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SUPREME C

STATE OF

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Plaintiff and Respondent,

Defendant and Appellant.

OF A

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,
Plaintiff and Respondent,

— vs. —

GLEN HESS SELMAN,
Defendant and Appellant.

Case No. 10544

BRIEF OF APPELLANT

STATEMENT OF NATURE OF CASE

The appellant, Glen Hess Selman, was convicted of Negligent Homicide, in violation of Section 41-6-43.10, Utah Code Annotated, 1953, in the District Court of the First Judicial District, in and for the County of Box Elder, State of Utah, and seeks by this appeal the review of that conviction.

DISPOSITION IN THE LOWER COURT

The appellant was charged in an information filed by the District Attorney of the First Judicial District, State of Utah, with Negligent Homicide. The case was tried

before the Honorable Lewis Jones, sitting with a
the jury returned a verdict of guilty and the defe
was sentenced to serve one year in the Box Elder C
Jail.

RELIEF SOUGHT ON APPEAL

The appellant seeks reversal of the convict
discharge of the defendant.

STATEMENT OF FACTS

On the 9th day of June, 1965, Carol Ann Sy
resided in a small farming community of Thatcher,
ed approximately 10 miles west of Tremonton,
(R. 10). She placed her own five children in the
station wagon, picked up seven additional neighbor
dren, and drove toward Tremonton, Utah (R. 10).
was taking the children to a summer school session
commenced at eight o'clock in the morning (R. 11).
was about ten minutes late at the time of the acci
(T. 17).

The particular day in question was a cloudless,
and warm morning (R. 27). She preceded East on
oiled road and was traveling by her estimate appro
mately sixty miles per hour (R. 11). She recalled se
dust on an intersecting dirt road about one-fourth
mile from the intersection in which the collision occur
(R. 12, 19). The collision occurred between the a
mobile being driven by Mrs. Sylvester and the defenda
Kenna Okada, age ten years, was killed in the accide
The automobile being driven by Mrs. Sylvester did

leave any skid marks prior to the vehicles coming together (R. 85) and Mrs. Sylvester did not place her foot on the brakes prior to the impact (R. 18). She did not slow her vehicle nor did she see the approaching vehicle again until the impact (R. 19).

The defendant, Glen Hess Selman, age nineteen, lived in Tremonton, Utah, and was going out to the neighboring farm area to work for a local farmer (R. 112). The defendant testified he was traveling north on the dirt road approximately thirty miles per hour as he approached the stop sign on the intersecting oiled road (R. 113). He testified he stopped for the stop sign and started up again, saw Mrs. Sylvester's vehicle approaching at what he estimated to be eighty miles per hour (R. 115), and was struck. The defendant applied his brakes and approximately fifteen feet of skid marks were recorded prior to impact (R. 41). The defendant suffered head injuries and a fractured leg (R. 116).

The State of Utah relied on the testimony of Mrs. Sylvester and the testimony of Utah Highway Patrol Trooper, Scott Lee, and another Highway Patrol Trooper who assisted in making measurement and taking photographs. Trooper Lee estimated the speed of the Sylvester vehicle at a minimum of fifty-five miles per hour at the trial (R. 77) and the defendant's vehicle at a minimum speed of forty-four miles per hour, prior to his vehicle beginning to skid. Trooper Lee at the preliminary hearing had estimated the Sylvester vehicle speed at a minimum of sixty miles per hour (R. 80). The Trooper further testified that this estimate did not include an esti-

mated nine miles per hour of forward speed of the vester vehicle which was absorbed by a ditch in wh came to rest after the collision (R. 87).

The speed limits on both roadways was sixty per hour (R. 63). There was further evidence from the witnesses that in the southwest corner of said section was a home, some trees, and other buildings partially obstructed the vision of both drivers as approached the intersection.

The State introduced numerous photographs scene and of the damaged vehicles.

Based upon the foregoing facts the jury return verdict of guilty.

ARGUMENT

POINT I

THE COURT COMMITTED ERROR IN FAIL-ING TO GRANT DEFENDANT'S MOTION FOR DISMISSAL OF THE CHARGE ON THE GROUNDS THAT THERE WAS INSUFFI-CIENT EVIDENCE TO GO TO THE JURY AND THAT THE EVIDENCE WAS INSUFFI-CIENT TO SUSTAIN THE VERDICT OF THE JURY.

It is the sole contention of the appellant that the should be reversed and the defendant discharged becau the evidence was insufficient to support the finding of the jury.

The defendant is charged with a violation of Section 41-6-43.10, Utah Code Annotated, 1953:

> "NEGLIGENT HOMICIDE . . . (a) when death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in reckless disregard of the safety of others, the person so operating such vehicle shall be guilty of Negligent Homicide."

In the case of *State v. Berchtold*, 11 Utah 2d 208, 357 P. 2d 183 (1960), the Utah Supreme Court indicated it was for the first time directly construing what is meant by "in reckless disregard for the safety of others." This same case involved a one-car roll-over at speeds of between seventy and one hundred and ten miles per hour.

