

63590-5

63590-5

No. 63590-5 I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

LARRY MARTIN

Plaintiffs/Petitioners.

v.

JEFFREY CONAN et al.

Defendant/Respondents.

APPELLANT'S REPLY BRIEF

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

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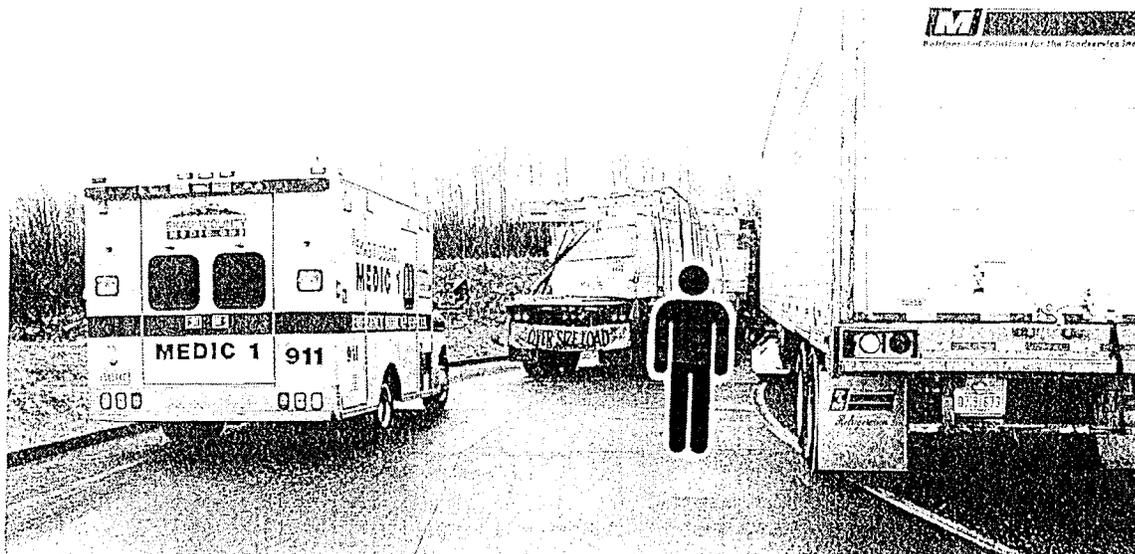
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PREFACE



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

Conan: No he was at the side."

Conan's oral statement the morning of the accident. CP 97-98.



"Q: That was the last place you saw him?"

A: was standing behind his trailer."

Conan's deposition two years later. CP91

" . . . Summary judgment procedure is not a catch penny contrivance to take unwary litigants into its toils and deprive them of a trial; it is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists. . . . "

Preston v. Duncan, 55 Wn.2d 678, 683, 349 P.2d 605 (1960) citing with approval Whitaker v. Coleman, 115 F.2d 305, 307 (5th Cir. 1940).

The Report of Proceedings confirms that the trial court dismissed this "fact driven" (RP3) catastrophic injury case on summary judgment, based on the wrong version of events, a version that was not only the least favorable to the non-moving party, but the least credible overall.

Further, the Report of Proceedings shows that the trial court judge unabashedly verbalized his deliberate choice to disregard an expert's declaration specifically stating that negligence by the defendant proximately caused the accident, even under this unfavorable and incredible version of events.¹

The appropriate version of events, which also happens to be the most credible version (coming as it does from the Defendant's own recorded statement within an hour of the incident), so obviously defeats summary judgment that Respondent's Brief resolutely ignores it, foisting instead the same flawed version of events upon this court as the supposed "undisputed facts".

¹ Ironically, Respondent insisted on providing this Court with the Report of Proceedings. It is appended hereto.

THE EVIDENCE UPON WHICH THE MOTION SHOULD HAVE BEEN
(AND SHOULD NOW BE) EVALUATED

The first and most fundamental question in this case is: Where was Larry Martin as Conan's truck approached? As set forth in Appellant's opening brief, and as illustrated in the top view of the Preface hereto, for purposes of summary judgment, the answer is:

- 1) He was IN THE ROAD, alongside his truck;
- 2) having already gone into the road to fetch the wallet;
- 3) while Conan's truck was still a SAFE DISTANCE AWAY;
- 4) and having ALREADY PICKED THE WALLET UP WHEN CONAN ARRIVED.

To briefly review the evidence on these points:

Larry Martin specifically testified that he had been careful to look before entering the road, and that Conan's truck was a safe distance away. CP116.

