

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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APPELLANT'S BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying the plaintiff's motion for a new trial or judgment notwithstanding the verdict, and in thereby declining to find a disfavored driver negligent as a matter of law when that driver failed to yield the right-of-way to a bicyclist riding within a dedicated bicycle lane, thus colliding with and injuring the bicyclist.
2. The trial court erred in instructing the jury concerning the rules of the road as applied to bicyclists riding upon a "roadway," or in otherwise failing to instruct the jury that the rules of the road do not apply to bicyclists riding in a designated bicycle lane, as the plaintiff was not riding upon a roadway at the time the collision at issue occurred.

### **A. Issues Pertaining to Assignments of Error**

1. When a disfavored driver 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?

(Assignment of Error 1)

2. When a trial court instructs a jury concerning a bicyclist's duty to comply with the rules of the road concerning riding on a roadway but the bicyclist was not riding on a roadway at the time of the collision at issue, should a judgment for the defendant driver be reversed and the matter remanded for a new trial?

(Assignment of Error 2)

## II. STATEMENT OF THE CASE

### A. **Facts**

John Borromeo has long been an avid bicycle rider.<sup>1</sup> (Vol. 3, 39.) After accepting a job as a courier with Federal Express in 1994, he would often ride his bicycle to his place of work. (*Id.*, 5, 39-41.) On July 6, 1999, Borromeo, riding his bicycle, followed a route to work that led him onto 196th Street S.E. westbound in Snohomish County. (*Id.*, 8-9.) He had taken the same route many times before. (Vol. 4, 93-94.)

Where 196th Street S.E. intersected with the Bothell-Everett Highway, Borromeo took a left and headed south. (Vol. 3, 7-8; and *see* Ex. 13.) Along the northbound lanes of the Bothell-Everett Highway at that location 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

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<sup>1</sup> The Verbatim Report of Proceedings is set forth in six volumes. Herein, the volume containing the testimony of Karen Shea is referenced as Volume 1, that containing the testimony of Michelle Borromeo as Volume 2, that containing the direct examination of John Borromeo as Volume 3 (February 8, 2006), that containing the crossexamination of John Borromeo as Volume 4, that containing the instructions conference and closing arguments as Volume 6, and that containing the arguments on the post-trial motion as Volume 5. The volumes are enumerated chronologically.

lane is demarcated as a bicycle lane by bicycle symbols painted onto the lane surface. (Vol. 4, 104-06.) In the block south of the intersection of 208th Street S.E. and the Bothell-Everett Highway, a directional arrow indicates that bicyclists may use the lane to go north only. (Vol. 3, 42-43.) North of that intersection, however, the bicycle lane has no directional arrows or signs. (Vol. 1, 21, 25; Vol. 2, 9-10; Ex. 11.) 208th Street S.E. marks the northern boundary of the Bothell city limits. (Vol. 3, 42-43.) In previous trips along the same route, Borromeo had observed bicyclists traveling in both directions on the same path, in an approximately even proportion. (*Id.*, 48.) Riding against the flow of traffic permitted Borromeo to see traffic. (Vol. 4, 140.)

Karen Shea had completed the graveyard shift the morning of July 6, 1999. (Vol. 1, 4.) She stopped at the Safeway store located at the intersection of the Bothell-Everett Highway and 208th Street S.E. on her way home. (*Id.*) After completing her shopping and while exiting the parking lot, she stopped where a sidewalk intersected the parking lot driveway. (*Id.*, 6.) Between the sidewalk and the roadway was the designated bicycle lane on which Borromeo was riding. (*Id.*, 5.) From experience, Shea knew of the bicycle lane. (*Id.*, 4.) Shea wanted to turn right, to head north. (*Id.*, 5.) According to Shea, she looked to the right at least three times when she stopped where the sidewalk abutted the

