

66334-8

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NO. 66334-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

KOTI HU,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,
an agency of the STATE OF WASHINGTON,

Appellant,

INTRASTATE PAINTING CORPORATION,
a Washington corporation; and MICHAEL F. SAVO,

Defendants.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

STATEMENT OF THE CASE	1
A. Koti Hu was a talented young man with great potential.....	1
B. On July 28, 2007, Hu stopped his gray 1973 Datsun 240Z under an overpass on a metered I-405 onramp.	2
C. Following after Hu in his company's Ford F150, Michael Savo accelerated down the onramp up to 53 to 57 mph.	3
1. Savo did not see the "Ramp Metered Ahead When Flashing" signs, and the "Stop Here" sign was "almost invisible," all of which violated MUTCD.	3
2. Savo did not see the signals hidden behind the overpass, also a MUTCD violation.	4
3. Savo also did not see Hu's gray car "hidden under the shadow" of the overpass.	5
D. Savo's truck collided with Hu's car at 45-to-54 mph, obliterating its back end.....	5
E. Wetsch saw Savo look forward to merge with traffic.	5
F. After struggling to unlatch Hu's seatbelt, John Phelps, Savo, and Mike Wetsch extricated Hu from his car.....	6
G. Savo was not impaired, intoxicated, or otherwise distracted.....	7
H. The collision rendered Hu quadriplegic.	7
ARGUMENT	8
A. The trial court properly allowed proximate cause to go to the jury. (BA 12-21).	8

1.	Review is <i>de novo</i> , taking all evidence and inferences in Hu’s favor.	9
2.	WSDOT’s defective design caused the overpass to shroud Hu’s car in shadows so that Savo did not see it, so proximate cause was for the jury.	10
3.	Other design defects also supported submitting proximate cause to the jury.	11
a.	WSDOT did not properly warn drivers that the onramp might be metered, violating MUTCD.	12
b.	The overpass significantly blocked the ramp meter signals, violating MUTCD.	13
c.	WSDOT failed to use a “Signal Ahead” sign, again violating MUTCD.	15
d.	Savo was preparing to merge onto I-405, looking forward – right where the missing “Signal Ahead” sign should have been.	16
4.	The cases WSDOT relies on are inapposite.	18
5.	WSDOT, not the jury, speculates about the collision.	21
B.	The trial court properly denied WSDOT’s Motion for New Trial, where the court’s curative instruction was necessary to cure WSDOT’s admitted misconduct.	22
1.	WSDOT admitted its misconduct in falsely stating in closing arguments that no prior collisions had occurred on the onramp, violating the trial court’s ruling excluding all prior-collision evidence.	23

2.	The trial court properly exercised its broad discretion, crafting an instruction to cure WSDOT's misconduct.	24
3.	The instruction did not comment on any "evidence" – it cured counsel's false remarks during closing arguments. (BA 24-27).	25
4.	The curative instruction was proper and accurate. (BA 27-28).	27
5.	The curative instruction did not unfairly prejudice WSDOT. (BA 28-29).	28
6.	WSDOT's misconduct invited the curative instruction. (BA 29-31).	29
C.	The trial court properly dismissed WSDOT's speculative "flying speaker" theory as legally and factually unsupported, and WSDOT itself introduced evidence that Hu's brake lights were working, so there were no jury questions on comparative fault.	31
1.	Review is <i>de novo</i> , and summary judgment is proper where all reasonable minds would agree.	31
2.	No statute imposes the absurd duty to install a car stereo to withstand a roughly 50 mph impact that demolishes the area where the amp/speaker unit is screwed into the car's frame.	32
3.	There also is no absurd common-law duty to install a car stereo to withstand a devastating rear-end collision that destroys the back end of the car where the amp/speaker unit is screwed into the car's frame.	36
4.	WSDOT failed to raise a genuine issue of material fact because there is no evidence	

the amp/speaker unit “flew through the air” or impacted Hu.	37
5. WSDOT itself adduced undisputed evidence that Hu’s brake lights were working.	43
D. The trial court properly allowed the “Signal Ahead” evidence, rejecting WSDOT’s inapplicable instruction.	44
1. WSDOT again omits relevant facts.	45
2. WSDOT’s proposed instruction that it had no duty to update its roads and roadway structures was misleading and inapplicable.	46
3. The “Signal Ahead” signs impeached WSDOT’s expert on a material issue.	49
CONCLUSION	50

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Alston v. Blythe</i>, 88 Wn. App. 26, 943 P.2d 692 (1997)	36
<i>Bellevue v. Kravik</i>, 69 Wn. App. 735, 850 P.2d 559 (1993)	47
<i>Bertsch v. Brewer</i>, 97 Wn.2d 83, 640 P.2d 711 (1982).....	38
<i>Casper v. Esteb Enters., Inc.</i>, 119 Wn. App. 759, 765, 82 P.3d 1223 (2004)	29
<i>Cowiche Canyon Conservancy v. Bosley</i>, 118 Wn.2d 801, 828 P.2d 529 (1992).....	36
<i>Cox v. Spangler</i>, 141 Wn.2d 431, 5 P.3d 1265 (2000).....	38
<i>Dep't of Ecology v. Campbell & Gwinn, L.L.C.</i>, 146 Wn.2d 1, 43 P.3d 4 (2002).....	32
<i>Dybdahl v. Genesco, Inc.</i>, 42 Wn. App. 486, 713 P.2d 113 (1986)	25
<i>Fabrique v. Choice Hotels Int'l, Inc.</i>, 144 Wn. App. 675, 183 P.3d 1118 (2008)	42
<i>Fosbre v. State</i>, 70 Wn.2d 578, 424 P.2d 901 (1967).....	47
<i>Garcia v. Dep't of Transp.</i>, 161 Wn. App. 1, 3, _ P.3d __ (2011).	16

Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 60 P.3d 1245 (2003)	41
Godfrey v. State, 84 Wn.2d 959, 530 P.2d 630 (1975).....	38
Griffin v. W.RS, 143 Wn.2d 81, 18 P.3d 558 (2001).....	45
Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 761 P.2d 618 (1988).....	25
Hertog v. City of Seattle, 138 Wn.2d 265, 979 P.2d 400 (1999).....	9
Hizey v. Carpenter, 119 Wn.2d 251, 830 P.2d 646 (1992).....	23, 25
In re Det. of Law, 146 Wn. App. 28, 204 P.3d 230 (2008)	44
In re Marriage of Tomsovic, 118 Wn. App. 96, 74 P.3d 692 (2003)	41
In re Recall of Pearsall-Stipeck, 141 Wn.2d 756, 10 P.3d 1034 (2000).....	49
Indus. Indem. Co. of the N.W., Inc. v. Kallevig, 114 Wn.2d 907, 792 P.2d 920 (1990).....	9, 16
Jacqueline's Wash., Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 498 P.2d 870 (1972).....	49, 50
Johanson v. King Cnty., 7 Wn.2d 111, 109 P.2d 307 (1941).....	19, 20
Keller v. City of Spokane, 146 Wn.2d 237, 44 P.3d 845 (2002).....	10, 17
Kuhn v. Schnall, 155 Wn. App. 560, 228 P.3d 828, <i>rev. denied</i> , 169 Wn.2d 1024 (2010).....	23

<i>Lipscomb v. Farmers Ins. Co. of Wash.</i> , 142 Wn. App. 20, 174 P.3d 1182 (2007)	33
<i>Marshall v. Bally's Pacwest, Inc.</i> , 94 Wn. App. 372, 972 P.2d 475 (1999)	37
<i>McLaughlin v. Cooke</i> , 112 Wn.2d 829, 774 P.2d 1171 (1989).....	42
<i>Merriman v. Toothaker</i> , 9 Wn. App. 810, 515 P.2d 509 (1973)	39
<i>Miller v. Likens</i> , 109 Wn. App. 140, 34 P.3d 835 (2001)	20
<i>Nakamura v. Jeffrey</i> , 6 Wn. App. 274, 492 P.2d 294, <i>rev. denied</i> , 80 Wn.2d 1005 (1972)	19, 20
<i>Nelson v. Martinson</i> , 52 Wn.2d 684, 328 P.2d 703 (1958).....	29
<i>Orcutt v. Spokane County</i> , 58 Wn.2d 846, 364 P.2d 1102 (1961).....	42
<i>Rounds v. Nellcor Puritan Bennett, Inc.</i> , 147 Wn. App. 155, 194 P.3d 274 (2008)	39
<i>Sanchez v. Haddix</i> , 95 Wn.2d 593, 627 P.2d 1312 (1981).....	21
<i>Schneider v. Seattle</i> , 24 Wn. App. 251, 600 P.2d 666 (1979)	36
<i>Schooley v. Pinch's Deli Mkt., Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	33
<i>Seybold v. Neu</i> , 105 Wn. App. 666, 677, 19 P.3d 1068 (2001)	42
<i>Singh v. Edwards Lifesciences Corp.</i> , 151 Wn. App. 137, 210 P.3d 337 (2009)	26