Conan himself confirmed that Martin was beside his truck, in both his recorded and his handwritten statements. CP97, CP106. Photographs confirm this would put him in the road. CP93.

The eyewitness Heaphy gave a statement the day in question confirming that the accident occurred as Conan's truck passed MARTIN's "position". CP110.

Within an hour of the accident Conan had given a recorded statement documenting what Heaphy had told him had happened next:

"...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 truck, had clipped him, had knocked him to the ground as I was going by him..."

CP 97 (emphasis added)

Conan also confirmed that Martin had the wallet in his hand as he lay on the pavement, after the accident obviously meaning he'd picked it up before being struck. CP100.

The only appropriate inference (for purposes of Summary Judgment) is that Conan sped up after Martin took his eyes off him to fetch the wallet, to a speed far beyond safe or anticipated on that road, thus arriving at Martin's position before Martin had left the road. Having arrived before Martin had safely left the road, Conan chose to keep going, and "clipped" Martin as he passed. (This isn't even an "inference" --- it is exactly what Heaphy first told Conan.)

Tellingly, Respondent's Brief simply refuses to deal with this evidence.

RESPONDANT'S BRIEF IGNORES THE EVIDENCE THAT DEFEATS SUMMARY JUDGMENT

One searches Respondent's Brief in vain for any mention of, let alone attempt to account for the following unambiguous testimony from Larry Martin:

"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-hu.

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.”

CP 115 (emphasis added)

This deposition testimony directly contradicts the version of events (as illustrated in the Preface, lower view) that Conan calls “undisputed”.

So: Respondent’s brief ignores it.

Likewise, one could read Respondent’s brief a thousand times and never know that Respondent himself gave recorded and hand-written statements on the day of the accident, both confirming that Martin was already beside his truck, and therefore IN THE ROAD when Conan arrived on the scene, to wit:

“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.

CP 98 (emphasis added)

"...the driver was walking towards the back of the van and was standing at the rear left hand corner as I started to go by him..."

CP 106 (emphasis added)

Finally, again, innumerable readings of Respondent's brief would never reveal that on the day of the accident, the "eyewitness" Heaphy said absolutely nothing about Martin "walking into the road"--- either in his own handwritten statement (CP 110), or to Conan himself. CP 97.

In other words, Respondent's Brief simply refuses to acknowledge that essentially all the evidence from the day of the accident contradicts the version counsel now offers this Court as "undisputed".

CONAN CONTINUES TO FOIST THE LEAST FAVORABLE
VERSION OF EVENTS AS "UNDISPUTED EVIDENCE"

Conan's counsel would be entitled to argue his contrived version of events to a jury, assuming the actual trial testimony supported it.

However, as repeatedly demonstrated in Appellant's opening Brief and herein, the favorable (and credible) evidence is that:

1. Martin was beside his truck, and therefore already in the road, as Conan approached; and
2. Conan's wide load simply "clipped" Martin "as [Conan] was going by him".

Thus, the following statements in Respondent's brief, when offered to this court as "UNDISPUTED EVIDENCE" in the context of Summary Judgment, can be charitably described as "unfortunate inaccuracies":

"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..." (Res. Brief, p. 1);

* * * *

"According to [eyewitness] Heaphy,

As the flat-bed with the trusses (Conan's truck) passed wide around the truck that had pulled over (Martin's truck), the driver over 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." (Res. Brief, p. 4)

* * * *

"At his deposition, Martin testified that he has difficulty with memory and does not remember much of anything about the day of the accident". (Res. Brief, p. 4).²

* * * *

"Martin walked in front of Conan's oncoming, oversized load only after Conan's cab passed Martin". (Res. Brief, p. 8)

* * * *

"The facts of this case are straightforward and corroborated by an unbiased witness, Mr. Heaphy". (Res. Brief, p. 9)

* * * *

"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." (Res. Brief, p. 9)

* * * *

² Remember: Martin SPECIFICALLY TESTIFIED THAT HE REMEMBERED ASSURING HIMSELF THAT CONAN'S TRUCK WAS A SAFE DISTANCE AWAY BEFORE HE ENTERED THE ROAD.

'He then bent over to retrieve a wallet in the roadway, stood up, and was struck by the trusses". (Id)

* * * *

"...Martin chose (inappropriately) to walk into the roadway instead of first letting Conan's truck and trailer pass... (Res. Brief, p.16)

* * * *

"There is no dispute that until Conan's cab passed Martin, Martin was out of harm's way from Conan's load." (Res. Brief, p.18)

* * * *

"There is no dispute (because Martin admitted it) that Martin moved out of the safe position... and moved into danger so he could retrieve a wallet in the roadway."

