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No. 72924-1

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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JASON M. LEE,  
Appellant,

vs.

JOSIAH WALKER *et ux.* and INFRASOURCE SERVICES, LLC  
Respondents.

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REPLY BRIEF OF APPELLANT JASON M. LEE

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2015 JUN 11 PM 3:07

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      - 1. they permit a party to argue that party's theory of the case;
      - 2. are not misleading; and
      - 3. when read as a whole properly inform the trier of fact on the applicable law.
    - ii. Only if these requirements are met are the court's instructions reviewed for abuse of discretion.
    - iii. If any of these requirements are not met, then jury instructions are reviewed *de novo*.
    - iv. In this case, the trial court's instructions read as a whole improperly failed to inform the jury on the applicable law.
    - v. Therefore, the proper standard of review is *de novo*.
  - B. A "favored driver" instruction should be given whether the defendant violates RCW 46.61.140 or 46.61.180.

- i. The violation of the statutory “right-of-way” is what gives rise to the cause of action in negligence.
- ii. RCW 46.61.140 creates a duty to remain in one’s own lane until it is safe to move out of it. It gives the right-of-way to the person not changing lanes.
- iii. RCW 46.61.180 creates a different duty, i.e. giving the right-of-way to the vehicle on the right under certain circumstances.
- iv. This case in no way involved RCW 46.61.180.
- v. The trial court’s conclusion that a “favored driver” instruction is only appropriate under RCW 46.61.180 is erroneous as a matter of law.

### III. CONCLUSION

- A. The trial court’s instructions deprived appellant of a fair trial.
- B. The court should reverse the verdict of the trial court and order a new trial.

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## I. INTRODUCTION

A. Appellant contends that the standard of review is *de novo*.

Respondent contends that the standard of review is abuse of discretion.

B. Appellant contends a “favored driver instruction” should be given when there is a statute setting forth which of the drivers is favored, or put another way, which has the right-of-way. Respondent contends that the trial court was correct in concluding that a favored driver instruction is only appropriate under RCW 46.61.180.

## II. ARGUMENT

### A. Standard of Review.

Our supreme court decisions tell us there is no single standard for appellate review of jury instructions. “Jury instructions are reviewed *de novo* for errors of law.” *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012) *citing* *Joyce v. Dep’t of Corr.*, 155 Wn.2d 306, 323, 119 P.3d 825 (2005). “This court reviews *de novo* the alleged errors of law in a trial court’s instructions to the jury.” *Barrett v. Lucky Seven Saloon, Inc.* 152 Wn.2d 259, 266, 96 P.3d 386, 389 (2004). On the other hand, our highest court has said, “[t]he number and specific language of the instructions are matters left to the trial court’s discretion.” *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240, 244 (1996), *accord* *Ethridge v. Hwang*, 105 Wn. App. 447, 456, 20 P.3d 958, 964 (2001).

The problem in this case is that the trial court assumed the jurors would know what was obvious to the court: “Clearly, it is against the law to drive into a bike lane.” Judge Halpert, RP 169. Had the court so instructed the jury in such straightforward terms, plaintiff probably would have prevailed. Instead, the court refused to instruct the jury that a statute, RCW 46.61.140, **requires** every driver to remain in his own lane until he can move to another with safety. This statute creates the right-of-way for the driver (in this case the cyclist) who was not changing lanes. There is no reason to believe the jury knew that.

The court was further informed that numerous of our supreme court cases have held that disfavored drivers have a “primary duty to avoid collision.” Again, the court refused to tell the jury the law as enunciated by our highest court. In both respects the “trial court’s instructions read as a whole improperly failed to inform the jury on the applicable law.” Such failure is an error of law to be reviewed by this court *de novo*.

The cases on which Respondent relies for its contention that the standard of review is abuse of discretion are all easily distinguishable. In *Havens v. C & D Plastics*, 124 Wn.2d 158, 876 P.2d 435 (1994), the trial court gave an instruction defining “just cause, or good cause” for the dismissal of an employee based on case law. There was no challenge to the instruction. But the defendant offered a second definition instruction, one

with evidentiary balancing tests, none of which arose out of case law or statute, and which, in fact misstated the law. *Id.* at 167.

Like *Havens*, in *Ethridge v. Hwang*, 105 Wn. App. 447, 20 P.3d 958, the court refused a burden of proof instruction that was “a misstatement of law,” a type of clean hands instruction that “constituted a misstatement of the law” and an irrelevant instruction about rights of first refusal when such right was not in issue. Interestingly, in *Etheridge* the court found no error in giving an instruction setting forth the elements of the Mobile Home Landlord Tenant Act because it “was an accurate statement of the law and giving it was not an abuse of discretion.” *Id.* at 455.