driveway. (*Id.*, 6-7.) She looked in both directions, both to the north and to the south, to check for pedestrians and other “hazards.” (*Id.*, 7.) She has testified she was stopped at the stop line for at least ten seconds. (*Id.*, 53.) She claims that she then pulled forward and stopped at the edge of the bicycle lane. (*Id.*, 8-9.) She mistakenly believed that there were directional arrows posted for the bicycle lane at that location requiring that bicyclists travel only in a northerly direction. (*Id.*, 21-23.) Because of the bicycle lane, she did not nose up to the edge of the roadway. She did not block the bicycle lane, and was stopped there for at least ten seconds before determining that she could begin her right turn. (*Id.*, 9, 54.) Nothing obstructed her vision in either direction. (*Id.*, 5.) To the right, she was able to see “several blocks up the road.” (*Id.*, 23.) Shea acknowledges, however, that during the ten seconds she was stopped at the edge of the bicycle lane, she looked only to the left. (*Id.*, 9.) Throughout that time, she did not look to the right, the direction from which Borromeo approached.<sup>2</sup> (*Id.*)

Apparently still looking to the left when she began her right turn, Shea accelerated toward Borromeo. Borromeo, seeing that a collision was inevitable, pushed off the left front corner of her vehicle’s hood with

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<sup>2</sup> In deposition testimony, Shea indicated she looked to both the left and the right when she stopped at the edge of the bicycle lane. (Vol. 1, 11-15.)

his left hand. (Vol. 3, 13; Vol. 4, 142.) Shea never saw 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 just turned her head to look straight ahead of her before putting her vehicle in motion, she would have had to have seen Borromeo. The impact occurred entirely within the bicycle lane. (Vol. 1, 6; Vol. 3, 14.)

According to Borromeo, he was traveling about 3 to 5 miles per hour as he approached the driveway. (Vol. 3, 9-10; Vol. 4, 120.) He was riding slowly because he was in an area of a busy intersection where multiple driveways abutted the bicycle lane. (Vol. 3, 10.) Simple mathematics indicates that if Borromeo was traveling at three miles per hour, he would have been no more than 52.8 feet away from the Safeway driveway where Shea waited twelve seconds before the collision.<sup>3</sup> At 20 seconds prior to the collision, he would have been no more than 88 feet away if traveling at three miles per hour.<sup>4</sup> If Borromeo was traveling at five miles per hour, he would have been no more than 88 feet away twelve seconds before the collision and no more than 146 feet away 20

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<sup>3</sup> 3 mph x 5280' = 15,840' per hour; 15,840' ÷ 60 = 264' per min.; 264' per min. ÷ 60 = 4.4' per sec.; 12 sec. X 4.4' = 52.8'.

seconds prior to the collision. At three miles per hour, Borromeo would have been traveling at 4.4 feet per second. At five miles per hour, he would have been traveling at 7.33 feet per second. These calculations establish that if Shea had looked to the right two seconds before she drove into the bicycle lane, Borromeo then would have been between 9 and 14.5 feet away.<sup>5</sup>

### **B. Trial and post-trial proceedings**

At trial, Borromeo and Shea testified concerning liability issues. Borromeo's wife, Michelle Borromeo, testified about, among other things, the layout of the bicycle lane and signage along the lane. No experts testified. 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, that any bicyclists riding in the lane would have the right of way. Her position, which her counsel advanced, 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

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<sup>4</sup>  $5 \text{ mph} \times 5280' = 26,400' \text{ per hour}; 26,400' \div 60 = 440' \text{ per min.}; 440' \text{ per min.} \div 60 = 7.33' \text{ per sec.}; 12 \text{ sec.} \times 7.33' = 87.96'$

<sup>5</sup> Borromeo's injuries ultimately resulted in a shoulder surgery. (Vol. 4, 141-42.)

traffic and to the right of the roadway. He insisted that the rules of the road pertain to bicycle lanes. (Vol. 5, 19.) This defense position was reflected both in questions counsel posed to Borromeo during cross-examination and in closing argument. (*See e.g.*, Vol. 4, 102 and Vol. 5, 54, 57-58.)

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 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 pertained 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. (*See* § III. B.2. below.)

The jury found no negligence on the part of Shea. (CP 45.) In moving for judgment notwithstanding the verdict, Borromeo asserted that Shea’s failure to yield the right of way to Borromeo rendered her negligent as a matter of law. (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, as Your Honor properly instructed them. I argued that he was, in fact, going the wrong way, and I argued that that was based upon the fact that he's required by the statute to comply with the markings and the signs, including that arrow in terms of the way he was going.

