

NO. 41576-3

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

MARILYN R. GUNTHER, a single woman,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF TRANSPORTATION,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This lawsuit arises from an incident where Ms. Gunther fell off her bicycle while attempting to jump a curb along State Route 20. Ms. Gunther was riding her bicycle eastbound on SR 20 to the Port Townsend ferry terminal when she saw a sign notifying her that the bike lane she was riding in would be ending. Ms. Gunther had the right and ability, however, to continue riding on SR 20 after the bike lane ended. Consistent with this, Ms. Gunther then passed a sign warning vehicles that bicycles would be on the road.

The bike lane ultimately ended 150 yards before the ferry terminal and was replaced by a lane that turned right into the terminal. This lane was 11.5 feet wide—2 feet wider than the other lanes on SR 20—allowing extra space for bicycles to ride alongside vehicles. After Ms. Gunther rode past the end of the bike lane, the proximity of a passing car made her uncomfortable. At the same time, she saw her companion, Aldoren Kauzlarich, exit the road by jumping a low point in the curb. After recognizing that the curb and sidewalk were not flush with the road, Ms. Gunther attempted to jump the curb as well. Unfortunately, she was not successful and was injured.

Ms. Gunther commenced this lawsuit alleging negligence against both the State and Jefferson County. Despite being granted a continuance

to do so, Ms. Gunther engaged in no discovery in this action. In opposition to the State’s summary judgment motion, Ms. Gunther presented no evidence of negligence—the record contains neither evidence of a violation of any applicable design standard, nor an expert opinion that SR 20 was not reasonably safe. The trial court properly granted summary judgment in favor of the State.¹

II. RESTATEMENT OF THE ISSUES

A. Did the trial court properly dismiss Ms. Gunther’s negligence claim where she provided no evidence that SR 20 was not in a condition reasonably safe for ordinary travel?

B. Did the trial court afford Ms. Gunther adequate due process when it provided her a full opportunity to submit briefing and supporting materials prior to dismissing her claim on summary judgment?

III. RESTATEMENT OF THE CASE

A. **Ms. Gunther Had The Right And Ability To Ride Her Bicycle On SR 20 After Her Bike Lane Ended**

On July 24, 2006, Marilyn Gunther spent a day touring Fort Casey and Port Townsend by bicycle.² At the end of this day of riding, Ms. Gunther and her riding companion, Mr. Kauzlarich, decided to ride

¹ It should be noted that the “assumption of risk” doctrine that Ms. Gunther dedicates two-thirds of her Argument section to is irrelevant to this appeal—neither party raised that doctrine before the trial court and the State does not rely upon it on appeal.

² CP 112-13.

back to the Port Townsend ferry terminal to catch the 6 p.m. ferry.³ To do so, they decided to ride in the bike lane that adjoined the eastbound lane of SR 20, with Ms. Gunther following Mr. Kauzlarich.⁴ In this location, SR 20 was a two-lane highway with one westbound lane, one eastbound lane, a bike lane separated from the eastbound lane by a painted white line, and a sidewalk parallel to the bike lane.⁵ The speed limit was 25 mph.⁶

After traveling a short distance, Ms. Gunther saw a sign notifying her that the bike lane was ending.⁷ Bicyclists have the right to ride on roads without regard to the existence of a bike lane, however, so this did not mean that Ms. Gunther had to exit the road.⁸ Consistent with this, Ms. Gunther also saw a sign notifying cars that they would be sharing the road with bicyclists.⁹

Some distance later, and approximately 150 yards before the ferry terminal, the bike lane ended and the white line that separated the bike lane from the eastbound lane of traffic made a gradual curve to the edge of

³ CP 26, 112-13.

⁴ CP 26-28, 113.

⁵ CP 71.

⁶ CP 71.

⁷ CP 28-29, 113, 123 (a color photo of this sign is attached as Attachment A).

⁸ RCW 46.61.755(1) (“Every person riding a bicycle upon a roadway shall be granted all of the rights and shall be subject to all of the duties applicable to the driver of a vehicle[.]”)

⁹ CP 28-29, 113, 125 (a color photo of this sign is attached as Attachment B).

the sidewalk.¹⁰ As a bicyclist approached the end of the bike lane from the west—i.e., the direction Ms. Gunther was traveling from—the end of the bike lane was visible from almost 200 yards away.¹¹ Once the bike lane ended, it was replaced by an eastbound, right turn only lane.¹² This lane was 11.5 feet wide, which was two feet wider than the other lanes on SR 20,¹³ allowing increased space for the presence of both bicycles and cars after the end of the bicycle path. This lane continued uninterrupted, abutted by only the sidewalk and Puget Sound for approximately 150 yards, until it turned right into the ferry terminal, which was Ms. Gunther’s ultimate destination.¹⁴

There is no evidence in the record that SR 20 was not safe for Ms. Gunther to continue riding her bicycle on to the ferry terminal. In fact, Ms. Gunther conceded at her deposition that she “probably could have” done so.¹⁵

¹⁰ CP 71, 116, 121 (a color photo of the aerial view of this location on the road is attached as Attachment C).

¹¹ CP 71.

¹² CP 71, 116, 121 (*see* Attachment C).

¹³ CP 71, 116, 121 (*see* Attachment C).

¹⁴ CP 71, 116, 121 (*see* Attachment C).

¹⁵ CP 35.

