

1971

## **The State of Utah v. Weldon Bassett And Judy Bassett : Brief of Appellants**

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**IN THE SUPREME COURT**  
**of the**  
**STATE OF UTAH**

THE STATE OF UTAH,  
PLAINTIFF AND RESPONDENT  
VS.  
WELDON BASSETT AND  
JUDY BASSETT,  
DEFENDANTS AND APPELLANTS

} Case No.  
12727

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**BRIEF OF APPELLANTS**  
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Appeal from the Judgment of the Second District Court  
for Weber County

HONORABLE JOHN F. WAHLQUIST, JUDGE

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**FILED**

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Clerk, Supreme Court, Utah  
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**BRIEF OF APPELLANTS**

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STATEMENT OF KIND OF CASE

This is a criminal action charging the defendants and each of them with Involuntary Manslaughter for the death of their minor child.

DISPOSITION IN LOWER COURT

The Jury found both defendants guilty of Involuntary Manslaughter.

RELIEF SOUGHT ON APPEAL

Defendants seek a reversal of the Jury verdict of guilty of Manslaughter as a matter of law and fact or that failing, remanding the case to the District Court for a new trial.

## STATEMENT OF FACTS

Weldon and Judy Bassett are the parents of Erica Jean Bassett, who was approximately fifteen months old at the time of death. Prior to birth and during the time Erica was alive Judy Bassett was industrially and legally blind with visual acuity of less than twenty-four hundred with complaints of double vision and distortion; her depth of perception bad. (Tr 137, lines 23 through 30; Tr 138, lines 1 through 27; Tr 139, lines 1 through 30; and Tr. 140, lines 1 through 19; Tr 142, lines 15 through 20.) Judy subsequently received a corneal transplant to one eye with another to be performed on the other eye.

On September 11, 1970, defendant Judy Bassett gave birth to the daughter, Erica Jean Bassett, at the St. Benedict's Hospital in Ogden, Utah. The birth was a breach birth, with the fanny coming first and the body doubled and bent. A breach birth is not normal and it is not uncommon for a child to be injured during such birth with broken bones and head injuries. (Tr 10, lines 5 through 30; Tr 11, lines 1 through 30; Tr 30; lines 19 through 30; and Tr 31, lines 1 through 36.).

Dr. Rogers was the doctor in attendance at the time of said birth, and had been the Bassetts' doctor since the time of the birth of their son, prior to the birth of Erica, and stated he had never had any reason to believe the defendants had ever abused their older son or Erica—that they seemed to be loving and devoted parents during all the time he knew them. They seemed to be kind and solicitous parents. (Tr 43, lines 10 through 30.) All who knew Weldon and Judy Bassett testified that

they seemed to love children very much and could not mistreat their own children—Weldon's mother (Tr 217, lines 11 through 20.); his brother Earl Dean (Tr 230, lines 8 through 16; Tr. 236, lines 1 through 6) his sister Mary Jean (Tr. 243 lines 9 through 30; Tr. 245 lines 11 through 27; Tr. 256 lines 16 through 18); Judy's father, Newton Glen (Tr. 258; lines 12 through 29.): her brother, Ronald J. (Tr. 263, lines 14 through 19).

Evidence showed that ever since birth the child seemed to be in constant great pain, cried a great deal and did not seem to be a normal happy, healthy child, (Tr 153, lines 2 through 27; Tr 173, lines 5 through 15; Tr 177, lines 1 through 30; Tr 219, lines 3 through 19; Tr 233, lines 5 through 17; Tr 246, lines 2 through 24; Tr 264, lines 7 through 22.) This would seem to show Erica had received painful and serious injuries at birth.

