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SUPREME COURT
STATE OF WASHINGTON

JOHN C. BORROMEO,

Appellant,

vs.

KAREN SHEA and JOHN DOE SHEA, her husband, and the
marital community composed thereof,

Respondents.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Karen Shea, defendant in the trial court, respondent in the Court of Appeals and respondent in this Court, respectfully asks the Court to deny the requested review of the Court of Appeals decision.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Should the Court review a unanimous Court of Appeals decision that applied settled law in confirming the trial court's upholding of the jury verdict which does not raise any issue of substantial public interest?

2. Did the Court of Appeals properly affirm the trial court's denial of appellant's motion for new trial or judgment notwithstanding the verdict when there was substantial evidence that allowed the jury in its discretion to conclude that respondent exercised ordinary care?

3. Did the Court of Appeals properly affirm the trial court's instructions to the jury on the duties of a bicycle rider?

III. RESTATEMENT OF THE CASE

A. Restatement of Facts.

This bicycle-automobile accident occurred on the Bothell-Everett Highway (SR 527) approximately one-quarter of a block north of 208th Street S.E. in Snohomish County. (Vol.1:37.) The Bothell-Everett Highway runs north and south, with two lanes in each direction. Designated bicycle lanes run along both sides of the highway. Within these lanes are markings, signs and arrows showing direction of travel. Outlines of bicycles accompanied by the word "lane" are spaced along the bicycle lanes on both sides. These figures and words are right side up for a bicyclist riding northbound along the east side of the highway adjacent to northbound vehicle traffic. Similarly, along the west side of the highway adjacent to the southbound vehicle lanes, these markings are right side up for a southbound bicyclist. (Vol. 4:105.) In addition, directional arrows are present within the lanes at various locations on both sides of the highway. These directional arrows on the east side point north and the arrows on the west side adjacent to the southbound traffic lanes point south. (Vol. 1:19, 20, 22, 39, 40.) Included is a directional arrow pointing north in the

bicycle lane on the east side just one block south of the location of the accident. (Vol. 4:110, Exhibit 9.)

Shea was very familiar with the area, having used the driveway out of the Safeway store many times previously. (Vol. 1:35-36.) When exiting that driveway, one can only turn right to travel northbound. (Vol. 1:36.) She was aware of the bicycle lanes on both sides of the highway and that they contained both directional arrows as well as the markings. She knew the directional arrows pointed northbound along the east side of the highway both north and south of the accident scene. (Vol. 1:19, 20, 22-23, 39-40, 47.) She was aware the markings in the form of the bicycle outline and the word "lane" were right side up when traveling north on the east side of the highway and therefore upside down when traveling south along that side of the highway. (Vol. 1:40-43, see Exhibit 7.) She knew the markings in the bicycle lane on the west side were read right side up when traveling southbound. (Vol. 1:40-43.) She therefore believed the bike lane in which the accident occurred on the east side of the highway was a northbound only bike lane since all signs, pavement markings and arrows pointed north. (Vol. 1:25.)

During the years she had driven on the highway, she had never seen a bicyclist riding southbound in the bicycle lane where the accident occurred on the east side of the highway. (Vol. 1:37.) She had also observed bicyclists riding only southbound in the bicycle lane on the west side of the highway. (Vol. 1:38.) She had only observed bicyclists in the bicycle lanes on both sides of the highway riding with the flow of general traffic. (Vol. 1:38.) It was thus her understanding based upon the markings in the bicycle lane as well as her experience that a bicyclist in the lane on the east side of the highway was required to ride northbound with traffic. (Vol. 1:40, 41.) It had not occurred to her based upon her knowledge and experience that someone would be riding southbound in the northbound bicycle lane on the east side of the highway. (Vol. 1:38.) It was her further understanding and belief that bicyclists were subject to the same rules of the road as motorists and should therefore be riding only northbound in the bicycle lane where the accident happened. (Vol. 1:38.) She didn't expect, therefore, to see a bicyclist riding southbound in that lane. (Vol. 1:23, 25.)

Borromeo had ridden his bicycle along the Bothell-Everett Highway in this area hundreds of times before the accident occurred. (Vol. 4:93; Vol. 3:41.) He was aware of the bike lanes on both sides of the highway (Vol. 4:103) and had ridden over the markings on both sides probably thousands of times. (Vol. 4:104.) He was aware those markings were upside down when riding southbound on the east side (Vol. 4:105.) He was aware of the northbound directional arrows in the bike lane on the east side and that there were no southbound directional arrows in that lane. (Vol. 4:109-110) He knew there was a northbound arrow only one block south of the accident scene. (Vol. 4:109, 110.) He was also aware of the southbound directional arrows in the west bicycle lane. (Vol. 4:110.) It was also his belief and understanding that he was required to comply with the same rules of the road as automobile drivers and that any auto driver was required to drive on the right side of the roadway. (Vol. 4:102.)