<i>Smith v. Seibly,</i> 72 Wn.2d 16, 431 P.2d 719 (1967).....	48
<i>State v. Brady,</i> 116 Wn. App. 143, 64 P.3d 1258 (2003)	48, 49
<i>State v. Francisco,</i> 148 Wn. App. 168, 199 P.3d 478, <i>rev. denied</i> , 166 Wn.2d 1027 (2009).....	23
<i>State v. Gamble,</i> 168 Wn.2d 161, 225 P.3d 973 (2010).....	26
<i>State v. Martin,</i> 77 Conn. App. 818, 827 A.2d 1 (2003)	30
<i>State v. McDaniel,</i> 155 Wn. App. 829, 230 P.3d 245, <i>rev. denied</i> , 169 Wn.2d 1027 (2010).....	47
<i>State v. Pockert,</i> 53 Wn. App. 491, 768 P.2d 504 (1989)	26
<i>Szupkay v. Cozzetti,</i> 37 Wn. App. 30, 678 P.2d 358 (1984)	46
<i>Tingey v. Haisch,</i> 159 Wn.2d 652, 152 P.3d 1020 (2007).....	32, 35
<i>Ugolini v. States Marine Lines,</i> 71 Wn.2d 404, 429 P.2d 213 (1967).....	42
<i>Vallandigham v. Clover Park Sch. Dist. No. 400,</i> 154 Wn.2d 16, 109 P.3d 805 (2005).....	31
<i>Wilson v. Steinbach,</i> 98 Wn.2d 434, 656 P.2d 1060 (1982).....	31
<i>Yakima Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.,</i> 146 Wn. App. 679, 192 P.3d 12 (2008)	36

FOREIGN CASES

In re Shue,

63 N.C. App. 76, 303 S.E.2d 636 (1983), *aff'd as modified on other grounds*, 311 N.C. 586, 319 S.E.2d 567 (1984)48, 49

Tarulis v. Prassas,

236 Ill. App. 3d 56, 603 N.E.2d 13, 18 (1992) *app. denied*, 149 Ill. 2d. 661 (1993)..... 18

STATUTES

RCW 4.22.005 36

RCW 46.37.680(1)..... 32

RULES

CR 51(c) 47

CR 51(j) 25

CR 56..... 31

RAP 10.3(a)(5)..... 1

OTHER AUTHORITIES

House Bill Report, EHB 1246..... 34

Restatement (Second) of Torts § 286..... 33

Senate Bill Report, EHB 1246..... 34

Wash. State Const. Art. 4, § 16..... 25

STATEMENT OF THE CASE

WSDOT omits nearly all unfavorable evidence. BA 5-11. It fails to take the facts and reasonable inferences in Hu's favor and fails to provide a "fair statement of the facts . . . without argument." RAP 10.3(a)(5). The relevant facts follow.

A. Koti Hu was a talented young man with great potential.

Koti Hu was a 27-year-old musician and church music director. RP 498-99, 504-05, 596. Hu grew up in a musical family, and was classically trained in voice, piano and violin. RP 498-99. Hu later learned guitar, started a music career, and recorded several albums. RP 499-500; Exs 164-66. His rock band, Cody Who, won Seattle Pacific University's talent contest. RP 503, 525-26; see Ex 166.

Hu completed at least a year of college, but took a break to start a small music business. RP 499-500, 505. Hu planned to finish college. RP 1195.

Hu also planned to marry his girlfriend of 10 years, Marena Hawk. RP 496, 506. He enjoyed an active lifestyle, including rock climbing, hiking, and bicycling. RP 500, 510, 589. He traveled extensively, often for mission work. RP 501-02, 613. Hu was a "people person." RP 504, 513.

B. On July 28, 2007, Hu stopped his gray 1973 Datsun 240Z under an overpass on a metered I-405 onramp.

On Saturday, July 28, 2007, Hu drove his gray 1973 Datsun 240Z from Bothell to Kirkland to get some teriyaki. RP 526-27, 1236, 1532.¹ The day was bright and sunny. CP 561. Hu left the restaurant at about 4:00 p.m., heading toward the I-405 onramp at the intersection of NE 70th St. and 116th Ave. NE in Kirkland.² RP 527, 1876; Ex 91; CP 561, 1078.

After the initial turn onto the onramp, the onramp turns sharply to the right, then becomes a straightaway until it merges with I-405. Exs 91, 262-68, 560. The downhill grade is 6%-to-6.5%. RP 870. There are trees on the left, between the onramp and I-405. RP 1292-94; Exs 262-68, 560. The onramp has an unmetered H.O.V. lane on the right, and two other lanes that are sometimes metered. RP 698, 707, 986-87; Exs 1-3, 7-8.

The ramp meter was on, which is unusual for a Saturday. RP 707. Hu did not recall seeing any "Ramp Metered Ahead When Flashing" ("RMAWF") signs, and did not see a flashing light. RP 528. Two RMAWF signs face each oncoming lane at the

¹WSDOT erroneously dates the collision on July 29, 2007. BA 5.

²Pictures of the onramp and of Hu's car are attached as Appendix A. CP 1059; Exs 2, 7, 13, 262, 265, 268, 343 (slide 8), 425, 564.

intersection. RP 697, 946-47; Ex 262, 421. A third is in the middle of the curve on the left side. RP 694, 943-44; Exs 262-67, 422.

Hu eventually saw the signals used to meter the onramp. RP 528. These two signals are on tall mast arms behind an overpass crossing the straightaway. RP 688, 691; Exs 1-3, 5, 7, 560. A "Stop Here on Red" sign and the metering stop bar are located directly under the overpass, in its shadow. RP 1925, 1961-62; Exs 2-4. Hu stopped his car at the stop bar under the overpass, waiting for the green signal. RP 527-28, 606.

C. Following after Hu in his company's Ford F150, Michael Savo accelerated down the onramp up to 53 to 57 mph.

- 1. Savo did not see the "Ramp Metered Ahead When Flashing" signs, and the "Stop Here" sign was "almost invisible," all of which violated MUTCD.**

Coming behind Hu, Michael Savo approached the onramp intersection in his company's Ford F150 truck. CP 4045, 4053-54. Savo did not recall seeing any cars in front of him, and he did not see the RMAWF sign facing his lane. CP 4053-55. This sign was too high – at 15.8 feet – so an ordinary driver would not see it. RP 947-49. The sign fails to command drivers' attention, violating the Manual on Uniform Traffic Control Devices ("MUTCD"). RP 929-31.

Savo turned right onto the onramp. CP 4053. He noticed the I-405 traffic as he followed the curve. CP 4054. He did not see

the RMAWF sign in the curve. CP 4054-55. This sign also fails to command a driver's attention while negotiating the sharp curve, again violating MUTCD. RP 943-44. MUTCD thus requires a "Signal Ahead" sign in the straightaway, but WSDOT failed to install one. RP 938-40, 943-44, 1963-65.

The stop bar and "Stop Here" sign also failed to command attention, violating MUTCD. RP 929-31, 1961. An ordinary driver could easily miss the stop bar and sign due to the shadow. RP 929-30. They are "almost invisible." *Id.*; Ex 2. WSDOT could easily have prevented this problem by placing the stop bar and sign in the sunlight, 24 feet before the overpass. RP 957, 1961-62.

2. Savo did not see the signals hidden behind the overpass, also a MUTCD violation.

Savo accelerated to a peak speed of 53 to 57 mph to merge onto I-405. RP 1538, 1664, 1677. Savo did not see the signals, which the overpass hid until he was about three seconds from striking Hu's car. CP 4061; RP 1590-91. This sight distance violates MUTCD, failing to provide sufficient stopping distance after the signals become visible. RP 892-95, 912-13; Ex 425. This defect made the ramp unsafe for ordinary drivers. RP 1932-33.

3. Savo also did not see Hu's gray car "hidden under the shadow" of the overpass.

Savo did not see Hu's car until "it was too late." CP 4061.

He blamed the sun's glare and the overpass shadow shrouding Hu's grey car (CP 4069):

And I blame a lot of it on the sun, and just the glare, his car being hidden under the shadow, his gray car.

D. Savo's truck collided with Hu's car at 45-to-54 mph, obliterating its back end.

Savo's truck collided with Hu's car at 45 to 54 mph, obliterating its back end. RP 1538, 1676-78; Exs 1-3, 5-14, 32.³ Savo's truck crushed Hu's rear wheels into the car frame, pushing his car far down the onramp. Exs 5, 7.

"This was an accident waiting to happen." RP 1968-69. The onramp was not safe for ordinary travel. RP 867. The design defects were the primary cause of the collision. RP 867, 962.

E. Wetsch saw Savo look forward to merge with traffic.

Mike and Tracy Wetsch came behind Savo, but in the H.O.V. lane, and witnessed the collision. RP 1253, 1259-60, 1298. WSDOT relies heavily on Mike Wetsch's testimony that Savo did

³WSDOT asserts that Savo struck Hu's car at 40-to-50 mph. BA 5. Yet WSDOT's own experts reconstructed the collision and determined that Savo struck Hu at 45-to-54 mph. RP 1538, 1676-78.

not look forward. BA 8-9. But Wetsch just “glanced” at Savo’s truck. RP 1277. At that moment, Savo was not looking ahead, but to the left, towards the freeway. RP 1262-63.

Yet WSDOT omits that Wetsch also said Savo was doing what he was doing – “looking ahead” to merge (RP 1279-80):

Q. [Y]ou were looking ahead and you were accelerating to merge with freeway traffic?

A. That’s correct.

Q. And was it your impression that the driver of the white pickup truck was doing the same thing?

A. He was.

When Wetsch looked at the I-405 traffic, he did not look to his left, but ahead past the signals. RP 1294. Trees between the onramp and I-405 interfered with a view of I-405. RP 1292-93; Ex 268.

