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No. 66532-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JESSE O. ALLEN,  
*Petitioner,*

v.

STATE OF WASHINGTON DEPARTMENT OF LICENSING,  
*Respondent.*

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Petitioner/Appellant's Brief

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COURT OF APPEALS  
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**A. INTRODUCTION:**

The Snohomish County Superior Court's December 17, 2010 Order affirming the Washington State Department of Licensing's ("DOL's") suspension of Petitioner's driving privilege is in error. The State's implied consent misleads commercial drivers concerning the length of time a commercial license will be disqualified, prejudicing commercial drivers to submit to, rather than to refuse, breath tests.

**B. ASSIGNMENT OF ERROR:**

The trial court erred in concluding that DOL's August 9, 2010 Implied Consent Findings, Conclusions and Order, which took action against Petitioner's driver's license pursuant to RCW 46.20.308, were supported by substantial evidence and were otherwise in accordance with law, thereby affirming Respondent's Order sustaining the suspension of Petitioner/Appellant's personal driver's license and causing the disqualification of his commercial driver's license.

**C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR:**

1. Whether the implied consent warning misleads commercial drivers regarding the length of disqualification of a

commercial license, prejudicing commercial drivers to submit to and not refuse breath tests?

**D. STATEMENT OF THE CASE:**

On March 18, 2010 at approximately 1:23 a.m., a Snohomish County Deputy was in a parking lot and heard a loud car engine accelerate. (Clerk's Papers, hereafter "CP", at 200). He saw a truck leave the parking lot and stop at an intersection. *Id.* The truck proceeded slowly through the intersection. *Id.* The road makes a 90 degree turn to the left. *Id.* at 41:23-25 - 42:1-3. The truck's right wheels crossed the fog line as the road turned left. (*Id.* at 42:3-5). The truck corrected and drove fifty feet. *Id.* at 42:7-12. The right wheels then again crossed the fog line. *Id.* at 42:12-15. The tires left the shoulder area for about the distance of one car's length and the deputy was worried the truck might leave the roadway. *Id.* The truck corrected. *Id.* at 42:14-15. There are no signs marking this sudden turn. *Id.* at 12:4-6. The deputy activated his emergency lights to stop the truck. *Id.* at 12:19-21.

A DUI investigation ensued. *Id.* at 197-199. Washington State Patrol Trooper David R. Clifton arrested Mr. Allen, took him to the Stanwood Police Department, and read Mr. Allen the entire implied consent warning. *Id.* at 59:8-16, and at 193. Mr. Allen had

a commercial driver's license at the time of the arrest. *Id.* at 77:5-8. Mr. Allen submitted to the breath test. *Id.* at 202. The results exceeded .08. *Id.* Mr. Allen's personal license was then suspended for 90 days (*Id.* at 169), and his commercial license was disqualified for one year. (*Id.* at 205).

Mr. Allen challenged in the course of his DOL hearing, among other things, the adequacy of the warning. *Id.* at 170.

The hearing officer made the following findings related to the Implied Consent warning: (1) the trooper provided the warning to Mr. Allen; (2) Mr. Allen expressed no confusion concerning the warning; and (3) Mr. Allen agreed to submit to the test. *Id.* at 172. The hearing officer concluded the warning given was not misleading. *Id.* at 174. She further concluded Mr. Allen did not show he was prejudiced by the warning. *Id.* These findings are challenged on appeal.

#### Superior Court's Ruling.

The Superior Court reviewed the pleadings and the administrative record in the file, heard arguments of counsel, and found that the Department's Implied Consent Findings, Conclusions and Order dated August 9, 2010 "was supported by substantial evidence and otherwise in accordance with law." *Id.* at 3.

**E. ARGUMENT:**

**1. Standard of Review.**

This court's review is limited to whether the administrative hearing officer committed errors of law. *Leininger v. DOL*, 120 Wn.App. 68, 72, 83 P.3d 1049, 1050 (2004); RCW 46.20.308(9); RALJ 9.1(a). The appellate court accepts factual determinations supported by substantial evidence, and their reasonable inferences. *Id.*; RCW 46.20.308(9); RALJ 9.1(b). Substantial evidence exists if the evidence in the record is sufficient to persuade a fair-minded rational person of the truth of the declared premise. *Morse v. Antonellis*, 112 Wn. App. 941, 945, 51 P.3d 199 (2002), *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004). The legal sufficiency of implied consent warnings is a question of law that is reviewed de novo. *Pattison v. Dept of Licensing*, 112 Wn. App. 670, 673, 50 P.3d 295 (2002).

