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STATE OF WASHINGTON
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NO. 40041-3

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LEESA M. LYNCH,

Petitioner,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Respondent.

BRIEF OF APPELLANT

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I. INTRODUCTION

Leesa Lynch was arrested for driving under the influence while driving her personal vehicle. Lynch was read the 2009 revised implied consent warnings and she said she understood them. Lynch then took breath alcohol tests (BAC) which showed her breath exceeded the legal alcohol limit. As a result, as required by statute, her driver's license was suspended for 90 days and her Commercial Drivers License (CDL) endorsement was disqualified for one year.

Washington law requires that certain statutory implied consent warnings be given to a driver. While additional accurate warnings may be given, it is not required. Nor is it required to tailor warnings to a specific driver. In this case, Lynch was given all of the statutorily required warnings. To the extent she was given additional information about her commercial driver's license, it was accurate. Having received accurate warnings that were not misleading, Lynch was unable to prove, and in fact failed to prove, that she was prejudiced by the warnings received. Thus, the Department properly suspended Lynch's license and the superior court's decision to the contrary was in error.

II. ASSIGNMENTS OF ERROR

The Department assigns no error to the decision being reviewed: the hearing officer's decision. However, the Department assigns error to the following aspects of the superior court's ruling:

1. The Pierce County Superior Court erred in ruling that the implied consent warnings read to Ms. Lynch were misleading in that "the warnings implied the availability of the ignition interlock license would serve as a remedy for CDL disqualification." CP 139.

2. The Pierce County Superior Court erred in ruling that the implied consent warning read to Ms. Lynch "was misleading as to length of [the] CDL disqualification." CP 139.

3. The Pierce County Superior Court erred in ruling that "[t]he misleading nature of the warning prejudiced Ms. Lynch's ability to make a knowing and intelligent decision whether to take the BAC test." CP139.

4. The Pierce County Superior Court erred in reversing the Department's decision sustaining the license suspension of Ms. Lynch's driver's license and denying the Department's motion for reconsideration. CP 139, 159-160.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The 2009 revised implied consent warnings mirror the statutory language regarding the ignition interlock license and provide legally

correct information regarding CDL disqualification. Washington law holds that implied consent warnings are not misleading when provided in substantially the same language as set forth in statute, and that such warnings need not enunciate each and every specific consequence of refusing to take the test. Additionally, warnings are not misleading unless they deprive the driver of the opportunity to make a knowing and intelligent decision about whether to take the breath test. Where warnings may be misleading, courts will reverse the Department's suspension of a license only on a showing that the driver was actually prejudiced by the misleading warning.

1. Where warnings otherwise correctly state the law and mirror the implied consent statute by stating that if a person's license is suspended, revoked, or denied, the person "may be eligible to immediately apply for an ignition interlock driver's license," did the hearing officer properly reject the argument that the warnings misleadingly imply that the availability of an ignition interlock license will remedy CDL disqualification? [Assignment of Error 1]

2. Where warnings otherwise correctly state the law and also state "for those not driving a commercial motor vehicle at the time of arrest: if your driver's license is suspended or revoked, your commercial driver's license, if any, will be disqualified," did the hearing officer properly

decline to hold that the warnings are misleading as to the length of CDL disqualification? [Assignment of Error 2]

3. If either of the warnings is misleading, did Lynch demonstrate she was actually prejudiced by the misleading warning, such that reversing the suspension of her driver's license is warranted? [Assignments of Error 3, 4]

IV. STATEMENT OF THE CASE

On March 27, 2009, Washington State Patrol (WSP) Trooper Garden arrested Lynch for DUI while she was driving her personal vehicle. DOL 4-6, 44, 46, 50-51.^{1,2} At the police station Trooper Garden read Lynch the implied consent warnings from the form titled Implied Consent Warning for Breath:

1. You are now advised that you have the right to refuse the breath test.
 - (a) Your driver's license, permit or privilege to drive will be revoked or denied by the Department of Licensing for at least one year; and
 - (b) Your refusal to submit to this test may be used in a criminal trial.

2. You are further advised that if you submit to this breath test, and the test is administered, your driver's license, permit or privilege to drive will be suspended, revoked or

¹ The Petitioner did not contest at the superior court that the trooper had legitimate reasons to stop her and had probable cause for the arrest.

² The agency record is included among the Clerk's Papers as a separate document. The record is marked as "DOL 1", "DOL 2" etc.

denied by the Department for at least ninety days if you are:

(a) Age 21 or over and the test indicates the alcohol concentration of your breath is .08 or more or you are in violation of RCW 46.61.502 driving under the influence, or RCW 46.61.504, physical control of a motor vehicle under the influence; or

(b) under age twenty-one and the test indicated the alcohol concentration of your breath is 0.02 or more, or you are in violation of RCW 46.62.502, driving under the influence, or RCW 46.61.504, physical control of a vehicle under the influence.

3. If your driver's license, permit or privilege to drive is suspended, revoked, or denied, you may be eligible to immediately apply for an ignition interlock driver's license.

4. You have the right to additional tests by any qualified person of your own choosing.

FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED.

DOL 46 . Lynch asked no questions about the warnings and stated that she understood them. DOL 52. She then submitted two valid breath samples which revealed a breath alcohol content of .110 and .120, exceeding the legal limit of .08. DOL 54.

Based on the results of the breath test, the Department notified Lynch that her driver's license would be suspended for ninety days under the implied consent statute, RCW 46.20.308. DOL 43. The Department

also informed her that as a result of her DUI arrest, her CDL would be disqualified for one year under RCW 46.20.090. DOL 59.

At the administrative hearing, Lynch argued that the warning she received regarding the consequences to her CDL were misleading, however she provided no testimony or evidence to support this argument. The hearing officer found the warnings Trooper Garden read to Lynch were legally adequate and affirmed the suspension of Lynch's driving privileges. DOL 4, 6-7. Lynch appealed the Department's order to the superior court. DOL 1. The superior court reversed the Department's order suspending Lynch's license and disqualifying her CDL, holding that the warnings were misleading in two respects and that, as a result, Lynch had been prejudiced:

1) the warnings implied the availability of the ignition interlock license would serve a remedy for CDL disqualification; and 2) the warning was misleading as to the length of CDL disqualification. The misleading nature of the warning prejudiced Ms. Lynch's ability to make a knowing and intelligent decision whether to take the BAC test.