B. Ms. Gunther Unsuccessfully Attempted To Jump The Curb After A Passing Car Made Her Uncomfortable On The Road

After Ms. Gunther came to the end of the bicycle path, she continued riding on the road for a short distance.¹⁶ Ms. Gunther then observed a car enter her lane “with what [she] considered to be no fair margin of safety to [her] presence[.]”¹⁷ At that point, Ms. Gunther observed Mr. Kauzlarich exit the highway by “jumping” a low point in the curb to get onto the sidewalk.¹⁸ The height of the curb at that point was two-and-a-half inches.¹⁹

Rather than continue riding on the road to the ferry terminal or stopping her bicycle and lifting it onto the sidewalk, Ms. Gunther decided to attempt the same jump as Mr. Kauzlarich.²⁰ Prior to attempting the jump, Ms. Gunther recognized that she would, in fact, have to “jump” because the curb and sidewalk were not flush with the road.²¹

¹⁶ CP 114; Opening Brief of Appellant (Br. Appellant) at 5-6.

¹⁷ CP 114. Ms. Gunther’s reference in her brief to *multiple* “oblivious” cars, Br. Appellant at 5, 31, has no support in the record and is the *fourth* different version of events she has provided to explain why she has left the road. In her complaint, Ms. Gunther referenced *no* cars and asserted that she left the road because of an alleged sign that stated that the lane she was in was for ferry traffic only. CP 2. At her deposition, Ms. Gunther again referenced no cars and asserted that she left the road because there were “no sign[s].” CP 29-30, 35-36. In her declaration opposing summary judgment, Ms. Gunther asserted for the first time that she left the road due to the actions of a *single* car, but did not reference *multiple* cars. CP 114.

¹⁸ CP 30, 33-34.

¹⁹ CP 30.

²⁰ In fact, Ms. Gunther was “just about to” stop and lift her bicycle onto the curb when she saw Mr. Kauzlarich jump the curb and decided to follow suit. CP 30.

²¹ CP 30.

Unfortunately, Ms. Gunther did not “jump” high enough—her bicycle did not clear the curb and she fell, suffering injuries.²²

C. Procedural History

Ms. Gunther filed this lawsuit on September 22, 2009, alleging that her fall was the result of purported negligence by the State of Washington and Jefferson County.²³ On October 16, 2009, the trial court granted Jefferson County’s CR 12(b)(6) motion to dismiss because the fall occurred in Port Townsend, and not in unincorporated Jefferson County.²⁴ Ms. Gunther did not sue the City of Port Townsend.

The State moved for summary judgment on August 17, 2010.²⁵ Ms. Gunther had engaged in no discovery, so she requested a continuance to conduct discovery.²⁶ The trial court granted Ms. Gunther’s request for a continuance, continuing the hearing until November 5, 2010.²⁷ The court also permitted additional briefing.²⁸

Despite being granted this continuance, Ms. Gunther neither propounded any discovery requests, nor supplemented her briefing prior to

²² CP 34-35.

²³ CP 1-5.

²⁴ CP 261-72.

²⁵ CP 10-17.

²⁶ CP 100, 103, 110; Report of Proceedings of the hearing of September 17, 2010 (RP (Sept. 17, 2010)) 2.

²⁷ RP (Sept. 17, 2010) 6-8.

²⁸ RP (Sept. 17, 2010) 6-8.

the November 5, 2010, hearing.²⁹ At that hearing, the trial court granted the State's summary judgment motion, dismissing Ms. Gunther's complaint with prejudice.³⁰

IV. STANDARD OF REVIEW

When reviewing an order of summary judgment, this Court engages in the same inquiry as the trial court. *Kirby v. City of Tacoma*, 124 Wn. App. 454, 463, 98 P.3d 827 (2004). Summary judgment shall be granted if there is no genuine issue of material fact. CR 56(c). Once the moving party has shown the absence of a genuine issue of material fact, the nonmoving party must establish that there is such a genuine issue. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, n.1, 770 P.2d 182 (1989). The nonmoving party may not, however, rely upon "speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value[.]" *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

²⁹ Report of Proceedings of the hearing of November 5, 2010 (RP (Nov. 5, 2010)) 2-3.

³⁰ CP 250-51. Ms. Gunther was not present during the November 5, 2010, hearing. RP (Nov. 5, 2010) 4. On September, 22, 2010, the State filed and served a re-note for their continued summary judgment motion to November 5, 2010, at 1 p.m. CP 246-47. The docket for the November 5, 2010, motion calendar also noted that the hearing was set for 1 p.m. CP 252. When Ms. Gunther did not appear at 1 p.m., the Court took a 10 minute recess to allow her additional time to arrive. RP (Nov. 5, 2010) 3-4. When Ms. Gunther failed to appear, the trial court rendered its decision, which was based on the materials presented and not on Ms. Gunther's failure to appear. RP (Nov. 5, 2010) 4-5.

V. ARGUMENT

A. Ms. Gunther Did Not Meet Her Burden Of Providing Evidence Of Negligence

In opposing summary judgment, Ms. Gunther bore the burden of coming forward with evidence of negligence. *Young*, 112 Wn.2d at 225, n.1. The mere fact that Ms. Gunther was injured on a State road was not enough—she was required to provide evidence that the State breached its duty to exercise ordinary care to build and maintain SR 20 in a condition “reasonably safe for ordinary travel.” *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002); *Provins v. Bevis*, 70 Wn.2d 131, 138, 422 P.2d 505 (1967) (The government is neither “an insurer against accident nor a guarantor of the safety of travelers upon its roadways.”)³¹ This burden is ordinarily met by providing either evidence of a violation of an applicable design standard³² or expert testimony.³³ Ms. Gunther provided neither.

Instead, Ms. Gunther relies on an *inapplicable* section of the Manual of Uniform Traffic Control Devices (the “MUTCD”). She

³¹ Ms. Gunther had the burden of proving each element of negligence—duty, breach, causation, and damages. *Keller*, 146 Wn.2d at 328. This burden can only be met with “substantial” evidence—a “mere scintilla” of evidence is insufficient. *Hojam v. Kelly*, 93 Wn.2d 143, 145, 606 P.2d 275 (1980).

