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COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

JOHN B. DILLINGER,

Appellant,

Vs.

RICHARD M. DIXSON, and JANE DOE DIXSON, and the marital
community properties composed thereof,

BRIEF OF APPELLANT DILLINGER

Chalmers C. Johnson, WSBA # 40180
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A. Summary Judgment was inappropriate in this case because considering the evidence in the record in a light most favorable to Mr. Dillinger, reasonable minds could differ in determining whether Mr. Dixson was negligent in failing to see Dillinger prior to hitting Dillinger with his car.5

1. It was not raining when Mr. Dixson failed to see Mr. Dillinger walking across the roadway and hit him. 5

2. The record shows that Mr. Dillinger was crossing the roadway from Mr. Dixson’s right to his left, and crossed two lanes of traffic in front of Mr. Dixson before Mr. Dixson hit Mr. Dillinger. Reasonable minds could differ in determining whether this afforded Dixson more than sufficient opportunity to have seen and avoided Dillinger, had he been exercising due care. 6

3. The record shows that Ms. Bohl was able to clearly see Mr. Dillinger walking across the roadway from 100 yards away while travelling in the opposite direction from Mr. Dixson, raising the question, upon which reasonable minds could differ, as to whether Dixson would have seen Dillinger had he been exercising the same level of due care as Bohl had on that night. 7

4. The records shows that Dillinger began crossing the roadway while Mr. Dixson was stopped at a red light facing Dillinger, providing Dixson with more of an opportunity to have exercised due care and notice Dillinger crossing the roadway than Ms. Bohl had, because he was observing the roadway before him while stationary. 7

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Rules

CR 56(c).4,5

I. ASSIGNMENTS OF ERROR

1. The Court found that there was no genuine issue of fact as to whether Mr. Dixon, the driver in this auto/pedestrian accident was liable to any extent.
2. The Court accepted the Respondent's argument that, because the driver in this case, Mr. Dixon, had the legal right of way, and Dillinger, the pedestrian, did not, Mr. Dixon was excused from the requirement of exercising due care to avoid hitting a pedestrian over whom he had right of way on a roadway.

II. APPELLANT'S STATEMENT OF THE ISSUES

1. Whether the trial Court erred in finding that no reasonable juror could have found that Mr. Dixon, the driver in an auto/pedestrian collision, was, to any extent, at fault where there was testimony from another driver who saw the pedestrian from 100 yards away immediately prior to the accident.
2. Whether Washington Statutory law excuses a driver who has the legal right of way from the requirement of exercising due care to avoid hitting pedestrians.

III. APPELLANT'S STATEMENT OF THE CASE

The motor vehicle accident from which this case arose occurred on December 17, 2009. It involved a vehicle driven by the Respondent, Mr. Dixon, hitting a pedestrian, Mr. Dillinger (Appellant), while Dillinger was crossing a five lane roadway in Poulsbo, Washington. What makes the record perhaps unique, in this case, is that neither party claims to have seen what happened. Only one person actually observed the events leading up to the accident and the accident. Mr. Dixon, the driver, testifies that he was not aware of Mr. Dillinger until he had already hit him with his car. (CP

111) Mr. Dillinger does not remember the evening at all. The police officer who responded to the scene, Officer Sabado, admits that he was not present at the time of the accident, and, since he only arrived later, can not testify as to what actually happened. (CP 136) A third party witness, however, did see what happened. Ms. Sharol K. Bohl is a nurse who was working in Seattle. She was returning home to Poulsbo that night. She saw Mr. Dillinger before and during his walk across the street, and was not only present to witness the accident, but stopped to render aid to Mr. Dillinger after he was injured. (CP 54-56, 97)

Ms. Bohl, in her Declaration, states that she reported, in August of 2010, that the evening was dark, but clear, when Mr. Dixon hit Mr. Dillinger, not raining, as Dixon argued at Summary Judgment. She also supports this (that it was not raining when the accident took place) in her deposition testimony. (CP 57-58, 96-98)

One of the theories that Mr. Dixon offered to the Court at Summary Judgment was that Mr. Dillinger somehow walked across both lanes going Mr. Dixon's direction, across Mr. Dixon's lane and then doubled back to fling himself into Mr. Dixon's path, without Mr. Dixon ever having seen Dillinger. This theory which was rejected by Ms. Bohl, the only eye witness, (CP 83-84). Even if the Court were to have accepted that completely unsupported fantastical story (Mr. Dixon made it abundantly clear that he never saw Mr. Dillinger at all until after his car had actually struck Mr. Dillinger. He even admitted as much to Ms. Bohl

at the scene of the accident. (CP 58)), the fact pattern still would still have Mr. Dillinger crossing right in front of Mr. Dixon with plenty of time and opportunity for Dixon to have seen him and avoided a collision.

