**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

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| STATE OF FLORIDA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| vs. | ) | CASE NO. 95,664 |
| | ) | |
| CHRIS KALOGEROPOLOUS, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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## PRELIMINARY STATEMENT

Respondent was the defendant and petitioner the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, In and For Palm Beach County, Florida. Petitioner was the appellant and respondent was the appellee in the Fourth District Court of Appeal. In this brief the parties will be referred to as they appear before this Court.

The symbol "R" will denote the Record on Appeal.

The symbol “T” will denote the Transcript on Appeal.

The symbol “IB will denote the Petitioner’s Initial Brief.

## CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier new type.

## STATEMENT OF THE CASE AND THE FACTS

Respondent accepts petitioner's statement of the case and the facts with the following additions and corrections:

1. Respondent's motion to dismiss listed the elements which must be proven to support a conviction for vehicular homicide. Those elements include that the defendant operated a motor vehicle in a reckless manner likely to cause death or great bodily harm and that the reckless operation of the vehicle was the proximate cause of death (R. 32-33). While a substantial portion of respondents's memorandum of law dealt with the issue of proximate cause as it related to the respective behavior of respondent and the decadent, it also specifically argued that the recklessness of respondent's conduct had to be established before the court addressed the issue of proximate cause. Respondent clearly argued that the only infraction involved was excessive speed and that excessive speed alone could not be law support a vehicular homicide conviction (T. 34-35).

2. During the motion hearing, petitioner cited several additional facts it believed were material to the case. Respondent questioned whether the facts were material, but did not dispute them. Rather, respondent argued that even after considering the additional facts petitioner had not established a prima facie case (T. 8).

3. Petitioner's traverse denied paragraph 3 of the motion which asserted there were no material disputed facts and that the undisputed facts failed to establish a prima facie case. Petitioner denied in part and admitted in part paragraph five[1] and stated additional facts were omitted by respondent. The traverse did not state which allegations were admitted and which were denied. While petitioner did mention additional facts it believed material at the motion hearing, petitioner never, either in it's written traverse or orally at the motion hearing, specifically denied any material facts asserted in respondents's motion to dismiss. During the hearing, petitioner stated it did not believe all the facts mentioned were relevant but admitted "I don't deny that those are facts. They are facts but they are not relevant to what we are doing here." (R. 38-42, T. 7). The memorandum of law accompanying petitioner's traverse dealt solely with the issue of proximate cause.

[1] Paragraph five of respondent's motion to dismiss contained a recitation of the undisputed material facts (R. 33-34).

## SUMMARY OF THE ARGUMENT

The trial court correctly granted respondent's motion to dismiss. Petitioner's traverse did not deny any facts alleged in respondent's motion with specificity. Even with the addition of undisputed facts recited at the motion hearing, petitioner failed to establish a prima facie case of reckless driving without which a vehicular homicide conviction cannot stand.

The trial court granted respondent's motion to dismiss because petitioner had not established a prima facie case. The trial court was correct in also ruling that even if respondent's actions were determined to be the proximate cause of death, it would be unjust to hold him criminally responsible because his conduct did not constitute reckless driving.

## ARGUMENT

THE TRIAL COURT CORRECTLY GRANTED RESPONDENT'S MOTION TO DISMISS.

Petitioner initially argues that the trial court erred in granting respondent's motion to dismiss because the C-4 motion itself was legally insufficient (IB. 13-16). This assertion is without merit.

Florida Rule of Criminal Procedure 3.190(c)(4) provides for the filing of a motion to dismiss when "there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant." The rule also provides that the "facts on which such motion is based should be specifically alleged and the motion sworn to." Respondent's motion to dismiss stated there were no material disputed facts and that the undisputed facts did not establish a prima facie case of vehicular homicide (R. 33). The motion contained a lengthy recitation of the facts upon which it was based (R. 33-34). The record contains the respondent's sworn affidavit declaring the facts outlined in the motion are correct and there were no material disputed facts (R. 56). The motion clearly conforms with the requirements set forth in Rule 3.190(c)(4).

Petitioner also argues that the motion to dismiss was legally insufficient because it relied on accident reports and did not

contain an unqualified recitation of facts within the defendant's personal knowledge (IB 16). In Devine v. State, 504 So. 2d 788, 789 (Fla. 3rd DCA 1987), the district court found a motion to dismiss was not procedurally defective when certain of the facts were not personally known to the defendant. The court listed three reasons supporting the decision. These were that the state had not contested any of the facts or objected to their inclusion and that rule 3.190(c)(4) does not require the defendant have personal knowledge of all the facts contained in the motion, only that he swear they are the material undisputed facts in the case. Additionally, the use of depositions in support of facts alleged in a motion to dismiss has been found appropriate. State v. McIntyre, 303 So. 2d 675, 676 (Fla. 4th DCA 1974). State v. Smulowitz, 482 So. 2d 1388 (Fla. 3rd DCA 1986). There is no reason that reports from medical and law enforcement officials should not also be used in support of a motion to dismiss.