On the day of the accident, Shea exited the store parking lot by driving westbound along the driveway approaching the highway. She initially stopped at the painted stop line at the sidewalk. (Vol. 1:6-7.) and looked to the north and south for pedestrians and any

other hazards that might be approaching. She looked to the south about three times and also to the north 3-4 times. (Vol. 1:7.) She observed heavy traffic approaching northbound on the highway, but saw no pedestrians or bicyclists in either direction. (Vol. 1:8.) She then crept toward the end of the driveway again stopping with the front of her vehicle at the edge of the street. (Vol. 1:8.) She was stopped in that position for approximately 10 seconds focusing her attention to the left because of the approaching northbound traffic. (Vol. 1:9.) Southbound traffic could not make a left turn into the driveway due to a raised barrier. Observing a gap in the traffic, she had just begun to move when Borrromeo crossed in front of her vehicle riding southbound in the northbound bicycle lane resulting in the impact. She had no reason to anticipate a bicyclist would be riding on the wrong side of the highway based upon her knowledge of the bicycle lane markings, arrows and her understanding of the rules of the road. (Vol. 1:23, 25, 37, 38, 40-41.)

B. Proceedings.

The jury, after hearing the testimony of both parties, concluded that Shea was not negligent and did not, therefore, reach the issue of whether Borrromeo was contributorily negligent in

violation of the duties of a bicyclist. The trial court in denying petitioner's post trial motions concluded there was substantial evidence that allowed the jury to find that respondent was not negligent and that the jury was properly instructed on the duties of a bicyclist.

The Court of Appeals, in affirming the trial court, held that the question of respondent's negligence was a factual issue to be determined only by the trier of fact and it was for the jury to decide whether respondent was negligent. The Court of Appeals concluded that the jury instructions properly stated the applicable law and which allowed the jury to decide whether respondent was riding on a roadway and therefore subject to the rules of the road. The Court of Appeals further concluded that the statutes do apply to bicyclists in a bicycle lane.

IV. ARGUMENT

A. The Court of Appeals' decision rests upon settled legal principles and does not raise any issue of substantial public interest.

The sole basis of the petition is that it involves an issue of substantial public interest due to increasing use of bicycle lanes.

RAP 13.4(b)(4). The jury, however, did not even address the issue of a bicyclist's duties in a bicycle lane since it found respondent was not negligent and did not proceed to petitioner's contributory negligence. Thus, the purported proliferation and use of bicycle lanes on public roadways is not relevant to the determination of this case.

B. The Court of Appeals properly confirmed the trial court's denial of respondent's post-trial motions since there was substantial evidence that allowed the jury to find that respondent was not negligent.

The Court of Appeals properly concluded in applying well established standards of review that the trial court did not err in denying the post trial motions concluding that it was for the jury to decide whether respondent was negligent. Substantial evidence supported the jury's conclusion that she exercised ordinary care. After she stopped at the sidewalk, she looked to her left as well as to her right at least three times. She then moved to the edge of the roadway, thereafter focusing her attention to her left, the only direction from which traffic was approaching. She had never seen anyone riding a bicycle southbound in the northbound bicycle lane.

She was aware of the numerous bicycle lane markings including the directional arrows all of which directed bicyclists northbound. She was aware of the bicycle lane on the west side of the highway for southbound riders. She further testified, without objection, that it was her understanding that bicyclists were required to ride with traffic and not against it. In light of these facts, the jury had substantial evidence upon which to conclude that she had no reason whatsoever to anticipate that Borromeo would be riding southbound against traffic and therefore ordinary care did not require her to look again to the north. The jury was properly instructed (CP 70, Inst. 19) without objection that Shea had no duty to anticipate that Borromeo would not comply with the rules of the road.

The jury was properly instructed that while emerging from a driveway one has the primary duty to yield, but that this right of way is relative and not absolute and both parties have the duty to exercise ordinary care. (CP 70, Inst. 15.) The jury had substantial evidence upon which to conclude that Shea had exercised her relative duty of ordinary care. The trial judge in denying Borromeo's motions properly relied upon the relative nature of the

duties. (Vol. 5:20.) Whether Shea had any reason to anticipate that Borromeo would be riding the wrong way and should have looked again to her right was in dispute and therefore properly submitted to the jury.