CP 139. The court subsequently denied the Department's motion for reconsideration. CP 159-160.

V. STANDARD OF REVIEW

The implied consent statute, RCW 46.20.308, governs judicial review of the Department's license revocation order. *Dep't of Licensing v.*

Cannon, 147 Wn.2d 41, 48, 50 P.3d 627 (2002). If a person's license suspension, revocation or denial is sustained at an administrative hearing, he has the right to appeal that decision to the superior court. RCW 46.20.308(9). Under RCW 46.20.308(9),

The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department.

The Court of Appeals reviews the Department's decision from the same position as the superior court. *Clement v. Dep't of Licensing*, 109 Wn. App. 371, 373, 35 P.3d 1171 (2001). Therefore, the Court of Appeals reviews the administrative order to determine whether the Department has committed any errors of law, upholding findings of fact supported by substantial evidence in the record. *See* RCW 46.20.308(9); *Clement*, 109 Wn. App. at 374.

VI. SUMMARY OF ARGUMENT

The warnings provided to Lynch – the statutorily required implied consent warnings plus additional, legally accurate information about her CDL – were not misleading. Lynch was provided the implied consent warning pertaining to the ignition interlock license as specifically set forth in the statute, RCW 46.20.308(9). Informing Lynch of the option to apply

for an ignition interlock license if her license was suspended, revoked, or denied was not misleading and did not prevent her from making a knowing and intelligent decision regarding whether to consent to or refuse the breath test. The additional warning given to Lynch that her CDL would be disqualified if her license were suspended or revoked was legally accurate, as conceded to by Lynch³. The arresting officer properly provided the additional information to Lynch and was not required to tell Lynch the length of the CDL disqualification.

These two warnings state independent consequences of a driver's license being suspended or revoked. They do not imply that the possibility of applying for an ignition interlock license could prevent CDL disqualification. Nor do they suggest anything about the length of CDL disqualification, much less that it is dependent upon the length of driver's license suspension or revocation.

Given that Lynch received the statutorily required warnings and accurate additional information and that Lynch did not demonstrate actual prejudice from any allegedly misleading warnings, the hearing officer's decision suspending her license was correct and should be affirmed.

³ Lynch admits the warnings given to her were an accurate statement of law. Respondent's Response to Motion for Discretionary Review at 7.

VII. ARGUMENT

A. **The implied consent warnings given to Lynch were not misleading and the Department properly suspended her license.**

The warning regarding the availability of the ignition interlock license does not interfere with a person's opportunity to make a knowing and intelligent decision about whether to refuse the breath test. Advised of this language, a person of normal intelligence would understand the consequences of his or her actions. Moreover, when read with the other warnings, the statutory language does not imply that the ignition interlock license is a remedy for the CDL disqualification. The information about the CDL disqualification is legal accurate. Based both on the plain language of the warnings and case law considering the validity of various iterations of the warnings through the years, the warnings provided to Lynch are legally accurate, not misleading, and therefore proper under the law.

1. **Background regarding Implied Consent Warnings, Ignition Interlock Licenses and Commercial Drivers Licenses**

a. **Washington law governing implied consent warnings**

Under Washington's implied consent statute, RCW 46.20.308, a driver is deemed to have consented to a test to determine the alcohol

content in her system if arrested by an officer having reasonable grounds to believe the driver has been DUI. RCW 46.20.308(1); *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 47, 50 P.3d 627 (2002). The Department suspends the license of anyone who, after arrest and receipt of statutory warnings, provides two breath test samples over the legal limit during a properly administered test. RCW 46.20.308(7). The driver may request a hearing to challenge the suspension. RCW 46.20.308(8).

The implied consent warnings advise the driver that she will lose her license administratively if she takes the test and the results indicate alcohol over certain legal limits *or* if she refuses to take the test. *Jury v. Dep't of Licensing*, 114 Wn. App. 726, 735, 60 P.3d 615 (2002). The warnings provide the driver with the opportunity to make a knowing and intelligent decision regarding whether to refuse a breath test: that is, whether to withdraw consent and what will result if the test is refused. *State v. Bostrom*, 127 Wn.2d 580, 588, 902 P.2d 157 (1995). "The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace." *Id.* at 590. As long as the opportunity to make the decision is provided, it need not be shown the driver actually understood the warnings, or that his or her decision was knowingly and intelligently made. *Jury*, 114 Wn. App. at 732.

The implied consent statute sets forth warnings to be provided “substantially” in the statutory language. The warnings, when provided to a driver in substantially the same language set forth in the statute, permit someone of normal intelligence to understand the consequences of his decision and to make a knowing and intelligent decision whether to submit or refuse the evidentiary breath test. *Bostrom*, 127 Wn.2d at 588; *Pattison v. Dep’t of Licensing*, 112 Wn. App. 670, 674, 50 P.3d 295 (2002). Because the language of the implied consent statute is unambiguous, courts are not free to require any additional warnings beyond those contained in the plain language of the statute. *Bostrom*, 127 Wn.2d at 586-87.

When an officer has provided additional warnings beyond those contained in the implied consent statute, courts have upheld those warnings as long as the information accurately states the law and does not affect the driver’s ability to make a knowing and informed decision. *Pattison*, 112 Wn. App at 674; *Moffitt v. City of Bellevue*, 87 Wn. App. 144, 148, 940 P.2d 695 (1997). Furthermore, it is not necessary for police officers to inform drivers of *all* consequences that will flow from refusing or submitting to a breath test.⁴ *Bostrom*, 127 Wn.2d at 586; *State v.*

⁴ The United States Supreme Court has similarly upheld implied consent warnings that do not include all consequences that will flow from refusing a blood-alcohol test. *South Dakota v. Neville*, 459 U.S. 553, 565-66, 103 S. Ct. 916 (1983).