It would appear that the test decided upon by the court is as follows:

> "We conclude if the evidence reasonably supports the finding that defendant *consciously chose* a course of action knowing that such a course would place his guests in grave and serious danger or *with knowledge of facts* which would disclose such danger to any reasonable person, when he could have avoided such danger, he was guilty of reckless disregard for the safety of others. This does not require a finding that the defendant was fully conscious of the great danger to others." (Emphasis added)

The Court went on in the *Berchtold case* and elaborated upon the test:

> "It does require the *choosing of a course* with grave and marked danger, *driver must be conscious and aware* of the course he chose, and such

course must be fraught with danger that al[illegible] sonable persons if they thought about it could fail to recognize the danger." (Emphasis add[illegible]

The Court further illustrated the type of co[illegible] that would place driving within the realm of our N[illegible] gent Homicide Statute:

> "Recklessness indicate indifference and ut[illegible] regard for the consequences *and not mere [illegible] vertence nor error in judgment.*" (Emp[illegible] added)

See also *Petersen* v. *Detwiller*, 218 Iowa 41[illegible] N.W. 529; 36 *Words and Phrases*, pp. 489 to 509; W[illegible] misconduct, 45 *Words and Phrases*, pp. 302 to 321.

In the later case of *State* v. *Park*, 17 Utah 2d 9[illegible] P. 2d 677 (1965) the Court applied the Negligent Ho[illegible] cide Statute to a situation in which a pedestrian [illegible] killed by defendant's automobile at night, immediat[illegible] after defendant passed two other cars. The evidence f[illegible] ther indicated a situation in which defendant failed to [illegible] either the pedestrian lane warning sign, or the thirty-[illegible] miles per hour sign and was travelling between fifty-[illegible] and sixty-five miles per hour.

The Court in the *Park* case reaffirmed the rule [illegible] follows:

> "Doing of an act fraught with the potentiality [illegible] producing death amounts to such a reckless dis[illegible] gard for the safety of others."

The Court then went on to cite the case of *Wo[illegible]* *Taylor*, 8 Utah 2d 210, 333 P. 2d 215, wherein the driv[illegible]

attempted to pass a load of hay on a narrow road, near a hill crest, and failed to slow his speed of seventy miles per hour in so doing.

The court further cited in support of its ruling in the *Park* case, *State* v. *Barker*, 113 Utah 514, 196 P. 2d 723; which is a more similar factual situation to our present case. This case involved an intersection with a stop sign, and the distinguishing features appearing to be that the court felt the headlights of the other automobile should have warned the defendant of its approach.

In the case of *State* v. *Riddle*, 112 Utah 356, 188 P. 2d 449, we had a situation involving driving on the wrong side of the road and evidence of drinking.

In *State* v. *Thatcher*, 108 Utah 63, 157 P. 2d 258, the evidence disclosed high speed, inattention and a night time situation.

In the case of *State* v. *Newton*, 105 Utah 561, 144 P. 2d 290, also cited by the court in *State* v. *Park*, the evidence received by the court disclosed the situation where defendant cut across an intersection to get ahead of another vehicle.

A brief review of the facts, presented as defendant must in the light most favorable to the State's contention, discloses the absence of the factual situations illustrated by the cited cases above. True, the facts show inattention on the part of the defendant. The defendant saw the other vehicle long enough to react, apply his brakes and skid fifteen feet prior to the impact. He was travelling

approximately fifteen miles per hour *under* the limit. The other vehicle, loaded with a total of [illegible] people was travelling at a minimum of sixty miles per hour and the evidence indicates this could have been considerably more.

It was the Sate's contention that the manner [illegible] the defendant, coupled with the obstructions [illegible] ner combined to make his actions above and beyond [illegible] of mere negligence and such as to fall within [illegible] punished as "reckless disregard."

It would appear to appellant that in [illegible] find the common ground, the unity of thought [illegible] nitions set forth by the court in *Bertholf* case [illegible] words are:

"Consciously chose"

"With knowledge of facts"

"Choosing of a course"

"Driver must be conscious and aware"

"Indifference and utter disregard"

There can be little argument that motor [illegible] travel today is an activity "fraught with danger" [illegible] that every instance of inattention can reasonably [illegible] pected to result in grave harm to others. Yet the legislature obviously did not intend that any death resulting from an omission or inattentive act on the part of a driver should be punished under the negligent homicide statute. It meant only the instances of "reckless disregard for the safety of others."

Any time a red light or a stop sign is not obeyed there exists the very real danger of injury or death to others. Yet, the definition of Negligent Homicide would appear to require an additional factor to show a conscious, volitional act illustrating the choosing of a course of conduct where the driver knew or reasonably should have known of the great danger.

CONCLUSION

The evidence was insufficient to sustain the verdict of the jury and the same should be reversed and the defendant discharged.

Respectfully submitted,

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