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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.

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COURT OF APPEALS  
STATE OF WASHINGTON  
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PETITION FOR REVIEW  
TO THE SUPREME COURT

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## **I. IDENTITY OF PETITIONER**

John Borromeo, the plaintiff in this action and appellant in the Court of Appeals, hereby petitions for review of the Court of Appeals decision affirming dismissal of his lawsuit.

## **II. CITATION OF COURT OF APPEALS DECISION**

Borromeo seeks review of the Court of Appeals (Division One) decision, Borromeo v. Shea, No. 58221-6, which was filed on April 30, 2007. No motion for reconsideration was filed.

## **III. ISSUES PRESENTED FOR REVIEW**

1. When a disfavored driver emerging from a parking lot fails to look, fails to see what is there to be seen, and fails to yield the right of way to a bicyclist riding within a designated bicycle lane, should that driver be deemed negligent as a matter of law?
2. Does a court err by instructing a jury concerning the duties of bicyclist riding in the through lane of a roadway when the evidence is undisputed that the bicyclist was not riding in the through lane of a roadway, but in a designated bicycle lane, when the subject collision occurred?

## **IV. STATEMENT OF THE CASE**

### **A. Facts**

On July 6, 1999, John Borromeo, ("Borromeo"), riding his bicycle, followed a route to work that took him south along the Bothell-Everett

Highway. (Vol. 3, 7-8.)<sup>1</sup> Along the northbound lanes of the Bothell-Everett Highway in Snohomish County is a dedicated bicycle lane. A solid white line separates the bicycle lane from the roadway. (*See* Ex. 4; Vol. 1, 18.) The lane is 70” wide, which is sufficiently wide to permit bicyclists traveling in opposite directions within the lane to pass each other. (Vol. 3, 45-46, 48.) A sidewalk lies to the other side of the bicycle lane. (Vol. 1, 5-6.) The lane is demarcated as a bicycle lane by bicycle symbols painted onto the lane surface. (Vol. 4, 104-06.) North of the intersection of 208th Street S.E. and the Bothell-Everett Highway, where Borromeo was riding, the bicycle lane has no directional arrows or signs. (Vol. 1, 21, 25; Vol. 2, 9-10; Ex. 11.) In previous trips along the same route, Borromeo had observed bicyclists traveling in both directions on the same path, in an approximately even proportion. (Vol. 3, 48.)

After completing the graveyard shift, Karen Shea (“Shea”) stopped at a Safeway store located at the intersection of the Bothell-Everett Highway and 208th Street S.E. (Vol. 1, 4.) After completing her shopping and while exiting the parking lot, she stopped at the edge of the designated bicycle lane in which Borromeo was riding, and which lay between her and the northbound through lanes of the roadway. (*Id.*, 5, 8-9.) Shea wanted to turn right, to head north. (*Id.*, 5.) She mistakenly believed that

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<sup>1</sup> References herein are to the six volumes of the trial transcript, to the trial exhibits, and to the Clerk’s Papers.

there were directional arrows posted for the bicycle lane at that location requiring that bicyclists travel only in a northerly direction. (*Id.*, 21-23.) She was stopped at the edge of the bicycle lane for at least ten seconds before determining that she could begin her right turn. (*Id.*, 9, 54.) Shea acknowledges that during the ten seconds she was stopped there, she looked only to the left, southward. (*Id.*, 9.) Throughout that time, she never looked to the right, the direction from which Borromeo approached. (*Id.*) As the Court of Appeals stated: “It is undisputed that the weather was sunny and clear, the view northward was unobstructed, and Shea did not look north in the 10 seconds before she turned.” (Decision, 2.)

Apparently still looking to the left when she began her right turn, Shea accelerated toward Borromeo, who was then passing in front of her. Borromeo, seeing that a collision was inevitable, pushed off the left front corner of Shea’s vehicle’s hood with his left hand. (Vol. 3, 13; Vol. 4, 142.) Shea did not see Borromeo until after she had hit him. (Vol. 1, 26.) Because Shea’s left bumper impacted Borromeo’s rear wheel, he had to have been most of the way past her at the time of impact. (Vol. 1, 26; Vol. 3, 12; Vol. 4, 143.) Accordingly, if Shea had merely turned her head to look straight ahead of her before putting her vehicle in motion, she would have had to have seen Borromeo.

**B. Trial, post-trial, and appellate proceedings.**

At trial, Shea's testimony indicated she understood that in pulling out of the Safeway parking lot and stopping at the line marking the edge of the bicycle lane, any bicyclists riding in the lane would have the right-of-way. Her position was that she had no reason to anticipate that any bicyclist would be approaching from her right, so she had no duty to look to the right before pulling out onto 208th Street. (Vol. 1, 23.) Her counsel argued that the law required that any bicyclist in the lane had to ride with the flow of traffic and to the right side of the roadway. He insisted that the rules of the road pertain to bicycle lanes. (Vol. 5, 19.)