(emphasis added)

CONAN LIKEWISE IGNORES CREDIBILITY ISSUES IN HIS VERSION OF EVENTS

This isn't only a case of different witnesses having different versions of events----as has been shown, Conan's and Heaphy's sworn testimony in support of Summary Judgment is directly contradicted by statements they themselves gave on the day of the accident.

Genuine credibility issues defeat summary judgment. Amend vs. Bell, 89 Wn.2d 124, 570 P.2d 138, 95 ALR 3d 225 (1977); Balise v. Underwood; 62 Wn.2d 195, 381 P.2 966.

In Tabek vs. State, 73 Wash. App. 691, 870 P.2d 1014 (1994), Division I held that summary judgment was improper where the key witness had given conflicting statements, even if the statements could arguably be reconciled. The plaintiff had been injured when he fell while using a "fishing platform" the state maintained in Lake Terrell. The "platform" consisted of several "floats" that were bolted together to form a larger, level unit. Some of the connecting bolts had broken, putting two floats "out of level", thereby creating a tripping hazard. Plaintiff tripped, fell and broke his leg.

One issue was: When did the State through its employees have knowledge of the broken bolts? A state employee testified that he knew of the broken bolts several months before Plaintiff's injury. However, he later signed a declaration that (1) the bolts he had been talking about at his deposition had been repaired before Plaintiff's injury, and (2) he did not learn of the broken bolts that led to Plaintiff's injury until after Plaintiff's fall. The State moved for summary judgment based upon the declaration. Summary judgment was granted and Plaintiff appealed.

Reversing, this Division of the Court of Appeals said at 73 Wash. App. 696:

"Although it is possible to reconcile [the witness's] inconsistent statements by assuming that he misspoke during his deposition and that he was talking about the broken bolts that were repaired in March 1991, that determination is for the trier of fact. Powell v. Viking Ins. Co., 44 Wn. App. 495, 503, 722 P.2d 1343 (1986) (conflicting statements on a material fact by the same witness preclude summary judgment)."

(emphasis added)

In Powell v. Viking Ins. Co., 44 Wn. App. 495, 722 P.2d 1343 (1986), Plaintiff made a "phantom vehicle" claim under his underinsured motorist insurance policy. The carrier denied coverage for lack of a corroborating witness. Plaintiff's wife, a passenger in the vehicle, signed an affidavit that she had seen a "phantom" vehicle pull into the intersection their car was approaching, which her husband swerved to avoid, causing the accident. However, earlier she had told the insurance investigator that she had seen no other vehicle at the intersection. The court held that the wife's affidavit therefore would not support summary judgment of coverage, saying at 44 Wash. App. 502:

"Though we agree with the trial court that [the wife] may provide independent corroborating evidence, we do not agree that summary judgment was thereby warranted. Summary judgment is properly granted if no genuine issue of material fact exists when the evidence and all reasonable inferences from the evidence are considered in the light most favorable to the nonmoving party". CR 56(c); Dunlap v. Wayne, 105 Wn.2d 529, 535, 716 P.2d 842 (1986). Under the circumstances, [the wife's] affidavit testimony, that her husband swerved to avoid hitting the phantom vehicle which had pulled out in front of him, does not mean that no issue of fact exists. In her initial statement to the insurance investigator, [the wife] stated that she did not see another car enter the intersection in front of her husband. [The wife's] conflicting statements raise a serious credibility problem that creates an issue of fact for the arbitrators as to the existence of the phantom vehicle. Credibility issues involving more than collateral matters may preclude summary judgment. Amend v. Bell, 89 Wn.2d 124, 129, 570 P.2d 138, 95 A.L.R.3d 225 (1977); Hays v. Lake, 36 Wn. App. 827, 836, 677 P.2d 792 (1984).

(emphasis added)

Consider, yet again, the various versions of events offered by Conan
and Heaphy:

Conan

1. Within an hour of the accident Conan had confirmed twice, orally and in writing, that Martin was beside his truck, therefore in the road, as Conan approached Martin's position.....

But at deposition he changed his story to say that Martin was safely tucked behind his truck as Conan passed.

2. In his oral statement Conan justified his decision to continue past Martin because he "GUESSED" he had 7 or 8 feet of clearance "as [he] was going by [MARTIN] so [he]...didn't think there was any problem whatsoever with going BY him"...