Ms. Bohl clarified, through her declaration and the drawing included, as well as through her deposition testimony, that Mr. Dillinger was crossing from Dixon's right, that he slowly walked across two lanes of traffic in front of Mr. Dixon before the collision, that She could see Dillinger from about 100 yards away as she was approaching from the opposite direction, moving faster than Mr. Dixon, and that there was nothing obstructing Mr. Dixon's view of Dillinger as Dillinger crossed the two lanes in front of Dixon's vehicle. (CP 53-54, 58, 64, 69, 87, 96-98) Ms. Bohl testified, in her declaration and deposition, that she could clearly see Mr. Dillinger, a pedestrian, walking slowly across the roadway from not only 100 years away, but across five lanes of traffic, as she approached him at a higher rate of speed than Dixon (Bohl estimates she was doing about 40 while Dixon testifies he was going much slower, starting from a stop at the light). (CP 53-54, 58, 64, 96-98)

Ms. Bohl observed that Mr. Dillinger had begun to cross the street while Mr. Dixon's light was still red. (CP 84-85) This means that Dillinger was crossing the street before Mr. Dixon could legally have started moving, giving Dixon even more time and opportunity to have noticed Dillinger beginning to cross the road had Dixon been making any attempt to keep a lookout towards the road ahead of him.

IV. STANDARD OF REVIEW

In this appeal, the Appellant is asking the Court to review an Order granting Summary judgment on Mr. Dillinger's claims against Mr. Dixon. Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). *Herskovits v. Group Health Coop.*, 99 Wash.2d 609, 613, 664 P.2d 474 (1983); *Wilson v. Steinbach*, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982).

On summary judgment motion, the reviewing court takes the position of the trial court, assuming facts most favorable to the nonmoving party. *Wilson v. Steinbach*, supra at 437, 656 P.2d 1030; *Highline Sch. Dist. 401 v. Port of Seattle*, 87 Wash.2d 6, 15, 548 P.2d 1085 (1976); *Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co.*, 81 Wash.2d 528, 503 P.2d 108 (1972); *Wood v. Seattle*, 57 Wash.2d 469, 473, 358 P.2d 140 (1960). The burden is on the moving party, in the original motion for Summary Judgment to prove there is no genuine issue as to a fact which could influence the outcome at trial. *Jacobsen v. State*, 89 Wash.2d 104, 108, 569 P.2d 1152 (1977). See also *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash.2d 255, 256-57, 616 P.2d 644 (1980) (summary judgment is not appropriate when reasonable minds might reach different conclusions); *Rounds v. Union Bankers Ins. Co.*, 22 Wash.App. 613, 617, 590 P.2d 1286 (1979) (if

there is a genuine issue of credibility, summary judgment should be denied).

The Appellate Court reviews summary judgment orders de novo. *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). An order granting summary judgment will be affirmed only if, viewing the evidence in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Ranger*, 164 Wn.2d at 552.

V. ARGUMENT FOR REVERSAL

A. Summary Judgment was inappropriate in this case because considering the evidence in the record in a light most favorable to Mr. Dillinger, reasonable minds could differ in determining whether Mr. Dixon was negligent in failing to see Dillinger prior to hitting Dillinger with his car.

1. It was not raining when Mr. Dixon failed to see Mr. Dillinger walking across the roadway and hit him.

Ms. Bohl, in her Declaration, states that she reported, in August of 2010, that the evening was dark, but clear, when Mr. Dixon hit Mr. Dillinger, not raining, as Defendant claims. She also supports this in her deposition testimony. (CP 57-58, 96-98) This is a genuine issue of fact. A jury could find that, on a clear night, Mr. Dixon was negligent in failing to see a slow moving pedestrian, walking across his field of vision under streetlights.

2. The record shows that Mr. Dillinger was crossing the roadway from Mr. Dixon's right to his left, and crossed two lanes of traffic in front of Mr. Dixon before Mr. Dixon hit Mr. Dillinger. Reasonable minds could differ in determining whether this afforded Dixon more than sufficient opportunity to have seen and avoided Dillinger, had he been exercising due care.

Mr. Dixon made it abundantly clear that he never saw Mr.

