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**NO. 58221-6**

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION I

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JOHN C. BORROMEO,

Appellant,

vs.

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

Respondents.

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**BRIEF OF RESPONDENTS**

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## **I. STATEMENT OF ISSUES**

1. Whether the trial court properly denied appellant's motion for a new trial or judgment notwithstanding the verdict when there was substantial evidence that allowed the jury in its discretion to conclude that respondent exercised ordinary care.

2. Whether the trial court properly instructed the jury on the duties of a bicycle rider.

## **II. COUNTERSTATEMENT OF THE FACTS**

This bicycle-automobile accident occurred on the Bothell-Everett Highway (SR 527) approximately one-quarter of a block north of 208<sup>th</sup> Street S.E. in Snohomish County. (Vol.1:37.) The Bothell-Everett Highway runs north and south, with two lanes in each direction. Designated bicycle lanes run along both sides of the highway. Within these lanes are markings, signs and arrows showing direction of travel. Outlines of bicycles accompanied by the word "lane" are spaced along the bicycle lanes on both sides. These figures and words are right side up for a bicyclist riding northbound along the east side of the highway adjacent to

northbound vehicle traffic. Similarly, along the west side of the highway adjacent to the southbound vehicle lanes, these markings are right side up for a southbound bicyclist. (Vol. 4:105.) In addition, directional arrows are present within the lanes at various locations on both sides of the highway. These directional arrows on the east side point north and the arrows on the west side adjacent to the southbound traffic lanes point south. (Vol. 1:19, 20, 22, 39, 40.) Included is a directional arrow pointing north in the bicycle lane on the east side just one block south of the location of the accident. (Vol. 4:110, see Exhibit 9.)

Shea was very familiar with the area, having used the driveway out of the Safeway store many times previously. (Vol. 1:35-36.) When exiting that driveway, one can only turn right to travel northbound. (Vol. 1:36.) She was aware of the bicycle lanes on both sides of the highway and that they contained both directional arrows as well as the markings. She knew the directional arrows pointed northbound along the east side of the highway both north and south of the accident scene. (Vol. 1:19, 20, 22-23, 39-40, 47.) She was aware the markings in the form of the bicycle outline and the word "lane" were right side up when

traveling north on the east side of the highway and therefore upside down when traveling south along that side of the highway. (Vol. 1:40-43, see Exhibit 7.) She knew the markings in the bicycle lane on the west side were read right side up when traveling southbound and upside down when riding north. (Vol. 1:40-43.) She therefore believed the bike lane in which the accident occurred on the east side of the highway was a northbound only bike lane since all signs, pavement markings and arrows pointed north. (Vol. 1:25.)

During the years she had driven on the highway, she had never seen a bicyclist riding southbound in the bicycle lane where the accident occurred on the east side of the highway. (Vol. 1:37.) She had also observed bicyclists riding only southbound in the bicycle lane on the west side of the highway. (Vol. 1:38.) She had only observed bicyclists in the bicycle lanes on both sides of the highway riding with the flow of general traffic. (Vol. 1:38.) It was her understanding based upon the markings in the bicycle lane as well as her experience that a bicyclist in the lane on the east side of the highway was required to ride northbound and a bicyclist in the west bike lane was required to ride southbound. (Vol. 1:40, 41.) It

had not occurred to her based upon her knowledge and experience that someone would be riding southbound in the northbound bicycle lane on the east side of the highway. (Vol. 1:38.) It was her further understanding and belief that bicyclists were subject to the same rules of the road as motorists and should therefore be riding northbound in the bicycle lane where the accident happened. (Vol. 1:38.) She didn't expect, therefore, to see a bicyclist riding southbound in that lane. (Vol. 1:23, 25.)

