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No. 63590-5 I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

LARRY MARTIN

Plaintiffs/Respondents,

v.

JEFFREY CONAN et al.

Defendant/Petitioners.

APPELLANT'S BRIEF

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

*Appellate Counsel for Plaintiffs/Respondents
Larry Martin et al.:*

DAVID A. WILLIAMS, WSBA #12010
Nine Lake Bellevue Drive, Suite 104
Bellevue, Washington 98005
Telephone: 425-646-7767
Facsimile: 425-646-1011



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INTRODUCTION

RPC 3.3 Candor Toward the Tribunal

“A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer,..”

All lawyers know that a Summary Judgment motion must be decided based upon the version of events most favorable to the non-moving party.

Does it not follow that when the moving party’s counsel argues any other version as grounds for Summary Judgment; he has failed his duty of candor with the tribunal, in effect luring the Trial Court into reversible error?

That is what happened in this case.

The Defendant Conan, a commercial truck driver operating a large rig with a wide load, had just left the parking lot of a "weigh station", when he knocked down and ran over a pedestrian without even realizing he'd done it. He had taken his eyes off the pedestrian as he passed him. Within an hour of the incident, Conan gave a recorded statement to the police, in which he:

Admitted seeing the pedestrian's rig parked on the side of the road as he approached;

Admitted seeing the pedestrian alongside his truck as he approached;

Claimed to be travelling slowly, "5 to 7, maybe 8 miles per hour" as he approached;

Admitted that he had no idea what the pedestrian was doing;

Admitted that he continued past the pedestrian without slowing down;

Admitted that he "guessed" that he had "7 or 8" feet of clearance as he passed the pedestrian;

Admitted that he did not maintain visual contact with the pedestrian in his side mirror as he passed him;

Admitted that without even realizing it, he "clipped" the pedestrian, knocked him to the ground, and then ran over his legs.

The pedestrian was Plaintiff Larry Martin, who had parked his rig and gotten out to retrieve a wallet he'd seen in the road. Martin sued Conan.

Almost three years later, at his deposition, Conan changed his story, now claiming that Martin was safely tucked behind his parked rig as Conan approached and passed him, and that he (Conan) had swung his rig "as far to the left as possible, to give as much clearance as possible" when passing Martin.

Conan's counsel brought a Motion for Summary Judgment based upon the supposedly "undisputed fact" that Martin had been behind his rig as Conan approached, but had inexplicably "walk[ed] into the middle of a freeway onramp" to pick up the wallet as Conan passed him, and had been hit as he was standing back up.

Martin's previous counsel opposed the Motion with an expert's declaration flatly stating that Conan was negligent, even based upon his new story. But the Trial Court didn't consider the declaration, though there was no objection or motion to strike it, and granted Summary Judgment.

ASSIGNMENT OF ERROR

1. The Trial Court erred in failing to consider the expert Declaration of Wade Westphal, which specifically states that Defendant Conan breached the standard

- of care for commercial truck drivers and caused the accident in question.
2. The Trial Court erred in granting Defendant's Motion for Summary Judgment and in denying Plaintiff's Motion for Reconsideration.

Issues

1. In the absence of an objection, let alone a ruling striking it, didn't the expert's declaration defeat Summary Judgment?
2. Did the evidence most favorable to the non-moving party Martin, including Conan's own original statement, recorded about 60 minutes after the incident, defeat Summary Judgment by documenting Conan's foolishness, with or without expert testimony?

STATEMENT OF THE CASE

1. The incident basing the complaint occurred on March 16, 2005. The sole question being whether the evidence supports an inference that Defendant Conan's negligence was a proximate cause of the accident, the facts will be covered in detail.

The scene of the accident

2. The incident occurred at the Bow Hill Port of Entry weigh station, south of Bellingham near milepost 235. CP 108, 106. An aerial photograph of the weigh station was not placed in the record below, but one is included as

Appendix I, should the Court wish to take judicial notice as authorized by ER 201.