During the instructions conference, the trial court recognized that no statutory rules of the road apply in designated bicycle lanes: ". . . once you're in the shoulder or the bike lane there are no statutory rules of the road." (Vol. 5, 27.) The court nonetheless expressed a sense that there might be rules of the road applicable to bicycle lanes ". . . that may have evolved by common practice . . ." (*Id.*, 27.) Shea, however, offered no evidence, of an expert nature or otherwise, suggesting such "common practice." Jury instructions, to which Borromeo's counsel objected, suggested that statutory obligations did pertain to Borromeo while he was in the bicycle lane, which instructions permitted Shea's counsel to argue that the collision occurred due to Borromeo's breach of statutory obligations.

The jury found no negligence on Shea's part. (CP 45.) In moving for judgment notwithstanding the verdict, Borromeo asserted that Shea's failure to yield the right-of-way to him rendered her negligent as a matter of law, or, alternatively, that a new trial was necessary because of instructional error. (CP 31-41.) In argument on the motion, Shea's counsel acknowledged having argued to the jury that Borromeo violated the rules of the road: "I argued that . . . the plaintiff was required to comply with the rules of the road for vehicles . . . I argued that he was, in fact, going the wrong way . . ." (Vol. 6, 12.) The court denied the motion. (CP 17-18.)

On appeal, the Court of Appeals rejected both of Borromeo's arguments. In a published decision, the Court stated with regard to Borromeo's claim that Shea was negligent as a matter of law: "Nothing in the applicable law removed the question of negligence from the jury's domain." (Decision, 8.) With regard to Borromeo's claim of instructional error, the Court acknowledged that "[a]s pertains to bicyclists, the statutes are not a model of clarity." (*Id.*, 1.) The Court then found that the instructions fairly stated the applicable law and were not in error.

## **V. ARGUMENT**

**A. This petition involves an issue of substantial public interest that the Supreme Court should address.**

RAP 13.4(b)(4) provides that the Supreme Court may accept a petition for review “[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court.” For the reasons set forth below, Borromeo submits that this petition involves an issue of public interest sufficiently to substantial warrant review.

Identification of the relative duties concerning drivers of motor vehicles and bicyclists with regard to designated bicycle lanes presents an issue of substantial public interest. The proliferation of bicycle lanes adjacent to public roadways, together with governmental encouragement of bicycle ridership, portend an ever-growing potential for conflict between bicyclists and drivers of motor vehicles.<sup>2</sup> Clarification of the respective rights and duties of drivers versus bicyclists would promote safety. Certainly, clarification of right-of-way priorities with regard to bicycle lanes would seem critical to ensuring safe and efficient interaction between motorists and bicyclists.

The Court of Appeals decision in this matter suggests that in some circumstances, a bicyclist may not reasonably expect a motor vehicle to

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<sup>2</sup> See, e.g., “Toward a Safer Seattle for Bicyclists,” The Seattle Post-Intelligencer, web archives for August 30, 2006; “Nickels Unveils Bicycle Master Plan, Aims to Triple Commuter Cycling,” The Seattle Times, web archives for April 4, 2007 (“Seattle Mayor Greg Nickels this morning released an ambitious bicycle master plan, which he hopes will triple the number of city residents who pedal to work”); and “Cyclists Soon to Get Safer Routes,” Seattle Post-Intelligencer, web archives for March 28, 2007 (“At the heart of the 10-year strategy [set out in Seattle’s Bicycle Master Plan] is a call to designate more than 200 miles of roadway as bike lanes, along with guidelines for safely sharing

yield to the bicyclist even when the bicyclist is lawfully riding in a designated bicycle lane. In that regard, the Court of Appeals decision imposes on bicyclists an obligation of self-protection that the usual rules pertaining to rights-of-way do not impose. Borromeo submits that the principles articulated in the Court of Appeals decision pose a threat to bicyclists' safety on our state's public lanes of travel. Analysis of pertinent law and facts, undertaken below, should clarify this threat.

**1. A motor vehicle driver who, while exiting a parking lot, who fails to observe what is there to be seen and therefore collides with a bicyclist properly riding within a designated bicycle lane, should be deemed to have negligently failed to yield the right-of-way as a matter of law.**

RCW 46.61.365 provides:

The driver of a vehicle within a business or residence district emerging from an alley, driveway or building shall stop such vehicle immediately prior to driving onto a sidewalk area extending across any alleyway or driveway, and shall yield the right-of-way to any pedestrian as may be necessary to avoid collision, and upon entering the roadway shall yield the right-of-way to all vehicles approaching on said roadway.

