, when the defendant is charged with a violation of N.J.S.A. 2C:11-5, the result that is a material element of the offense is the death of another person. See N.J.S.A. 2C:11-5; see also Pelham, 176 N.J. at 460, 467 (implying victim's death was "actual result" for purposes of N.J.S.A. 2C:2-3(c)); State v. Jamerson, 153 N.J. 318, 335-36 (1998) (indicating victim's death was "actual result" in vehicular homicide case); Martin, 119 N.J. at 11-12 (inferring in murder case in which defendant was accused of setting fatal fire, death of victim was "actual result" under N.J.S.A. 2C:2-3(c)).

When applied to a vehicular homicide case, such as the present matter, the first prong of N.J.S.A. 2C:2-3(c) requires the jury to assess whether the defendant was aware that his allegedly reckless driving gave rise to a risk of a fatal motor vehicle accident. See State v. Buckley, 216 N.J. 249, 264 (2013). If the jury determines that the State has proven beyond a reasonable doubt that the defendant understood that the manner in which he or she drove created a

risk of a traffic fatality, the element of causation is established. See Martin, 119 N.J. at 12.

When a mens rea of recklessness applies, the State may also establish causation under the second prong of N.J.S.A. 2C:2-3(c). The second prong of N.J.S.A. 2C:2-3(c) requires proof that the actual result -- in this case the victim's death -- "involve[s] the same kind of injury or harm as the probable result" of the defendant's conduct. Under the second prong, when permitted by the law, "'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 (quoting Martin, 119 N.J. at 13).

The Code "does not identify what may be an intervening cause," ibid., but "'deals only with the ultimate criterion by which the significance of such possibilities ought to be judged.'" Martin, 119 N.J. at 13 (quoting Final Report, commentary to § 2C:2-3, at 50). However, the Court has recognized that 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 (quoting Black's Law Dictionary 212 (7th ed. 1999)).

"Generally, to avoid breaking the chain of causation for criminal liability

a variation between the result intended or risked and the actual result of [the] defendant's conduct must not be so out of the ordinary that it is unfair to hold [the] defendant responsible for that result." Id. at 461-62 (citing Martin, 119 N.J. at 14; Wayne R. LaFave & Austin W. Scott, Jr., Handbook on Criminal Law § 35, at 246 (1972)). Thus, an "intervening cause" denotes an event or condition which renders a result "too remote, accidental in its occurrence, or dependent on another's volitional act" to fairly affect criminal liability or the gravity of the offense. See N.J.S.A. 2C:2-3(c); Pelham, 176 N.J. at 461-62.

Notably, as the New Jersey Supreme Court recognized "[t]he defendant's desire to mitigate his liability may never legally override, in whole, or in part, the decisions of the physicians and the family regarding the treatment of the victim." Pelham, 176 N.J. 448, 465 (2003) (quoting In re N., 406 A.2d 1275, 1282 (D.C. 1979). Thus, removal of life support, as a matter of law, may not constitute an independent intervening cause for purposes of lessening a criminal defendant's liability. Pelham, 176 N.J. at 465. A defendant's criminal liability also is not lessened by the existence in the victim of a medical condition that, unbeknownst to the defendant, made the victim particularly vulnerable to attack. State v. Hofford, 169 N.J. Super. 377 (App. Div. 1979). See also People v. Funes, 28 Cal. Rptr. 2d 758, 769 (Ct. App. 1994)("the decision to withhold antibiotics was, as a matter of law, not an independent

intervening cause. Instead, it was a normal and reasonably foreseeable result of defendant's original criminal act.").

Applying these principles here, it is clear that defendant's experts' opinions are irrelevant to the material facts. Case law clearly establishes a victim's conduct is irrelevant to a vehicular homicide prosecution under the first prong of causation. See Buckley, 216 N.J. 249 (2013). Case law also clearly establishes that a victim's medical treatment decisions are not intervening causes and, therefore, the experts opinions relating to same are likewise irrelevant, even if the State proceeds under the second prong of causation. See Pelham, 176 N.J. 448 (2003). Accordingly, the trial court's order denying the State's motion to preclude defendant's experts from testifying was legally erroneous and an abuse of discretion.