But at deposition he changed his story to say "the last time [he] saw [Martin]", Martin was "standing behind his trailer" and therefore safely off the road, where there wouldn't be any issue whatsoever of "clearance".

3. In his oral statement Conan reported that eyewitness Heaphy had explained that, Conan had "clipped" (Martin) "as [Conan] was going by him". Heaphy's "explanation" contained NOT ONE WORD about Martin even "moving toward" Conan's truck, let alone bending down to pick up the wallet....

But in his written statement, Conan now added that Heaphy told him that Martin was hit as he reached DOWN to pick the wallet;

Heaphy

1. According to Conan's oral statement, moments after the accident Heaphy "ran up and explained" that Conan's wide load had "clipped" Martin as Conan "was going by him", with no mention whatsoever of ANY movement by Martin; and
2. According to Conan's written statement later that morning, Heaphy saw Martin be struck as he reached DOWN to pick UP the wallet; and
3. According to Heaphy's own written statement that day, Martin didn't BEND DOWN AT ALL before the accident; he simply "MOVED TOWARD" Conan's truck as it passed MARTIN's POSITION.....

But the declaration Heaphy signed years later contradicts all of this, saying that Martin had walked into the road as Conan's truck was passing him, picked up the wallet and been hit as he stood BACK UP.

THE SUMMARY JUDGMENT HEARING

The Verbatim Report of oral argument on Conan's Motion for Summary

Judgment documents the following:

1. Conan's counsel repeatedly argued what he knew to be the least favorable, least credible version of events;

Appellant's opening brief documents the written mischaracterization of the "undisputed facts" in the Motion for Summary Judgment itself.³ Here is what Conan's counsel told the court as he began his oral argument:

"...But here's the undisputed facts (sic) that I think are important: Mr. Conan was driving appropriately, he moved over to the far left side. Mr. Martin was BEHIND THE TRUCK OFF THE SIDE OF THE ROAD. My client had no chance to see what was about to happen when MR. MARTIN WALKED OVER AND WENT NEXT TO MY TRUCK AS IT DROVE BY..."

RP3. (emphasis added)

Review of the transcript shows that at least four other times Conan's counsel told Judge Needy to his face that the "undisputed facts" were that Martin was "behind" his truck and/or "walked into the road" as Conan passed. RP 4-7. In truth, as has been shown, these "facts"---which first emerged in the Heaphy Declaration years after the accident----are directly contradicted by:

Heaphy's own written statement on the day of the accident;

Conan's own recorded statement on the day of the accident;

Conan's own written statement on the day of the accident;

Larry Martin's deposition testimony.

2. Martin's then-counsel for whatever reason essentially acquiesced in that version of events for purposes of her own argument;

Unfortunately, probably because she had expert testimony that Conan was negligent even under his newest story, Martin's own then-counsel didn't bring out the

³ As set forth already, the same mischaracterizations contaminate Respondent's Brief in this Court.

favorable, credible evidence supporting Martin's case, or point out that Conan's and Heaphy's testimony in support of summary judgment both were directly contradicted by their own statements given on the day of the accident. Instead, she essentially adopted Conan's version, at one point telling the Court that:

"The following witness said that he saw my client walk out into the road, walk over to the wallet, bend down, pick it up, stand up and then he was hit."

RP9.

What Martin's counsel unfortunately didn't tell the court was that the "following witness" Heaphy had said no such thing on the day of the accident, either in his own written statement, or to Conan himself.

Thankfully, since this court engages in de novo review, Martin's then-counsel's "strategy" is not binding here.

3. The Court adopted and based its ruling on Conan's contrived version of events, despite abundant evidence in the court file;

It has been said the trial Court is obligated to search the court file independently to assure itself that there are no genuine issues of fact. 10 Wright and Miller, Federal Practice and Procedure: Civil, §2739 (1973)

It is perhaps understandable that the Court did not do so here, since Martin's then-counsel never contradicted and indeed essentially accepted defense counsel's characterization of the "undisputed facts", but had Judge Needy carefully inspected the record before him, he would have undoubtedly seen that the Motion completely lacked merit.

Even so, Judge Needy simply ignored Westphal's expert testimony that Conan was negligent even under defense counsel's version of events, dismissing Westphal's declaration with an oral wave of his hand:

"Mr. Westphal's declaration as an expert does propose to me that there are duties different that those that I'm recognizing. I simply don't find those duties to exist under the law and the facts of this case."