3. The incident occurred on the "back loop" of the exit road that leads from the weigh station parking lot, "loops" back past the weigh station itself, and then continues to the Interstate 5 on-ramp¹. CP 97. This is the "northwest corner" of the weigh station complex. Id. In the area of the incident the exit road curves sharply to the right. CP 86, CP 93. Martin's truck was parked on the right shoulder, off the road but very near the painted line, as seen below in the photo taken shortly after the incident. CP 93.



¹ Conan's Motion for Summary Judgment repeatedly referred to the exit road itself as a "freeway on-ramp". It is no such thing.

4. The record doesn't reflect the speed limit on the exit road but there is no dispute that it is designed to be travelled at very low speeds. Conan placed his own speed at under ten miles per hour throughout. CP 100.
5. On the morning of the incident the weather was "blowing hard" CP 108. It was "sprinkling" rain at the time of the incident and the roadway was "damp". CP 104.

Plaintiff's memory of the incident

6. Plaintiff Larry Martin ("Martin") was leaving the parking lot on the exit road when he thought he saw a wallet in the road. CP 114. He parked his truck on the right side of the exit road. Id. CP 93.
7. Martin's testimony as to what he did next is as follows (CP 116):

Q. So what I understand is that you went out into the road to see if any trucks were coming, correct?

A. Yes.

Q. You saw a wallet out there, and you wanted to go out and pick up the wallet, correct?

A. Yes.

Q. And you walked out around your truck to see if any other trucks were coming--

A. Uh-huh.

Q. ---correct? Is that a yes?

A. Yes.

Q. You saw a truck in the distance, correct?

A. Yes.

Q. You don't know how far away it was or how many truck lengths away, correct?

A. No.

Q. You think you had enough time to go out and get the wallet, so you did that, correct?

A. Yes.
(emphasis added)

8. Martin specifically denied that he walked out into the road as Conan's truck was "coming around him" (CP 115);

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.

Q. Right.

A. And if he would have been that close, I wouldn't have walked.

Q. If you saw that truck hauling trusses, you wouldn't have walked out there to pick up a wallet; is that right?

A. If he was closer, I wouldn't have walked.

(emphasis added)

As can be seen from the photo (CP 93), Martin had to walk "around" his truck to see back down the exit road because it was parked (off the road) in the turn, blocking the view rearwards.

9. Martin has no memory of the incident itself. CP 114. But as set forth above, he clearly remembered, and unambiguously testified that before fetching the wallet,

he assured himself that Conan was a safe distance away, and specifically denied that he would have ever stepped into the road as a truck was passing him.

Conan's original version of events

10. 911 was called immediately after the incident. CP 99. By 9:04 a.m. Washington State Patrol officers had been dispatched. CP 108. They arrived in about 10 minutes. CP 106.
11. At 9:39 a.m., within an hour or so of the incident, Detective Craig Cardinal of WSP began taking a recorded statement from Conan. CP 96. (Conan's Statement is Appendix II) When asked "what happened here", Conan replied (CP97):

"I was exiting the scale.....uh, he had checked my permit at the scale house....I was...as I was driving along the exit road, a uh, truck was pulling a van had pulled over to the right shoulder...uh, the driver had exited the cab...he is...he was walking toward the end, the back of his, of the van as I was coming up on it...uh, he got to the back of the van...as I was going by him uh, as I went by him, I made sure that I was quite clear of his truck and trailer and as I went by, I got near to the front where his truck was...I looked in my mirror and I saw that he was on the ground..." (emphasis added)

As can be seen, Conan said nothing about "swinging over to the left" to avoid Martin.

12. Conan went on to tell Detective Cardinal that:

"...another driver that was about 100 yards behind me, he had pulled up...he stopped...he...he saw the whole accident happen...he ran up and explained that uh, my load that was, sticks out about two and a half feet outside of my truck uh, out of my trailer, had clipped him, had knocked him down onto the ground as I was going by him and he had rolled and then my tandem axle on my trailer ran over his ankle basically". Id. (emphasis added)

13. Detective Cardinal then "locked down" one point (CP 97-98) :

Cardinal: Okay and when you went by him here, you said he'd walked to the back....did he step uh, did he step behind his vehicle at that point?

Conan: No, he was at the side.

Cardinal: Right at the corner of it?

Conan: Yeah, he was right at the corner...