**2. By Inaccurately Conveying a More Coercive Impact Than is Permitted By Statute, the Implied Consent Warning Improperly Misleads Commercial Drivers Regarding the Length of Disqualification of a Commercial License, Prejudicing Commercial Drivers to Submit to and Not Refuse Breath Tests.**

The State must provide a driver with the opportunity to make a knowing and intelligent decision whether to take a breath test or

refuse under the implied consent law. *Pattison, supra*, 112 Wn.App. at 674. Drivers have a right to accurate warnings phrased so that one of normal intelligence would understand the consequences of his or her actions. *Gibson v. DOL*, 54 Wn.App. 188, 194, 773 P.2d 110, 113 (1989). Generally, the State discharges its burden once it provides statutory warnings under RCW 46.20.308(2). *State v. Bostrom*, 127 Wn.2d 580, 586, 902 P.2d 157, 159-160 (1995).

Police are not free to graft onto the implied consent warning any additional warnings not contained in the plain language of the statute. *City of Bellevue v. Moffitt*, 87 Wn.App. 144, 149, 940 P.2d 695, 697 (1997). A warning need not exactly match the statutory language, so long as no other meaning is implied or conveyed. *Town of Clyde Hill v. Rodriguez*, 65 Wn.App. 778, 785, 831 P.2d 149, 153 (1989). [Emphasis added.] Warnings which are inaccurate or misleading contravene the purpose of the implied consent warning and thus require suppression of the test results. *Moffitt, supra.*, 87 Wn.App. at 148. A warning is misleading where it inaccurately conveys “a more coercive impact” related to the decision to either take the test or refuse than is permitted under statute, as it may lead the driver to make the choice that avoids that

negative consequence. *State v. Whitman Cty.*, 105 Wn.2d 278, 285-86, 714 P.2d 1183, 1187 (1986).

Courts have reviewed a number of situations where textual differences in the warning have misled drivers. See *Id.* (Warning incorrectly stated a refusal “shall” be used as evidence at trial); *Welch v. Dept of Motor Vehicles*, 13 Wn.App. 591, 592, 536 P.2d 172, 173 (1975) (Warning incorrectly stated driver “could” lose license if test refused); and *Mairs v. Dept. of Licensing*, 70 Wn.App. 541, 546, 854 P.2d 665, 669 (1993) (Warning incorrectly stated driver would “probably” lose license if test refused); *but see Moffitt, supra.*, 87 Wn.App. at 148-149 (reading statutory language to drivers regarding additional test not misleading).

Mr. Allen was read a warning that contained the following information<sup>1</sup>:

YOU ARE NOW ADVISED YOU HAVE THE RIGHT TO REFUSE THIS BREATH TEST; AND THAT IF YOU REFUSE: YOUR DRIVER'S LICENSE ... WILL BE REVOKED OR DENIED ... FOR AT LEAST ONE YEAR.

YOU ARE FURTHER ADVISED THAT IF YOU SUBMIT TO THIS BREATH TEST ... YOUR DRIVER'S LICENSE ... WILL BE SUSPENDED, REVOKED, OR DENIED ... FOR AT LEAST NINETY DAYS.

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<sup>1</sup> CP at 193.

**FOR THOSE NOT DRIVING A COMMERCIAL MOTOR VEHICLE AT THE TIME OF ARREST: IF YOUR DRIVER'S LICENSE IS SUSPENDED OR REVOKED, YOUR COMMERCIAL DRIVER'S LICENSE, IF ANY, WILL BE DISQUALIFIED.**  
[Emphasis added]

The last provision does not come from the implied consent statute and was grafted onto the warning by the Washington State Patrol. The statutory warnings (RCW 46.20.308(2)) contain a built in level of coercion that encourages drivers to submit to the breath test. A decision to refuse will lead to a license revocation of "at least" one year, whereas a taking the test with a result exceeding 0.08 will lead to a suspension of "at least" 90 days. It is lost on no one that such a warning is meant to encourage drivers to submit to the breath test and avoid the longer license revocation.