RP14.

What "duties" does Westphal's expert declaration "propose"? The duty to "properly" maintain awareness of the unknown pedestrian he had just passed, such that he doesn't run over him.

RESPONDANT OFFERS NO COHERENT JUSTIFICATION FOR THE FAILURE TO CONSIDER WESTPHAL'S EXPERT DECLARATION

Somewhat wearily, Appellant's counsel will emphasize for the final time (until oral argument) that the version of events offered by Conan's counsel----that Larry Martin "walked into the road" as Conan passed him----is directly contradicted by every witness in the case including Conan himself.

However, Wade Westphal's expert declaration says that, even under Conan's manufactured version of events, had Conan been "PROPERLY" monitoring his passenger side mirror, he would have been able to avoid striking Martin. The basis of this opinion is Conan's own testimony that at the speed he claims to have been travelling, he could have stopped his truck in "not even one second".

CP 134.

Thus even by his own (contrived) version of the facts, Conan's failure to see and avoid Martin, in Westphal's expert opinion, violated the standard of care for commercial truck drivers. Id.

In other words, Westphal opines that drivers of huge commercial trucks should take care not to run over pedestrians. How, exactly, does this impose a "higher duty" (Res. Brief, p. 18) than that contained in RCW 46.61.245, which required Conan to "exercise due care to avoid colliding with any pedestrian upon any roadway"? According to Conan:

"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, reaching a duty."

Res. Brief, p. 16 (emphasis in original).

This simply will not do.

First and most fundamentally, Westphal's declaration doesn't say Conan should have focused "only" on his side passenger mirror. Westphal's declaration says Conan could have avoided the accident, had he "properly" monitored his passenger-side mirror. CP134.

Second, there is certainly no evidence to support the proposition that the standard of care under the circumstances necessarily required or even condoned Conan "splitting" his vision equally "right, left and forward", or for that matter at all. He was on a low-speed, single-lane, one-way access road heading into a sharp right turn, in the most isolated area of the weigh station. There was nothing but

GRASS to his "left and forward". On the other hand, there was an unknown pedestrian to his right.

Third, Conan could have slowed down or STOPPED until he ascertained Martin's intentions, and/or assured himself that he could safely pass. He chose to proceed. Westphal opines that he could have done so safely. Is Conan now arguing that he could not? If so, Conan was obviously negligent for proceeding at all.

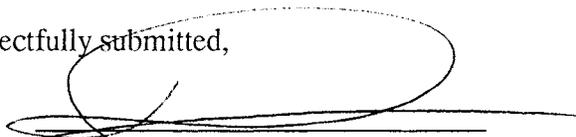
CONCLUSION

Thus was a catastrophic injury case dismissed on summary judgment, though (1) the "uncontested facts" offered the Court were directly contradicted by every witness in the case; (2) the witnesses relied upon by Defendant had given prior inconsistent statements and (3) expert had declared that the Defendant's manufactured version of events none the less constituted negligence.

The judgment should be reversed.

DATED this 2nd day of NOVEMBER, 2009.

Respectfully submitted,



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No. 63590-5 1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

LARRY MARTIN

Plaintiffs/Petitioners.

v.

JEFFREY CONAN et al.

Defendant/Respondents.

***APPENDIX TO
APPELLANT'S REPLY BRIEF***

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

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THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SKAGIT

LARRY MARTIN, an individual,)
 Plaintiff,)
 vs.)
) No. 07-2-02302-2
 JEFFREY CONAN and "JANE DOE") COA No. 63590-5-I
 CONAN, husband and wife and marital)
 community thereof; JEFF CONAN)
 TRANSPORT, INC., a British Columbia,)
 Canada corporation,)
 Defendants.)

MOTION FOR SUMMARY JUDGEMENT

Heard before the Honorable Judge Dave Needy

March 30, 2009

TRANSCRIBED BY: Bonnie Reed, CETD
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 DATE TRANSCRIBED: August 18, 2009

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truck, of course -- when it went by.

I think the key points for the Court to keep in mind is that there was an exhaustive evaluation of my client's equipment, truck, the whole circumstance by the state patrol immediately after the accident; obviously a very, very serious accident; very, very, very serious injuries.

There's one objective eyewitness, has no axe to grind or anything else. And he tells the state patrol and signs his declaration, as you've seen as part of the materials, that my driver had no chance, had nothing to do with this and was not his fault.

