No. 04-92291-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS
Plaintiff-Appellee

v.

CRAIG HILL
Defendant-Appellant

# BRIEF OF APPELLEANT

APPEAL FROM THE DISTRICT COURT OF MIAMI COUNTY, KANSAS
HONORABLE RICHARD SMITH, DISTRICT JUDGE
DISTRICT COURT CASE NO 03-CR-100

## NATURE OF THE CASE

Defendant was charged with one count of Involuntary Manslaughter in violation of K.S.A. §21-3404 following an accident wherein the Defendant fell asleep while driving his tractor-trailer northbound on U.S. Highway 69. Toxicology tests confirmed that Defendant was not under the influence of alcohol or drugs of any kind at the time of the accident. Defendant had not remained awake for an extended period of time prior to the accident and had not driven in excess of the maximum allowable hours on the date of the accident. Further, as of the date of the accident, Defendant had not been previously diagnosed with any sleep-related disorder of any kind. Finally, Defendant had no prior traffic accidents or other occurrences that could reasonably be deemed sleep-related, such as to provide notice of a potentially dangerous condition. At trial, Defendant requested

and received a "lesser included" instruction on Vehicular Homicide in violation of K.S.A. §21-3405. Following two days of testimony and evidence, the jury convicted Defendant of the single count of Involuntary Manslaughter as charged. Defendant challenges the sufficiency of the evidence to support a conviction of the greater offense in the absence of any evidence demonstrating actual realization of the dangerous condition or conscious disregard of that danger.

## STATEMENT OF ISSUES TO BE DECIDED ON APPEAL

Did the State Present Sufficient Evidence of "Recklessness" to Support a Conviction for Involuntary Manslaughter in Violation of K.S.A. §21-3404?

## STATEMENT OF FACTS

1. On April 14, 2003, Defendant Craig Hill was traveling north on U.S. Highway 69 in Miami County, Kansas. (Vol. 5, p.155) During the course of his job duties with Miller Paving, a construction company based in the Kansas City Metro area, Hill had delivered construction implements to a work site in Pittsburg, Kansas and returned to the metro area via U.S. Highway 69 in the early afternoon hours of that day. (Vol. 5, p.155)

2. After passing the Drexel Exit at approximately 2:15 p.m., Hill noticed that northbound traffic had stopped ahead due to road construction. (Vol. 5, p.157) Hill immediately initiated aggressive braking maneuvers, and realized that he would be unable to stop within the distance between his vehicle and the vehicles ahead of him. (Vol. 5, p.155) Because there was a vehicle parked on the right shoulder of the road, Hill realized that he would not be able to utilize the shoulder to avoid a collision. (Vol. 5, p.155) He then swerved into the left lane, where he saw oncoming southbound traffic. (Vol. 5, p.155) While attempting to return to the north bound lane of traffic, Hill's tractor

trailer rotated and "jack-knifed," causing him to lose control of the vehicle. (Vol. 5, p.155) By the time Hill was able to stop his vehicle, the trailer had struck and killed Susan Unger, a member of the road construction crew. (Vol. 5, p.133) On May 29, 2003, the state filed a criminal complaint alleging a single count of Involuntary Manslaughter in violation of K.S.A. §21-3404(b). (Vol. 1, p. 4-5)

3. On September 11, 2003, the trial court conducted an evidentiary preliminary hearing in this matter. (Vol. 3 p.1) At the conclusion of said hearing, the trial court found sufficient probable cause to sustain the charge and arraigned the Defendant on the single count of Involuntary Manslaughter. (Vol. 3 p. 75-76) Anne Harver Smith testified that she had been following the defendant on U.S. Highway 69 during the minutes before the accident occurred. (Vol. 3 p. 5-6) Mrs. Smith testified both at preliminary hearing and at trial that she was traveling with her cruise control set at 60 miles per hour that day and at that speed she could clearly read the license tag on the Defendant's truck. (Vol. 3 p. 23, Vol. 5 p. 47) Smith testified at preliminary hearing and at trial that with her cruise control set at 60 miles per hour, she was able to maintain close proximity to the Defendant's truck and was only able to distance her vehicle from the truck by disengaging the cruise control. (Vol. 3 p. 23, Vol. 5 p. 47)

4. At preliminary hearing, Smith testified that the Defendant's truck "was veering from left to right, side to side" while she followed it. (Vol. 3 p. 6) At trial, she testified that the Defendant's truck "would veer off the road on the right-hand side … and every time it did, dust would fly up, so you were very aware it had gone off the road." (Vol. 5, p. 38) She stated that at the time the Defendant entered the highway, a "white panel-type van, sort of like a Sears van, immediately got off the road abruptly." (Vol. 3

p. 6) At trial, she testified that after the van pulled onto the highway in front of the Defendant, "dust flies up and there was this van that had pulled off the road. It had to be right in front of the 18-wheeler." (Vol. 5. p. 39) She further stated "…it was so abrupt you could tell there was no signal light that it gave…" (Vol. 5. p. 39) Although Smith speculated that the driver of the panel van pulled off of the highway because of the Defendant's driving, at trial she testified that she did not have a clear, unobstructed view of the van at the time it pulled off the highway, that she never actually spoke to the driver of the van and had no independent knowledge of why the driver of the van actually pulled off of the highway. (Vol. 5 p. 49-50)

5. At the preliminary hearing, Smith testified that at one point, the Defendant's truck "veered into the oncoming path… of a school bus… coming southbound on [U.S. Highway] 69…" and that the Defendant's truck then "veered back into its right, correct lane." (Vol. 3 p. 7-8) She stated "I could see the school bus coming towards us and the 18-wheeler almost hit the school bus." (Vol. 3 p. 8) However, at trial Smith testified that the school bus did not need to engage in any evasive maneuvers at all to avoid collision with the Defendant's truck and further testified that she did not believe the school bus "was aware of the danger that it was in" and that "it [the school bus] didn't see what we saw." (Vol. 5 p. 41) At trial, Smith again testified that she did not believe the school bus even saw the Defendant drift briefly over the lane divider and back into the correct lane of travel. (Vol. 5 p. 51) She further admitted that she did not have any opportunity to identify or speak with the driver of the school bus at any time. (Vol. 5 p. 51)

6. At the preliminary hearing, Mrs. Smith testified that she "didn't actually see the accident itself" and further stated "I admit that I didn't get a real good view of the actual accident." (Vol. 3 p. 8-9) However, at trial, Smith gave a vivid account of the accident, stating: "there was dust kicked up, you could literally – it seemed like in slow motion. There were vehicles that were going up in the air, and then this 18 wheeler turned, I didn't know it was called jack-knifing at the time, but now I do, that the trailer is going one direction and the cab is sort of backwards." (Vol. 5 p. 42) Upon arriving at the scene of the accident, Smith testified that the Defendant "was shaking his head and he was saying 'I just fell asleep, I just fell asleep'" and further testified of the Defendant that "he looked remorseful." (Vol. 3 p. 11) Smith also admitted to using foul language, calling the Defendant "a stupid son of a bitch" and feeling "ready to beat the crap out of him." (Vol. 3 p. 11)

7. At trial, Laura Lewis testified that she was traveling south on U.S. Highway 69 just north of the Drexel exit at the time of the accident. (Vol. 5 p.55) She testified that she had "just [driven] through a construction area" when she saw the Defendant's semi traveling northbound in her lane of traffic. (Vol. 5 p.55) She testified that she pulled onto the shoulder of the road and after coming to a complete stop, the accident had already occurred. (Vol. 5 p.56) Lewis got out of her car and approached the accident scene on foot. (Vol. 5 p.56) She eventually spoke with the Defendant and testified that he stated to her "I must have fallen asleep." (Vol. 5 p.56) Lewis testified that she then asked the Defendant "Why didn't you pull over?" to which he replied "I was going to at the Drexel exit, but I must have slept through it." (Vol. 5 p.58)

