ORIGINAL
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20080140

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

In the Interest of B.F., a Child	)	
Reid A. Brady,	)	
Petitioner and Appellant,	)	Supreme Court No. 20080140
vs.	)	Juvenile Ct. No. 09-07-R-900
J.F., T.F., and B.F.,	)	
Respondents and Appellees.	)	

APPELLANT'S BRIEF

Appeal from the May 16, 2008 Order on Request for Review
East Central Judicial District
the Honorable Georgia Dawson, Presiding

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[¶3] STATEMENT OF ISSUE

[¶4] Whether the district court judge erred, in reviewing the referee's legal conclusion relating to negligence, by failing to consider all of the established attendant circumstances and focusing solely on the speed at which B.F. was driving and the obstructed nature of the intersection.

[¶5] STATEMENT OF CASE

[¶6] On February 29, 2008, a trial was held before a judicial referee. The referee subsequently adjudicated B.F. delinquent for committing the acts of negligent homicide and aggravated reckless driving. (App. at 8.)

[¶7] Through a Request for Review and Specifications of Error, B.F. appealed from the referee's negligent homicide adjudication to a district court judge. (App. at 17.) The district court judge issued an order reversing the referee's negligent homicide adjudication. (App. at 19.)

[¶8] The State appeals to this Court, seeking reinstatement of the referee's decision. The State contends that the district court judge erred, as a matter of law, by failing to consider all of the established attendant circumstances in reviewing the referee's conclusion that B.F. committed negligent homicide. More specifically, the State asserts that the district court judge erred by focusing solely on the speed at which B.F. was driving and the obstructed nature of the intersection. The State requests that this Court review the legal issue given the established facts, reverse the district court judge's order, and reinstate the referee's decision adjudicating B.F. delinquent for committing negligent homicide.

[¶9] **STATEMENT OF FACTS**

[¶10] Through a petition, B.F. was charged with (1) negligent homicide for negligently causing the death of his passenger R.B. by driving a pickup at a high rate of speed on a gravel or dirt road, failing to yield to a semi-truck, and crashing into the semi-truck; and (2) aggravated reckless driving, as amended, for driving his pickup at a high rate of speed on a gravel or dirt road while approaching an obstructed intersection and thereby injuring his passenger T.F. (App. at 4-5.)

[¶11] A. Trial Before the Judicial Referee

[¶12] A trial was held before the judicial referee on February 29, 2008. The evidence showed that on the afternoon of August 12, 2007, B.F. was driving a small pickup eastbound on 36R Street, a minimum maintenance gravel road, west of Casselton, ND. (App. at 7-8, 10.) T.B., T.F., and R.B. were passengers in B.F.'s pickup. (App. at 10.) T.F. was sitting on T.B's and R.B.'s laps because there was not enough room on the front seat of the pickup for all four persons. (App. at 10.) B.F. was driving back to Casselton after he and his passengers had been at a gravel pit. (App. at 10.) B.F. was speeding at more than 69 mph toward 36R Street's intersection with 154th Avenue. (App. at 11-12.) B.F.'s view of the northbound traffic on 154th Avenue was obstructed by trees running alongside 36R Street and farm buildings. (App. at 10.) B.F. slammed on the brakes and his pickup skidded 263 feet. (App. at 10.) After skidding 263 feet, B.F.'s pickup crashed into a northbound semi-truck that had already proceeded through a portion of the intersection. (App. at 10-11.)

[¶13] Ronald Radermacher, the driver of the semi-truck, estimated that he had approached 154th Avenue's intersection with 36R Street at about 10 to 15 mph. (App. at 10-11.) As Radermacher was beginning to drive through the intersection, he saw B.F.'s pickup skidding toward him at a high rate of speed. (App. at 11.) When B.F. crashed his pickup into the trailer of the semi-truck in front of the semi-truck's rear wheels, B.F.'s pickup crushed down under the trailer of the semi-truck. (App. at 11.) T.F. suffered injuries from the crash. (App. at 11.) R.B. later died at the hospital from injuries he suffered during the crash. (App. at 11.)