Mr. Martin's standing behind the truck on the right-hand side of the road. My driver goes by, sees him there -- and he's a truck driver, let's keep in mind. He is not like the statute that they reference. He's not a person that doesn't know what's going on or a child. Okay. And the statute is only addressed to those types of people, not a pedestrian like this, that's a truck driver on the side of a road, on an on-ramp at a weigh station. It's a completely separate type of situation here.

Mr. Martin is behind his truck, standing there, they make eye contact. My driver drives by, swings left, goes and drives by very, very slowly. And

March 30, 2009

-o0o-

THE COURT: All right. This is defense motion for summary judgment.

MR. SCHEER: It is, Your Honor. My name is Mark Scheer for the defendant, Mr. Conan.

I was thinking about raising my hand, but since you let us go first, I guess I don't have to.

THE COURT: The only one that could have raised her hand, she already left with her agreed order signed, so...

MR. SCHEER: There you go.

Well, I will wish we had an agreed order here, but we don't. And I don't know that it will take all that much time because I think it's pretty straightforward.

THE COURT: It is fact driven.

MR. SCHEER: It is. It is fact driven. But here's the undisputed facts that I think are important: Mr. Conan was driving appropriately, he moved over to the far left side. Mr. Martin was behind the truck off the side of the road. My client had no chance to see what was about to happen when Mr. Martin walked over and went next to my truck as it drove by -- my driver's

Mr. Martin for the life of me -- he doesn't remember anything -- but why would he walk out in the road like that even if there was a wallet laying in the road? All he had to do was wait another three seconds for my truck driver to go past and then step out and pick up the wallet and come back. It's not -- he's not in any danger of having my driver get out and get the wallet. He didn't even see the wallet.

So Mr. Martin steps out, picks up the wallet. When he stands up, he gets hit by the oversized load that's coming his way on the trailer that my client is pulling. And Mr. Martin can see that as he looks down, he admits it in his testimony; he sees that there's an oversized load coming his way. And, again, he's a truck driver.

My driver's load is marked, it's tagged, it's flagged, he has a sign on it. The state patrol took him through nth degree of detail, you know they would. He's a Canadian driver, they're going to make sure everything is proper. They give him a clean bill of health. They don't cite him. They don't say that he did anything wrong, because he didn't. And next thing you know, there's a lawsuit.

This case shouldn't go to trial because no reasonable jury could conclude that my client did

1 anything wrong. It's not enough to cite a statute about
2 pedestrians, especially here. And here's the deciding
3 factor, I think, Your Honor. Here's the distinction. I
4 know you've read the materials, I'm sure you have. And
5 they submit an affidavit from their expert. And if you
6 had questions on that, let me know.

7 But the one point that I was thinking of:
8 Well, why is their expert so wrong? Here's what's wrong
9 about it: In order for you to draw the conclusion my
10 client did something wrong, as his expert has, he has to
11 draw these wild speculations about what might have
12 happened if his client, or Mr. Martin, hadn't walked
13 from the side of the road into my driver's right of way.
14 That's the distinction. He talks about off-tracking.
15 Remember in his affidavit, he talks about, well, when
16 you swing a big load like that, the truck tractor will
17 go in one direction, but the trailer doesn't quite
18 follow it, so it off-tracks. If we'd have hit a
19 pedestrian on the side of the road, if we'd have hit a
20 stationary object, he'd probably be right; we'd probably
21 have to go to trial on that. There'd be a jury trial
22 because it would be a question of fact about that. But
23 that's not what happened.

24 This is undisputed. My driver's driving by.
25 Mr. Martin is standing on the side of the road and he

1 He knows he bears the fault. We know he bears the
2 fault. We don't believe he bears all of the fault, and
3 that's the issue here.

4 Counsel made reference to our expert, Wade
5 Westphal, being wildly wrong. First off, he's the only
6 expert that's been cited here and he's the only one
7 who's given any testimony about the duty of care for a
8 commercial truck driver.