The Supreme Court's holding in State v. Buckley, 216 N.J. 249 (2013), clearly establishes the evidence at issue is not relevant to the jury's inquiry under the first prong of N.J.S.A. 2C:2-3(c). The first of determination the jury will need to make is whether the defendant's conduct is "an antecedent but for which the result in question would not have occurred." N.J.S.A. 2C:2-3(a)(1). The "but for" test is a simple one. If the State proves beyond a reasonable doubt the "result" would not have occurred without the "conduct," it has met its burden on this threshold issue. Martin, 119 N.J. at 11-12. The "but for"

test of N.J.S.A. 2C:2-3(a) focuses the jury entirely upon the role of the defendant's conduct -- the manner in which he drove before and during the collision. The State must demonstrate nothing more than that the fatal accident would have been avoided had defendant not driven his vehicle in the manner in which he did.

Here, the "result" is Mele's death in the motor vehicle accident. Defendant's "conduct" is the manner in which he drove the vehicle, namely, having consumed a depressant medication in an amount exceeding therapeutic value, being aware of his inebriated condition, and after having been warned not to drive, defendant did then drive a motor vehicle on a major highway, fall asleep, drift across four lanes of traffic, and crash head-on into the victim motor vehicle. Defendant's proffered fact and expert evidence on Ms. Mele's medical decision therefore is irrelevant to the threshold "but for" causation inquiry.

Ms. Mele's medical decisions also are irrelevant to the first component of the N.J.S.A. 2C:2-3(c) two-pronged test for causation: whether "the actual result" was "within the risk of which the actor is aware." Under this portion of the statutory test, the jury will determine whether defendant was aware that, by virtue of the manner in which he drove the vehicle, he created a risk of a fatal collision. See Pelham, 176 N.J. at 467; Martin, 119 N.J. at 12; see also State

v. Campfield, 213 N.J. 218, 234 (2013) (whether risk of death was contemplated for reckless manslaughter). If the jury determines that defendant was aware that his conduct gave rise to such a risk, it need not assess the exact degree of that risk, or the variables that could affect its magnitude. Fact and expert evidence that Ms. Mele received palliative care and defendant's experts' opinions regarding same is thus irrelevant to the jury's inquiry on the first prong of N.J.S.A. 2C:2-3(c). Accordingly, the trial court erred in denying the State's motion to preclude them from testifying.

The court also erred in denying the State's motion because defendant's experts' opinions were irrelevant even if the State proceeds with a prosecution for vehicular manslaughter utilizing the second prong of causation. In this case, defense counsel argues gross malpractice, euthanasia, and murder, but the defense experts do not identify any specific action by anyone constituting any gross malpractice, regular malpractice, or even negligence. Defense experts never proffer any different or viable alternative course of treatment. Accordingly, defendant's experts' opinions are irrelevant and should be barred.

Again, defendant's experts' opinions also would be irrelevant if the State proceeds under the second prong of causation. Under the second component of the test, when permitted by the law, "'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 (quoting Martin, 119 N.J. at 13). "A defendant may be relieved of criminal liability for a victim's death if an 'independent' intervening cause has occurred, an act that breaks the chain and in effect becomes the cause of the victim's injury." Id. at 450. Unlike the first prong of causation, where the jury looks solely at the defendant's conduct, a prosecution under the second prong is broader and permits a defendant to introduce intervening acts that might absolve him of criminal culpability. However, even though "[c]ausation is a factual determination for the jury to consider . . . the jury may consider only that which the law permits it to consider." State v. Pelham, 176 N.J. 448, 466, cert. denied, 540 U.S. 909 (2003). As previously stated, "[t]he defendant's desire to mitigate his liability may never legally override, in whole, or in part, the decisions of the physicians and the family regarding the treatment of the victim." Pelham, 176 N.J. 448, 465 (2003) (quoting In re N., 406 A.2d 1275, 1282 (D.C. 1979). Accordingly, here, where defendant's experts challenge the effect of the victim's medical choices, their opinion is irrelevant because they do not identify legally cognizable intervening causes.