(Vol. 6, 12.) In framing the issue posed in the post-trial motion, the Court stated:

. . . the harder question[] posed today is whether the defendant as the party who was emerging from a driveway onto a highway, and who was the disfavored driver, can ever be 100 percent excused from liability merely because the plaintiff was arguably traveling the wrong way in the bicycle lane. \* \* \* Instruction 19 instructed the jury that the defendant had a right to assume that others would use ordinary care and comply with the law. I find that this instruction is the primary defense that has been offered in this case. The argument seems to be that an ordinarily prudent person would have no reasonable expectation that someone would be approaching the driveway exit on the wrong side of the highway, and therefore, the defendant didn't have to look to the north before exiting the driveway. [¶] I conclude this is a matter left to the jury's discretion . . .

(*Id.*, 20-21.) The Court, accordingly, denied the motion. (CP 17-18.)

### **III. ARGUMENT**

#### **A. Summary of Argument**

Shea was the disfavored driver when exiting a private driveway intersecting with a designated bicycle lane. She stopped at the edge of

the bicycle lane and looked only to the left. The bicycle lane to Shea's right was straight for a considerable distance and posed no obstructions to her view. Borromeo was traveling southbound in the bicycle lane between three and five miles per hour as he approached the intersection with the driveway. Borromeo had just about passed by Shea when she pulled out and hit him—the left front bumper of Shea's automobile, which was turning right, struck the rear tire of Borromeo's bicycle. The impact occurred within the bicycle lane.

These undisputed facts establish that Shea was negligent as a matter of law and that her negligence proximately caused Borromeo's damages. She failed to yield the right of way to Borromeo, failing to see what she had a duty to see and which was in front of her in plain view. Under such circumstances, the jury's verdict must be set aside, Shea deemed negligent as a matter of law, and this matter remanded for trial for a determination of damages.

Alternatively, even if Shea was not negligent as a matter of law, this matter should be remanded for a new trial because of instructional error. The instructions gratuitously identified immaterial statutory duties and otherwise overemphasized Shea's argument that Borromeo should have been riding with the flow of vehicular traffic. Because Borromeo had no statutory or other legal obligation to ride with the flow of traffic,

instructions based on statutes implying such a duty constituted prejudicial error, particularly in view of the court's failure to give an instruction informing the jury that Borromeo had no such obligation.

## **B. Argument**

**1. The evidence reveals that Shea was negligent as a matter of law, and, accordingly, the trial court erred in denying Borromeo's motion for judgment notwithstanding the verdict with regard to Shea's negligence.**

### **a. Standard of review.**

CR 50(a)(1) states:

If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim.

In considering such a motion, a court is to "accept[] the truth of the nonmoving party's evidence and draw[] all reasonable inferences in its favor." *Oregon Mutual Ins. Co. v. Barton*, 109 Wn. App. 405, 413, 36 P.2d 1065 (2001). Because a trial court exercises no discretion in ruling on a motion pursuant to CR 50(a)(1), appellate review is de novo. *Id.*

**b. Shea's failure to yield the right of way requires that she be deemed negligent 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.

*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). Stated differently, "[o]nly when it becomes apparent to the favored driver that the disfavored driver will not yield, is he required to react concerning this possible danger." *Petersavage v. Bock*, 72 Wn.2d 1, 5-6, 431 P.2d 603 (1967).

Although rights of way are relative, the primary duty to avoid an accident falls upon the disfavored driver. *Sanchez v. Haddock*, 95 Wn.2d 593, 597, 627 P.2d 1312 (1981). The general rule is that a

favored driver who has done nothing to confuse or 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>6</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, the *Petersavage* 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 negligence on the defendant's part as a matter of law, and similarly 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 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 . . .

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<sup>6</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 and that there was nothing whatsoever to obstruct her ability to see the defendant. Accordingly, Borromeo could not have deceived Shea. In fact, the opposite occurred. Shea deceived Borromeo into thinking that she was yielding the right of way to him because she stopped her vehicle next to the bicycle lane after she proceeded from the original stop line.