Petitioner asserts it's traverse was legally sufficient and therefore the trial court was required to deny respondent's motion to dismiss. Once a defendant alleges that the material facts of the case are not in dispute and demonstrates that they fail to establish a prima facie case or that they establish a valid defense, the burden shifts to the state, who must, in it's traverse, place a material fact in dispute or establish that the

undisputed facts do establish a prima facie case. Ellis v. State, 346 So. 2d 1044, 1045 (Fla. 1st DCA 1977) *cert. denied* , 352 So. 2d 635 (Fla. 1977). The simple filing of a traverse is not enough to meet this burden. State v. Kemp, 305 So. 2d 833, 834 (Fla. 3rd DCA 1974). Rule 3.190 (d), Florida Rules of Criminal Procedure (1998) provides that factual matters alleged in a motion to dismiss are deemed admitted unless specifically denied in the state's traverse. A motion to dismiss "shall be denied if the state files a traverse that with specificity denies under oath the material facts or facts alleged in the motion to dismiss."

The Fourth District[2] found petitioner's traverse legally insufficient for failure to comply with the dictates of Rule 3.190(d). The district court correctly noted that in response to the detailed facts put forth in respondent's motion, the state's traverse generally denied there were materially disputed facts, denied in part and admitted in part the paragraph containing the recitation of facts and stated there were additional facts omitted by the defendant (R. 38). The Fourth District certified conflict with Branciforte v. State, 678 So. 2d 426 (Fla 2nd DCA 1996) and State v. Blanco, 432 So. 2d 633 (Fla. 3rd DCA 1983) and stated these

[2] The trial court's order of dismissal did not address the legal sufficiency of the traverse, but held the state had not established a prima facie case of vehicular homicide.

two cases were incorrectly decided because they ignored the direct and uncontroverted language of Florida Rule of Criminal Procedure 3.190 (d).

The Fourth District compared the decisions in Branciforte and Blanco with those in State v. Wright, 386 So. 2d 583 (Fla. 4th DCA 1980) (cited in the Blanco decision) and State v. Hamlin, 306 So. 2d 150, 151 (Fla. 4th DCA 1975). The traverses filed in Wright and Hamlin complied with the dictates of Rule 3.190(d). They each denied with specificity certain material facts alleged in the motion to dismiss. As required by the rule, they stated which specific material fact they denied and why those facts were denied. *See* Wright, 386 at 583 and Hamlin, 306 at 151.

The traverses filed in Branciforte and Blanco are the same and state "The state specifically denies that the material facts as presented in the defendants sworn motion to dismiss are the only facts upon which the state would rely during the state's case in chief." Branciforte, 678 So. 2d at 427 ; Blanco 432 So. 2d at 634. The traverses did not specifically deny any material facts nor did they specifically deny that the material facts presented failed to allege a prima facie case.

The traverse filed by petitioner completely fails to comply with the requirements of Rule 3.190(d). The traverse admitted paragraph one stating respondent was charged with vehicular

homicide; it admitted paragraph two which listed the elements of vehicular homicide; and, it took no position on paragraph four which stated that respondent's sworn affidavit in support of the motion was attached. Paragraph three of respondent's motion to dismiss stated : "In this case there are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant". Petitioners complete response was: " The State denies paragraph three." The traverse does not even attempt to comply with rule 3.190(d) by stating it "specifically" denies paragraph three, or as it should, by stating ***why*** it specifically denies paragraph three. *See also* State v. Morales, 693 So. 2d 1063 (Fla. 4th DCA 1997); State v. Gale, 575 So. 2d 760 (Fla. 4th DCA 1991); State v. Teague, 452 So. 2d 72 (Fla. 1st DCA 1984), *affirmed* 475 So. 2d 213 (Fla. 1985).

Paragraph five of the motion to dismiss contained a lengthy recitation of the relevant facts. The petitioner's complete response: " The state denies in part, and admits in part paragraph five and states there are additional facts omitted by the defendant." Once again the petitioner failed to specifically deny any of the material facts alleged in the motion to dismiss. "The filing of a traverse which denies no material fact is insufficient as a matter of law." Fox v. State, 384 So. 2d 226, 227 (Fla. 3rd DCA 1980).

