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No. 72924-1

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

JASON M. LEE,
Appellant,

vs.

JOSIAH WALKER *et ux.* and INFRASOURCE SERVICES, LLC
Appellees.

BRIEF OF APPELLANT JASON M. LEE

Douglas Lee Burdette, WSBA #17636
Kelly D. Burdette, WSBA #44339
BURKETT & BURDETTE
2101 Fourth Avenue, Suite 1830
Seattle, Washington 98121
206-441-5544
DLBurdette@BurkettBurdette.com

Attorneys for Appellant Jason M. Lee

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TABLE OF CONTENTS

I. INTRODUCTION.....5

II. ASSIGNMENTS OF ERROR.....5

III. STATEMENT OF THE CASE.....6

IV. ARGUMENT.....8

A. Standard of Review.....8

B. By Refusing to Give Plaintiff’s Offered Instructions the Court Failed to Properly Inform the Trier of Fact of the Applicable Law.....8

V. CONCLUSION.....13

TABLE OF AUTHORITIES

Cases

<i>Anfinson v. FedEx Ground Package Sys., Inc.</i> , 174 Wn.2d 851, 281 P.3d 289 (2012).....	8
<i>Barrett v. Lucky Seven Saloon, Inc.</i> , 152 Wn.2d 259, 96 P.3d 386 (2004).....	12, 13
<i>Bodin v. City of Stanwood</i> , 130 Wn.2d 726, 732, 927 P.2d 240 (1996).....	8
<i>Borromeo v. Shea</i> , 138 Wn. App. 290, 156 P.3d 946 (2007).....	11
<i>Grobe v. Valley Garbage Serv., Inc.</i> , 87 Wn.2d 217, 551 P.2d 748 (1976).....	6
<i>Hue v. Farmboy Spray Co.</i> , 127 Wn.2d 67, 92, 896 P.2d 682 (1995).....	13
<i>Hough v. Stockbridge</i> , 152 Wn. App. 328, 216 P.3d 1077 (2009).....	8
<i>Poston v. Mathers</i> , 77 Wn.2d 329, 462 P.2d 222 (1969).....	5
<i>Pudmaroff v. Allen</i> , 138 Wn.2d 55, 977 P.2d 574 (1999).....	8
<i>Sanchez v. Haddix</i> , 95 Wn.2d 593, 627 P.2d 1312 (1981).....	5, 10
<i>State v. Goree</i> , 26 Wn. App. 205, 208, 673 P.2. 194 (1983).....	11

Statutes

RCW 46.04.500.....	9
--------------------	---

RCW 46.04.670.....9
RCW 46.61.140.....5, 7, 9, 10, 11
Seattle Municipal Code § 11.53.190.....9
WPI 60.01..... 5, 7, 10

Appendix

1. Plaintiff’s Proposed Instructions
2. Court’s Instructions to the Jury

I. INTRODUCTION

This case involves a collision in the City of Seattle between appellant, Jason M. Lee (“Lee”), who was riding a bicycle, and appellee, Josiah Walker (“Walker”), who was driving a van and pulling a trailer in the service of appellee, Infrasource Services, LLC. Lee and Walker were both headed northbound. Walker was driving in a marked lane. Lee was riding in a designated bike lane to the right of Walker. They collided when Walker made a right hand turn in front Lee. Lee suffered personal injuries.

II. ASSIGNMENTS OF ERROR

1. The court erred in refusing to give WPI 60.01, which instructs the jury that RCW 46.61.140 provides whenever any roadway has been divided into two or more clearly marked lanes for traffic a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety; and
2. The court erred in refusing to instruct the jury that a driver of a vehicle with the right-of-way is a favored driver and that a disfavored driver has the primary duty to avoid a collision. *Sanchez v. Haddix*, 95 Wn.2d 593, 597, 627 P.2d 1312, 1314 (1981); *Poston v. Mathers*, 77

Wn.2d 329, 462 P.2d 222 (1969); *Grobe v. Valley Garbage Serv., Inc.*, Wn.2d 217, 551 P.2d 748 (1976).

III. STATEMENT OF THE CASE

Appellant Lee was riding a bicycle northbound on California Avenue SW in the City of Seattle. Verbatim Transcript of Proceedings Transcribed from Audio Recording Requested Excerpts November 12, 2014 (RP) at 102. At the same time, Appellee Walker was driving a van with a trailer northbound on California Avenue SW some distance ahead of Lee. RP 103. Lee was gaining ground on Walker as Walker began to slow down at the intersection of Frontenac St. RP 103, 106, 138-9. There were two lanes at this intersection for northbound traffic, “a clearly marked car lane,” and a “clearly marked bike lane.” RP 45-6. Lee was in a clearly marked bike lane to the right of the lane in which Walker was traveling. RP 103. Walker testified that he looked in his side-view mirror, but did not see Lee in the lane to his right. RP 42, 44. Lee testified that he saw that the light at the intersection was green for northbound traffic. RP 140. Lee testified that he did not see a right turn signal on the Walker vehicle. RP 103. Walker turned right from his lane across the bike lane. RP 103-4, 50. Just as he did so, Lee collided with the right hand side of Walker’s van. RP 51.