Dillinger at all until after his car had actually struck Mr. Dillinger. He even admitted as much to Ms. Bohl at the scene of the accident. (CP 58) The only evidence available, provided by Ms. Bohl, the only eye witness to the event, shows that that Mr. Dillinger was crossing from Dixon's right, that he slowly walked across two lanes of traffic far in front of Mr. Dixon as he approached from far away, after waiting for a light to change, before the collision, that She could see Dillinger from about 100 yards away, and that there was nothing obstructing Mr. Dixon's view of Dillinger as he crossed. (CP 53-54, 58, 64, 69, 87) At the very least the facts taken in a light most favorable to Dillinger present a genuine issue of material fact as to whether Mr. Dixon was negligent in failing to keep at least as diligent a lookout for pedestrians as Ms. Bohl was keeping on that night. Based on the facts in the record, reasonable minds could certainly differ as to whether Dixon's failure to notice Dillinger was a result of his negligent failure to keep a proper lookout.

3. The record shows that Ms. Bohl was able to clearly see Mr. Dillinger walking across the roadway from 100 yards away while travelling in the opposite direction from Mr. Dixon, raising the question, upon which reasonable minds could differ, as to whether Dixon would have seen Dillinger had he been exercising the same level of due care as Bohl had on that night.

Ms. Bohl testified, in her declaration and deposition, that she could clearly see Mr. Dillinger, a pedestrian walking slowly across the roadway from not only 100 yards away, but across five lanes of traffic, as she approached him at a higher rate of speed than Dixon (Bohl estimates she was doing about 40 while Dixon testifies he was going much slower, starting from a stop at the light). (CP 53-54, 58, 64) A reasonable juror could certainly find that, if one driver, under identical weather and lighting circumstances, could and did easily see Mr. Dillinger, who was not even in her lane of travel, from 100 yards away, Mr. Dixon's failure to notice Dillinger, when Dillinger was actually crossing his lane of travel, was the result of negligence on Dixon's part.

4. The records shows that Dillinger began crossing the roadway while Mr. Dixon was stopped at a red light facing Dillinger, providing Dixon with more of an opportunity to have exercised due care and notice Dillinger crossing the roadway than Ms. Bohl had, because he was observing the roadway before him while stationary.

Ms. Bohl observed that Ms. Dillinger had begun to cross the street while Mr. Dixon's light was still red. (CP 84-85) This means that Dillinger was crossing the street before Mr. Dixon could legally have

started moving and while Dixson was some way off. One can clearly see that a reasonable juror, upon being presented with this evidence, could find that Mr. Dixson, who was stopped at a stop light, could only have missed seeing a pedestrian crossing from a lit sidewalk, and could only have continued to fail to notice the pedestrian as he slowly made his way across two lanes of traffic in front of Mr. Dixson's accelerating vehicle though the driver's negligent failure to exercise due care. This is so especially in light of the fact that Ms. Bohl, approaching from the opposite direction, moving in traffic rather than stopped with the luxury of being able to devote attention exclusively to the roadway before her, and exercising due care, did see Mr. Dillinger and continued to see him for 100 yards before passing where he was crossing the roadway.

B. Having the right of way does not excuse a driver from the requirement to keep a proper lookout and to exercise reasonable care to avoid pedestrians in the roadway.

The only legal issue before the Court raised in Dixson's motion for summary judgment was Dixson's apparently successfully argued position that where a driver has the right of way, he is free to throw caution to the wind, driver as negligently as he likes, and to run down any pedestrian who may be crossing the road with impunity. Whether Mr. Dillinger was intoxicated, whether he was wearing a dark jacket, whether he was crossing a roadway without availing himself of the protection of a crosswalk are all salient points for Dixson to have pursued in this case... as part of the affirmative defense of contributory negligence. However,

whether wearing a dark colored jacket or crossing the street at a point where his hotel and destination was located on the other side, rather than taking the half mile or so detour to use a crosswalk were negligence on Mr. Dillinger's part or not and how much are clearly issues to be determined by the jury based on the evidence, and not at summary judgment. Dixon's legal argument, and the only legal premise upon which the Order under appeal could be based that drivers who have the right of way over a pedestrian owe the pedestrian no duty of care is without merit and should be rejected by the Court.

Washington statutory law defines the "rules of the road" in Chapter 46.61 of the Revised Code. This section deals mainly, if not exclusively, with determining who has a right of way in different situations. Most germane to this case is section 46.61.245, which places a specific burden on drivers, regardless of whether they have the right of way in a particular situation, to exercise due care to avoid colliding with any pedestrian upon the roadway.