In it's initial brief, Petitioner cites the decision in Ellis v. State, 346 So. 2d 1044 (Fla. 1st DCA 1977) (IB. 11-12, 13) In Ellis, the traverse filed did not deny any material facts, but denied that the undisputed material facts established a prima facie case. Finding the issue did not present itself, the district court did not directly rule on whether the state must list the material facts it wishes to rely on during hearing on a motion to dismiss in the traverse. However, the court did state " . . . the better practice would be for all such factual matters to be contained or alluded to in the State's traverse and that the State should not be permitted (absent an amendment to the traverse) to present evidence at the hearing on the motion to dismiss concerning facts which were not contained or alluded to within the motion to traverse. . . ." Id. at 1046.

Petitioner argued that the mere assertion that the state would rely on additional facts at trial is enough to defeat the motion to dismiss. The traverse filed below did not allege it would present any additional **material** facts. Respondent concedes that the prosecution must not present every scrap of evidence it intends to use at trial. However, simply stating that some facts presented in the motion to dismiss are admitted and some are denied (without giving any indication which facts they may be) and stating there are additional facts to be presented at trial (without stating

wether or not they are material facts or giving the court any guidance or indication as to which, if any element, of the crime the facts relate to) is tantamount to asking the trial court to rule blindly on the motion. It is a waste of judicial resources and flies in the face of the intent of Rule 3.190 (d) which demands a traverse deny any material facts with specificity. The District Court correctly found the traverse did not place any material facts in dispute and the motion to dismiss was correctly granted.

Additionally, petitioner did not specifically deny that the undisputed material facts failed to establish a prima facie case. In it's traverse and at hearing on the motion, counsel for petitioner stated she did not address whether there was a prima facie case because in his motion, respondent did not challenge the presence of a prima facie case, but only whether there was causation (T. 5-6). This response is disingenuous at worst and at best illustrates the need for prosecutors to strictly comply with rule 3.190 (d) and deny any allegations with specificity. Respondent's motion clearly states the elements of the offense and that the undisputed facts do not establish a prima facie case of guilt (R. 32-33).

In the memorandum of law incorporated in respondent's motion, it is initially argued that an element of the offense is that respondent's reckless driving was the proximate cause of the death

of Mr. Todd. However, in the next paragraph respondent argues that before it can establish proximate cause, the state must prove respondent's driving was reckless. The memorandum continued, arguing that respondent's act of driving over the speed limit did not constitute reckless driving (R. 34-35). Petitioner was well aware that respondent was challenging the existence of a prima facie case and could have argued against such.

It has been held error to refuse to allow the state to amend or clarify it's traverse at a hearing on the motion to dismiss. *See* State v. Rodriguez, 640 So. 2d 206, 208 (Fla. 4th DCA 1994); State v. Aurelius, 587 So. 2d 1167, 1168 (Fla. 4th DCA 1991) However, in those cases, the initial traverse had given the trial court some indication which facts were in dispute and the prosecution was either seeking to present additional argument or evidence in support of the traverse. In the case at hand, the traverse presented nothing which could be clarified or supported. Once again the facts at hand support the opinion offered by the Ellis court, in dicta, that the state should be bound by those assertions or arguments presented in it's traverse. Ellis, 346 at 1046.

The additional facts listed by the petitioner at the hearing were not alleged to be material facts. If considered material, they were not disputed by the respondent. Therefore the trial court's ruling was based upon the undisputed material facts and

whether they constituted a prima facie case of vehicular homicide. " The function of a c(4) motion to dismiss is to ascertain whether or not the facts which the State relies upon to constitute the crime charged, and on which it will offer evidence to prove it, do, as a matter of law, establish a prima facie case of guilt of the accused." Styron v. State, 662 So. 2d 965, 966 (Fla. 1st DCA 1995).[3]

To survive a motion to dismiss, it must be shown that the undisputed material facts establish a prima facie case of guilt. The trial court correctly determined that the material undisputed facts did not establish a prima facie case of vehicular homicide. Vehicular homicide is the killing of a human being by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm , to another. Florida Statute 782.071. In McCreary v. State, 371 So. 2d 1024, 1026 (Fla. 1979), the court stated the above referenced statute was enacted to punish "reckless driving which results in the killing of a human being where the degree of negligence falls short of culpable negligence but where the degree of negligence is more than a mere failure to use ordinary care." Vehicular homicide cannot be proven without

[3] These case again illustrates the need for specificity in a traverse. How can the trial court determine if the facts upon which the state is relying to establish a prima facie case do so, if it is not aware what those facts are.

also proving the elements of reckless driving. W.E.B,III v. State, 553 So. 2d 323, 326 (Fla. 1st DCA 1989). Thus, it must be proven appellee drove "in willful or wanton[4] disregard for the safety of persons or property." and he knew the manner in which he was operating his vehicle was "likely to cause the death of, or great bodily injury, to another". Florida Statute 316.192. W.E.B,III at 326.

