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No. 66532-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JESSE O. ALLEN,  
*Petitioner,*

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,  
*Respondent.*

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APPELLANT'S REPLY BRIEF

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I. REPLY TO RESPONDENT'S ARGUMENT

A. **By Not Including the Statutory Language Regarding the Length of the CDL Disqualification, the Trooper Failed to Accurately State the Law.**

Although Mr. Allen is not asking that the court require the state to add more language to the CDL warning given by the Trooper (*Petitioner's Brief at 10*), Respondent incorrectly states that the additional CDL language, given by the Trooper but not required by the Implied Consent Warning statute for drivers stopped while driving personal vehicles (RCW 46.20.308(2)(a)-(d)), was legally accurate. *Respondent's Brief at 1, 10, 11.*

RCW 46.25.090 provides, in pertinent part,

(1) A person is disqualified from driving a commercial motor vehicle **for a period of not less than one year** if a report has been received by the department pursuant to RCW 46.20.308 or 46.25.120 [emphasis added][.]

Pursuant to RCW 46.20.308, the Trooper properly advised Mr. Allen that his personal driver's license would be suspended for at least 90 days if the breath test revealed an alcohol concentration of .08 or more, and that his commercial driver's license, if any, would be disqualified. *CP at 190.* However, the Trooper made no mention of the length of time Mr. Allen's commercial driver's license would be disqualified, as stated in RCW 46.25.090(1). By failing to

mention the length of time Mr. Allen's commercial driver's license would be disqualified, the Trooper failed to accurately state the law.

Although an arresting officer need not ensure that the driver does in fact make a knowing and intelligent decision regarding whether to refuse the test, the driver still needs to be afforded the opportunity to exercise informed judgment. *Lynch v. State, Dept. of Licensing* 2011 WL 4543081, 4 (Div. 2, 2011)<sup>1</sup>, quoting *Medcalf v. DOL*, 133 Wash.2d 290, 299, 944 P.2d 1014 (1997). Such an opportunity is provided when the officer informs the driver of the rights **and consequences** under the statute. *Id.*, citing *Jury v. DOL*, 114 Wn.App. 726, 731–32, 60 P.3d 615 (2002). By failing to properly advise him of the consequences to his CDL under the statute, the Trooper failed to afford Mr. Allen the opportunity to exercise informed judgment.

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<sup>1</sup> *Lynch*, supra, was published after the filing of the parties' initial briefs in this matter. Unlike the driver in *Lynch*, Mr. Allen argues that the implied consent warnings given to him were legally inaccurate. He argues that, either no CDL warnings should have been given, or the Trooper should have informed him of the one-year CDL disqualification regardless of his decision to take the breath test.

**B. That Mr. Allen Spoke with an Attorney Prior to the Trooper Administering the Implied Consent Warnings is Not Dispositive.**

Respondent notes that Mr. Allen spoke with an attorney for nine minutes prior to the Trooper reading him the Implied Consent Warnings. *Respondent's Brief at 2-3.* This fact is not germane to the issue at hand, i.e. whether the Implied Consent Warnings as read to Mr. Allen mislead commercial drivers. It would have more bearing on the issue had Mr. Allen spoken with an attorney *after* the implied consent warning were read to him. Then he would have been in a better position to ask the attorney about the impact his decision would have on his commercial driver's license, and would have been in a better position to make an informed decision. Indeed, in holding that the "knowing and intelligent decision" rule applies equally to CDL disqualifications and personal driver's license revocations, our Supreme Court has reasoned that "a proper implied consent warning may be more imperative in commercial license cases" because the driver's livelihood is at stake. *Thompson v. DOL*, 138 Wn.2d 783, 792, 982 P.2d 601 (1999).

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**C. A Driver Need Not Show Confusion to Establish That the Implied Consent Warnings are Misleading.**

Contrary to the assertion in Respondent's Brief, a driver need not show confusion to establish the fact that the Implied Consent Warnings are misleading. See *Graham v. DOL*, 56 Wn.App. 677, 784 P.2d 1295 (1990). Indeed, a driver can honestly believe she understands the warnings, and still be misled by them. The driver in *Graham, supra*, did not ask questions nor did she ask to speak with a lawyer, yet the court found the implied consent warnings to be inaccurate, improper, and potentially misleading. *Id.* at 680-681, 784 P.2d at 1295. That Mr. Allen expressed no confusion to the Trooper does not mean he was not misled.

**D. The Trooper's Misleading Warning Prejudiced Mr. Allen.**

Contrary to the representation by Respondent (*Respondent's Brief at 17-18*), Mr. Allen was, in fact, prejudiced by the Trooper's failure to advise him of the one-year disqualification period on his CDL because the Trooper deprived Mr. Allen of making a knowing and voluntary decision on whether or not to take a breath test. If Mr. Allen had been advised that his CDL would be disqualified for one year regardless of whether he submitted to or refused a breath test, he may very well have elected to refuse the

test, reasonably believing that he stood a better chance of challenging the DOL suspension and the DUI charge if the state had no test result to prove his breath alcohol concentration.

**E. Mr. Allen Meets the Prejudice Criteria.**

The Trooper's additional CDL warning language prejudiced Mr. Allen because Mr. Allen falls within the class of persons affected by the warnings, and his ability to make a knowing and intelligent decision was affected such that a refusal could have changed the outcome of his case. Contrary to Respondent's assertion (*Respondent's Brief at 23-24*), Mr. Allen need not make an evidentiary showing of prejudice; rather, the law merely requires a showing of a logical connection between the breath test decision and the inaccurate warning. See *Gonzales v. DOL*, 112 Wn.2d 890, 902, 774 P.2d 1187, 1194, 774 P.2d 1187 (1989). Indeed, the *Gonzales* court specifically found that the driver was not prejudiced by the inaccurate warning because, unlike Mr. Allen in the present case, the driver in *Gonzales* refused to take the breath test.

Had Mr. Allen been properly advised of the potential one-year CDL disqualification, it logically flows that he might very well have decided not to take the breath test to put himself in a better position to challenge a looming criminal DUI charge. As the court

noted in *Gahagan v. DOL*, 59 Wn.App. 703, 710, 800 P.2d 844,  
848 - 849 (1990),

The Department's standard for actual prejudice requires much more - proof of actual communication of the licensee's desire for an additional test. That clearly was not required in *Graham*. There the licensee asked no questions and did not ask to speak to a lawyer before refusing to submit to the breath test [internal citation omitted]. In short, the Department's argument for a higher standard is not supported by precedent.

DATED this 27 day of October, 2011.

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JESSE O. ALLEN,

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DEPARTMENT OF LICENSING,

Respondent.

No. 66532-4-1

DECLARATION OF SERVICE

I, Kristine E. Allen, declare as follows:

That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

That on the 27<sup>th</sup> day of October, 2011, I requested that ABC Legal Messengers serve a copy of Petitioner's Reply Brief (to be served on or before October 28, 2011) to:

MATTHEW TILGHMAN-HAVENS  
Assistant Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104

I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Executed at Everett, Washington this 27th day of October, 2011.



\_\_\_\_\_  
Kristine E. Allen

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