While the jury did not reach the issue of Borromeo's negligence, there was also substantial evidence before it upon which it could have concluded that he was at fault in causing the accident. Borromeo admitted that he had ridden over the markings in the bicycle path on the east side of the highway literally hundreds of times and was aware that the bicycle outline and the word "lane" indicated a northbound direction of travel. He further admitted that he was aware of the directional arrows along the bicycle path, one of which was only approximately one block to the south of the accident scene which required he ride northbound. He was aware of the bicycle lane on the west side of the street with reversed markings requiring southbound travel. He also knew that he was required to obey the rules of the road for vehicles when riding his bicycle which would require him to ride with traffic.

C. The jury was properly instructed on the duties of a bicycle rider as confirmed by the Court of Appeals.

The jury was properly instructed on the duties of a bicyclist consistent with the relevant statutes RCW 46.61.755 and RCW 46.61.770. RCW 46.61.750 confirms that 46.61.755 applies to bicycles whenever operated upon any highway. The Court of Appeals emphasized that instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury and properly inform the jury of the applicable law and that an instruction which follows the words of a statute is proper unless the statutory language is not reasonably clear or is misleading. Such an instruction permits the parties to argue opposing interpretations. The Court of Appeals further noted that the trial court has considerable discretion in the wording of instructions and a reversal based upon an instructional error must be prejudicial. Jury instructions 12 and 13 accurately stated the law, were not misleading, and permitted the parties to argue their respective theories. It was then properly left for the jury to decide whether Borromeo was riding on a roadway and therefore subject to the rules of the road.

The Court of Appeals further rejected petitioner's argument that the jury should have been instructed that Borromeo had no duty to observe these statutes because he was not riding on a roadway while in a designated bicycle lane. The Court noted that pursuant to RCW 46.04.670 a bicycle is a vehicle and that a roadway is "that portion of a highway improved, designed or ordinarily used for vehicular travel . . ." RCW 46.04.500. These statutes are consistent with RCW 46.61.770(1) which allows cyclists on a roadway to choose to ride in traffic thru lanes, on the shoulder, or in designated bicycle lanes. None of the statutes exclude bicycles from their application. These statutes are further consistent with RCW 46.61.050 and 46.04.611 which require compliance with signs and markings on the roadway which expressly includes bicyclists which formed the basis for instruction 14 which was not objected to by plaintiff. These statutes when read together clearly show that a bicyclist while in a designated bicycle lane must comply with the rules of the road. Therefore, the Court concluded a bicyclist in a marked, designated bicycle lane is on a roadway and subject to the rules of the road for vehicles. To conclude otherwise, would allow a bicyclist in a bicycle lane to ride

as he pleases without regard to any rules, a conclusion which would be contrary to the intended use of bicycle lanes to enhance bicyclist safety and makes neither common sense nor is based upon existing statutes.

V. CONCLUSION

This Court should deny petitioner's request to review the Court of Appeals decision that does not raise any issue of substantial public interest. Petitioner received a fair trial. The jury was presented with substantial evidence that respondent exercised ordinary care which was within the jury's discretion and it was further properly instructed as to the law.

Respectfully submitted this 25th day June, 2007.

SNOOK SCHWANZ



Edwin J. Snook, WSBA #03060
Attorneys for Respondent Shea

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SUPREME COURT
STATE OF WASHINGTON

JOHN C. BORROMELO,)	
)	
Appellant,)	NO. 58221-6
)	(Court of Appeals Cause No.)
vs.)	
)	AFFIDAVIT OF FILING
KAREN SHEA and JOHN DOE SHEA, her)	ANSWER TO PETITION
husband, and the marital community)	FOR REVIEW
composed thereof,)	
)	
Respondents.)	
)	

STATE OF WASHINGTON)
) ss.
 COUNTY OF KING)

The undersigned, being first duly sworn on oath, deposes and says:

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on June 25, 2007, affiant delivered to ABC Legal Services, Inc. the original and one copy of Answer to Petition for Review, with instructions to file said documents no later than June 26, 2007 with the Clerk of the Washington

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State Supreme Court, 415 – 12th Avenue S.W., Olympia, Washington.

DATED this 25th day of June, 2007.



Marla Thomas

Subscribed and sworn to before me this 25th day of June, 2007.



Thomas L. Schwanz
Notary Public residing at Bothell
My appointment expires 7/18/07