8. Ricky Smith was the driver of the pickup truck that was stopped at the construction site north of the Drexel exit. (Vol. 5 p. 64) Mr. Smith's vehicle was struck from behind at an angle by the Defendant's truck while the Defendant attempted to stop. (Vol. 5 p. 67) Although Mr. Smith's shoulder and neck were sore following the accident, he did not sustain any serious bodily injuries. (Vol. 5 p. 71) At trial, Mr. Smith testified that he had been parked for approximately 1 or 2 minutes at the construction site when he first noticed the Defendant's semi approaching in his rear-view mirror. (Vol. 5 p. 72) He further testified that approximately 35 seconds to a minute elapsed between the time he first observed the Defendant's truck in his rear-view mirror and the moment of impact. (Vol. 5 p. 72) Mr. Smith testified that he looked in his rear-view mirror on at least 3 occasions while the Defendant approached and at no time did he observe the Defendant in the left oncoming lane of traffic or in the right hand shoulder of the road. (Vol. 5 p. 72) He confirmed that on each occasion that he observed the Defendant's semi truck, it was traveling within its lane of traffic. (Vol. 5 p. 72-73) Smith testified that he knew the Defendant had "locked up" the brakes of his semi prior to impact and that the braking sound "was very loud." (Vol. 5 p. 66) Finally, Smith testified that after the accident, the Defendant "apologized" and "said he was sorry, he'd dozed off." (Vol. 5 p. 70) Smith stated that the Defendant appeared upset and remorseful for what had happened. (Vol. 5 p. 73)

9. Trooper Timothy D. Harding of the Kansas Highway Patrol arrived at the scene of the accident at approximately 4:00 in the afternoon. (Vol. 5 p. 84) Trooper Harding's primary responsibility was to videotape the scene of the accident as well as the area of the highway leading up to the point of impact. (Vol. 5 p. 81) Harding began

videotaping at approximately mile marker 109, 3 miles south of the accident scene which occurred at mile marker 112. (Vol. 5 p. 83-84) Harding's videotape documented that in the 3 miles immediately south of the accident scene as many as 5 warning signs were lying down on the ground in such a manner that they were not visible to northbound traffic. (Vol. 5 p. 84) Trooper Harding testified that he did not put the warning signs in that position and further did not know why they would not be properly displayed. (Vol. 5 p. 84)

10. Trooper Shane Hovey was also present at the accident scene as part of the investigation team. (Vol. 5 p. 86) Hovey testified that he had occasion to speak with the Defendant at the scene of the accident and that he collected blood samples from the Defendant for analysis in order to determine if drugs or alcohol contributed to the accident. (Vol. 5 p. 97) Hovey testified that the blood samples were negative for alcohol and drugs, indicating that the Defendant was not under the influence of any chemical substances at the time of the accident. (Vol. 5 p. 97) During the course of his investigation, Hovey also noted that 5 warning signs were lying face down on the ground in the 3 miles south of the accident scene. (Vol. 5 p. 99) The signs read: "Road Work;" "Do Not Pass;" "Be Prepared to Stop;" "Blasting Zone" and the final sign depicted the image of a flagman against a fluorescent orange background. (Vol. 5 p. 99-101) Hovey agreed that the signs were clearly intended to warn northbound drivers of the work zone and the flag person ahead and confirmed that all such signs were lying down on the ground when he arrived at the scene. (Vol. 5 p. 101)

11. Clint Edwards, an employee for the contractor that was responsible for the construction on U.S. Highway 69, testified at trial that he was working on the day of the

accident. (Vol. 5 p. 136) He testified that he was not at the scene at the time of the accident, but was in Louisburg. (Vol. 5 p. 136) He stated that he was notified of the accident by telephone. (Vol. 5 p. 136) Edwards stated that it was his employer's policy to raise the warning signs in the vicinity of the construction only immediately before blasting and then put the signs back down after each blast. (Vol. 5 p. 139-140) He testified that "if you leave the sign up… all day, the public is going to get to the point where they ignore them." (Vol. 5 p. 140) Edwards also testified that the only reason Susan Unger would have stopped traffic at the construction scene is if the crew was preparing to blast, in which case all of the signs should have been raised at the time of the accident. (Vol. 5 p. 142-143)

12. Lieutenant Brain E. Basore, an accident reconstruction expert with the Kansas Highway Patrol appeared at the accident scene to make a determination as to how the accident occurred. (Vol. 5 p. 124-126) Basore testified that his primary focus at the scene of the accident included "tire marks, skid marks, damage that was sustained to each vehicle…, paint transfer [and] impact damage from one car to another." (Vol. 5 p. 127) In investigating the accident scene, Lieutenant Basore identified and measured 362 feet of skid marks left by the Defendant's truck from the point where the tires initially locked to the point of impact. (Vol. 5 p. 130) Basore rendered no opinion at trial as to the estimated speed of the Defendant's truck at the time the Defendant initiated braking maneuvers 362 feet from the point of impact. (Vol. 5 p. 124-134)

13. At the close of the state's evidence, counsel for Defendant moved the trial court for a judgment of acquittal, arguing that the state had failed to present evidence sufficient to support the necessary elements of recklessness to support a conviction of

Involuntary Manslaughter in violation of K.S.A. §21-3404. (Vol. 5 p. 150) The prosecution then argued: "Judge, I think the state has provided sufficient evidence for this case to go to the jury on reckless involuntary manslaughter, *based upon the erratic driving of the defendant and the admission by him that he'd fallen asleep*." (Vol. 5 p. 150-151) (Emphasis Added) As set forth fully in the Arguments and Authorities section of Defendant's brief, Defendant submits that and the "erratic" driving occasioned by the mere act of falling asleep, *unaccompanied by any other aggravating circumstances* is insufficient to sustain a conviction Involuntary Manslaughter.

14. Defendant Craig Hill testified on his own behalf in the Defendant's case in chief. (Vol. 5 p. 153) Hill testified that on the date in question, the weather was clear and sunny and he drove to Pittsburg Kansas without incident. (Vol. 5 p. 155) He had not logged an excessive number of hours driving in the days before the accident and had not stayed up late in the evenings prior to April 14. (Vol. 5 p. 160) Hill testified that he delivered the implements to the construction site in Pittsburg between 11:30 and 12:00 noon and stated that he did not feel unusually tired that day. (Vol. 5 p. 156) Hill stopped along the way from Pittsburg back to Kansas City to eat. (Vol. 5 p. 156) After eating and resuming his trip, Hill testified that he recalled thinking that he would stop at the Drexel exit, but he had no recollection of driving past that exit. (Vol. 5 p. 156) The next thing Hill recalled was "seeing a black Ford pickup truck stopped" and further recalled "I remember thinking this is going to be close." (Vol. 5 p. 157)

15. In describing the events leading up to the collision, Hill stated: "I remember I was on the brakes, and had the Jake brake working, and I realized I wasn't going to be able to stop." (Vol. 5 p. 157) During his testimony, Hill explained his efforts

to avoid the collision as follows: "I looked to the right and saw a vehicle sitting there, so I went over to the left lane, saw two vehicles coming towards me, one, which was completely off on the shoulder, and one that hadn't got off on the shoulder, so I cut the wheel back to the right to avoid a head-on collision." (Vol. 5 p. 157) Hill specifically recalled that he had his cruise control set at 60 miles per hour, (Vol. 5 p. 157) which corroborates Ann Smith's testimony that at 60 miles per hour, she was able to follow closely enough to read the Defendant's license number. (Vol. 3 p. 23)