Perhaps, had defendant's experts claimed Ms. Mele was the victim of

gross malpractice, their opinions would be relevant. See State v. Pelham, 176 N.J. 448, 467 (2003). However, that is not what is alleged. In his report dated January 5, 2023, defense expert Marc Polimeni opined that Ms. Mele's injuries were not life-threatening, she was "suffering from end stage dementia and Alzheimers," placed "on elective end of life and hospice care" where she was treated "appropriately," and died a "natural cause of death." (Pa11; Pa12). Importantly, Ms. Mele was not suffering from (or prescribed anything for) end stage dementia/Alzheimer's. While doctors noted Ms. Mele's preexisting demented condition impacted her ability to rehabilitate, Ms. Mele was placed in hospice/palliative care with medication because the severe pain and terminal injuries. (5T41-17 to 42-4; 5T48-11 to 49-23; 5T50-22 to 52-4; 5T52-14 to 55-5; 5T57-13 to 58-22; 6T121-8 to 122-4). Critically, Dr. Polimeni does not allege anyone committed gross malpractice, nor does he offer any alternative treatment plan that would have saved Ms. Mele. Dr. Polimeni's January 5, 2023, opinion is misleading, insufficient, and irrelevant.

Defense expert Marc Polimeni's more recent report is likewise irrelevant. In his report dated July 31, 2023, Dr. Polimeni noted that he was provided additional medical records and then set forth the same opinion from January 5, 2023. (Pa301 to Pa306). Therein, Dr. Polimeni details that which he presumes to have been administered to Ms. Mele, including oral medication

never actually administered because Ms. Mele was NPO. (Pa303 to Pa304). Nonetheless and paramount, Dr. Polimeni does not allege anyone committed any malpractice, gross or otherwise. He also does not offer an alternative treatment plan that would have resulted in an outcome other than death. Dr. Polimeni's July 31, 2023, opinion is misleading, insufficient, and irrelevant.

Defense expert Dr. Henry Velez's opinion is likewise irrelevant. In his report dated July 20, 2023, Dr. Velez notes that Ms. Mele was screaming at times, but believes the most probable cause for it was her Alzheimer's and "break through pain [that] was adequately controlled with morphine." (Pa309). Dr. Velez noted that "the appropriate use of morphine for pain control" "lessened" some of Ms. Mele's "moaning." Id. In his assessment, Dr. Velez writes that Ms. Mele "received the standard of care at all times," which included her transfer to hospice where, "[a]ppropriately, doses of morphine were escalated […] to provide a peaceful and dignified death […] in accordance with the wishes of the [patient/]family." Dr. Velez acknowledged that Ms. Mele's "hospital course was marked by severe pain, which was adequately controlled with opioids" and that x-rays and CT scans of the chest "were both suggestive of lung contusion." (Pa311). Critically, Dr. Velez does not allege anyone committed gross malpractice.

Despite Ms. Mele's condition, Dr. Velez opines that Ms. Mele could

have survived her injuries had she not been placed in hospice. (Pa312). However, he fails to address the crash that caused her injuries and fails to offer an alternative treatment plan that would have saved her. (Pa312). Dr. Velez's July 20, 2023, opinion is misguided, insufficient, and irrelevant.

Robert Pandina's expert report similarly is irrelevant. In his report dated January 29, 2023, Dr. Pandina, who is a psychologist (not a medical doctor), acknowledged review of partial discovery (sans Julio Ortiz Statement in which he stated defendant admitted to overmedicating himself) and opined that defendant's blood revealed Clonazepam at such significant levels he doubts the testing results because he has remaining questions about how the testing was conducted and because law/medical professionals did not note defendant to appear intoxicated. (Pa21 to 23; Pa31 to 34). While Dr. Pandina was not willing to acknowledge the role of defendant's intoxication in the crash, he did opine "that the erratic driving behavior of [defendant] was the major contributing factor in the collision." (Pa36; Pa39). Having been denied the critical facts surrounding defendant's lunch excursion and admission of over-medicating himself, Dr. Pandina's January 29, 2023, opinion is ill/mis-informed and speculative in nature.

In his report dated July 18, 2023, Dr. Pandina indicated he was in the process of reviewing Ms. Mele's medical records to "evaluat[e …] the impact

of medication administered during the course of treatment." (Pa289). Based on Dr. Pandina's psychological review of Ms. Mele's medical records, he was unable to identify "the actual times and doses" of the pain medication "actually delivered." (Pa290). Dr. Pandina questioned how medications ordered were not detected in Ms. Mele's blood, noting Ms. Mele's blood draw on June 5, 2019 "only indicated a relatively low level of morphine." (Pa290). Dr. Pandina does not allege anyone committed gross malpractice. Dr. Pandina's July 18, 2023, opinion is confused, insufficient, and irrelevant.

