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NO. 66864-1

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

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STATE OF WASHINGTON, DEPARTMENT OF LICENSING,

Appellant,

v.

LANCE K. HOFFMAN,

Respondent.

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**AMENDED BRIEF OF APPELLANT**

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FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 SEP 15 PM 12:16

ORIGINAL

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## I. INTRODUCTION

Lance Hoffman was arrested for driving under the influence while driving his personal vehicle. Hoffman was read the 2009 revised implied consent warnings and expressed no confusion. Hoffman then took the breath alcohol test (BAC) which showed his breath greatly exceeded the legal alcohol limit. As a result, as required by statute, his driver's license was suspended for 90 days and his Commercial Drivers License (CDL) endorsement was disqualified for one year.

Washington law requires that certain statutory implied consent warnings be given to a driver. While additional accurate warnings may be given, it is not required. Nor must warnings be tailored to a specific driver. In this case, Hoffman was given all of the statutorily required warnings. To the extent he was given additional information about his commercial driver's license, it was accurate. Having received accurate warnings that were not misleading, Hoffman was unable to prove—and in fact failed to prove—that he was prejudiced by the warnings received. Thus, the Department properly suspended Hoffman's license and the superior court's decision to the contrary was in error.

## **II. ASSIGNMENTS OF ERROR**

The Department assigns no error to the decision being reviewed, the hearing officer's order. However, the Department assigns error to the following aspects of the superior court's ruling:

1. The superior court erred in ruling that the implied consent warnings did not afford Hoffman the opportunity to make a knowing and intelligent decision regarding whether to submit to the breath test. CP 153-54, CP 1.

2. Having found the warnings to be misleading, the superior court erred in failing to rule on the question of whether Hoffman was actually prejudiced by the implied consent warnings he received. CP 153-54.

3. The superior court erred in reversing the Department's decision to sustain the license suspension of Mr. Hoffman's driver's license. CP 153-54.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

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, warnings are not misleading unless they deprive the driver of the opportunity to make a knowing and intelligent decision about whether to take the breath test. Where warnings may be misleading, courts will reverse the Department's suspension of a license only on a showing that the driver was actually prejudiced by the misleading warning.

1. Where warnings otherwise correctly state the law and also state "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 decline to hold that the warnings are misleading as to the length of CDL disqualification? [Assignment of Error 1]

2. Where warnings otherwise correctly state the law and mirror the implied consent statute by stating that if a person's license is suspended, revoked, or denied, the person "may be eligible to immediately apply for an ignition interlock driver's license," did the hearing officer properly reject the argument that the warnings misleadingly imply that the availability of an ignition interlock license will remedy CDL disqualification? [Assignment of Error 1]

3. If either of the warnings are misleading, did the hearing officer properly hold that Hoffman failed to demonstrate he was actually

prejudiced by the misleading warning, such that reversing the suspension of his driver's license is warranted? [Assignment of Error 2]

#### **IV. STATEMENT OF THE CASE**

On June 7, 2010, at 11:23 p.m., Skagit County Sheriff's Deputy Caulk observed Hoffman having difficulty maintaining his lane, straddling the fog line by half the width of vehicle over the entire length of a bridge. Hoffman's improper lane travel continued until he was stopped by Deputy Caulk. CP 56.

Deputy Caulk lawfully arrested the Petitioner for DUI and transported him to the Skagit County Sheriff's Department where he was advised of his Constitutional Rights.<sup>1</sup> The deputy then read the Petitioner the standard Implied Consent Warnings for Breath form:

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

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<sup>1</sup> Hoffman does not contest that the officer had legitimate reasons to stop him and probable cause to arrest.

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 50.

Deputy Caulk explained at the administrative hearing that he read the last paragraph concerning the commercial driver's license to Hoffman twice. CP 127. Hoffman expressed no confusion after receiving the warnings, signed the form to acknowledge receipt of the warnings, and agreed to submit to the evidential breath test. CP 52, CP 38, (Finding of Fact) FF 4.<sup>2</sup> Hoffman provided two breath samples that were above the .08 legal limit, .229 and .231, respectively. CP 64. Prior to his arrest and

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<sup>2</sup> The Petitioner does not challenge the findings that he received the warnings required by RCW 46.20.308(2) and that he did not express any confusion after receiving the warnings on the standard form.

during breath test process Mr. Hoffman was crying and making suicidal and self harm threats as he stated he would lose his CDL and his \$30.00 per hour job. CP 57-58.

Based on the results of the breath test, the Department notified Hoffman that his driver's license would be suspended for ninety days under the implied consent statute, RCW 46.20.308, CP 35. The Department also informed him that as a result of his DUI arrest, his CDL would be disqualified for one year under RCW 46.25.090, CP 67.