F. After struggling to unlatch Hu’s seatbelt, John Phelps, Savo, and Mike Wetsch extricated Hu from his car.

John Phelps heard the collision while driving down I-405, immediately pulled his car over, and ran to Hu’s car. RP 1692-94. Mike Wetsch and Savo also ran to Hu’s car. RP 1263-64, 1282, 1694. Hu was unconscious. RP 1264.

They tried to pull Hu out, but he was stuck in his seatbelt. RP 1264-65, 1697. Savo – whose hand was bleeding – reached

across Hu to release the seatbelt. RP 1264-65, 1697; CP 1697-98, 4058-59. Phelps, Wetsch, and Savo pulled Hu out of the car, laying him down on the pavement nearby. RP 1265.

G. Savo was not impaired, intoxicated, or otherwise distracted.

Washington State Patrol Trooper Brian Dixon arrived at the scene after Hu was removed from his car. RP 1229-30, 1236; CP 1130-31. Dixon had served as a Trooper for seven years, and was a certified technical collision investigator and a Drug Recognition Expert. RP 1232, 1235, 1237. He determined that Savo was not intoxicated, impaired or distracted. RP 1239-40, 1243.

H. The collision rendered Hu quadriplegic.

Hu cannot use his legs and has limited use of his arms, but no control of his fingers. RP 569-70, 591. Despite his paralysis, he is in constant pain. RP 542, 548, 560-61, 1102-05. His doctors have unsuccessfully tried seven or eight different drug combinations to alleviate his pain without harsh side effects. RP 561-64, 1104. Hu's pain has increased since the collision. RP 559.

Hu has no control over his bladder and bowels. RP 551-53. He has had several surgeries, including to realign his spine, to install a catheter, and to remove his toenails. RP 529, 551-52, 586,

1042. He has been hospitalized twice for autonomic dysreflexia, a potentially fatal condition. RP 553-54, 584-85.

Unable to sing or play instruments, Hu cannot continue his career as a musician, composer, and church music director. RP 504, 572-73, 590-92. He obviously cannot pursue his former active lifestyle. RP 589, 1045-46, 1474-76; Ex 452.

Hu's girlfriend Hawk – a nurse – tried to help Hu with his daily care. RP 845. Hu told Hawk that she should not have to help him. *Id.* Hawk decided that they should separate, feeling that she was impeding Hu's progress. RP 593-95, 845-46.

ARGUMENT

A. The trial court properly allowed proximate cause to go to the jury. (BA 12-21).

WSDOT's argument that the trial court erroneously denied its J.N.O.V. motions assumes that WSDOT negligently designed the onramp, but claims that the many design defects did not cause the collision. BA 13-14. WSDOT omits most of the relevant evidence and erroneously takes all evidence and inferences in its favor. Most significantly, WSDOT omits Savo's statement that he did not see Hu's car due to the overpass shadow. BA 15 (citing CP 4062, 4068-69). This is alone sufficient to sustain the jury's verdict, particularly coupled with Trooper Dixon's confirmation of this

“problem” and the expert testimony that shrouding the stop bar and sign in the overpass shadow violated MUTCD.

WSDOT also omits evidence that Savo was looking forward and preparing to merge, even claiming that the experts incorrectly assumed that Savo was looking forward. BA 17. Savo was “looking ahead” preparing to merge onto I-405. RP 1280. This was exactly what an ordinary driver would (and should) be doing under the circumstances. RP 869, 1021. The trial court correctly left proximate cause to the jury. This Court should affirm.

1. Review is *de novo*, taking all evidence and inferences in Hu’s favor.

Proximate cause is generally a jury question. ***Hertog v. City of Seattle***, 138 Wn.2d 265, 275, 979 P.2d 400 (1999). WSDOT agrees that a directed verdict is appropriate only where “there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for” Hu. BA 13. Review is *de novo*. ***Indus. Indem. Co. of the N.W., Inc. v. Kallevig***, 114 Wn.2d 907, 915-16, 792 P.2d 920 (1990). This Court will affirm if there is sufficient evidence to sustain the verdict. 114 Wn.2d at 915-16. J.N.O.V is rarely appropriate, and only when the evidence could not possibly sustain the verdict. *Id.*

2. **WSDOT's defective design caused the overpass to shroud Hu's car in shadows so that Savo did not see it, so proximate cause was for the jury.**

WSDOT has a duty to construct highways that are reasonably safe for ordinary travel by an ordinary driver. *Keller v. City of Spokane*, 146 Wn.2d 237, 44 P.3d 845 (2002). WSDOT owes this duty even to a negligent driver. *Id.* at 251.

Savo plainly stated that he did not see Hu's gray car due to the overpass shadow (CP 4068-69, emphasis added):

I'm shocked I didn't see him, I'm shocked I didn't see the sign, whatever all those things are. I can blame that on the sun being in the windshield, you know, there's a million things. I still cannot ever come to a conclusion in my mind how I did not see his car. And I blame a lot of it on the sun, and just the glare, **his car being hidden under the shadow**, his gray car.

WSDOT quotes this testimony, but omits the final sentence. BA 15.

The omitted sentence disproves WSDOT's preposterous claim that "no **facts**" show its negligent design caused this collision. BA 17.

Further belying its claim, Trooper Dixon (who responded to the scene) testified that the overpass blocked the signals and that its shadow made it hard to see a dark car at the stop-bar. RP 1244-45. It is hard to imagine more direct evidence than this. Trooper Dixon unequivocally identified for the jury the "problem" created by WSDOT's negligent design. RP 1244, 1248.

In addition to this direct evidence, experts Douglas and Parsonson explained why it was negligent to place the stop bar and “Stop Here On Red” sign in the overpass shadows, violating MUTCD. RP 929-30, 1960-61. MUTCD requires that traffic control devices command attention. *Id.* In the shadows, the stop-bar is easily missed until a driver is “right on top of it.” RP 929. The sign is “almost invisible” until a driver is “really close to it,” particularly if the driver’s eyes have adjusted to the sunlight. RP 929-30.⁴

This evidence presented a jury question on causation:

- ◆ Savo unequivocally attributed his failure to see Hu’s car to the overpass shadow. CP 4069.
- ◆ Dixon, Douglas and Parsonson agreed that the shadow caused visibility problems. RP 929, 1244, 1248, 1960-61.
- ◆ Douglas and Parsonson opined that this negligent-design problem violated MUTCD. RP 929, 1960-61.

WSDOT virtually ignores all of this dispositive evidence. The trial court did not err in submitting proximate cause to the jury.

3. Other design defects also supported submitting proximate cause to the jury.

Three additional design defects supported submitting proximate cause to the jury: (1) WSDOT did not adequately warn

⁴ WSDOT’s warning signs do not solve the visibility problem. RP 931-32. WSDOT could have alleviated this problem simply by moving the stop bar and sign just 24 feet in front of the overpass. RP 2012-13.

drivers that the ramp might be metered; (2) the overpass hid the meter signals from drivers' view, providing insufficient stopping distance; and (3) WSDOT omitted a required "Signal Ahead" sign.

a. WSDOT did not properly warn drivers that the onramp might be metered, violating MUTCD.

The intersection at the onramp's entrance has two "Ramp Metered Ahead When Flashing" ("RMAWF") signs with a light on top of each sign. RP 946-47; Ex 421. The signs face opposite directions, one facing each lane that feeds into the onramp. *Id.* The signs are 15.8 feet tall and 13.6 feet tall. *Id.*

Immediately after the entrance, the onramp turns 90 degrees to the right. RP 946-47. There is no sign on the inside (right-hand side) of the curve. There is a RMAWF sign on the outside (left-hand side) of the curve. RP 694, Ex 422.

After the 90-degree turn, the onramp is straight, running parallel to I-405 to the left. Ex 564. The straightaway begins approximately 416 feet from the overpass. RP 1401-02; Ex 564. The onramp has no "Signal Ahead" sign. Exs 265, 268, 564.⁵

The RMAWF signs violated MUTCD. RP 929, 943, 945-46, 948-49. Ordinary drivers at the onramp entrance focus on the

⁵ Hu discusses this additional design defect *infra*, at Argument § A.3.c.

intersection signals, so they miss the RMAWF signs. RP 948-49.

The signs also were far too high for the ordinary driver. *Id.*

It was also “highly likely” that drivers would not see the sign in the 90-degree turn. RP 943.⁶ Drivers negotiating a turn look to the inside corner – here, the right – so they would not see the sign on their left. RP 1415, 1417-18. The sign in the curve also conveys the wrong message. RP 939. As discussed below, the overpass blocks the meter signals, so there should be a “Signal Ahead” sign in the straightaway. *Id.*

b. The overpass significantly blocked the ramp meter signals, violating MUTCD.

The two signals that meter traffic (when the ramp meter is on) are located beyond the overpass, about 120 feet from the stop bar. RP 950; Exs 2 & 7. The left signal is 17.94 feet high and the right signal is 19.31 feet high. RP 916. The overpass clears the onramp at only 15.75 feet. RP 1959. Video footage taken from a car driving down the onramp shows that the overpass blocks the signals until a driver is too close to the stop bar. Ex 342.

⁶ Human-factors expert Dr. Johnson explained that ordinary drivers “see” these signs peripherally, but without conscious awareness. RP 1429. MUTCD requires that they command attention. RP 929, 930-31.