In his report dated August 1, 2023, Dr. Pandina's "focus" was to "evaluat[e …]the impact of medication administered during the course of treatment." (Pa295). Again, he was unable to identify "the actual times and doses" of the pain medication "actually delivered." (Pa296). Still, Dr. Pandina "assum[es] that the orders noted in Ms. Mele's chart were executed," and provided a "limited" opinion stating Ms. Mele's life-systems were compromised by the pain medication. (Pa299). Dr. Pandina does not allege anyone committed gross malpractice. Dr. Pandina's August 1, 2023, opinion is misguided, insufficient, and irrelevant.

In New Jersey, euthanasia is illegal. N.J.S.A. 26:2H-54(e). Even so, life-sustaining treatment may be withheld/withdrawn under N.J.S.A. 26:2H-67(a)(1) when it "is likely to be ineffective or futile in prolonging life, or is

likely to merely prolong an imminent dying process" (e.g., this case); under N.J.S.A. 26:2H-67(a)(3) "When the patient is in a terminal condition, as determined by the attending physician and confirmed by a second qualified physician" (e.g., again, this case); and under N.J.S.A. 26:2H-67(a)(4) "when the patient has a serious irreversible illness or condition, and the likely risks and burdens associated with the medical intervention to be withheld or withdrawn may reasonably be judged to outweigh the likely benefits to the patient from such intervention, or imposition of the medical intervention on an unwilling patient would be inhumane" (e.g., yet again, this case). "The withholding or withdrawing of life-sustaining treatment […], when performed in good faith, and in accordance with the terms of an advance directive and the provisions of this act, shall not constitute homicide, suicide, assisted suicide, or active euthanasia." N.J.S.A. 26:2H-77. Thus, even assuming the victim's death was a result of her treatment in this case, which none of defendant's experts' claim was gross malpractice, it would not constitute an intervening act. Rather, it is a reasonably foreseeable result of defendant's reckless conduct. Accordingly, defendant's expert's opinions also are not relevant under the first or second prong of causation.

B. The Trial Court Abused Its Discretion In Denying The State's Motion Because Defendant's Experts' Opinions Are Inadmissible Net Opinions.

The "net opinion" rule states that expert opinions comprising "bare conclusions, unsupported by factual evidence," are inadmissible. Buckelew v. Grossbard, 87 N.J. 512, 524 (1981). "Simply put, the net opinion rule 'requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion.'" State v. Townsend, 186 N.J. 473, 494 (2006) (quoting Rosenberg v. Tavorath, 352 N.J. Super. 385, 401 (App. Div. 2002)).

Moreover, an expert's failure to refer to any recognized resource renders the expert testimony nothing more than a personal view, an inadmissible net opinion. See Taylor v. DeLosso, 319 N.J. Super. 174 (App. Div. 1999) (holding that the lack of standards, customs, or recognized practices rendered the expert's testimony a net opinion and nothing more than his personal view); see also, Kaplan v. Skoloff & Wolfe, P.C., 339 N.J. Super. 97, 770 A.2d 1258 (App. Div. 2001) (holding in a legal malpractice case that the expert's anecdotal experience was insufficient without evidential support establishing the existence of a standards beyond those personal to him); State v. Sharp, 395 N.J. Super. 175 (Law Div. 2006) (holding the State's fire expert's opinion was inadmissible as a net opinion because it was not supported by scientific evidence). Opinions not reasonably supported by the facts are net opinions.

Creanga v. Jardal, 185 N.J. 345, 360 (2005). "Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him [or her] to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture." Dawson v. Bunker Hill Plaza Assocs., 289 N.J. Super. 309, 323 (App. Div.), certif. denied, 146 N.J. 569 (1996).

In this case, Dr. Pandina first opines that he is unsure whether defendant's toxicology results are accurate because the large amount of Clonazepam found in his blood and the lack of professionals noting inebriation on the part of defendant. Dr. Pandina ignores or was not provided with the fact that defendant admitted to Mr. Ortiz to taking too much medication. Dr. Pandina did not have the facts and his opinion should be barred.

