

No. 39675-1-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

APPELLANT,

Vs.

ANNA WEAVER,

RESPONDENT.

FILED
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STATE OF WASHINGTON
BY  L. SMITH

Appeal from the Superior Court of Washington for Lewis County
Honorable Judge Lawler

State's Reply Brief

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STATE'S REPLY TO MS. WEAVER'S RESPONSE BRIEF

A. THE PLAIN LANGUAGE OF THE FAILURE TO YIELD STATUTE UNAMBIGUOUSLY REQUIRES OTHER MOTORISTS TO YIELD TO THE RIGHT UPON THE APPROACH OF AN EMERGENCY VEHICLE REGARDLESS OF WHETHER THE EMERGENCY VEHICLE IS RESPONDING TO AN "ACTUAL EMERGENCY" AND DOES NOT MAKE ANY EXCEPTION FOR TRAFFIC INFRACTION STOPS.

In her response brief, Weaver misconstrues the plain wording of the statutes at issue in this case and relies upon case law that is irrelevant because it does not address the point at issue in this appeal. The issue in this appeal is: does the failure to yield statute, which provides that upon the approach of an emergency vehicle other motorists must pull to the right hand side of the highway, apply to motorists being pursued by an emergency vehicle for the purpose of targeting the motorist for a traffic infraction stop. The answer to that question is yes, it does.

In reviewing a statute, a court interprets "unambiguous statutes according to their plain language; only ambiguous statutes will be construed." State v. Skylstad, 160 Wn.2d 944, 163 P.3d 413, 415 (2007), citing State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). When interpreting a statute, the goal is to determine and enforce the intent of the legislature. Alvarado, 164 Wash.2d at 561-62, 192 P.3d 345. Where the meaning of statutory

language is plain on its face, we must give effect to that plain meaning as an expression of legislative intent. Alvarado, 164 Wash.2d at 562. In discerning the plain meaning of a provision, the reviewing court will consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. Alvarado, 164 Wash.2d at 562. "We may not read unwritten language into a statute." Id., citing State v. Malone, 106 Wn.2d 607, 610, 724 P.2d 364 (1986). Common sense informs this analysis, as absurd results in statutory interpretation are to be avoided. Alvarado, Id., citing Tingey v. Haisch, 159 Wash.2d 652, 664, 152 P.3d 1020 (2007). "[N]o construction should be accepted that has 'unlikely, absurd, or strained consequences.'" Id., quoting State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). We presume that the legislature does not intend a result that is "impossible of execution." In re Welfare of Child of S.S.W., 767 N.W.2d 723, 729 (Minn. 2009).

Because the "plain language" of the failure to yield statute unambiguously states *without exception* that motorists must pull over to the right side of the roadway upon being approached by an emergency vehicle, its meaning is clear, and we need not analyze it

any further.¹ Skylstad, supra, RCW 46.61.210. Contrary to Weaver's contention--the "plain language" of the failure to yield statute does not contain an exception for traffic infraction stops, and does not contradict the traffic infraction stop statute. RCW 46.61.210; RCW 46.61.012. Had the legislature intended the failure to yield statute to not apply to traffic infraction stops, *it would have said so*, either there or in the traffic infraction statute. It did not.

Let's again review the language of the "failure to yield" statute, which states:

(1) Upon the immediate approach of an authorized emergency vehicle making use of audible and visual signals meeting the requirements of RCW 46.37.190, *or of a police vehicle* properly and lawfully making use of an audible signal only, the driver of every other vehicle shall yield the right-of-way and shall immediately drive to a position parallel to, and as close as possible to, the right-hand edge or curb of the roadway. . . and shall stop and remain in such position until the authorized emergency vehicle has passed, except when otherwise directed by a police officer.

RCW 46.61.210(1)(emphasis added). A "plain reading" of this statute unambiguously requires other motorists to yield to the right upon the approach of an emergency vehicle, period. Id. The plain

¹ The State nonetheless has addressed statutory interpretation issues here and in its opening brief because those issues were previously discussed at the District Court and Superior Court levels in this case.

language of this statute makes no exception for "traffic stops." Nor does this statute state that it applies only if the emergency vehicle is "actually responding to an emergency," as also urged by Weaver and as decided by the Superior Court. Response Brief 15, & n.4.. Here, Ms. Weaver pulled to the left side of the roadway, rather than to the right, as dictated by the failure to yield statute. She accordingly violated the failure to yield statute, and the Superior Court's contrary ruling should be reversed.

