IN THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO: 19-010559CF10A
JUDGE: J. MURPHY III.

STATE OF FLORIDA, :

Plaintiff, :

vs. :

JORGE CARBALLO, :

Defendant. :

STATE'S MOTION FOR RECONSIDERATION OF DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

The State of Florida, by and through the undersigned Assistant State Attorneys, hereby requests that this Honorable Court reconsider the Court's Order dated 2/24/2023, and as grounds asserts the following:

PROCEDURAL HISTORY

1. The defendant stands before this Court charged with nine (9) counts of Aggravated Manslaughter Elderly/Disabled Victim.
2. The Information was filed on 9/16/2019. The defendant's trial commenced on Monday, 1/30/2023.
3. Prior to the defendant's trial commencing, this Honorable Court presided over pretrial hearings, three (3) hearings of which were Defendant's Motions to Dismiss, all of which were denied.

4. Most recently of the three, this Court issued an Order Denying Defendant's Sworn Rule 3.190(C)(4) Motion to Dismiss on 12/2/2022.

5. In the aforementioned order, this Court specifically found that "there are material disputed facts that establish a *prima facie* case of guilt against the defendant, precluding dismissal of the information."

6. During the course of the trial, the defense timely moved for a Judgement of Acquittal following the State of Florida resting its case on Monday, 2/20/2023.

7. On 2/22/2023 the Defendant's Motion for Judgement of Acquittal was heard by this Court.

8. The Order for which the State seeks reconsideration was entered on 2/24/2023.

LEGAL ARGUMENT

I. THIS COURT MUST CONSIDER THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, INCLUSIVE OF EVERY INFERENCE FROM THE EVIDENCE FAVORABLE TO THE STATE.

A Motion for Judgement of Acquittal admits the facts in evidence **and every reasonable inference from the evidence favorable to the state**. *Lynch v. State*, 293 So. 2d 45 (Fla. 1974). This includes not only the evidence presented, but also the circumstances surrounding the case. The defendant's conduct is not viewed in a vacuum, but rather, through the prism of the circumstances surrounding the particular case. Fla. State. Ann. §784.05.

There is no uniform schedule of specific acts that constitute criminal culpable negligence; rather, culpable negligence is the omission to do something which a reasonable, prudent, and cautious man would do, or the doing of something which such a man would not do under the circumstances surrounding a particular case. Fla. State. Ann. §784.05.

II. THE JURY IS ENTITLED TO CONCLUDE FROM THE EVIDENCE THAT THE DEFENDANT'S CONDUCT CONSTITUTED CULPABLE NEGLIGENCE, IRRESPECTIVE OF FORESEEABILITY.

In *Heston v. State*, 484 So. 2d 84, 86 (Fla. 2nd DCA 1986) the jury was entitled to conclude from the evidence presented that the defendant's conduct in pointing an arrowless/unloaded crossbow at a Florida Power Company driver, which caused an accident, constituted culpable negligence. Likewise, in *Logan v.* State, it was highlighted that "no person shall drive a motor vehicle upon a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual **and potential hazards** then-existing." *Logan v. State*, 592 So. 2d 295 (5th DCA 1991).

The nature of an accused's actions, viewed individually *and* in continuous sequence, under a totality of the circumstances analysis, is what equates to culpable negligence. *See id*. There is no requirement for the state to prove that the defendant knew or should have known that his actions and omissions were reasonably likely to lead to the victims' deaths or cause great bodily injury. In fact, a potential hazard is sufficient.

This Court's own finding in the Court's Order that the defendant was involved in a "compounding series of miscalculations and entirely avoidable failures which led to the tragic deaths of RCHH residents" and the defendant's "unwise and ultimately unsuccessful decisions" is legally sufficient to overcome a Motion for Judgement of Acquittal, especially at the procedural juncture wherein such findings are to be ruled in the light most favorable to the state.