On November 8th, 1970, Erica was taken to the McKay-Dee Hospital where she was suffering from convulsions and mild fever. (Tr 14, lines 6 through 30; Tr 15, lines 1 through 30; Tr 16, lines 1 through 30.) Dr. Rogers examined the child, had a brain and spinal tap performed and found traces of blood from the brain and spinal tap, but indicated that such might have resulted from the physical action of taking such a tap. (Tr 17, lines 5 through 30; Tr 18, lines 1 through 6; and Tr 20, lines 6 through 25.) The child was subsequently released from the hospital after no emergency care and ac-

ording to the Doctor in excellent health. (Tr 22, lines 25 through 30; Tr 23, lines 1 through 27.) On November 24, 1970, the child was taken to the St. Benedict's Hospital where it was pronounced dead, with no visible evidence of any injuries or bruises. (Tr 25, lines 5 through 30.) The father, Weldon Bassett, willingly consented to an autopsy, or at least attempted so to do. (Tr 168, lines 19 through 28.) An autopsy was in fact performed where it was found that the child, Erica, had died from acute and chronic subdural hematoma no skull fractures or bruises on head was ever found. (Tr 78, lines 3 through 9.)

The defendant Weldon Bassett was accused of the crime of Involuntary Manslaughter in one action, and the defendant Judy Bassett was also accused of Involuntary Manslaughter in another cause, which said causes were then joined and tried together. The case was tried before the Trial Court. The defendants moved for a dismissal at the conclusion of the State's case, which Motion was denied; defendants submitted testimony and the matter was placed in the hands of the jury, which returned a verdict of guilty for both defendants. (Tr 269, lines 28 through 30; and Tr 220, lines 1 through 5.)

#### POINT I

THE TRIAL COURT ERRED IN REFUSING TO DISMISS THE STATE'S CASE AGAINST BOTH DEFENDANTS AT THE CONCLUSION OF THE STATE'S EVIDENCE.

At the conclusion of the State's case, defendants moved the Court for an Order dismissing the complaints

against each of them for Involuntary Manslaughter, which Motion was denied by said Trial Court. Defendants contend that this denial was in error. At the conclusion of the State's case the only evidence adduced was that the defendants Weldon and Judy Bassett were the parents of one Erica Bassett; that Erica subsequently died on November 24th, 1970, being approximately two and one-half months old. The State further showed that Erica had insignificant bruises upon her arms and body, the only injuries visible to the eye, but upon completion of an autopsy Erica was found to have had broken ribs and subdural hematoma. Nothing more was introduced by the State to show that either Weldon or Judy had committed any act causing the injuries resulting in the death of Erica. As a matter of fact, the State's witness, Dr. Rogers, indicated that he had known the defendants since the birth of their first child; that at all times the defendants had shown love and affection for not only Erica but for their older child and that he had no reason to suspect or believe that either of them had ever abused Erica or their older son and that they seemed to be loving and devoted parents.

The State's evidence also indicated that brain taps had been performed on the child, which could have caused subdural hematoma; that the child Erica was born breach, which could have resulted in broken bones and head injuries; that there are many and various reasons for subdural hematoma: falling from bed or couch, blow, shaking, accidental blow, veins severed by brain tap and many other reasons, with only evidence being that of a spinal tap, Judy accidentally bumping baby's



head on crib and Erica's brother playing roughly around her with toy wheels, and this is all. The State had failed to show that either Judy or Weldon Bassett ever struck Erica or had ever abused her in any way. There was no visible evidence of a blow to her head. There was no act nor intent offered into evidence by the State as defined in our Statute, Tile 76-1-20, Utah Code Annotated, 1953. Even assuming all of the evidence to be true and held most strongly as against the defendants, there is absolutely no such evidence to submit the case to the Jury and the trial Court should have dismissed the action as against Judy and Weldon Bassett; the Court erred in refusing to dismiss.

## POINT II

### THE EVIDENCE DOES NOT SUPPORT THE VERDICT OF GUILTY RENDERED BY THE JURY AGAINST DEFENDANTS.

This action was originally filed in two separate causes by the State of Utah, charging each of the defendants singularly with the commission of the crime of Involuntary Manslaughter as defined by our Statute 76-30-5, Utah Code Annotated 1953, a pertinent part which is set forth as follows:

“(2) Involuntary in the commission of an unlawful act not amounting to a felony or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.”