Dr. Pandina's opinion about Ms. Mele is also a net opinion. Not only is he not trained, studied, certified, qualified in the medical field, Dr. Pandina's opinion is little more than his repeated assertion that cannot make a determination. Indeed, Dr. Pandina "emphasize[d]" then "reemphasize[d]" how he did have the necessary records to render his opinion regarding Ms. Mele. (Pa291; Pa299). Dr. Pandina's non-opinion should also be barred.

Similarly, Dr. Polimeni and Dr. Velez fail to reference to any support, text book, treatise, standard, custom or recognized practice applicable to Ms.

Mele. Both doctors cherry-pick and misquote the medical records, constructing a false narrative around Ms. Mele's condition and treatment. Amazingly, and clearly not appreciating the implications of their fabrications (i.e., Ms. Mele was unlawfully euthanized/murdered), neither doctor alleges any deviation from any standard of care. Without the facts and without the scientific support, defendant's experts' net opinions must be precluded.

Defendant's experts' opinion not only should be barred because they are irrelevant, and net opinions, they should also be barred because they contradict the nationally accepted standards for determining cause of death. Trial courts have broad discretion in determining whether the probative value of a particular piece of evidence is outweighed by its potential prejudice. State v. Kelly, 97 N.J. 178, 215 (1984) (citing State v. Sands, 76 N.J. 127 (1978)). The court should be guided to permit expert testimony "only if the expert has sufficient expertise to offer the intended testimony and the testimony itself is sufficiently reliable." State v. Cavallo, 88 N.J. 508, 516 (1982). In that same vein, N.J.R.E. 702 requires an expert witness to "have sufficient expertise to offer the intended testimony." Such testimony is only admissible if the technique or mode of analysis used by the expert has sufficient scientific basis to produce uniform and reasonably reliable results so as to contribute materially to the ascertainment of truth. State v. Dishon, 297 N.J. Super. 254,

276 (App. Div. 1997).

Notably, the Handbook details how a medical examiner/coroner should handle a legally important death. Specifically, "[i]n certifying the cause of death, any disease, abnormality, injury, or poisoning, if believed to have adversely affected the decedent, should be reported"; that "[t]he conditions present at the time of death may be completely unrelated […or] causally related"; and that death may result a "combined effect of two or more conditions." (Pa61). The cause of death section of the death certification is for coroners to report "the chain of events leading directly to death." (Pa63). The Handbook indicates that "[t]he mechanism of death, such as cardiac or respiratory arrest, should not be reported as it is a statement not specifically related to the disease process, and it merely attests to the fact of death. The mechanism of death therefore provides no additional information on the cause of death." (Pa64).

Pertinently, the Guide addresses how to handle "Deaths of those with major disease and minor accidental trauma." (Pa193). Specifically, in those cases, the death "may be classified as natural if it is thought that death was about as likely to have occurred when it did had the trauma not existed." Id. As it concerns the confluence of injury and intoxication in the deaths of those with major disease and minor accidental trauma, the Guide discussed that "if

an injury or intoxication plays a role in causing death, whether cited in Part I or Part II of the cause-of-death statement, death cannot be certified as natural, and that the natural classification is reserved for deaths that are exclusively (100% natural)." (Pa205). In that same vein, the Guide provides:

> People who die of complications of therapy for treatment of "homicidal" injuries can be managed using a general rule: if the injury is life threatening, then the manner is homicide—if the original injury is not life threatening, then the therapeutic complication should dominate. [This brings up the concept of a supervening cause, which is a legal term. In such cases, whether an inflicted injury is life threatening will be a topic of debate, as will the relative severity of the initial injury and the complication of therapy. Most cases can probably be managed using the "but-for" principle—"but for the inflicted ("homicidal") injury, the therapeutic complication and death would not have occurred.
>
> (Pa206).

In addition, the Guide states, "[i]n deaths resulting from medical treatment complications, the underlying disease or injury for which treatment was given should be included in the cause-of-death statement—for example—'anaphylaxis due to penicillin treatment for gunshot wound of abdomen.'" Id.