16. Defendant Hill testified that he had no recollection of swerving into the southbound lane of traffic or swerving into the shoulder of the road at any time before the evasive maneuvers that he engaged in immediately prior to impact. (Vol. 5 p. 158) Hill testified that he had no recollection of ever falling asleep or nodding off at the wheel prior to the accident. (Vol. 5 p. 158) Hill testified that prior to the subject accident of April 14, 2003, he had never had any episodes wherein he had fallen asleep at the wheel or caught himself dozing or nodding off at the wheel. (Vol. 5 p. 159, 175) He further testified that prior to the subject accident, he had never had any accidents, near misses or other incidents while driving that would give him any reason to believe that he may have any problem with drowsiness or inattention while driving. (Vol. 5 p. 160) Hill testified that the only reason he stated "I must have fallen asleep" repeatedly at the scene of the accident was <u>not</u> because he *knew* that was what had in fact happened, but because "It just seemed to be the only thing that would explain the void in time." (Vol. 5 p. 159)

17. Based on the Defendant's determination that falling asleep at the wheel "seemed to be the only thing that would explain the void in time," the Defendant consulted with his primary care physician after the accident to determine if he suffered

from any sleep related disorders. (Vol. 5 p. 161) Hill's primary care physician referred him to the Sleep Disorders Clinic at Research Medical Center in July, 2003, *more than 3 months after the accident occurred* to participate in an overnight sleep study. (Vol. 5 p. 191) This was the first time the Defendant had participated in an overnight sleep study or sought medical consultation of any kind related sleep disturbance. (Vol. 5 p. 164) Based on the results of the overnight sleep study, the Defendant was diagnosed with sleep apnea. (Vol. 5 p. 161)

18. Hill testified that following the sleep study and the resulting medical diagnosis, his doctors prescribed the use of a Constant Positive Airflow Pressure (C-PAP) device to alleviate his sleep apnea and Respiratory Effort Related Arousals. (Vol. 5 p. 165) When asked at trial if the C-PAP in fact helped reduce his feelings of daytime drowsiness, Hill stated "It's the difference between night and day." (Vol. 5 p. 165)

19. At the conclusion of the Defendant's direct testimony, he confirmed that he had no idea that he was falling asleep or *even at risk* of doing so on April 14, 2003 and further confirmed that he would not have driven had he known that he was placing other drivers at risk: (Vol. 5 p. 165)

> "Q: Mr. Hill, were you aware that you were falling asleep as you drove north on U.S. Highway 69… on April 14th of 2003?
>
> A: No.
>
> Q: Were you aware that you were at risk of falling asleep as you drove north on U.S. Highway 69 on April 14, 2003?
>
> A: Absolutely not.
>
> Q: Were you aware that you were putting other people at danger that day?
>
> A: No.

Q: Had you known, Mr. Hill that you were either falling asleep or even at risk of falling asleep, would you have continued to drive anyway?

A: Definitely not.

Q: Had you known that you were placing other people in danger that day, would you have continued to drive anyway?

A: No." (Vol. 5 p. 165-166)

20. During the Defendant's cross-examination, the prosecutor inquired about statements the Defendant had allegedly made in a Sleep Inventory questionnaire associated with his treatment at the Sleep Disorders Center. (Vol. 5 p. 178) The Sleep Inventory questionnaire was dated July 21, 2003, *more than 3 months <u>after</u> the subject accident herein*. (Vol. 5. p. 215) In that questionnaire, the Defendant had apparently reported "frequent awakenings… disturbed sleep… loud snoring… as well as a profound complaint of daytime sleepiness." (Vol. 5 p. 178-179) The Defendant testified that his wife had completed that form, stating: "This is my wife's report. My wife reported that I snore loudly and sleep restlessly." (Vol. 5 p. 179)

21. Dr. John Magee, Director of the Sleep Disorders Clinic at Research Medical Center testified at trial as to the Defendant's sleep disorder. (Vol. 5 p. 188) Dr. Magee testified that sleep apnea, sleep hypopnea, and Respiratory Effort Related Arousals are "disorders of breathing during sleep … that disturb [and] disrupt sleep." (Vol. 5 p. 190) Magee testified that the effect of said sleep disruptions is that "sleep does not serve its restorative value, and I'm making these statements on very well-established scientific fact and literature published in journals." (Vol. 5 p. 197) When asked if there was a connection between sleep fragmentation and daytime drowsiness, Dr. Magee replied: "Absolutely. Unequivocally, it cannot be argued. You will not find another

board certified sleep specialist who would argue." (Vol. 5 p. 199) Magee stated conclusively during his testimony that "When sleep is fragmented and disturbed, daytime sleepiness ensues." (Vol. 5 p. 197)

22. The results of the Defendant's sleep study indicated that the Defendant suffered from sleep apnea, having experienced an average of 16 Respiratory Effort Related Arousals every hour of sleep. (Vol. 5 p. 194) Dr. Magee noted in his records of Hill that "the patient does arouse or awaken briefly in response to virtually all respiratory disturbances resulting in sleep fragmentation." (Vol. 5 p. 196) At trial, Magee testified that "Sixteen events per hour is certainly sufficient to induce complaints of daytime sleepiness." (Vol. 5 p. 194) Magee further testified that in most cases, individuals experiencing a high number of said sleep disruptions and arousals were completely unaware of the condition because "they [are] not awake a long enough … period of time to consolidate or to store the memory for retrieval during wakefulness the following day." (Vol. 5 p. 200) In support of this statement, Magee noted that following the overnight sleep study, Hill indicated that he recalled waking up only "Two or three times" though he in fact experienced, on average, 16 such arousals every hour. (Vol. 5 p. 201) When asked if he believed it was possible that the Defendant would have no idea he suffered from this sleep disorder at the time of the accident in April 2003, Dr. Magee stated: "Yes, it is, and, in fact, unfortunately, a number of patients that I've seen present at the Sleep Disorder Center, only after something's happened … had a near miss accident, or fell asleep at an inappropriate time…" (Vol. 5 p. 201-202)

23. During Dr. Magee's cross-examination, the prosecutor continued his inquiry about the Sleep Inventory questionnaire associated with the Defendant's

treatment at the Sleep Disorders Center. (Vol. 5 p. 211) This was the same questionnaire that the Defendant had previously testified that *his wife had filled out in July of 2003,* prior to participating in the sleep study. (Vol. 5 p. 179) Dr. Magee testified that he does not review the questionnaires until after the overnight sleep study and does so only to confirm what the sleep study indicates. (Vol. 5 p. 208) Magee Confirmed that the sleep questionnaire would only indicate subjective symptoms apparent *at the time the form was completed* and further confirmed that the Defendant's form was not completed until July 21, 2003, more than 3 months after the subject accident. (Vol. 5 p. 215) Magee testified that patients with sleep disorders and increased levels of daytime drowsiness are frequently unaware of the extent of their symptoms because a subjective assessment is "an internal thing" and a patient only has his or her own experience to consider, with no opportunity to compare to the subjective experiences of others. (Vol. 5 p. 202) Dr. Magee concluded his re-direct testimony by stating unequivocally that, based on the overnight sleep study, the Defendant demonstrated "significant sleep disruption associated with respiratory disturbances to induce daytime sleepiness." (Vol. 5 p. 219)

**STANDARD OF REVIEW**

24. "When the sufficiency of the evidence is challenged in a criminal case, the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational fact finder could have found the defendant guilty beyond a reasonable doubt." *State v. Jamison*, 269 Kan. 564, 571, 7 P.3d 1204 (2000), *State v. Jenkins*, 272 Kan. 1366, 39 P.3d 47 (2002).