III. THE DECISION TO REMOVE THE DECEDENTS FROM HARM IS NOT A MEDICAL DECISION

The facts of each case are critical in determining whether the totality of the circumstances supports a finding of culpable negligence, however, there is no requirement that the state show proof that a defendant is aware of the specific nature of the medical condition or injury. *Lanier v. State*, 264 So. 3d 402, 406 (Fla. 1st DCA 2019). In *Lanier*, the worsening of a child's condition over time did not require the expertise of a medical professional. Rather, the need for medical attention **would have been obvious to any reasonable person**. *See also Moore v. State*, 790 So. 2d 489 (Fla. 5th DCA 2001).

Similarly, medical knowledge or training by the sons of a decedent was not required for brothers to be held liable. *Peterson v. State*, 765 So. 2d 861 (5th DCA 2000). In the *Peterson* case, "the police officers and the paramedics who went to the Petersons' home testified as to the horrendous condition of Mrs. Peterson's living circumstances. *Id*. at 864. *It was very hot in her room, there was no air conditioning, and no windows were open* (emphasis added). *Id*. The odor in the house and, in particular in her room from human waste, made them ill. *Id*. The carpet was stained with human waste and feces. *Id*. At trial, medical experts testified it would have taken several weeks for bed sores to have become as extensive and severe as hers were, at the time of her death." *Id*.

The defendant in this case cannot simply turn a blind eye to the conditions endured by the residents of the Rehabilitation Center of Hollywood Hills. Nor is the defendant absolved of criminal liability based upon the sheer fact that he does not have a medical background. The defendant's ability to see and know about the conditions within the facility for which he was in charge of running is legally sufficient. The evidence presented at trial has illustrated that the defendant knew or should have known the extent of the deterioration of the residents.

Medical professionals as well as lay people have testified to their direct observations of lethargic residents sweating, exhibiting changes in their behavior, and audibly crying out for help (specifically, Betty Hibbard and John Ralph Segno, the brother of witness Louise Segno). As in *Peterson*, conditions such as heat, the lack of air conditioning, residents seeking help, windows being closed (thereby exasperating the heat) were all visible and/or audible to the "non-medically trained" eye. This is in addition to the testimony that some residents were found dead in their rooms, some of whom experienced rigor mortis and lividity, all of which is consistent with the overall lack of care in the defendant's facility that he was solely in charge of.

IV. A JURY SHOULD CONSIDER THE EVIDENCE AND THE CREDIBLITY OF *ALL* WITNESSES PRESENTED AND DECIDE WHICH TESTIMONY IS NOT RELIABLE OR LESS RELIABLE THAN OTHER EVIDENCE

It is for the jury to consider the evidence and the credibility of the witnesses. *Davis v. State*, 703 So. 2d 1055,1059-60 (Fla. 1997). Pursuant to the Florida's Criminal Jury Instructions, jurors are given guidelines as to how they should gauge a witness' credibility. *Florida Criminal Jury Instructions, 3.9 Weighing the Evidence.* This instruction applies to *all* witnesses and involves the considerations of a witness' memory, a witness' interest in how the case should be decided, and whether or not there has been any pressure, threats, or preferred treatment that would affect the truth of a witnesses' testimony, among other factors. *Id*. It is then up to the jury to believe or disbelieve all or any part of the evidence or the testimony of any witness. *Id*.

Reasonably so, the Court's Order does not list all witnesses called by the State of Florida during the course of the three weeks of testimony. However, the assertion that "none

of the medical professionals present had cause for concern" in reference to the resident's conditions seemingly only considers the medical testimony of Sergo Colin, as Physician's Assistant James cannot be considered at this juncture.

Sergo Colin's testimony, when weighed against the delineated factors of 3.8 of the Florida Criminal Jury Instructions would reflect that Colin did not have an accurate memory, was not honest or straightforward with his answers, was impeached, and that his testimony was not absent of any pressure or bias. Particularly, the evidence shows that Larkin, owner of Rehabilitation Center at Hollywood Hills, paid for the attorney retained by Colin for representation in this very matter.