Cardinal: ...of...of the very back of the van.

Cardinal: So his body would...would stick out maybe two feet off the van?

Conan: Uh, yeah, about that.

(emphasis added)

As can be seen from the photo, if Martin was at the side of his truck, he was in the road. CP93. According to Conan, Martin was "just standing there" CP 98.

14. Conan told Detective Cardinal:

"I was guessing I probably had between 7 to 8 feet of clearance as I was going by him so I...didn't think there was any problem whatsoever with going by him". (emphasis added)

Again, as seen, Conan said nothing about maneuvering to the left to avoid Martin. He said he felt there was no problem "whatsoever" going by him.

15. Finally, Conan told Cardinal that Martin had a wallet in his hand as he lay on the ground AFTER the incident. CP 100. Thereafter the two speculated that Martin might "possibly" have entered the road to fetch the wallet as Conan was passing him, (CP 100-101) though Conan had already told Cardinal that the eyewitness "100 yards back" had said nothing of the kind.

Conan incorporates the wallet into his written statement

16. Apparently shortly after his recorded statement, Conan wrote a statement. CP 106. Conan's written Statement is Appendix III. He reiterated that Martin was "standing at the rear left-hand corner" of his truck as Conan "started to go by

him". Id. He reiterated his claim that he was travelling about "5-7 mph" as he did so. Id. He reiterated that he "looked in [his] right side reer [sic] view mirror to make sure I was clear", and as he looked, he "saw [Martin] on the ground".Id. He wrote nothing about maneuvering his rig to the left to avoid Martin.

17. He also reiterated that the eyewitness "100 yards behind" told him his wide load had "clipped" Martin, but now Conan wrote that the witness told him he'd "clipped" Martin "when [Martin] had bent over to pick up a wallet that was on the ground". Id.

18. Conan did not explain in his written statement (1) how, exactly, the witness could possibly have seen the incident at all from 100 yards back around the turn through Martin's truck (2) how he could tell from 100 yards back that Martin was "bending over to pick up a wallet"; or (3) how, exactly, Martin ended up with the wallet in his hand after being run over by Conan's truck, if he was hit as he "bent over to pick [it] up".

The Eyewitness Heaphy's *original* statement

19. The eyewitness "100 yards back" was John Heaphy. He signed a written statement the day of the accident. CP 110. Mr. Heaphy's Statement is Appendix IV.

20. Heaphy attended Martin at the scene and was therefore aware of the wallet; the statement he signed says Martin had "exited his truck to retrieve a wallet in the road". Id.

21. Heaphy's written statement specifically says that Conan was "passing [Martin's] position" when the incident occurred. Id. It says that Martin "moved toward" Conan's truck as it was passing him and was struck by "protruding lumber". Id.
22. The statement does not say that Martin was struck when he "bent over", and indeed, doesn't even say he was moving towards a wallet. It says, simply, that Martin moved "towards" the truck as it passed "his" position.
23. Heaphy's statement doesn't say how far he was from what he believed he saw. It doesn't describe Conan's speed as he was "passing [Martin's] position...". It doesn't say that Conan "swung wide" as he was "passing [Martin's] position". It doesn't describe which direction Martin was facing as he supposedly moved "towards" the truck. It doesn't describe how far "towards the truck" Martin moved, or why he moved.

Post accident photographs

24. The State Patrol took photographs, only a few of which ended up in the record. Photos of Conan's truck establish that he absolutely did not swing his rig "as far as possible to the left", if he "swung wide" at all. CP 140, 141.

Conan Changes His Story At Deposition

25. Conan was deposed on January 7th, 2008, nearly three years after the accident. Only a few pages of his deposition was put into the record, but the Motion quoted this testimony for the Court (CP 91):

Q. Okay. Did you see him at the back of his trailer before you started to pass his trailer?

A. Yes.

Q. How far back were you when you first saw him at the back of his trailer?

A. I'm not sure how many feet or yards it was.

Q. Was it at least the length of your tractor?

A. I would say two or three.

Q. Two or three tractor lengths?

A. Yes.

Q. And how long did the plaintiff 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.

Q. So he was still back behind his truck---back behind his trailer, as far as you knew?

A. As far as I knew.

Q. That was the last place you saw him?

A. Was standing behind his trailer.
(emphasis added)

26. Conan's deposition testimony thus inarguably contradicted his recorded statement given within an hour of the incident(CP 97), in which it will be recalled he said:

Cardinal: Okay and when you went by him here, you said he'd walked to the back....did he step uh, did he step behind his vehicle at that point?