The onramp has a 290-foot “minimum visibility distance”; *i.e.* a driver takes 290 feet to come to a complete stop after seeing the signals. RP 894.⁷ Expert Douglas estimated that Savo’s visibility distance was 244.5 feet, 45.5 feet less than MUTCD requires. RP 922.⁸ This design fails to provide adequate visibility distance for all vehicles, regardless of vehicle height. RP 913, 919-23; Ex 425.

Expert Parsonson concurred. RP 1931, 1933-34, 1950-51. The onramp was not reasonably safe for ordinary drivers, where there was insufficient sight distance for drivers to stop in time. RP 1932-33. The collision was entirely foreseeable. RP 1968-69.

There is no indication that WSDOT took the overpass into account. RP 873. WSDOT apparently installed pre-ordered signals without realizing that the overpass significantly blocked them. RP 873-74. WSDOT could have cured this problem “easily” – and complied with MUTCD – by simply lowering the signals. RP 874, 925-27, 1937; Ex 426.

⁷ MUTCD’s 270-foot minimum visibility distance is based on a flat surface. RP 894. But the onramp has a 6%-to-6.5% grade, so Douglas calculated that MUTCD required a 290-foot minimum visibility distance. *Id.*

⁸ Douglas calculated the minimum visibility distance using 30 mph, the slowest speed any expert used. RP 893. The design speed for the onramp is 40 mph. *Id.* Greater speeds require greater stopping distances. RP 892-93.

c. WSDOT failed to use a “Signal Ahead” sign, again violating MUTCD.

Since the overpass blocks the signals, MUTCD required WSDOT to install a “Signal Ahead” sign. RP 933-34, 939-40, 1963-65. WSDOT had no discretion to use a RMAWF sign instead of a Signal Ahead sign. RP 939-40, 1964, 1968. Without the correct sign, the collision was an “accident waiting to happen.” RP 1968.

The experts unequivocally opined that these many design defects proximately caused the collision, at least in part:

- ◆ The onramp was not “reasonably safe for ordinary travel on the day of the collision.” RP 867.
- ◆ “[T]he ramp metering system was the primary cause of this accident.” RP 962.
- ◆ The collision “was definitely foreseeable. This was an accident waiting to happen. . . .” RP 1968-69.

Virtually ignoring this expert testimony, WSDOT claims that “no **facts**” showed that negligent design caused Savo to miss the signs. BA 17. Savo could not say why he missed the signs because he is not a highway-design expert. CP 4068-69. The experts opined that the signs failed to command attention, violated MUTCD, and caused (in part) the collision. This is more than enough to go to a jury.

d. **Savo was preparing to merge onto I-405, looking forward – right where the missing “Signal Ahead” sign should have been.**

WSDOT claims that Hu’s experts incorrectly assumed that Savo was “paying attention,” when – according to WSDOT – there are “no **facts** . . . that Savo was looking ahead at any relevant time.” BA 17; see *also* BA 15-17, 21. On the contrary, there is no evidence that Savo was inattentive. Savo was not eating, texting, or talking on his cell phone. CP 3776; RP 1240. Trooper Dixon ruled out such “safety issues.” RP 1240.⁹

WSDOT omits evidence and improperly reads inferences in its favor, attempting to support its incorrect claim that Savo was looking to his left, not “ahead.” BA 16; ***Indus. Indemnity Co.***, 114 Wn.2d at 915. Savo plainly contradicted this assertion: He was looking at the “mainline” preparing to merge. RP 1243, 1280.

⁹ WSDOT cites, but does not address, ***Garcia v. Dep’t of Transp.*** to support its argument that a design defect is not a proximate cause, where “a driver fails to pay attention and is not looking ahead.” BA 16 (citing 161 Wn. App. 1, 3, _ P.3d __ (2011)). ***Garcia*** is inapposite. There, driver Cushing hit a pedestrian in a marked crosswalk, killing him. 161 Wn. App. at 3. Cushing admitted that she was not paying attention – she was talking to her son sitting in the passenger seat. *Id.* An accident reconstruction expert opined that Cushing’s inattentiveness caused the collision. *Id.* at 8. Traffic experts opined that the intersection met applicable safety standards. *Id.* The trial court dismissed the case on summary judgment, and the appellate court affirmed. *Id.* at 10, 16. ***Garcia*** is nothing like this case.

WSDOT also argues that Savo did not see the signs or Hu's car and did not report to Dixon that he was "confused." BA 14-15. Confusion is irrelevant: Savo did not see the signs or Hu's car because WSDOT negligently designed the onramp, misplacing and misusing inappropriate signage that failed to command attention.

WSDOT's star witness on this point, Mike Wetsch, also agreed that Savo was "looking ahead." *Compare* BA 16-17 with RP 1280. Wetsch "glanced" over when Savo was looking to the left. RP 1277. But Wetsch agreed that Savo was otherwise "looking ahead . . . accelerating to merge with freeway traffic." RP 1280.

Taking snippets of the Wetsches' testimony out of context, WSDOT argues that they saw some (but not all) of the signs and Hu's car. BA 15. What Tracy Wetsch saw is irrelevant – there is no "ordinary passenger" standard. What Mike Wetsch saw is largely irrelevant as well: it makes no difference what one driver saw, or even what average drivers see. WSDOT has a duty to design safe highways for "extremes" – not for averages. RP 1974; *see also Keller*, 146 Wn.2d at 249 (duty to design roads safe for ordinary travel, even by negligent drivers).

In any event, Wetsch did not see some of the signs and was confused about some events leading up to the collision (BA 15-17):

- ◆ Savo turned right to enter the onramp – Mike Wetsch thought he turned left. RP 1270, 1308, 1311.
- ◆ He saw only one “Ramp Metered Ahead When Flashing” sign – there are three. RP 1257.
- ◆ He placed the RMAWF sign on his right, after the 90-degree turn – the sign is on the left. *Compare* RP 1257, 1271-72 *with* Exs 262-68.

4. The cases WSDOT relies on are inapposite.

WSDOT relies on a series of inapposite cases, none of which involve a driver who did not see warning signs or the car he collided with, coupled with expert testimony that design defects hid signals, misdirected drivers, and shrouded a dark car in shadows. BA 17-20. These factually inapposite cases have no bearing on proximate cause, a peculiarly fact-specific inquiry.

In *Tarulis v. Prassas*, the plaintiff relied on two inferences that were “merely speculative”: (1) that the at-fault driver struck a median because she did not see it; (2) and that she did not see it because it was not readily visible. BA 17-18 (citing 236 Ill. App. 3d 56, 603 N.E.2d 13, 18 (1992) *app. denied*, 149 Ill. 2d. 661 (1993)). Savo said he did not see Hu’s car because of the overpass shadow. CP 4069. He did not see the signs because they failed to command attention, violating MUCTD. *See supra*, Statement of Case § C. *Tarulis* is inapposite.

Johanson and **Nakamura** are no more persuasive. BA 19-20 (citing **Johanson v. King Cnty.**, 7 Wn.2d 111, 109 P.2d 307 (1941); **Nakamura v. Jeffrey**, 6 Wn. App. 274, 492 P.2d 294, *rev. denied*, 80 Wn.2d 1005 (1972)). In **Johanson**, plaintiff Clair Tholstrup was traveling southbound on a four-lane, two-direction road. 7 Wn.2d at 115-17. Peter Rian crossed the road's center, colliding with Tholstrup. *Id.* at 117-18. Tholstrup argued that an old yellow "directional" line between the two southbound lanes "might have" misled Rian. *Id.* at 121-22. But there was no evidence that Rian saw the yellow line and "the only reasonable inference" based on Rian's pre-collision driving was "that he was not following or relying upon the yellow line." *Id.* at 122. The appellate court therefore affirmed the trial court's order granting the City judgment as a matter of law. *Id.* at 123-24.

This matter is not about whether Savo "might have" seen something that "might have" misled him. Savo did not see Hu's car

or the signs due to WSDOT's negligent design. **Johanson** does not apply here.¹⁰

In **Nakamura**, disfavored-driver Grady Jeffery T-boned Thomas Garret and Ben Nakamura at an uncontrolled intersection. 6 Wn. App. at 276. Garret and Nakamura sued the City of Seattle, claiming that the City negligently failed to place a sign at the intersection warning drivers that residential structures might obstruct the view. *Id.* But unlike here, there was no evidence that these structures impaired Jeffery's view. *Id.* The appellate court affirmed a directed verdict for the City. *Id.* at 276-77. **Nakamura** is nothing like this case.