None of defendant's purported experts ascribe, adopt, apply, express any familiarity with, or even address the nationally accepted standards for forensic pathologists in determining cause of death. Defense expert Henry Velez,

M.D., who is not a forensic pathologist and has zero experience determining cause of death for patients not his own, alleges that the implementation of palliative care led to medicine Ms. Mele's body could not withstand. (Pa307 to 312). Dr. Velez documents severe pain and hypoxia, but attributes the hypoxia solely to morphine, ignoring the relationship of the trauma to both the pain and hypoxia. Dr. Velez's claims that it is "more probable than not" had Ms. Mele not been put on palliative care she would have survived, but does not provide any alternative. Dr. Velez also does not define what he means by "survived" and whether is contemplates Ms. Mele's advanced directive.

Similarly, Dr. Polimeni, who is not a forensic pathologist and has zero experience determining cause of death for patients not his own, maintained his prior opinion that the cause of death was natural. (Pa8 to 12; Pa301 to 306). That is, Dr. Polimeni opines Ms. Mele was just about as likely to have died when she did had the trauma not existed. Notably, at the time of the crash, Ms. Mele was on her way to dinner out with the ladies, without any pressing medical issue. There is no support for the proposition that Ms. Mele was going to die when she did anyway.

Dr. Pandina, who is not a forensic pathologist and is not even a medical doctor, now sets forth an opinion that he does not have enough information to rule out that Ms. Mele's body could not withstand the medication she

appropriately received. (Pa21 to 39; Pa289 to 291). By Dr. Pandina's own admission he should be precluded.

Comparatively, as explained by Dr. Leffers, "cause of death" on a death certificate and autopsy report refers to the injury or disease that leads to death, either directly and immediately, or indirectly. Whereas, the "manner of death" refers to the circumstances of that injury or disease: natural, accident, homicide, or suicide. Forensic pathologists may also refer to a "mechanism of death," which is the process through which the cause of death actually results in the death. Any additional factors that contribute to death, including the therapy received, the decision to forego therapy, as well as pre-existing conditions of the victim are part of the mechanism of death, but do not alter the cause of death. Only an unrelated event bringing about death in a person who would have otherwise survived would cause a forensic pathologist to ignore the original injury or disease. Neither Drs. Pandina nor Velez dispute the cause of death and Dr. Polimeni confuses alleged possible mechanisms of death with "cause of death."

As detailed by an actual forensic pathologist medical examiner with decades of experience on these very issues, the cause of death in this case is the blunt impact injuries resultant of a motor vehicle collision without which none of the other events under discussion would have taken place. The

opinions submitted by defense are not only inadequate, as explained by an actual forensic pathologist, Dr. Leffers, they are contrary to medical standards. They must be precluded and the court abused its discretion in denying the State's motion.

C. The Trial Court Abused Its Discretion In Denying The State's Motion Because It Failed To Explain Its Reasoning And Denied The State's Request For An N.J.R.E. 104 Hearing.

Pursuant to R. 1:6-2(f),

> If the court has made findings of fact and conclusions of law explaining its disposition of the motion, the order shall indicate whether the findings and conclusions were written or oral and the date on which they were rendered. […] If no such findings have been made, the court shall append to the order a statement of reasons for its disposition if it concludes that explanation is either necessary or appropriate.

Moreover, as this Court has recognized, the record, or lack thereof, in explaining why the court rules on a motion clearly establishes the trial court abused its discretion. See Cardell, Inc. v. Piscatelli, 277 N.J. Super. 149, 155 (App. Div. 1994).

Here, the trial court failed to explain its reason for denying the State's motion. As case law establishes, this failure, unto itself establishes the trial court's ruling was an abuse of discretion. This failure was particularly problematic because, in addition to denying the State's motion without

explanation, the trial court also denied the State's request for an N.J.R.E. 104 hearing. By failing to explain why the State's motion was denied and effectively reserving on the admissibility of the testimony at issue, the court has prevented the parties from definitively knowing what evidence will be admitted at trial and forming an appropriate strategy. If the trial court changes its ruling about the admissibility of defendant's experts' opinions after a midtrial N.J.R.E. 104 hearing, a mistrial is likely to result. As such, the court's failure to explain its ruling and its denial of the State's request for a pretrial N.J.R.E. 104 hearing also was an abuse of discretion that warrant reversal.

CONCLUSION

Defendant drove in a manner that created a risk of a traffic fatality and, as a result of his actions, Ms. Mele was killed. Specifically, defendant overmedicated himself prior to driving and was so inebriated/tired that he fell asleep while driving. Defendant then failed to maintain his lane when he stopped minding the road and caused an accident that was the "but for" cause of Ms. Mele's death.