Conan: No, he was at the side.

Conan also testified at deposition that he “got as far left as possible, to give as much clearance as possible”. CP 151. This deposition testimony was Conan’s third description of the incident, but the first in which he described any sort of “evasive” action by him.

27. At deposition Conan testified that he "would guess" that he was traveling "7 to 8 miles per hour" as he passed Martin. CP 152. He acknowledged that it would take "not even a second" to stop his truck at that speed. CP 152.

Eyewitness Heaphy's Declaration

28. The eyewitness Heaphy was not deposed before Summary Judgment.

29. On January 6th, 2008, however, the day before Conan’s deposition, Heaphy had signed a Declaration drafted on Conan's defense counsel's stationary.

Heaphy’s Declaration is Appendix V. It says in part:

“5. The weigh station onramp makes a curve to the right. As I approached toward the onramp, I noticed a truck in front of the flat-bed with the trusses parked to the side of the onramp along the curve. The driver was standing behind his trailer.

6. As the flat-bed 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.

7. When the driver stood back up, the end or the trusses on the flat-bed hit him, knocking him down sharply and projecting his legs under the flat-bed, which ran over them".
(emphasis added) CP 86.

30. Thus Heaphy's declaration directly contradicts the statement he signed the morning of the incident, which says Conan's truck was passing Martin's position

when the incident occurred. The Declaration also added Heaphy's heretofore non-existent "observations" that 1) Martin "bent down" to pick "something" up, and 2) was struck when he "stood back up". CP86.

31. Heaphy's Declaration is also inconsistent with what he told Conan on the day of the incident. Recall that Conan himself told Detective Cardinal (CP 97):

"...another driver that was about 100 yards behind me, he had pulled up...he stopped...he...he saw the whole accident happen...he ran up and explained that uh, my load that was, sticks out about two and a half feet outside of my truck uh, out of my trailer, had clipped him, had knocked him down onto the ground as I was going by him and he had rolled and then my tandem axle on my trailer ran over his ankle basically".
(emphasis added)

The Summary Judgment Motion

32. Conan through counsel filed a Motion for Summary Judgment on March 2nd, 2009. The second sentence of the Motion (Appendix VI) sets forth the "undisputed facts" as follows (CP74):

"Plaintiff's alleged injuries are solely due to his own negligent behavior in walking into the middle of a freeway onramp in front of Mr. Conan's oncoming tractor-trailer, bending down to pick up a wallet, and standing back up, without noticing Mr. Conan's clearly and legally marked, oversized load, which struck Plaintiff."
(emphasis added)

33. The Motion listed the "uncontested facts" beginning on its second page. CP 75. It quoted Conan's deposition testimony that Martin was behind his truck at all times before the incident. CP 76. The Motion referred to Heaphy's declaration, citing it as "undisputed evidence" that (CP 77):

"... as the flat bed truck with trusses passed wide around the truck that had pulled over ... Plaintiff walked into the on ramp toward the passing truck,

and bent down to pick something up ... when Plaintiff stood back up, the end of the trusses on the flat bed hit him ...”
(emphasis added)

The Motion mentioned Conan’s original oral statement and his original written statement but neither quoted them nor pointed out their inconsistencies with Conan’s deposition. CP 76. The Motion did not apprise the Court of the eyewitness Heaphy’s original written statement that passed Martin’s position on the road, let alone quote it or point out its inconsistencies. Heaphy’s Declaration was presented as his pristine account. CP 76-77.

34. The Motion for Summary Judgment also ignored Martin’s specific testimony that he saw Conan's truck safely in the distance before entering the road. The only mention of Martin's deposition testimony in the Motion for Summary Judgment is a spectacularly misleading partial quote, used to "show" that Martin "agreed" that he had been negligent (CP 77-78):

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.

