

No. 63590-5 I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

LARRY MARTIN

Plaintiff/Appellant

v.

JEFFREY CONAN and JANE DOE CONAN AND JEFF CONAN
TRANSPORT, INC.

Defendant/Respondent.

ON APPEAL FROM
SKAGIT COUNTY SUPERIOR COURT
CAUSE NO. 07-2-02302-2
HONORABLE JUDGE DAVE NEEDY

RESPONDENT'S BRIEF

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I. IDENTITY OF THE RESPONDING PARTY

Respondent Jeffrey Conan and Jane Doe Conan and Jeff Conan Transport, Inc. (hereinafter "Conan").

II. INTRODUCTION

This case arises out of an incident at the Bow Hill truck scales in March 2005. CP 74. Martin alleged injuries as a result of being struck by Conan's oncoming tractor-trailer. Martin's injuries were caused when he moved from a safe position next to his own truck and trailer and entered the road to pick up a wallet. Martin did this after Conan's truck cab passed him, but without noticing the clearly and legally marked, oversized load markings on Conan's trailer. When Martin retrieved the wallet, he stood up and was struck by the oversized load. CP 74. At all times relevant to the incident, Conan operated his tractor-trailer in compliance with all state regulations. CP 75. If Martin had remained standing where he was when Conan drove past him, then Martin never would have been injured.

Respondent respectfully requests this Court affirm the trial court's Summary Judgment decision. The ruling should be upheld for at least two reasons. First, no genuine issue of material fact exists, so Summary Judgment was warranted. Second, the trial court did consider the opinion of Martin's expert Wade Westphal. Westphal's opinion was that Conan

owed a higher standard of care to Martin. However, the trial court ruled that the duty described by Westphal was not consistent with current law or statute, and was therefore not material to the ruling of the Court. Because the undisputed material facts indicated that Conan met his legal duties Summary Judgment was warranted.

III. STATEMENT OF ISSUES

- A. Whether the trial court erred in granting Conan's Motion for Summary Judgment and in denying Martin's Motion for Reconsideration?

ANSWER: NO

- B. Whether the trial court failed to consider the opinion of expert Wade Westphal and thereby erred in granting Summary Judgment?

ANSWER: NO

IV. STATEMENT OF THE CASE

A. Substantive History

On March 16, 2005, Conan travelled south on Interstate 5. CP 83. At mile marker 235, he pulled into the Bow Hill Scales weigh station. *Id.* After weighing his vehicle and confirming his paperwork with the scalemaster, Conan proceeded to leave. *Id.* It was completely light out with clear line of vision. *Id.* Conan proceeded around the semi-circle onramp at approximately 5-8 mph to return to Interstate 5, and Conan

observed a truck on the side of the road with its driver, Martin, walking to the back of the truck. CP 83. Conan maneuvered his truck around Martin and Martin's truck. As Conan's truck cab passed Martin, they saw one another and Conan's truck had clearance around Martin. As Conan continued to move around Martin's truck and trailer, Conan watched forward, left and right of his vehicle, keeping a watch out for others. When Conan looked in his passenger, right-side mirror to ensure that the rear of his trailer would clear Martin and his truck, Conan observed a man lying in the middle of the road approximately 8-10 feet from the shoulder. *Id.* Conan immediately stopped and exited his vehicle to render assistance to the man. *Id.*

At his deposition, Conan testified as follows:

Q. And how long did the Martin remain in your field of vision as you're going by?

A. He was in my field of vision the whole time until I passed him.

Q. That's what I'm asking. Once you started to pass him, could you see him?

A. No.

CP 91. Conan further testified:

Q. At any point before that incident had you seen him come out from behind his trailer?

A. No.

CP 92.

Police were called to the scene, and Conan provided a written statement, as well as a recorded statement. CP 99, 109. The Police Traffic Collision Report prepared by Officer T.L. Nickelson stated Martin “observed a wallet sitting on the parking lot exit road,” and Martin pulled his vehicle over to the shoulder, exited his vehicle, walked out toward the wallet, and was struck by the load of trusses. CP 108. Officer Nickelson’s report indicated that Conan’s trailer met all of the requirements of the permit. *Id.*

An eyewitness to the accident, truck driver John E. Heaphy (“Heaphy”), was driving his truck behind Conan and witnessed the accident. CP 86. Heaphy confirms Martin “moved toward the truck [Conan’s] as it was passing him and was struck by the protruding lumber.” *Id.* According to Heaphy,

[A]s the flat-bed with the trusses (Conan’s truck) passed wide around the truck that had pulled over (Martin’s truck), the driver of the truck that had pulled over, walked into the onramp toward the passing flat-bed, and bent down to pick something up. When the driver (Martin) stood back up, the end of the trusses on the flat-bed hit him, knocking him down sharply and projecting his legs under the flat-bed, which ran over them.