[¶14] B.F. gave varying statements regarding the speed he believed he was driving. When speaking at the crash scene with Cass County Sheriff's Detective Al Kulesa, B.F. estimated that he was driving 25 to 30 mph prior to the crash. (App. at 11.) The next day, B.F. advised Cass County Deputy Sheriff Bruce Renshaw that B.F. believed he was driving around 55 mph prior to the crash. (App. at 11.)

[¶15] North Dakota Highway Patrol Trooper Mitch Rumple performed a crash reconstruction. (App. at 11.) Trooper Rumple concluded that, just prior to skidding, B.F. had been driving a "minimum" speed of 69 mph. (App. at 11.) Trooper Rumple stated that 69 mph was the speed necessary for B.F.'s vehicle to skid 263 feet and then simply stop. (App. at 12.) Trooper Rumple testified that because there was no way to factor in the additional speed lost when B.F.'s pickup crashed into the semi-truck and crushed underneath it, B.F. actually had been driving faster than 69 mph. (App. at 11-12.) Trooper Rumple explained that if B.F. had been driving only

69 mph, B.F's vehicle would have stopped before any impact. (App. at 12.) Trooper Rumple also calculated that if B.F. had been driving 55 mph prior to braking, his pickup would have safely stopped more than 100 feet from the point of impact. (App. at 12.)

[¶16] B. Trial Findings of the Judicial Referee

[¶17] At the close of the evidence, the judicial referee permitted the parties to submit written closing arguments. B.F. did not contest the aggravated reckless driving charge. (App. at 15.) On April 22, 2008, the Findings and Order of the Judicial Referee were issued. (App. at 15.) The judicial referee found that B.F. operated a vehicle with insufficient seating and seat belts for all passengers, used excessive speed, and failed to appropriately reduce his speed and yield when approaching the intersection. (App. at 8.)

[¶18] In support of her findings and order, the judicial referee issued and incorporated a memorandum. (App. at 9.) In it, the referee explained: that there were trees and farm buildings which "presented an obstruction to the view of the intersection" (App. at 10); that B.F. "slammed on his brakes and his vehicle skid 263 feet" (App. at 10); "that [B.F.'s] vehicle collided with the back-end of the semi-trailer and was crushed under the trailer near the rear wheels" (App. at 11); and that she found Trooper Rumple's opinions reasonable (App. at 12-13). The referee, accordingly, acknowledged that Trooper Rumple calculated the "minimum speed" that B.F. was driving was 69 mph" (App. at 11); that because Trooper Rumple could

not factor in the resulting crash itself and only "calculated the minimum speed necessary to operate a vehicle, leave 263 feet of skid marks and then come to a stop, the actual speed of [B.F.'s] vehicle in Trooper Rumple's opinion was in excess of 69 mph" (App. at 11-12); and that in [Trooper Rumple's] opinion, "had [B.F.] been traveling at 55 mph, his vehicle would have come to a complete stop more than 100 feet before the intersection" (App. at 12).

[¶19] The referee concluded B.F.'s conduct under all the circumstances went beyond carelessness and constituted a gross deviation from acceptable standards of conduct. (App. at 14.) "There were conscious, extreme, risk-taking decisions made by [B.F.] that put him and others at significant risk of harm." (App. at 14.) The referee concluded that B.F. had committed the delinquent act of negligent homicide. (App. at 8.)

[¶20] C. District Court Judge's Decision on B.F.'s Appeal From the Referee's Adjudication

[¶21] B.F. filed a Request for Review and Specification of Error, seeking a district court judge's review of the judicial referee's decision. (App. at 17.) B.F. alleged several errors were committed by the referee and requested that the referee's decision relating to the adjudication of negligent homicide be reversed. (App. at 18.) B.F. indicated that he "d[id] not appeal the conviction of the delinquent act of aggravated reckless driving." (App. at 18.)

[¶22] In her May 16, 2008, Order on Request for Review, the district court judge reversed the referee's decision regarding B.F.'s adjudication for negligent

homicide. (App. at 19.) In her order, the district court judge recognized that the crash reconstructionist "concluded [B.F's] vehicle was traveling at a minimum of 69 miles per hour, based on the 263 feet of skid marks" and that the referee "found [B.F.] was traveling at a minimum of 69 miles per hour." (App. at 20.) The district court judge "f[ound] the Referee's rationale for adopting the accident reconstructionist's reasoning persuasive," but "then, accept[ed] that [B.F] was traveling at 69 miles per hour in a 55 mile per hour zone." (App. at 21) (emphasis added.)