*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 in a right of way situation. 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 his bicycle, and waited for traffic to clear. When a vehicle stopped to permit him to cross, and the crosswalk otherwise 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. She claimed that a vehicle traveling in the opposite direction obscured her vision of the bicyclist. *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 claim that her supposed 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”); and *Smith v. Laughlin*, 51 Wn.2d 740, 321 P.2d 907 (1958).

*Jung v. York*, 75 Wn.2d 195, 449 P.2d 409 (1969) similarly emphasizes the heightened obligations of a disfavored driver in a right of way situation. Although *Jung* does not involve a bicycle lane, it does involve a pedestrian in a crosswalk. The Court stated:

If the conceded right of way means anything at all, it puts the necessity of continuous observation and avoidance of injury upon the driver of the automobile when approaching a crossing, just as the necessity of the case puts the same higher degree of care upon the pedestrian at other places than crossings.

*Id.*, 198, quoting *Johnson v. Johnson*, 85 Wa. 18, 25-26, 147 Pac. 649

(1915). The Court stated further:

A corollary of this rule is that the pedestrian rightfully in the crosswalk has the right to assume that operators of approaching vehicles will obey the law and yield the right of way until he knows or should know to the contrary. [Citations omitted.] [¶] A pedestrian cannot at one and the same time have the right to assume that the right of way will be yielded and a duty to look to make sure that it is. In the absence of circumstances which would alert the pedestrian rightfully in the crosswalk to the fact that an approaching vehicle is not going to yield, negligence cannot be predicated on his failure to look and see the vehicle in time to avoid the accident.

*Id.*

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.)

The record herein discloses that Shea was emerging from a driveway as she approached the bicycle lane in which Borromeo was riding. She claims to have looked to the right at least three times after stopping at the edge of the sidewalk. (Vol. 1, 7.) The calculations set forth above indicate Borromeo was no more than 88 feet away at the time Shea claims to have last looked in his direction. After stopping at the edge of the bicycle lane, Shea acknowledges that she did not look to

the right in Borromeo's direction for at least ten seconds prior to turning right across the bicycle lane. (*Id.*, 54.) A likely explanation for her failure to look to the right was her mistaken impression that the bicycle lane was posted with directional signs permitting bicyclists to travel only northward at that location. (*Id.*, 21-22.) She had no obstructions to her view in any direction. (*Id.*, 5.)

Viewed in the light most favorable to Shea, these undisputed facts permit no reasonable conclusion other than that Shea negligently collided with Borromeo. The inescapable conclusion is that if Shea, at anytime as she exited the driveway, had fulfilled her obligation as the disfavored driver to check both directions for pedestrians and bicyclists and see what was there to be seen, she would have seen Borromeo. If Shea had looked to the right at any time when she was stopped for at least ten seconds at the original stop line, she could not have missed seeing Borromeo. If she had looked to the right during the ten seconds she supposedly waited at the edge of the bicycle lane, she could not have missed seeing him. Borromeo, who was riding his bicycle very slowly, had almost passed Shea's automobile when she accelerated her automobile across the bicycle lane striking the rear of his bicycle with the left front bumper of the right-turning automobile. Shea plainly

failed to see what she had a duty to see. Her failure to see Borromeo is legally inexcusable.

The cases cited above establish that a disfavored driver in a right of way situation has a duty of “continuous observation” (*Pudmaroff*), and that a favored driver (or pedestrian or bicyclist with the right of way) is entitled to assume the disfavored driver will yield the right of way” (*Maxwell*). Having the right of way would otherwise be meaningless. Shea’s counsel’s contention that a person of ordinary prudence would not reasonably anticipate that a bicyclist would be riding against the flow of traffic in a designated bicycle lane ignored the duty imposed on a disfavored driver. Applicable law reveals the impropriety of such a contention; applicable law plainly imposed a duty on Shea to anticipate precisely the situation that developed here. In particular, the law cited above establishes that Borromeo was not required, while in the designated bicycle lane, to travel one way or the other. He was not in a roadway, and so was not bound by any rules of the road.<sup>7</sup> Accordingly,