## ARGUMENTS AND AUTHORITIES

I. Defendant's Conduct Was Not Reckless

25. In the subject case, the State of Kansas charged the Defendant with a single count of Involuntary Manslaughter in violation of K.S.A. §21-3404. Specifically, the State alleged that the unintentional killing at issue occurred during the commission of Reckless Driving in violation of K.S.A. §8-1566. Pursuant to statute, Reckless Driving is defined as driving "any vehicle in *willful or wanton disregard* for the safety of persons or property." (Emphasis Added) In defining the term "Reckless," P.I.K. 70.04 states as follows: "Reckless means driving a vehicle under circumstances that show a *realization of the imminence of danger* to another person or the property of another where there is a *conscious and unjustifiable disregard* of that danger." (Emphasis Added)

26. In reviewing the evidence presented at trial in the light most favorable to the prosecution, said evidence was clearly insufficient to establish beyond a reasonable doubt that Defendant *realized the imminence of danger* or that Defendant *consciously and unjustifiably disregarded* that danger. The evidence presented at trial established conclusively that the Defendant was not under the influence of drugs or alcohol at the time of the accident. The prosecution presented no evidence that Defendant was traveling at an excessive rate of speed at the time of the accident. Further, the prosecution presented no evidence that Defendant had knowingly or deliberately remained awake for extended periods of time in the days preceding the accident *or* that he had driven an excessive number of hours on the day of the accident. The prosecution presented no evidence whatsoever of previous traffic accidents, citations, or infractions of any kind that could have reasonably been attributed to excessive daytime drowsiness.

Finally, the prosecution presented no evidence that the Defendant had been diagnosed with any sleep disorder of any kind *prior to* the subject accident such as to provide notice of a potentially dangerous condition. The prosecution's case was essentially devoid of any evidence whatsoever to establish beyond a reasonable doubt *realization of the imminence of danger* or *conscious and unjustifiable disregard* of that danger.

II. Kansas Criminal Auto Fatality Law; Ordinary Negligence is Insufficient to Support Criminal Liability.

27. It is well accepted that when an unintentional killing is the result of the operation of a motor vehicle, Vehicular Homicide in violation of K.S.A. §21-3405 is deemed to be a lesser included offense of Involuntary Manslaughter in violation of K.S.A. §21-3404. K.S.A. §21-3405 defines Vehicular Homicide as "the unintentional killing of a human being committed by the operation of an automobile … in a manner which creates an unreasonable risk of injury to the person or property of another and constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances." Thus, where an unintentional death results from the operation of an automobile *and there is no evidence of drug or alcohol influence*, the question of whether the Defendant is guilty of Involuntary Manslaughter, Vehicular Homicide, or guilty of no criminal offense whatsoever is a question of both the relative degree of the dangerous conduct at issue as well as the Defendant's *knowledge and awareness* of the risk that said conduct creates. At issue in the case at bar is P.I.K. 68.09 which instructs jurors that "When there is reasonable doubt as to which of two or more offenses defendant is guilty, he may be convicted of the lesser offense only." Thus, in the absence of any evidence proving either *realization of the imminence of danger* or

*conscious and unjustifiable disregard* of that danger by the Defendant, the jury could have properly convicted the Defendant of Misdemeanor Vehicular Homicide only.

28. The Kansas Supreme Court directly addressed this issue in the case *State v. Makin*, 223 Kan. 743 (1978). There, the Defendant was convicted of Involuntary Manslaughter following an auto fatality that occurred while driving under the influence of alcohol. Defendant appealed his conviction, contending that the general statute relating to Involuntary Manslaughter, K.S.A. §21-3404, was superseded by the more specific statute on Vehicular Homicide, K.S.A. §21-3405. Affirming Defendant's conviction, the court held that the legislature did not intend to reduce the penalty from a felony to a misdemeanor for a homicide caused by *wanton* or *reckless* conduct of defendant. The court concluded that an unintentional death arising from the operation of a motor vehicle, *which resulted from wanton conduct or gross negligence,* was included within the confines of involuntary manslaughter under §21-3404. The distinguishing factor in *Makin* was the Court's finding that there was sufficient evidence of wanton conduct to support the conviction of involuntary manslaughter based on defendant's knowing operation while under the influence of alcohol, a factor wholly absent in the case at bar.

29. Although decided *before* the legislature enacted K.S.A. §21-3442, which specifically addresses the issue of auto fatality occurring while under the influence of alcohol or drugs, *Makin* provides a thorough analysis of the history of Kansas criminal auto fatality legislation. In its analysis, the Court initially acknowledged that prior to the enactment of K.S.A. §21-3404 and §21-3405, Kansas had a "negligent homicide" statute, G.S. 1949, 8-529, which provided in part:

> "(*a*) When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle in negligent disregard of the safety of others, the person so operating such vehicle shall be guilty of negligent homicide."

Cases under the former statute interpreted it to apply to ***ordinary*** negligence on the part of the driver of the vehicle which proximately resulted in the death of another. (See: *State v. Miles,* 203 Kan. 707, 457 P.2d 166*;* and *State v. Champ*, 172 Kan. 737, 242 P.2d 1070.)

30. In 1969 the legislature repealed the negligent homicide statute and replaced it with K.S.A. §21-3405, Vehicular Homicide which provided in pertinent part:

> "(1) Vehicular homicide is the killing of a human being by the operation of an automobile … in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes a substantial deviation from the standard of care which a reasonable person would observe under the same circumstances."

In 1972 the legislature amended the foregoing language by substituting the word "*material*" for "*substantial*" in describing the type or degree of deviation from the standard of care necessary to establish criminal guilt. In its analysis, the *Makin* Court observed that in *State v. Gordon*, 219 Kan. 643, 549 P.2d 886, (1976), the Court had previously determined that the 1972 amendment was, in essence, *no change at all*, stating: "We think the Legislature meant something more than simple negligence when it defined the standard of conduct condemned under the vehicular homicide statute." *Gordon,* 219 Kan. at 654.

31. As previously set forth, the distinction between Vehicular Homicide and Involuntary Manslaughter is not limited to the relative degree of negligence at issue, but also involves determining the defendant's *awareness* of the risk of harm that the

negligent conduct creates. The degree of awareness necessary to support a conviction of the greater offense is "wantonness" as codified in K.S.A. 21-3201(3) which states: "Wanton conduct is conduct done under circumstances that show a *realization of the imminence of danger* to the person of another and a *reckless disregard or complete indifference and unconcern* for the probable consequences of such conduct." Said definition mirrors that language of P.I.K. 70.04 which provides that "Reckless means driving a vehicle under circumstances that show a *realization of the imminence of danger* to another person or the property of another where there is a *conscious and unjustifiable disregard* of that danger." (Emphasis Added)

32. In its analysis of the distinction between "*something more than simple negligence*" and "*wantonness*" the *Makin* Court acknowledged that "Precise statements of what constitutes wanton or gross negligence are impossible. If the absence of negligence is white and gross negligence is black, then innumerable shadings of grey lie between. Using this analogy *the legislature obviously seeks to exclude the pale grey areas from criminal responsibility*." 223 Kan. at 746.