Q. Right.

35. The "quote" did NOT include the next five lines of Martin's testimony on that point, to wit (CP 115):

"A. AND IF HE WOULD HAVE BEEN THAT CLOSE, I WOULDN'T HAVE WALKED.

Q. If you saw that truck hauling trusses, you wouldn't have walked out there to pick up a wallet; is that right?

A. IF HE WAS CLOSER, I WOULDN'T HAVE WALKED."
(emphasis added)

36. Martin through counsel defended the motion with a declaration from Wade Westphal, an expert in commercial trucking. CP 131-141. Westphal's Declaration is Appendix VII. Westphal's declaration states that Conan "violated the standard of care required of a commercial truck driver in the State of Washington, and this violation was a proximate cause of the accident with Plaintiff Larry Martin". CP 142.

37. The crux of Westphal's opinion was that (1) Conan, being aware of Martin's presence, had a duty to monitor his passenger side mirror to ensure that he safely passed; and (2) had he done so, by his own testimony Conan could have prevented the accident by simply applying his brakes. CP 142-145.

38. Westphal's opinion is not dependant upon whether Martin was "beside" or "behind" his trailer. In fact the Declaration specifically refers to the eyewitness Heaphy's Declaration and its version of events. CP 144.

39. The Court disregarded Westphal's declaration and granted Summary Judgment.

CP 153-155. Martin moved for Reconsideration which the Court denied. CP

160-168.

40. In opposing Reconsideration, (Appendix VIII) Conan's counsel wrote:

"In support of its Motion for Summary Judgment, Defendants produced uncontested evidence of the following:

- Plaintiff negligently walked into the middle of the freeway on-ramp directly in the path of Defendant Jeffrey Conan's oncoming flat-bed trailer.

- Plaintiff negligently walked in front of Mr. Conan's oncoming ... load only after Mr. Conan passed Mr. Martin standing behind his truck along the side of the road;
- Plaintiff negligently walked from the side of the road behind his trailer, into the middle of the road way ... even though Mr. Conan was driving wide left around him along the side of the road;"
(emphasis added)
CP 164.

SUMMARY OF ARGUMENT

1. This Court should review the record de novo.
2. If the evidence as cast in the light most favorable to Martin supports an inference that negligence by Conan was a proximate cause of the incident, the Trial Court must be reversed.
3. Wade Westphal's expert declaration states unambiguously that Conan was negligent, by each and every version of the facts, including Conan's revised version and the eyewitness Heaphy's altered "recollection". Westphal's Declaration declares Conan's negligence to have been a cause of the accident.

The Trial Court's unexplained, inexplicable decision to disregard the declaration was error.

4. Even without Westphal's Declaration, evidence cast in the light most favorable to Martin supports the inference that (1) Martin looked for and saw Conan's truck a safe distance away from him before entering the access road to retrieve the wallet; (2) Martin retrieved the wallet; (3) Conan approached Martin while the latter was still in the road, "beside" his truck; (4) Conan chose to continue past Martin, incorrectly "guessing" that he had "7 or 8 feet" of clearance; and (4) Conan's wide load "clipped" Martin as he passed, which would have been easily preventable had Conan not (5) broken off visual contact with Martin as he passed him, or simply stopped his truck until Martin re-entered his. This scenario obviously supports an inference that Conan's negligence was a proximate cause of the incident.

ARGUMENT

I. The Standard of Review is De Novo

It is axiomatic that the Trial Court's ruling on a motion for Summary Judgment is reviewed de novo. Castro v. Stanwood School Dist. No. 401, 151 Wn.2d 221, 86 P.3d 1166 (2004); Jones v. Allstate Ins. Co. 146 Wn.2d 291, 45 P.3d 1068 (2002).

II. Summary Judgment Must Be Reversed If The Evidence Reviewed In The Light Most Favorable to Martin, The Non-Moving Party Support The Inference That Negligence By Conan Was a Proximate Cause of The Incident.