³² See, e.g., *Keller*, 146 Wn.2d at 240-41; *Kitt v. Yakima Cnty.*, 93 Wn.2d 670, 674-76, 611 P.2d 1234 (1980).

³³ See, e.g., *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789-90, 108 P.3d 1220 (2005); *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 910-11, 223 P.3d 1230 (2009), *review denied*, 169 Wn.2d 1003, 234 P.3d 1172 (2010).

alternatively relies on her own conclusion that the conditions she faced on the day of her fall rendered SR 20 “unsafe,” without demonstrating that the State even had notice of, much less responsibility for, these conditions. Neither argument is sufficient to survive summary judgment.

B. Ms. Gunther Provided No Evidence That Any Applicable Design Standard Was Violated

Ms. Gunther’s primary argument on appeal is that the State was negligent because it violated Section 9C.04 of the MUTCD, which states that bike lanes should stop at least 100 feet before a right through lane becomes a right turn only lane and then resume to the left of the right turn only lane.³⁴ As a preliminary matter, Ms. Gunther is precluded from raising this argument because she did not raise it before the trial court. RAP 2.5(a), 9.12. Before the trial court, she argued solely that the State had violated Section 9C.03 of the MUTCD by failing to erect a sign instructing motorists to yield to bicyclists, and referenced neither Section 9C.04 nor its standard.³⁵

Even if the Court considers this new argument, it fails for at least two reasons. First, Section 9C.04’s guidance does not apply to the section of road at issue. At the location of Ms. Gunther’s fall, the bike lane ended

³⁴ Br. Appellant at 15-18; CP 202.

³⁵ CP 108. The State explained before the trial court why Section 9C.03 was also inapplicable to the section of road at issue. CP 84. Ms. Gunther has not raised that issue on appeal and has thus waived that argument.

and a right turn only lane was simultaneously added to replace it.³⁶ Section 9C.04's guidance, however, applies only to roads where a *right through lane*, not a bike lane, is dropped and replaced by a right turn only lane.³⁷ Further, Section 9C.04 generally concerns *through bike lanes*,³⁸ but the bike lane at issue here ended and was thus not a through bike lane. Thus, Section 9C.04 was not violated because it does not apply.³⁹

Second, even if the State violated Section 9C.04, that violation would not be evidence of negligence because Ms. Gunther has not demonstrated that the type of harm that occurred in this case was the type of harm Section 9C.04 was created to prevent. *State v. Warner*, 125 Wn.2d 876, 891, 889 P.2d 479 (1995) (“[A] person can only borrow a statutory duty of care to show negligence if the harm that occurs is the type of harm that statute is designed to prevent.”). Ms. Gunther was not struck by a car—she fell while attempting to jump a curb.

³⁶ Br. Appellant at 17 (recognizing that the lane change happened “simultaneously”); CP 116, 121 (*see* Attachment C).

³⁷ CP 202.

³⁸ CP 202.

³⁹ Ms. Gunther also cites Section 9C.04's “standard” that “[a] through bicycle lane shall not be positioned to the right of a right turn only lane,” but does not assert that this standard was violated. Br. Appellant at 16. This is likely due to the fact that this standard was *not* violated—as the bike lane turned into the right turn only lane, and thus there was never a through bicycle lane positioned to the right of a right turn only lane.

C. There Is No Evidence That The Condition Of SR 20 “Forced” Ms. Gunther To Attempt To Jump The Curb

Ms. Gunther alternatively argues that the State was negligent because the unique combination of circumstances she faced on the day of her fall—ranging from an inattentive driver to obstructions on the sidewalk—prevented her from exercising her legal right to continue riding on the road and “forced” her to attempt to jump the curb.⁴⁰ Yet there is no evidence that the condition of *the road* prevented Ms. Gunther from continuing to ride on it. Further, the State is not responsible for an allegedly hazardous condition it did not create unless it has notice of, and time to correct, the hazard in question. *Leroy v. State*, 124 Wn. App. 65, 68-69, 98 P.3d 819 (2004). Here, the allegedly hazardous condition was the *combination* of conditions Ms. Gunther faced. But Ms. Gunther has provided no evidence that the State had notice of *any* of, much less the *combination* of, those conditions.

1. The State Is Not Responsible For The Alleged Carelessness Of A Driver

The first circumstance Ms. Gunther relies upon is a car entering her lane “with what [Ms. Gunther] considered to be no fair margin of safety to [her] presence[.]”⁴¹ But there is no evidence that the driver of

⁴⁰ Br. Appellant at 13-18; CP 115.

⁴¹ CP 114; *see also* Br. Appellant at 31 (alleging that Ms. Gunther was “forced out of her lane by non-yielding motor vehicles”).

that car was an agent of the State or that the State had any notice of cars driving too close to bicycles at this location. *Leroy*, 124 Wn. App. at 68-69.⁴² In fact, contrary to Ms. Gunther's unsupported assertion that the lane "left no room for bicycles,"⁴³ the lane was *two feet wider* than the other lanes on SR 20,⁴⁴ allowing increased space to avoid bicycle-car collisions. In any event, there is no evidence that the State was responsible for, or had notice of, the alleged carelessness of a single driver.⁴⁵

2. The State Is Not Required To Erect Every Imaginable Sign

Ms. Gunther acknowledges that, prior to the end of the bike lane, she passed a sign notifying bicyclists that it was ending and a sign notifying motorists that there would be bicyclists on the road.⁴⁶ Despite these warnings, the second circumstance Ms. Gunther relies upon is the absence of the following *six* additional signs: (1) an *additional* sign notifying bicyclists of the end of their bike path, (2) an *additional* sign

⁴² To the extent this driver failed to pass Ms. Gunther with sufficient space to "clearly avoid" coming into contact with her, he or she would have been violating the law. RCW 46.61.110(2).