33. The *Makin* Court further emphasized that in analyzing auto fatality cases, the totality of the circumstances must be considered, as identical conduct under different circumstances may result in no criminal responsibility, vehicular homicide, or involuntary manslaughter. The Court stated:

> "For example, let us assume that a person is operating his vehicle at 60 miles per hour on dry pavements on a sunny day with little traffic at 4:00 on a Tuesday afternoon and he strikes and kills a pedestrian crossing the road. This same set of facts could be (a) no responsibility if it occurred in a remote, sparsely populated area; (b) vehicular homicide if it occurred in a residential area; and (c) involuntary manslaughter in a posted school zone. Even within these classes

additional facts would have to be supplied before a definitive statement could be made." *Id.*

34. The recent case *State of Kansas v. Krovvidi*, 274 Kan. 1059 (2002) provides additional analysis of Kansas criminal auto fatality statutes. There, Defendant Bala Subrahmanyan Krovvidi appealed his sentence and conviction for vehicular homicide. Following a bench trial, the trial court found that Krovvidi had run a red light causing the accident which resulted in the death of Daniel Hawthorne. The State presented evidence that the defendant had entered the intersection moments before the light controlling traffic traveling in his direction had actually changed from red to green. Further, the evidence presented at trial established that the decedent had entered the intersection after the traffic light controlling traffic traveling in his direction had already turned yellow.

35. The trial court concluded that "had the vehicle driven by Mr. Krovvidi not entered the intersection at the time that the vehicle did enter the intersection under a red light, that at the speed the vehicle driven by Mr. Hawthorne was proceeding, that vehicle would have cleared the … southernmost westbound lane of 103rd Street such that the accident would not have occurred." 274 Kan. at 1065. This conclusion supported the Trial Court's decision that the State had sustained its burden of proof to demonstrate, beyond a reasonable doubt, that each of the elements of the crime of vehicular homicide had been met and found Krovvidi guilty of one count of misdemeanor vehicular homicide. The trial court essentially ruled that the running of the red light, *with no additional indication of other recklessness or impairment*, satisfied the necessary element

of a "material deviation" from the standard of care required for a conviction of vehicular homicide under K.S.A. §21-3405.

36. On appeal, Krovvidi contended that the evidence presented at trial was insufficient to support the finding that the mere running of a red traffic light, *unaccompanied by any other aggravating factors*, constitutes the "material deviation" required by K.S.A. §21-3405. The Kansas Court of Appeals reversed the conviction and remanded with instructions to vacate the sentence. In determining that said conduct did not constitute a "material deviation" as contemplated by statute, the *Krovvidi* Court observed as did the Court in *Makin* that the legislature repealed the negligent homicide statute (G.S. 1949, 8-529) and replaced it with K.S.A. §21-3405, which requires something more than simple or ordinary negligence in order to support a criminal conviction.

37. The Krovvidi Court cited the case *State v. Gordon*, 219 Kan. 643, 653-654, (1976), wherein the State claimed it only had to prove simple negligence to convict a defendant of vehicular homicide. Noting the legislative history of the Kansas vehicular homicide statute, the *Gordon* court disagreed, stating: "We think the Legislature meant something more than simple negligence when it defined the standard of conduct condemned under the vehicular homicide statute… We conclude that the degree of negligence contemplated by the Legislature in K.S.A. §21-3405 is something more than simple negligence." 219 Kan. at 654.

38. The Krovvidi Court also cited *State v. Randol*, 226 Kan. 347, 349-50 (1979) wherein the Supreme Court reviewed *Gordon*, K.S.A. §21-3405 and the predecessor statute K.S.A. §8-529. The *Randol* Court stated: "Even though 'negligence'

is not expressly mentioned in 21-3405, we have held that it is still the gravamen of the offense. *State v. Choens,* 224 Kan. 402, 580 P.2d 1298 (1978); *State v. Makin,* 223 Kan. 743, 576 P.2d 666 (1978)." *Randol,* 226 Kan. at 350-51. The foregoing analysis and rationale in *Krovvidi* clearly reinforces the assertion set forth in *Makin*, infra, that "*the legislature obviously seeks to exclude the pale grey areas from criminal responsibility*."

39. Thus, at issue in the case at bar is whether the mere act of falling asleep while driving, *unaccompanied by any additional aggravating factors*: (1) falls within the 'pale grey' area that the legislature intended to exclude from criminal liability; (2) constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances; or (3) constitutes a conscious and unjustifiable disregard of a realization of the imminence of danger to another person. Here, the Defendant was not under the influence of drugs or alcohol of any kind, had not deliberately remained awake for an extensive time period before the accident, had not driven an excessive number of hours on the day of the accident, had no previous driving incidents of any kind that would reasonably provide notice of a potentially dangerous physical condition and had no previous medical diagnosis of any sleep related complications. Based on the rationale of the foregoing cases, the facts of the case at bar represent perhaps the *palest* shade of grey and clearly should be excluded from felonious liability, if not excluded from criminal liability entirely.

III. Medical Condition as Cause or Contributing Factor to Accident

40. A valid defense in criminal auto fatality cases wherein the accident occurs while the driver is unconscious from the effects of illness or physical defect is that, at the time of the collision, the driver's unconscious state renders it impossible for said driver to

form the requisite mental capacity to support criminal liability. Cases wherein said defense is deemed *inapplicable* involve situations where the driver deliberately undertakes the driving task with knowledge of the existing medical condition and the dangerous circumstances that said condition creates. See: 63 ALR 2d, §2, *Illness or Physical Defect*. The pivotal determining factor of liability in such cases involving debilitating medical conditions is whether or not the driver knows or has reason to know of the dangerous condition at the time of the decision to drive. *Id*. Based on the undisputed evidence presented at trial related to the Defendant's diagnosis of sleep apnea and the effect that medical condition has upon his degree of daytime drowsiness, this case should be reviewed as a case involving a medical condition as cause or contributing factor of the accident herein.

41. The recent case *State v. Jenkins*, 272 Kan. 1366, 39 P.3d 47 (2002), squarely addresses the issue of a medical condition as a contributing factor in a criminal auto fatality case. In *Jenkin*s, the defendant was convicted by a Sedgwick County jury of two counts of involuntary manslaughter in violation of K.S.A. §21-3404 following a traffic collision that occurred while defendant was experiencing an epileptic seizure. Defendant appealed, challenging the sufficiency of the evidence, as he claimed it did not show "recklessness." Specifically, the defendant asserted that it was physically impossible for him to have *consciously* realized the imminence of danger during the epileptic episode nor could he have *consciously* disregarded that realization.

42. The Court of Appeals affirmed the convictions, finding that the evidence showed defendant's history of *seven past accidents* caused by his susceptibility to seizures. This provided sufficient evidence for the jury to find that he *knew* of the

imminent danger he created for other motorists *before* driving on the occasion in question and that he consciously disregarded that danger. As for the defendant's argument that he lacked the necessary mental capacity, the State proved recklessness through his prior collisions, his decision to drive despite being warned by doctors not to, and his failure to report seizures to his doctor and the Kansas Department of Revenue. All of these facts showed *prior knowledge* of his impaired condition and thereby *prior knowledge* of the danger his decision to drive posed to other motorists. The State had the burden of proving defendant's knowledge, and it met this burden by showing other, prior collisions, which defendant admitted were caused by seizures. Thus, the Court believed that the defendant exercised the necessary mental capacity before the epileptic episode at issue inarguably occluded his awareness.