A driver with the right-of-way, the favored driver, need not anticipate a disfavored driver's failure to yield the right-of-way:

. . . a reasonable person in the favored driver's position would ordinarily expect the disfavored driver to yield the right-of-way. Thus, the favored driver may assume that the disfavored driver will yield the right-of-way until the favored driver reaches that point at which a reasonable person would realize that the disfavored driver is not going to yield.

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roads and trails with cars and pedestrians. [T]he plan anticipates a huge increase in recreational and community bicyclists").

*Maxwell v. Piper*, 92 Wn. App. 471, 476, 963 P.2d 941 (1998). Our Supreme Court has referred to the “general rule” that “a favored driver is entitled to rely on his right-of-way until he becomes aware, or in the exercise of reasonable care should have become aware, that the right-of-way will not be yielded.” *Bohnsack v. Kirkham*, 72 Wn.2d 183, 192, 432 P.2d 554 (1967). A corollary rule is that a favored driver who has done nothing to deceive the disfavored driver, is entitled to assume that the disfavored driver will yield the right-of-way. *Massengale v. Svangren*, 41 Wn.2d 758, 252 P.2d 317 (1953).<sup>3</sup>

A disfavored driver’s failure to yield the right-of-way, absent an obstructed view, permits a finding of negligence as a matter of law. For instance, in *Petersavage v. Bock*, 72 Wn.2d 1, 431 P.2d 603 (1967), the Court overturned a judgment entered on a defense jury verdict involving a defendant who was a disfavored driver alleged to have violated the right-of-way. Finding the defendant negligent as a matter of law, and finding no contributory negligence on the plaintiff’s part, the Court stated:

. . . [The defendant] had a positive duty to stop, observe all traffic upon the arterial and yield the right-of-way to all traffic moving in

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<sup>3</sup> The “deception” doctrine refers to a favored driver wrongfully deceiving a reasonably prudent disfavored driver into believing that he or she may proceed with a fair margin of safety. *Oliver v. Harvey*, 31 Wn. App. 279, 282, 640 P.2d 1087 (1982). The deception doctrine does not apply in cases where a disfavored driver did not look or where the disfavored driver looked but did not see what was there to be seen. *Id.*, 283. In the instant case, Shea testified that she never saw Borromeo. Accordingly, Borromeo could not have deceived Shea.

either direction. He was obliged to see and appreciate the presence of all vehicles going in either direction and to allow them a fair margin of safety. The evidence conclusively established that he failed to see what was there to be seen on a straight, level, arterial street, or, if he saw it, failed as a matter of law to provide a fair margin of safety in entering, crossing and proceeding along the arterial. These are facts upon which reasonable minds could not differ . . .

*Id.*, 5.

*Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999), likewise involves a finding of negligence as a matter of law on the part of a disfavored driver. The case arose from a collision between a motor vehicle and a bicyclist in a marked crosswalk. The bicyclist had stopped at the crosswalk, dismounted, and waited for traffic to clear. When the crosswalk appeared safe to enter, the bicyclist remounted his bicycle and rode into the crosswalk. The defendant driver approached the crosswalk at the posted speed, but apparently did not see the bicyclist until he was two feet in front of her. *Id.*, 58-59.

The trial court granted summary judgment for the plaintiff, finding both that the defendant was negligent as a matter of law and that the plaintiff had no comparative fault. The Supreme Court affirmed the Court of Appeals' decision upholding the trial court's decision. The Court, rejecting the defendant's argument that her claim of obstructed vision should permit liability issues to go to the jury, stated: "As the driver of a vehicle approaching a crosswalk, [the defendant] had a duty of continuous

observation.” *Id.*, 67. See also *Roberts v. Leahy*, 35 Wa.2d 648, 651, 214 P.2d 673 (1950) (“When a favored vehicle is within view to the right of the disfavored vehicle it will be conclusively held that the disfavored driver actually saw what he could have seen if he had performed the duty of looking”).

In the instant case, the jury was instructed concerning Shea’s duty to yield the right-of-way to Borromeo. Instruction Number 15, to which Shea did not object, provided:

Another statute provides that a driver who is emerging from a driveway shall stop the vehicle immediately before driving onto a sidewalk or onto the sidewalk area extending across the driveway and shall yield the right-of-way to any pedestrians as may be necessary to avoid collision and upon entering the roadway shall yield the right-of-way to all vehicles approaching on the roadway. Similarly, upon crossing a designated bicycle lane, the vehicle shall yield the right-of-way to all bicycles approaching in the designated bicycle lane.

The right-of-way, however, is not absolute, but relative, and the duty to exercise ordinary care rests upon both parties. The primary duty, however, rests upon the driver of the emerging vehicle, which duty must be performed with reasonable regard to the maintenance of a fair margin of safety at all times.

(CP 67.) This instruction is based upon RCW 46.61.365. Further, the jury was instructed: “Every person has a duty to see what would be seen by a person exercising ordinary care.” (CP 70; Inst. 18.)