The victim in this matter, a ninety-four-year-old woman, who suffered twelve fractures to her ribs as a result of the accident, was transported to Trinitas Hospital from the scene of the accident. Then, as result of the effect of the injuries, and in accordance with her pre-existing wishes, she was placed on palliative care. Just twenty-six hours after the accident, having never left the hospital, Ms. Mele succumbed to her injuries and died. Ms. Mele's choice to receive palliative care in such circumstances was a personal decision to not receive life-sustaining services and, thus, it cannot be deemed an intervening act that breaks the causal chain.

Defendant was reckless and the result risked was realized. The normal, expected yet idiosyncratic health of victims is a risk borne by reckless drivers. Expert testimony opining that the victim died as a result of being placed on palliative care and not as a result of the motor vehicle accident is irrelevant.

Indeed, not only are defendant's experts' opinions irrelevant, they are only likely to confuse the jury. Moreover, they are inadmissible net opinions and contrary to nationally accepted standards for determining a cause of death. Accordingly, the trial court's denial of the State's motion to preclude was an abuse of discretion and must be reversed on appeal.

For the foregoing reasons, the State respectfully requests that the trial court's order be reversed.

Respectfully submitted,

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Re: State of New Jersey, Plaintiff-Movant v. Thomas J. DiNapoli, Defendant-Respondent
Respondent's Merits Brief on Behalf of Defendant-Respondent Thomas J. DiNapoli
On Motion for Leave To Appeal the Interlocutory Order of the Superior Court of New Jersey, Law Division, Union County
Attorneys for Respondent, Thomas J. DiNapoli
Sat Below The Honorable Thomas K. Isenhour
Docket No.: A-000200-23

Dear Ms. Vaz:

Please accept this brief, in lieu of a more formal brief, in response to the State's merits brief in the above captioned matter. Defendant relies upon the statement of facts and procedural history contained in his December 29, 2024 submission. Defendant also relies upon his previously submitted legal argument with the following additions.

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LEGAL ARGUMENT

POINT I. THE STATE CANNOT RELIEVE ITSELF OF ITS BURDEN TO PROVE CAUSATION BY NEGATING THE DEFENDANT'S RIGHT TO OFFER EXPERT TESTIMONY AS PART OF HIS DEFENSE. (Pa 316)

In its merits brief, the State opines extensively on the nature of mens rea and asserts that because the State contends that the defendant drove while intoxicated, the defendant has no right to proffer expert testimony to prove that he was not intoxicated and that the alleged victim's death was not caused by the car accident in question. The State asserts that any such expert testimony is irrelevant. However, the State fails to recognize that it has the burden to prove both that the defendant was knowingly intoxicated and that the alleged victim died as a result of the defendant's actions. N.J.S.A. 2C:11-5(a), (b); State v. Eldridge, 388 N.J. Super. 485, 494 (App. Div. 2006).

The defendant has every right to defend himself in a criminal prosecution, and the court has wide discretion to weigh any evidence provided by the defendant to determine whether it is relevant and has probative value. State v. Kelly, 97 N.J. 178, 215 (1984). Because the defendant's experts are providing evidence directly related to a key element of the crimes alleged (whether his actions caused the alleged victim's death), that evidence is relevant, and the trial court did not abuse its discretion in allowing its introduction at trial.

The State has focused on the defendant's alleged intoxication and acts as if it is a foregone conclusion that the defendant was knowingly intoxicated at the time of the accident. However, it is the State's burden to prove that the defendant was knowingly intoxicated. State v. Martin, 119 N.J. 2, 12 (1990). Since the State is offering evidence to show that the defendant was allegedly intoxicated, the defendant has the right to offer evidence that he was not. Id. In any event, the State must first prove that the defendant was intoxicated in order to receive the benefit of any inferences that his actions were knowing and voluntary.