Hoffman requested a hearing to contest the suspension and disqualification. At the administrative hearing, he argued that the warnings were misleading because 1) they failed to advise him of the length of the disqualification of his commercial driver's license and 2) the warnings suggest that consequences to their commercial driver's license would be cured by the ignition interlock driver license. CP 37-38. The hearing officer affirmed the suspension concluding that the warnings were not misleading and even if the warnings were misleading that Hoffman failed to demonstrate prejudice. CP 40-41. Hoffman appealed the Department's order to the superior court. CP 10.

The superior court reversed the Department's order suspending his license and disqualifying his CDL, finding that the warnings did not give Hoffman an opportunity to make a knowing and intelligent decision

regarding whether to take the breath test. *See* CP 153–54. The superior court made no finding regarding whether Hoffman was prejudiced.

## V. 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). If a person’s license suspension, revocation or denial is sustained at an administrative hearing, he has the right to appeal that decision to the superior court. RCW 46.20.308(9). Under RCW 46.20.308(9),

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.

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.

## **VI. SUMMARY OF ARGUMENT**

The warnings provided to Hoffman – the statutorily required implied consent warnings plus additional, legally accurate information about his CDL – were not misleading. The additional warning given to Hoffman that his CDL would be disqualified if his license were suspended or revoked was legally accurate. The arresting officer properly provided the additional information to Hoffman and was not required to tell Hoffman the length of the CDL disqualification.

Hoffman was provided the implied consent warning pertaining to the ignition interlock license as specifically set forth in the statute, RCW 46.20.308(9). Informing Hoffman of the option to apply for an ignition interlock license if his license was suspended, revoked, or denied was not misleading and did not prevent him from making a knowing and intelligent decision regarding whether to consent to or refuse the breath test.

These two warnings state independent consequences of a driver's license being suspended or revoked. They do not imply that the possibility of applying for an ignition interlock license could prevent CDL disqualification. Nor do they suggest anything about the length of CDL disqualification, much less that it is dependent upon the length of driver's license suspension or revocation.

Given that Hoffman received the statutorily required warnings and accurate additional information and that Hoffman did not demonstrate actual prejudice from any allegedly misleading warnings, the hearing officer's decision suspending his license was correct and should be affirmed.

## VII. ARGUMENT

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

The warning regarding the availability of the ignition interlock license does not interfere with a person's opportunity to make a knowing and intelligent decision about whether to refuse the breath test. Advised of this language, a person of normal intelligence would understand the consequences of his or her actions. Moreover, when read with the other warnings, the statutory language does not imply that the ignition interlock license is a remedy for the CDL disqualification. The information about the CDL disqualification is legally accurate. Based both on the plain language of the warnings and case law considering the validity of various iterations of the warnings through the years, the warnings provided to Hoffman are legally accurate, not misleading, and therefore proper under the law.

**1. Background regarding Implied Consent Warnings, Ignition Interlock Licenses, and Commercial Drivers Licenses**

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

Under Washington's implied consent statute, RCW 46.20.308, 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 DUI. RCW 46.20.308(1); *Cannon*, 147 Wn.2d at 47. 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). 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). The warnings 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. *State v. Bostrom*, 127 Wn.2d 580, 588, 902 P.2d 157 (1995). "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.

The implied consent statute sets forth warnings to be provided “substantially” in the statutory language. The warnings, when provided to a driver in substantially the same language set forth in the statute, permit someone of normal intelligence to understand the consequences of his decision and to make a knowing and intelligent decision whether to submit or refuse the evidentiary breath test. *Bostrom*, 127 Wn.2d at 588; *Pattison v. Dep’t of Licensing*, 112 Wn. App. 670, 674, 50 P.3d 295 (2002). Because the language of the implied consent statute is unambiguous, courts are not free to require any additional warnings beyond those contained in the plain language of the statute. *Bostrom*, 127 Wn.2d at 586-87.

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). Indeed, no court has held that warnings that include only correct statements of the law may nevertheless be misleading. Furthermore, it is not necessary for police officers to inform drivers of *all* consequences that will flow from refusing or submitting to a breath test.<sup>3</sup> *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 which each state must meet when licensing commercial motor vehicle drivers. Pursuant thereto, in 1989 Washington passed the Uniform Commercial Driver’s License Act (Act). Laws of 1989, ch. 178 (codified at RCW 46.25). Washington Courts have held that the 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).

The Act includes a separate regimen of DUI penalties for commercial drivers, providing in part:

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<sup>3</sup> The United States Supreme Court has similarly upheld implied consent warnings that do not include all consequences that will flow from refusing a blood-alcohol test. *South Dakota v. Neville*, 459 U.S. 553, 565–66, 103 S. Ct. 916 (1983).

(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[.]

RCW 46.25.090 (emphasis added). The italicized portion of the warning was added in 2006. Laws of 2006, ch. 327, § 4. Therefore, since at least 2006, a person driving a noncommercial vehicle who is stopped for DUI loses his or her commercial driver's license for a year if a police report has been received by the department pursuant to RCW 46.20.308.