Shea’s conduct plainly breached the duties identified in these instructions. In particular, Shea was emerging from a driveway as she approached the bicycle lane in which Borromeo was riding. After

stopping at the edge of the bicycle lane, where she acknowledges waiting for at least ten seconds, she never looked in Borromeo's direction before turning right across the bicycle lane. The inescapable conclusion is that if Shea had looked to the right at any time during the time she waited at the edge of the bicycle lane, she could not have missed seeing Borromeo, particularly given that he had almost passed her automobile when she accelerated across the bicycle lane.

Viewed in the light most favorable to Shea, these undisputed facts permit no reasonable conclusion other than that Shea negligently collided with Borromeo, unless, as her counsel argued, he was riding in the wrong direction. None of the statutes cited above required Borromeo, while in the designated bicycle lane, to travel one way or the other. Accordingly, the disfavored driver, Shea, most certainly did not act with ordinary prudence in failing to even consider his possible approach from the right. Borromeo, legally proceeding at a slow rate of speed, was entitled to assume that Shea would obey the law and yield the right-of-way to him. The primary duty to avoid this collision was upon Shea, not Borromeo. As a matter of law, Shea should be deemed negligent in failing to yield the right-of-way to Borromeo, in failing to look to the right prior to pulling across the bicycle lane, and in failing to see that which was there to be seen.

A disfavored driver in a right-of-way situation has a duty of “continuous observation” (*Pudmaroff*), and a favored driver (or pedestrian or bicyclist with the right-of-way) is entitled to “assume that the disfavored driver will yield the right-of-way” (*Maxwell*). The Court of Appeals decision contravenes these right-of-way rules. Indeed, the Court of Appeals decision provides a bicyclist with no more protection than he or she would have if riding in a lane in which motor vehicles travel, and with less protection than he or she could rely upon if traveling on a shoulder. The decision absolves a motorist of any obligation to look in both directions before crossing a bicycle lane from a stop. The decision minimizes a motorist’s duty of vigilance in a right-of-way situation. The decision, in short, creates an anomaly in our state’s laws concerning a motorist’s duty with regard to bicyclists when emerging from a driveway or parking lot.

**2. The trial court erred in instructing the jury concerning the direction a bicycle must ride if in a through lane, and in failing to instruct the jury that Borrromeo was not required to ride in any particular direction within the span of the bicycle lane in which he was riding at the time Shea collided with him.**

The standard for assessing jury instructions is well-established: “Instructions must allow each party to argue its theory of the case, not mislead the jury and, when taken as a whole, properly inform the jury of the applicable law.” *Oregon Mutual Ins. Co. v. Barton*, 109 Wn. App. 405, 412-13, 36 P.2d 1065 (2001). Review of instructions on appeal is de

general, “[j]ury 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.” *Blaney v. Int’l Ass’n of Machinists*, 151 Wn.2d 203, 210, 87 P.3d 757 (2004).

Even instructions that correctly state applicable law still may prejudice a party and require setting aside a verdict. In particular,

[w]hen the instructions as a whole so repetitiously cover a point of law or the application of a rule as to grossly overweigh their total effect on one side and thereby generate an extreme emphasis in favor of one party to the explicit detriment of the other party, it is, we think, error—even though each instruction considered separately might be essentially correct. Thus, if the instructions on a given point or proposition are so repetitious and overlapping as to make them emphatically favorable to one party, the other party has been deprived of a fair trial.

*Cornejo v. State*, 57 Wn. App. 314, 320, 788 P.2d 554 (1990), quoting *Samuelson v. Freeman*, 75 Wn.2d 894, 897, 454 P.2d 406 (1969).

Moreover, instructing a jury on an issue which is not properly in dispute constitutes error. *Anderson v. Beagle*, 71 Wn.2d 641, 645, 430 P.2d 539 (1967). *See also Hammel v. Rife*, 37 Wn. App. 577, 584, 682 P.2d 949 (1984) (“It is prejudicial error to submit an issue to the jury where there is no substantial evidence concerning it”).

Washington law plainly provides that while riding upon a roadway, a bicyclist is “granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle,” but when riding on a sidewalk or in a crosswalk, a bicyclist is “granted all of the rights and is subject to

all of the duties applicable to a pedestrian.” RCW 46.61.755. Further,

RCW 46.61.770 provides:

Every person operating a bicycle upon a roadway at a rate of speed less than the normal flow of traffic at the particular time and place shall ride as near to the right side of the right through lane as is safe . . . A person operating a bicycle upon a roadway may use the shoulder of the roadway or any specially designated bicycle lane if such exists.

