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NO. 66532-4-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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JESSE ALLEN,

Appellant,

v.

DEPARTMENT OF LICENSING,

Respondent.

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

A person arrested for DUI while driving a personal vehicle is entitled to receive warnings specified by Washington's implied consent statute regarding the consequences of submitting to or refusing a breath test. In addition to the required warnings, the arresting officer may provide the driver with additional, accurate information that is not misleading. Such information is not misleading unless it deprives the driver of the opportunity to make a knowing and intelligent decision about whether to submit to an evidentiary breath test.

In this case, the trooper who arrested Jesse Allen for DUI advised him of the statutory implied consent warnings. Because Allen also holds a commercial driver's license endorsement (CDL), the trooper provided additional, accurate statements about the potential impact on Allen's CDL. Allen submitted to the test and blew over the legal limit. Because the additional, accurate warnings about his CDL did not deprive Allen of the ability to make a knowing and intelligent decision regarding whether to take the breath test, the Department asks the Court to affirm the orders of the superior court and Department suspending Allen's driver's license.

## **II. COUNTERSTATEMENT OF THE ISSUES**

The 2009 revised implied consent warnings mirror the statutory language regarding the ignition interlock license and provide legally

correct information regarding CDL disqualification. Washington law holds that implied consent warnings are not misleading when provided in substantially the same language as set forth in statute, and that such warnings need not enunciate each and every specific consequence of refusing to take the test. Additionally, in order to be misleading, the warnings must deprive the driver of the opportunity to make a knowing and intelligent decision about whether to take the breath test.

1. Where warnings correctly state the law and also provide a legally accurate statement that “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,” did the hearing officer properly hold that the warnings are not misleading as to the length of CDL disqualification?

2. Assuming *arguendo* that the warnings are misleading, did the hearing officer correctly determine that Allen was not actually prejudiced by the warning, so that suspension of his driver’s license is warranted?

### **III. COUNTERSTATEMENT OF THE CASE**

After lawfully arresting Allen for DUI, Washington State Patrol Trooper Clifton transported him to the Stanwood Police Department. There Allen, after being read his *Miranda* rights, spoke to a defense

attorney for nine minutes. CP at 190, 196. The trooper then read Allen the standard form entitled Implied Consent Warnings for Breath:

1. You are now advised that you have the right to refuse the breath test.
  - (a) Your driver's license, permit or privilege to drive will be revoked or denied by the Department of Licensing for at least one year; and
  - (b) Your refusal to submit to this test may be used in a criminal trial.
  
2. You are further advised that if you submit to this breath test, and the test is administered, your driver's license, permit or privilege to drive will be suspended, revoked or denied by the Department for at least ninety days if you are:
  - (a) Age 21 or over and the test indicates the alcohol concentration of your breath is .08 or more or you are in violation of RCW 46.61.502 driving under the influence, or RCW 46.61.504, physical control of a motor vehicle under the influence; or
  - (b) under age twenty-one and the test indicated the alcohol concentration of your breath is 0.02 or more, or you are in violation of RCW 46.62.502, driving under the influence, or RCW 46.61.504, physical control of a vehicle under the influence.
  
3. If your driver's license, permit or privilege to drive is suspended, revoked, or denied, *you may be eligible to immediately apply for an ignition interlock driver's license.*
  
4. You have the right to additional tests by any qualified person of your own choosing.

**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.**

CP at 190. Allen provided breath samples of .137 and .138. CP at 169, (Finding of Fact (FF) 6), 175 (Conclusion of Law (CL) 5), 196, 199. After receiving Allen's breath test results, the Department sent him an order suspending his personal driver's license for 90 days and an order disqualifying his CDL for one year. CP at 187, 203.

Allen requested a hearing before a Department hearing officer to challenge the Department's decision to suspend his personal driver's license for 90 days and to disqualify his CDL. CP at 184–85. Allen testified at the hearing, but did not discuss the impact of the implied consent warnings provided to him on his decision to take the breath test. Indeed, he did not testify as to why he decided to take the breath test. *See* CP at 71–74. Subsequently the hearing officer sustained the decision to suspend Allen's personal driver's license. CP at 172. Allen appealed, and the superior court ultimately affirmed the suspension. This appeal followed.