The warnings at issue in this case, given to drivers who hold commercial driver's licenses 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.

The additional warning was added by Washington State Patrol to their forms in January 2009 in response to numerous challenges to the prior warnings. Specifically CDL holders complained that nothing in the

warnings informed them that their commercial driver's licenses would be disqualified in addition to the suspension or revocation of their personal licenses.

**c. Ignition Interlock Licenses**

In 2008, the legislature amended the licensing statutes to allow a person whose license had been suspended or revoked because of a DUI to apply for an ignition interlock license. RCW 46.20.385. A driver may apply for the ignition interlock license regardless of whether they take the breath test or refuse. RCW 46.20.385(1). Furthermore it is only available if the driver's license has been suspended or revoked. RCW 46.20.385(1).

To reflect this change in law, the legislature added language to the implied consent warnings to advise drivers of the availability of the ignition interlock license. RCW 46.20.308(2)(d). In response, the Washington State Patrol revised the implied consent warnings printed on its forms, which are used throughout the state by all law enforcement agencies for DUI arrests.

Hoffman was provided the 2009 revised implied consent warnings which included the information regarding the availability of the ignition interlock license as stated in RCW 46.20.308(2)(d): "if the driver's license, permit, or privilege to drive is suspended, revoked, or denied the

driver may be eligible to immediately apply for an ignition interlock driver's license." CP 52.

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

The warning provided to Hoffman advised him that his CDL endorsement would be disqualified if his driver's license was suspended or revoked. Though not required by statute, this warning was legally accurate and did not mislead Hoffman. The hearing officer properly held that "a disqualification is clearly stated as the action that will be taken" and the warnings given to Hoffman did not deprive him of the opportunity to make a knowing and intelligent decision about whether to take the breath test.

Appellate precedent is clear regarding additional warnings or information not found in the statute: additional information does not contravene the purpose of the implied consent warnings if it is accurate and not misleading. There is no bright line rule that any deviation from the statutory language requires suppression of the test results. *Moffitt*, 87 Wn. App. 144 at 147-48. Also, nothing prohibits an officer from providing additional information in the warnings as long as the information does not affect the driver's ability to make a knowing and informed decision. *Pattison*, 112 Wn. App. at 674. Where no different

meaning is implied or conveyed by the language of the warnings, the defendant is not misled by additional information. *Town of Clyde Hill v. Rodriguez*, 65 Wn. App. 778, 785, 831 P.2d 149 (1992); *Moffitt*, 87 Wn. App. at 148.

Here, in addition to giving Hoffman the statutory implied consent warnings, the arresting officer provided the additional information from the warnings form informing Hoffman: “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 52. The additional information given to Hoffman about his CDL was not inaccurate, nor did it imply that the length of his CDL disqualification would be the same as the length of his personal license suspension or revocation. He was told his CDL would be *disqualified* if his personal license was suspended or revoked. This does not imply or convey any information regarding the length of the disqualification. Moreover, stating that the CDL would be disqualified distinguishes that action from suspension or revocation of a driver’s license, for which the warnings do identify time periods. Because “no different meaning is implied or conveyed by the language of the warnings,” the additional information in the warnings provided to Hoffman was not misleading. *See Rodriguez*, 65 Wn. App. at 785.

Where warnings provided to a driver have been more specific than the warnings provided in the statute, they have been upheld so long as they provide accurate information. In *Pattison v. Dep't of Licensing*, the drivers were given warnings as developed by the State Patrol which omitted none of the statutory required warnings but which added language providing more specific information than the statutory language. The patrol 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.” *Pattison*, 112 Wn. App at 675.

In contrast, the statutory language makes the “if ... in violation of” warning applicable only “in the case of person under age twenty-one.” RCW 46.20.308(2); *Pattison*, 112 Wn. App. at 675. The court nevertheless held that the drivers in *Pattison* failed to show that the patrol’s more specific warning was inaccurate or misleading because it was correct that drivers both over 21 and under 21 would have their license suspended or revoked, the only difference was that the legal limit was lower for drivers under 21. *Pattison*, 112 Wn. App. at 675.

The drivers further argued that the language providing “if you are violation of” could be reasonably understood to mean “if you are arrested.” They contended the term “violation” could mislead drivers into

believing that losing one's license is an inevitable consequence of merely being arrested. *Id.* at 676. The driver's attempt to have the court make this leap in logic was explicitly rejected by Division I. *Id.*

Like the drivers in *Pattison*, Hoffman is asking this Court to make a leap in logic. He argues that the warning which tells him that his CDL will be disqualified if his driver's license is suspended or revoked misled him into thinking it will be disqualified for "at least ninety days" therefore convincing him to take the breath test rather than refuse. CP 113.