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<sup>7</sup> The trial court’s suggestion that perhaps “common practice” might have imposed a duty on Borromeo to ride in the bicycle lane with the flow of traffic is curious. No expert testified to any applicable standard of care or “common practice.” Accordingly, the record contains no foundation for identifying a “common practice.” Shea’s testimony concerning her perceptions of a bicyclist’s duties in a bicycle lane does not provide sufficient foundation: “Although, where negligence is in issue, the usual conduct or general custom of others under similar circumstances is relevant and admissible, such custom may not be established by evidence of conduct of single persons or businesses.” *Miller v. Staton*, 58 Wn.2d 879, 885, 365 P.2d 333 (1961).

the disfavored driver, Shea, most certainly did not act with ordinary prudence in failing to anticipate his presence. Shea's misunderstanding that signs at the collision's location permitted only northward travel by bicyclists in the bicycle lane provides her no excuse.

Borromeo, who was 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. He was entitled to proceed on such assumption until put on notice that his assumption was misplaced. Indisputedly, Borromeo did not ride in front of Shea's vehicle until after he saw her stop at the bicycle lane, thus indicating to him that she was yielding the right of way to him. He had no further duty to, for instance, make eye contact with Shea, as defense counsel suggested at trial. (Vol. 4, 122-23.) He rode his bicycle slowly past her and almost got by before she pulled out and struck the rear wheel of his bicycle. Borromeo's entirely legal conduct offers no justification for Shea's failure to observe him.

In addressing the post-trial motion, the trial court indicated that the jury, in its discretion, was permitted to rely on Instruction Number 19 in finding that Shea did not act negligently. (Vol. 6, 20-21.) That instruction provides: "Every person has a right to assume that others will use ordinary care and comply with the law, and a person has a right to proceed on such assumption until he or she knows, or in the exercise of

ordinary care should know, to the contrary.” (CP 71.) Because the record provides no evidence that Borromeo did anything but act with ordinary care and comply with the law, such instruction provides no basis for finding for Shea.

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 when she claimed to look to the right. Nothing obstructed her view; she could have and should have seen Borromeo approaching in the bicycle lane for blocks up the Bothell-Everett Highway.<sup>8</sup> Nothing excuses Shea’s unreasonable failure to look to the right, and to observe anyone who might be approaching from that direction. As a matter of law, Shea should be deemed negligent given such circumstances.

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<sup>8</sup> Assuming negligence as a matter of law on Shea’s part, a causal relationship between such negligence and Borromeo’s injuries must also be found as a matter of law before liability may be imposed on her. Such a relationship is quite apparent. If Shea had yielded the right of way, had seen what was there to be seen, or had looked to the right at any time for the last ten seconds before she pulled out, the collision plainly would not have happened. Accordingly, the causal relationship between Shea’s negligence and Borromeo’s injuries is apparent, and may be found as a matter of law. See *Petersavage*, 72 Wn.2d at 5; and *Van Cleve v. Betts*, 16 Wn. App. 748, 753, 559 P.2d 1006 (1977).

**2. The trial court erred in instructing the jury concerning the direction a bicycle must ride if in a roadway, and in failing to instruct the jury that Borromeo was not required to ride in any particular direction in 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*, 109 Wn. App. at 412-13. Review of instructions on appeal is de novo. (*Id.*, 412.) In 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). An instruction that erroneously states the applicable law “is reversible error where it prejudices a party.” *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995). *See also, Cox v. Spangler*, 141 Wn.2d 431, 442, 5 P.3d 1265 (2000). An appellate court will presume prejudice “[w]hen considering erroneous instructions.” *Blaney*, 151 Wn.2d at 211.

Even instructions which correctly state applicable law may prejudice a party and provide a basis for 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 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. 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 in a bicycle lane. Indeed, by its terms, the statute applies only to bicyclists riding in a roadway. *See, Crawford v. Miller*, 18 Wn. App. 151, 153, 566 P.2d 1264 (1977). “Roadway” is defined in RCW 46.04.500:

“‘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.” A bicycle lane is not intended for vehicular travel, so does not fit within the definition of a roadway. Importantly, no statute specifies the direction in which a bicycle must ride, unless in a roadway; within a designated bicycle lane, no statutory provisions direct travel.

Accordingly, absent directional arrows or posted signage in a particular location, Washington law does 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 had 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.) Further, “. . . our legislature has never said thou shalt go in the direction the signs are facing.” (*Id.*, 21.) The Court even acknowledged that the first sentence of Instruction Number 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 some 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.