Id. Heaphy noted that Conan’s truck was not speeding, and that there was nothing Conan could have done differently to prevent the accident. *Id.*

At his deposition, Martin testified that he has difficulty with memory, and does not remember much of anything about the day of the accident. CP 113, 114. He then gave the following testimony:

Q. Okay. If my client was coming and driving up and coming around you, that would be a bad time to walk out into the road to get a wallet right? Would you agree with that?

A. Yes.

Q. It would be better to wait until the truck passed before you walked out to get the wallet right.

A. Yes.

Q. And there'd be nothing preventing you from waiting until the truck passed, to walk out to get –

A. Right.

Q. – the wallet, right?

A. Yes.

CP 115.

B. Procedural History

Martin filed his Complaint for damages against Conan on December 4, 2007 in Skagit County Superior Court. CP 3. On December 14, 2007, Conan filed his answer and affirmative defenses. CP 9. On January 10, 2008, Martin filed an amended Complaint. CP 67.

Conan moved for Summary Judgment on March 2, 2009. CP 74. On March 30, 2009, the Summary Judgment motion was heard before the Honorable Judge Dave Needy. Verbatim Report of Proceedings 1 (“RP”). On March 30, 2009, Judge Needy granted Conan’s motion for Summary Judgment. RP 13. The trial court found no genuine issue of material fact existed. RP 13. The trial court also ruled that Conan fulfilled his duty of care to Martin. Specifically, the Court found that Conan’s duty as he

passed Martin was to pass with sufficient clearance so as not to strike Martin or his vehicle. The Court held that Conan met this duty because he saw Martin standing at the rear of his rig, Conan moved his truck and trailer to the left to avoid Martin, that Conan was driving forward and had an obligation to continue looking forward, right, and left (which Conan did), and Mr. Martin came out into the road and was struck. RP 12-13.

The Court went on to hold that Martin's "expert", Westphal, was incorrect under the law, and the higher standard of care that Westphal described did not exist under Washington law. RP 14. Martin's trial counsel even acknowledged at oral argument that there was no case supporting the Westphal position. RP 8.

As a result of these findings, the trial court granted Conan's summary judgment motion. RP 14. On April 9, 2009, Martin sought reconsideration under CR 59. CP 156. The trial court denied the CR 59 Motion for Reconsideration of Order Granting Summary Judgment on June 13, 2009. CP 166. On June 28, 2009, Martin filed Notice of Appeal and this action is now before this Court. CP 169.

V. ARGUMENT

A. NO GENUINE ISSUE OF MATERIAL FACT EXISTS IN THIS MATTER, SO SUMMARY JUDGMENT WAS WARRANTED.

The facts presented at the summary judgment motion and oral arguments left no material dispute that would permit a reasonable person to reach any conclusion other than Conan met his burden and was not responsible for Martin's injuries. Despite Martin's attempted obfuscation of the facts¹, no genuine issue of material fact exists. The trial court was correct in granting summary judgment.

1. Standard of review

This court reviews an order granting summary judgment de novo. Adams v. King County, 164 Wn.2d 640, 647, 192 P.3d 891 (2008). Under CR 56(c), a court may grant summary judgment if the record presents no genuine issue of material fact and the law entitles the moving party to judgment. Id. "In conducting this inquiry, this court must view all facts and reasonable inferences in the light most favorable to the nonmoving party." Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). Such facts must move beyond mere speculative and

¹ It is not hard to interpret appellant's offensive reference to RPC 3.3 as an insinuation of improper conduct by counsel. Nothing could be further from the truth and we are chagrined to see appellate counsel employ this tactic. Especially when trial counsel did a very capable job, and the trial court had a very commanding knowledge and understanding of both the facts and the law.

argumentative assertions. Retired Pub. Employees Council of Wash. v. Charles, 148 Wn.2d 602, 612-13, 62 P.3d 470 (2003). A fact is a material fact only if it is a fact upon which the outcome depends, and mere argumentative speculation or assertion are insufficient to place a fact in material controversy. Cranwell v. Mesecc, 77 Wn.App. 90, 890 P.2d 491, *rev. denied*, 127 Wash.2d 1004 (1995). When a nonmoving party fails to controvert facts supporting the summary judgment motion, those facts are considered as established. Central Wash. Bank v. Mendelson-Zeller, Inc., 113 Wn.2d 346, 779 P.2d 697 (1989).