Additionally, the implication of there being no concern exhibited by medical professionals ignores the testimony of two of the nurses assigned to the second floor on September 12, 2017, through he morning of September 13, 2017, Tamika Miller and Althia Meggie, as well as CNAs Zonya Crawford, Tatiana Garcia, Maria Gonzalez Leal, and Emmanuella Destin.

The Court's Order also notes that "he [defendant] left them [residents] in the care of trained medical professionals who were equipped to call emergency services if required, such as Sergo Colin, who was a licensed registered nurse with over twelve years of experience at the time. While it appears the staff could have certainly benefited from better training, they were nevertheless capable of rendering aid to the residents, and more importantly, calling emergency services if they were no longer able to care for the residents on their own." In the very next sentence the Court's Order goes on to say "Unfortunately, it appears that the medical staff failed to timely realize that the residents were beginning to suffer from heat-related

illness and take appropriate action." These findings by the Court illustrate just how untrained and incapable the medical staff were. The medical staff whom the defendant, in his capacity as the Administrator, chose to leave in charge of a facility housing the most fragile of residents in a critical emergency. In the light most favorable to the state, and drawing every reasonable inference from the evidence, the testimony of the other medical professionals (i.e. nurse and CNA witnesses) should also be considered before absolving the jury of their task to decide this case.

The Court's Order further relies upon the testimony of witnesses such as experts Dr. Nannette Hoffman and Terry Goodman, though the totality of the testimony is not included. For instance, the Order notes that Expert Witness Goodman testified about "nothing but bad choices" and a "damned-if-you-do and damned-if-you-don't" situation. However, Goodman also went on to testify that while a full evacuation is generally not common, the defendant could, ***given the circumstances***, order an evacuation of the facility on his own. Goodman further testified that it is necessary to conduct an "overall evaluation of the situation" and educated the jury on partial evacuation, where the at-risk residents could be removed, or simply moved. During re-direct examination by the State of Florida, Goodman testified that since things change and situations change, one must be flexible and fluid enough to handle the situation, which would require a person to be there to see it. Goodman testified that temperatures near three digits would cause for a critical situation and four days without air conditioning would matter when evaluating the totality of the circumstances. Goodman's expert opinion as to actions to be taken were "dependent on the circumstances," and Goodman did not waiver when he stated that he would "absolutely" remove residents from the heat

source.

This statement is also consistent with the testimony that Expert Witness Hoffman would have moved residents based upon even the heat alone in South Florida in September. Hoffman concurred with Goodman during her testimony. Both expert witnesses also confirmed the need for a plan, the proper execution of said plan which would entail training and informing staff of the existence of said plan, as well as notifying family members of the situation, and removing residents from the heat source if one does not have proper cooling. Expert Witnesses Goodman and Hoffman also testified about the Comprehensive Emergency Management Plan, and the purpose of its proper use and execution. Hoffman noted the importance of the mutual aid agreements. There is no evidence that the defendant took any of these actions. Nor is there any evidence that the defendant even made an effort to consult with his Medical Director or Director of Nursing to discuss the situation. Which, notably, was included in the testimony of Hoffman when she highlighted the fact that an "Administrator does not operate in isolation." Hoffman's testimony went on to expand upon the importance of the Administrator collaborating and receiving guidance from Director of Nursing and Medical Director, initiating patient rounds, and determining what families to be called. The Administrator collaborating is part of the emergency management plan.

A broad misapplied rule that it is dangerous to move people if they are older in age or possess co-morbidities does not control the case at bar. As noted by Hoffman, "the risk of morbidity and mortality from continued exposure to heat for the very elderly, frail individuals" is what is to be analyzed and weighed when reviewing a decision. There is no evidence that the defendant initiated a meeting to seek any advice before deciding the

resident's fate, which according to the CEMP is his decision to make. While that alone demonstrates a reckless regard for human life and the safety of those exposed to its dangerous effects, the calling of an evacuation is not the crux of the evidence against the defendant.