Lee's theory of the case was that Walker was negligent in failing to merge into the bike lane before executing his right hand turn, instead turning across the lane to his right directly into Lee's path. Lee asked the court to instruct the jury pursuant to WPI 60.01 and RCW 46.61.140 as follows:

A statute provides whenever any roadway has been divided into two or more clearly marked lanes for traffic a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

The court declined to give the instruction and exception was taken.

Verbatim Transcript of Proceedings Transcribed from Audio Recording
Requested Excerpts November 13, 2014 (2 RP) at 2-3.

Lee asked the Court to instruct the jury as follows:

The driver of a vehicle with the right-of-way is a favored driver. The driver required to yield the right of way is a disfavored driver. Although all drivers must exercise reasonable care, disfavored drivers have the primary duty to avoid collision and favored drivers are entitled to a reasonable reaction time after it becomes apparent in the exercise of due care that the disfavored driver will not yield the right of way. This rule applies even though the favored driver did not see the disfavored driver until it was too late to avoid the accident.

The court declined to give the instruction and exception was taken. 2 RP 2-3. The jury returned a defense verdict in favor of Walker.

IV. ARGUMENT

A. Standard of Review.

The trial court's jury instructions are reviewed by this court *de novo* for errors of law. *Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." *Anfinson*, 174 Wn.2d at 860 (*quoting Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P2d 240 (1996)). Insufficient instructions are legally erroneous. *Anfinson*, 174 Wn.2d at 860.

The decision to give or not to give a specific instruction is reviewed for an abuse of discretion. *Hough v. Stockbridge*, 152 Wn. App. 328,342, 216 P.3d 1077 (2009).

B. By Refusing to Give Plaintiff's Offered Instructions the Court Failed to Properly Inform the Trier of Fact of the Applicable Law

In *Pudmaroff v. Allen*, 138 Wn.2d 55, 977 P.2d 574 (1999), the court questioned, but did not decide, the applicability of the rules of the road to bicyclists. *Id.* at 63-64. In fact, when *Pudmaroff* was decided the

State of Washington Supreme Court noted the “anomalous place” of bicycles in the rules of the road. The Court invited legislative action.

Legislative bodies, such as the City of Seattle and the Washington Legislature, took up the challenge to clarify matters. For example, Seattle Municipal Code Section 11.53.190 provides that “[t]he operator of a motor vehicle shall not drive in a bicycle lane except to execute a turning maneuver, yielding to all persons riding bicycles thereon.” (Submitted as part of plaintiff’s “issues instruction,” which the trial court did not give, but to which no exception was taken).

RCW 46.61.140 provides as follows:

Whenever any roadway¹ has been divided into two or more clearly marked lanes for traffic the following rules in addition to all others consistent herewith shall apply:

- (1) A vehicle² shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

These laws, taken together, make it clear that a bicyclist riding in a clearly marked bike lane has the right-of-way and that persons traveling in any other lane are prohibited from moving into the bike lane unless they can safely do so. The trial court recognized Lee’s right-of-way: “I don’t

¹ A roadway is for the use of all vehicles, including bicycles. RCW 46.04.500.

² A bicycle is a vehicle. RCW 46.04.670.

think anyone would deny, statute or not, if there's a clearly marked bike lane, the driver can't just drive into it without taking due care. I mean, that clearly has to be the law." RP 168-9. Having said that, the trial court's further comments suggested the court had doubts about how helpful WPI 60.01 (and RCW 46.61.140) would be to the jury: "Whether we need this----whether this is helpful or not, I have some doubts." RP 169. The trial court concluded, without agreeing to give WPI 60.01, that "clearly, it is against the law to drive into a bike lane."

As the person with the acknowledged right-of-way, Lee was entitled to have the jury instructed that he was the favored driver and that, as such, the primary duty to avoid a collision lay upon Walker. The trial court declined the so-called *Sanchez Instruction*. In the colloquy among counsel and the court regarding the court's decision not to give WPI 60.01 and the *Sanchez Instruction*, the trial judge stated:

I did have a comment on that, because I went through and read all the cases. The favored driver instruction is based on 46.61.140, which has to do with two vehicles from opposite roads in an intersection, so I don't think it's factually supported here. And I'm satisfied as the other instruction that the statute is ---doesn't give really any guidance at all to the jury in that it is a standard negligence, reasonable care.

2 RP 2-3. Regrettably, the trial court was clearly mistaken in its interpretation of RCW 46.61.140. The language of the statute is clear and applies not to “opposite roads,” but to “any roadway that has been divided into two or more clearly marked lanes for traffic.” As stated by Justice Ellington in *Borromeo v. Shea*, 138 Wn. App. 290, 156 P.3d 946 (2008)(one of the few Washington appellate cases dealing with the adequacy of instructions in a bicycle case), “[a]n instruction which follows the words of a statute is proper unless the statutory language is not reasonably clear or misleading.” *Id. quoting State v. Goree*, 26 Wn. App. 205, 208, 673 P.2. 194 (1983). In *Borromeo*, unlike this case, the trial judge gave a number of bicycle specific rules of the road instructions, which were challenged as impermissibly repetitive. No error was found.