43. In affirming the convictions, the Jenkins Court stated: "*Had the seizure been Jenkins' first, he would not have had any criminal liability because he would not have had any reason to believe he was putting other motorists in danger by driving*. Here, the jury understandably found that Jenkins knew of the imminent danger before driving and consciously disregarded it. The seizure was not a surprise to Jenkins." 272 Kan. at 1375. (Emphasis Added) In analyzing the issue of the defendant's knowledge of the dangerous situation and the effect that said knowledge had on his ultimate criminal responsibility, the *Jenkins* Court considered analogous cases from other jurisdictions. Specifically, the *Jenkins* court cited *Commonwealth. v. Cheatham*, 615 A.2d 802 (Pa. Super. 1992), wherein the Pennsylvania Superior Court had summarized the issue as follows:

> "An epileptic seizure while driving and an ensuing fatal accident is an example law school textbooks use to distinguish cases in which there is no

> criminal culpability from those in which there is criminal responsibility. See S. Kaddish and S. Schulhofer, *Criminal Law and its Processes,* p. 195 (Little, Brown and Co. 1989). The case most often cited is *People v. Decina,* 138 N.E.2d 799, 2 N.Y.2d 133, 157 N.Y.S.2d 558, (1956). In that case, [defendant] killed four children when he lost control of his car during an epileptic seizure. The question before the court was whether the evidence was sufficient to indict. [Defendant] argued the state had no evidence of the *mens rea* required to indict for involuntary manslaughter. The New York court held that, assuming the truth of the indictment as it must on demurrer, [defendant] knew he was subject to epileptic seizures. That knowledge and the choice to drive, the court said, amounted to culpable negligence. The court distinguished [defendant's] behavior from that of a person for whom the seizure was unexpected. *An unexpected attack, the court reasoned, is altogether different, suggesting a lack of criminal culpability*." *Malcolm v. Patrick,* 147 So. 2d 188, *cert. denied* 148 So. 2d 278 (Fla. App. Div. 1962) (tort liability depends on foreknowledge of epilepsy). (emphasis added) 272 Kan. at 1377-1378.

The *Cheatam* court further stated:

> "The defining difference between the epileptic who drives with the knowledge that he or she is seizure prone and the unsuspecting epileptic who drives is choice. One chooses to take the risk; *the other does not know he is taking the risk*. The Pennsylvania Supreme Court defined criminal culpability in terms of choice in *Commonwealth v. Hicks,* 502 Pa. 344, 466 A.2d 613 (1983), as pertaining to drivers who know or should know that death is a probable consequence of their violations of the Motor Vehicle Code and who 'should reasonably anticipate that their conduct is likely to produce death.'" 272 Kan. at 1378. (Emphasis added)

44. By contrast to the defendant in *Jenkins*, supra, the Defendant in the case at bar had no such knowledge or awareness of the dangerous condition at issue before he made the decision to drive on the date in question. Only after the accident did the Defendant seek medical assessment and diagnosis. Only after the accident did the Defendant discover that he suffered from chronic sleep apnea. Only after the accident did the Defendant learn that his chronic sleep apnea dramatically increased his propensity for daytime drowsiness. Because the Defendant had no prior auto accidents, citations or other occurrences that could reasonably be attributed to excessive daytime drowsiness,

the event at issue was Defendant's first such episode. Thus, the rationale set forth in *Jenkins,* is specifically analogous to the case at bar. The Jenkins Court clearly and unequivocally stated: "*Had the seizure been Jenkins' first, he would not have had any criminal liability because he would not have had any reason to believe he was putting other motorists in danger by driving*." In the case at bar, the accident at issue was the result of the first such event for the Defendant. Thus, based on the rationale of *Jenkins,* the Defendant *cannot have any criminal liability because he did not have any reason to believe he was putting other motorists in danger by driving.*

IV. Drowsiness as Cause or Contributing Factor to Accident

45. Though Defendant's pre-existing and previously undiagnosed medical condition effectively reduced his ability to realize the imminence of danger, cases addressing non-medical conditions of daytime drowsiness provide further support for reversal of the criminal conviction herein. Notwithstanding the general rule that one is not criminally liable for actions occurring during a state of unconsciousness or sleep, a driver who is involved in an auto fatality resulting from drowsiness or falling asleep is not necessarily absolved of criminal liability. See: 63 ALR 2d, §3, *Drowsiness or Falling Asleep*. Analogous to the rationale for imposing criminal liability in cases of illness or medical condition, the basis of criminal liability for falling asleep at the wheel is the negligence of the driver, *not in his conduct while asleep,* but in his decision to drive while sleepy. *Id.* As summarized in the case *State v. Olsen,* 160 P.2d 427, 108 Utah 37 (1945), "While one is not liable for what he does during the unconsciousness of sleep, one is responsible for allowing himself to go to sleep."

46. Similarly, though not deemed to be an absolute defense to criminal liability, the mere act of falling asleep itself will not necessarily support a conviction of an offense requiring more than simple negligence. See: 63 ALR 2d, §3[b] *Sleep as Prima Facie Negligence*. In the case *State v. Mundy*, 90 SE 2d 312, 243 NC 149 (1955), the Court held that the mere fact that the operator of a motor vehicle involuntarily falls asleep while driving, absent any other aggravating factors, does not constitute culpable negligence. In determining the issue of culpable negligence, the focus of the inquiry was determined to be whether, based on previous strenuous activities, lack of sleep, pronounced drowsiness or other premonitory symptoms of sleep, the driver *became aware* of the likelihood of falling asleep and knowingly, deliberately disregarded that awareness.

47. Few reported Kansas criminal cases directly address the issue of auto fatality resulting exclusively from falling asleep while driving, *unaccompanied by any additional aggravating factors*, such as deliberately and knowingly remaining awake for an extended period before driving or alcohol consumption (hence, the adoption of K.S.A. §21-3442, which specifically addresses the issue of auto fatality resulting from operation of a vehicle while under the influence of alcohol or drugs). In such cases, it is the additional aggravating factors and *not the conduct while asleep or sleepy* that support criminal liability.

48. A clear example is found in the case *State v. Patrick*, 799 P.2d 1052 (Kan. App. 1990). Though not designated for publication, said opinion does "have persuasive value with respect to a material issue not addressed in a published opinion of a Kansas Appellate Court and [will] assist the Court in its disposition" of the case at bar as

contemplated by Rule 7.04(f)(2)(ii). A copy of said opinion is attached hereto in compliance with Rule 7.04(f)(2)(iii). In *State v. Patrick*, defendant Milton Patrick was driving a motor home on 1-70 near the eastern terminal toll booth in Bonner Springs, Kansas when the motor home struck the crash attenuator in front of the toll booth, became airborne, and landed on a station wagon which had been sitting at the toll booth. The driver of the station wagon and her two small children were killed in the crash and ensuing fire.

49. Patrick had driven the motor home to Kansas City from Oakland, California, on August 8, 1988, to attend a convention. Some time between 12:30 and 1:00 a.m. on August 13, 1988, the defendant and his passenger visited 2 nightclubs where they stayed until approximately 3:00 a.m. The defendant was seen drinking beer while at one of the nightclubs. Some time around 3:30 a.m. on August 13, the defendant and his passenger returned to the hotel area where the passenger collected his belongings. The two left the hotel area, with Patrick driving, around 5:00 a.m. The defendant indicated to his passenger that he felt rested and well enough to drive, that he would drive until he got tired, and that he felt he could drive for two or three hours. The passenger testified that the defendant asked him to remain awake in case the defendant wanted to take a nap himself. The passenger further testified that he fell asleep soon after the two left the hotel area, that he was awakened when the defendant swerved to miss a barrel on 1-70, and that he fell asleep again and did not awaken until the crash.

50. Immediately after the crash, the defendant and his passenger escaped from the motor home. A toll collector testified that immediately after the accident, the defendant was staggering and grabbing the barriers on the toll booth for support, had

slurred speech, and smelled of alcohol. Trooper Larry Foster investigated the accident at the scene and testified that the defendant swayed as he walked, smelled of alcohol, and that his eyes were bloodshot and glassy. The defendant performed several field sobriety tests, and Foster testified that he believed the defendant was under the influence of alcohol. The defendant refused to take a breath alcohol test. Ten unopened cans of beer were found in the motor home.