#### **IV. STANDARD OF REVIEW**

The implied consent statute, RCW 46.20.308, governs judicial review of the Department's license revocation order. *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 48, 50 P.3d 627 (2002). A driver whose license suspension or revocation is sustained at an administrative hearing has the

right to appeal that decision to the superior court. RCW 46.20.308(9).

That subsection provides, in part:

The review must be limited to a determination of whether the department has committed any errors of law. The superior court shall accept those factual determinations supported by substantial evidence in the record: (a) That were expressly made by the department; or (b) that may reasonably be inferred from the final order of the department.

RCW 46.20.308(9). The Court of Appeals reviews the Department's decision from the same position as the superior court. *Clement v. Dep't of Licensing*, 109 Wn. App. 371, 373, 35 P.3d 1171 (2001). Therefore, the Court of Appeals reviews the administrative order to determine whether the Department has committed any errors of law, upholding findings of fact supported by substantial evidence in the record. *See* RCW 46.20.308(9); *Clement*, 109 Wn. App. at 374. The substantial evidence standard is deferential and requires the court to view all "the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed" below. *State v. Pierce County*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992).

## V. ARGUMENT

The Court should affirm the Department's orders suspending Allen's personal driver's license and disqualifying his CDL because Allen was provided with accurate warnings that provided him the opportunity to

make a knowing and intelligent decision whether to take or refuse the breath test. Even if the warnings were misleading, Allen failed to demonstrate that he was actually prejudiced by them.

**A. The implied consent warnings given to Allen were not misleading, and the Department properly suspended his license.**

The implied consent warnings provided to Allen are not misleading because they are drawn directly from the statute and include otherwise accurate statements of the law. RCW 46.20.308(1); *State v. Bostrom*, 127 Wn.2d 580, 588, 902 P.2d 157 (1995); *Pattison v. Dep't of Licensing*, 112 Wn. App. 670, 674, 50 P.3d 295 (2002). When an officer has provided additional warnings beyond those contained in the implied consent statute, courts have upheld those warnings as long as the information accurately states the law and does not affect the driver's ability to make a knowing and informed decision. *Pattison*, 112 Wn. App. at 674; *Moffitt v. City of Bellevue*, 87 Wn. App. 144, 148, 940 P.2d 695 (1997). Such is the case here. The Department thus properly suspended Allen's license.

**1. Background regarding implied consent warnings and Commercial Drivers Licenses**

**a. Washington law governing implied consent warnings**

Under Washington's implied consent statute, a driver is deemed to have consented to a test to determine the alcohol content in his system if arrested by an officer having reasonable grounds to believe the driver has been driving under the influence of alcohol or drugs. RCW 46.20.308(1); *Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 47, 50 P.3d 627 (2002). The Department suspends the license of anyone who, after arrest and receipt of statutory warnings, provides two breath test samples over the legal limit during a properly administered test. RCW 46.20.308(7).<sup>1</sup> The driver may request a hearing to challenge the suspension. RCW 46.20.308(8).

The implied consent warnings advise the driver that he will lose his license administratively if he takes the test and the results indicate alcohol over certain legal limits or if he refuses to take the test. *Jury v. Dep't of Licensing*, 114 Wn. App. 726, 735, 60 P.3d 615 (2002). Specifically, the officer must warn the driver (1) that if he or she refuses the test, the driver's license or privilege to drive will be revoked for at least one year, (2) that evidence of refusal may be used in a criminal trial,

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<sup>1</sup> The Department revokes the license of a driver who refuses a breath test offered under the statute. This revocation is for at least a year. RCW 46.20.308(7), 46.20.3101(1).

(3) that if the driver submits to the test with a result over .08, his or her driver's license will be suspended for at least 90 days, and (4) that if the driver's privilege to drive is suspended or revoked, he or she can immediately apply for an ignition interlock device. RCW 46.20.308(2)(a)-(d).