This statute does not direct that a bicyclist must ride on any specific side of a street if on a shoulder or in a designated bicycle lane, nor whether a bicyclist must ride with or against the flow of traffic when riding on a shoulder or in a bicycle lane. Indeed, by its terms, the statute applies only to bicyclists riding in the through lane of a roadway. *See Crawford v. Miller*, 18 Wn. App. 151, 153, 566 P.2d 1264 (1977). Only when traveling in the through lane of a roadway does the statute dictate a bicyclist’s direction of travel.

The definition of “roadway,” set forth in RCW 46.04.500, suggests bicycle lanes should be exempted from the rules of the road: “‘Roadway’ means that portion of a highway improved, designed, or ordinarily used for vehicular travel exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles.” Bicycle lanes certainly would seem more akin to sidewalks or shoulders than to lanes designed for motor vehicular travel. Because shoulders are excluded from the definition of roadway, and RCW 46.61.770 indicates that

bicyclists riding on shoulders or in designated bicycle lanes should be treated equally under the law, imposing duties on a bicyclist riding in a designated bicycle lane that are not imposed on a bicyclist riding on a shoulder, such as requiring riding with the flow of traffic, creates statutory tension. Importantly, as stated above, no statute specifies the direction in which a bicycle must ride, unless in the through lane of a roadway; within a designated bicycle lane, no statutory provisions direct travel.

Washington statutes simply do not impose any directional requirements on bicyclists riding in designated bicycle lanes.

In the instant case, the trial court erroneously instructed the jury on issues which were not properly in dispute and otherwise overemphasized the defense contention that Borromeo violated his legal obligations. In particular, the court instructed the jury that “[a] person riding a bicycle upon a roadway has all the rights of a driver of a motor vehicle and must obey all statutes governing the operation of vehicles except for those statutes that, by their nature, can have no application.” (CP 64, Inst. 12.) The court also instructed the jury, based on RCW 46.61.770, that “[a] statute provides that every person operating a bicycle upon a roadway at a rate of speed of less than the normal flow of traffic at the particular time and place shall ride as near to the right side of the right through lane as is safe. A person operating a bicycle upon a roadway may use the shoulder

of the roadway or any specially designated bicycle lane if such exists.”

(CP 65, Inst. 13.)

The court gave these instructions despite recognizing a lack of any statutory basis for them: “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.) The court even acknowledged that the first sentence of Instruction 13 did not “apply” to the case, but felt it should be included in the instruction to provide “context.” (*Id.*, 14.) Comments from the court during the instructions conference suggest hesitation about how to instruct the jury:

THE COURT: Do I have to point that out to the jury, please note I haven’t given you any rules of the road for bicycle lanes, or is that something the lawyers ought to point out in their closing arguments?

MR. SCOTT: Well, I think that the law needs to come from you.

THE COURT: But this is the absence of law.

(*Id.*, 22-23.) Though he did not originally propose such an instruction, when the court’s intention to instruct the jury concerning rules of the road pertaining to bicyclists became clear, Borromeo’s counsel proposed instructing the jury as follows: “I think there should be an instruction that says there are no rules of the road in the statutes that apply to bicycle lanes.” (Vol. 5, 31.) Such an instruction might have counterbalanced the instructions suggesting the rules of the road do apply to bicyclists riding in bicycle lanes. The court, however, did not give such an instruction. (*Id.*)

Borromeo's counsel objected to Instructions 12 and 13. First, counsel stated:

. . . we take exception to No. 12, because the bicycle in this case is not riding on a roadway, there's no evidence that he's on a roadway, and . . . there are no rules of the road that apply to bicycle lanes, and, therefore, I don't think that . . . instruction relates to the facts in this case. And it could be misleading. They could decide that he has to ride on the right-hand side . . .

(Vol. 5, 28.) Second, counsel stated:

The next one is Instruction No. 13 . . . I object to it first—the first sentence only, which is the one that says that a statute provides that every person operating a bicycle upon a roadway at a rate of speed less than the normal flow of traffic at the particular time and place shall ride as near to the right side of the right through lane as is safe. That simply doesn't apply in this case. He was not riding in a through lane on the roadway, and I don't see how that helps the jury. It would confuse the jury.

(*Id.*, 29.)

In closing, over objection, defense counsel made repeated references to Borromeo's having "violat[ed] the law" in riding against the flow of traffic in the bicycle lane or in ignoring applicable traffic control devices. (*Id.*, 54, 57, and 60.) Defense counsel specifically referenced the quoted instructions in contending that Borromeo had been riding on a roadway: "Instruction 12, a person riding a bicycle upon a roadway must obey all statutes governing the operation of vehicles . . . Simply put, a person on a bicycle must comply with the same rules of the road that a driver of a car or vehicle does." (*Id.*, 57.) Further,

. . . there's a second paragraph or instruction here that also deals with bicycles, and it says that a bicycle, when you factor in the fact that he's got to comply with the rules of the road just like a vehicle, go the same way, shall ride as near to the right side of the right through lane as is safe. In other words, . . . if he's going slow he's going to be way over on the right-hand side.