Furthermore, despite Weaver's frequent and mighty (and telling) protestations to the contrary, Weaver's (and the Superior Court's) interpretation of the failure to yield statute *would indeed* bring about the utterly absurd and unenforceable result of leaving it up to the other motorist to decide willy-nilly whether the approaching emergency vehicle is "actually responding to an emergency"-- triggering the duty to move to the right. This "yields" an absurd result. As one Georgia Court correctly explained when discussing a nearly identical failure to yield statute::

Motorists are not permitted to decide whether they should yield the right of way based on their determination as to whether the law enforcement vehicle is responding to an emergency. The duty of the motorist is constant, so long as the motorist is given an audible and visual signal.

Hersh v. Griffith, 643 S.E.2d 309313 (Georgia 2007). This common-sense reasoning applies here whether the Hersh case addresses a traffic infraction situation or not.

Despite Weaver's protestations to the contrary, Weaver inexplicably ignores the practical reality that her interpretation of the failure to yield statute renders that statute impossible to enforce because the other motorist can always claim "I didn't think the vehicle was actually responding to an emergency so I didn't have to yield to the right." Put differently, nowhere does Weaver explain precisely how "other motorists" would be able to determine whether an emergency vehicle was "actually responding to an emergency," as opposed to whether the emergency police vehicle was instead about to pull the motorist over for a traffic infraction stop. And the reason Weaver never addresses that issue is because a motorist being approached from the rear by an emergency police vehicle (as here) cannot know whether that approaching vehicle intends to stop her for a traffic violation, or whether "it" intends to pass her-- until the motorist actually pulls over and stops. So, whether the emergency vehicle is "actually responding to an emergency" is utterly irrelevant to the analysis of the failure to yield statute because that determination is impossible to make in the real world.

The State is also sticking to its previous assertion that any other interpretation of the failure to yield statute would result in chaos on the highways. As an example of this, let's presume for illustrative purposes that Ms. Weaver has stopped on the left side of the roadway upon being approached by the emergency law enforcement vehicle. Ms. Weaver pulls over to the left shoulder, and so does the law enforcement vehicle. But, on the right side of the roadway we also have another motorist who pulled over to the right upon being approached by an ambulance. Then--wouldn't you know it--here comes yet another emergency vehicle from the same direction as the emergency police vehicle was coming from when it pulled Ms. Weaver over. What this latest emergency vehicle then encounters are vehicles stopped on both sides of the roadway. This is hardly a safe situation (and not an unrealistic scenario given the volume of traffic on most of our highways).

Obviously, allowing motorists to pull over to whichever side of the roadway they feel like pulling over to creates an unsafe situation in comparison to a rule providing that all motorists must always pull over to the right side of the highway when approached by emergency vehicles. RCW 46.61.210. As the State said in its opening brief, the drivers of emergency vehicles have the right to

presume that all motorists will pull to the right side of the roadway when approached.

Despite Weaver's vehement denials that she "has never argued that the [failure to yield statute] depends upon the existence of an 'actual' emergency," both the Superior Court's ruling and Weaver's reading of the statute *does exactly that*. Response Brief 15, citing Lakoduk as holding that for the failure to yield "statute to apply, an emergency vehicle must be 'actually responding to an emergency call.'" Response Brief 15, Lakoduk at 654. Call the State stupid, but how does this statement differ from the State's claim that Weaver is arguing that the failure to yield statute only applies when the emergency vehicle is "actually responding to an emergency"? Indeed, after denying that her interpretation compels this obviously absurd and unenforceable result, Weaver in the next breath declares that "neither the 'failure to yield' nor the traffic law exemption statute, RCW 46.61.035, applies unless the driver of the emergency vehicle is in fact responding to an emergency call." Response Brief 16 (underline emphasis added). So, Weaver first denies that she is arguing that the failure to yield statute depends upon the existence of an actual emergency, and then she argues that the failure to yield statute does not apply

unless the emergency vehicle is actually responding to an emergency call. Is the State imagining this epic contradiction? How is Weaver's statement (and the Superior Court's ruling) that the failure to yield statute only applies when the emergency vehicle is "actually responding to an emergency" different from the State's depiction of Weaver's argument as saying just that? The only "difference" is that the State points out the fact that it is impossible to "execute" the failure to yield statute under Weaver's nonsensical interpretation.

Weaver mocks the State for its claim that her interpretation of this statute leaves the decision of whether to yield to the right in the hands of the motorist, based upon whether the motorist believes the emergency vehicle is responding to an actual emergency. As previously noted, Weaver claims that she "made no such argument," and that the Superior Court made no such ruling either. Balderdash! Read the Superior Court's ruling. Response Brief 15 n.4. Under any reading of Weaver's argument and of the Superior Court's ruling, that is precisely what the practical effect of Weaver's and the trial court's interpretation of this statute would be. The Superior Court said, "[t]he purpose of the failure to yield statute. . . is to clear a path for emergency vehicles

actually responding to emergency calls." Response Brief 15, n.4 citing CP 6(3-4)(emphasis added). What this means is that because the emergency vehicle in this case was not "actually responding to an emergency" (as interpreted by the Court and Weaver), then Weaver could ignore the dictates of the failure to yield statute and could pull over to whichever side of the roadway she felt like pulling over to.