A careful review of the transcript of the trial pro-

ceedings nowhere reflects any act or omission of either of the defendants which could convict under our Statute. To the contrary, from the testimony of the child's doctor, Dr. Rogers, the Bassetts seem to be kind and solicitous parents, very much interested in the welfare of Erica Jean and their other child, with no evidence or hint at all of any propensity toward abuse. There is absolutely no other evidence of any act or omission as required by the Statute. Without exception all witnesses who knew both Weldon and Judy Bassett stated that both of them seemed to love this child and their other child very greatly, was always with them, was always showing them attention and were concerned with the welfare of Erica. There is no evidence of a pattern of child abuse—drinking or temper tantrums that is almost universally present in almost every child abuse case.

On one instance the defendant, Weldon Bassett, stated that the child Erica had a bump on her head when the defendant, Judy Bassett, who was for all purposes legally blind, attempted to lift Erica from the bed to place her in the crib, which was adjacent to the bed. This is the only evidence that either of the defendants ever did anything to hurt Erica and this is certainly not an act as contemplated by the Statute. It is an unfortunate accident resulting from a condition beyond the control of either of the defendants.

Another aspect of this case, apparently ignored by the Jury, was the fact that the testimony of Weldon Bassett and a number of witnesses who knew Erica from her birth indicated that something seemed to be wrong with her, that she seemed to be in constant terrible pain and

cried in a manner not consistent with the normal child, which would certainly indicate that there is some question as to Erica's being rather seriously injured at birth. The State's expert witness, Dr. Rogers, and the testimony of the pathologist was in part completely contradictory. Dr. Rogers stated they found no evidence of injury to Erica at any time, but the pathologist stated that the ribs were broken possibly as far back as birth. Either Dr. Rogers did not examine carefully or he missed these injuries. The same is true with respect to the hematoma.

The child's doctor, Dr. Rogers, testified that Erica was born breach, in other words, fanny first. The Doctor further testified that it is not uncommon for bones to be broken and injuries to occur in such a breach birth. This would seem to be consistent with the evidence that Erica was in considerable pain from the birth on and could account for many of the injuries as determined by the autopsy. It would be further entirely consistent that in the handling of Erica these injuries that could have been caused at birth would be aggravated even with normal handling and would cause the chronic, painful crying. It should be noted further, that with respect to the injuries to the brain, such could have occurred when the child's head was bumped against the crib or possibly bumped by accident on any other occasion. Dr. Weston stated babies of this age have been known to roll over and fall, causing such brain damage and death.

Defendants' minor son squeezed Erica and threw his toy made out of wheels around the home, which could have struck and injured Erica. It was further testified

to that two brain taps were performed on Erica at the time she was first taken into the hospital for examination, and that it is possible that injuries could have occurred by the needle passing into the skull into the area between the skull and the brain itself, which could puncture veins and cause bleeding. The bruises testified to by Dr. Rogers were all indicated to be minimal and normal bruises which you would probably find on a youngster that size and age, and none contributed to the baby's death.

Once again defendants respectfully submit that there is absolutely no evidence in the record at all showing any act of any specific nature by either of the defendants upon which to base a finding of guilty. The defendant, Weldon Bassett, was not shown to have committed any act whatsoever, accidentally or otherwise. The defendant, Judy Bassett, accidentally bumped the child's head in an attempt to place the child in its crib. The defendants respectfully submit that the Jury disregarded the evidence and instructions and based their verdict solely upon biased prejudice or in the heat of passion.

### POINT III

**THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBER 8, SETTING OUT THE ELEMENTS TO BE FOUND BY THE JURY TO CONVICT THE DEFENDANTS OF THE CRIME OF INVOLUNTARY MANSLAUGHTER.**

The Appellants and Defendants objected to the Court giving Instruction Number 8 at the conference of the Trial Judge and counsel, prior to the giving of the

instructions and exception was taken to the said instruction after the instructions were given to the Jury. Instruction objected to is as follows:

“No. 8

Before you can convince the defendant of the crime of Involuntary Manslaughter you must find from the evidence, beyond a reasonable doubt, all of the following elements of that crime.