Elkins, 152 Wn. App. 871, 877–78, 220 P.3d 211 (2009). Nor are police officers required to tailor the warnings to every driver stopped. *Jury*, 114 Wn. App. at 734.

b. Ignition Interlock Licenses

In 2008, the legislature amended the licensing statutes to allow a person whose license had been suspended or revoked because of a DUI to apply for an ignition interlock license. RCW 46.20.385. A driver may apply for the ignition interlock license regardless of whether they take the breath test or refuse. RCW 46.20.385(1). Furthermore it is only available if the driver’s license has been suspended or revoked. RCW 46.20.385(1).

To reflect this change in law, the legislature added language to the implied consent warnings to advise drivers of the availability of the ignition interlock license. RCW 46.20.308(2)(d). In response, the Washington State Patrol revised the implied consent warnings printed on its forms, which are used throughout the state by all law enforcement agencies for DUI arrests.

Lynch was provided the 2009 revised implied consent warnings which included the information regarding the availability of the ignition interlock license as stated in RCW 46.20.308(2)(d): “if the driver’s license, permit, or privilege to drive is suspended, revoked, or denied the

driver may be eligible to immediately apply for an ignition interlock driver's license.” .

c. Commercial Driver's Licenses

The Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. §§ 31301–31317, established minimum national standards which each state must meet when licensing commercial motor vehicle drivers. Pursuant thereto, in 1989 Washington passed the Uniform Commercial Driver's License Act (Act). Laws of 1989, ch. 178 (codified at RCW 46.25). Washington Courts have held that the Act is to be “liberally construed to protect the public.” *Merseal v. Dep't of Licensing*, 99 Wn. App. 414, 418, 994 P.2d 262, *review denied*, 141 Wn.2d 1021 (2000).

The Act includes a separate regimen of DUI penalties for commercial drivers. RCW 46.25.090 provides in 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, or if the person has been convicted of a first violation, within this or any other jurisdiction, of:

(a) Driving a motor vehicle under the influence of alcohol or any drug;

(b) Driving a commercial motor vehicle while the alcohol concentration in the person's system is 0.04 or more, *or driving a noncommercial motor vehicle while the alcohol concentration in the person's system is 0.08 or more, or is 0.02 or more if the person is under age twenty-one*, as determined by any testing methods approved by law in this state or any other state or jurisdiction[.]

The italicized portion was added in 2006. Laws of 2006, ch. 327, § 4. Therefore, since at least 2006, a person driving a noncommercial vehicle who is stopped for DUI loses his or her commercial driver's license for a year if a report has been received by the department pursuant to RCW 46.20.308.

The warnings at issue in this case, given to drivers who hold commercial drivers licenses but are stopped for DUI in their personal vehicles, are not required by statute. The information given is legally correct, as set forth above in RCW 46.25.090, but there is no requirement in statute or case law that this additional warning be given.

The additional warning was added by Washington State Patrol to their forms in January 2009 in response to numerous challenges to the prior warnings. Specifically CDL holders complained that nothing in the warnings informed them that their commercial driver's licenses would be disqualified in addition to the suspension or revocation of their personal licenses.

2. **The information regarding the availability of the ignition interlock license is not misleading and when read with the other warnings does not imply that the ignition interlock license is a remedy for the CDL disqualification.**

The warning given to Lynch regarding the availability of the ignition interlock license is exactly the same as the statutory language.

RCW 46.20.308(2) provides, in part:

The officer shall warn the driver in substantially the following language, that:

...

(d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.⁵

The language in the warnings read to Lynch is taken directly from the language in section (d) above. DOL 46. The statute *requires* that officers inform drivers that they may *apply* for an ignition interlock license, and this is what the Trooper did in Lynch's case. The ignition interlock license is only available to a driver if his or her license is suspended or revoked pursuant to a driving under the influence arrest. RCW 46.20.385.

In their entirety, the implied consent warnings advise the driver that: 1) you have the right to refuse the breath test; 2) if you refuse, your license will be revoked by the department for at least one year; 3) if you submit and the alcohol concentration of your breath is 0.08 or more your license will be suspended for at least 90 days; 4) if your license is suspended or revoked you may apply for an ignition interlock license; and 5) you have the right to additional tests administered by any qualified

⁵ A complete copy of RCW 46.20.308 is attached as Appendix A.

person of your choosing. In a separate paragraph below these warnings, drivers are advised that if they are not driving a commercial motor vehicle at the time of arrest and their driver's license is suspended or revoked, their commercial driver's license, if any, will be disqualified.

The five statutorily specified warnings, including the interlock ignition warning, use the terms "suspended," "revoked," and "denied" to describe what may happen to a person's driver's license after he or she is stopped for DUI. Likewise, the CDL warning describes a driver's license being suspended or revoked. However, the CDL warning identifies that the CDL license will be disqualified. The "disqualification" language (as distinguished from "suspended or revoked"), used in both the CDL statute and the CDL warning, is a special term that refers only to prohibitions against a commercial motor vehicle license. RCW 46.25.010(8).⁶

The superior court's ruling that the statutorily required warning regarding the ignition interlock license is misleading and implies such a license is a remedy for a CDL disqualification conflicts with *State v.*

⁶ The term is drawn from federal statutes and regulations that specify a mandatory minimum penalty schedule. 49 U.S.C. § 31310, 31311(a)(3), (13), (15), (20); 49 CFR 383.51 Table 1 (mandatory one year disqualification for refusal or for DUI conviction while in any vehicle.) State compliance with the penalty schedule is mandatory, and overseen by the Federal Motor Carrier Safety Administration of the U.S. Dep't of Transportation. 49 U.S.C. § 31311(a); 49 CFR § 384.301. A state's failure to comply with the federal disqualification schedule can result in the withholding of highway funds. 49 CFR § 384.401.

Whitman County Dist. Ct., 105 Wn.2d 278, 714 P.2d 1183 (1986); and *Bostrom*, 127 Wn.2d at 588.