Instead of instructing the jury on the law as it particularly applies to the movement of a vehicle from one lane of traffic into another---or put another way---instead of instructing the jury on the “rules of the road” applicable in this case, the trial court gave a general negligence instruction, as follows:

It is the duty of every person using a public street or highway to exercise ordinary care to avoid placing themselves or others in danger and to exercise ordinary care to avoid a collision.

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until they know, or in the exercise of ordinary care should know, to the contrary.

Every person has a duty to see what would be seen by a person exercising ordinary care.

By instructing the jury in this way, the trial court assumed that each and every one of the jurors knew the “rules of the road.” The error is clear. The instructions given failed to inform the trier of fact of the applicable law. Lee was prejudiced by the incomplete explanation of the law and as a consequence did not receive a fair trial.

In *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 96 P.3d 386 (2004), Barrett claimed he was injured as a result of Lucky’s selling of alcohol to an intoxicated third-party. Barrett claimed that Lucky violated RCW 66.44.200, which prohibits the sale of alcohol “to any person apparently under the influence.” Lucky argued that the correct legal standard was “obviously intoxicated.” The court refused to instruct the jury on RCW 66.44.200 and prohibited Barrett from arguing that “apparent intoxication” could be the basis for liability. The court of appeals affirmed. On appeal to the supreme court, the court found that the trial court’s refusal to instruct the jury on an applicable statutory standard

of conduct is reversible error. Finding that RCW 66.44.200 was the applicable law defining the duty owed by Lucky's, the supreme court stated that "a court's omission of a proposed statement of the governing law will be 'reversible error where it prejudices a party.'" *Id.* at 267, quoting *Hue v. Farmboy Spray Co.*, 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

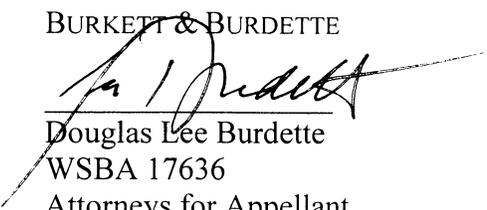
Just as in *Barrett v. Lucky Seven*, the trial court in this case refused to instruct the jury on the applicable standard of care. The jury was never informed that Lee was the favored driver; the jury was never informed that Walker had a duty to remain in his own lane until he could safely move to another; the jury was never informed that Walker was under a duty to yield to Lee. For these reasons, the jury was not informed of the applicable law.

V. CONCLUSION

Appellant Lee respectfully urges the court to reverse the verdict of the trial court and grant a new trial on all issues.

DATED this 10th day of April 2015.

BURKETT & BURDETTE



Douglas Lee Burdette

WSBA 17636

Attorneys for Appellant

APPENDIX

This is a civil case brought by plaintiff Jason Lee against defendants Infrasource Services, LLC. Mr. Lee's lawyers are LEE BURDETTE and KELLY BURDETTE of BURKETT & BURDETTE. The defendants' lawyer is RODNEY UMBERGER, JR., and DREW PEARSALL of WILLIAMS KASTNER & GIBBS, LLC.

This case arises out of bicyclist/truck collision, which occurred on April 24, 2013, in West Seattle, Washington. At that time, Mr. Lee was riding his bicycle in a clearly marked bicycle lane. Defendant Josiah Walker, who is an employee of Infrasource Services, LLC, made a right hand turn across the bike lane causing Mr. Lee to collide into his truck. Mr. Lee claims defendant Walker was negligent. Mr. Walker and Infrasource Services, LCC deny that Mr. Walker negligent and claim that Lee was negligent. Mr. Lee claims he suffered bodily injuries that were caused by Mr. Walker.

It is your duty as a jury to decide the facts in this case based upon the evidence presented to you during this trial. Evidence is a legal term. Evidence includes such things as testimony of witnesses, documents, or other physical objects.

One of my duties as judge is to decide whether or not evidence should be admitted during this trial. What this means is that I must decide whether or not you should consider evidence offered by the parties. For example, if a party offers a photograph as an exhibit, I will decide whether it is admissible. Do not be concerned about the reasons for my rulings. You must not consider or discuss any evidence that I do not admit or that I tell you to disregard.

The evidence in this case may include testimony of witnesses or actual physical objects, such as papers, photographs, or other exhibits. Any exhibits admitted into evidence will go with you to the jury room when you begin your deliberations. When witnesses testify before you,

please listen very carefully. You will need to remember testimony during your deliberations because testimony will rarely, if ever, be repeated for you.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. Although the lawyers will frequently make reference to the evidence and the law, their statements are not evidence or the law. The evidence is the testimony and the exhibits. The law is the law as I give it to you. You must disregard anything the lawyers say that is at odds with the evidence or the law as I give it to you.