(*Id.*, 58.)

Instructions 12 and 13 identified a bicyclist's duties when riding "upon a roadway" or in the through lane of a roadway. No evidence suggested Borromeo ever rode in a through lane on the Bothell-Everett Highway. The discussion above indicates he should not have been treated as riding upon a roadway for purposes of determining in which direction he should have been riding. Accordingly, gratuitously instructing the jury concerning a bicyclist's duties while riding in the through lane of a roadway posed a significant risk of misleading the jury into thinking that it is illegal to ride against the flow of traffic in a designated bicycle lane. As set forth above, instructing a jury on an issue which is not properly in dispute constitutes error. *Anderson*, 71 Wn.2d at 645.

Taken together, Instructions 12 and 13 overemphasized defense arguments about Borromeo's supposed violation of rules of the road pertaining to bicyclists. Those instructions changed the focus from the party with the primary duty to avoid a collision, Shea, to the party who was entitled to assume that he would be yielded the right-of-way, Borromeo. Again, the record permits no reasonable inference that

Borromeo violated any law in riding his bicycle in the designated bicycle lane.

In finding no instructional error, the Court of Appeals establishes murky precedent.<sup>4</sup> The Court acknowledged the lack of statutory clarity with regard to the respective duties between motorists and bicyclists when meeting at a designated bicycle lane, but then declared that a bicyclist has no more expectation of protection in such situation than he or she might have if traveling in the through lane of a roadway. Who owes what duty to whom thereby becomes more confused. The purpose of a bicycle lane becomes muddled. The decision certainly could be interpreted as mandating that bicyclists ride with the flow of traffic when in bicycle lanes, which would be a curious mandate given that bicyclists on shoulders are not required to side with the flow of traffic. Indeed, according to the Court of Appeals, a bicyclist's expectation of having the right-of-way when encountering the intersection between a bicycle lane and a driveway would be misplaced. A fair synthesis of the applicable statutes should produce a different result by making clear that, regardless of the direction from which a bicyclist approaches a driveway intersecting with a bicycle lane, the bicyclist has the right-of-way.

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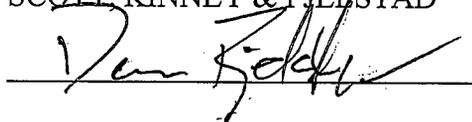
<sup>4</sup> The Court identified the "central dispute" of this case as the question of "how to interpret the phrase 'on a roadway' in RCW 46.61.755 and 46.61.770(1)." (Decision, 5.)

## VI. CONCLUSION

This case involves an issue of substantial public interest. Articulation of the respective duties of motorists and bicyclists wherever they might come into contact is essential at a time of increasing bicycle usage. The decision at issue lessens bicycle safety. Supreme Court review is warranted.

DATED this 30th day of May, 2007.

SCOTT, KINNEY & FJELSTAD

A handwritten signature in black ink, appearing to read "Dan Fjelstad", is written over a horizontal line.

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

**APPENDIX**

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SCOTT, KINNEY & FJELSTAD

## IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON DIVISION ONE

JOHN C. M. BORROMEO,	)	No. 58221-6-1
Appellant,	)	
v.	)	
KAREN SHEA and JOHN DOE	)	PUBLISHED OPINION
SHEA, her husband, and the marital	)	
community composed thereof,	)	
Respondents.	)	FILED: April 30, 2007

ELLINGTON, J. This case raises another question about rules of the road for drivers and bicyclists. Here, the bicyclist was riding in a bike lane, but in the direction opposed to the flow of traffic. He was injured when he was hit by a car turning onto the roadway from a parking lot. The jury found the driver not negligent.

The court instructed the jury as to the duties of both driver and cyclist under the statutes. As pertains to bicyclists, the statutes are not a model of clarity. But the instructions were proper, and the evidence supports the verdict. We therefore affirm.

### BACKGROUND

Karen Shea was making a right turn from a supermarket parking lot into the northbound lanes of the Bothell-Everett Highway. John Borromeo was riding

southbound in the adjacent bike lane. As she turned, Shea collided with Borromeo's bicycle. Borromeo was injured, and filed this suit.

That portion of the highway has two lanes of traffic in each direction, and an additional designated bicycle lane on each side. The bike lanes are separated from the main traffic lanes by a single solid white line. Where the collision occurred, the road is divided so that cars exiting the parking lot must turn right, traversing a sidewalk and the bicycle lane before reaching the traffic lanes.

Shea stopped her car before crossing the sidewalk, looked both to her left and her right, and then pulled her car to the edge of the bicycle lane. She remained stopped for about 10 seconds, awaiting a suitable break in traffic. It is undisputed that the weather was clear and sunny, the view northward was unobstructed, and Shea did not look north in the 10 seconds before she turned.