Based on recent state and federal legislation<sup>2</sup>, a commercial driver faces a one year CDL disqualification if caught driving a non-commercial vehicle with a BAC greater than 0.08 or if they refuse the test. Contrary to the warnings above, this consequence to the commercial driver is the same regardless of the decision made as

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<sup>2</sup> 49 USC §§ 31310, 31311(a)(3), (13), 15), (20); 49 CFR § 383.51 Table 1; 49 CFR § 384.401; RCW 46.25.090.

to whether or not to submit to a breath test. However, there is no requirement under RCW 46.20.308(2) to provide this warning.

The warning is misleading because it encourages commercial drivers to submit to the breath test based on a false premise. Much like *Whitman Cty.*, 105 Wn.2d 278, *supra.*, the added language, read in conjunction with the statutory warning, disfavors refusing the test in order to avoid a negative consequence; a one year revocation. This is accomplished by implying the commercial endorsement disqualification will last for as long as the personal license suspension or revocation. This implication has merit, since by statute a person may not have a CDL endorsement without a valid personal license. RCW 46.25.050(2).

The language the State grafted onto the warning only states the endorsement will be disqualified<sup>3</sup> if the driver's license is "suspended or revoked." Linking the terms "suspension" and "revocation" together, the logical conclusion is that the endorsement will be "disqualified" for the same period of time that the

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<sup>3</sup> See RCW 46.25.010(8) ("Disqualification" means a prohibition against driving a commercial motor vehicle.) This definition fails to identify a length of time a commercial endorsement disqualification may be in effect.

personal license is suspended or revoked. A commercial driver in this situation will certainly take the test, and risk a suspension/disqualification for as short as 90 days, rather than refuse and suffer a revocation/disqualification for at least one year. The driver is making a decision based on a combination of two warnings that fails to warn the driver he or she faces the same one year disqualification regardless of the choice.

The State generally characterizes the Petitioner's argument as two-fold: (1) the additional warning is accurate and cannot be misleading; and (2) the Appellant desires additional licensing requirements to be added to the warning, i.e., length of CDL disqualification, in contradiction to *State v. Bostrom*, 127 Wn.2d 580, *supra*.

Addressing the second issue first, Mr. Allen contends a warning without the grafted CDL warning would be better than a warning with it included. It was the State who added the CDL language to the warning form. Should the State delete this information there would be no basis to contend the warning is misleading. There is no requirement it be given to drivers. Therefore, Mr. Allen is not asking for more information to be added to the warning.

Addressing the first issue, the warning is only accurate if read in a vacuum. At issue is the State's failure to separate the warning's built in coercion related to a refusal from the mandatory disqualification faced by commercial drivers. Whether the warning is correct when read alone is not the point. The point is that when the warning is read in conjunction with the warnings required under RCW 46.20.308(2), it creates an interpretation that is misleading. Looking at the totality of the warning, it is misleading to commercial drivers.

**3. A Driver Can be Prejudiced Even When He or She Submits to the Test.**

While it seems counterintuitive to suggest a person would be better off refusing a test, the decision to refuse is an important decision that affects the simultaneous criminal prosecution the driver faces following his or her DUI arrest. A recognized purpose of the implied consent statute (and warning) is to give the driver notice concerning both civil administrative and criminal penalties associated with failing or refusing a test. *Jury v. Dept of Licensing*, 114 Wn.App. 726, 734, 60 P.3d 615, 618 (2002). Refusing a breath test may cause substantial consequences to the driving privilege, but it may also make the criminal prosecution more

difficult to prove, and thus serves other interests important to the driver.