[¶23] The district court judge reasoned that "[w]hile the Court does not take issue with respect to the Referee's Findings of Fact concerning the attendant circumstances, the Court takes issue with the Referee's ultimate conclusion finding criminal negligence." (App. at 21.)

[¶24] The district court judge acknowledged that:

> B.F. may have committed several statutory violations: N.D.C.C. § 39-09-02(1)(f), 69 miles per hour in a 55 mile per hour zone; N.D.C.C. § 39-10-54(1), prohibiting driving when there are more than three persons in the front seat and the driver's view is obstructed as a result; and N.D.C.C. § 39-10-22, requiring the driver of the vehicle on the left to yield the right of way to the vehicle on the right in uncontrolled intersections.

(App. at 21-22.) The district court judge, however, noted "the failure of the landlord to clear the obstruction and the failure of the responsible governmental subdivision to erect cautionary signage" and expressed that she "cho[se] to view this accident as a singular occurrence." (App. at 22.) In summarizing the factors she was considering in reviewing the conclusion of negligence, the district court judge indicated she was

"left with 14 miles per hour over the limit with obstructed views of crossbound traffic." (App. at 22.)

[¶25] The district court judge "d[id] not accept, however, that [B.F.'s] conduct exhibited unreasonable disregard to the substantial likelihood of risk of another's death" and opined that "[n]egligent homicide cases are more properly limited to cases which fall far further outside the bounds of acceptable conduct, such as driving under the influence or driving far in excess of the speed limit." (App. at 22-23.)

[¶26] The State filed its Notice of Appeal under N.D.C.C. § 27-20-56, seeking reversal of the district court judge's order and reinstatement of the referee's decision. (App. at 24.)

[¶27] STANDARD OF REVIEW

[¶28] Review of a juvenile delinquency matter is controlled by N.DC.C. § 27-20-56(1). The statute provides:

> An aggrieved party, including the state or a subdivision of the state, may appeal from a final order, judgment, or decree of the juvenile court to the supreme court.... The appeal must be heard by the supreme court upon the files, records, and minutes or transcript of the evidence of the juvenile court, giving appreciable weight to the findings of the juvenile court.

[¶29] The Court reviews factual findings from a juvenile court under a clearly erroneous standard. In re K.H., 2006 ND 156, ¶ 7, 718 N.W.2d 575. The Court reviews questions of law de novo. Id.

[¶30] In reviewing a district court judge's reversal of a judicial referee's conclusion of law in a delinquency case, this Court has explained "a trial court's

conclusions of law are not subject to the clearly erroneous rule applicable to findings of fact, and are thus fully reviewable upon appeal." In Interest of K.S., 500 N.W.2d 603, 605 (N.D. 1993) (internal citation omitted) (involving a case in which the district court judge "accepted the referee's findings of fact, but determined that they led to a different conclusion of law").

[¶31] In the case at hand, the district court judge explained that while she "d[id] not take issue with respect to the Referee's Findings of Fact concerning the attendant circumstances, the [District] Court t[ook] issue with the Referee's ultimate conclusion finding criminal negligence." (App. at 21.) The district court judge adopted the referee's memorandum in all respects, except insofar as it concerned the referee's conclusion relating to negligent homicide. (App. at 23.) Accordingly, the facts are proven and established. The sole issue on appeal involves the district court judge's reversal of the referee's conclusion of law that B.F. committed the delinquent act of negligent homicide. The issue is fully reviewable by this Court.

[¶32] LAW AND ARGUMENT

[¶33] The district court judge erred, in reviewing the referee's legal conclusion relating to negligence, by failing to consider all of the established attendant circumstances and focusing solely on the speed at which B.F. was driving and the obstructed nature of the intersection.

[¶34] In this case, B.F. was charged, in pertinent part, with negligent homicide in violation of N.D.C.C. § 12.1-16-03. The statute provides that "[a] person is guilty of a class C felony if he negligently causes the death of another human being." N.D.C.C. § 12.1-16-03. A person engages in conduct "'[n]egligently' if he engages

in the conduct in unreasonable disregard of a substantial likelihood of the existence of the relevant facts or risks, such disregard involving a gross deviation from acceptable standards of conduct." N.D.C.C. § 12.1-02-02(1)(d).