Based on these inapposite cases, WSDOT argues that there is no fact question on proximate cause, even assuming that Savo

¹⁰ WSDOT also cites, without any discussion, **Miller v. Likens**, 109 Wn. App. 140, 147, 34 P.3d 835 (2001). BA 20. There, taking the contested facts in the plaintiff's favor, Likens crossed the fog line and hit Quimback, who was walking on the shoulder. **Miller**, 109 Wn. App. at 143-44. Miller (Quimback's mother) sued the City of Seattle, arguing that the City negligently failed to make the fogline more noticeable. 109 Wn. App. at 147. The appellate court affirmed summary judgment for the City, holding that there was no evidence that Likens was confused or misled by the fogline. *Id.*

If Likens had survived and testified that he did not see the fogline because it was hidden, then summary judgment would have been inappropriate. *Id.* at 147. This would be doubly true if experts opined that the fogline did not comply with applicable safety standards and made the road unsafe for ordinary travel. *Id.* at 144-47. Since these things did not happen, **Miller** is nothing like this case.

was looking straight ahead, where Hu cannot establish causation if WSDOT is negligent under one of “only two theories.” BA 18-19. But there is no theory under which WSDOT is fault-free. WSDOT negligently placed the stop bar and sign under the overpass, violating MUTCD and shrouding Hu’s car in the shadows. *Supra*, Statement of the Case § C. WSDOT negligently placed inadequate signs in the wrong spots, violating MUTCD and failing to warn Savo about the ramp-meter signals. *Id.* WSDOT negligently failed to place a “Signal Ahead” sign before the overpass, again violating MUTCD and misleading Savo. *Id.* The jury properly found WSDOT’s negligence a proximate cause of the collision.¹¹

5. WSDOT, not the jury, speculates about the collision.

WSDOT concludes that Savo “looking left and not paying attention was as likely a cause of the accident as the . . . faulty on-ramp design.” BA 20-21. WSDOT’s dogged refusal to even acknowledge the contrary evidence requires its repetition:

¹¹ This case is entirely unlike *Sanchez v. Haddix*, in which the defendant was traveling in his proper lane within the speed limit when he broadsided a disfavored vehicle that failed to yield the right-of-way, pulling out in front of him without warning. BA 18-19 (citing *Sanchez v. Haddix*, 95 Wn.2d 593, 599, 627 P.2d 1312 (1981)).

- ◆ The jury did not have to “speculate” about why Savo did not see Hu’s car. BA 20. Savo plainly stated that he did not see Hu’s car because of the overpass shadow. *Compare* BA 20 *with* CP 4069. WSDOT’s defective design caused this visibility problem. *Supra*, Argument § A 3.
- ◆ The jury did not have to speculate about why Savo did not see the signs or signals. BA 20. The misplaced and incorrect signs failed to command attention and the overpass blocked the signals. *Supra*, Argument § A 3. WSDOT’s negligence also caused these visibility problems. *Id.*
- ◆ The jury did not have to speculate about where Savo was looking. BA 20-21. Savo told Dixon he was looking at the “mainline” traffic, preparing to merge. RP 1243. Mike Wetsch unequivocally agreed that Savo was “looking ahead and ... accelerating to merge with traffic.” RP 1279-80. It is a reasonable inference from the evidence that Savo was looking ahead, under the overpass. *Id.*; Ex 268.

The jury reasonably refused to believe WSDOT’s assertions so inconsistent with the evidence cited above. The jury did not accept WSDOT’s farfetched claim that Savo was looking left the entire time he accelerated through a sharp right turn and down the onramp. Proximate cause was for the jury to decide.

B. The trial court properly denied WSDOT’s Motion for New Trial, where the court’s curative instruction was necessary to cure WSDOT’s admitted misconduct.

WSDOT raises three issues under the rubric of its new trial motion, the first pertaining to the court’s instruction curing WSDOT’s admitted misconduct in its closing argument (BA 21-31); the second pertaining to the court’s partial summary judgment

ruling that Hu was not at fault as a matter of law (BA 31-45); and the third pertaining to expert testimony regarding signage on other onramps in Washington. BA 45-49. This section addresses only the first argument – the others are addressed below.

This Court reviews for an abuse of discretion a trial court's order denying a new trial. ***State v. Francisco***, 148 Wn. App. 168, 180, 199 P.3d 478, *rev. denied*, 166 Wn.2d 1027 (2009). The trial court is in the best position to evaluate closing-argument misconduct, so it has broad discretion to fashion a remedy. ***Kuhn v. Schnall***, 155 Wn. App. 560, 577, 228 P.3d 828, *rev. denied*, 169 Wn.2d 1024 (2010). The trial court also has broad discretion in how to word jury instructions. ***Hizey v. Carpenter***, 119 Wn.2d 251, 268, 830 P.2d 646 (1992).

1. **WSDOT admitted its misconduct in falsely stating in closing arguments that no prior collisions had occurred on the onramp, violating the trial court's ruling excluding all prior-collision evidence.**

Both Hu and WSDOT knew that there had been prior collisions on this onramp. CP 381, 1893. WSDOT asserted a federal privilege, convincing the court to exclude prior-collision evidence *in limine*. CP 333-64; 864-67; 975-76; 1348-50; 1779-88,

1887-89, 1893-96, 2420-21; RP 31, 39, 93-125. Hu complied with this order, pursuing a different negligence theory at trial.

Apparently unsatisfied with its shield, WSDOT tried to use the *in limine* ruling as a sword, falsely stating during its closing argument that no one “has ever had a reported problem” on the onramp and that “there had never been an accident.” RP 31, 39, 93-125, 2093, 2103. WSDOT admitted that these remarks were “clearly improper” and “inaccurate.” RP 2120-21.

2. The trial court properly exercised its broad discretion, crafting an instruction to cure WSDOT’s misconduct.

The trial court’s curative instruction first explains that other-collision records are privileged under federal law. RP 2128. Based on this privilege, WSDOT’s remarks were “improper and inaccurate,” echoing WSDOT’s own admissions:

Members of the jury, accident history is kept as required by federal law for freeway on-ramps. The federal statute provides that this information is kept to improve safety, and for no other purpose. The statute provides that this information is privileged to encourage states to keep this information, and the information need not be disclosed as discovery in lawsuits. The statute is designed to balance competing interests. Therefore, under those circumstances, the remarks yesterday of counsel for WSDOT that there have never been other collisions at this location and that Mr. Savo was the only driver to have a problem here were improper and inaccurate. You should not consider those comments made by counsel for WSDOT in your

deliberations, and you should also strike from your notes any reference to those remarks.

RP 2120-21, 2128-29. The court read this instruction into the record, but did not send it into the jury room. RP 2161.

3. The instruction did not comment on any “evidence” – it cured counsel’s false remarks during closing arguments. (BA 24-27).

WSDOT argues that the curative instruction was an impermissible comment on the “evidence.” BA 24-27. Our Constitution provides that “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. State Const. Art. 4, § 16; *see also* CR 51(j). A jury instruction impermissibly comments on the evidence only if it “conveys to the jury a judge’s personal attitudes toward the merits of the case” or allows the jury to infer that “the judge personally believed or disbelieved” the evidence. ***Hamilton v. Dep’t of Labor & Indus.***, 111 Wn.2d 569, 571, 761 P.2d 618 (1988). Review is *de novo*. ***Dybdahl v. Genesco, Inc.***, 42 Wn. App. 486, 489-90, 713 P.2d 113 (1986).

This curative instruction did not comment on any “evidence” for three simple reasons: First, the instruction addresses counsel’s closing argument, which is not “evidence.” ***Hizey***, 119 Wn.2d at 271. The ***Hizey*** Court rejected an argument like WSDOT’s where,

among other reasons, the court's "'comment' was directed to counsel's arguments, which the jury was duly instructed are not evidence." *Id.* Here too, the jury was so instructed. CP 4982. The jury presumably followed the instructions. ***State v. Gamble***, 168 Wn.2d 161, 178, 225 P.3d 973 (2010); ***Singh v. Edwards Lifesciences Corp.***, 151 Wn. App. 137, 152, 210 P.3d 337 (2009).

Second, the court could not have commented on any "evidence" because no prior-collision evidence was "introduced at trial to the jury." ***State v. Pockert***, 53 Wn. App. 491, 495, 768 P.2d 504 (1989). Only WSDOT's false argument in violation of the order *in limine* was before the jury, so the trial court had to cure WSDOT's falsehood. This was not a comment on any evidence.

Third, the curative instruction says nothing about the judge's personal opinion about any evidence. ***Pockert***, 53 Wn. App. at 495. The court corrected WSDOT's false argument about prior collisions, but did not weigh-in on a live factual dispute or vouch for one side's version of events. In any event, the trial court instructed the jury that nothing it said could be taken as a comment on the evidence. CP 4982. Again, no comment on the evidence occurred.

WSDOT does not address any of these fatal flaws in its arguments. BA 24-27. The trial court did not comment on the evidence in giving a necessary and sufficient curative instruction.

4. The curative instruction was proper and accurate. (BA 27-28).

WSDOT, not the trial court, “injected excluded evidence into the case.” BA 27. The trial court had to correct WSDOT’s false assertion that there had not been prior collisions. The court did not say that there had been prior collisions – it stated that WSDOT’s remarks were inaccurate, as WSDOT admitted. RP 2120-21, 2129.

And the trial court did not “imp[ly] counsel had been lying.” BA 27, 29. “Lying” suggests the intent to deceive – the curative instruction is appropriately silent on counsel’s intent, merely stating that counsel’s “remarks . . . were improper and inaccurate.” RP 2129. His remarks were “improper” – WSDOT violated the court’s *in limine* orders, referring to the absence of evidence the court had excluded at WSDOT’s request. And the remarks were “inaccurate” – there have been prior collisions. The instruction suggests that counsel erred in light of the federal privilege, not that counsel lied. While WSDOT falsely told the jury no prior collisions occurred, the trial court refrained from calling counsel a liar.