In *State v. Whitman County Dist. Ct.*, the court upheld warnings informing drivers that a refusal to take the breath test *may* be used against them in a criminal trial. *Id.* at 285. The Supreme Court looked to the language of the statute, which contained the word “may” rather than “shall” and concluded that warnings given in the exact language of the statute “conveyed their full import and were sufficient to adequately inform the respondents of the consequences of a refusal to submit to a Breathalyzer test.” *Id.* at 287.

The same is true here. The warning explains that the driver’s license will be suspended if her breath test exceeds the legal limit and that if her license is suspended she may apply for an ignition interlock license. The warning contains the exact language of the statute, which is sufficient to adequately inform Lynch that she may apply for an ignition interlock license. The warning does not set forth all of the prerequisites for receiving an ignition interlock license nor is it required to do so. The warning does not promise a driver that she will receive an ignition interlock license. It only informs her of her right to apply. It also does not state or imply that the ability to apply for this restricted license affects, in any way, the mandatory CDL disqualification pursuant to a separate

statute which is mentioned in a separate section of the warnings two paragraphs later. RCW 46.25.090(1).

In *Bostrom*, the drivers acknowledged that they were given all of the implied consent warnings as specifically set forth in the implied consent statute at the time of their arrests, but argued that they should have received additional warnings. *Bostrom*, 127 Wn.2d at 585. The court noted that the Legislature had amended several statutes pertaining to drunk driving, imposing stiffer penalties for drivers who refused the breath test but were nevertheless convicted of DUI, and offering probationary licenses for drivers who blew over the legal limit with a two-year license revocation if the driver received another DUI during the probationary period. Former RCW 46.20.365(3)(b)(1994). The drivers maintained that because recent amendments altered the consequences of taking or refusing the breath test, the statutory warnings were no longer sufficient, as they no longer allowed drivers to make informed and intelligent decisions. *Id.* at 586. The court disagreed and found notwithstanding that the warnings only mentioned the consequences of refusing the test, the statutory warnings were sufficient. *Id.* The court held that the implied consent statute was unambiguous and therefore a court could not alter its meaning or graft additional warnings not contained in the plain language of the statute to those provided by the legislature. *Id.* at 586-87.

The statutory language informing a driver that she may *apply* for an ignition interlock license is likewise unambiguous. The statutory warnings do not state or imply that a driver's ability to apply for an ignition interlock license means that her CDL will be spared (or for that matter that she is guaranteed an ignition interlock license). Nor does the statute require warnings regarding the interplay between the potential ignition interlock license and a CDL endorsement.

Informing a driver that he or she may apply for an ignition interlock license does not prevent the driver from making a knowing and intelligent decision about whether to consent to or refuse a breath test. Moreover, the officer is only required to give those warnings required by statute, which occurred in this case. Lynch does not dispute that she received the warnings required by the statute. The superior court's holding that the interlock ignition license warning was misleading was in error. The Department's decision should be affirmed.

3. When read together the warnings are not misleading as to the length of disqualification for the commercial driver's license.

The warning provided to Lynch advised her that her CDL endorsement would be disqualified if her driver's license was suspended or revoked. Though not required by statute, this warning was legally accurate and did not mislead Lynch. The hearing officer properly held

that it did not deprive her of the opportunity to make a knowing and intelligent decision about whether to take the breath test.

Appellate precedent is clear regarding additional warnings or information not found in the statute: additional information does not contravene the purpose of the implied consent warnings if it is accurate and not misleading. There is no bright line rule that any deviation from the statutory language requires suppression of the test results. *Moffitt*, 87 Wn. App. 144 at 147–48. Also, nothing prohibits an officer from providing additional information in the warnings as long as the information does not affect the driver’s ability to make a knowing and informed decision. *Pattison*, 112 Wn. App. at 674. Where no different meaning is implied or conveyed by the language of the warnings, the defendant is not misled by additional information. *Town of Clyde Hill v. Rodriguez*, 65 Wn. App. 778, 785, 831 P.2d 149 (1992); *Moffitt*, 87 Wn. App. at 148.

Here, in addition to giving Lynch the statutory implied consent warnings, the arresting officer provided the additional information from the warnings form informing Lynch: “For those not driving a commercial motor vehicle at the time of arrest: if your driver’s license is suspended or revoked, your commercial driver’s license, if any, will be disqualified.” DOL 46. The additional information given to Lynch about her CDL was

not inaccurate, nor did it imply that the length of her CDL disqualification would be the same as the length of her personal license suspension or revocation. She was told her CDL would be *disqualified* if her personal license was suspended or revoked. This does not imply or convey any information regarding the length of the disqualification. Moreover, stating that the CDL would be disqualified distinguishes that action from suspension or revocation of a driver's license, for which the warnings do identify time periods. Because "no different meaning is implied or conveyed by the language of the warnings," the additional information in the warnings provided to Lynch was not misleading. *Rodriguez*, 65 Wn. App. at 785.

Where warnings provided to a driver have been more specific than the warnings provided in the statute, they have been upheld so long as they provide accurate information. In *Pattison v. Dep't of Licensing*, the drivers were given warnings as developed by the State Patrol which omitted none of the statutory required warnings but which added language providing more specific information than the statutory language. The patrol added that, regardless of age, "your license, permit or privilege to drive will be suspended, revoked or denied [if the breath test result is over the limit] or if you are in violation of RCW 46.61.502, 46.61.503 or 46.61.504." *Pattison*, 112 Wn. App at 675.

In contrast, the statutory language makes the “if ... in violation of” warning applicable only “in the case of person under age twenty-one.” RCW 46.20.308(2); *Pattison*, 112 Wn. App. at 675. The court nevertheless held that the drivers in *Pattison* failed to show that the patrol’s more specific warning was inaccurate or misleading because it was correct that drivers both over 21 and under 21 would have their license suspended or revoked, the only difference was that the legal limit was lower for drivers under 21. *Id.* at 675.

The drivers further argued that the language which says “if you are violation of” could be reasonably understood to mean “if you are arrested.” They contended the term violation could mislead drivers into believing that losing one’s license is an inevitable consequence of merely being arrested. *Id.* at 676. The driver’s attempt to have the court make this leap in logic was explicitly rejected by Division I. *Id.*

Like the drivers in *Pattison*, Lynch is asking this Court to make a leap in logic. She argues that the warning which tells her that her CDL will be disqualified if her driver’s license is suspended or revoked mislead her into thinking it will be disqualified for “at least ninety days” therefore convincing her to take the breath test rather than refuse.