Case law holds a driver can be prejudiced by submitting to a breath test. See *Whitman Cty*, 105 Wn.2d 278, *supra*. There, drivers were erroneously told a refusal “shall” be used at trial, in contradiction to the statutory language “may.” Setting aside the argument why the warning was misleading, the Court reversed trial convictions and remanded for new trial because the defendants were coerced into taking the breath tests. The alternative for the drivers was to refuse the test, assuming they had been properly advised. This would have resulted in longer license revocations for the drivers under the implied consent law. The issue wasn’t whether they were better off taking the test; it was not for the Court to decide. At issue was the fact they were denied the opportunity to make a knowing and intelligent choice to refuse the test.

Here, Mr. Allen was denied the opportunity to make a knowing and intelligent choice to refuse the test. The Respondent claims Mr. Allen could not have been prejudiced because he faced a one year CDL disqualification whether he took the test (and failed) or refused. But the issue has nothing to do with the

consequences the driver may face; the issue addresses the lost opportunity to invoke the right to refuse.

**4. Mr. Allen was Prejudiced Because He Fell Into a Class of Drivers Negatively Affected by the Inaccurate Language.**

A driver must establish the warning prejudiced his decision. See *Gonzales v. Dept of Licensing*, 112 Wn.2d 890, 774 P.2d 1187 (1989). Cases subsequent to *Gonzales* have held that a driver establishes “prejudice” resulting from an inaccurate warning when they fall into a class of drivers negatively affected by the inaccurate language. See *Graham v. Dept of Licensing*, 56 Wn.App. 677, 784 P.2d 1295 (1990); *Gahagan v. Dept of Licensing*, 59 Wn.App. 703, 800 P.2d 844 (1990). No case addressing “prejudice” from an inaccurate warning requires the driver to prove what he or she would have done if correctly advised.

*Gonzales*, *Graham*, and *Gahagan* share identical facts. Drivers were given a warning stating if they wanted to obtain an independent test, it would be at their own expense. *Gonzales*, *supra.*, 112 Wn.2d at 893; *Graham*, *supra.*, 56 Wn.App. at 678; and *Gahagan*, *supra.*, 59 Wn.App. at 704-705.

*Gonzales* explained why the warning was misleading:

As we explained in [*State v. Bartels*, 112, Wn.2d 882, 774 P.2d 1183 (1989)], this language is inaccurate as to indigent drivers. Under our court rules, an indigent driver may in the appropriate case obtain reimbursement for the costs of an additional test. Costs for which one is reimbursed are not “at your own expense”. The inclusion of this language in an implied consent warning could, therefore, deny an indigent driver the opportunity to make a knowing and intelligent decision whether to take the Breathalyzer test. *Gonzales*, at 898-899. [Emphasis added]

The driver had the burden to prove he or she was indigent in order to meet the standard of “actual prejudice” standard.

*Gonzales, supra.*, 112 Wn.2d at 901. The driver was not required to prove what he would have done if properly advised in the warning.

In *Graham*, the question of actual prejudice was strictly factual:

The question to be addressed is whether Ms. Graham was actually prejudiced by inclusion of the “at your own expense” language. ... To obtain reversal on remand, therefore, Ms. Graham must demonstrate that she would have been eligible, at the time she made her decision to refuse the breath test, for public payment for services under CrRLJ 3.1(f). *Graham, supra.*, 56 Wn.App. at 680-681.

In *Gahagan*, the State attempted to create a “prejudice” standard deviating from *Gonzales*, arguing the driver had to prove he:

- (1) distrusted the test given,
- (2) wanted an additional test and,
- (3) believed he would ultimately have to pay for the test. *Gahagan*, at 709.

The State's argument was rejected. The Court re-affirmed "indigency" demonstrated actual prejudice. *Gahagan*, 59 Wn.App. at 710.

A later case, *Thompson v. Dept of Licensing*, 138 Wn.2d 783, 982 P.2d 601 (1999), addressed the "actual prejudice" standard from *Gonzales*. The trial court dismissed a commercial vehicle DUI charge where the driver was read both the implied consent warning and the warning for commercial drivers. *Id.*, at 786-787. Thompson sought dismissal of the DOL commercial license disqualification using the trial court decision as collateral estoppel. *Id.* at 788.

The issue arose whether the trial court correctly determined Thompson was prejudiced by the two warnings. *Id.*, at 790. The Supreme Court held it would not re-visit the issue. *Id.*, at 798. However, in reviewing the arguments the Court rejected the State's argument that, since Thompson faced a commercial license disqualification whether he took the test or not, he could not be

prejudiced by the two warnings. *Thompson, supra*, 138 Wn.2d at 797.