The purpose of the warnings is to provide the driver with the opportunity to make a knowing and intelligent decision regarding whether to refuse a breath test: that is, whether to withdraw consent and what will result if the test is refused. *Bostrom*, 127 Wn.2d at 588. "The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace." *Id.* at 590. As long as the opportunity to make the decision is provided, it need not be shown the driver actually understood the warnings or that his or her decision was knowingly and intelligently made. *Jury*, 114 Wn. App. at 732. It is not necessary for police officers to inform drivers of all consequences that will flow from refusing or submitting to a breath test. *Bostrom*, 127 Wn.2d at 586; *State v. Elkins*, 152 Wn. App. 871, 877-78, 220 P.3d 211 (2009). Nor are police officers required to tailor the warnings to every driver stopped. *Jury*, 114 Wn. App. at 734.

**b. Commercial Driver's Licenses**

The Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C. §§ 31301–31317, established minimum national standards each state must meet when licensing commercial motor vehicle drivers. In 1989, Washington passed the Uniform Commercial Driver's License Act, RCW 46.25. Laws of 1989, ch. 178. This law included a separate regimen of DUI penalties for commercial drivers. RCW 46.25.090 provides in part:

(1) A person is disqualified from driving a commercial motor vehicle for a period of not less than one year if a report has been received by the department pursuant to RCW 46.20.308 or 46.25.120, or if the person has been convicted of a first violation, within this or any other jurisdiction, of:

(a) Driving a motor vehicle under the influence of alcohol or any drug;

(b) Driving a commercial motor vehicle while the alcohol concentration in the person's system is 0.04 or more, *or driving a noncommercial motor vehicle while the alcohol concentration in the person's system is 0.08 or more, or is 0.02 or more if the person is under age twenty-one*, as determined by any testing methods approved by law in this state or any other state or jurisdiction[.]

The italicized portion was added in 2006. Laws of 2006, ch. 327, § 4. Therefore, since at least 2006, a person who holds a CDL and is arrested for DUI while driving a *noncommercial* vehicle loses his or her CDL for a year if a report has been received by the Department pursuant to RCW 46.20.308 or 46.25.120. *Id.*

If a driver is stopped for DUI while driving a *commercial* motor vehicle, law enforcement is required to give them separate implied consent warnings under RCW 46.25.120:

(1) A person who drives a commercial motor vehicle within this state is deemed to have given consent, subject to RCW 46.61.506, to take a test or tests of that person's blood or breath for the purpose of determining that person's alcohol concentration or the presence of other drugs.

...

(3) The law enforcement officer requesting the test under subsection (1) of this section shall warn the person requested to submit to the test that a refusal to submit will result in that person being disqualified from operating a commercial motor vehicle under RCW 46.25.090.

Washington's Uniform Commercial Drivers' License Act is to be "liberally construed to protect the public." *Merseal v. Dep't of Licensing*, 99 Wn. App. 414, 418, 994 P.2d 262, *review denied*, 141 Wn.2d 1021 (2000). A mere technical error in the CDL implied consent warnings that does not result in prejudice will not merit reversal. *Id.* at 422-23.

The warnings at issue in this case, given to drivers who hold CDLs but are stopped for DUI in their personal vehicles, are not required by statute. The information given is legally correct, as set forth above in RCW 46.25.090, but there is no requirement in statute or case law that this additional warning be given.

Allen suggests that if the State simply deleted the CDL information from the warnings form, “there would be no basis to contend the warning is misleading.” Appellant’s Br. at 10. The additional warning was added by the Washington State Patrol to their forms in January 2009 in response to numerous challenges to the prior warnings. *See* CP at 290. Specifically, CDL holders complained that nothing in the warnings informed them that their CDL endorsements would be disqualified in addition to the suspension or revocation of their personal licenses.

**2. When read together the warnings are not misleading as to the length of disqualification for the commercial driver’s license.**

The warnings provided to Allen properly advised him of the required implied consent warnings and that his CDL endorsement would be disqualified if his driver’s license was suspended or revoked. Though not required by statute, this CDL warning was legally accurate and therefore not misleading. The hearing officer properly held that it did not deprive Allen of the opportunity to make a knowing and intelligent decision about whether to take the breath test.