Still, Weaver repeatedly insists that she "has never argued that application of RCW 46.61.210(1) depends upon the existence of an "actual" emergency." Response Brief 16. "Me thinks the lady doth protest too much." Exactly what is the difference between "the failure to yield statute applies only where the emergency vehicle is 'actually responding to emergency calls'"(Weaver's version) and "the failure to yield statute applies only where the emergency vehicle is responding to an actual emergency"(State's reading of Weaver's interpretation)? There is no difference. These two supposedly-contradictory readings of the statute are about as distinguishable "as a pig with lipstick is distinguishable from a pig without." Stetter v. R.J. Corman Derailment Servs., 2010 WL 1135725 (Ohio 2010). There simply is no difference between the State's interpretation of Weaver's reading of the statute, and

Weaver's own expressly-stated claim that the failure to yield statute applies only when an emergency vehicle is "actually responding to an emergency call." Response Brief 15. The State is beginning to wonder if the parties are even speaking the same language.

The point is that what Weaver is asking us to do is to completely ignore the plain and unambiguous language of the failure to yield statute which states that motorists must pull to the right side of the roadway when approached by an emergency vehicle. RCW 46.61.210. Nowhere does this statute say that the motorist may pull over to the left (as Weaver did) if the emergency vehicle is not "actually responding to an emergency." Weaver's myopic view of this statute asks us to disregard the fact that her reading of the statute reaches the absurd result of rendering the statute essentially unenforceable. Apparently, Weaver believes that issues such as the "impossibility of execution" under her interpretation of the statute are irrelevant. Weaver states that, "[a]pplication of the failure to yield statute depends not upon the perceptions of the defendant, but upon the objective conditions existing at the time." Response Brief 26. But Weaver again neglects to tell us what "objective conditions existing at the time" could possibly allow a motorist to know that an emergency police

vehicle approaching from the rear is "actually" about to perform a traffic stop rather intending to pass the motorist? Weaver cannot answer this question, and neither do any of the cases she cites stand for this pronouncement. Weaver's interpretation of the failure to yield statute is short-sighted, incomplete, illogical, and contrary to principles of statutory construction. "[N]o construction should be accepted that has 'unlikely, absurd, or strained consequences.'" State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

Weaver further claims, "[t]he State sets up a straw man by contending that the Superior Court erred in ruling that emergency vehicle [sic] must be responding to an 'actual emergency.'" Response Brief 15. Yet in the next breath Weaver states that, [t]he Supreme Court has held that for the statute to apply, an emergency vehicle must be '*actually responding to an emergency call*.'" *Id.* (emphasis in original). Say *what?* Indeed, it is Weaver herself who "attacks a straw man, never directly confronting the real issue raised in this appeal." Darity v. State, 220 P.3d 731, 739 (Okla. Crim.App. 2009). The real issue in this appeal is that Weaver's interpretation of the failure to yield statute cannot stand because the plain language of that statute unambiguously states that

motorists must yield to the right side of the roadway when approached by an emergency vehicle. RCW 46.61.210. This statute states no exceptions, and the traffic infraction statute does not address which side of the road a motorist must stop on. RCW 46.61.021(1). All the traffic infraction stop statute requires is that the motorist must stop--it does not say where to stop. Id. And contrary to Weaver's characterization, the State is not "ignoring the fact that traffic infraction stops are governed by an entirely separate statute, RCW 46.61.021(1)." Response Brief 16. The State does not need to consult that statute, because that statute does not govern which side of the roadway a motorist is required to go to. RCW 46.61.021(1).

In sum, it simply does not matter whether the approaching emergency vehicle is "actually responding to an emergency" or is about to perform a traffic stop on the motorist. The motorist must pull over to the right. End of story. RCW 46.61.210. This must be true, because there is absolutely no way that a targeted motorist knows whether the approaching emergency vehicle behind her is "actually responding to an emergency" until after the motorist has pulled over and stopped. Only then will the motorist know whether the approaching-from-behind emergency vehicle intends "to pass"

or is performing a traffic stop on the motorist. This is the reality that Weaver wants to ignore. Such an interpretation "ignores reality and the precept of statutory construction that the consequence of a particular interpretation must be considered." Lubovinsky v. Com., Unemployment Comp. Bd., 526 A.2d 467, 469 (Pa. Cmwlth 1987).

