

NO. 33200

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

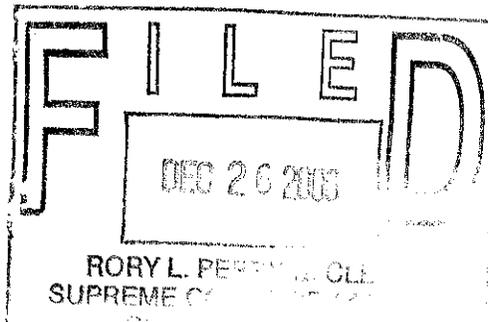
STATE OF WEST VIRGINIA,

*Appellee,*

v.

MARJORIE GREEN,

*Appellant.*



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APPELLANT'S REPLY BRIEF

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LARY D. GARRETT  
Garrett & Garrett  
Attorneys at Law  
P. O. Box 510  
Moorefield, WV 26836  
304-538-2375  
fax: 304-538-6807  
email: [garrettlaw@hardynet.com](mailto:garrettlaw@hardynet.com)  
WV State Bar ID # 1344

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Comes now the Appellant, Marjorie V. Green, and does reply to the Brief filed by the Appellee, State of West Virginia, on or about December 14, 2006.

In its Brief, Appellee agrees that, “[m]ere inattention does not constitute reckless behavior.” *Appellee’s Brief* at p. 7. Appellee goes on to state that there was “. . . other evidence suggesting that the Appellant was inattentive at a time when she needed to be attentive. An inattentive driver on a deserted county (sic) road may be less blameworthy than one traveling on a crowded city street.” *Appellee’s Brief* at pp.7-8. The brief goes on to say that, “[c]riminal liability depends upon the actor’s state of mind,” and cites Commonwealth v. Welansky, 55 N.E2d 902, 912, 316 Mass. 383 (1944), for the proposition that the question is whether Appellant’s “inattentiveness increased the risk of harm to such a degree that disregarding the risk amounts to criminal conduct.” *Appellee’s Brief* at p. 8.

Commonwealth v. Welansky is a manslaughter case arising out of a fire at a public bar and restaurant. A review of this case does not support Appellee's position. In fact, in this case, the court states that, "[u]sually wonton or reckless conduct consists of an affirmative act, like driving an automobile or discharging a firearm, in disregard of probable harmful consequences to another." 316 Mass at 397. However, the court goes on to note that the Welansky case involved a duty of care for the safety of business visitors invited to premises which the Defendant controls, and that, in such a case, ". . .wonton or reckless conduct may consist of intentional failure to take such care in disregard of the probable harmful consequences to them or of their right to care." 316 Mass at 397.

In Welansky, the court approved a jury charge which states:

To constitute wonton or reckless conduct, as distinguished from mere negligence, grave danger to others must have been apparent, and the Defendant must have chosen to run the risk rather than alter his conduct so as to avoid the act or omission which caused the harm. If the grave danger was in fact realized by the Defendant, his subsequent voluntary act or omission which caused the harm amounts to wonton or reckless conduct, no matter whether the ordinary man would have realized the gravity of the danger or not.

316 Mass at 398. The Court goes on to state that, "[w]onton or reckless conduct is the legal equivalent of intentional conduct." 316 Mass at 401.

The only other case decided by a state appellate court outside of West Virginia cited by Appellee is Whitaker v. State, 778 N.E.2d 423, 425 (Ind. Ct. App. 2002), for the proposition that Appellant's conduct created a substantial risk of harm, that she consciously disregarded this risk,

and that this disregard was a substantial deviation from acceptable standards of conduct.

*Appellee's Brief* at p. 8.

However, the Whitaker opinion is explained in Clancy v. State, 2005 N.E.2d Slip (Ind. Ct. App. 2005-333). In Clancy, the Defendant fell asleep and drove on the wrong side of the road of the road until he ran into someone. He then lied about who was driving the vehicle. Nonetheless, the Court of Appeals for the State of Indiana reversed Clancy's conviction, ruling that, "[n]egligent driving generally is not a basis for imposing criminal liability in Indiana, no matter how tragic the result," citing Whitaker, 778 N.E.2d, at 428. The Court found that Clancy was a diabetic and that he may have passed out because he did not eat for a long period of time. Further, it was not clear whether Clancy was aware of the risk he was running by not eating while driving. The court concluded: "In sum, there is insufficient evidence of criminal recklessness on Clancy's part; the mere fact that he fell asleep behind the wheel is not sufficient." 2005 N.E. Slip at 336. Obviously, Clancy was inattentive while he was asleep.