Excessive speed alone cannot sustain a conviction for reckless driving. Miller v. State, 636 So. 2d 144, 151 (Fla. 1st DCA 1994). The commission of a traffic infraction constitutes simple negligence. Logan v. State, 592 So. 2d 295 (Fla. 5th DCA 1991). "A simple negligence cannot by itself give rise to criminal liability . . . . Something more is required." Werhan v. State, 673 So. 2d 550, 554 (Fla. 1966). A reckless driving conviction will stand when looking at the totality of the circumstances the court finds " sufficient other circumstances and conduct" to support a conviction. High v. State, 516 So. 2d 275 (Fla. 2nd DCA 1987), *quoting* Filmon v. State, 336 So. 2d 596 (Fla. 1976). [5] None

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[4] Willful means "intentionally, knowingly and purposefully." Wanton means with a conscious and intentional indifference to consequences and with the knowledge that damage is likely to be done to persons or property." Miller v. State, 636 So. 2d 144, 150 (Fla. 1st DCA 1994).

[5]Examples of additional circumstances which would support a reckless driving conviction are stated in the Order Granting

of these other circumstances or conduct are present in the instant case. Appellee's act of speeding is, alone, a mere failure to use ordinary care. The state cannot establish his actions evidenced a willful or wanton disregard for the safety of others or that he knew speeding was likely to cause the death of, or great bodily injury, to another.

Appellant correctly cites Union v. State, 642 So. 2d 91 (Fla. 1st DCA 1994) to support the principle that a decedents's conduct will be a defense to vehicular homicide when it is established that conduct was the sole proximate cause of the accident. However, the court in Union also stated that the decedent's conduct may supersede the defendant's as the proximate cause of the homicide when it would be "unjust or unfair to impose criminal liability" on the defendant. Id. at 92. In Velazquez v. State, 561 So. 2d 347, 351 (Fla. 3rd DCA 1990, the court stated:

> Even where a defendant's reckless operation of a motor vehicle is a cause-in-fact of the death of a human being, Florida and other courts throughout the country have for good reason declined to impose criminal liability (1)where the prohibited result of the defendant's conduct is beyond the scope of any fair assessment of the danger created by the defendant's conduct, or (b) where it would otherwise be unjust, based on fairness and policy consideration, to hold the defendant criminally responsible for the prohibited

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Defendant's Motion to Dismiss (R. 78-87).

result.

*See also* Hodges v. State, 661 So. 2d 107, 110 (Fla. 3rd DCA 1995).

The trial court correctly found it would be unjust and unfair to hold appellee criminally responsible when his actions did not constitute reckless driving. (R. 86-87). They did not constitute any crime, rather they constituted the noncriminal offense of speeding. A defendant cannot be held responsible for an event when a separate, independent and unforeseeable cause intervenes to produce that event. M.C.J. v. State, 444 So. 2d 1001 (Fla. 1st DCA 1984). The victim's actions were an unforeseeable independent cause of the accident, therefore appellee's noncriminal act of speeding was not the proximate cause of the accident.

> "As a general rule, where, as here, the material facts are undisputed, the trial court in considering a motion to dismiss must determine whether the undisputed facts raise a jury question, in much the same manner as a judge evaluates a motion for acquittal made at trial. Ellis v. State, 346 So. 2d 1044 (Fla. 1st DCA 1977).Thus, where, in the opinion of the trial judge the undisputed material facts do not legally constitute the crime charged, or affirmatively establish a valid defense,a motion to dismiss should be granted. Camp v. State 293 So. 2d 114(Fla. 4th DCA 1974).

State v. Smith, 376 So. 2d 261, 262 (Fla. 3rd DCA 1979).

When reviewing a decision of the trial court on a motion to dismiss it is to be presumed that the trial court resolved all inferences in favor of the state. Even if the reviewing court

would have been inclined to send the case to a jury if the initial decision were up to it, such a determination on appeal would "constitute usurpation of the function of the trial court." State v. Moore, 425 So. 2d 1172, 1173 (Fla. 4th DCA 1983).

The trial court correctly granted the motion to dismiss as the state had not presented facts which would have supported a prima facie case of vehicular homicide. Additionally, the Fourth District Court of Appeal, correctly affirmed the trial courts order of dismissal because the traverse filed by the petitioner was legally insufficient to defeat the motion to dismiss. The decisions of the Circuit Court and the District Court should be affirmed.

## CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Appellant respectfully requests this Court

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to SARAH MAYER, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this _____ day of October, 1999.

ELLEN GRIFFIN
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