§ 46.61.245. Drivers to exercise care

(1) 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.

Although no evidence has been presented to prove that Dillinger was confused or incapacitated at the time of the accident, The Court seems to

have accepted this as fact, and that it obviated Mr. Dixon of any responsibility to exercise due care to avoid running over Mr. Dillinger as he crossed the roadway on foot. Not only does this require the Court to assume facts in a light **least** favorable to Mr. Dillinger, the non-moving party, the opposite of what is called for under Civil Rule 56, but the legal position is directly counter to the clear language of RCW 46.61.245, which not only reinforces that drivers must always exercise due care to avoid hitting pedestrians, but provides specific instruction for a driver to exercise proper precaution when in the presence of someone who is “obviously confused or incapacitated upon a roadway.” This duty upon drivers was so paramount, in the eyes of the minds of the legislature that even drivers of emergency vehicles, to whom pedestrians are specifically required to surrender right of way, are not excepted from the duty to exercise due care to avoid hitting the pedestrian.

PEDESTRIANS' RIGHTS AND DUTIES

§ 46.61.264. Pedestrians yield to emergency vehicles

(1) Upon the immediate approach of an authorized emergency vehicle making use of an audible signal meeting the requirements of RCW 46.37.380 subsection (4) and visual signals meeting the requirements of RCW 46.37.190, or of a police vehicle meeting the requirements of RCW 46.61.035 subsection (3), every pedestrian shall yield the right-of-way to the authorized emergency vehicle.

(2) This section shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons using the highway nor from the duty to exercise due care to avoid colliding with any pedestrian.

The record in this case shows, clearly, that Dixson failed to keep a sufficient lookout to see a pedestrian crossing the street, a pedestrian who was visible to and actually seen by another driver on the same roadway from one hundred yards distant. The applicable statute places a duty squarely on Mr. Dixson's shoulders to have exercised due care and taken particular care to avoid colliding anyone who was obviously confused or incapacitated upon the roadway. If driver of an emergency vehicles, to whom a pedestrian owes a specific statutory duty to give right of way is not excepted from the duty of exercising due care to avoid injury to the pedestrian, it strains the boundaries of reasonable legal interpretation, far past the breaking point, to find, as the Trial Court has in this case, that Mr. Dixson owed pedestrians no such duty. The Appellate Court should decline to interpret the Washington Statutory law regarding right of way upon the roadways as lessening the burden upon drovers to exercise care to avoid striking pedestrians under any circumstances.

VI. CONCLUSION

This is an interesting case, in that neither party can testify as to what happened immediately preceding this accident. From the testimony of the only actual witness to the accident, it is clear that there are factual issues for the trier of fact to determine. In a light most favorable to Mr. Dillinger, the record shows that it was clear but dark night. Dillinger was crossing a five lane roadway at a part of the roadway where there were three large streetlights. A driver (Ms. Bohl) in the Northbound lane

(coming from Dillinger's right and across four lanes of traffic) easily saw Dillinger as he walked slowly across the road from 100 yards away. Dixon, was stopped at a stop light when Dillinger started crossing, was approaching Dillinger at a slower rate of speed than Bohl was, and had Dillinger in his field of vision as Dillinger crossed two lanes before Dixon's vehicle crossed Dillinger's path. Any reasonable juror could find that, if Ms. Bohl could see Mr. Dillinger at 100 yards away from further than Dixon was, while she was travelling faster than Dixon, and take note of him when Dillinger was not even near Bohl's lane of travel, then Mr. Dixon's failure to even notice Dillinger until after he had hit Dillinger with his car is evidence that Dixon was not exercising reasonable care in keeping a proper lookout, and was negligent in causing the collision which injured Mr. Dillinger. If one rejects the premise that drivers who have the right of way over pedestrians are free to eschew the use of reasonable care, then the record in this case presents obvious genuine issues of material fact, and issues upon which reasonable minds could differ. The Appellant respectfully requests that the Court reverse the Order of the Trial Court and return this case to the Kitsap Superior Court for a trial on the merits.


9-12-12
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Attorney for the Appellant

CERTIFICATE OF MAILING

SIGNED at Silverdale, Washington

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 18th day of September, 2012, the document to which this certificate is attached, Brief of Appellant White, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Richard S. Lowell
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A handwritten signature in black ink that reads "Linda Shathman". The signature is written in a cursive style with a horizontal line underneath the name.