No less axiomatic is the Court's duty, when reviewing the evidence in the context of Summary Judgment, to do so in the light most favorable to the non-moving party. Jones, supra, 146 Wn.2d 300. Fact issues may be decided as a matter of law only if reasonable minds could reach but one conclusion. Sherman v. State, 128 Wn.2d 164, 184, 905 P.2d 355 (1995).

An order granting Summary Judgment will be reversed if a genuine issue of fact exists. Hartley v. State, 103 Wn.2d 768, 698 P.2d 77. (1985)

III. The Expert Wade Westphal's Declaration Defeats Summary Judgment By Conan's Own Version of the Facts.

In addition to his obvious common law duty of care in operating his rig, Conan had a specific statutory duty to "exercise due care to avoid colliding with any pedestrian upon any roadway". RCW 46.61.245.

Surely Conan's counsel will not dare tell this Court that the evidence he offered the Trial Court in support of Summary Judgment was "uncontested", let alone cast in the light most favorable to Martin, the non-moving party. In fact, Conan's Motion was obviously based on the least favorable and least credible evidence – the Heaphy Declaration signed three years after the accident, in which Heaphy directly contradicted his earlier statement from an hour after the accident.

It shouldn't have mattered.

Wade Westphal's Declaration states in part:

“4. In my professional opinion on a more probable than not basis, on March 16, 2005, Defendant Jeffrey Conan violated the standard of care required of a commercial truck driver in the State of Washington, and this violation was a proximate cause of the accident with Plaintiff Larry Martin.” (emphasis added)

Westphal's Declaration sets forth in detail the basis of his opinion:

“6. In the present matter, Defendant Conan did not exercise due care or proper precaution as he drove past Plaintiff. Defendant Conan was hauling an over width load on a curved exit from a state truck scale parking lot. He was aware that Plaintiff was pedestrian and was in the roadway near Defendant's tractor-trailer (Conan Dep., p 38, ll. 5-21), and he was aware that Plaintiff was at least as tall as the portion of his load that extended beyond the side of his trailer. (id., p. 43, ll. 9-11). Defendant did not know why Plaintiff was in the roadway or what he planned on doing. (Id., p. 50, ll. 11-18). Although Plaintiff left his line of sight after Defendant's tractor passed Plaintiff (Id., p. 38, ll. 16-23), Defendant knew that Plaintiff still had to be in the area. Nonetheless, Defendant Conan did not take care to watch for Plaintiff in his mirror.” (emphasis added)

* * *

“8. Defendant Conan testified that as he passed Plaintiff,, he wanted to give as much clearance as possible around Plaintiff's "truck". (Conan Dep., p. 39, ll. 4-12). He pointed out that he was looking in his mirror to make sure that he had cleared Plaintiff's "tractor" by a large distance. (Id., ll. 20-23). Only then did he use his mirrors to look back to the rear of his trailer, at which point he saw Plaintiff on the ground. (Id., ll. 23-25). Defendant had not kept his eye on the rear of his trailer and the over-width portion of the load to make sure he did not strike anything or anyone. This violated the standard of care.” (emphasis added)

Westphal's Declaration specifically states that Conan was negligent even based upon eyewitness Heaphy's changed testimony:

“9. The following truck driver, witness John Heaphy, declared that he saw Plaintiff walk out in to the roadway toward the passing truck, bend down to pick something up, and then stand back up, only to then be knocked down by

an oversized portion of Defendant's load. (Heaphy Decl. para. 6, 7). Defendant Conan testified at his deposition that at the speed he was traveling prior to the accident, it would have taken him "not even one second" to stop his tractor-trailer. (Conan Dep., p. 40, ll. 17-20). Based upon Defendant Conan's own testimony, had he properly been watching the rear portion of his trailer as he should have, there would have been time for him to see Plaintiff walk into the roadway and to stop his rig before striking him." (emphasis added)

There is no conceivable basis to disregard Westphal's Declaration and Conan never offered any. Conan didn't move to strike the Declaration (there being no conceivable grounds to do so). Conan didn't object to any specific portion of the Declaration (there being no conceivable grounds to do so). Conan's only response to Westphal's Declaration was to fecklessly characterize Westphal's opinions as "speculation", though they were specifically based on Conan's own testimony that he could have stopped his truck in "not even one second", but wasn't watching Martin as he passed.

