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No. 58221-6

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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JOHN C. BORROMEO,

Appellant,

v.

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

Respondent.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2008 DEC 23 PM 4:34

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APPELLANT'S REPLY BRIEF

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In her brief, Shea makes a number of factual assertions which are inconsistent with the record. Moreover, in seeking to uphold the trial court's judgment, Shea's primary argument incorporates both misstatements of fact and misinterpretation of the pertinent law. Because of Shea's misapprehension of fact and law, her conclusion, that substantial evidence supports the jury's verdict, fails. These issues are addressed in turn below.

**I. Shea's brief makes factual assertions which are inconsistent with the record.**

Shea's brief contains a "Counterstatement of the Facts" section. This section sets out a number of key factual assertions with neither support in, nor citation to, the record. For instance, without citation, Shea states, "[d]esignated bicycle lanes run along both sides of the highway. Within these lanes are markings, signs and arrows showing direction of travel." Resp. Br., 1. Similarly, again without citation, she states, "directional arrows are present within the lanes at various locations on both sides of the highway." *Id.*, 2. In fact, the record plainly establishes that from 208th Street S.E. northward, no directional signs or arrows appear anywhere within the bicycle lanes that run along the Bothell-Everett Highway. (Vol. 1, 21, 25; Vol. 2, 9-10; Vol. 3, 42-43; and Ex. 11.) Given the record on this issue, characterizing the lanes as having directional arrows "at various locations" is, at best, misleading. Most importantly, within the block in which the collision occurred, no directional arrows or signs were present that pertained to bicyclists in the bicycle lane. (Vol. 1, 21-25; Vol. 2, 9-10; Ex. 11.)

Further, Shea claims that she “knew the directional arrows pointed northbound along the east side of the highway both north and south of the accident scene.” Resp. Br., 2. Similarly, she supposedly “knew the directional arrows pointed northbound along the east side of the highway both north and south of the accident scene.” *Id.* Because, as stated above, the bicycle lane contained no directional arrows north of the collision site, Shea could not “know” of such arrows’ presence. Indeed, at trial, Shea acknowledged that she had mistakenly believed that the bicycle lane contained directional arrows near the site of the collision. (Vol. 1, 21-22.)

Lastly, once more without citation to the record, Shea states, “[o]bserving a gap in the traffic, she had just begun to move when Borromeo crossed in front of her vehicle riding southbound and approaching from her right resulting in the impact.” Resp. Br., 5-6. Nothing in the record would suggest that Borromeo began passing in front of Shea’s vehicle after she had already begun moving. Rather, Borromeo testified Shea was stopped when he began passing in front of her. (Vol. 3, 11.) Because Shea never saw Borromeo until after she had hit him, she could offer no testimony concerning when he began crossing in front of her. Most importantly, because the left front end of Shea’s vehicle impacted the rear wheel of Borromeo’s bicycle, the likelihood that he did not begin passing in front of her until after she began moving would seem extraordinarily small.

**II. Shea’s argument that the rules of the road applied to Borromeo while riding in the bicycle lane, that he violated them, and that because of such violation she had no reason to anticipate his approach from her right, relies on faulty legal assertions.**

The central premises of Shea's argument are: (a) the bicycle lane in which Borromeo was riding was part of the "roadway," so the rules of the road applied to him, particularly the rule providing that a bicycle shall be ridden as far to the right as is safe when traveling at less than the speed limit in a through lane; (b) Borromeo violated such rule by riding southbound in the bicycle lane abutting the northbound lane of the Bothell-Everett Highway; and (c) such violation vitiated any obligation on Shea's part to anticipate that he might be approaching from her right. Each premise of this argument fails because Shea misreads controlling statutory authority.

First, Shea incorrectly claims that Borromeo was riding in a roadway. Her contention that the statutory definition of "roadway" extends to include the designated bicycle lane at issue herein reflects a rather remarkable misreading of the pertinent statute. RCW 46.04.500 defines roadway:

"Roadway" means that *portion of a highway* improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such shoulder is used by persons riding bicycles . . .

(Italics added.) Unwilling to let this rather plain definition stand on its own, Shea suggests this definition must be construed in light of the statutory definitions of "highway" (RCW 46.04.197) and "vehicle" (RCW 46.04.670). Such construction produces an unusual result: according to Shea, ". . . when construing these statutes together, a 'roadway' includes not only the entire 'highway', but includes the area ordinarily used for vehicles including bicycles." (Italics added.) Resp. Br., 18. Comparing the italicized language from RCW 46.04.500 above with the italicized language from Shea's brief reveals the impossibility of her definition of roadway. The specific and plain language of RCW 46.04.500 simply does not anticipate characterizing

a designated bicycle lane as part of a roadway. Because RCW 46.61.770, which states that bicycles must travel “as near to the right side of the right through lane as is safe . . .,” only applies to bicycles traveling “upon a roadway,” no statute directed which way Borromeo could ride while within a designated bicycle lane.

Shea’s claim that Borromeo was required by statute to ride on the right side of the bicycle lane and with the flow of traffic, which claim is repeated throughout her brief, simply does not reflect a fair reading of controlling authority. As the trial judge noted, “I have never found a law that says you have to ride with the flow of traffic if you’re in a bicycle lane.” (Vol. 5, 20.) Accordingly, the first premise of Shea’s central argument, that the rules of the road required Borromeo to ride with the flow of traffic on the right side of the bicycle lane, fails.