Respondent reads *Hue v. Farmboy Spray Co., Inc.* 127 Wn.2d 67, 896 P.2d 682 (1995), too narrowly. Nothing in *Hue* suggests that *de novo* review is limited to an “erroneous statement of the applicable law.” Respondent’s Brief at 10. That is certainly one ground on which *de novo* review is appropriate. However, as the *Hue* court said, it is an error of law to fail to “properly inform the jury of the law to be applied.” *Id.* at 92. The error can, therefore be one of commission or omission.

In the case before the court today, the trial court instructed the jury in Instruction 12 that everyone traveling the roads has a right to assume others will “use ordinary care and will obey the rules of the road,” but the court omitted to tell the jury the applicable rules of the road.

**B. A favored driver instruction should be given in all cases where there is a favored driver.**

Respondent correctly points out our error on page 10 of Appellant’s Brief where we stated the court referred to RCW 46.61.140, when in fact the court referred to 46.61.180.<sup>1</sup> However, this typographical error is not “crucial,” as Respondent contends. In fact, it is irrelevant to the analysis.

Appellant’s proposed “favored driver” instruction is applicable in all cases where there is a favored driver. The cases cited in support of the instruction, *Sanchez v. Haddix*, 95 Wn.2d 593, 627 P.2d 1312 (1981), *Poston v. Mathers*, 77 Wn.2d 329, 462 P.2d 222 (1969) and *Grobe v. Valley Garbage Serv., Inc.*, 87 Wn.2d 217, 551 P.2d 748 (1976), deal with three different scenarios. In *Sanchez*, the collision occurred at an intersection when the defendant went through a stop sign attempting to cross a thoroughfare. There was not, as Judge Halpert suggested, any discussion of RCW 46.61.180. The language in Appellant’s proposed favored driver instruction is drawn directly from the Supreme Court’s decision in *Sanchez*.

In *Poston*, the Supreme Court set forth the statutory rules applicable to the case in footnotes. Footnote 1 refers to RCW 46.48.010, 46.61.400 and 46.61.185; footnote 3 again refers to RCW 46.61.185, 46.61.190(2) and 46.61.360. Again, it is noteworthy that the court nowhere refers to RCW

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<sup>1</sup> As an aside, Respondent is just as guilty of a failure to proofread, referring 4 times on page 14 of its brief to RCW Chapter 41, which has nothing whatsoever to do with this matter.

46.61.180. Moreover, *Poston*, states that, “it is error to instruct the jury that all rights-of-way are relative and that the duty to avoid an accident at intersections rests upon both drivers, **unless such instruction is qualified by the statement that the primary duty to avoid a collision rests upon the disfavored driver.**” *Poston v. Mathers*, 77 Wn.2d at 333. The prejudice arising out of the trial court’s failure to instruct the jury on the relative duties of the parties was perfectly expressed in *Poston*: “If the jury was not properly instructed and was unaware of the duty which respondent breached, it was unable to determine rationally if appellant’s breach of his related duty contributed to the cause of the accident.” *Id.* at 333, 334.

The *Grobe* case did not involve a stop sign as in *Poston* or a thoroughfare as in *Sanchez*, but an uncontrolled intersection. *Grobe v. Valley Garbage Serv., Inc.*, 87 Wn.2d at 219. The central argument in *Grobe* was that the court erred in not giving an instruction on excessive speed, referring not to RCW 46.61.180 (as Judge Halpert suggested), but to RCW 46.61.400. *Id.* at 221, 222. Moreover, the *Grobe* court approved the trial court’s favored driver instruction, which stated in essence that a favored driver is allotted a reasonable reaction time after he realizes the disfavored driver will not yield. *Id.* at 225.

In all of these cases, specific instruction on the duties of each driver was required or approved. Such instruction was even more urgently needed

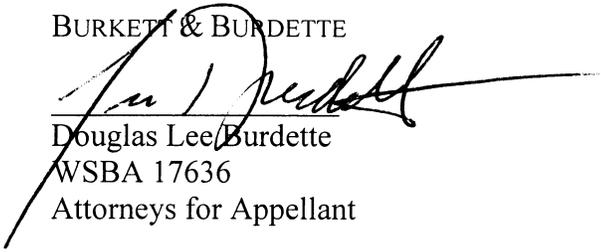
in the case before the court. Bicycle law, as our supreme court said in *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999) “do[es] not present a picture of clarity.” *Id.* at 69. By instructing the jury that ordinary care is required of both driver and bicyclist (Instruction 17) and that bicyclists “must obey all statutes governing the operation of vehicles” (Instruction 11) without instructing the jury on the respective duties of the truck driver and the bicyclist is clearly an error of law.

### III. CONCLUSION

Appellant Lee respectfully urges the court to reverse the verdict of the trial court and grant a new trial on all issues.

DATED THIS 11<sup>th</sup> day of June 2015.

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