Since 1996, Borromeo had ridden his bicycle along the Bothell-Everett Highway in this area hundreds of times before the accident occurred. (Vol. 4:93; Vol. 3:41.) He was aware of the bike lanes on both sides of the highway (Vol. 4:103) and had ridden over the markings on both sides probably thousands of times. (Vol. 4:104.) He was aware those markings were upside down when riding southbound on the east side (Vol. 4:105.) He was aware of the northbound directional arrows in the bike lane on the east side and that there were no southbound directional arrows in that lane. (Vol. 4:109-110) He knew there was a northbound arrow only one block south of the accident scene. (Vol. 4:109, 110.) He was also aware of the southbound directional arrows in the west bicycle

lane. (Vol. 4:110.) It was also his belief and understanding that he was required to comply with the same rules of the road as automobile drivers and that any auto driver was required to drive on the right side of the roadway. (Vol. 4:102.)

On the day of the accident, Shea exited the store parking lot by driving westbound along the driveway approaching the highway. She initially stopped at the painted stop line at the sidewalk. (Vol. 1:6-7.) and looked to the north and south for pedestrians and any other hazards that might be approaching. She looked to the south about three times and also to the north 3-4 times. (Vol. 1:7.) She observed heavy traffic approaching northbound on the highway, but saw no pedestrians or bicyclists in either direction. (Vol. 1:8.) She then crept toward the end of the driveway again stopping with the front of her vehicle at the edge of the street. (Vol. 1:8.) She was stopped in that position for approximately 10 seconds focusing her attention to the left because of the approaching northbound traffic. (Vol. 1:9.) Southbound traffic could not make a left turn into the driveway due to a raised barrier. Observing a gap in the traffic, she had just begun to move when Borromeo crossed in front of her vehicle riding southbound and approaching from her right resulting

in the impact. She had no reason to anticipate a bicyclist would be riding on the wrong side of the highway based upon her knowledge of the bicycle lane markings, arrows and her understanding of the rules of the road. (Vol. 1:23, 25, 37, 38, 40-41.)

Borromeo testified that he believed the northbound arrow in the east bike lane just south of 208<sup>th</sup> (see Exhibit 9) required him to ride northbound because he had crossed into the City of Bothell. Therefore when riding southbound, he would cross the highway at 208th continuing southbound on the west side. He admitted, however, that in his deposition he testified that he had never used the bike lane on the west side. (Vol. 4:115-116.) He also testified on cross examination that he didn't know where the City of Bothell limits were. (Vol. 4:111.) He further testified in response to a juror's question which was restated by the Court:

"The court: All right. Did you think the rules were different regarding bike lanes depending upon what jurisdiction you're in?"

The witness: I believe so.

The court: How?

The witness: Well, like, for example, in California, I believe there's –

The court: No, this is just where we're taking about on SR 527.

The witness: I do not know, sir, the answer.

(Vol. 4:146.)

The jury, after hearing the testimony of both parties, concluded that Shea was not negligent. In denying plaintiff's post-trial motions, the trial court concluded the issue of Shea's negligence was properly submitted to the jury under proper instructions.

### III. ARGUMENT

#### A. Standard of Review.

In reviewing the trial court's denial of Borromeo's motions for judgment notwithstanding the verdict or for a new trial with regard to Shea's alleged negligence, this court must view the evidence and reasonable inferences from the evidence in the light most favorable to Shea. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of*

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*Omaha*, 126 Wn.2d 50, 98, 882 P.2d 703, 891 P.2d 718 (1994).

The rule is that a directed verdict should be granted only when it can be held as a matter of law that there is no evidence or reasonable inference therefrom to sustain a jury verdict for the non-

moving party. *Bordynoski v. Bergner*, 97 Wn.2d 335, 338, 644 P.2d 1173 (1982); *Cherberg v. People's Nat'l Bank*, 88 Wn.2d 595, 564 P.2d 1137 (1997); *Bender v. Seattle*, 99 Wn.2d 582, 587, 664 P.2d 492 (1983). The trial court exercises no discretion and must accept the truth of the non-moving party's evidence. *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha, supra*.

A directed verdict is inappropriate where reasonable minds could differ in their interpretation of the facts. It is only when the facts are undisputed and the inferences there from are plain and incapable of reasonable doubt or difference of opinion does it become a question of law for the court. *Bordynoski, supra*, at 338; *Harris v. Burnett*, 12 Wn.App. 833, 532 P.2d 1165 (1975). If any justifiable evidence exists from which reasonable minds could reach a verdict in the non-moving party's favor, the question is for the jury and a directed verdict must be denied. *Dewey v. Tacoma School District No. 10*, 95 Wn. App. 18, 974 P.2d 847 (1999).