MR. SCOTT: Well, I mean, I can't argue what's—that there are no rules of the road for a bicycle in the statutes.

THE COURT: You can say there's nothing in the judge's instructions that tells you a rule of the road for bicycle lanes.

MR. SCOTT: But there is something in the judge's instructions about rules of the road and riding on the right-hand side.

THE COURT: But that applies to the through lane. The through lane is clearly not the bicycle lane.

MR. SCOTT: I understand that, but the jury might say why is that in there if that's not important . . .

(*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 did 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, for example . . .

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

The next one is Instruction No. 13, and we already discussed this. 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. [¶] The next sentence which says a person operating a bicycle upon a roadway may use the shoulder of the roadway or any specially designated bike lane if such exists is an appropriate and correct statement of the law, and that should be the only part of the instruction that is given.

(*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.<sup>9</sup> (*Id.*, 54, 57, and 60.) Defense counsel specifically referenced the quoted instructions in contending that Borromeo had been riding on a roadway. In particular, he stated: "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

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<sup>9</sup> Instruction Number 14 identified the duty of motorists and bicyclists to comply with traffic control signs and devices. (CP 66.) The record contains no evidence Borromeo actually ignored any traffic control sign or device before the collision. So, this instruction also improperly directed the jury's attention to statutory duties on Borromeo's part.

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 both identified a bicyclist’s duties when riding “upon a roadway.” No evidence suggested Borromeo ever rode in a through lane on the Bothell-Everett Highway; no evidence suggested he ever rode upon a roadway. Accordingly, gratuitously instructing the jury concerning a bicyclist’s duties while riding upon 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 in dispute constitutes error. *Anderson*, 71 Wn.2d at 645. Because Borromeo did not ride in a roadway, a bicyclist’s duties while riding in a roadway were entirely beside the point, and instructing the jury on such duties could only cause confusion and unnecessary speculation. Any reasonable juror would have to expect that no part of the instructions were superfluous; indeed, the jury was, as is any jury, instructed that all instructions are “equally important.” (CP 51, Inst. 1.)

In final argument, Shea's counsel capitalized on the instructional error. He stated at least three times, over the objection of Borromeo's counsel, that Borromeo illegally rode in the bicycle lane in the wrong direction. This argument misstated the pertinent law and compounded the error set forth in Instruction Number 13. The instruction's language may well have caused the jury to believe that the first sentence of Instruction Number 13 meant that it was illegal for a person to ride a bicycle on the left-hand side of the roadway in a bicycle lane. Shea's inappropriate argument concerning Borromeo's alleged wrong-way travel permitted the jury to excuse the Shea's failure to yield the right of way and her failure to see Borromeo when he was in plain sight. Borromeo was legally entitled to ride his bicycle in the bicycle lane precisely in the manner and direction he was riding when Shea hit him. At a minimum, giving the jury two instructions concerning Borromeo's supposed statutory duties overemphasized defense counsel's arguments.

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. Prejudice from the unnecessary instructions should be presumed, and this matter remanded for a new trial.

#### IV. CONCLUSION

Pursuant to CR 59, the Court is requested to order a new trial on the issue of damages only. There is simply no evidence or reasonable inference from the evidence to justify the verdict of no negligence on the part of the defendant in this matter. The defendant was negligent as a matter of law and the defendant's negligence proximately caused the collision in this case. Alternatively, the Court is requested to order a new trial on all issues because of instructional error.

DATED this 9<sup>th</sup> day of October, 2006.

SCOTT, KINNEY & FJELSTAD

  
\_\_\_\_\_  
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 BRIEF

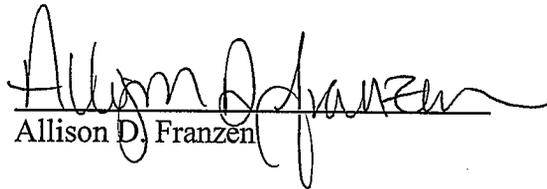
And served the same document via legal messenger to the party below:

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 9th day of October, 2006.

SCOTT, KINNEY & FJELSTAD

  
Allison D. Franzen

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