**a. The warnings accurately state the law.**

Courts have found that adding language to the warnings, beyond what is in the statute, can be misleading and invalid if the additional language includes *incorrect statements of law*. Where warnings provided

to a driver have been more specific than the warnings provided in the statute, they have been upheld as long as they provide accurate information. In *Pattison v. Dep't of Licensing*, 112 Wn. App. 670, 50 P.3d 295 (2002), the drivers were given warnings that contained all of the statutorily required warnings plus additional information about what would happen if the drivers were in violation of the criminal DUI statute. *Id.* at 572. The warning form added that, regardless of age, “your license, permit or privilege to drive will be suspended, revoked or denied [if the breath test result is over the limit] or if you are in violation of RCW 46.61.502, 46.61.503 or 46.61.504.” *Id.* at 675. In contrast, the statutory language makes the “if ... in violation of” warning applicable only “in the case of persons under age twenty-one,” and of the three statutes listed, only RCW 46.61.503 applies to persons under twenty-one. RCW 46.20.308(2); *Pattison*, 112 Wn. App. at 675. The court nevertheless held that the additional warning was neither inaccurate nor misleading because it was correct that drivers both over 21 and under 21 would have their licenses suspended, revoked, or denied if they refused the breath test or if their blood alcohol concentration was over the legal limit. *Id.*

The drivers in *Pattison* further argued that the language, “if you are in violation of,” could reasonably be understood to mean “if you are arrested,” thereby misleading drivers into believing that losing one’s

license is an inevitable consequence of *arrest*. *Id.* at 676. They contended that it was misleading because the sole purpose of the implied consent statute is to inform drivers of possible administrative sanctions. *Id.* The court concluded that, while it is true that the penalties provided by the implied consent statute are “separate and distinct” from penalties imposed as a result of a criminal conviction, that fact did not make it misleading to include accurate information about the loss of license that occurs as a result of a criminal conviction. *Id.*

Just as in *Pattison*, where the language regarding criminal sanctions was accurate (though not required to be provided by the implied consent statute), the warning regarding the consequences to a driver’s CDL endorsement is an accurate statement of the law, though not required to be provided by the implied consent statute. Here, too, the consequences to a driver’s personal license for refusing or failing the breath test are distinct from the consequences to a driver’s CDL. But, just as in *Pattison*, that fact does not make it misleading to provide accurate information about the consequences to a driver’s CDL if his personal license is revoked or suspended.

An incorrect statement of the law in implied consent warnings renders the warnings misleading. In *Cooper v. Dep’t of Licensing*, the driver was informed that if he refused to take a breath test, his driver’s

license would be revoked “probably for at least a year, depending upon his driver record, maybe two.” *Cooper v. Dep’t of Licensing*, 61 Wn. App. 525, 527, 810 P.2d 1385 (1991). However, a driver’s license *will* be revoked or denied for at least one year if he or she refuses the breath test. RCW 46.20.3101(1); RCW 46.20.308(2)(a). Division III found that the warning given to Cooper was legally incorrect and inaccurate because it implied that Mr. Cooper might have his license revoked for less than one year when it was an “absolute certainty” that if Mr. Cooper refused, he would lose his license for a minimum of one year. *Id.* at 528.

In another case, the officers informed the drivers that they could obtain an additional test “at their own expense.” *State v. Bartels*, 112 Wn.2d 882, 884, 774 P.2d 1183 (1989). This language was not authorized by statute and did not accurately describe an indigent defendant’s right to obtain reimbursement for the cost of an additional test. *Id.* at 887. Again, because the additional language was an incorrect statement of law, the court found that it prevented the driver from making a properly informed decision whether or not to submit to a blood alcohol content test. *Id.* at 889. The court found that the warning was “less accurate than saying nothing on the proposition.” *Id.* at 888.