Lynch cannot show that the current State Patrol warnings form inaccurately states the law. Nor can she demonstrate that a person of

normal intelligence would be misled into taking the test or refusing to take the breath test because they are informed:

FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED.

DOL 46. The fact that Lynch was not told how long the disqualification would be did not make the warnings misleading or invalid. In addition to the fact that they are an accurate statement of the law as written, police officers are not required to inform drivers of *all* consequences that will flow from refusing or submitting to a breath test. *Bostrom*, 127 Wn.2d at 586. Nor are police officers required to tailor the warnings to every driver stopped. *Jury*, 114 Wn. App. at 734. The hearing officer's decision is consistent with both *Bostrom* and *Jury*.

By contrast, applying the superior court's ruling consistently would require law enforcement to inform CDL holders of the precise nature of all the consequences of taking or refusing to take a breath test. That would amount to this Court grafting additional language onto the warnings to be provided to drivers. This is contrary to appellate precedent and not required by statute.

Courts have found that adding language to the warnings, beyond what is in the statute, can be misleading and invalid if the additional

language includes *incorrect statements of law*. In *Cooper v. Dep't of Licensing*, the driver was informed that if he refused to take a breath test, his driver's license would be revoked "probably for at least a year, depending upon his driver record, maybe two." This was an incorrect statement of law. The implied consent statute stated that the officer shall inform the driver that his or her privilege to drive *will be revoked or denied* if he or she refuses to submit to the test. *Cooper v. Dep't of Licensing*, 61 Wn. App. 525, 526-27, 810 P.2d 1385 (1991). Division III found that the warning given to Cooper was legally incorrect and inaccurate because it implied that Mr. Cooper might have his license revoked for less than one year when it was an "absolute certainty" that if Mr. Cooper refused he would lose his license for a minimum of one year. *Id.* at 528.

In *State v. Bartels*, the officers informed the drivers that they could obtain an additional test at their own expense. This language was not authorized by statute and did not accurately describe an indigent defendant's right to obtain reimbursement for the cost of an additional test. *State v. Bartels*, 112 Wn.2d 882, 887, 774 P.2d 1183 (1989). Again, because the additional language given as part of the warnings by the officer was an incorrect statement of law, the court found that it prevented

the driver from making a properly informed decision whether or not to submit to a blood alcohol content test. *Id.* at 889.

In Lynch's case, she agrees that the warning regarding her CDL disqualification was legally correct. The additional warning about the CDL disqualification was appended after the statutorily required warning in a separate district paragraph. DOL at 46. The fact that the statute requires that a driver be informed that his or her personal license will be suspended, revoked, or denied for at least ninety days if test results reflect a breath alcohol concentration is 0.08 or more does not make the warning about the disqualification of their commercial license legally inaccurate or misleading.

Nothing in the implied consent statute or case law requires warnings to indicate the length of the CDL disqualification when a CDL holder is arrested while driving her personal vehicle. The additional warning regarding CDL disqualification is an accurate statement of the law and was added to provide additional legally accurate information to the drivers. There is no case law holding that the addition of legally accurate information to the statutory implied consent warnings results in warnings that are misleading such that they deprive the driver of the opportunity to make a knowing and intelligent decision about whether to take the breath test. The addition in this instance is legally accurate.

Moreover, it does not create an additional duty on the part of the arresting officer to warn the driver of the length of disqualification. *Bostrom*, 127 Wn.2d at 586. The Department's decision suspending Lynch's license was correct and the superior court's holding to the contrary was in error.

B. Given that Lynch failed to prove she was prejudiced by the warnings she received, the hearing officer properly suspended her license.

Because the implied consent warnings are not misleading this Court does not have to reach the prejudice prong, however, if this Court does find they were misleading, Lynch failed to demonstrate actual prejudice required in order for her to prevail.

Contrary to Lynch's argument to the superior court, Washington courts do not merely consider whether a driver falls into a particular "class of persons" who *could* be prejudiced when determining whether prejudice has been established as a result of misleading warnings. Rather, courts look to whether the driver has established actual prejudice as a matter of fact due to the allegedly misleading advisement. *Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 901, 774 P.2d 1187 (1989). Here, Lynch cannot meet the actual prejudice standard. She did not testify or provide any evidence that the information actually influenced her decision to take the test.

In *Gonzales*, the court held that drivers need to show actual prejudice from having been given inaccurate or misleading implied consent warnings in order to have their license revocations reversed. *Gonzales*, 112 Wn.2d at 899. The drivers in that case were told they had the right to an additional breath test “at your own expense and that your refusal to take the test shall be used against you in a subsequent criminal trial” *Id.* at 892-93. The “at your own expense” language was not part of the statute. *Id.* Additionally, the warnings given advised that refusal to take a breath test “shall” be used in a criminal trial, while the statute used the permissive word “may.” Both drivers refused the breath test. *Id.*

With respect to the “at your own expense” language, the court found that such language could possibly be misleading to indigent drivers, since for such drivers court rules provided for reimbursement of the costs of obtaining an additional test. *Id.* at 898-99. Nonetheless, the court determined that since the drivers in question had made no claim of indigency, the “at your own expense” language could not have influenced their decision. *Gonzales*, 112 Wn.2d at 899. Consequently, because actual prejudice had not been shown, the inaccurate and therefore misleading warning did not invalidate the revocation of the licenses. *Id.* at 895.

With respect to the warning advising that refusal to take a breath test “shall,” rather than “may,” be used in a criminal trial, the court acknowledged that the incorrect mandatory language could mislead a driver into *taking* the test. *Id.* at 902. However, since the driver did *not* take the test, “he could not have been prejudiced by the inaccurate warning and that warning thus does not serve as a basis to invalidate the revocation of his driver’s license.” *Id.* Therefore, the warning with the word “shall” rather than “may” could only have made a driver more likely to take the breath test and since Mr. Gonzales refused, the warning did not prejudice him. *Id.* Thus, “actual” prejudice requires more than a demonstration that one could be prejudiced by the language of the warning. The actual result must be prejudicial.