Riding south in the bicycle lane, Borromeo slowed as he approached the parking lot driveway. He believed Shea had seen him and was waiting for him to pass, so he proceeded. Borromeo had nearly crossed the driveway when Shea began her turn. Her left bumper hit Borromeo's rear tire.

At trial, Borromeo argued that a bicyclist in a bike lane is not subject to the rules of the road, and that Shea had a duty to see and avoid him. Shea emphasized that Borromeo was riding against the flow of automobile traffic, and that she reasonably did not anticipate that a cyclist might approach from that direction. She explained that there was another bicycle lane on the opposite side of the road, that markings painted on the bike lane would have been upside-down for a cyclist riding southbound, that signs on nearby sections of the same road indicated the bike lane was for northbound travel only,

and that in her experience commuting along the route, she had never seen a cyclist riding southbound in that lane. The jury found Shea not negligent.

Borromeo appeals the judgment as well as the court's denial of his post-trial motion for judgment notwithstanding the verdict or new trial.

## DISCUSSION

### *Jury Instructions*

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.<sup>1</sup> "An instruction which follows the words of a statute is proper unless the statutory language is not reasonably clear or is misleading."<sup>2</sup> Such an instruction permits parties to argue even diametrically opposing interpretations of a statute.<sup>3</sup> The trial court has considerable discretion in deciding how instructions will be worded and whether more specific or clarifying instructions are necessary to guard against misleading the jury.<sup>4</sup> We review instructions de novo, and reverse only where an error was prejudicial.<sup>5</sup>

The relevant statutes are RCW 46.61.755 and RCW 46.61.770. RCW 46.61.755 provides:

(1) Every person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle by this chapter, except as to special regulations in RCW 46.61.750 through 46.61.780 and except as to those provisions of this chapter which by their nature can have no application.

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<sup>1</sup> Stevens v. Gordon, 118 Wn. App. 43, 53, 74 P.3d 653 (2003).

<sup>2</sup> State v. Goree, 36 Wn. App. 205, 208, 673 P.2d 194 (1983).

<sup>3</sup> See id.

<sup>4</sup> Gammon v. Clark Equip. Co., 104 Wn.2d 613, 617, 707 P.2d 685 (1985).

<sup>5</sup> Stevens, 118 Wn. App. at 53.

(2) Every person riding a bicycle upon a sidewalk or crosswalk must be granted all of the rights and is subject to all of the duties applicable to a pedestrian by this chapter.

RCW 46.61.770 provides:

(1) Every person operating a bicycle upon a roadway at a rate of speed less than the normal flow of traffic at the particular time and place shall ride as near to the right side of the right through lane as is safe except as may be appropriate while preparing to make or while making turning movements, or while overtaking and passing another bicycle or vehicle proceeding in the same direction. A person operating a bicycle upon a roadway or highway other than a limited-access highway, which roadway or highway carries traffic in one direction only and has two or more marked traffic lanes, may ride as near to the left side of the left through lane as is safe. A person operating a bicycle upon a roadway may use the shoulder of the roadway or any specially designated bicycle lane if such exists.

At issue are Instructions 12 and 13, and the court's refusal to instruct the jury that Borromeo had no duty to observe the rules of the road. Instruction 12 reads:

A person riding a bicycle upon a roadway has all the rights of a driver of a motor vehicle and must obey all statutes governing the operation of vehicles except for those statutes that, by their nature, can have no application.<sup>[6]</sup>

Instruction 13 reads:

A statute provides that every person operating a bicycle upon a roadway at a rate of speed of less than the normal flow of traffic at the particular time and place shall ride as near to the right side of the right through lane as is safe. A person operating a bicycle upon a roadway may use the shoulder of the roadway or any specially designated bicycle lane if such exists.<sup>[7]</sup>

These instructions accurately state the law.

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<sup>6</sup> Clerk's Papers at 64.

<sup>7</sup> Id. at 65.

Borromeo contends that these instructions were improper because a bike lane is not part of the roadway, and the court should have instructed the jury that he had no duty to observe the rules of the road. Thus, the central dispute is how to interpret the phrase "on a roadway" in RCW 46.61.755 and .770(1).

The statutes are not a model of clarity. In Pudmaroff v. Allen,<sup>8</sup> our Supreme Court held that RCW 46.61.755 does not apply to a cyclist using a pedestrian crosswalk connecting two segments of the multiuse Interurban Trail, first, because a multiuse trail is not a roadway, and second, because the plaintiff was in a pedestrian crosswalk where special rules apply. The court questioned, but did not decide, whether the statute "relates to bicycle lanes on roadways."<sup>9</sup> In a lengthy footnote, the court noted the "anomalous place" of bicycles in traffic safety laws, and invited legislative amendment to reduce confusion.<sup>10</sup> To date, the legislature has made no such amendments.