Because no rules of the road concerning direction of travel pertained to Borromeo while riding in the bicycle lane, the second premise of Shea’s argument also must fail. In particular, though both at trial and in her appellate brief Shea repeatedly referred to Borromeo’s having violated the rules of the road, such claim reflects a misapprehension of controlling authority. Neither the record nor controlling authority provides any basis for claiming that Borromeo violated any rule of the road.<sup>1</sup>

Because of the failure of Shea’s contentions that the rules of the road concerning direction of travel pertained to Borromeo in the bicycle lane and that he violated such rules, her third premise must also fail. In particular, she contends that she had no

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<sup>1</sup> Given the absence of legal authority supporting Shea’s claim that the rules of the road applied to Borromeo in the bicycle lane, and the lack of any evidence that he violated any rule of the road, the court’s instructions concerning such rules of the road should not have been given. (CP 64-66; Instructions 12, 13, and 14.) Giving these instructions provided Shea an opening for arguing that Borromeo was riding in the wrong direction, pursuant to controlling law, at the time of the collision. The jury apparently adopted that argument.

obligation to anticipate Borromeo's approach from her right because he was violating the rules of the road. Shea repeatedly references her understanding or knowledge of the rules of the road and of directional markings or signs supposedly pertaining to the bicycle lane at the site of the collision as justification for her failure to look to the right before pulling out to cross the bicycle lane. For instance, she asserts 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." Resp. Br., 6.

Shea's claim in this regard is curious. As set forth above, the bicycle lane lacked any directional markings at the site of the collision; Shea's apparent belief that such markings were present hardly provides any justification for her actions. Moreover, Shea's belief that the rules of the road required that bicyclists travel with the flow of traffic in a designated bicycle lane can hardly justify her failure to respect Borromeo's right of way. A right of way would mean nothing if a disfavored driver is permitted to disregard the right of way due to misunderstandings. Nothing in the record or the controlling law provides Shea with any meritorious excuse for failing to "anticipate" Borromeo's approach. She had an obligation to look to her right before entering the bicycle lane. She failed, however, even to look straight ahead of her to observe the bicyclist passing in front of her vehicle. Rather, though she blindly entered the bicycle lane, after having her head crooked to the left for a good ten seconds (Vol. 1, 9), Shea blames Borromeo for the collision. Her argument approaches absurdity.

**III. Substantial evidence does not support the court's conclusion that Shea acted with ordinary care.**

Shea concludes that the record provides substantial evidence of her having acted with ordinary care. As a matter of law, Shea failed to act with ordinary care. She acknowledges she was the disfavored driver at the time of the collision. Moreover, Instruction 15 (CP 67), to which Shea did not object, informed the jury that Borromeo had the right of way. The only rationale Shea offered for her failure to yield the right of way was her failure to anticipate Borromeo's approach because of her misunderstanding concerning directional markings or signs at the scene of the collision and concerning applicable rules of the road. Such rationale must fail. Nothing in the record or the controlling law excuses her failure to yield the right of way and her failure to see what was there to be seen right in front of her.

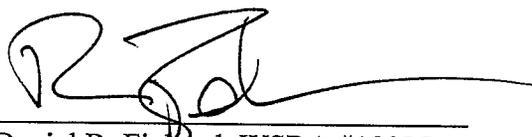
**IV. Conclusion**

For the reasons stated above and in Borromeo's initial brief, Borromeo respectfully submits that the trial court's judgment should be set aside and this matter remanded for trial on the issue of damages only. Alternatively, Borromeo requests

that the Court order a new trial on all issues because of instructional error.

DATED this 1st day of December, 2006.

SCOTT, KINNEY & FJELSTAD

A handwritten signature in black ink, appearing to read 'D. R. Fjelstad', with a long horizontal flourish extending to the right.

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Daniel R. Fjelstad, WSBA #18025  
Brian D. Scott, WSBA #4840  
Of Attorneys for Appellant

**PROOF OF SERVICE**

I, Allison D. Franzen, hereby declare that I am and at all times herein mentioned, a citizen of the United States and a resident of the State of Washington, over the age of eighteen, not a party nor interested in the above-entitled action, and am competent to be a witness herein.

On this day, I filed with the State of Washington Court of Appeals the following document:

APPELLANT'S REPLY BRIEF

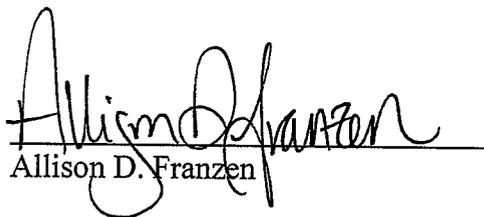
And served the same document via facsimile and regular mail to the party below:

Edwin J. Snook  
Snook & Schwanz  
25 Central Way, Suite 3100  
Kirkland, Washington 98033

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

DATED this 1<sup>st</sup> day of December, 2006.

SCOTT, KINNEY & FJELSTAD

  
Allison D. Franzen

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