

IN THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, CRIMINAL DIVISION
IN AND FOR PALM BEACH COUNTY, FLORIDA

CASE NO. 09CF006636AMB DIV "U"

STATE OF FLORIDA

vs.

RICHARD ANDERSON,

Defendant.

STATE'S TRAVERSE AND RESPONSE TO DEFENDANT'S MOTION TO DISMISS
AND REQUEST FOR AN ADVERSARIAL EVIDENTIARY HEARING

COMES NOW the State of Florida, by and through the undersigned Assistant State Attorney, in and for Palm Beach County, Florida, pursuant to Florida Rules of Criminal Procedure 3.190(d) and files this Traverse and Response to the Motion to Dismiss filed on behalf of the Defendant, RICHARD ANDERSON, and in support of this Traverse and Response the State would show:

1. There are materially disputed facts in this case and the Defendant's Motion to Dismiss must be denied.

2. The Defendant has asserted a "Stand Your Ground" defense and claims that he is immune from prosecution pursuant to F.S. 776.032.

3. As conceded in Defendant's first footnote to his Motion, the opinion of Velasquez v. State, 9 So. 3d 22 (Fla. 4th DCA 2009), is binding precedent in this district. When there are materially disputed facts rule 3.190(c)(4) governs and the motion to dismiss must be denied.

4. The testimony of witnesses referred to in paragraphs 4, 5, 7, 8 and 10 of Defendant's motion are all based upon hearsay. As stated in paragraph 3 of Defendant's motion the only eyewitnesses to the alleged events are the victim, Edwin Kaczorowski, Nurse Gilda Moltimer and the Defendant.

5. The victim, Edwin Kaczorowski, was 85 years of age on May 20, 2009 and was restrained at the time he was struck by the Defendant. (See Deposition of Gilda Moltimer, page 13, line 16, taken on September 25, 2009, attached hereto as Exhibit "A".)

6. On May 20, 2009 the victim, Edwin Kaczorowki was suffering from a form of dementia which was worsened due to his acute medical problems. (Deposition of Pedro W. Tirado, M.D., taken on February 5, 2010, not yet transcribed.) Mr. Kaczorowski had been diagnosed with a mild case of Alzheimer's in mid-2008 which was deteriorating up to the time of his hospital admission on May 18, 2009. (Deposition of Enrique Lopez-Moscoso, M.D., taken on April 221, 2010, not yet transcribed.)

7. The Defendant is claiming immunity from prosecution pursuant to F.S. 776.032(1) due to the alleged justified use of force under F.S. 776.012. Therefore, to paraphrase this section, the factual issue before this Court is whether the Defendant was justified in using force against the alleged victim in this case as the Defendant reasonably believed such conduct was necessary to defend himself against the imminent use of unlawful force perpetuated by the alleged victim, Edwin Kaczorowski. In the presence of such material facts in dispute, this motion must be denied.

8. F.S. 776.013 and F.S. 776.031 are not applicable as they apply to home protection, trespass and tortuous interference with real or personal property, respectively.

9. The assertion by the defense that the defendant reasonably believed that his conduct was necessary to defend himself against the use of force by the alleged victim, is tantamount to asserting that raising self-defense entitles the defendant to immunity from prosecution.

10. Based upon the evidence in this case and the disputed facts, the victim, Edwin Kaczorowski, could not form the requisite intent to knowingly commit a Battery on an Emergency Medical Care Provider in violation of F.S. 784.07.

11. While a registered nurse, such as the Defendant, satisfies the definition of an Emergency Medical Care Provider in accordance with F.S. 784.07(1)(a), he also, as a Health Care Provider, satisfies the definition of a Caregiver in accordance with F.S. 825.101(2). The victim, Edwin Kaczorowski, satisfies the definition of an Elderly Person in accordance with F.S. 825.101(5).

12. The defendant is alleged to have committed a Battery on a Person 65 Years of Age or Older. Additionally he is alleged to have committed Abuse of an Elderly Person, in his role as a Caregiver, by inflicting physical injury upon the victim, Edwin Kaczorowski, who did not have the capacity to consent to this attack.

13. Both Dennis v. State, 17 So. 3d 305 (Fla. 4th DCA 2009) and Govoni v. State, 17 So. 3d 809 (4th DCA 2009) are controlling in this district and stand for the proposition that when the state's traverse places essential material facts in dispute when a motion to dismiss based upon statutory immunity is filed by the defense, said motion must be denied.

14. It is noteworthy that the defense sets forth the certified conflict between Florida's District Courts of Appeal as to the procedural mechanism which is proper for an accused to assert the immunity provided by F.S. 776.032. Courts in other districts suggest that the proper mechanism is a pretrial evidentiary hearing. Such a request must be denied in this case based upon the controlling authority in this district.

15. In light of this certified conflict, the State of Florida does not object to the Defendant's Request for an Extension of Time to Pursue Appellate Remedy, upon the denial of this motion.

WHEREFORE, the State of Florida through its undersigned Assistant State Attorney respectfully requests that this Honorable Court deny the Motion to Dismiss as filed on behalf of the Defendant, Richard Anderson, as there are materially disputed facts in this case and deny the Defendant's Request for an Evidentiary Hearing.

I declare under penalty of perjury, that I in good faith believe that the foregoing statements contained in this motion are true and correct to the best of my knowledge and belief.

PRESTON MIGHDOLL

BEFORE ME, appeared PRESTON MIGHDOLL, being personally known to me, and who on this 22nd day of April, 2010 took an oath.

Notary Public

Printed Name of Notary
My Commission Expires:

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by U.S. Mail and facsimile, on this 22nd day of April, 2010, to Leonard Feuer, Esquire, Dell and Schaefer Chartered, 2404 Hollywood Boulevard, Hollywood, FL 33020.

Respectfully submitted,

PRESTON MIGHDOLL
Assistant State Attorney
Florida Bar No. 220124
401 North Dixie Highway
West Palm Beach, Florida 33401
(561) 355-7394