Division III agreed with this analysis when addressing another case involving an incorrect “at your own expense” warning. *Graham v. Dep’t of Licensing*, 56 Wn. App 677, 681, 748 P.2d 1295, 1298 (1990). There, the driver argued that the warning that additional tests could be taken at her own expense had a “chilling effect” on her decision whether to take the breath test. The court employed the reasoning in *Gonzales* and found the question of actual prejudice is a factual one. The court remanded the case to the trial court to determine whether the driver would have in-fact qualified as an indigent under court rules. *Id.*

A showing of actual prejudice requires demonstrating that a misadvisement of rights actually affected an individual's decision. Again, in this case, the only evidence, which is uncontested, is that Lynch received accurate warnings. There is no evidence that the warnings misled Lynch into taking the test. In *Storhoff*, the Supreme Court again held that a driver must show actual prejudice from misleading information before dismissal or reversal of a driving while license suspended charge. *State v. Storhoff*, 133 Wn.2d 523, 531-32, 946 P.2d 783 (1997). There the drivers were habitual traffic offenders criminally charged with driving while license revoked. *Id.* They were sent notices by DOL stating that they had ten (10) days to request an administrative hearing. However, the statute stated drivers had fifteen (15) days to request a hearing. The drivers argued that they were not required to demonstrate prejudice and attempted to distinguish their criminal cases from *Gonzales v. Dep't of Licensing*. *Id.* at 529. The court rejected this argument, again holding that the drivers must demonstrate actual prejudice. *Id.* at 531-32.

If the warnings involved here were misleading, Lynch would be required to establish that she was actually prejudiced by the allegedly misleading warnings in order for the Court to reverse her license suspension. The superior court's holding that "the misleading nature of the warning prejudiced Ms. Lynch's ability to make a knowing and

intelligent decision as to whether to take the BAC test,” did not apply the actual prejudice standard because it did not scrutinize the facts of the case *nor* did it analyze the difference in the results of blowing or refusing.

Here, Lynch chose to take the breath test but refusing to take the test would have carried the same consequences to her CDL: a one year disqualification. If anything, her being encouraged to submit to the breath test resulted in a better outcome, as her personal license was suspended for 90 days rather than being revoked for one year. This is also consistent with the policy behind the implied consent law which is to encourage drivers to take the breath test. Furthermore, whether she took or refused the test had no bearing on whether she could receive an ignition interlock license.

Lynch was required to show that she falls within the class of persons that would be affected by the warnings and that, by virtue of her membership in that class, her ability to make a knowing and intelligent decision was affected such that a different decision could have changed the outcome of her case. *See Gonzales*, 112 Wn.2d at 902. Lynch cannot demonstrate this. Thus, the Department properly suspended her license.

VIII. CONCLUSION

The Department respectfully requests that this court reverse the superior court order and affirm the Department's order of suspension. Lynch was provided legally correct warnings, consistent with the statute, which would allow a person of normal intelligence to knowingly and intelligently decide whether to submit to a breath test.

RESPECTFULLY SUBMITTED this 9th day of June, 2010.

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APPENDIX A

RCW 46.20.308**Implied consent -- Test refusal -- Procedures.**

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath or blood for the purpose of determining the alcohol concentration or presence of any drug in his or her breath or blood if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. However, in those instances where the person is incapable due to physical injury, physical incapacity, or other physical limitation, of providing a breath sample or where the person is being treated in a hospital, clinic, doctor's office, emergency medical vehicle, ambulance, or other similar facility or where the officer has reasonable grounds to believe that the person is under the influence of a drug, a blood test shall be administered by a qualified person as provided in RCW 46.61.506(5). The officer shall inform the person of his or her right to refuse the breath or blood test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if the driver is age twenty-one or over and the test indicates the alcohol concentration of the driver's breath or blood is 0.08 or more, or if the driver is under age twenty-one and the test indicates the alcohol concentration of the driver's breath or blood is 0.02 or more, or if the driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504; and

(d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of vehicular homicide as provided in RCW 46.61.520 or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested.

(4) Any person who is dead, unconscious, or who is otherwise in a condition rendering him or her incapable of refusal, shall be deemed not to have withdrawn the consent provided by subsection (1) of this section and the test or tests may be administered, subject to the provisions of RCW 46.61.506, and

the person shall be deemed to have received the warnings required under subsection (2) of this section.

(5) If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath or blood, no test shall be given except as authorized under subsection (3) or (4) of this section.

(6) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 or more if the person is age twenty-one or over, or 0.02 or more if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (7) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (8) of this section and that the person waives the right to a hearing if he or she receives an ignition interlock driver's license;

(c) Mark the person's Washington state driver's license or permit to drive, if any, in a manner authorized by the department;

(d) Serve notice in writing that the marked license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until the suspension, revocation, or denial of the person's license, permit, or privilege to drive is sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces; and

(e) Immediately notify the department of the arrest and transmit to the department within seventy-two hours, except as delayed as the result of a blood test, a sworn report or report under a declaration authorized by RCW 9A.72.085 that states:

(i) That the officer had reasonable grounds to believe the arrested person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or was under the age of twenty-one years and had been driving or was in actual physical control of a motor vehicle while having an alcohol concentration in violation of RCW 46.61.503;

(ii) That after receipt of the warnings required by subsection (2) of this section the person refused to submit to a test of his or her blood or breath, or a test was administered and the results indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person is age twenty-one or over, or was 0.02 or more if the person is under the age of twenty-one; and

(iii) Any other information that the director may require by rule.

(7) The department of licensing, upon the receipt of a sworn report or report under a declaration

authorized by RCW 9A.72.085 under subsection (6)(e) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW 46.20.3101, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or when sustained at a hearing pursuant to subsection (8) of this section, whichever occurs first.