Our state constitution prohibits a trial judge from making a comment on the evidence. For example, it would be improper for me to express my personal opinion about the value of a particular witness's testimony. Although I will not intentionally do so, if it appears to you that I have indicated my personal opinion concerning any evidence, you must disregard that opinion entirely.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

In deciding this case, you will be asked to apply a concept called "burden of proof." The phrase "burden of proof" may be unfamiliar to you. Burden of proof refers to the measure or amount of proof required to prove a fact. The burden of proof in this case is proof by a preponderance of the evidence. Proof by a preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that a proposition is more probably true than not true.

During your deliberations, you must apply the law to the facts that you find to be true. It is your duty to accept the law as I give it to you, regardless of what you personally believe the law is or what you think it ought to be. You are to apply the law you receive from me to the facts and in this way decide the case.

At this time, I would like to introduce you to the court reporter, _____, who will record everything that is said or done in this courtroom during this trial. _____ is responsible for recording these proceedings accurately. What he or she transcribes is referred to as the "record." I would also like to introduce you to the court clerk, _____, and the bailiff, _____. The job of the court clerk is to keep track of all documents and exhibits and to make a record of rulings made during the trial. The bailiff keeps the trial running smoothly. You will be in the care of the bailiff throughout this trial. He or she will help you with any problems you may have related to jury service. Please follow any instructions that he or she gives you.

Now I will explain the procedure to be followed during the trial.

First: The lawyers will have an opportunity to make opening statements outlining the testimony of witnesses and other evidence that they expect to be presented during trial.

Next: The plaintiff will present the testimony of witnesses or other evidence to you. When the plaintiff has finished, the defendant may present the testimony of witnesses or other evidence. Each witness may be cross-examined by the other side.

Next: When all of the evidence has been presented to you, I will tell you what law applies to this case. The law that applies will be set out in written instructions, which I will read

out loud. You will have individual copies of the written instructions with you in the jury room during your deliberations.

Next: The lawyers will make closing arguments.

Finally: You will be taken to the jury room by the bailiff where you will select a presiding juror. The presiding juror will preside over your discussions of the case, which are called deliberations. You will then deliberate in order to reach a decision, which is called a "verdict." Until you are in the jury room for those deliberations, you must not discuss the case with the other jurors or with anyone else, or remain within hearing of anyone discussing it.

Throughout this trial, you must come and go directly from the jury room. Do not remain in the hall or courtroom, as witnesses and parties may not recognize you as a juror, and you may accidentally overhear some discussion about this case. I have instructed the lawyers, parties, and witnesses not to talk to you during trial.

It is essential to a fair trial that everything you learn about this case comes to you in this courtroom, and only in this courtroom. You must not allow yourself to be exposed to any outside information about this case. Do not permit anyone to discuss or comment about it in your presence. You must keep your mind free of outside influences so that your decision will be based entirely on the evidence presented during the trial and on my instructions to you about the law.

Until you are dismissed at the end of this trial, you must avoid outside sources such as newspapers, magazines, the Internet, or radio or television broadcasts which may discuss this case or issues involved in this trial. By giving this instruction I do not mean to suggest that this particular case is newsworthy; I give this instruction in every case.

During the trial, do not try to determine on your own what the law is. Do not seek out any evidence on your own. Do not consult any reference materials, such as dictionaries and the like.

Do not inspect the scene of any event involved in this case. If your ordinary travel will result in passing or seeing the location of any event involved in this case, do not stop or try to investigate. You must keep your mind clear of anything that is not presented to you in this courtroom.

Throughout the trial, you must maintain an open mind. You must not form any firm and fixed opinion about any issue in the case until the entire case has been submitted to you for deliberation.

As jurors, you are officers of this court. As such, you must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a just and proper verdict.

To accomplish a fair trial takes work, commitment, and cooperation. A fair trial is possible only with a serious and continuous effort by each one of us, working together.

Thank you for your willingness to serve this court and our system of justice.

You will be allowed to propose written questions to witnesses after the lawyers have completed their questioning. You may ask questions in order to clarify the testimony, but you are not to express any opinion about the testimony or argue with a witness. If you ask any questions, remember that your role is that of a neutral fact finder, not an advocate.

Before I excuse each witness, I will offer you the opportunity to write out a question on a form provided by the court. Do not sign the question. I will review the question to determine if it is legally proper.

There are some questions that I will not ask, or will not ask in the wording submitted by the juror. This might happen either due to the rules of evidence or other legal reasons, or because

the question is expected to be answered later in the case. If I do not ask a juror's question, or if I rephrase it, do not attempt to speculate as to the reasons and do not discuss this circumstance with the other jurors.

By giving you the opportunity to propose questions, I am not requesting or suggesting that you do so. It will often be the case that a lawyer has not asked a question because it is legally objectionable or because a later witness may be addressing that subject.

INSTRUCTION NO. _____

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law as I explain it to you, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

In order to decide whether any party's claim has been proved, you must consider all of the evidence that I have admitted that relates to that claim. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of the witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things they testify about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the

witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

The law does not permit me to comment on the evidence in any way. I would be commenting on the evidence if I indicated my personal opinion about the value of testimony or other evidence. Although I have not intentionally done so, if it appears to you that I have indicated my personal opinion, either during trial or in giving these instructions, you must disregard it entirely.