2. Analysis

a. No genuine issue of material fact exists.

Summary judgment was appropriate as no genuine issue of material fact existed and Conan met his duty under the law. The undisputed facts of this case are these: Martin saw Conan's approaching tractor-trailer before he entered the freeway on ramp. Martin walked into the freeway onramp, for the purpose of picking up a wallet. Martin walked in front of Conan's oncoming load on the trailer, which was loaded with oversized wood building trusses that were clearly and lawfully marked with lights, flags, and a sign stating "oversized load". Martin walked in front of Conan's oncoming, oversized load only after Conan's cab passed Martin. Martin was then struck by Conan's load.

The facts of this case are straightforward and corroborated by an unbiased witness, Mr. Heaphy. Heaphy testified,

[A]s the flatbed with the trusses passed wide around the truck that was pulled over, the driver of the truck that was pulled over walked into the onramp toward the passing flat-bed and bent down to pick something up. When the driver stood back up, the end of the trusses on the flat-bed hit him, knocking him down sharply and projecting his legs under the flatbed, which ran over them...There was nothing the driver of the flatbed with the trusses could have done differently to prevent this accident.

CP 86.

Martin failed to wait the few moments it would have taken Conan's trailer to completely pass before entering the roadway. Instead, Martin entered the roadway as Conan's tractor-trailer rig was passing. He then bent over to retrieve a wallet in the roadway, stood up, and was struck by the trusses. Martin was only struck by the trusses after he entered the roadway, and if Martin had stayed where he was standing when Conan started to move around him then he never would have been struck by the trusses.

b. "Common Sense" Analysis Results in Summary Judgment.

During oral argument on the Summary Judgment Motion, the trial Court specifically noted reading the responses from the parties, including the declaration from Westphal. However, the trial court concluded that it

was important to keep common sense as a factor “even when the law is somewhat complicated.” RP 11. Trial court, found the following facts were not in dispute:

Conan, driving this truck, saw the other truck parked on the side of the on-ramp, and by everyone’s agreement, cleared the parked truck. He also saw Mr. Martin standing at the rear of that tractor-trailer and knew that he was there at the rear of his rig. He was monitoring his mirrors, I believe to make sure, one, he was going left but not too far; and one, that he was to the right, clearing the rig that was parked. RP 12.

Martin goes to great lengths in his brief to confuse the court with references to whether Martin was alongside his truck or behind his truck when Conan passed Martin and alleged inconsistencies in Heaphy’s witness statement and declaration. These arguments are red herrings and not material to the trial Court’s analysis. The facts show that Conan met his duty to Martin.

Further, Martin’s complaint about Heaphy’s witness declaration was better made at the trial court level. Martin had the opportunity to ask for more time to depose the witness, or move to strike the declaration, and Martin chose to do nothing.

Again, the material facts show no genuine dispute. Conan saw the parked truck and saw Martin standing next to it. Martin saw Conan in his truck. Conan maneuvered his tractor-trailer around Martin and his parked vehicle. As the cab of Conan’s truck passed Martin, Martin walked out

into the roadway and was struck by the protruding lumber. Under these facts Conan met his duty of care. It is not foreseeable for a commercial truck driver standing next to his own truck who sees an oncoming tractor-trailer with all the requisite “oversized load” markings approaching him to walk out into the road as the tractor-trailer passes by.

The “disputes” raised by Martin as to where Martin was standing and whether Heaphy was consistent in his statement are not material. These discrepancies do not alter two material facts that are agreed by Martin, namely that Martin was in a safe location when Conan started to go by, where he would never be struck, and then Martin moved into the danger zone. Martin does not dispute these basic facts. As a result it is immaterial whether Martin was behind his rig or at the corner of his rig when he made the decision to enter the road to retrieve the wallet.