9 THE COURT: Can you point me to any case that's
10 even close factually to this one? I mean, when we talk
11 about pedestrians, children --

12 MS. LARSON: I can't.

13 THE COURT: -- incapacitated people.

14 MS. LARSON: It appears to be kind of a first
15 impression here. We couldn't find anything on point,
16 Your Honor.

17 THE COURT: Sorry for the interruption. Go
18 right ahead.

19 MS. LARSON: That's okay.

20 Counsel mentioned that his driver didn't have a
21 chance to see my driver walk out into the road. That's
22 because he wasn't looking. His own testimony was that
23 he was watching as he passed the tractor of my client's
24 vehicle parked here. He looked in his mirror to see the
25 tractor. Then he looked in his mirror to watch the back

1 walks out into the roadway and gets hit. He walks into
2 my client's trailer. My client can't be -- legally, my
3 client can't be responsible for that. The Court should
4 take that away as a matter of law. There was no duty
5 that was not fulfilled here. He did everything he was
6 supposed to; we've got an eyewitness that verifies it.
7 And you've got the complete state patrol evaluation,
8 inspection, investigation afterwards that confirms he
9 didn't do anything wrong. I think it's pretty
10 straightforward, Your Honor.

11 I'm absolutely happy to entertain any questions
12 you might have about this because, obviously, this is my
13 chance. But if there's any debate about it, certainly
14 I'd like to hear about it. Everything I've represented
15 to you is undisputed in this case.

16 THE COURT: I don't have any questions at this
17 point. But I'll give you an opportunity for a brief
18 rebuttal if we get to that.

19 MR. SCHEER: I appreciate that. Thank you,
20 Your Honor.

21 THE COURT: It's Ms. Larson.

22 MS. LARSON: Good afternoon, Your Honor.
23 Rebecca Larson.

24 First off, I'd like to point out we are not
25 saying that Mr. Martin bears no fault for this accident.

1 of his rig and that's when he saw my client already on
2 the road knocked down.

3 The following witness said that he saw my
4 client walk out into the road, walk over to the wallet,
5 bend down, pick it up, stand up and then he was hit.

6 Mr. Conan's testimony was that he could stop
7 that rig in less than a second. So if he had been
8 paying attention, seeing the -- watching the rear of his
9 tractor as it off-tracked around this parked vehicle, he
10 should have been able to see my client walk out and stop
11 in time to avoid hitting him. At the very least, to
12 avoid knocking him down and then driving over him after
13 he fell. So we believe that there is both breach of
14 duty there and causation.

15 Additionally, the photos we submitted made it
16 clear that Mr. Conan's vehicle was not as far over to
17 the left as it could have been. Mr. Westphal points out
18 that that is also a duty that the driver has to do when
19 he's passing.

20 THE COURT: I didn't quite understand that.
21 The duty is to go as far as left as -- I mean, I saw the
22 tape measure and certainly the front cab was only this
23 far or so from the far left, but the rear tracking
24 differently or off-tracking wasn't. But are you saying
25 he breached the duty by not having tires up and over?

1 And what if he didn't --
 2 MS. LARSON: He didn't have to go up and over
 3 but should have been farther over and would have been
 4 safer to have done that. And if he had done that --
 5 THE COURT: No, being safer -- excuse me -- is
 6 different from a duty to go as far left as possible.
 7 Are we saying that somehow --
 8 MS. LARSON: Mr. Westphal in his opinion says
 9 that is the duty --
 10 THE COURT: Right.
 11 MS. LARSON: -- and the standard of care. And
 12 by doing -- by not going over that far -- we're dealing
 13 with a static object in the road, it was in one
 14 location. My client walked to bend down to get it; when
 15 he stood up, he was struck by the defendant's vehicle,
 16 which was there. Had it been farther over, that
 17 accident wouldn't have happened. We think there's
 18 clearly some issues of not only fact here but of
 19 (inaudible) of damages.
 20 THE COURT: We don't know where the wallet is.
 21 You say static object -- I mean, if the wallet had been
 22 further out and your client had been further out --
 23 MS. LARSON: Exactly, but --
 24 THE COURT: So are you saying if he'd been all
 25 the way to the left and still this had happened then he

1 read the materials in the file. Let me make some
 2 indications of what I believe the agreed facts are. And
 3 that is that Mr. Conan, driving this truck, saw the
 4 other truck parked on the side of the on-ramp, and by
 5 everyone's agreement, cleared -- went far enough to the
 6 left to clear the parked truck. He also saw Mr. Martin
 7 standing at the rear of that tractor-trailer and knew
 8 that he was there at the rear of his rig. He was
 9 monitoring his mirrors, I believe, to make sure, one,
 10 that he was going left but not too far; and one, <sic>
 11 that he was to the right, clearing the rig that was
 12 parked. And he was also driving forward at somewhere
 13 around 7 to 8 miles an hour. So he had to keep his
 14 vision split between right, left and forward. To simply
 15 focus on one of those three areas, may have, in fact,
 16 been, at least arguably, breaching a duty. Because he
 17 watched to see that the rig cleared on his right mirror
 18 and then the next time he checked his right mirror, saw
 19 a person laying in the road and stopped immediately,
 20 which shows all of this within an approximate length of
 21 his rig or so at 8 miles an hour. No one, I don't
 22 think, did the math to see how far one would travel or
 23 how many seconds would pass in that time.
 24 But it seems clear to me the facts are that
 25 Mr. Conan was checking mirrors as well as looking