Here, Allen asks this Court to go further than courts have been willing to go and find that warnings that accurately state the law are

nevertheless misleading. In the present case, the warning regarding the CDL disqualification is legally correct. And Allen concedes that the warnings provided to him were accurate statements of the law. The warning about the CDL disqualification was appended after the statutorily required warning in a separate paragraph. CP at 190. The fact that the statute requires that a driver be informed that his or her personal license will be suspended, revoked, or denied for at least 90 days if test results reflect a breath alcohol concentration is 0.08 or more does not make the warning about the disqualification of the commercial license legally inaccurate or misleading.

Nothing in the implied consent statute or case law requires warnings to indicate the length of the CDL disqualification when a CDL holder is arrested while driving his personal vehicle. The additional warning regarding CDL disqualification is an accurate statement of the law and was added to provide additional, legally accurate information to the drivers. There is no case law holding that the addition of legally accurate information to the statutory implied consent warnings results in warnings that are misleading such that they deprive the driver of the opportunity to make a knowing and intelligent decision about whether to take the breath test.

**b. The CDL language does not change the meaning of the warning.**

Warnings are misleading where the added language changes the warning's meaning from the language set forth in the statute. *State v. Whitman Cy. Dist. Ct.*, 105 Wn.2d 278, 714 P.2d 1183 (1986). In *Whitman County*, drivers were advised that their refusal to submit to a breath test “shall be used against you in a subsequent criminal trial.” *Id.* at 280. However, refusal evidence is admissible only under limited circumstances, and the implied consent statute requires officers to warn drivers that their refusal to take the test *may* be used against them in any subsequent criminal trial. RCW 46.20.308(1); *Whitman Cy. Dist. Ct.*, 105 Wn.2d at 285. The court concluded, therefore, that the “change in wording operated to convey a different meaning than that specified in the statute . . . with regard to the frequency or probability that those negative consequences will follow.” *Whitman Cy. Dist. Ct.*, 105 Wn.2d at 285-86.

In contrast, here the CDL warning does not change the meaning of the negative consequences that flow either from refusal to take the breath test or from blowing over the legal limit. The CDL language simply clarifies that if the driver's personal license is suspended or revoked, there will be consequences to his or her CDL, if any.

Allen cannot demonstrate that people of normal intelligence would be misled into taking or refusing the breath test because they are informed that their CDL will be disqualified if their personal license is suspended or revoked. The fact that Allen was not told how long the disqualification would last did not make the warnings misleading or invalid. In addition to the fact that the language is accurate as written, police officers are not required to inform drivers of *all* consequences that will flow from refusing or submitting to a breath test. *Bostrom*, 127 Wn.2d at 586. Nor are police officers required to tailor the warnings to every driver stopped. *Jury*, 114 Wn. App. at 734. The hearing officer's decision is thus consistent with both *Bostrom* and *Jury*. Because Allen was afforded an opportunity to make a knowing and intelligent decision about whether to take or refuse the breath test, the Court should affirm his license suspension.

**B. The hearing officer properly suspended Allen's license because Allen failed to prove he was prejudiced by the warnings he received.**

Even if a warning is misleading as a matter of law, a driver still must demonstrate that he was actually prejudiced by the warning in order to obtain a reversal of the Department's action. *Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 901, 774 P.2d 1187 (1989). Courts look to whether the driver has established actual prejudice as a matter of fact due to the allegedly misleading advisement. *Id.* Because the implied consent

warnings provided to Allen are not inaccurate, they could not have been misleading. Therefore, this Court does not have to reach the prejudice inquiry. However, if this Court does find the warnings were misleading, it should still affirm the hearing officer's order because Allen cannot meet the actual prejudice standard. He did not testify that the warnings actually influenced his decision to take the breath test. CP at 71-74

When determining whether prejudice has been established as a result of misleading warnings, courts look to whether the driver has established actual prejudice as a matter of fact due to the allegedly misleading warnings. *Gonzales*, 112 Wn.2d at 901. Contrary to Allen's argument, Washington courts do not merely consider whether a driver falls into a particular "class of persons" who could be prejudiced. *See id.* Here, Allen did not testify that the warnings influenced his decision to take the breath test. And Allen cannot meet the actual prejudice standard because: 1) he took the breath test, resulting in less of a sanction to his personal license than if he had refused; 2) the impact on his CDL was the same whether he blew over the legal limit or refused; and 3) he made no showing that the breath test results were used against him in a criminal trial, and claiming that as a mere possibility is too speculative to meet the "actual prejudice" standard.