B. CONAN FULFILLED ALL OF HIS DUTIES TO MARTIN IN EVERY SENSE POSSIBLE.

Conan owed a duty of reasonable care to Martin and the trial Court determined that Martin fulfilled that duty. Martin alleges in his first Assignment of Error that the trial court failed to consider the declaration of his expert, Wade Westphal (“Westphal”). Martin further alleges, through Westphal, that Conan owed a higher duty of care to Martin, because he is a commercial truck driver. The trial court dismissed this

proposition as incorrect and not supported in law. RP 14. Instead, the trial court stated unequivocally that,

Mr. Westphal's declaration does propose to me that there are duties different that those that I am recognizing. I simply don't find those duties to exist under the law and under the facts of this case. RP 14.

There is no issue of material fact created when the Court disregarded the Westphal declaration. That declaration assumed the same facts as found by the trial Court. Instead, Westphal's opinion was that Conan owed a different duty based on the same agreed facts. However, as the Court pointed out, Martin's argument that Conan breached a duty to Martin by not watching his mirrors continuously belies "common sense". Conan had a duty to keep watch forward, right and left and to focus on the right hand rear-view mirror exclusively would arguably have breached Conan's duty to all others. RP 12. In other words, the trial Court rejected Westphal's opinion because it advocated that Conan owed Martin a duty to the detriment of all others. That is clearly not the law in Washington.

1. Standard of Review

RCW 46.61.240 provides:

- (1) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection *shall yield the right-of-way* to

all vehicles upon the roadway.

Emphasis added.

RCW 46.61.245 provides:

Notwithstanding the foregoing provisions of this chapter every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary and shall exercise proper precaution *upon observing* any child or any obviously confused or incapacitated person upon a roadway.

Emphasis added.

RCW 46.61.235 provides:

(2) No pedestrian or bicycle shall suddenly leave a curb or other place of safety and walk, run, or otherwise move into the path of a vehicle which is so close that it is impossible for the driver to stop.

2. Analysis

a. Conan fulfilled his duty to Martin by properly moving his vehicle around to the left.

The duty that Conan owed Martin was one of reasonable care. Martin argues that Conan breached that duty in several ways. First, Martin argues Conan breached his duty when he didn't move his truck as far left as possible when passing Martin's truck. The trial court disagreed. RP 10. Martin's trial counsel, Rebecca Larson, was asked if Conan

breached a duty to Martin by not taking his tires up and over [the concrete curb barrier]. RP 9-10. Counsel stated, “[h]e didn’t have to go up and over but should have been farther over and would have been safer to do that.” RP 10.

The trial court responded to this by saying, “No, being safer – excuse me – is different from a duty to go as far left as possible.” *Id.* The court was correct in the evaluation that it was not Conan’s duty to go as far left as possible. In other words, being safer by moving further left does not render a failure to move further left negligent. Conan fulfilled his duty to Martin when he maneuvered around Martin and Martin’s trailer. If Martin had remained standing by his truck and not moved into Conan’s path, he never would have been struck. It didn’t matter how far left Conan went – it only mattered that Martin stepped out into the lane occupied by a moving truck.

RCW 46.61.245 required Conan to exercise due care to avoid colliding with Martin. Conan complied with that standard and “did everything to clear that obstacle.” RP 13. Conan complied with his “duty of clearing the object, that being the other truck and trailer in the road.” *Id.*

RCW 46.61.240 provides:

Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an

intersection shall yield the right-of-way to all vehicles upon the roadway.

In fact, the true cause of the accident was that Martin violated RCW 46.61.240 when he failed to yield the right-of-way to Conan and entered the roadway as Conan's truck was maneuvering around Martin's parked truck. RCW 46.61.235 required Martin to not suddenly leave a place of safety and move into the path of a vehicle which is so close that it is impossible for the driver to stop, yet that is exactly what Martin did. As Heaphy testified, Martin walked out into the roadway as Conan's trailer passed wide around Martin's trailer. CP 86. Martin violated RCW 46.61.235 when he left the safety of his position by his trailer and entered the roadway.

This is not a set of facts where Martin would have had the right-of-way under 46.61.240. Martin would have had the right-of-way had he entered the roadway within a marked/unmarked crosswalk at an intersection. Here, Martin entered the roadway of a freeway onramp as Conan's tractor trailer was in the process of maneuvering around Martin and his trailer. Conan met his burden, Martin did not and therefore summary judgment was warranted. Considering these undisputed facts, for Mr. Martin to prevail herein he must demonstrate a legally cognizable duty Conan owed to Martin that is supported by these facts.

b. Conan fulfilled his duty by properly checking his mirrors.