5. The curative instruction did not unfairly prejudice WSDOT. (BA 28-29).

WSDOT grossly overstates the curative instruction, calling it “a *formal instruction from the trial judge* that previous accidents had occurred at the on-ramp.” BA 29. Again, the instruction does not say that there have been prior collisions. RP 2128-29. It simply states that counsel’s remarks were improper and inaccurate. *Id.*

WSDOT is particularly offended by the word “inaccurate,” buried in the middle of the 18-line, 132-word instruction. BA 29; RP 2128-29.¹² But the court had to call WSDOT’s remarks “inaccurate” (as its own counsel did) to cure WSDOT’s misconduct. WSDOT’s false remarks undermined Hu’s claims that the onramp was not reasonably safe, and bolstered WSDOT’s argument that the collision was due to Savo’s inattentiveness. Anything short of “inaccurate” would have legitimized the false and prejudicial sting of WSDOT’s remarks. In fact, WSDOT’s proposed instruction, telling the jury to “disregard” any reference to a “lack of accidents” (CP 6167) was akin to telling the jury, “there haven’t been any collisions, but you are not supposed to know that.”

¹² WSDOT repeats a similar argument below, stating that “[t]here was no legitimate reason to give the curative instruction.” BA 30. This argument is meritless for the same reasons discussed here.

WSDOT also complains that the jury submitted questions on this point, so that the prior-collision evidence was “important.” BA 29. WSDOT was well aware of these unanswered questions when it stood up in closing and falsely argued that there were no prior collisions. WSDOT stated that it did not want a mistrial, gambling that the jury would rule in its favor. CP 6168; RP 2115. WSDOT does not get a new trial just because it lost its wager. See **Nelson v. Martinson**, 52 Wn.2d 684, 690, 328 P.2d 703 (1958).

6. WSDOT’s misconduct invited the curative instruction. (BA 29-31).

In arguing that invited error cannot apply, WSDOT ignores controlling authority, and cites an inapposite foreign case. BA 30-31. In **Casper v. Esteb Enters., Inc.**, defendant Esteb repeatedly attempted to testify about evidence the trial court had excluded *in limine*. 119 Wn. App. 759, 765, 82 P.3d 1223 (2004). When he did so, the court corrected his answers to comply with the court’s order. *Id.* at 765-66. While the appellate court agreed that the court’s comments “likely conveyed to the jury the judge’s attitude toward Esteb’s credibility,” the court held that “Esteb invited the error” (*id.* at 771):

Here, Esteb made repeated attempts to violate the court’s pretrial discovery rulings during his trial testimony. And

these attempts caused the trial court to respond in the manner that Esteb now claims is error. [The court] was left little choice because of Esteb's willful attempts to violate its pretrial orders.

Here too, WSDOT's "affirmative and voluntary action" (falsely remarking on prior-collisions) "induce[d] the trial court to take an action" (give the curative instruction). *Id.* WSDOT cannot complain now, after leaving the trial court with "little choice." *Id.*

And this matter is nothing like ***State v. Martin***, 77 Conn. App. 818, 827 A.2d 1 (2003)). BA 30-31. There, defense counsel stated in closing argument that there was no evidence of guilt because the two co-conspirators were not guilty. ***Martin***, 827 A.2d at 5-6. But one of the co-conspirators had already been convicted. *Id.* at 6. That court did not, as here, instruct the jury that counsel's comment was inaccurate. *Id.* Rather, it instructed the jury that a defendant's co-conspirator had been convicted of the same crimes the defendant was charged with. *Id.*

In sum, WSDOT fought tooth-and-nail to exclude the prior-collision evidence, only to falsely tell the jury in the final hour that no prior collisions occurred. Anything short of calling counsel's statements what they were – improper and inaccurate – could not have cured WSDOT's misconduct.

- C. **The trial court properly dismissed WSDOT’s speculative “flying speaker” theory as legally and factually unsupported, and WSDOT itself introduced evidence that Hu’s brake lights were working, so there were no jury questions on comparative fault.**

WSDOT argues that the trial court improperly ruled that Hu was not at fault for his injuries in this rear-end collision. BA 31-45. WSDOT claims that (1) Hu had a duty to secure an amp/speaker unit in the back of his car so as to remain immobile during a roughly 50 mph rear-end collision that obliterated the back end of his car, and (2) Hu had a duty to have working brake lights. But there is no duty to install a car stereo that stays in place while the entire car around it is mangled, and there is literally no evidence that the amp/speaker unit Hu. WSDOT itself elicited undisputed evidence that Hu’s brake lights were visibly working. The trial court did not err in refusing to put WSDOT’s unsupported claims before the jury.

1. **Review is *de novo*, and summary judgment is proper where all reasonable minds would agree.**

This Court reviews summary judgment rulings *de novo*, applying the usual summary judgment standards under CR 56. ***Vallandigham v. Clover Park Sch. Dist. No. 400***, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is proper when reasonable minds could reach but one conclusion. ***Wilson v. Steinbach***, 98 Wn.2d 434, 437, 656 P.2d 1060 (1982). Statutory

interpretation is also a question of law reviewed *de novo*. ***Dep't of Ecology v. Campbell & Gwinn, L.L.C.***, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The Court's purpose is to discern the Legislature's intent. *Id.* "A reading that produces absurd results must be avoided because 'it will not be presumed that the legislature intended absurd results.'" ***Tingey v. Haisch***, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007) (citations omitted).

2. **No statute imposes the absurd duty to install a car stereo to withstand a roughly 50 mph impact that demolishes the area where the amp/speaker unit is screwed into the car's frame.**

As evidence of Hu's alleged duty, WSDOT cites (at BA 33) a statute requiring that sound-system components be securely attached to the vehicle so that they cannot become dislodged during operation of the vehicle, RCW 46.37.680(1):

All vehicle sound system components, including any supplemental speaker systems or components, must be securely attached to the vehicle regardless of where the components are located, so that the components cannot become dislodged during operation of the vehicle.

WSDOT admits that Hu sought the help of a "professional installer" to screw the amp/speaker unit into the frame of the car. BA 35-36, 38. It nonetheless challenges whether the components were "securely attached" so that they "cannot become dislodged during operation of the vehicle." BA 39; RCW 46.37.680(1).

But the primary issue is whether this statute imposes the duty WSDOT alleges. WSDOT admits that Washington applies the RESTATEMENT (SECOND) OF TORTS § 286¹³ to determine whether a person has a duty under a statute. BA 33-34 (citing § 286 and **Schooley v. Pinch's Deli Mkt., Inc.**, 134 Wn.2d 468, 474-75, 951 P.2d 749 (1998)). But WSDOT fails to inform the Court that it never raised § 286 below. Compare *id.* with CP 1394-1400, 5117-19. WSDOT failed to preserve this argument, never giving the trial court a fair opportunity to consider § 286. See, e.g., **Lipscomb v. Farmers Ins. Co. of Wash.**, 142 Wn. App. 20, 32-33, 174 P.3d 1182 (2007).

In any event, none of the §286 elements is met here. WSDOT omits key legislative history explaining the legislative intent underlying the “Courtney Amisson Law”: to discourage placing

¹³ “The court may adopt as the standard of conduct of a reasonable [person] the requirements of a legislative enactment ... whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.”

unattached home-stereo speakers, or even unattached car-stereo speakers, in the backs of cars:

It is increasingly popular for motor vehicle owners to install stereo speakers in the back seat of a car or in the bed of a passenger truck. Certain stereo speakers are manufactured **only for residential use**, rather than automotive use. **These speakers, as well as unsecured automotive speakers**, can become projectiles in the event of a vehicle collision.

CP 1464 (House Bill Report, EHB 1246; emphases added). Indeed, the Senate Bill Report noted that EHB 1246 created an unfunded mandate to educate the public about the risks of “unsecured vehicle sound system components”:

The Traffic Safety Commission must within their existing budget, create and implement a statewide educational program **regarding the risks of unsecured vehicle sound system components**.

CP 1461 (Senate Bill Report, EHB 1246; emphasis added). The Senate testimony for the Bill noted that securing such components “is a very simple, inexpensive process.” CP 1462.

In sharp contrast to this “simple, inexpensive process,” WSDOT put on detailed expert testimony from a metallurgist that an automotive engineer “would” have done the installation differently and that he “could have” designed a system to withstand the “worst crash known to man,” although he did not do so. CP 1323, 1413. It is undisputed, however, that the “professional

installer” screwed the amp/speaker unit into the car’s frame. BA 35-36, 38. This statute – on its face – requires nothing more.

Addressing § 286 *arguendo*, Hu was not in the class of persons the Legislature intended to protect – those who put unsecured speakers in their vehicles. Nor did the Legislature intend to protect those who undisputedly use a “professional installer,” but then are subject to a roughly 50 mph rear-end collision that crushed, twisted and mangled the frame of the car where the component was attached. It would be absurd to attempt to protect against components moving about in a car that is literally demolished in a high-speed impact. The trial court correctly refused to impose an absurd duty. ***Tingey***, 159 Wn.2d at 664.

The Legislature also could not have intended to impose a new industry standard in the area of automotive safety, which is plainly governed by federal law. Whether an automotive engineer or metallurgist might have used a different method to install the car stereo is irrelevant. The Legislature has not imposed the absurd duty to engineer and build a system that can withstand a catastrophic rear-end collision. The trial court properly granted summary judgment on duty as a matter of law.