In Clancy, the Indiana Court of Appeals held that the definition given to "willful and/or wanton misconduct" should apply to criminal "recklessness." In furtherance of this rule, the court stated: "wanton or willful misconduct requires a host-driver to (1) be conscious of her misconduct, (2) be motivated by reckless indifference for the safety of her guest, and (3) know that her conduct subjects her guest to probability of injury." 2005 N.E.2d Slip (2005-333, at p.3 of 8). The Indiana Court of Appeals went on to say, "[o]ur supreme court has also approved of describing willful and wonton misconduct as either (1) an intentional act done with reckless disregard of the natural and probable consequences of injury to known person under the circumstances known to the actor at the time; or (2) an omission or failure to act when the actor

has actual knowledge of the natural and probable consequence of injury and his opportunity to avoid the risk. [citations omitted]. 2005 N.E.2d Slip (2005-333, at p.3 of 8).

The Clancy court also discusses cases from other jurisdictions with consistent standards of proof necessary to impose criminal liability on drivers who fall asleep behind the wheel. Clancy cites Hargrove v. Commonwealth, 394 S.E.2d 729 (Va. 1990), where the Virginia Court of Appeals reversed the involuntary manslaughter conviction of a person who ran over a pedestrian after falling asleep behind the wheel. The Virginia court held that this willful and wanton standard was met only where the evidence showed that the Defendant knew that he was “extremely tired” after working the night-shift before driving home. 394 S.E.2d at 730. Likewise, in Clancy, the Indiana court found that, “[t]here is no evidence that he consciously ignored a substantial premonitory systems of impending sleep.” 2005 N.E.2d Slip (2005-333, at p.4 of 8).

In Appellee’s Brief, the state alleges that, “Appellant chose to take her eyes off of the road.” *Appellee Brief* at p. 10. Appellee contends that, “Appellant, aware of the risks created by her conduct, chose to take her eyes off of the road. Indeed she took her eyes off of the road for approximately nine seconds, while driving 59 miles per hour. This was not an act of simple negligence. Her conduct created a substantial risk, she was aware of the risk, and consciously disregarded it.” *Appellee Brief* at p. 11.

Yet clearly the State is attempting to boot-strap its argument. Obviously, Appellant was inattentive. However, there is no showing that she was aware that she was being inattentive, nor that she consciously chose to continue being inattentive despite the risk to others. This is not a case where Appellant chose to close her eyes or put a sack over her head for nine seconds to see

if she could drive carefully during that time.

Moreover, there is no showing that she had her eyes off the road for nine seconds, nor that she was driving 59 miles per hour. The State's witness, Sara Watts estimated that the Appellant's van was "going about the speed limit, 55." *Appeal Record* at p.345. The speed limit was 55 miles per hour.

Obviously, Mrs. Green had her eyes off of the road for some part of the "nine seconds." However, it may very well be that for the first few seconds when she came over the hill, and could see down the road, that she did have her eyes on the road, but that there was then no indication that the Dante vehicle was slowing down, stopping, or turning. It was only after Mrs. Green was well into the "nine seconds" that she would have realized there was a hazard in front of her. Apparently, she did have her eyes off the road at the critical time, just a few seconds before impact.

Nonetheless, there is no showing that she knew she was not going to be paying attention. In addition, she had been traveling in the Augusta area, which has a 40 mile per hour speed limit for several miles. As she finally passed the car wash, before the crest of the hill, she came to the area where the speed limit increased from 40 to 55. Accordingly, a reasonable person would assume there was now less congestion, and more open space and highway to justify the increased speed limit.

It is also pertinent to note that since this accident, the speed limit in this area has been reduced, and signs warning of turning cars have been posted. Appellee argues that when one crests this hill that the driveway to the church is readily visible, and so one should be on the lookout for turning vehicles. But on the contrary, when one crests the hill, all one can see for a

moment is open space, because the descent is very steep. The next thing one notices is that the on-coming traffic is merging from two lanes into a single lane. One's attention is also drawn to the long, steep drop-off from the road on the right, marked only by a simple guardrail. There is much more to see at this point than one church driveway, which is curved and slightly hidden under the hillside. In closing argument, the prosecuting attorney repeatedly referred to this area as "where the three-way ends." See also testimony of Avin Brent Swisher. *Appeal Record*, at p. 385.