In this case, the judge left for the jury to decide whether Borromeo was riding on a roadway and therefore subject to the rules of the road. The court did not err in exercising its discretion to instruct according to the text of the existing statutes. We think, however, that the statutes do apply to cyclists in a bicycle lane such as the one on the Bothell-Everett Highway. ✱

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<sup>8</sup> 138 Wn.2d 55, 63–64, 977 P.2d 574 (1999).

<sup>9</sup> Id. at 63.

<sup>10</sup> Id. at 64 n.3.

The prime objective in statutory construction is to effectuate legislative intent.<sup>11</sup> We begin by looking at the plain meaning of the language, but in discerning this meaning, we take into account all of the text in this and related statutes.<sup>12</sup>

A bicycle is a vehicle.<sup>13</sup> A roadway is "that portion of a highway improved, designed, or ordinarily used for vehicular travel, exclusive of the sidewalk or shoulder even though such sidewalk or shoulder is used by persons riding bicycles."<sup>14</sup> Thus, a plain reading of the statutes shows that unlike a multiuse trail or a crosswalk, a bicycle lane adjacent to regular traffic lanes is both designed and ordinarily used for vehicular travel, and is thus part of the roadway.

This interpretation is consistent with RCW 46.61.770(1), which allows cyclists on a roadway to choose to ride in traffic through lanes, on the shoulder, or in designated bicycle lanes. (Borromeo did not object to the part of Instruction 13 setting forth that part of the statute.) A bicyclist in a marked, designated bicycle lane is on a roadway.

Borromeo next contends that the first sentence of Instruction 13 (bicyclists must use far side of right lane) was irrelevant because he was not in a traffic lane, and overemphasized the defense theory of the case by suggesting he should ride in the direction of automobile traffic.

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<sup>11</sup> Bosteder v. City of Renton, 155 Wn.2d 18, 42, 117 P.3d 316 (2005).

<sup>12</sup> Id.

<sup>13</sup> RCW 46.04.670 (a vehicle "includes every device capable of being moved upon a public highway . . . including bicycles").

<sup>14</sup> RCW 46.04.500.

The court included that sentence to provide context. Instructions may not be “so repetitive and overlapping as to make them emphatically favorable to one party.”<sup>15</sup> But there is nothing repetitive or overlapping in Instruction 13, nor is there anything emphasizing any particular theory, especially since other instructions advised the jury that drivers must yield to cyclists in bicycle lanes (Instruction 15), and that both parties bear a duty of ordinary care to avoid collisions (Instruction 17).<sup>16</sup>

The court did not err in its instructions to the jury.

*Motion for Judgment as a Matter of Law or New Trial*

Judgment as a matter of law is appropriate only when, viewed in the nonmoving party's favor, the evidence is insufficient to sustain a verdict for that nonmoving party.<sup>17</sup> Borromeo's motion was based on the contention that under Instruction 15, Shea was per se negligent in failing to see him and yield the right of way. But Instruction 15 also told the jury that a motorist's duty to yield to cyclists in a bicycle lane is “not absolute, but relative.”<sup>18</sup> The jury was further instructed:

It is the duty of every person using a public street or highway whether a driver of a motor vehicle or a bicyclist, to exercise ordinary care to avoid placing himself or others in danger and to exercise ordinary care to avoid a collision.<sup>[19]</sup>

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<sup>15</sup> Cornejo v. State, 57 Wn. App. 314, 320, 788 P.2d 554 (1990) (quoting Samuelson v. Freeman, 75 Wn.2d 894, 897, 454 P.2d 406 (1969)).

<sup>16</sup> See id. at 321 (instruction on plaintiff's duty to see hazard unduly emphasized contributory negligence over general duty of ordinary care and “clear evidence of the [defendant's] negligence”).

<sup>17</sup> CR 50(a)(1); Davis v. Microsoft Corp., 149 Wn.2d 521, 531, 70 P.3d 126 (2003).

<sup>18</sup> Clerk's Papers at 67.

<sup>19</sup> Id. at 69.

The jury was also instructed that even if Shea violated a statutory duty to yield to Borromeo, such a violation is not itself determinative but is evidence to be weighed on the question of negligence.

"Whether a person has exercised due care for the safety of other users of the highway is a factual issue to be determined only by the trier of facts."<sup>20</sup> Nothing in the applicable law removed the question of negligence from the jury's domain. It was for the jury to decide whether Shea was negligent, and the court did not err in denying the motion for judgment as a matter of law.

Affirmed.

Edenfor, J.

WE CONCUR:

Cox, J.

Becker, J.

<sup>20</sup> Johnson v. Northern P. R. Co., 66 Wn.2d 614, 618, 404 P.2d 444 (1965).