(8) A person receiving notification under subsection (6)(b) of this section may, within twenty days after the notice has been given, request in writing a formal hearing before the department. The person shall pay a fee of two hundred dollars as part of the request. If the request is mailed, it must be postmarked within twenty days after receipt of the notification. Upon timely receipt of such a request for a formal hearing, including receipt of the required two hundred dollar fee, the department shall afford the person an opportunity for a hearing. The department may waive the required two hundred dollar fee if the person is an indigent as defined in RCW 10.101.010. Except as otherwise provided in this section, the hearing is subject to and shall be scheduled and conducted in accordance with RCW 46.20.329 and 46.20.332. The hearing shall be conducted in the county of the arrest, except that all or part of the hearing may, at the discretion of the department, be conducted by telephone or other electronic means. The hearing shall be held within sixty days following the arrest or following the date notice has been given in the event notice is given by the department following a blood test, unless otherwise agreed to by the department and the person, in which case the action by the department shall be stayed, and any valid temporary license marked under subsection (6)(c) of this section extended, if the person is otherwise eligible for licensing. For the purposes of this section, the scope of the hearing shall cover the issues of whether a law enforcement officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more if the person was under the age of twenty-one, whether the person was placed under arrest, and (a) whether the person refused to submit to the test or tests upon request of the officer after having been informed that such refusal would result in the revocation of the person's license, permit, or privilege to drive, or (b) if a test or tests were administered, whether the applicable requirements of this section were satisfied before the administration of the test or tests, whether the person submitted to the test or tests, or whether a test was administered without express consent as permitted under this section, and whether the test or tests indicated that the alcohol concentration of the person's breath or blood was 0.08 or more if the person was age twenty-one or over at the time of the arrest, or 0.02 or more if the person was under the age of twenty-one at the time of the arrest. The sworn report or report under a declaration authorized by RCW 9A.72.085 submitted by a law enforcement officer is prima facie evidence that the officer had reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drugs, or both, or the person had been driving or was in actual physical control of a motor vehicle within this state while having alcohol in his or her system in a concentration of 0.02 or more and was under the age of twenty-one and that the officer complied with the requirements of this section.

A hearing officer shall conduct the hearing, may issue subpoenas for the attendance of witnesses and the production of documents, and shall administer oaths to witnesses. The hearing officer shall not issue a subpoena for the attendance of a witness at the request of the person unless the request is accompanied by the fee required by RCW 5.56.010 for a witness in district court. The sworn report or report under a declaration authorized by RCW 9A.72.085 of the law enforcement officer and any other evidence accompanying the report shall be admissible without further evidentiary foundation and the certifications authorized by the criminal rules for courts of limited jurisdiction shall be admissible without further evidentiary foundation. The person may be represented by counsel, may question witnesses, may present evidence, and may testify. The department shall order that the suspension,

revocation, or denial either be rescinded or sustained.

(9) If the suspension, revocation, or denial is sustained after such a hearing, the person whose license, privilege, or permit is suspended, revoked, or denied has the right to file a petition in the superior court of the county of arrest to review the final order of revocation by the department in the same manner as an appeal from a decision of a court of limited jurisdiction. Notice of appeal must be filed within thirty days after the date the final order is served or the right to appeal is waived. Notwithstanding RCW 46.20.334, RALJ 1.1, or other statutes or rules referencing de novo review, the appeal shall be limited to a review of the record of the administrative hearing. The appellant must pay the costs associated with obtaining the record of the hearing before the hearing officer. The filing of the appeal does not stay the effective date of the suspension, revocation, or denial. A petition filed under this subsection must include the petitioner's grounds for requesting review. Upon granting petitioner's request for review, the court shall review the department's final order of suspension, revocation, or denial as expeditiously as possible. The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department. The superior court may reverse, affirm, or modify the decision of the department or remand the case back to the department for further proceedings. The decision of the superior court must be in writing and filed in the clerk's office with the other papers in the case. The court shall state the reasons for the decision. If judicial relief is sought for a stay or other temporary remedy from the department's action, the court shall not grant such relief unless the court finds that the appellant is likely to prevail in the appeal and that without a stay the appellant will suffer irreparable injury. If the court stays the suspension, revocation, or denial it may impose conditions on such stay.

(10)(a) If a person whose driver's license, permit, or privilege to drive has been or will be suspended, revoked, or denied under subsection (7) of this section, other than as a result of a breath or blood test refusal, and who has not committed an offense for which he or she was granted a deferred prosecution under chapter 10.05 RCW, petitions a court for a deferred prosecution on criminal charges arising out of the arrest for which action has been or will be taken under subsection (7) of this section, or notifies the department of licensing of the intent to seek such a deferred prosecution, then the license suspension or revocation shall be stayed pending entry of the deferred prosecution. The stay shall not be longer than one hundred fifty days after the date charges are filed, or two years after the date of the arrest, whichever time period is shorter. If the court stays the suspension, revocation, or denial, it may impose conditions on such stay. If the person is otherwise eligible for licensing, the department shall issue a temporary license, or extend any valid temporary license marked under subsection (6) of this section, for the period of the stay. If a deferred prosecution treatment plan is not recommended in the report made under RCW 10.05.050, or if treatment is rejected by the court, or if the person declines to accept an offered treatment plan, or if the person violates any condition imposed by the court, then the court shall immediately direct the department to cancel the stay and any temporary marked license or extension of a temporary license issued under this subsection.

(b) A suspension, revocation, or denial imposed under this section, other than as a result of a breath or blood test refusal, shall be stayed if the person is accepted for deferred prosecution as provided in chapter 10.05 RCW for the incident upon which the suspension, revocation, or denial is based. If the deferred prosecution is terminated, the stay shall be lifted and the suspension, revocation, or denial reinstated. If the deferred prosecution is completed, the stay shall be lifted and the suspension, revocation, or denial canceled.

(c) The provisions of (b) of this subsection relating to a stay of a suspension, revocation, or denial and the cancellation of any suspension, revocation, or denial do not apply to the suspension, revocation,

denial, or disqualification of a person's commercial driver's license or privilege to operate a commercial motor vehicle.