1 would have fulfilled his duty and there would be no
 2 action?
 3 MS. LARSON: I believe he would have fallen
 4 within fulfilling his duty if he'd gone over as far as
 5 he could have, Your Honor.
 6 THE COURT: But he went over far enough --
 7 we're not arguing that he went over far enough to clear
 8 the other --
 9 MS. LARSON: He did clear the other vehicle,
 10 yes.
 11 THE COURT: Okay.
 12 MS. LARSON: So we believe there's issues of
 13 fact, Your Honor. There's no contrasting expert
 14 testimony. We think that this should go to a jury.
 15 THE COURT: I was wrong about 20 minutes.
 16 So any rebuttal?
 17 MR. SCHEER: If the Court's going to grant the
 18 order, I don't need to rebut. If the Court's even
 19 debating it, I would like rebuttal.
 20 THE COURT: My common sense reacted one way and
 21 then I read the responses and I the read the declaration
 22 of the expert. But I think it's important to keep
 23 common sense as a factor even when law is somewhat
 24 complicated.
 25 I cannot imagine -- let me back up a second. I

1 forward and driving, and he had all three to focus on.
 2 So if he had never checked any mirrors and simply gone
 3 forward, I think we might have a different situation.
 4 But I don't believe there's any material issue of fact
 5 that leads to any other conclusion except he fulfilled
 6 all of his duties to Mr. Martin in every sense possible.
 7 And the fact that Mr. Martin can come out into the
 8 roadway and stand up and have him be struck by the load
 9 that Mr. Conan is carrying is to put in place a duty
 10 that not only goes against common sense, but I think
 11 goes against any legal theory in that a truck driver
 12 simply cannot be expected to drive forward watching only
 13 one mirror because a person was standing beside a truck.
 14 He did everything to clear that obstacle and
 15 not go too far to the left. I certainly would agree
 16 that he could have gone another foot or foot and a half
 17 to the left. But I don't believe legally, factually or
 18 in any other sense that he has a duty to try to go right
 19 up to that line and perhaps risking going over it as
 20 long as he did fulfill his duty of clearing the object,
 21 that being the other truck and trailer in the road.
 22 So for all of these reasons, I do believe the
 23 defense is entitled to a summary judgment. And I will
 24 grant their motions based on the pleadings in the file
 25 and the facts as I know them.

1 Mr. Westphal's declaration as an expert does
 2 propose to me that there are duties different than those
 3 that I'm recognizing. I simply don't find those duties
 4 to exist under the law and under the facts of this case.

5 MR. SCHEER: Thank you, Your Honor. I have a
 6 proposed order signed by both counsel as the one that we
 7 submitted with our pleadings, Your Honor.

8 THE COURT: All right.

9 MR. SCHEER: I'll make copies and provide to
 10 counsel, of course.

11 THE COURT: All right. Nice to meet you both.

12 MR. SCHEER: Thank you, Your Honor. Do I take
 13 the original to --

14 THE COURT: Yes, you can take that directly
 15 down to the clerk's office if you want copies.
 16 Otherwise, it would be a slower process.

17 (Conclusion of hearing.)
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CERTIFICATE

1 STATE OF WASHINGTON)
 2)
 3) ss
 4)
 5 COUNTY OF KING)
 6)

7 I, the undersigned, under my commission as
 8 a Notary Public in and for the State of Washington, do
 9 hereby certify that the foregoing recorded statements,
 10 hearings and/or interviews were transcribed under my
 11 direction as a transcriptionist; and that the transcript
 12 is true and accurate to the best of my knowledge and
 13 ability; that I am not a relative or employee of any
 14 attorney or counsel employed by the parties hereto, nor
 15 financially interested in its outcome.

16
 17 IN WITNESS WHEREOF, I have hereunto set my
 18 hand and seal this _____ day of _____,
 19 2009.

20
 21 _____
 22 NOTARY PUBLIC in and for
 23 the State of Washington,
 24 residing at Seattle.
 25 My commission expires 12-28-10