1. That Erica Bassett was the lawful child of the defendant under consideration and as such the defendant was under an obligation to provide ordinary protection. The protection that a parent must provide need not be of exceptional or extra careful or unusually wise type of protection, but need only be in accordance with community minimal acceptable standards.

2. That Erica Bassett died as a result of head injuries caused by trauma and that the trauma was administered while there existed a child-parent relationship with the defendant under consideration on or about the date alleged.

3. That the parent under consideration failed to provide minimal protection for the child and because of such failure the child received the trauma that resulted in its death. A parent is not a guarantor of the safety of a child but is required to use ordinary reasonable care. The criminal law does not punish a parent for negligent care of a child unless that negligence is so gross as to amount to a wilful disregard for the consequences and it must be under circumstances containing no

satisfactory excuse. While a parent may under many circumstances reasonably trust the other parent to provide protection, neither parent may totally shift the duty to the other unless the circumstances appear to warrant such confidence.

If you believe that the evidence establishes each and all of the essential elements of the offenses beyond a reasonable doubt, it is your duty to convict the defendant. On the other hand, if the evidence has failed to so establish one or more of said elements then you should find the defendant not guilty.”

The Statute under which the defendants are charged is as follows: Utah Code Annotated, 1953.

76-30-5 Manslaughter defined — Manslaughter is the unlawful killing of a human being without malice. It is of two kinds: (1) (Not applicable) (2) Involuntary in the commission of an unlawful act not amounting to a felony or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection.

The defendants requested the court to give an instruction based upon this definition but the Court refused to do so.

The Instruction that was given does not reflect the wording nor the intent under which the defendants and each of them were charged. There is no mention of the requirement to find that the defendants committed an un-

lawful act not amounting to a felony, nor that the defendants committed a lawful act which might produce death in an unlawful manner or without due caution and circumspection. The Statute clearly requires one of these elements to fall within the purview of such Manslaughter Statute. An extensive search of the cases decided by this Court, based upon the Statute in question, reveals nowhere any authority for the type of Instruction that was given. State v Lancaster, 20 U (2d) 80, 433 P2d 312 et seq: Most of the other cases cited by the Supreme Court were involved with automobile homicide.

This Instruction further was improper under the circumstances because there was no evidence of negligence on the part of either of the defendants upon which to base the Instruction. A careful review of the transcript reveals no evidence of any negligence whatsoever. Another reason that said Instruction was improper was the fact that the Court did not instruct the Jury that any trauma which might have caused the death must have been administered by either one or both of the said defendants, and under paragraph two (2) of said Instructions merely indicated that if the trauma was administered while there existed a child-parent relationship with the defendants, this would be sufficient. We submit that under our Statute the trauma must have been administered by either one or the other or both of the said defendants to convict either or both of the said offense. The Instruction as given was prejudicial for the above reasons and does not reflect the necessary and essential elements of the crime in order to convict.

## CONCLUSION

Defendants and each of them represent that the conviction of both of them of the crime of Involuntary Manslaughter was not supported by the facts or by the law, and that errors committed during the time of the trial were prejudicial. There was never shown any act or intent as is required by our Statutes and Court decisions. There was never shown any neglect even to support a conviction under the improper Instruction Number 8. The case did in fact involve a fact situation which would tend to give rise to a great deal of sympathy and passion, which they submit did in fact influence the Jury and did result in the conviction.

We further respectfully submit that it is not incumbent upon the defendants to prove themselves innocent, it is incumbent upon the State to prove guilt beyond a reasonable doubt which they submit was not done in this matter.

Defendants conclude that based upon the law and facts produced in this case the Jury's decision should be reversed and the defendants and each of them found not guilty, or this failing, remanding this case to the lower Court for a new trial.

Dated this 28<sup>th</sup> day of December, 1971.

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