[¶35] North Dakota's Criminal Code distinguishes "negligent" conduct from "reckless" conduct, which requires a higher level of culpability. Negligent conduct requires "only an 'unreasonable disregard'" of a substantial likelihood of the existence of the relevant facts or risks, while reckless conduct requires "conscious and clearly unjustifiable disregard" of a substantial likelihood of the existence of the relevant facts or risks. See State v. Ohnstad, 359 N.W.2d 827, 835 (N.D. 1984) (explaining "negligently" in the context of a negligent homicide case). "The major difference is that the negligent person need not be aware of the likelihood that he is engaging in the prohibited conduct." Id. (citation omitted).

[¶36] In assessing whether conduct is criminally negligent, all of the relevant attendant circumstances must be considered. See State v. Tranby, 437 N.W.2d 817, 820 (N.D. 1989) (reviewing "all of the circumstances present in [the] case"). "[A]lthough violation of a statutory duty is not negligence per se, it is evidence of negligence." State v. Smaage, 547 N.W.2d 916, 921-22 (N.D. 1996) (rejecting a defendant's contention that the jury was improperly instructed on statutory violations in a negligent homicide trial). It is proper to consider the "rules of the road" in determining whether there is criminal negligence. See id. at 922 (citation omitted) (upholding jury instructions on DUI, the law of left turns, and the general duty of care

required by a driver). The existence of statutory violations, however, is not necessary to establish that a person committed negligent homicide. "Indeed, the gist of the crime of negligent homicide is an unintentional death caused by negligence in the commission of an act which is otherwise lawful in itself." Tranby, 437 N.W.2d at 820.

[¶37] In the instant case, the district court judge erroneously focused solely on the speed at which B.F. was driving and the obstructed nature of the intersection in reviewing whether B.F. acted negligently. Those two attendant circumstances will be addressed first. The additional attendant circumstances that the district court judge failed to consider will then be addressed.

[¶38] B.F.'s excessive driving speed was a proven attendant circumstance relevant to the issue of negligence. It was undisputed that under N.D.C.C. § 39-09-02(1)(f), the speed limit on 36R Street was 55 mph. It should be noted that in considering the speed at which B.F. was driving, the district court judge initially recognized that the "minimum" speed was 69 mph and found the referee's rationale for adopting the crash reconstructionist's reasoning persuasive. (App. at 20-21.) However, the district court judge later inconsistently characterized the speed at which B.F. was driving as merely 69 mph and only 14 mph over the speed limit. (App. at 21-22.) The crash reconstructionist explained that if B.F. had been going only 69 mph, B.F.'s pickup would have stopped and there would have been no crash. (App. at 12.) The crash reconstruction indicated that 69 mph was used as a "minimum"

speed because there was no way to determine the additional speed that was lost when the pickup smashed into and crushed underneath the semi-truck. (App. at 11-12.) B.F.'s excessive driving speed - a "minimum" speed of 69 mph, which is well over the limit provided by N.D.C.C. § 39-09-02(1)(f) - was an established fact supporting the referee's conclusion B.F. committed negligent homicide.

[¶39] The obstructed nature of the intersection was a proven attendant circumstance. Under N.D.C.C. § 39-09-01, "every person shall drive at a safe and appropriate speed when approaching and crossing an intersection" and "shall drive having regard to the actual and potential hazards." It was established that "[t]here are trees and some farm buildings along 36R Street which presented an obstruction to the view of the intersection at 154th Avenue and 36R Street." (App. at 10, 19.) Despite the obstruction to his view and his duty under N.D.C.C. § 39-09-01, B.F. failed to reduce his speed as he bore down on the intersection. This attendant circumstance supports the referee's conclusion that B.F. committed negligent homicide.