The Supreme Court rejected the “damned if you do, damned if you don’t” analysis:

This analysis is too facile. It depends on the fortuity that a driver's BAC result will be above 0.04, and provides no disincentive to law enforcement officials to give improper implied consent warnings. As Thompson correctly notes, “If the Court of Appeals is correct as to the meaning of prejudice, then the trooper did not need to give Thompson *any* implied consent warnings, because no matter what Thompson's decision, the penalty would be the same, and therefore, no prejudice.” Pet. for Review at 7. In the apt words of Judge Munson, “The City and County both argued that suppression of these results would penalize society simply because the officers derogated from the statute's mandate and since the defendants were not prejudiced by this derogation. We disagree. Society is penalized when officers derogate from the mandates of the Legislature.” *City of Spokane v. Holmberg*, 50 Wn.App. 317, 323-24, 745 P.2d 49 (1987), *rev. denied*, 110 Wash.2d 1013 (1988), *overruled on other grounds by State v. Storhoff*, 133 Wn.2d 523, 946 P.2d 783 (1997).

*Id.* at 797, fn. 8.

Courts have repeatedly rejected imposing a standard requiring the driver to prove what he or she would have done if correctly advised. Courts are concerned with the impact a warning has on a driver's decision making process, not what the end result of the test is. If this really were the standard, there would never be

any review of the warnings unless a driver who refused a test could establish he was under the legal limit. Any person who took the test could never challenge the warning because the option to refuse the test would lead to the same license revocation. This type of “prejudice” analysis has been soundly rejected by the Supreme Court.

The State will respond the above comments from *Thompson* were dicta and not controlling. They will respond a driver must prove his decision would have been different if properly advised. See *Jury v. Dept of Licensing*, 114 Wn.App. 726, 735, 60 P.3d 615, 618-19 (2002). Ironically, this reference is itself dicta. The court in *Jury* found the warning was not misleading. Therefore, the court did not have to address any prejudice resulting from the warning. Most important, the court did not cite to an authority.

The logic within *Thompson*, however, should not be so lightly dismissed. *Thompson* merely explains that creating a prejudice standard requiring the driver to prove what he would have done if not given a misleading warning creates a standard that in reality can never be met. Further, our courts have already declined to require a driver to specify why an inaccurate warning was prejudicial:

In light of the inaccuracy, the question then is whether Mr. Cooper was prejudiced by the advice. Prejudice is determined by considering whether the inaccurate information may have encouraged Mr. Cooper *not* to take the Breathalyzer. See *Graham v. Dept of Licensing*, 56 Wn.App. 677, 680, 784 P.2d 1295 (1990). If Mr. Cooper thought it was possible his license would be revoked for less than 1 year, he might have been more willing to risk revocation by refusing the Breathalyzer. We conclude the information was misleading and prevented Mr. Cooper from making a knowing and intelligent decision. [Emphasis added]

*Cooper v. Department of Licensing*, 61 Wn.App. 525, 528, 810 P.2d 1385, 1386 (1991).

In Mr. Allen's case, the warning contained misleading language encouraging the commercial driver to submit to the breath test. A commercial driver is told the commercial endorsement is subject to disqualification conditioned on the suspension or revocation of the personal license. A commercial driver is told, by direct inference, they face a disqualification for at least 90 days if they take the test, but face at least a one year disqualification if they refuse. The warning makes it clear that the more negative consequence (disqualification and revocation for one year) could be avoided in the situation where the commercial driver submits to the test. Therefore, the driver in this situation will "obviously" make the

decision that avoids the more negative consequences. The driver will not exercise the right of refusal.

**F. CONCLUSION:**

Because the Implied Consent Warning misleads commercial drivers regarding the length of disqualification of a commercial license, prejudicing commercial drivers to submit to and not refuse breath tests, the trial court erred in affirming Respondent's Order sustaining the suspension of Petitioner/Appellant's personal driver's license and causing the disqualification of his commercial driver's license.

DATED this 22 day of August, 2011.

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