51. The case was tried to a jury and the jury was instructed and given verdict forms which allowed it to find the defendant guilty of aggravated vehicular homicide, guilty of vehicular homicide, or not guilty of any crime in each of three counts arising from the deaths of Ann Carnes and her two children. The jurors were also instructed to find the defendant guilty or not guilty of operating a vehicle while under the influence of alcohol. The jury found the defendant guilty of three counts of vehicular homicide and not guilty of operating a vehicle under the influence of alcohol.

52. On appeal, the defendant challenged the sufficiency of the evidence to support a criminal conviction, as the jury had specifically found the defendant not guilty of Driving Under the Influence, the apparent aggravating factor in the case. Specifically the defendant argued that the evidence taken as a whole could not lead a rational finder of fact to the conclusion that he had materially deviated from the standard of ordinary care. The defendant contended that the evidence at trial established only that he fell asleep without warning under circumstances where he subjectively felt he was capable of safely operating his vehicle.

53. However, this Court disagreed, holding that:

> "A rational finder of fact could have reached the conclusion that Patrick's actions were a material deviation from ordinary care on the strength of the following evidence: Patrick had been drinking in two nightclubs several hours prior to driving the motor home, the toll collector and the Kansas Highway Patrolman reported an odor of alcohol around Patrick, Patrick performed poorly on the field sobriety tests, … refused to take a breath test, … decided to drive his vehicle after having been up all night with only slightly more than an hour of sleep, Patrick knew that he was tired … and the toll booth at which the crash occurred is well lit and announced by numerous signs along the way. We therefore conclude there was sufficient evidence for a rational finder of fact to decide beyond a reasonable doubt that Patrick had materially deviated from the standard of ordinary care." (Emphasis Added) *Patrick*, supra at 13.

54. In stark contrast to the facts present in *Patrick*, no such aggravating factors are apparent in the case at bar. Here, the Defendant had *not been drinking* in the hours or even days before the subject accident. He was *not taking any medications* that contributed to his daytime drowsiness. He had *not remained awake the night before* the subject accident. He *did not realize that he was too tired to drive* and he subjectively felt capable of safely operating his vehicle. He deliberately pulled over within an hour of the accident for lunch and got out of the vehicle to walk and have a soft drink before resuming his drive. Here, the evidence presented at trial established only that the Defendant fell asleep without warning under circumstances where he subjectively felt he was capable of safely operating his vehicle. Such conduct, *unaccompanied by any aggravating circumstances*, simply cannot support a criminal conviction.

## V. Precedent and Perspectives from Other Jurisdictions

55. Additional support for Defendant's position is found in criminal cases from other jurisdictions. Specifically, Ohio law differentiates vehicular homicide from *aggravated* vehicular homicide in a manner consistent with that of Kansas. Therefore,

criminal auto fatality cases from that jurisdiction require similar analysis and provide support for Defendants position herein. An analogous case is *State of Ohio v. Robert L. Harris*, No. 72767, 707 N.E.2d 515, (Ohio App. 1998), Lexis 4874. Though not designated for publication, said opinion does "have persuasive value with respect to a material issue not addressed in a published opinion of a Kansas Appellate Court and [will] assist the Court in its disposition" of the case at bar as contemplated by Rule 7.04(f)(2)(ii). A copy of said opinion is attached hereto in compliance with Rule 7.04(f)(2)(iii). In *State v.* Harris, defendant Robert L. Harris appealed from a jury verdict finding him guilty of felony aggravated vehicular homicide in connection with a motor vehicle accident which occurred when Harris fell asleep while operating his 1989 Ford Escort and struck a tree, resulting in the death of one of his passengers.

56. Harris, then 18 years of age, picked up several friends and drove to one of his friend's apartment where they played cards and drank beer and wine until midnight. At trial, the defendant testified that during this time, he drank about 1 1/2 glasses of beer and some wine. Around 1:00 A.M., the group left with the defendant driving his friends to their respective homes. The defendant fell asleep at the wheel and the car then crossed left-of-center, struck a tree and burst into flames killing one of the passengers. The defendant and one passenger were able to escape from the burning car, and ambulances took them to a nearby hospital. The hospital conducted a blood alcohol test along with its routine blood chemistry analysis which revealed the defendant's level to be .079 per-cent. Thereafter, following police investigation, the grand jury indicted Harris on one count of aggravated vehicular homicide which contained a DUI specification.

57. The court tried the case before a jury where the evidence revealed that after they arrived at the friend's apartment, the defendant and the others began to drink and play cards, but no drinking had occurred earlier. Further, the evidence indicated that the defendant appeared sober when he left the apartment to drive everyone home. The Deputy Coroner testified that because the hospital conducted the BAC test on Harris' blood serum instead of his whole blood, he actually had a BAC of only .06, not .079 as previously reported. The defendant testified in his defense and admitted that he consumed 1 1/2 glasses of beer and a 1/2 glass of wine, that he felt "buzzed" but not drunk, that he felt sleepy just before he drove down Lee Road, and that he fell asleep at the wheel of the car. Following final argument, the court charged the jury on aggravated vehicular homicide and the lesser included offense of vehicular homicide. After its deliberation, the jury returned a verdict finding Harris guilty of aggravated vehicular homicide. On appeal, the defendant alleged, among other errors, that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

58. In its analysis, the Ohio Court of Appeals initially set forth the distinction between *aggravated* vehicular homicide, which requires a finding of reckless operation of a motor vehicle, and simple vehicular homicide, which only requires a finding of negligent operation. Though the defining text of the terms "reckless" and "negligent" differs from that of comparable Kansas law, the essence is consistent. *R.C. 2901.22(C)* defines the culpable mental state of "recklessly" in the following manner:

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." *Harris*, supra, p. 9

*R.C. 2901.22(D)* defines the culpable mental state of negligently as follows:

> "A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist." *Harris*, supra, p. 9-10

59. In assessing the facts of the case, the Ohio Court of Appeals stated: "The record before us reflects … that [Harris] appeared to be sober when he left Reva Duke's apartment, that according to Dr. Seligman's testimony he had a BAC of .06, that he took over an hour to drive to W. 14th Street and back to Lee Road, and that he fell asleep at the wheel resulting in the accident and Bazley's death. Notable is that a BAC level of .06 does not rise to the level of intoxication as defined by *R.C. 4511.19*, and further apparent is the fact that Harris had driven Treadwell to his W. 14th Street home and returned to East Cleveland without incident." *Harris*, supra, p. 11-12

60. Based on that analysis of the operative facts leading up to the accident, the Court vacated the defendant's conviction of aggravated vehicular homicide, entered a judgment of conviction for vehicular homicide and remanded the matter to the trial court for re-sentencing on the lesser conviction. The Court held: "Considering that the appellant had little sleep in the previous twenty-four hour period, that he had been drinking earlier in the evening but appeared sober when he left to drive everyone home, and had driven to W. 14th Street and back to Lee Road before becoming involved in this tragic accident, and that he fell asleep while driving with a BAC of .06, and, after weighing this evidence and all reasonable inferences and considering the credibility of the witnesses, we conclude that *the jury lost its way in resolving conflicts in this evidence*

*and created a miscarriage of justice which requires us to reverse Harris' conviction.* We conclude the evidence demonstrates that Harris acted negligently on the morning of October 15, 1996, not recklessly." (Emphasis Added) *Harris*, supra, p. 12

61. By contrast and to the Defendant's credit herein, the Defendant had not 'had little sleep in the previous twenty-four hour period,' had not 'been drinking earlier' before the accident, and had not fallen asleep while driving with a BAC of .06. As the *Harris* court determined that the foregoing factors were insufficient to convict of the greater felony charge in that case, and could only support a conviction of the lesser misdemeanor charge, the significantly mitigated facts of the case at bar clearly cannot support a felony conviction. It is apparent that in the case at bar, just as in *Harris*, the jury lost its way in resolving the issues at trial and created a miscarriage of justice which requires reversal of Defendant Hill's conviction.