As to the comments of the lawyers during this trial, they are intended to help you understand the evidence and apply the law. However, it is important for you to remember that the lawyers' remarks, statements, and arguments are not evidence. You should disregard any remark, statement, or argument that is not supported by the evidence or the law as I have explained it to you.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

As jurors, you have a duty to consult with one another and to deliberate with the intention

of reaching a verdict. Each of you must decide the case for yourself, but only after an impartial consideration of all of the evidence with your fellow jurors. Listen to one another carefully. In the course of your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon the evidence. You should not surrender your honest convictions about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of obtaining enough votes for a verdict.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, bias, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

Finally, the order of these instructions has no significance as to their relative importance. They are all equally important. In closing arguments, the lawyers may properly discuss specific instructions, but you must not attach any special significance to a particular instruction that they may discuss. During your deliberations, you must consider the instructions as a whole.

INSTRUCTION NO. _____

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. _____

The defendant Infrasource Services, LLC is a corporation. A corporation can act only through its officers and employees. Any act or omission of an officer or employee is the act or omission of the corporation.

INSTRUCTION NO. _____

Infrasource Services, LLC and Josiah Walker are sued as principal and agent. Infrasource Services, LLC is the principal and Josiah Walker is the agent. If you find Josiah Walker is liable, then you must find that Infrasource Services, LLC is also liable. However, if you do not find that Josiah Walker is liable, then Infrasource Servicee, LLC is not liable.

INSTRUCTION NO. _____

1. The plaintiff claims that defendant Josiah Walker was negligent in one or more of the following respects:

Plaintiff claims that Josiah Walker caused the collision when he negligently made a right hand turn into a clearly marked bike lane and failed to yield to Mr. Lee who was traveling in the bike lane. In doing so, plaintiff claims that Josiah Walker violated the following statutes:

1. Seattle Municipal Code Section 11.53.190: "The operator of a motor vehicle shall not drive in a bicycle lane except to execute a turning maneuver, yielding to all person riding bicycles thereon."
2. RCW 46.61.150-Driving on divided highways. "Whenever any highway has been divided into two or more roadways by leaving an intervening space or by a physical barrier or clearly indicated dividing section or by a median island not less than eighteen inches wide formed either by solid yellow pavement markings or by a yellow crosshatching between two solid yellow lines so installed as to control vehicular traffic, every vehicle shall be driven only upon the right-hand roadway unless directed or permitted to use another roadway by official traffic-control devices or police officers. No vehicle shall be driven over, across or within any such dividing space, barrier or section, or median island, except through an opening in such physical barrier or dividing section or space or median island, or at a crossover or intersection established by public authority."

Defendants deny that Josiah Walker was negligent.

3. The defendants' claim as an affirmative defense that Mr. Lee was negligent because he failed to use reasonable care to avoid a collision with Mr. Walker's vehicle. The defendants claim that plaintiff's conduct was a proximate cause of plaintiff's injuries and damage.

The plaintiff denies these claims.

INSTRUCTION NO. _____

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression “if you find” is used, it means that you must be persuaded, considering all the evidence in the case bearing on the question, that the proposition on which that party has the burden of proof is more probably true than not true.

INSTRUCTION NO. _____

The plaintiff has the burden of proving each of the propositions as to defendant Josiah Walker:

First, that the defendant acted, or failed to act, in one of the ways claimed by plaintiff and that in so acting or failing to act, the defendant was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the defendant was a proximate cause of the injury to the plaintiff.

The defendants have the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the defendants, and that in so acting, or failing to act, the plaintiff was negligent.

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligent.

INSTRUCTION NO. _____

A person riding a bicycle upon a roadway has all the rights of a driver of a motor vehicle and must obey all statutes governing the operation of vehicles except for those statutes that, by their nature, can have no application.

INSTRUCTION NO. _____

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

INSTRUCTION NO. _____

The violation, if any, of a statute is not necessarily negligence, but may be considered by you as evidence in determining negligence.

INSTRUCTION NO. _____

A statute provides whenever any roadway has been divided into two or more clearly marked lanes for traffic a vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

INSTRUCTION NO. _____

It is the duty of every person using a public street or highway to exercise ordinary care to avoid placing himself or herself or others in danger and to exercise ordinary care to avoid a collision.

INSTRUCTION NO. _____

Every person using a public street or highway has the right to assume that other persons thereon will use ordinary care and will obey the rules of the road and has a right to proceed on such assumption until he or she knows, or in the exercise of ordinary care should know, to the contrary.

INSTRUCTION NO. _____

The driver of a vehicle with the right-of-way is a favored driver. The driver required to yield the right of way is a disfavored driver. Although all drivers must exercise reasonable care, disfavored drivers have the primary duty to avoid collision and favored drivers are entitled to a reasonable reaction time after it becomes apparent in the exercise of due care that the disfavored driver will not yield the right of way. This rule applies even though the favored driver did not see the disfavored driver until it was too late to avoid the accident.