⁴³ Br. Appellant at 15.

⁴⁴ CP 71, 116, 121 (*see* Attachment C).

⁴⁵ In making repeated references to the "emergency" this car created, Br. Appellant at 11, 15, 21, 31, Ms. Gunther appears to be attempting to invoke the "emergency doctrine." This doctrine, however, is irrelevant to the resolution of this appeal because it is a *defense* to a claim that a party was negligent and Ms. Gunther's comparative negligence is not at issue on appeal. *See Kappelman v. Lutz*, 167 Wn.2d 1, 9-10, 217 P.3d 286 (2009).

⁴⁶ CP 28-30, 113, 123, 125 (*see* Attachments A and B).

notifying motorists that bicycles would be on the road, (3) a sign instructing cars to yield to bicyclists, (4) a sign notifying bicyclists that the bike path would turn into a lane for vehicles, (5) a sign instructing bicyclists what to do after the end of the bike path, and (6) a painted bicycle symbol on the pavement.⁴⁷

Before the trial court, Ms. Gunther mentioned only *three* of these six signs,⁴⁸ and thus she is precluded from asserting that the failure to erect the other three signs constituted negligence. RAP 2.5(a), 9.12. Further, not only has Ms. Gunther failed to point to any provision in the MUTCD that required the placement of any of these signs on the section of SR 20 at issue,⁴⁹ but this argument ignores the following guidance in the MUTCD: “Regulatory and warning signs should be used conservatively because these signs, if used to excess, tend to lose their effectiveness.”⁵⁰

⁴⁷ Br. Appellant at 11, 14.

⁴⁸ CP 106 (taking issue with lack of signs instructing cars to yield to bicyclists and that bike lane was ending and lack of bicycle symbol on pavement).

⁴⁹ Before the trial court, Ms. Gunther argued that Section 9C.03 of the MUTCD required a sign instructing cars to yield to bicycles. CP 108-09. As the State indicated to the trial court, however, Section 9C.03 and the cited figure applied only to (a) “shared use paths” and (b) bike paths that pass that continue to through an intersection and are located to the left of a right turn only lane. CP 84, 199-202. As a result, Ms. Gunther has abandoned her reliance on these portions of the MUTCD on appeal.

⁵⁰ This guidance is contained in Section 2A.04 (“Excessive Use of Signs”) of the version of the MUTCD in place at the time of Ms. Gunther’s fall, which is available at <http://mutcd.fhwa.dot.gov/HTM/2003/part2/part2a.htm> and is attached as Attachment H. As the State has adopted the MUTCD through its regulations, WAC 468-95-010, it is appropriate for the Court to take judicial notice of Section 2A.04 pursuant to ER 201. ER 201(f) (“Judicial notice may be taken at any stage of the proceeding.”).

As Ms. Gunther has provided no support—either from the MUTCD or from expert testimony—that these signs were required in this location, Ms. Gunther’s argument on this point reduces to a contention that every road must have signs to warn travelers of every possible contingency. That is contrary to the MUTCD’s call for conservative sign use and is not the law. Moreover, a lack of signage did not cause Ms. Gunther to try to jump a curb with her bicycle.

3. The State Is Not Responsible For The Condition Of The Sidewalks

The third circumstance Ms. Gunther relies upon is her allegation that the point where she attempted to jump the curb was the first unobstructed point of access to the sidewalk after a sign informed her that the bike path was ending.⁵¹ This was due to two prior points of access to the sidewalk allegedly being obstructed by vegetation or debris.⁵²

As an initial matter, this is demonstrably false, as there were at least two other access points to the sidewalk—the first a driveway and the second a sidewalk ramp—that Ms. Gunther could have used, but did not.⁵³ Yet even ignoring these two alternative access points, the City of

⁵¹ Br. Appellant at 5-6; CP 102, 106.

⁵² Br. Appellant at 5-6; CP 113-14, 131 (color photos of these points of access are attached as Attachment D and E).

⁵³ Br. Appellant at 3; CP 113, 123, 125 (*see* Attachments A and B). Ms. Gunther asserts in her brief that the sidewalk was “considerably narrower” at these access points than where she attempted to jump the curb. Br. Appellant at 3-4. Yet the

Port Townsend, not the State, was responsible for maintaining the sidewalks in this area.⁵⁴ Further, there is no evidence that the State had any notice of the alleged obstructions and their alleged affect on bicyclists on SR 20. *Leroy*, 124 Wn. App. at 68-69. Simply put, there is no evidence that the State was responsible for, or had notice of, the alleged lack of sidewalk access prior to the site of Ms. Gunther's fall.

4. There Is No Evidence That The State Had Notice Of The Condition Of The Curb Or That The Condition Was Unreasonably Dangerous For Ordinary Travel

The final circumstance Ms. Gunther relies upon is the condition of the curb at the site of her fall.⁵⁵ As a preliminary matter, even if the curb were not reasonably safe, Ms. Gunther has provided no evidence that the State had notice of the fact that the curb in the location of her fall was lower than the adjacent curb. *Leroy*, 124 Wn. App. at 68-69.⁵⁶ This includes providing no evidence—other than her own speculation, which is insufficient to survive summary judgment—that the curb was lower

photographs she cites in support of this proposition do not reveal that to be the case. Further, she does not attempt to assert that this narrowness prevented her from riding her bicycle on the sidewalk. Finally, Ms. Gunther never raised this issue before the trial court and is cannot do so now for the first time on appeal. RAP 2.5(a), 9.12.