V. THE STATE OF FLORIDA IS NOT RELYING ON THE EVACUATION OF THE FACILTIY TO PROVE CULPABLE NEGLIGENCE

The overall conditions of the facility run by the defendant is relevant to his culpable negligence. *See Mitchell v. State*, 491 So. 2d 596 (1st DCA 2001). This is inclusive of the condition of the facility, inadequacies in the facility, and lack of adequate staff or training. *Id*. at 598. Financial benefits, such as RUGS, are also relevant and to be considered when determining whether a defendant is culpably negligent. *See id*.

The evidence put forth during the course of the trial is that there was excessive heat in the defendant's facility, which housed frail and dependent residents. The evidence further showed that there was no telling when, or if, the defendant's facility was going to get power back or restored. In response to this, the defendant acted in direct opposite of his own Broward County-approved Comprehensive Emergency Management Plan. The defendant did not open windows. The defendant did not direct the taking of temperatures of residents every 4 hours. The defendant did not effectuate the taking of ambient temperatures.

Aside from the blatant violation of his own emergency plan, the defendant decided to primarily prepare for the air conditioning outage **after** the fact. The Court's Order states that the "defendant had undertaken preparations ahead of Hurricane Irma, including

stocking up on essentials," but the defendant didn't stock up on the necessary amount of essential items such as portable AC units or even fans (utility or personal). Notably, the evidence has shown that there weren't enough fans for the resident's rooms. Rather, residents were left to scrounge and beg family members and loved ones to bring fans, or even steal a fan from another resident, as per the testimony of Linda Harmon. Expert Witness Hoffman also testified to the fact that the facility was not, in fact, prepared. The Court record reflects that Hoffman's testimony was that the facility should have secured fans beforehand, rather than driving to Kendall after the storm to look for them. Hoffman further testified that the facility should have had fans at a warehouse or storage room, available and ready to go, because that would be part of the emergency plan.

The evidence has shown that the defendant did not possess enough spot coolers or fans for his facility to make residents comfortable during a potentially hazardous condition. Instead of following his emergency plan, the defendant ordered his directors to go shopping for dire supplies in the aftermath of the hurricane. While the directors shopped for fans, time passed, and every minute mattered in terms of the facility growing hotter and hotter.

As the Administrator of the facility, the defendant was aware of what was needed to maintain the required temperature of 81 degrees Fahrenheit. He also knew that he was not equipped to do that, as evidenced by the defendant's own email authored by the defendant while victims were dying at 2:22 AM on 9/13/2017. It was "not even close" to the proper amount of coolant, according to testimony of HVAC (Heating, Ventilation, and Air Conditioning) Expert Scott Crawford. Crawford additionally testified that the spot coolers were not installed correctly, and while the defendant did not personally install the

spot coolers he delegated the task to his staff in his authority as Administrator. The porter, Mark Miller, further testified that he left the facility at approximately 6:00AM on Monday, 9/11/2017 due to the facility's unwillingness to pay him for his time to maintain the spot coolers, yet another financial decision by the defendant in his role as Administrator.

The defendant is later seen on surveillance footage manipulating the portable AC units, consistent with the fact that the portable AC units were not working. Nonetheless, the defendant still chose to leave the facility without confirmation that the portable AC units were working properly. Even the defendant being available by phone, as noted in the Court's Order, is simply not enough in an emergency of this nature, as illustrated by witness Goodman's testimony involving the need for face-to-face contact in an ever-changing emergency environment.