A primary question in reviewing the trial court's decision denying a motion for judgment as a matter of law is whether the losing party received a fair trial. If so, the motion must be denied. *Levea v. GA Gray, Corp.*, 17 Wn. App. 214, 562 P.2d 1276 (1977).

Also, the court even though it may disagree with the jury's verdict, cannot substitute its opinion in place of the jury's where there has been a fair trial. In *State v. O'Connell*, 83 Wn.2d 797, 838, 523 P.2d 872 (1974), the Supreme Court in upholding the trial court's denial of a motion for new trial stated:

“As we have said on so many occasions, this court will overturn a jury's verdict only rarely and then only when it is clear that there was no substantial evidence upon which the jury could have rested its verdict.” *Valente v. Bailey*, 74 Wn.2d 857, 447 P.2d 589 (1968) and cases cited. This court will not willingly assume that the jury did not fairly and objectively consider the evidence and the contentions of the parties relative to the issues before it. *Phelps v. Westcott*, 68 Wn.2d 11, 410 P.2d 611 (1966). The inferences to be drawn from the evidence are for the jury and not for this court. The credibility of witnesses and the weight to be given to the evidence are matters within the province of the jury and even if convinced a wrong verdict has been rendered, the reviewing court will not substitute its judgment for that of the jury, so long as there was evidence, which, if believed, would support the verdict rendered...”

**B. The trial court properly denied Borromeo's post-trial motions since there was substantial evidence that allowed the jury to find that Shea was not negligent.**

Substantial evidence supported the jury's conclusion that Shea exercised ordinary care. After she stopped at the sidewalk, she looked to her left as well as to her right at least three times. She then moved to the edge of the roadway, thereafter focusing her attention to her left, the only direction from which traffic was approaching. She had never seen anyone riding a bicycle southbound in the northbound bicycle lane. She was aware of the numerous bicycle lane markings including the directional arrows all of which directed bicyclists northbound. She was aware of the bicycle lane on the west side of the highway for southbound riders. She further testified, without objection, that it was her understanding that bicyclists were required to ride with traffic and not against it. In light of these facts, the jury had substantial evidence upon which to conclude that she had no reason whatsoever to anticipate that Borromeo would be riding southbound against traffic and therefore ordinary care did not require her to look again to the north. The jury was properly instructed (CP 70, Inst. 19) without objection that Shea had no duty to anticipate that Borromeo would not comply with the rules of the road.

The trial judge, in denying Borromeo's motion acknowledged this substantial evidence:

"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 had 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 that this is a matter left to the jury's discretion and should not be second-guessed by a court as a matter of law. In deciding whether the plaintiff was, in fact, one hundred percent contributorily negligent, as Mr. Snook argued and as the jury found, or fifty percent contributorily negligent as I personally would have found, or zero percent contributorily negligent as Mr. Scott argued and continues to urge, is a matter of discretion and not a matter of law. A reasonable jury could have found that bicycles are hard enough to see on a busy street in the first place, and that when they choose to ride in the wrong direction along a highway, the unsuspecting driver entering that highway from the driveway is relieved of her duty of care." (Vol. 5:20-21.)

The jury further had substantial evidence before it upon which to conclude that Borromeo was completely at fault in causing the accident. The jury was properly instructed that a person riding a bicycle on a roadway must obey all statutes governing the operation of vehicles. (CP 70, Inst. 12). The jury was further properly instructed that a statute required a bicyclist to obey the instructions of all applicable traffic control devices including signs and markings (CP 70, Inst.14).

The plaintiff admitted that he had ridden over the markings in the bicycle path on the east side of the highway literally hundreds of times and was aware that the bicycle outline and the word "lane" indicated a northbound direction of travel. He further admitted that he was aware of the directional arrows along the bicycle path, one of which was only approximately one block to the south of the accident scene which required he ride northbound. He was aware of the bicycle lane on the west side of the street with reversed markings consistent with southbound bicycle travel. He also knew that he was required to obey the rules of the road for vehicles when riding his bicycle which would require him to ride with traffic.