⁵⁴ RCW 47.24.020; CP 230-35.

⁵⁵ Br. Appellant at 14. At the section of SR 20 where Ms. Gunther fell, the City of Port Townsend was responsible for the maintenance of the sidewalk, while the State was responsible for the maintenance of the roadway and curb. RCW 47.24.020; CP 230-35.

⁵⁶ This also applies to any contention that it was the paving of the adjacent road, rather than the curb itself, which contributed to the allegedly hazardous condition, Br. Appellant at 14, as Ms. Gunther has provided *no* evidence regarding such paving, including *when* the curb became lower in comparison to when the road was paved.

because the State intended it to serve as a bicycle ramp and not because the curb and sidewalk simply “settled” into the seaside bluff that it rested upon.⁵⁷ *Seven Gables Corp.*, 106 Wn.2d at 13 (holding that plaintiff may not avoid summary judgment by relying upon “speculation, argumentative assertions that unresolved factual issues remain, or in having its affidavits considered at face value”).

Yet even if the State did have notice of the curb’s height, what constitutes a reasonably safe curb depends on the *purpose* of a curb. *See Wilson v. City of Seattle*, 146 Wn. App. 737, 741, 194 P.3d 997 (2008) (“What constitutes a reasonably safe condition on a parking strip is not the same as it is for a sidewalk because a sidewalk’s purpose is mainly pedestrian use, while a parking strip frequently contains utility poles and meters, fire hydrants, trees, grass, and other ornamentation.”). The purpose of a curb is to serve as a physical barrier to protect pedestrians on the sidewalk from traffic on the road.⁵⁸ Ms. Gunther’s issue with the curb is that it served that purpose too well by preventing her from accessing the

⁵⁷ Br. Appellant at 4, 17. Given the *ad hoc* sanding, concrete, and spray paint on the sidewalk joints visible in the photographs of the site, CP 115, 135-36 (color photos of the curb and sidewalk at this location are attached as Attachments F and G), along with the fact this purported “ramp” was located several yards *after* the end of the bicycle path (a strange location if the purpose was to allow bicyclists to avoid riding on the road), the settling of the curb and sidewalk might in fact be the *only* reasonable inference to be drawn regarding the reason for the reduced curb height.

⁵⁸ *See Hyatt v. Sierra Boat Co.*, 79 Cal. App. 3d 325, 340 (1978) (“[A] curb is defined as a stone or row of stones or a similar construction of concrete, wood, or other material along the margin of the roadway as a limit to the roadway and a restraint upon and protection to the adjoining sidewalk space.”).

sidewalk. She cites no authority that such a condition constitutes negligence.⁵⁹

Finally, the condition of the curb was open and obvious.⁶⁰ The State's duty of care with respect to roads "is the alternative duty either to eliminate a hazardous condition, or to adequately warn the traveling public of its presence." *Cornejo v. State*, 57 Wn. App. 314, 322, 788 P.2d 554 (1990) (internal quotation marks omitted). Yet there is no duty to warn of conditions that are open and obvious. See *Hansen v. Washington Natural Gas Co.*, 95 Wn.2d 773, 632 P.2d 504 (1981); *Wilson*, 146 Wn. App. at 742; *Seiber v. Poulsbo Marine Ctr., Inc.*, 136 Wn. App. 731, 740, 150 P.3d 633 (2007); *Hoffstatter v. City of Seattle*, 105 Wn. App. 596, 600-01, 20 P.3d 1003 (2001).

The open and obvious nature of the curb is confirmed by the record. Ms. Gunther admits that she saw the curb and recognized that she

⁵⁹ Nor does Ms. Gunther provide any support for her assertion that a 4.5 inch curb is "standard" or that the curb she fell on was "more than double the allowable height differential[.]" Br. Appellant at 3, 11.

⁶⁰ Ms. Gunther is precluded from making any argument regarding the "assumption of risk" doctrine because she did not make it before the trial court. RAP 2.5(a), 9.12; CP 109 (arguing only that the curb was not "open and obvious"). In any event, Ms. Gunther's argument is irrelevant because the State's argument, both below and on appeal, is that the condition of the curb was "open and obvious," not that Ms. Gunther "assumed the risk" of jumping the curb. Compare *Erie v. White*, 92 Wn. App. 297, 303, 966 P.2d 342 (1998) (holding that "assumption of risk" turns on plaintiff's subjective knowledge of risks) with *Lugo v. Ameritech Corp. Inc.*, 464 Mich. 512, 523-24 (2001) (holding that "open and obvious" turns on objective nature of condition).

would have to jump it because it was not flush with the roadway.⁶¹ At best, Ms. Gunther claims she misperceived the size of the curb, but her own photographs show the existence and height of the curb.⁶²

D. There Is No Due Process Right To A Hearing On A Written Summary Judgment Motion

Ms. Gunther suggests that the trial court erred by granting the State's summary judgment motion without her presence at the hearing.⁶³ This argument fails for several reasons. First, this argument should not be considered because it is raised only in two sentences in the "Issues" section of Ms. Gunther's brief without any additional references elsewhere in the brief. *Timson v. Pierce Cnty. Fire Dist. No. 15*, 136 Wn. App. 376, 385, 149 P.3d 427 (2006) ("[W]e will not review an issue that was addressed by an inadequate argument or that is given only passing treatment"). Second, this argument should also not be considered because Ms. Gunther failed to raise this issue before the trial court (e.g., by means of a motion for reconsideration or for relief from judgment). RAP 2.5(a), 9.12. Third, to the extent this argument might concern a "manifest error affecting a constitutional right" that warrants review for the first time on appeal, RAP 2.5(a)(3), there is no due process right to oral argument

⁶¹ CP 114.