3. **There also is no absurd common-law duty to install a car stereo to withstand a devastating rear-end collision that destroys the back end of the car where the amp/speaker unit is screwed into the car's frame.**

WSDOT briefly suggests “a common law duty to securely attach the amplifier to his vehicle.” BA 34-35. A defendant must show that the plaintiff had a duty to act as a reasonable person exercising care for his or her own safety under similar circumstances. RCW 4.22.005, .015 (fault definition includes “unreasonable failure to avoid an injury or to mitigate damages”); ***Alston v. Blythe***, 88 Wn. App. 26, 32, 943 P.2d 692 (1997); ***Schneider v. Seattle***, 24 Wn. App. 251, 259, 600 P.2d 666 (1979) (“the test for contributory or comparative negligence turns on a reasonable person . . . standard and is therefore objective”). Again, it is absurd to suggest that a reasonable person is obligated to design a car-stereo system to withstand this severe a collision.

WSDOT's single paragraph cites no legal authority imposing such a duty. BA 34-35. Its argument is plainly insufficient and the Court should disregard it. *E.g.*, ***Cowiche Canyon Conservancy v. Bosley***, 118 Wn.2d 801, 809, 828 P.2d 529 (1992); ***Yakima Cnty. v. E. Wash. Growth Mgmt. Hearings Bd.***, 146 Wn. App. 679, 698, 192 P.3d 12 (2008). And as explained above, there cannot be a

duty – common law or otherwise – to install a car-stereo system so as to withstand a collision that indisputably mangled the car's frame. See, e.g., Ex 13 (attached). Neither our Legislature nor our courts impose absurd duties. This Court should affirm.

4. WSDOT failed to raise a genuine issue of material fact because there is no evidence the amp/speaker unit “flew through the air” or impacted Hu.

While the absence of a duty resolves this issue, WSDOT also failed to raise a genuine issue of material fact on proximate cause. WSDOT had nothing but speculation, failing to provide evidence that (1) any reasonable car-stereo installation could withstand a catastrophic rear-end collision; (2) the 30 lb. amp/speaker unit “flew through the air”; (3) the unit impacted Hu in any way; or (4) if those things had happened, they could have caused Hu's quadriplegia without leaving any evidence of impact. The trial court did not err in granting summary judgment.

A “claim of liability resting only on a speculative theory will not survive summary judgment.” *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 381, 972 P.2d 475 (1999). While contributory negligence is ordinarily a fact question, a court should not put it before a jury if reasonable minds would all agree that the

plaintiff exercised the care that a reasonably prudent person would have exercised for his own safety under the circumstances. ***Bertsch v. Brewer***, 97 Wn.2d 83, 91, 640 P.2d 711 (1982). In other words, the issue of contributory negligence should go to the jury only if the plaintiff had a duty, breached that duty, and proximately caused his own injuries. WSDOT has the burden to establish each of these elements. ***Cox v. Spangler***, 141 Wn.2d 431, 447, 5 P.3d 1265 (2000) (citing ***Godfrey v. State***, 84 Wn.2d 959, 965, 530 P.2d 630 (1975)). WSDOT fails to do so.

Breach. As explained above, WSDOT failed to establish a duty to engineer an installation that could withstand a high-impact collision. WSDOT also did not (and could not) present evidence that Hu failed to exercise reasonable care by installing a car stereo that moved when the car was demolished. WSDOT's experts never opined that Hu did not act as a reasonable person. While WSDOT's experts might have established standards and practices for automotive and metallurgical engineers, they never testified that a reasonable person is held to those standards. CP 1412-15. WSDOT's expert metallurgist (Kent) even implied that the installation could have withstood a lesser collision. CP 1413-14.

The trial court properly granted partial summary judgment because there was no evidence that Hu breached a duty of reasonable care.

Proximate Cause. WSDOT also failed to proffer evidence that (a) the 30 lb. amp/speaker unit “flew through the air”; (b) the unit impacted Hu’s head or seatback; or (c) that (if those things happened) they could have caused Hu’s injuries without leaving any evidence of an impact. The most WSDOT established is that it was imaginable that these things could have happened. Such speculation is insufficient to raise a genuine issue of material fact.

An expert’s testimony must be based on the facts of the case and not on speculation or conjecture. ***Rounds v. Nellcor Puritan Bennett, Inc.***, 147 Wn. App. 155, 163, 194 P.3d 274 (2008). “The testimony must be sufficient to establish that the injury-producing situation ‘probably’ or ‘more likely than not’ caused the subsequent condition, rather than the accident or injury ‘might have,’ ‘could have,’ or ‘possibly did’ cause the subsequent condition.” *Id.* (quoting ***Merriman v. Toothaker***, 9 Wn. App. 810, 814, 515 P.2d 509 (1973)).

WSDOT proffered no evidence that the amp/speaker unit had “flown forward” as a projectile (BA 32):

- a. WSDOT's expert initially claimed that the amp/speaker unit hit Hu in the head. CP 588-89.
- b. But WSDOT's experts could not show how the amp/speaker unit could fly through the air because that "wasn't in [their] interest." CP 1159-60, 1292, 1295.
- c. The jury would have had to speculate on whether the unit became a projectile. CP 1296-98.

WSDOT also proffered no evidence that the amp/speaker unit struck Hu in the Head:

- a. Hu literally had no external injuries to his head or neck. CP 1163, 1725-26, 1728-30.
- b. It is simply impossible for a 20 to 30 lb. unit to fly and strike Hu's head at 20 to 30 mph but not kill him or severely injure his head. CP 1028, 1725.
- c. There is no evidence that the carbon-based material on the amp face came from Hu (or even from a human being). CP 1412, 1682-93, 1713-14, 1719.

After Hu pointed out these shortcomings in WSDOT's speculations, its experts attempted to evade them with new unsupported speculations: First, its experts speculated that Hu was leaning to his right based on a drop of blood on the center console:

- a. The only evidence in the record is that the drop of blood on the center console came from Savo. CP 1697-98.
- b. There is no evidence that the drop of blood belonged to Hu, nor was the blood even tested. CP 1304-05.

- c. WSDOT's experts had no evidence that Hu was leaning out over the center console when the collision occurred, just baseless speculation about the blood. CP 1153-57.¹⁴

WSDOT's second fallback was that the unit struck the seatbacks before striking Hu, but without injuring the seatbacks or Hu's head:

- a. Again, there is no evidence that the unit flew through the air.
- b. There is no evidence that the seatbacks were damaged – they were “pristine[].” CP 1725.
- c. There is no evidence that the unit could have first hit the seatbacks and yet still caused Hu's injuries. CP 1153-56, 1296, 1298.

Indeed, WSDOT failed to present any medical expert testimony establishing that any of WSDOT's speculations – if they actually happened – could cause Hu's quadriplegia without causing the slightest injury to his head or even to the seatbacks. Common

¹⁴On WSDOT's motion for reconsideration, Kent submitted a third declaration stating that he had tested an exemplar seatback similar to the one in Hu's car. CP 2675. But the trial court refused to consider Kent's third declaration when ruling on WSDOT'S motion for reconsideration. CP 2779. The trial court was correct because this was not previously unavailable and “newly discovered evidence” warranting reconsideration. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 109, 74 P.3d 692 (2003); *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88-90, 60 P.3d 1245 (2003). Also, Kent did not examine Hu's seat and could not say that the twisting actually occurred to his seat. CP 2675-76.

sense suggests that a 20 to 30 lb. metal object traveling at 20 to 30 mph would cause severe – if not fatal – injury and damage.¹⁵

But causation of quadriplegia is far beyond the ken of an average juror. As a result, absent medical testimony – and absent any facts supporting its speculations – WSDOT's speculations failed to raise a genuine issue of material fact:

Medical testimony as to a causal relationship between the negligent act and the subsequent injuries or condition complained of must demonstrate “that the injury “probably” or “more likely than not” caused the subsequent condition, rather than that the accident or injury “might have,” “could have,” or “possibly did” cause the subsequent condition.” ***Ugolini v. States Marine Lines***, 71 Wn.2d 404, 407, 429 P.2d 213 (1967) (quoting ***Orcutt v. Spokane County***, 58 Wn.2d 846, 853, 364 P.2d 1102 (1961)). Importantly, medical testimony must be based on the facts of the case and not on speculation or conjecture. ***Seybold[v. Neu]***, 105 Wn. App. [666,] 677[, 19 P.3d 1068 (2001)]. Finally, such testimony must also be based upon a reasonable degree of medical certainty. ***McLaughlin v. Cooke***, 112 Wn.2d 829, 836, 774 P.2d 1171 (1989).

Fabrique v. Choice Hotels Int'l, Inc., 144 Wn. App. 675, 687-88, 183 P.3d 1118 (2008) (affirming summary judgment due to lack of

¹⁵ Cheng – who is not a doctor – said some people are paralyzed without suffering external injuries. CP 1375. Hayes – who has extensive medical training and experience – explained that those cases involved low relative velocities, or impacts with soft, compliant surfaces. CP 1724-25. This was allegedly a metal amp face traveling 20 to 30 mph.

medical expert testimony establishing proximate cause). WSDOT's experts did not even come close. This Court should affirm.

5. WSDOT itself adduced undisputed evidence that Hu's brake lights were working.

WSDOT argues that the jury should have decided whether Hu caused the collision by having non-functioning or insufficient brake lights. BA 41-45. But WSDOT elicited uncontradicted testimony from Tracy Wetsch that she saw Hu's brake lights just before Savo ran into Hu's car. RP 1299. Hu also testified that his brake lights were working. RP 601. No evidence showed that the lights were not working or could not be seen. Indeed, WSDOT's own expert admitted in his deposition that Hu's brake lights were on when Savo ran into them because the filaments were deformed, indicating that they were hot just prior to the impact. CP 4230.