62. Similarly, in *State of Iowa v. Michael Allen Cox*, 500 N.W.2d 23 (1993), the defendant was charged with felony vehicular manslaughter after failing to stop at a controlled intersection, resulting in an auto fatality. In Iowa, the term "Vehicular Homicide" refers to a class "C" felony as opposed to Kansas' assignment of the same term to denote a misdemeanor offense. Following the collision, Cox was taken to the Hospital, treated and released. While at the hospital he was interviewed by two members of the Iowa highway patrol. Cox was asked to provide a breath sample although the troopers found no evidence at the accident scene to suggest he had consumed any alcohol. The test was administered in the hospital and it showed no alcohol in his system.

63. At trial, Cox testified that he got up at approximately 6:30 a.m. and had completed his farm chores. He then went to retrieve a farming implement that he had left

at another farm in the area. He had traveled the road at issue several times, was somewhat familiar with the intersection, and knew that he was required to stop at the intersection. He stopped for gas approximately four miles from the accident site and picked up a can of pop and a candy bar. He was traveling forty-five to fifty miles per hour as he approached the intersection from the west. He testified that he had apparently "dozed off" as he approached the intersection. When he awoke, he saw the stop sign and approaching vehicle and immediately slammed on his brakes. The jury convicted Cox of the felony offense.

64. Following jury trial, Cox appealed his conviction for felony homicide asserting that the evidence was insufficient to support the requisite finding of recklessness to support the felony conviction. Although the district court thought it was a close question, it found several factors in support of its denial of Cox's motion for a judgment of acquittal. The factors identified by the district court were that "there were rumble strips, there was an unobstructed view to the south and east, there was a stop sign at the intersection, he should have seen the stop sign and he should have known he had to yield, he was familiar with the road, and he ran the stop sign at a rather substantial speed." 500 N.W. 2d at 25.

65. However, the Court of Appeals reversed the defendant's felony conviction of vehicular homicide and remanded the case for entry of a judgment of acquittal on the charge. The Court held that "It was the State's burden to prove that Cox was driving in a reckless manner. Here, the evidence establishes Cox failed to stop and yield as required by *Iowa Code section 321.322*. There was no evidence that Cox was speeding or operating his vehicle in an erratic manner." *Id*. at 26. The Court determined that Cox's

admission that he had "dozed off" was insufficient to support the jury's conviction of the felony charge.

66. Although not binding precedent, the facts in *Cox* are distinctly analogous to the case at bar. Just as Cox testified that he had "dozed off" in the moments before the fatal collision, the Defendant stated repeatedly at the scene of the accident "I must have fallen asleep, I must have fallen asleep." Similarly, just as Cox "immediately slammed on his brakes" the moment he regained consciousness and saw the intersection and oncoming vehicle, so too did the Defendant herein make every attempt to avoid the collision the moment he became aware of his circumstances as evidenced by the 362 feet of skid marks leading up to the accident scene. Further, just as there was no evidence that Cox was speeding or operating his vehicle in an erratic manner, the only evidence that Defendant was swerving on the road suggests that said conduct occurred *while he was already experiencing the effects of the sleepy condition.*

67. As in *Cox,* the physical evidence presented at trial in the case at bar simply does not support the jury's finding that the Defendant consciously or unjustifiably disregarded the dangerous condition at issue herein. In fact, the conviction herein is wholly contrary to the general rule that the basis of criminal liability is the negligence of the driver, *not in his conduct while asleep,* but in his decision to drive while sleepy. Here, Defendant's conviction was based exclusively on his conduct *while asleep,* as he made no conscious decision to drive *with knowledge* of the fact that he would become dangerously sleepy and the state presented no such evidence at trial.

## CONCLUSION

68. The jury herein convicted the Defendant of a single count of Involuntary Manslaughter in violation of K.S.A. §21-3404 based on its finding that the unintentional killing at issue occurred during the commission of Reckless Driving in violation of K.S.A. §8-1566.

69. In reviewing the evidence presented at trial in the light most favorable to the prosecution, said evidence was clearly insufficient to establish beyond a reasonable doubt that Defendant *realized the imminence of danger* or that Defendant *consciously and unjustifiably disregarded* that danger. The evidence presented at trial established conclusively that the Defendant: was not under the influence of drugs or alcohol at the time of the accident; was not traveling at an excessive rate of speed at the time of the accident; had not knowingly or deliberately remained awake for extended periods of time in the days preceding the accident; and had not driven an excessive number of hours on the day of the accident. The prosecution presented no evidence whatsoever of previous traffic accidents, citations, or infractions of any kind that could have reasonably been attributed to excessive daytime drowsiness and further presented no evidence that the Defendant had been diagnosed with any sleep disorder of any kind *prior to* the subject accident such as to provide notice of a potentially dangerous condition. The prosecution's case was essentially devoid of any evidence whatsoever to establish beyond a reasonable doubt *realization of the imminence of danger* or *conscious and unjustifiable disregard* of that danger.

70. The rationale for imposing criminal liability in auto fatality cases involving drowsiness as a contributing factor is analogous to the rationale for imposing

criminal liability in cases involving illness or physical defect: the basis of criminal liability is the negligence of the driver, *not in his conduct while falling asleep or while experiencing the effects of the medical condition,* but in the decision to drive with knowledge of the dangerous condition. Here, the drowsiness that contributed to the accident was not 'ordinary' drowsiness occasioned by deliberate late night hours, but was the result of a chronic and previously undiagnosed medical condition. That Defendant had no knowledge of the condition prior to the accident is undisputed, based on the evidence presented at trial.

71. The only evidence on which the jury could have based its conclusion that the Defendant had engaged in criminally "Reckless" behavior was the evidence of the Defendant's driving during the brief minutes immediately before the accident occurred or the information contained in the sleep questionnaire accompanying the medical records of the Defendant's overnight sleep study at Research Medical Center.

72. As set forth *supra*, the basis for criminal liability cannot be based the Defendant's conduct in the minutes before the accident *while falling asleep or while experiencing the effects of the medical condition.* In such cases, criminal liability can only be based upon evidence of the Defendant's voluntary decision to drive knowing of the dangerous condition. No such evidence was presented at trial for the jury to consider.

73. Similarly, because the sleep questionnaire introduced at trial was not completed until July 21, 2003, *over 3 months after the date of the subject accident*, and because the evidence presented at trial established that *the Defendant's wife filled out the questionnaire*, it cannot be said that the information contained in said questionnaire reflected in any way the Defendant's subjective knowledge of his condition on the date of

the accident. The prosecution presented absolutely no evidence of the Defendant's own subjective awareness of his condition before the date of the accident.

74. Thus, based on the foregoing, either basis for imposing criminal liability would be error subject to reversal by this Court. The case at bar is distinctly analogous to the facts in *Harris*, supra, wherein that appellate court determined "that the jury lost its way in resolving conflicts in [the] evidence and created a miscarriage of justice" which required reversal of that criminal conviction. Based on the evidence presented at trial, the jury herein also 'lost its way' and returned a conviction that this Court must reverse.

Respectfully Submitted,

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## CERTIFICATE OF SERVICE

I certify that on this _____ day of August, 2004, five true and correct copies of the foregoing Brief of Appellant were delivered via United States Mail, First Class postage prepaid to:

David Miller
Miami County Attorney
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I certify that on this _____ day of August, 2004, one true and correct copy of the foregoing Brief of Appellant was delivered via United States Mail, First Class postage prepaid to:

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