⁶² CP 30, 34, 114-15, 135-36 (color photos of the curb and sidewalk at this location are attached as Attachments F and G).

⁶³ Br. Appellant at 2.

where, as here, the parties had an opportunity to present their positions in writing. *State v. Bandura*, 85 Wn. App. 87, 92-93, 931 P.2d 174 (1997).⁶⁴

VI. CONCLUSION

Ms. Gunther presents no evidence that SR 20 was not reasonably safe for ordinary travel, as she is required to do to support her claim of negligence. This Court should affirm the trial court's order granting summary judgment and dismissing Ms. Gunther's claims with prejudice.

RESPECTFULLY SUBMITTED this 8th day of July, 2011.

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Assistant Attorney General
Attorneys for Respondents

⁶⁴ It should also be noted that the default procedure for motions in federal district court in the Western District of Washington is that *all* motions are decided *without* oral argument. W.D. Wash. LCR 7(b)(4) ("Unless otherwise ordered by the court, all motions will be decided by the court without oral argument."). In addition, appeals in Washington appellate courts may be decided without oral argument. RAP 11.4(j).

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Marilyn Gunther
5312 Ninth Avenue NE
Seattle, WA 98105

- US Mail Postage Prepaid via Consolidated Mail Service
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

STATE OF WASHINGTON
 BY [Signature]
 DEPUTY CLERK

11 JUL 11 AM 8:40
 COURT REPORTER
 COURT REPORTER

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 8th day of June, 2011, at Tumwater, WA.