Martin argues that Conan breached his duty to Martin by failing to continuously watch his right-rear mirror, to watch for Martin as he passed. If, in fact, Conan had done so he would have breached his duty to others. As Conan's vehicle was moving, he was required to split his vision right, left, and forward. RP 12. To simply focus on one of those three areas, may have, in fact, been, at least arguably, breaching a duty." (Emphasis added). *Id.* It's illogical for Martin to argue that Conan had to look into the rear view mirror exclusively, forsaking his duty to watch where he was going. Just because Martin chose (inappropriately) to walk into the roadway instead of first letting Conan's truck and trailer pass does not change the duty that Conan had. Conan fulfilled his duty – it is Martin who did not.

Further, as the trial Court pointed out:

...[t]he fact that Mr. Martin can come out into the roadway and stand up and have him be struck by the load that Mr. Conan is carrying is to put in place a duty that not only goes against common sense, but I think goes against any legal theory in that a truck driver simply cannot be expected to drive forward watching only one mirror because a person was standing beside a truck. RP 13.

Conan exercised due care required by RCW 46.61.245 by avoiding a collision with Martin and his truck. To require Conan to anticipate that

Martin would enter the roadway is to attach a duty to avoid a moving target. Such a position is nonsensical and not supported in law. Conan testified that he saw Martin standing by his trailer. CP 83. Conan then exercised due care by watching all of his directions as he maneuvered, the mirrors to the left and the right, and looking ahead. RP 12. When Conan again checked his right mirror, he saw Martin lying in the roadway and stopped immediately. *Id.* Conan met his duty by “checking mirrors as well as looking forward and driving and he had all three to focus on.” RP 12-13. No breach of any duty occurred, so summary judgment was warranted.

CONCLUSION

For Martin to prevail on appeal he must demonstrate that there is a material issue of fact in controversy that is essential to the motion decided against him at the trial Court. That motion was that the uncontested facts demonstrate that Conan fulfilled his duty to Martin and that Martin failed to convince the court of a different, higher duty under the law.

Martin has failed to demonstrate that there are any facts in controversy that are material to the trial Court’s decision, and would have altered the outcome. There is no dispute that Conan moved his truck and trailer to the left to avoid striking Martin or his truck. There is no dispute that until Conan’s cab passed Martin, Martin was out of harm’s way from

Conan's load. There is no dispute that had Martin remained where he was when Conan passed him then Martin would never have been struck. There is no dispute (because Martin admitted it) that Martin moved out of the safe position after he was out of direct sight by Conan and moved into danger so he could retrieve a wallet in the roadway. These are the uncontroverted facts upon which the trial Court based its finding of no breach of duty by Conan and dismissed the claims. Considering that Martin makes no reasonable argument that any material facts are in actual controversy, the trial Court's ruling on this motion should be upheld.

The only other way for Martin to prevail in this appeal is to prove to this Court that the Trial Court applied the wrong duty of care to the undisputed facts. However, Martin can not do so. Despite Martin's arguments in this case, there was no error by the trial Court in rejecting Westphal's opinion as to a higher duty of care. Martin's trial counsel admitted that there was no legal support for such a higher duty. In fact, Westphal and Martin argue the absurd position that Conan's only duty was to continuously watch Martin to the detriment of all others on the road. While such a position would seek to insulate Martin from his own mistake in entering the roadway, there is no support for that position at law or under the facts of this case.

Conan respectfully requests this Court to affirm the trial court's ruling of summary judgment in favor of defendants because the undisputed facts support the Court's decision that Conan met his duty to Martin, and because Martin has failed to articulate any other duty which is legally cognizable under the facts of this case.

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CERTIFICATE OF SERVICE

I, Yalda Biniazan, certify that on October 20, 2009, I caused a true and correct copy of this to be served on the following in the manner indicated below:

<u>Attorneys for Plaintiff</u> David A. Williams 9 Lake Bellevue Drive, Ste 104 Bellevue, WA 98005	<input type="checkbox"/> Hand Delivery <input type="checkbox"/> Legal Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/> E-mail
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DATED this 20th day of October, 2009.

By: 
Yalda Biniazan