In *Gonzales*, the court held that drivers need to show actual prejudice from having been given inaccurate or misleading implied consent warnings in order to have their license revocations reversed. *Gonzales*, 112 Wn.2d at 899. The drivers in that case were told they had the right to an additional breath test “at your own expense and that your refusal to take the test shall be used against you in a subsequent criminal trial . . . .” *Id.* at 892-93. The “at your own expense” language was not part of the statute. *Id.* Additionally, the warnings given advised that refusal to take a breath test “shall” be used in a criminal trial, while the statute used the permissive word “may.” Both drivers refused the breath test. *Id.*

With respect to the “at your own expense” language, the court found that such language could possibly be misleading to indigent drivers, since for such drivers court rules provided for reimbursement of the costs of obtaining an additional test. *Id.* at 898-99. Nonetheless, the court determined that since the drivers in question had made no claim of indigency, the “at your own expense” language could not have influenced their decision. *Gonzales*, 112 Wn.2d at 899. The court did not use the term “possible prejudice,” but “actual prejudice.” Because actual prejudice was not shown, the inaccurate and therefore misleading warning did not invalidate the revocation of the licenses. *Id.* at 895.

With respect to the warning advising that refusal to take a breath test “shall,” rather than “may,” be used in a criminal trial, the court acknowledged that the incorrect mandatory language could mislead a driver into taking the test. *Id.* at 902. However, since the driver did not take the test, “he could not have been prejudiced by the inaccurate warning and that warning thus does not serve as a basis to invalidate the revocation of his driver’s license.” *Id.*

Thus, after initially determining that a warning could potentially be misleading, the *Gonzales* court looked first to whether the drivers in question fell within the class of persons who could be affected by the misleading warning. But its prejudice inquiry did not end there. The court went on to consider whether the misleading language would have led the drivers to make a different choice—to submit to the test—with the possible consequence being a reduced sanction under the implied consent laws. The court concluded the language provided would not have led to a different choice. *Id.* at 902. “A warning that a refusal ‘shall’ be used in a criminal trial makes these negative consequences more probable, and thus encourages a driver to take the Breathalyzer test even more so than does a warning that a refusal ‘may’ be used.” *Id.* at 904.

Therefore, the warning with the word “shall” rather than “may” could only have made a driver more likely to take the breath test and since

Gonzales refused, the warning did not prejudice him. *Id.* “Actual” prejudice thus requires more than a demonstration that one could be prejudiced by the language of the warning. The actual result must be prejudicial.

Division III agreed with this analysis when addressing another case involving an incorrect “at your own expense” warning. *Graham v. Dep’t of Licensing*, 56 Wn. App 677, 681, 748 P.2d 1295, 1298 (1990). There, the driver argued that the warning that additional tests could be taken at her own expense had a “chilling effect” on her decision whether to take the breath test. The court employed the reasoning in *Gonzales* and found the question of actual prejudice is a factual one. The court remanded the case to the trial court to determine whether the driver would have in-fact qualified as an indigent under court rules. *Graham*, 56 Wn. App. at 681. Here, there is no evidence that the warnings provided actually influenced Allen’s decision to take the breath test.

A showing of actual prejudice requires that a misadvisement of rights actually affected an individual’s decision about whether and how to exercise those rights. In *State v. Storhoff*, the Supreme Court again held that a driver must show actual prejudice from misleading information before dismissal or reversal of a driving while license suspended charge. *State v. Storhoff*, 133 Wn.2d 523, 531-32, 946 P.2d 783 (1997). There the

drivers were habitual traffic offenders criminally charged with driving while license revoked. *Id.* When they had accrued a substantial number of traffic offenses, DOL had sent them notices stating that they had ten days to request an administrative hearing. However, the statute stated drivers had 15 days to request such a hearing. The drivers did not demonstrate that the inaccurate statement on their notice of appeal rights actually influenced their decision of whether to appeal. *Id.* at 526.