Sanchez v. Haddix, 95 Wn.2d 593, 597, 627 P.2d 1312, 1314 (1981); *Poston v. Mathers*, 77 Wn.2d 329, 462 P.2d 222 (1969); *Grobe v. Valley Garbage Serv., Inc.*, Wn.2d 217, 551 P.2d 748 (1976). *See also*, Blashfield Automobile Law & Practice s 114.84 (3d ed. F. Lewis 1965).

INSTRUCTION NO. _____

Contributory negligence is negligence on the part of a person claiming injury or damage (the plaintiff) that is a proximate cause of the injury or damage claimed.

INSTRUCTION NO. _____

If you find contributory negligence on the part of the plaintiff, you must determine the degree of negligence, expressed as a percentage, attributable to the plaintiff. In doing so, you should compare the respective fault of the plaintiff and defendant. The court will furnish you with a special verdict form for this purpose. Your answers in the special verdict form will furnish the basis by which the court will apportion damages, if any.

INSTRUCTION NO. _____

The term “proximate cause” means a cause which in direct sequence produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.

INSTRUCTION NO. _____

It is the duty of the court to instruct you as to the measure of damages.

You must determine the amount of money that will reasonably and fairly compensate the plaintiff for such damages as you find were proximately caused by the negligence of the defendant.

You should consider the following past economic damages elements:

The reasonable value of earnings, earning capacity and business opportunities lost to the present time.

In addition you should consider the following noneconomic damages elements:

The nature and extent of the injuries.

The disability, scarring, disfigurement and loss of enjoyment of life experienced and with reasonable probability to be experienced in the future.

The pain and suffering, both mental and physical, inconvenience, mental anguish, emotional distress, experienced and with reasonable probability to be experienced in the future.

The burden of proving damages rests upon the plaintiff. It is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

Your award must be based upon evidence and not upon speculation, guess, or conjecture.

The law has not furnished us with any fixed standards by which to measure noneconomic damages. With reference to these matters you must be governed by your own judgment, by the evidence in the case, and by these instructions.

WPI 30.01.01, 30.04, 30.05, 30.06

RCW 4.56.250(1)(b), 30.08.01 30.08.02 (6th ed.)

INSTRUCTION NO. _____

According to mortality tables, the average expectancy of life of a male aged 28 is 48.07 years. This one factor is not controlling, but should be considered in connection with all the other evidence bearing on the same question, such as that pertaining to the health, habits, and activity of the person whose life expectancy is in question.

INSTRUCTION NO. _____

When you begin to deliberate, your first duty is to select a presiding juror. The presiding juror's responsibility is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

You will be given the exhibits admitted in evidence, these instructions and a verdict form for recording your verdict. Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted, or in any other way indicate how your deliberations are proceeding. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

In order to reach a verdict ten of you must agree. When ten of you have agreed, then the presiding juror will fill in the verdict form. The presiding juror must sign the verdict whether or not the presiding juror agrees with it. The presiding juror will then inform the bailiff that you have reached a verdict. The bailiff will conduct you back into this courtroom where the verdict will be announced.

FILED
KING COUNTY, WASHINGTON

NOV 13 2014

SUPERIOR COURT CLERK
KIRSTIN GRANT,
DEPUTY

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

Jason Lee,)

Plaintiff,)

v.)

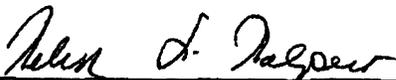
Josiah Walker, Et Ano)

Defendant.)

No: 13-2-21525-0 SEA

COURT'S INSTRUCTIONS TO THE JURY

Dated this 13 day of November, 2014



Helen L. Halpert, Judge

1
2 **INSTRUCTION NO. 1**

3 It is your duty to decide the facts in this case based upon the evidence
4 presented to you during this trial. It also is your duty to accept the law as I explain it to
5 you, regardless of what you personally believe the law is or what you personally think
6 it should be. You must apply the law from my instructions to the facts that you decide
7 have been proved, and in this way decide the case.

8 The evidence that you are to consider during your deliberations consists of the
9 testimony that you have heard from witnesses and the exhibits that I have admitted
10 during the trial. If evidence was not admitted or was stricken from the record, then you
11 are not to consider it in reaching your verdict.

12 Exhibits may have been marked by the court clerk and given a number, but
13 they do not go with you to the jury room during your deliberations unless they have
14 been admitted into evidence. The exhibits that have been admitted will be available to
15 you in the jury room.

16 In order to decide whether any party's claim has been proved, you must
17 consider all of the evidence that I have admitted that relates to that claim. Each party
18 is entitled to the benefit of all of the evidence, whether or not that party introduced it.

19 You are the sole judges of the credibility of the witness. You are also the sole
20 judges of the value or weight to be given to the testimony of each witness. In
21 considering a witness's testimony, you may consider these things: the opportunity of
22 the witness to observe or know the things they testify about; the ability of the witness
23 to observe accurately; the quality of a witness's memory while testifying; the manner of
24 the witness while testifying; any personal interest that the witness might have in the
25 outcome or the issues; any bias or prejudice that the witness may have shown; the
reasonableness of the witness's statements in the context of all of the other evidence;

1 and any other factors that affect your evaluation or belief of a witness or your
2 evaluation of his or her testimony.