The Court's Order characterizes the aforementioned as "trying to do one's best" However, based on the defendant's WhatsApp phone messages alone, it is clear that "one's best" was really one's interest in financial gain, or RUGS (Resource Utilization Groups). The Court's finding that the WhatsApp messages show "RCHH employees' concern for the wellbeing of the residents" is vehemently disputed by the State of Florida. The messages show not only complete lack of planning on the part of the defendant, but also complete disregard for human life. When told that "those patient [sic] don't look good" and that the residents "had a difficult night," the defendant's continuous responses involves RUGS money. The defendant even blatantly states "I do not want to lose RUGS" when faced with opposition over the wellbeing of the residents. This evidence alone shows that the focus of the defendant was not on the safety and wellbeing of the fragile geriatric

residents whom were under his care, custody, and control. Rather, the defendant's focus was on the bottom line, and his greed resulted in the residents' lives being put at risk for the sake of making extra money. The WhatsApp group text undeniably shows the motivation behind the culpably negligent actions of the defendant., which was the purpose of the presentation of testimony from Expert Witness Stephen Quindoza. Quindoza explained RUGS and why RUGS would be a motive to keep humans ensnared within excruciating conditions- money. Financial motive shows the defendant's utter disregard for the safety of others.

Finally, as in *Mitchell*, the evidence has shown that aside from the above, the defendant also did not train, did not monitor, and did not brief any staff members on what to do given the circumstances of the facility. Across the board, witnesses have testified that it was necessary to have leadership present during such a critical time. Yet it is undisputed that the defendant left his facility that he was in charge of, without leaving full Comprehensive Emergency Management Plans for the staff to refer to in an emergency situation, without notifying staff of the regulations required of them, and leaving a man who was on his first shift as a supervisor to be the most senior staff member in charge during what witnesses have described as a "critical situation." Even with 12 years of experience, the idea of selecting someone unfamiliar with the residents and untrained on the facility's basic operations is yet another factor involved with the defendant's overall culpable negligence. Based on these choices by the defendant, staff members were left without any guidance on how to handle the emergency, which would reasonably lead to a potentially hazardous and even deadly outcome.

VI. IT IS FOR A JURY TO DECIDE WHETHER THE COURSE OF CONDUCT OF THE DEFENDANT LEADING TO THE DEATHS OF NINE (9) PEOPLE WAS ACCIDENTAL OR THE RESULT OF CULPABLE NEGLIGENCE

The defense has argued that foreseeability is the lynchpin of the criminal culpability of the defendant; however, the criminal conduct of the defendant is not one of intent. *Mutch v. State*, 308 So. 3d 700 (1st DCA 2020). On the contrary, a jury is to look at not only the defendant's course of conduct, based upon the totality of the circumstances, in addition to testimony such of that of a medical examiner. *Id*. In the trial at bar, the State presented expert witness testimony by Dr. Sneed and Dr. Osbourne, the medical examiners tasked with conducting the autopsies of the victims involved in this criminal proceeding. Both doctors have opined that the injuries sustained leading to the homicides were not accidents.

As in *Mutch*, the jury should be able to properly weigh and consider the testimony of the forensic pathologists. While the Court's Order is silent on the testimony of Dr. Sneed and Dr. Osbourne, their testimony is wholly relevant to the jurors having the opportunity to deliberate the issues presented in this case.

CONCLUSION

The State of Florida acknowledges the uniqueness of the case before this Honorable Court. It is this distinctiveness which impelled the request for reconsideration. While respectful of the Court's ruling, the State of Florida simultaneously has faith that this Court will reconsider the prior argument in conjunction with the aforementioned clarifying argument and case law. In applying what is legally required, it is the request of the State of Florida that this Court allow for a jury to decide the case on its merits, as a *prima facie* case has been presented for the jury's consideration. The State of Florida resolutely asserts that

the case presented satisfies the criminal law requirement at this juncture of the proceedings, given the standard in the light most favorable to the state.

WHEREFORE, the undersigned respectfully request that this Honorable Court reconsider the arguments presented and DENY the Defendant's Motion for Judgement of Acquittal, based upon the reasons aforementioned and the authorities cited therein.

I HEREBY CERTIFY that a copy of this Motion has been served electronically on this the 26th day of February, 2023 to:

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