Hoffman cannot show that the current State Patrol warnings form inaccurately states the law. Nor can he demonstrate that a person of normal intelligence would be misled into taking the test or refusing to take the breath test because they are informed:

**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.**

The fact that Hoffman was not told how long the disqualification would be did not make the warnings misleading or invalid. In addition to the fact that they are an accurate statement of the law 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 consistent with both *Bostrom* and *Jury*.

By contrast, applying the superior court's ruling consistently would require law enforcement to inform CDL holders of the precise nature of all the consequences of taking or refusing to take a breath test. That would amount to this Court grafting additional language onto the warnings to be provided to drivers. This is contrary to appellate precedent and not required by statute.

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*. 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." This was an incorrect statement of law. The implied consent statute stated that the officer shall inform the driver that his or her privilege to drive *will be revoked or denied* if he or she refuses to submit to the test. *Cooper v. Dep't of Licensing*, 61 Wn. App. 525, 526-27, 810 P.2d 1385 (1991). 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 *State v. Bartels*, the officers informed the drivers that they could obtain an additional test at their own expense. 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. *State v. Bartels*, 112 Wn.2d 882, 887, 774 P.2d 1183 (1989). Again, because the additional language given as part of the warnings by the officer 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.

In Hoffman's case, he agrees that the warning regarding his CDL disqualification was legally correct. The additional warning about the CDL disqualification was appended after the statutorily required warning in a separate distinct paragraph. CP 52. 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 ninety days if test results reflect a breath alcohol concentration is 0.08 or more does not make the warning about the disqualification of their 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. The addition in this instance is legally accurate. Moreover, it does not create an additional duty on the part of the arresting officer to warn the driver of the length of disqualification. *See Bostrom*, 127 Wn.2d at 586. The Department's decision suspending Hoffman's license was correct, and the superior court's holding to the contrary was in error.

**B. Given that Hoffman failed to prove he was prejudiced by the warnings he received, the hearing officer properly suspended his license.**

Because the implied consent warnings are not misleading this Court does not have to reach the prejudice prong; however, if this Court does find they were misleading, Hoffman failed to demonstrate actual prejudice required in order for him to prevail.

Contrary to Hoffman's argument to the superior court, Washington courts do not merely consider whether a driver falls into a particular "class of persons" who *could* be prejudiced when determining whether prejudice has been established as a result of misleading warnings. Rather, courts look to whether the driver has established actual prejudice as a matter of fact due to the allegedly misleading advisement. *Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 901, 774 P.2d 1187 (1989). Here, Hoffman cannot meet the actual prejudice standard. He did not testify or provide any evidence that the information actually influenced his decision to take the test.

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. *Id.* at 899. Consequently, because actual prejudice had not been 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.* 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 Mr. Gonzales refused, the warning did not prejudice him. *Id.* Thus, “actual” prejudice 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, 784 P.2d 1295 (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. *Id.*

A showing of actual prejudice requires demonstrating that a misadvisement of rights actually affected an individual’s decision. Again, in this case, the only evidence, which is uncontested, is that Hoffman received accurate warnings. There is no evidence that the warnings misled Hoffman into taking the test. 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.* They were sent notices by DOL stating that they had ten days to request an administrative hearing. However, the statute stated drivers had 15 days to request a hearing. The drivers 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 court rejected this argument, again holding that the drivers must demonstrate actual prejudice. *Id.* at 531-32.

If the warnings involved here were misleading, Hoffman would be required to establish that he was actually prejudiced by the allegedly misleading warnings in order for the Court to reverse his license suspension. The superior court's holding that Mr. Hoffman was not afforded the opportunity to make a knowing and intelligent decision regarding submission to the breath test did not apply the actual prejudice standard, failing to address the actual prejudice prong of the test on a legal basis, to scrutinize the facts of the case or to analyze the difference in the results of blowing or refusing.

Here, Hoffman chose to take the breath test. But refusing to take the test would have carried the same consequences to his CDL: a one year disqualification. If anything, his being encouraged to submit to the breath test resulted in a better outcome, as his personal license was suspended for 90 days rather than being revoked for one year. This is also consistent with the policy behind the implied consent law which is to encourage drivers to take the breath test. *Cannon*, 147 Wn.2d at 47. Furthermore,

whether he took or refused the test had no bearing on whether he could receive an ignition interlock license.

Hoffman 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.. Hoffman cannot demonstrate this. Thus, the Department properly suspended his license.

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### VIII. CONCLUSION

The Department respectfully requests that this court reverse the superior court order and affirm the Department's order of suspension. Hoffman was provided legally correct warnings, consistent with the statute, which would allow a person of normal intelligence to knowingly and intelligently decide whether to submit to a breath test.

RESPECTFULLY SUBMITTED this 14<sup>th</sup> day of September, 2011.

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