3 One of my duties has been to rule on the admissibility of evidence. Do not be
4 concerned during your deliberations about the reasons for my rulings on the evidence.
5 If I have ruled that any evidence is inadmissible, or if I have asked you to disregard
6 any evidence, then you must not discuss that evidence during your deliberations or
7 consider it in reaching your verdict.

8 The law does not permit me to comment on the evidence in any way. I would
9 be commenting on the evidence if I indicated my personal opinion about the value of
10 testimony or other evidence. Although I have not intentionally done so, if it appears to
11 you that I have indicated my personal opinion, either during trial or in giving these
12 instructions, you must disregard it entirely.

13 As to the comments of the lawyers during this trial, they are intended to help
14 you understand the evidence and apply the law. However, it is important for you to
15 remember that the lawyers' remarks, statements, and arguments are not evidence.
16 You should disregard any remark, statement, or argument that is not supported by the
17 evidence or the law as I have explained it to you.

18 You may have heard objections made by the lawyers during trial. Each party
19 has the right to object to questions asked by another lawyer, and may have a duty to
20 do so. These objections should not influence you. Do not make any assumptions or
21 draw any conclusions based on a lawyer's objections.

22 As jurors, you have a duty to consult with one another and to deliberate with the
23 intention of reaching a verdict. Each of you must decide the case for yourself, but only
24 after an impartial consideration of all of the evidence with your fellow jurors. Listen to
25 one another carefully. In the course of your deliberations, you should not hesitate to
re-examine your own views and to change your opinion based upon the evidence.
You should not surrender your honest convictions about the value or significance of

1 evidence solely because of the opinions of your fellow jurors. Nor should you change
2 your mind just for the purpose of obtaining enough votes for a verdict.

3 As jurors, you are officers of this court. You must not let your emotions
4 overcome your rational thought process. You must reach your decision based on the
5 facts proved to you and on the law given to you, not on sympathy, bias, or personal
6 preference. To assure that all parties receive a fair trial, you must act impartially with
7 an earnest desire to reach a proper verdict.

8 Finally, the order of these instructions has no significance as to their relative
9 importance. They are all equally important. In closing arguments, the lawyers may
10 properly discuss specific instructions, but you must not attach any special significance
11 to a particular instruction that they may discuss. During your deliberations, you must
12 consider the instructions as a whole.

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INSTRUCTION NO. 2

Plaintiff has the burden of proving each of the following propositions:

First, that the Defendants acted, or failed to act, in one of the ways claimed by the Plaintiff and that in so acting or failing to act, the Defendants were negligent;

Second, that Plaintiff was injured; and

Third, that the negligence of the Defendants was a proximate cause of the injuries to Plaintiff.

With respect to the contributory negligence claims, the Defendants have the burden of proving both of the following propositions:

First, that Plaintiff acted, or failed to act, in one of the ways claimed by the Defendants, and that in so acting or failing to act, Plaintiff was negligent;

Second, that the negligence of Plaintiff was a proximate cause of Plaintiff's own injuries and therefore he was contributory negligent.

INSTRUCTION NO. 3

When it is said that a party has the burden of proof on any proposition, or that any proposition must be proved by a preponderance of the evidence, or the expression "if you find" is used, it means that you must be persuaded, considering all the evidence in the case, that the proposition on which that party has the burden of proof is more probably true than not true.

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INSTRUCTION NO. 4

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The law treats all parties equally whether they are corporations or individuals. This means that corporations and individuals are to be treated in the same fair and unprejudiced manner.

INSTRUCTION NO. 5

Any act or omission of an agent within the scope of authority is the act or omission of the principal. Josiah Walker and InfraSource Services, LLC are sued as principal and agent. InfraSource Services, LLC is the principal and Josiah Walker is the agent. If you find Josiah Walker is liable, then you must find that InfraSource Services, LLC is also liable. However, if you do not find that Josiah Walker is liable, then InfraSource Services, LLC is not liable.

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INSTRUCTION NO. 6

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2 The evidence that has been presented to you may be either direct or
3 circumstantial. The term "direct evidence" refers to evidence that is given by a
4 witness who has directly perceived something at issue in this case. The term
5 "circumstantial evidence" refers to evidence from which, based on your common
6 sense and experience, you may reasonably infer something that is at issue in this
7 case.

8 The law does not distinguish between direct and circumstantial evidence in
9 terms of their weight or value in finding the facts in this case. One is not necessarily
10 more or less valuable than the other.

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INSTRUCTION NO. 7

Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.

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INSTRUCTION NO. 8

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Ordinary care means the care a reasonably careful person would exercise under the same or similar circumstances.

INSTRUCTION NO. 9

The term "proximate cause" means a cause which in a direct sequence unbroken by any superseding cause, produces the injury complained of and without which such injury would not have happened.