He initially claimed that while riding southbound he would cross the highway at 208<sup>th</sup> just south of the accident scene because he was aware of the northbound only arrow just south of 208<sup>th</sup>. He had previously testified in his deposition that he had never ridden southbound in the west bike lane. He claimed he crossed at 208<sup>th</sup> because it was the city of Bothell boundary. However, there was no evidence presented that the intersection was, in fact, the city boundary or that any city boundary would change the rules or markings on a state highway. In addition, he admitted he didn't know where the boundary line was and, in response to a juror's question, admitted that he didn't know the rules were different regarding bike lanes depending upon what jurisdiction he was in.

The jury was entitled to reject plaintiff's argument that the absence of any arrows at the specific point where the accident occurred allowed him to ride southbound despite all the other markings, including arrows which required a northbound direction of travel. There was substantial evidence upon which the jury could conclude that Borromeo was required to comply with the

rules of the road including obedience to signs and markings, but had failed to do so, resulting in the accident.

The jury was instructed that while emerging from a driveway one has the primary duty to yield, but that this right of way is relative and not absolute and both parties have the duty to exercise ordinary care. (CP 70, Inst. 15.) Under the facts of this case, the jury had substantial evidence upon which to conclude that Shea had exercised her relative duty of ordinary care, even though she was disfavored, and that Borromeo had not. The trial judge in denying Borromeo's motions properly relied upon this relative nature of the duties. (Vol. 5:20.) Whether Shea had any reason to anticipate that Borromeo would be riding the wrong way and should have looked again to her right was clearly in dispute and therefore properly submitted to the jury.

Petitioner's reliance upon *Petersavage*, *Pudmaroff* and *Jung* is misplaced as the facts and applicable law in those cases are substantially different. In *Petersavage*, the defendant was entering an arterial attempting to enter lanes on the far side, knowing that traffic would be lawfully coming in the direction plaintiff approached. There, plaintiff was not traveling the wrong way on the wrong side

of the arterial in violation of the rules of the road as well as markings and arrows. *Pudmaroff and Jung* are marked crosswalk cases. The sole issue in *Pudmaroff* was whether a bicyclist is entitled to the protection of the crosswalk when crossing a roadway. The court in holding to the affirmative noted the special rules applicable to crosswalk cases including the rule of continuous observation, further emphasizing that the rules of the road are not applicable to bicyclists in a crosswalk. Similarly, *Jung* involved a pedestrian crossing the street in a marked crosswalk. The law is clear that a pedestrian in a crosswalk is not required to comply with the rules of the road for vehicles but is in a highly protected area with a high degree of care imposed upon the approaching driver. These rules of the road have no application to the facts of this case. The jury heard substantial evidence allowing it to conclude in its discretion that Shea was not negligent.

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**C. The jury was properly instructed on the duties of a bicycle rider.**

The trial court properly 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 70, Inst. 12)

This instruction, based upon RCW 46.61.755, was clearly applicable. RCW 46.61.750 confirms that the rules set forth in RCW 46.61.755 apply to bicycles “whenever a bicycle is operated upon any highway or upon any bicycle path, subject to those exceptions stated herein.” Thus, a bicyclist whenever riding upon a highway or in a bike path, must comply with the same rules of the road applicable to the driver of a vehicle. RCW 46.61.100 requires that “a vehicle shall be driven upon the right half of the roadway...”. A bicyclist, whether on the highway itself or in a bicycle path, is required to do the same.

RCW 46.61.770 further requires that:

“(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.... A person operating a bicycle upon a roadway may use the shoulder of the roadway or any specially designated bicycle lane if one exists.”