Weaver claims that "if the 'failure to yield' statute was intended to apply to vehicles targeted for traffic stops, there would have been no need to enact a specific statute imposing a general duty to stop when signaled to do so." With this claim, Weaver ignores the fact that the "duty to stop" *is not the same as* "duty to pull to the *right* side of the road." Compare RCW 46.61.210 with RCW 46.61.012. There is no contradiction between the traffic infraction statute and the failure to yield statute because one statute tells motorists to stop when so approached, and the other tells motorists *which side of the road* to stop on. RCW 46.61.021(1) and RCW 46.61.210(1). In other words, the fact that the traffic infraction statute does not say *which side* of the road to pull over to does not mean we *ignore* the statute that does. Weaver's argument to the contrary is illogical, and is not supported by any rule of statutory interpretation that the State is aware of. Interpreting the traffic code to allow motorists to sometimes pull

over to the left and other times pull over to the right makes no sense whatsoever--and would cause disorder on our highways. This could not possibly be what the Legislature intended.

Weaver cites cases from other jurisdictions with nearly identical failure to yield statutes in support of her argument that the failure to yield statute does not apply to traffic infraction stops. Response Brief 21-23. However, none of the cases cited by Weaver are applicable because those cases do not address a situation where the motorist pulled over to the left side of the roadway rather than to the right side of the roadway as occurred in this case. See, e.g., Jackson v. State, 477 S.E.2d 28 (Georgia App. 1996)(issue was that motorist failed to stop--not whether he pulled to the wrong side of the road). Furthermore, despite Weaver's ridiculing the State's observation that the Jackson case deals with a criminal statute and is thus distinguishable--the fact of the matter is that the rules for interpreting a criminal statute are far different than those for interpreting a non-criminal statutes like the ones here. See e.g., Ritts, 94 Wn.App. at 787 (noting that where a *criminal* statute is subject to two possible interpretations, it must be "strictly construed in favor of the defendant"--there is not such requirement for civil statutes).

Weaver also cites Burrell v. State, 483 S.E.2d 679 (Georgia 1997), but--like Jackson, Burrell does not address a situation where the motorist pulled over to the left side of the roadway. Nor does the McFerrin case deal with a motorist who pulled to the left side of the roadway--instead, similar to the Burrell case, the motorist in McFerrin failed to stop--with police in hot pursuit. McFerrin v. State, 339 So.2d 127 (Ala.Crim.App. 1976). In sum, all of the cases cited by Weaver are distinguishable. So--just as Weaver points out that "not one of the cases" cited by the State involves precise the issue before this court--neither do any of the cases cited by Weaver address the precise circumstances presented here. But apparently, the rules that Weaver holds the State to do not apply to her.

Nor is Weaver's accusation that "the State wholly ignores the Washington cases interpreting this statute" valid, because not a single Washington case compels the result found by the Superior Court and urged by Weaver here. Response Brief 23-25, and Washington cases cited therein. Not one of the cases cited by Weaver stands for the proposition that the failure to yield statute does not apply to traffic infraction stops. Thus, the State's failure to address these cases is proper, because they are irrelevant to the facts presented here.

So, where this all really brings us to is finger pointing and accusations of "absurdity" on both sides, and the inescapable conclusion--if we ignore the plain language of the statute-- that the issue presented in this case is one of first impression in this State. However, the State maintains that we need not reach this conclusion because the plain language of the failure to yield statute requires, *without exception*, that all other motorists to pull over to the right side of the roadway when approached by an emergency vehicle. There is no other way to read this statute. It contains no "emergency vehicle must be actually responding to an emergency" exception. Nor does the existence of the traffic infraction statute change this analysis--all that statute does is state that a motorist has a duty to stop. It does not state which side of the roadway to stop on. These statutes simply mean what they say.

Accordingly, when Ms. Weaver pulled over to the left side of the roadway upon seeing the approach of the emergency police vehicle, she violated the failure to yield statute. RCW 46.61.210(1). Weaver's arguments to the contrary compel an absurd, impossible-to-execute result. This Court should agree, and should reverse the Superior Court's decision and remand with instructions to reinstate Weaver's conviction for violating the failure to yield statute.

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STATE OF WASHINGTON

BY _____
DEPUTY

RESPECTFULLY SUBMITTED this 26th day of May, 2010.

MICHAEL GOLDEN
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Declaration of Service by U.S. Mail and E-mail

The undersigned certifies that on this date a copy of this reply brief was served upon the Respondent by U.S. mail addressed to her attorney Alan Shabino, and by e-mail addressed to Mr. Shabino at: allen@shabinolawfirm.com.

Dated this 26th day of May, 2010, at Chehalis, WA.