The drivers in *Storhoff* argued that they were not required to demonstrate prejudice and attempted to distinguish their criminal cases from *Gonzales v. Dep't of Licensing*. *Id.* at 529. The Supreme Court rejected this argument and affirmed its decisions in *Bartels*, 112 Wn.2d 882, and *Gonzales*, 112 Wn.2d 890, again holding that the drivers must demonstrate actual prejudice. In *Storhoff*, showing actual prejudice would have required a showing that the incorrect information about the amount of time the drivers had to request a hearing actually affected whether they were able to appeal their license suspensions. *See Storhoff*, 133 Wn.2d at 526, 531-32. Similarly, here demonstrating actual prejudice would require a showing that the warnings actually influenced Allen's decision to take the breath test. He has made no such showing.

Allen argues that under *Gahagan v. Department of Licensing*, he only needs demonstrate that he has a commercial driver's license in order

to prove prejudice, but this is incorrect. *See Gahagan v. Dep't of Licensing*, 59 Wn. App. 703, 800 P.2d 844 (1990). In *Gahagan*, the driver was advised that he had the right to an additional test at his "own expense." Applying *Gonzales*, this Court found that if a driver demonstrates indigency, then he has demonstrated actual prejudice if he received the warning that an additional test could be obtained "at your own expense." However, the court does not find that a driver who is in a particular class of drivers, such as CDL holders, has automatically demonstrated actual prejudice simply by being in the class. The *Gahagan* decision only applies to drivers who demonstrated they were indigent and were given the "at your own expense" warning. Insofar as *Gahagan* holds that prejudice is merely class-based, it is inconsistent with *Gonzales*, *Storhoff* and *Graham*, and this Court should limit it to its facts.

Allen was required to show that he falls within the class of persons that would be affected by the warnings **and** that, by virtue of his membership in that class, his ability to make a knowing and intelligent decision was affected such that a different decision could have changed the outcome of his case. *See Gonzales*, 112 Wn.2d at 902. He also would have had to demonstrate that the allegedly misleading information in the implied consent warnings actually influenced Allen's decision to take the

breath test. He cannot demonstrate this. Thus, the Department properly suspended his license.

## VI. CONCLUSION

Based on the foregoing, the Department respectfully requests that the Court affirm the decisions of the Department and superior court suspending Allen's driver's license.

RESPECTFULLY SUBMITTED this 22<sup>nd</sup> day of September, 2011.

ROBERT M. MCKENNA  
Attorney General

A handwritten signature in black ink, appearing to read "M. Tilghman-Havens", written in a cursive style.

MATTHEW TILGHMAN-HAVENS,  
WSBA # 38069  
Assistant Attorney General  
Attorneys for Respondent

NO. 66532-4-I

**COURT OF APPEALS FOR DIVISION I  
STATE OF WASHINGTON**

JESSE ALLEN,

Petitioner,

v.

DEPARTMENT OF LICENSING,

Respondent.

DECLARATION OF  
SERVICE

I, SHIRLEY LINDBERG, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

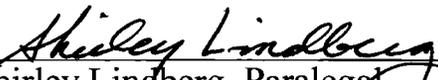
2. That on the 22nd day of September 2011, I caused to be served by ABC Legal Messenger a copy of Brief of Respondent to:

JOEL NICHOLS  
DENO MILLIKAN LAW FIRM PLLC  
3411 COLBY AVENUE  
EVERETT, WA 98201-4709

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 SEP 22 AM 10:19

I DECLARE UNDER PENALTY OF PERJURY  
UNDER THE LAWS OF THE STATE OF WASHINGTON  
that the foregoing is true and correct.

Dated this 22nd day of September 2011 in Seattle,  
Washington.

  
\_\_\_\_\_  
Shirley Lindberg, Paralegal