[Signature]
 Breanne Higginbotham, Legal Assistant

Attachment A



Attachment B



Attachment C

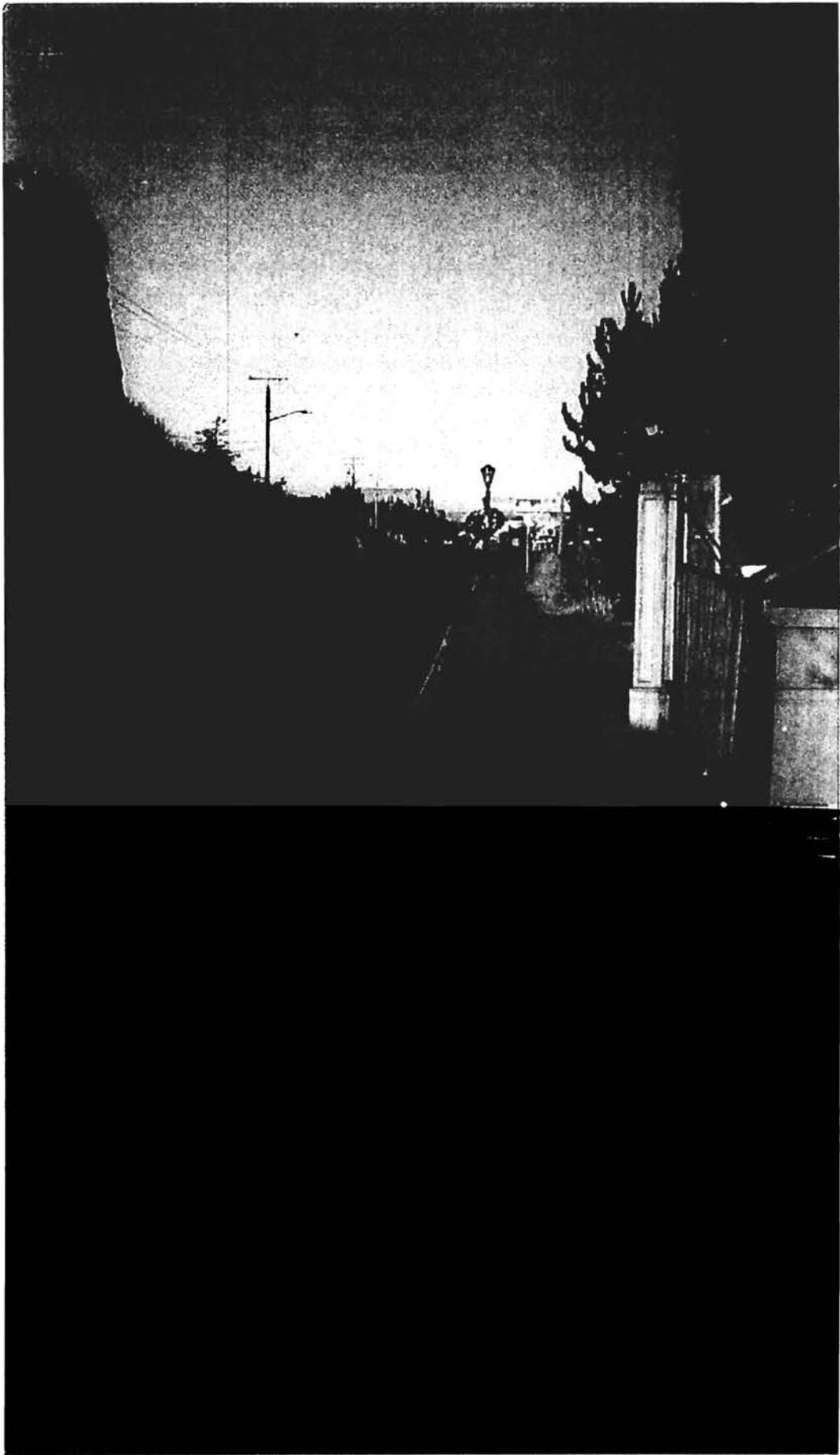


Attachment D



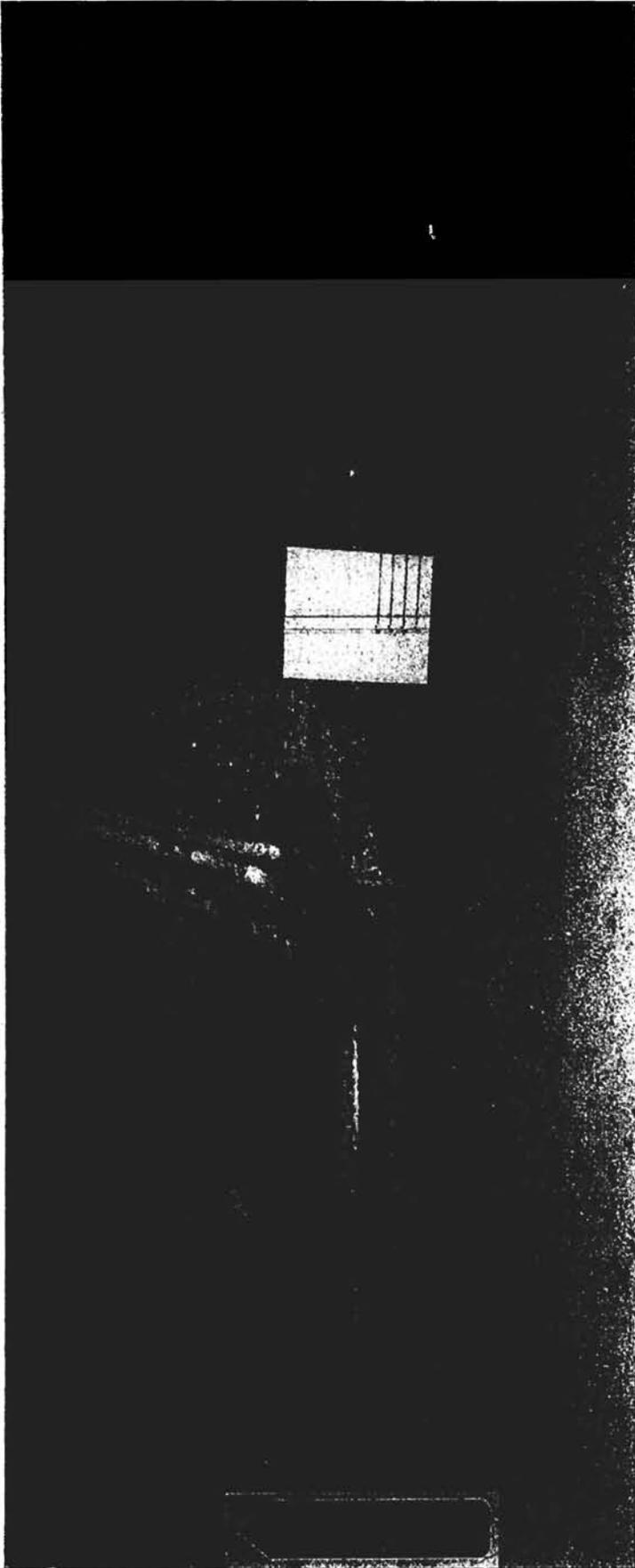
H-1

Attachment E



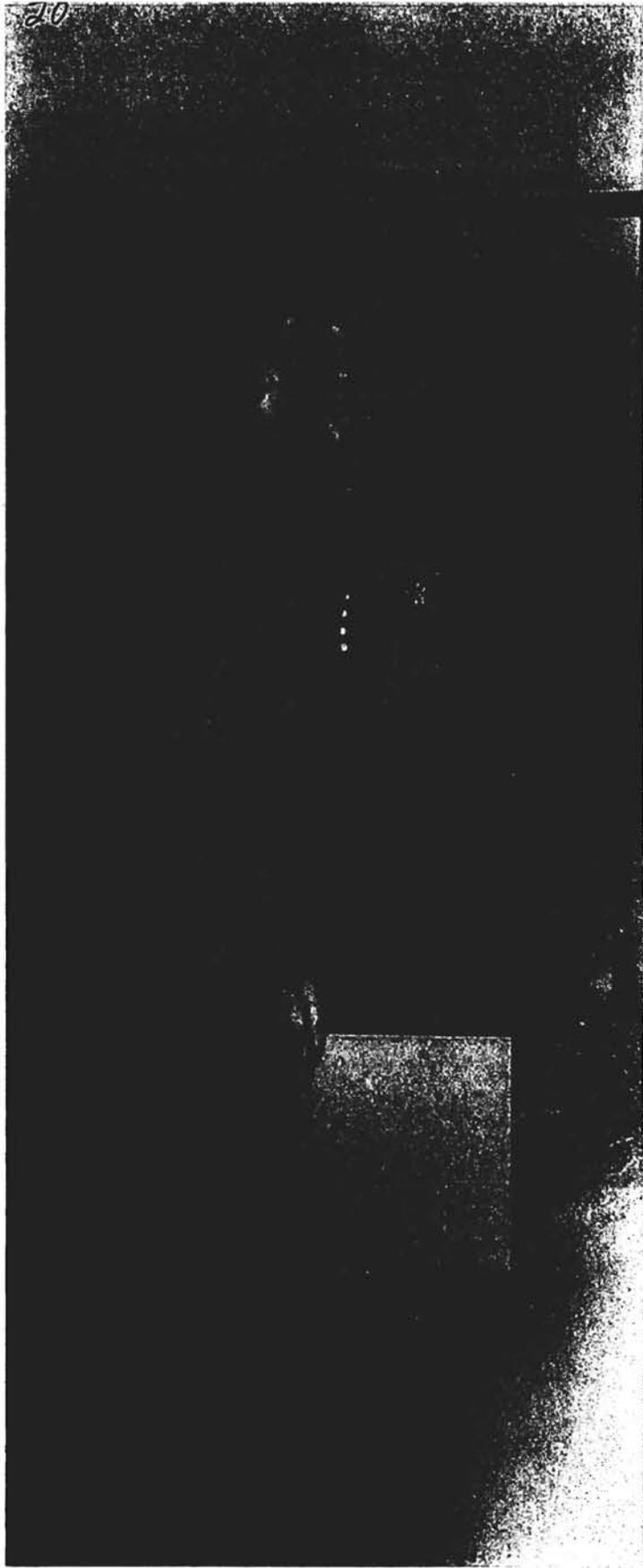
11-2

Attachment F



Exh. H-6-a

Attachment G



Exh. H-6-b

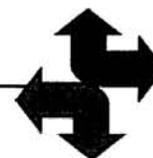
Attachment H



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Manual on Uniform Traffic Control Devices (MUTCD)

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Chapter 2A. General

Section 2A.01 Function and Purpose of Signs

Support:

This Manual contains Standards, Guidance, and Options for the signing within the right-of-way of all types of highways open to public travel. The functions of signs are to provide regulations, warnings, and guidance information for road users. Both words and symbols are used to convey the messages. Signs are not typically used to confirm rules of the road.

Detailed sign requirements are located in the following Chapters of Part 2:

[Chapter 2B](#)—Regulatory Signs

[Chapter 2C](#)—Warning Signs

[Chapter 2D](#)—Guide Signs (Conventional Roads)

[Chapter 2E](#)—Guide Signs (Freeways and Expressways)

[Chapter 2F](#)—Specific Service (Logo) Signs

[Chapter 2G](#)—Tourist-Oriented Direction Signs

[Chapter 2H](#)—Recreational and Cultural Interest Area Signs

[Chapter 2I](#)—Emergency Management Signs

Standard:

Because the requirements and standards for signs depend on the particular type of highway upon which they are to be used, the following definitions shall apply:

- A. Freeway—a divided highway with full control of access;**
- B. Expressway—a divided highway with partial control of access;**
- C. Conventional Road—a street or highway other than a low-volume road (as defined in [Section 5A.01](#)), a freeway, or an expressway; and**
- D. Special Purpose Road—a low-volume, low-speed road that serves recreational areas or resource development activities, or that provides local access.**

Section 2A.02 Definitions

Support:

Definitions that are applicable to signs are given in Sections [1A.13](#) and [2A.01](#).

Section 2A.03 Standardization of Application

Support:

It is recognized that urban traffic conditions differ from those in rural environments, and in many instances signs are applied and located differently. Where pertinent and practical, this Manual sets forth separate recommendations for urban and rural conditions.

Guidance:

Signs should be used only where justified by engineering judgment or studies, as noted in [Section 1A.09](#).

Results from traffic engineering studies of physical and traffic factors should indicate the locations where signs are deemed necessary or desirable.

Roadway geometric design and sign application should be coordinated so that signing can be effectively

placed to give the road user any necessary regulatory, warning, guidance, and other information.

Standard:

Each standard sign shall be displayed only for the specific purpose as prescribed in this Manual. Determination of the particular signs to be applied to a specific condition shall be made in accordance with the criteria set forth in Part 2. Before any new highway, detour, or temporary route is opened to traffic, all necessary signs shall be in place. Signs required by road conditions or restrictions shall be removed when those conditions cease to exist or the restrictions are withdrawn.

Section 2A.04 Excessive Use of Signs

Guidance:

Regulatory and warning signs should be used conservatively because these signs, if used to excess, tend to lose their effectiveness. If used, route signs and directional signs should be used frequently because they promote reasonably safe and efficient operations by keeping road users informed of their location.

Section 2A.05 Classification of Signs

Standard:

Signs shall be defined by their function as follows:

- A. Regulatory signs give notice of traffic laws or regulations.**
- B. Warning signs give notice of a situation that might not be readily apparent.**
- C. Guide signs show route designations, destinations, directions, distances, services, points of interest, and other geographical, recreational, or cultural information.**

Section 2A.06 Design of Signs

Support:

This Manual shows many typical standard signs approved for use on streets, highways, bikeways, and pedestrian crossings.

In the specifications for individual signs, the general appearance of the legend, color, and size are shown in the accompanying tables and illustrations, and are not always detailed in the text.

Detailed drawings of standard signs and alphabets are shown in the "Standard Highway Signs" book. Section 1A.11 contains information regarding how to obtain this publication.

The basic requirements of a highway sign are that it be legible to those for whom it is intended and that it be understandable in time to permit a proper response. Desirable attributes include:

- A. High visibility by day and night; and
- B. High legibility (adequately sized letters or symbols, and a short legend for quick comprehension by a road user approaching a sign).

Standardized colors and shapes are specified so that the several classes of traffic signs can be promptly recognized. Simplicity and uniformity in design, position, and application are important.

Standard:

The term legend shall include all word messages and symbol designs that are intended to convey specific meanings.

Uniformity in design shall include shape, color, dimensions, legends, borders, and illumination or retroreflectivity.

Where a standard word message is applicable, the wording shall be as herein provided. Standardization of these designs does not preclude further improvement by minor changes in the proportion or orientation of symbols, width of borders, or layout of word messages, but all shapes and colors shall be as indicated.