The law requires that not only must a bicyclist ride with the flow of vehicular traffic on the right side, but if moving slower than

vehicular traffic, must further ride along the right side of the right lane or has the option of riding on the shoulder or in a designated bike lane if one exists. RCW 46.61.770 does not modify the requirement that a bicyclist must comply with the rules of the road by riding with traffic on the right side of the roadway. Rather, this statute, consistent with RCW 46.61.755 is premised upon a bicycle riding with traffic as indicated by language "at a rate of speed less than the normal flow of traffic." These statutes do not exempt a bicyclist in a bike lane or path from following the rules of the road and thus allow the bicyclist to ride against traffic. The rules of the road for vehicles still apply.

Borromeo contends that these rules of the road are not applicable because "he was not in a roadway, and so was not bound by any rules of the road."<sup>1</sup> Therefore, he argues that he could ride in any direction he desired ignoring also the bicycle lane markings and arrows. Borromeo's interpretation leads to absurd results. For example, under Borromeo's theory, he would not be

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<sup>1</sup> Borromeo argues on the one hand that he was not required to obey the rules of the road because he was not on a roadway, while at the same time arguing that Shea violated a statute in failing to yield the right of way to Borromeo "approaching on the roadway."

required to obey traffic control signals as long as he was within the bike lane.

Borromeo relies upon the definition of “roadway” in RCW 46.04.500, which states:

“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...”

It should be noted that “highway” is defined in RCW 46.04.197:

“Highway’ means the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.”

Furthermore, Borromeo fails to note the language in RCW 46.04.500 “or ordinarily used for vehicular travel.” “Vehicle” is defined in RCW 46.04.670 as “including bicycles.” Therefore, when construing these statutes together, a “roadway” includes not only the entire “highway”, but includes the area ordinarily used for vehicles including bicycles.

The court’s instructions 12 and 13 accurately and clearly state the law applicable to bicyclists on roadways and highways,

including bicycle lanes. Borromeo provides no relevant authority for his position that a bicyclist may disregard these rules of the road which apply to bicyclists and which would allow him to ride southbound adjacent to northbound traffic.

It should be further noted that Borromeo did not submit to the court nor request a written jury instruction to the effect that the statutory rules of the road do not apply to bicyclists in bicycle lanes. Borromeo has therefore waived the argument that the trial court erred in the giving of these instructions. *City of Bellevue v. Kravik*, 69 Wn. App. 735, 740, 860 P.2d 559 (1993); *Gammon v. Clark Equip. Co.*, 104 Wn.2d 613, 617, 707 P.2d 685 (1985).

The court's instructions are accurate statements of the law and were neutral in their application to the facts. Both sides were able to fully argue their positions in the application of the facts to the court's instructions.

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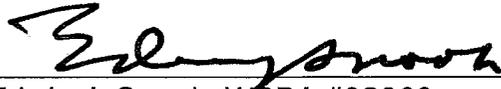
#### IV. CONCLUSION

This court should confirm the trial court's denial of Borromeo's post-trial motions with regard to Shea's negligence. The jury was presented with substantial evidence that Shea

exercised ordinary care which was within the jury's discretion and was properly instructed as to the law.

DATED this 30th day of October, 2006.

SNOOK SCHWANZ KINERK

A handwritten signature in black ink, appearing to read "Edwin J. Snook", written over a horizontal line.

Edwin J. Snook, WSBA #03060  
Attorneys for Respondent

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SUPREME COURT  
STATE OF WASHINGTON

JOHN C. BORROMELO, )  
)  
Appellant, ) NO. 58221-6  
) (Court of Appeals Cause No.)  
vs. )  
) AFFIDAVIT OF SERVICE  
KAREN SHEA and JOHN DOE SHEA, her )  
husband, and the marital community )  
composed thereof, )  
)  
Respondents. )  
\_\_\_\_\_ )

STATE OF WASHINGTON )  
) ss.  
COUNTY OF KING )

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

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

S N O O K ❖ S C H W A N Z

Attorneys at Law

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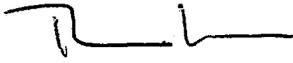
4:00 p.m. on the following office:

Scott, Kinney & Fjelstad  
Brian D. Scott  
600 University Street, Suite 1928  
Seattle, WA 98101

DATED this 25th day of June, 2007.

  
\_\_\_\_\_  
Marla Thomas

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

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