Appellee attempts to distinguish the State v. Richeson 179 W.Va. 711, 259 S.E.2d 728 (1988) (*per curiam*) case on the basis that the state had failed to prove the physical limitations affecting Richeson's ability to drive. This is true. However, this still does not offset the thrust of the Richeson holding, which is that someone who has broken his arm, has been to the doctor to have his arm treated, has been prescribed and taken a controlled substance, and then crosses the centerline at night and runs head-on into and kills an oncoming driver is not guilty of negligent homicide. Richeson later could not even recall the collision. He obviously must have fallen asleep.

It should be remembered also that Richeson could not drive himself to the hospital after he broke his arm, but had a friend drive him. Richeson only decided to drive home when the friend indicated that the friend could not drive any longer. Surely, Richeson should have been aware that he was tired, injured, under the influence of medication, with a broken arm, at night; yet still he still drove. In Richeson, the Court does not say that Richeson was "inattentive." However, obviously he was extraordinarily inattentive because he did not see at night the lights of the oncoming car (how many seconds away can one usually see the lights of an oncoming car

at night?), and he violated a serious safety statute by crossing the center line. Richeson's "inattentiveness" rose to the maximum degree.

Unlike Richeson, Appellant here was not tired, not medicated, not injured, not driving at night, and did not cross the centerline. She did not have conscious awareness of disregarding anyone's safety, because, by definition, under these circumstances, one would not be aware of one's inattentiveness. In addition, there are no underlying causes of the inattentiveness of which she should have been aware. She simply saw a long motorcycle procession, and for a few seconds, she gazed at it.

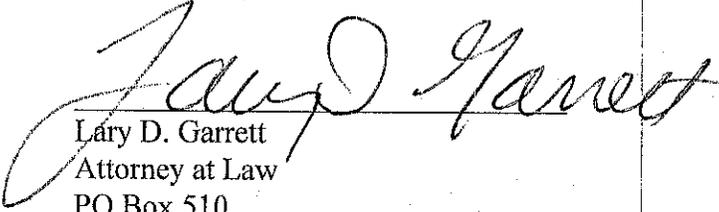
There are no other states that have any type of similar standards or language which differ from Virginia, West Virginia, and the cases cited by Appellee.

In its Brief, the State relies in part upon testimony by the Appellant's witness at trial, Greg Manning. The issue before the Court is whether or not the trial court erred by refusing to grant Appellant's Motion for a Directed Verdict of Acquittal based upon insufficient evidence to sustain a conviction made at the close of the State's presentation of evidence. The State cannot boot-strap this issue by adding testimony presented by Appellant after the Court refused to grant Appellant's Motion for Directed Verdict. The issue is whether or not the evidence was sufficient to sustain the conviction as presented by the State in its case in chief up to the point when the State has rested. Appellant was not required to produce any evidence at trial; however, Appellant is entitled to produce evidence. It is clearly a violation of due process for the State to be able to rely upon Appellant's exercise of her right to produce evidence in order to sustain its burden of making a *prima facie* showing during its case in chief.

Respectfully submitted this the 22 day of December, 2006.

MARJORIE V. GREEN

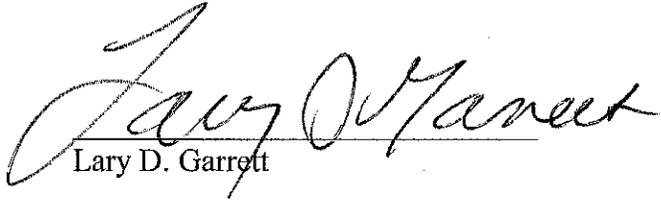
By Counsel

  
Lary D. Garrett  
Attorney at Law  
PO Box 510  
Moorefield WV 26836  
304-538-2375  
Fax: 304-538-6807  
E-mail: [garrettlaw@hardynet.com](mailto:garrettlaw@hardynet.com)  
WV State Bar ID# 1344

**CERTIFICATE OF SERVICE**

I, Lary D. Garrett, Counsel for Appellant, do hereby verify that I have served a true copy of the Appellant's Reply Brief, upon counsel for the State of West Virginia, Robert D. Goldberg, Assistant Attorney General, by depositing said copy in the United States mail, with first-class postage prepaid, on this the 22<sup>nd</sup> day of December, 2006, addressed as follows:

To: Robert D. Goldberg  
Assistant Attorney General  
State Capitol, Room 26-E  
Charleston, West Virginia 25305

  
Lary D. Garrett