(11) When it has been finally determined under the procedures of this section that a nonresident's privilege to operate a motor vehicle in this state has been suspended, revoked, or denied, the department shall give information in writing of the action taken to the motor vehicle administrator of the state of the person's residence and of any state in which he or she has a license.

[2008 c 282 § 2. Prior: 2005 c 314 § 307; 2005 c 269 § 1; prior: 2004 c 187 § 1; 2004 c 95 § 2; 2004 c 68 § 2; prior: 1999 c 331 § 2; 1999 c 274 § 2; prior: 1998 c 213 § 1; 1998 c 209 § 1; 1998 c 207 § 7; 1998 c 41 § 4; 1995 c 332 § 1; 1994 c 275 § 13; 1989 c 337 § 8; 1987 c 22 § 1; prior: 1986 c 153 § 5; 1986 c 64 § 1; 1985 c 407 § 3; 1983 c 165 § 2; 1983 c 165 § 1; 1981 c 260 § 11; prior: 1979 ex.s. c 176 § 3; 1979 ex.s. c 136 § 59; 1979 c 158 § 151; 1975 1st ex.s. c 287 § 4; 1969 c 1 § 1 (Initiative Measure No. 242, approved November 5, 1968).]

NOTES:

Effective date -- 2008 c 282: "Sections 2, 4 through 8, and 11 through 14 of this act take effect January 1, 2009." [2008 c 282 § 23.]

Effective date -- 2005 c 314 §§ 101-107, 109, 303-309, and 401: See note following RCW 46.68.290.

Part headings not law -- 2005 c 314: See note following RCW 46.17.010.

Effective date -- 2004 c 187 §§ 1, 5, 7, 8, and 10: "Sections 1, 5, 7, 8, and 10 of this act take effect July 1, 2005." [2004 c 187 § 11.]

Contingent effect -- 2004 c 95 § 2: "Section 2 of this act takes effect if section 2 of Substitute House Bill No. 3055 is enacted into law." [2004 c 95 § 17.] 2004 c 68 § 2 was enacted into law, effective June 10, 2004.

Finding -- Intent -- 2004 c 68: "The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to ensure swift and certain consequences for those who drink and drive.

To accomplish this goal, the legislature adopts standards governing the admissibility of tests of a person's blood or breath. These standards will provide a degree of uniformity that is currently lacking, and will reduce the delays caused by challenges to various breath test instrument components and maintenance procedures. Such challenges, while allowed, will no longer go to admissibility of test results. Instead, such challenges are to be considered by the finder of fact in deciding what weight to place upon an admitted blood or breath test result.

The legislature's authority to adopt standards governing the admissibility of evidence involving alcohol is well established by the Washington Supreme Court. See generally *State v. Long*, 113 Wn.2d 266, 778 P.2d 1027 (1989); *State v. Sears*, 4 Wn.2d 200, 215, 103 P.2d 337 (1940) (the legislature has the power to enact laws which create rules of evidence); *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929) ("rules of evidence are substantive law"). [2004 c 68 § 1.]

Effective date -- 1999 c 331: See note following RCW 9.94A.525.

Effective date -- 1998 c 213: "This act takes effect January 1, 1999." [1998 c 213 § 9.]

Effective date -- 1998 c 209: "This act takes effect January 1, 1999." [1998 c 209 § 6.]

Effective date -- 1998 c 207: See note following RCW [46.61.5055](#).

Intent -- Construction -- Effective date -- 1998 c 41: See notes following RCW [46.20.265](#).

Severability -- 1995 c 332: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1995 c 332 § 23.]

Effective dates -- 1995 c 332: "This act shall take effect September 1, 1995, except for sections 13 and 22 of this act which are necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [May 11, 1995]." [1995 c 332 § 24.]

Short title -- Effective date -- 1994 c 275: See notes following RCW [46.04.015](#).

Effective dates -- 1985 c 407: See note following RCW [46.04.480](#).

Legislative finding, intent -- 1983 c 165: "The legislature finds that previous attempts to curtail the incidence of driving while intoxicated have been inadequate. The legislature further finds that property loss, injury, and death caused by drinking drivers have reached unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem. To that end the legislature seeks to insure swift and certain punishment for those who drink and drive. The legislature does not intend to discourage or deter courts and other agencies from directing or providing treatment for problem drinkers. However, it is the intent that such treatment, where appropriate, be in addition to and not in lieu of the sanctions to be applied to all those convicted of driving while intoxicated." [1983 c 165 § 44.]

Effective dates -- 1983 c 165: "Sections 2, 3 through 12, 14, 16, 18, 22, 24, and 26 of chapter 165, Laws of 1983 shall take effect on January 1, 1986. The remainder of chapter 165, Laws of 1983 is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect on July 1, 1983. The director of licensing may immediately take such steps as are necessary to insure that all sections of chapter 165, Laws of 1983 are implemented on their respective effective dates." [1984 c 219 § 1; 1983 c 165 § 47.]

Severability -- 1983 c 165: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1983 c 165 § 48.]

Severability -- 1979 ex.s. c 176: See note following RCW [46.61.502](#).

Effective date -- Severability -- 1979 ex.s. c 136: See notes following RCW [46.63.010](#).

Severability, implied consent law -- 1969 c 1: See RCW [46.20.911](#).

Liability of medical personnel withdrawing blood: RCW [46.61.508](#).

Refusal of test -- Admissibility as evidence: RCW 46.61.517.

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BY _____ DEPUTY

NO. 40041-3

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

LEESA M. LYNCH,

Respondent,

v.

STATE OF WASHINGTON,
DEPARTMENT OF LICENSING,

Petitioner.

DECLARATION OF
SERVICE

I, Kathryn Riske, certify that I caused a copy of **Brief of Appellant**
to be served on all parties or their counsel of record on the date below:

**Via facsimile and US Mail via
Consolidated Mail Service:**

Via hand delivery:

Barbara Bowden
Michael Frans
5611 76th Street W, #A
Lakewood, WA 98499
Fax: (206) 246-5747

Supreme Court
415 12th Ave SW
Olympia, WA 98504-0929

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

RESPECTFULLY SUBMITTED this 9th day of June, 2010.


KATHRYN RISKE, Legal Assistant