IV. Even Without Westphal's Declaration, When Properly Reviewed In The Light Most Favorable To Martin, The Evidence Obviously Supports An Inference That Conan Was Egregiously Negligent.

Here is the evidence as cast in the light most favorable to Martin, the non-moving party:

1. Before entering the road, Martin assured himself that Conan's truck was a safe distance away from him. Martin specifically testified to this at his deposition. It is admissible lay opinion under ER 701. See generally Ashley v. Hall 138 Wn.2d 151, 978 P.2d 1055 (1999). At trial, Conan's counsel would be free to argue that Martin's assessment was wrong, but for

purposes of summary judgment it must be assumed to have been correct--
Conan was a safe distance away as Martin entered the road to get the wallet.
This means that Conan must have sped up AFTER Martin entered the road,
probably because he didn't realize there was pedestrian in his path.

2. Martin had retrieved the wallet BEFORE Conan's truck passed him. Martin had the wallet *in his hand* as he lay on the ground after having been struck. He obviously had picked it up before being hit. But the allegation that Martin knowingly bent over to pick up the wallet as Conan was bearing down on him, then was struck just as he rose from picking it up did not exist until Heaphy signed a declaration prepared for him on defense counsel's pleading paper, three years after the accident.

Recall that in his original statement, the eyewitness Heaphy said nothing whatsoever about Martin even "bending over", let alone being struck as he rose from picking up the wallet. He said Martin "moved towards" Conan's truck.

Neither did Conan in his own original statement quote Heaphy as saying anything about Martin "bending over", let alone being struck as he rose from picking up the wallet. Conan reported that Heaphy told him that Conan's truck "clipped" Martin as he was "going by him".

The credible evidence obviously demonstrates that Martin had already picked up the wallet when Conan "arrived".

3. Martin was "beside his truck" IN the road, as Conan approached him, NOT "behind" it. Conan himself specifically confirmed this within an hour of the accident, as did Heaphy.

Recall once again Conan's oral statement (CP 97-98):

“Cardinal: Okay and when you went by him here, you said he'd walked to the back....did he step uh, did he step behind his vehicle at that point?

Conan: No, he was at the side.”
(emphasis added)

4. Conan was fully aware of Martin's presence in close proximity to Conan's rig as he passed. Conan's own estimate on the day of the accident was a "guess" that he had "7 or 8 feet" of clearance as he passed Martin.
5. Conan didn't know what Martin was doing and took no steps to find out. Again, Conan's own statement on the day of the accident confirms this.
6. Conan kept going. He didn't stop or even slow down.
7. CONAN FAILED TO MAINTAIN VISUAL CONTACT WITH MARTIN AS HE PASSED. Yet again, Conan confirmed this on the day of the accident.
8. Conan's wide load "clipped" Martin as he passed him and knocked him down; thereafter Conan ran over him.

Negligence and proximate cause are questions of fact for the jury. Ruff v. County of King, 125 Wn.2d 697, 709, 887 P.2 886 (1995). Will Conan's counsel dare suggest to this Court that no reasonable jury would find Conan's conduct as set

forth above to have been negligent, with or without the assistance of Wade Westphal's expert testimony?

It might be emphasized again that, not only is the version of events set forth above the most "favorable" to Martin, it is the most credible.

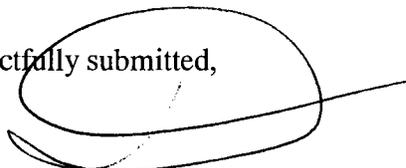
CONCLUSION

The Motion for Summary Judgment cast the evidence in the light least favorable to the non-moving party Martin using the least credible evidence. The proposition that Larry Martin "walked out from behind his truck" as Conan was passing him did not exist until someone in defense counsel's office drafted a piece of paper called a Declaration and obtained the eyewitness Heaphy's signature thereon.

The Motion for Summary Judgment should have been denied. The Trial Court should be reversed.

DATED this 31st day of July, 2009.

Respectfully submitted,



DAVID A. WILLIAMS
Attorney for Appellant
WSBA Number 12010