[¶40] The road condition and B.F.'s failure to stop his vehicle after 263 feet of skidding were relevant established facts which the district court judge failed to consider in reviewing the referee's conclusion that B.F. acted negligently. Under N.D.C.C. § 39-08-03, a person is guilty of reckless driving if the person drives "[r]ecklessly in disregard of the rights or safety of others" or "[w]ithout due caution and circumspection and at a speed or in a manner as to endanger or be likely to

endanger any person[.]" B.F. conceded that he had committed aggravated reckless driving. (App. at 15.) The judicial referee aptly noted that "36R Street is a minimum maintenance gravel road" and assessed B.F.'s conduct "under the circumstances." (App. at 13-14.) The referee also acknowledged that B.F.'s "vehicle skid 263 feet" before colliding with the semi-truck. (App. at 10.) The district court judge, however, expressly indicated the only two attendant circumstances she was using to assess negligence, and neither the road condition nor B.F.'s 263 feet of skidding were used. (App. at 22.) The poor quality of the road and B.F.'s inability to stop after skidding 263 feet were proven attendant circumstances, which help show B.F.'s violation of his duty under N.D.C.C. § 39-08-03, and which support the judicial referee's conclusion that B.F. committed negligent homicide.

[¶41] B.F.'s failure to yield to the semi-truck in violation of N.D.C.C. § 39-10-22 was a relevant established fact which the district court judge failed to consider in assessing B.F.'s negligence. Under N.D.C.C. § 39-10-22, "the driver of the vehicle on the left shall yield the right of way to the vehicle on the right" if vehicles approach an intersection at about the same time and the intersection does not have a traffic control device. It was shown that the intersection of 36R Street and 154th Avenue does not have a traffic control device; that B.F. was the driver of the vehicle on the left; and that Radermacher had actually proceeded through much of the intersection before B.F. crashed into Radermacher's semi-truck near its rear wheels. (App. at 10-11.)

[¶42] The district court judge erroneously reasoned that "the failure to yield is another way of saying [B.F.] approached the intersection in an unsafe manner – it is not necessarily additional evidence of negligence." (App. at 22.) The error in this reasoning can be shown by changing one of the facts. For instance, if B.F. had been driving westbound and the semi-truck driver, accordingly, had the duty to yield, B.F. certainly would be less culpable. B.F.'s failure to comply with his duty to yield under N.D.C.C. § 39-10-22 was a proven attendant circumstance supporting the judicial referee's conclusion that B.F. was negligent.

[¶43] B.F.'s cramming of four persons into the front seat of his small pickup was an established fact which the district court judge failed to consider in assessing negligence. Under N.D.C.C. § 39-10-54(1), a person is prohibited from driving when there are more than three persons in the front seat and the person's view to the front or sides is obstructed as a result. The judicial referee properly found that B.F. drove his vehicle without sufficient seating and seat belts and recognized that B.F. was driving "a small Mazda pickup" and his passenger T.F. was seated on the laps of B.F.'s two other passengers. (App. at 8, 10.) The district court judge, however, did not appear to consider this fact when expressly indicating the two attendant circumstances she was using to assess negligence. B.F.'s driving with too many passengers crammed into his vehicle was contrary to his duty under N.D.C.C. § 39-10-54(1) and was a proven attendant circumstance supporting the judicial referee's conclusion that B.F. acted negligently.

[¶44] The district court judge failed to consider all of the established attendant circumstances in reviewing whether B.F. acted negligently. The district court judge misinterpreted the law in concluding that "negligent homicide cases are more properly limited to cases which fall far further outside the bounds of acceptable conduct, such as driving under the influence or driving far in excess of the speed limit." (App. at 22-23.) Our legislature did not limit the application of negligent homicide to such cases. Rather, the negligent homicide statute is broad and simply prohibits a person from negligently causing the death of another.

[¶45] A review of all the established attendant circumstances shows that B.F. drove his small pickup with four persons crammed into the front seat at faster than 69 mph on a minimum maintenance gravel road while approaching an obstructed intersection at which it was his duty to yield to northbound traffic, skidded 263 feet into the intersection, and crashed into a northbound semi-truck near its rear wheels, thereby killing R.B. Given the established facts, the judicial referee correctly concluded that B.F. committed the delinquent act of negligent homicide.

[¶46] CONCLUSION

[¶47] The State respectfully requests that the Court reverse the district court judge's order and reinstate the judicial referee's adjudication.

Respectfully submitted this 4th day of August, 2008.

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[¶48] CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document was sent by e-mail on 4th day of August, 2008, to: bquick@vogellaw.com and mfriese@vogellaw.com

Reid A. Brady