Regardless of whether the defendant was intoxicated at the time of the accident, the State must prove that the alleged victim died as a result of the injuries received from the accident. N.J.S.A. 2C:11-5(a), (b); State v. Eldridge, 388 N.J. Super. 485, 494 (App. Div. 2006). The defendant, in response to the State's evidence, has offered testimony from three doctors who opined that the alleged victim did not die as a result of the injuries sustained from the accident and that the testing used to determine whether the defendant was intoxicated was unreliable. (Pa 21-39; 289-91; 295-312.) The credibility of the experts' opinions is a determination for the jury. State v. Pelham, N.J. 448, 461 (2003). The Court must determine whether expert testimony is relevant and, as the Court correctly noted in its February 20, 2024 opinion denying the State's motion at issue, the "mere

possibility" that evidence could be prejudicial does not justify its exclusion. State v. Morton, 155 N.J. 383, 453-54 (1998).

Thus, the Court correctly denied the State's motion to preclude the defendant's experts because their testimony related directly to a key element of the crime alleged, their credibility is a question for the jury, and the Court will either qualify the witnesses at experts prior to them giving testimony at trial or will decline to do so. A Rule 104 hearing is not necessary to determine their qualifications ahead of time. Incidentally, the State's assertion that the Court gave no reasoning for denying the State's motion is untrue. The Court issued a ten-page decision outlining its reasoning in detail on February 20, 2024.

The State is fixated on the concept that palliative care does not negate the causation of a victim's death. Pelham, 176 N.J. at 465. However, the State, again, misses the issue at hand. The question before the Court is not whether palliative care was the true case of the alleged victim's death, but rather whether the alleged victim was given palliative care for preexisting injuries and illnesses that had nothing to do with the accident at issue. An additional issue is whether it was appropriate for the alleged victim to have been given palliative care when, prior to her son's interference, the doctors treating her were preparing her for rehabilitation and a full recovery. (Da 46). Indeed one of the doctors indicated that "even if the patient got better, she would still have dementia and Alzheimer's disease, which is

making her nonfunctioning." (Da 66). Thus significant questions exist as to the cause of the alleged victim's death and the circumstances surrounding the order for palliative care. While the State believes that the defendant has no right to question the circumstances surrounding the alleged victim's death, this assertion is contrary to this State's evidence rules, jurisprudence, and the defendant's state and federal constitutional rights.

Every defendant has the right to offer expert evidence to defend himself. The trial court did not abuse its discretion in finding that the expert testimony is admissible. Prior to testifying, Dr. Pandina, Dr. Velez, and Dr. Polimeni will be qualified as experts. If the trial court finds that they are not qualified, they will not be allowed to testify. It is inappropriate for the State to ask the Appellate Court to step into the role of the Trial Court and qualify the experts ahead of trial. It is also unnecessary to hold a separate 104 hearing to assess an issue that can be easily handled at trial prior to the jury hearing any actual testimony. Thus, no harm will result from the trial court's actions in this matter, and this appeal should be denied.

The State also complains that the defense's experts are supplying "net opinions" and are not as credible as the State's expert. As previously mentioned, the credibility of the experts is for the jury to decide, and this Court has no role in weeding out experts based upon their credibility. With respect to the "net opinion" rule, the court in Buckelew defined it as bare conclusions unsupported by facts. 87

N.J. 512, 524 (1981). Importantly, while the State opines extensively on the medical opinions given (the State is not qualified to make such conclusions on its own behalf) and asserts that the "net opinion" rule requires that treatises and medical sources be cited, nothing within the "net opinion" rule, as cited in Buckelew, requires such resources be cited. Id. Indeed, the Court concluded that it was sufficient that the opinions given by the expert were common knowledge within the medical community. Id. at 528.

The experts proffered by the defense gave opinions within their area of expertise. Their credentials and experience were proffered to the State and to the Court. The experts properly gave conclusions based upon the factual record and using common knowledge and/or knowledge obtained from their years of experience within their areas of expertise. There was no requirement that they cite to treatises and/or medical sources. Even if the State is convinced that the defense experts' failure to cite to such sources is indicative of their lack of credibility, that determination is for the jury to weigh. Because the experts proffered by the defense based their conclusions on the factual record and reports provided by the State in addition to the experts' common knowledge and expertise, their opinions are not "net opinions."

Conclusion

For the foregoing reasons, this Court should deny the State's appeal and should affirm the trial court's February 20, 204 order.

Respectfully submitted,
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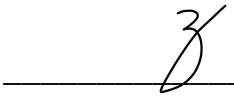
Attorneys for Thomas J. DiNapoli



Zinovia H. Stone, Esq.

March 11, 2024