There may be more than one proximate cause of an injury.

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INSTRUCTION NO. 10

Contributory negligence is negligence on the part of a person claiming injury or damage that is a proximate cause of the injury or damage claimed.

If you find that Plaintiff Jason Lee was contributorily negligent, you must determine the degree of negligence, expressed as a percentage, attributable to him. The court will furnish you a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

INSTRUCTION NO. 11

A person riding a bicycle upon a roadway has all the rights of a driver of a motor vehicle and must obey all statutes governing the operation of vehicles except for those statutes that, by their nature, can have no application.

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INSTRUCTION NO. 12

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2 It is the duty of every person using a public street or highway to exercise
3 ordinary care to avoid placing themselves or others in danger and to exercise ordinary
4 care to avoid a collision.

5 Every person using a public street or highway has the right to assume that
6 other persons thereon will use ordinary care and will obey the rules of the road and
7 has a right to proceed on such assumption until they know, or in the exercise of
8 ordinary care should know, to the contrary.

9 Every person has a duty to see what would be seen by a person exercising
10 ordinary care.

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INSTRUCTION NO. 13

If you find that more than one party was negligent, you must determine what percentage of the total negligence is attributable to each party that proximately caused the injury and damages alleged by Plaintiff. The court will provide you with a special verdict form for this purpose. Your answers to the questions in the special verdict form will furnish the basis by which the court will apportion damages, if any.

Parties include the Defendants and the Plaintiff.

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INSTRUCTION NO. 14

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2 It is the duty of the court to instruct you as to the measure of damages. By
3 instructing you on damages the court does not mean to suggest for which party your
4 verdict should be rendered.

5 If your verdict is for the Plaintiff, then you must first determine the amount of
6 money required to reasonably and fairly compensate Plaintiff for the total amount of
7 such damages as you find were proximately caused by the negligence of the
8 Defendants, apart from any consideration of contributory negligence.
9

10 You should consider the following past economic damages elements:

11 The reasonable value of necessary medical care, treatment and services,
12 which the parties have agreed is the sum of \$5,000.

13 In addition you should consider the following noneconomic damages elements:

14 The nature and extent of the injuries.

15 The disfigurement and loss of enjoyment of life experienced and with
16 reasonable probability to be experienced in the future.
17

18 The pain and suffering, both mental and physical, inconvenience, mental
19 anguish and emotional distress experienced and with reasonable probability to be
20 experienced in the future.

21 The burden of proving damages rests upon the plaintiff. It is for you to
22 determine, based upon the evidence, whether any particular element has been proved
23 by a preponderance of the evidence.
24

25 Your award must be based upon evidence and not upon speculation, guess, or
conjecture.

1 The law has not furnished us with any fixed standards by which to measure
2 noneconomic damages. With reference to these matters you must be governed by
3 your own judgment, by the evidence in the case, and by these instructions.

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INSTRUCTION NO. 15

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2 When you begin to deliberate, your first duty is to select a presiding juror. The
3 presiding juror's responsibility is to see that you discuss the issues in this case in an
4 orderly and reasonable manner, that you discuss each issue submitted for your
5 decision fully and fairly, and that each one of you has a chance to be heard on every
6 question before you.

7 You will be given the exhibits admitted in evidence and these instructions. You
8 will also be given a special verdict form that consists of several questions for you to
9 answer. You must answer the questions in the order in which they are written, and
10 according to the directions on the form. It is important that you read all the questions
11 before you begin answering, and that you follow the directions exactly. Your answer
12 to some questions will determine whether you are to answer all, some, or none of the
13 remaining questions.

14 During your deliberations, you may discuss any notes that you have taken
15 during the trial, if you wish. You have been allowed to take notes to assist you in
16 remembering clearly, not to substitute for your memory or the memories or notes of
17 other jurors. Do not assume, however, that your notes are more or less accurate than
18 your memory.

19 You will need to rely on your notes and memory as to the testimony presented
20 in this case. Testimony will rarely, if ever, be repeated for you during your
21 deliberations.

22 If, after carefully reviewing the evidence and instructions, you feel a need to ask
23 the court a legal or procedural question that you have been unable to answer, write
24 the question out simply and clearly. For this purpose, use the form provided in the jury
25 room. In your question, do not state how the jury has voted, or in any other way
indicate how your deliberations are proceeding. The presiding juror should sign and

1 date the question and give it to the bailiff. I will confer with the lawyers to determine
2 what response, if any, can be given.

3 In order to answer any question on the special verdict form, ten (10) jurors must
4 agree upon the answer. It is not necessary that the jurors who agree on the answer
5 be the same jurors who agreed on the answer to any other question, so long as ten
6 (10) jurors agree to each answer.

7 When you have finished answering the questions according to the directions on
8 the special verdict form, the presiding juror will sign the verdict form. The presiding
9 juror must sign the verdict whether or not the presiding juror agrees with the verdict.
10 The presiding juror will then tell the bailiff that you have reached a verdict. The bailiff
11 will bring you back into court where your verdict will be announced.

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