WSDOT's argument on appeal is misdirected. It is true that Hu's expert remarked in passing that the brake lights on a car like Hu's are "almost nonexistent," but he did not do so to create an issue about WSDOT's negligence. BA 42. Hu testified that while his brake-light covers might have been worn, their brightness was unaffected. RP 602. The only evidence before the jury was that

the lights worked and were plainly visible, so there was no evidence on which to base a comparative fault instruction or argument.

WSDOT cites Savo's testimony that he did not see the brake lights (BA 42), but his first statement was an "I don't recall" answer, and his second shows only that he did not notice the lights in the split second before the collision. CP 4061-62. As the jury found, Savo's negligence in failing to see Hu's car does not absolve WSDOT of its negligence in failing to properly design a safe onramp. The trial court did not err in rejecting WSDOT's unsupported claims.

D. The trial court properly allowed the "Signal Ahead" evidence, rejecting WSDOT's inapplicable instruction.

The trial court was well within its broad discretion in allowing Parsonson to testify that four Seattle-area onramps use "Signal Ahead" signs. *In re Det. of Law*, 146 Wn. App. 28, 37, 204 P.3d 230 (2008) (evidentiary rulings reviewed for abuse of discretion). This evidence impeached WSDOT's expert on a material issue: whether WSDOT negligently failed to install a "Signal Ahead" sign. Although counsel and the trial court initially agreed that a limiting instruction would be necessary, the court was within its discretion to

later reject WSDOT's confusing, inapplicable proposed instruction. *Griffin v. W.R.S.*, 143 Wn.2d 81, 90-91, 18 P.3d 558 (2001).

1. WSDOT again omits relevant facts.

WSDOT again omits key facts relevant to its argument. BA 45-47. Hu's expert opined that MUTCD required a "Signal Ahead" sign to warn drivers about the hidden meter signals. RP 931-35. Two WSDOT witnesses responded that "Signal Ahead" signs are not used in Washington – one quipped that a "junior engineer who doesn't really understand the MUTCD" would get transferred for recommending a "Signal Ahead" sign. RP 699-701, 1755-56.

WSDOT later moved to exclude evidence of metered onramps using "Signal Ahead" signs. CP 5653-57; RP 1765-67, 1905-11. The court asked whether Hu would concede to an unspecified limiting instruction, "such as the State's not required to update, et cetera," and Hu had no objection. RP 1910. Without asking Savo or Intrastate, the court denied WSDOT's motion, noting that it thought some limiting instruction would be required. RP 1910-11.

On Savo's direct, Parsonson testified that MUCTD required a "Signal Ahead" sign on this onramp and that four other metered onramps in the Seattle area use this sign. RP 1965-68. On cross,

Hu introduced photographs of two of those onramps for illustrative purposes only. RP 1971-72; Exs 576 & 578.

WSDOT later proposed a supplemental jury instruction that it had no duty to update its “roads and roadway structures.” RP 2023-24; CP 5659. The trial court queried about an instruction on updating signs that WSDOT said it “would live with,” but WSDOT never proffered such an instruction. RP 2027-28, 2030. The court ruled that WSDOT’s proposed instruction – which did not mention signs – would create “more problems than it addresses.” RP 2030. WSDOT objected based on counsel’s prior “agreement” to an unspecified instruction, but did not proffer a relevant instruction. *Id.*

2. WSDOT’s proposed instruction that it had no duty to update its roads and roadway structures was misleading and inapplicable.

The trial court properly rejected WSDOT’s confusing and inapplicable instruction. A trial court may reject a proposed jury instruction if it is inapplicable to the facts or if it would confuse the jury. *Szupkay v. Cozzetti*, 37 Wn. App. 30, 32-33, 678 P.2d 358 (1984). WSDOT’s proposed “roads and roadway structures” instruction was inapplicable and confusing.

WSDOT erroneously argues that the jury could infer from Parsonson’s testimony that WSDOT had a duty to update its signs.

BA 47. But no one even suggested that WSDOT had a duty to update signs. RP 1985-86. Parsonson did not even know when WSDOT installed the “Signal Ahead” signs. No reasonable juror could infer from the mere existence of “Signal Ahead” signs at other onramps that WSDOT somehow had a duty to update its signs.

WSDOT erroneously argues that it was prejudiced, where the trial court initially indicated that an instruction would be required, but ultimately refused to give the proposed instruction. As WSDOT admits, a judge “can freely change its mind until a formal judgment is entered.” *Fosbre v. State*, 70 Wn.2d 578, 584, 424 P.2d 901 (1967); see BA 48. Here, the trial judge properly refused to give WSDOT’s confusing and inapplicable instruction.¹⁶

The judge also ruled on the objections before him. WSDOT does not argue that Hu waived all possible objections to the as-yet unspecified instruction. The trial judge did not ask whether Savo or Intrastate objected when the issue originally came up, and they did

¹⁶ While the court asked about an instruction regarding signs, WSDOT failed to propose one or to object to the failure to give one. RP 2027-28, 2030. Those failures are fatal. See, e.g., *Bellevue v. Kravik*, 69 Wn. App. 735, 740, 850 P.2d 559 (1993) (affirmative duty to proffer correct instruction); *State v. McDaniel*, 155 Wn. App. 829, 856, 230 P.3d 245, rev. denied, 169 Wn.2d 1027 (2010) (failure to propose alternative instruction waives error); CR 51(c) (proposed instruction must be typewritten and properly submitted).

not say anything until the objectionable instruction was proposed. RP 1910-11, 2025. The trial judge then ruled on the arguments and proposal before it. RP 2030. That is no abuse of discretion.

WSDOT speculates that it would have cross-examined Parsonson differently, but our courts will not speculate about unelicited testimony absent an offer of proof. BA 48-49; **Smith v. Seibly**, 72 Wn.2d 16, 18, 431 P.2d 719 (1967). WSDOT made no offer of proof, and counsel even admitted that he could “only wonder what [*sic*] my exam would have been different” RP 2030. This Court should similarly decline to speculate.

WSDOT’s cited cases are inapposite: **State v. Brady**, 116 Wn. App. 143, 64 P.3d 1258 (2003); **In re Shue**, 63 N.C. App. 76, 303 S.E.2d 636 (1983), *aff’d as modified on other grounds*, 311 N.C. 586, 319 S.E.2d 567 (1984). In **Brady**, the appellate court reversed when the trial court suddenly decided half-way through *voir dire* to hold only one questioning session rather than the two initially promised. 116 Wn. App. at 145-46, 148-49. But here, the court suggested the need for an instruction before hearing the testimony. RP 1910-11. After hearing the evidence and reading the proposed instruction, it decided that the inapposite proposed

instruction would create more problems than it solved. RP 2030. Unlike in **Brady**, this judge properly changed his mind.

In **Shue**, the trial court told parties in a custody dispute that it would disregard the child's current living situation in determining the child's best interests, only to change its mind at the hearing, requiring the mother to prove that it was not in the child's best interests to stay with the father. 63 N.C. App. at 83. The trial court's change of mind fundamentally affected the evidence the parties would present and the standard of proof. *Id.* Here, in contrast, the trial court's eventual decision not to give WSDOT's duty-to-update instruction did not change the relevant evidence or the standard of proof. The court simply prevented the jury from hearing a misleading instruction.

3. The "Signal Ahead" signs impeached WSDOT's expert on a material issue.

WSDOT argues that Parsonson's "Signal Ahead" signs testimony was inadmissible impeachment on a collateral matter. BA 49. But a party may use extrinsic evidence to impeach a witness' credibility on a material issue. ***In re Recall of Pearsall-Stipeck***, 141 Wn.2d 756, 776 n.6, 10 P.3d 1034 (2000); ***Jacqueline's Wash., Inc. v. Mercantile Stores Co.***, 80 Wn.2d

784, 788, 498 P.2d 870 (1972). The evidence must be “independently competent” and “admissible for a purpose other than that of attacking the credibility of the witness.” *Jacqueline’s Wash.*, 80 Wn.2d at 789.

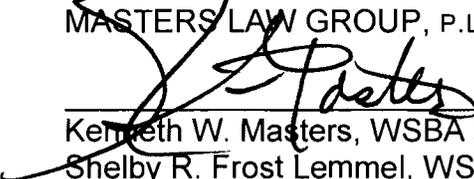
Parsonson’s testimony was material to Hu’s theory that the onramp was not reasonably safe because the signage was improper and insufficient. RP 931-38, 1971-73. Parsonson saw the “Signal Ahead” signs used on other similar Washington onramps, so he was competent to testify on the point. RP 1965-68. Calling the evidence “impeachment” does not limit its purpose. BA 49. The trial court was well within its broad discretion to allow the “Signal Ahead” sign evidence.

CONCLUSION

For the reasons stated above, this Court should affirm.

RESPECTFULLY SUBMITTED this 12th day of August, 2011.

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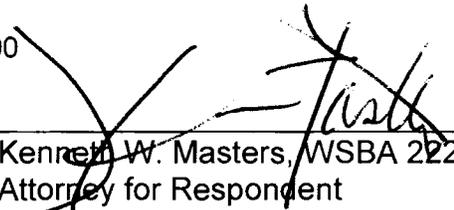
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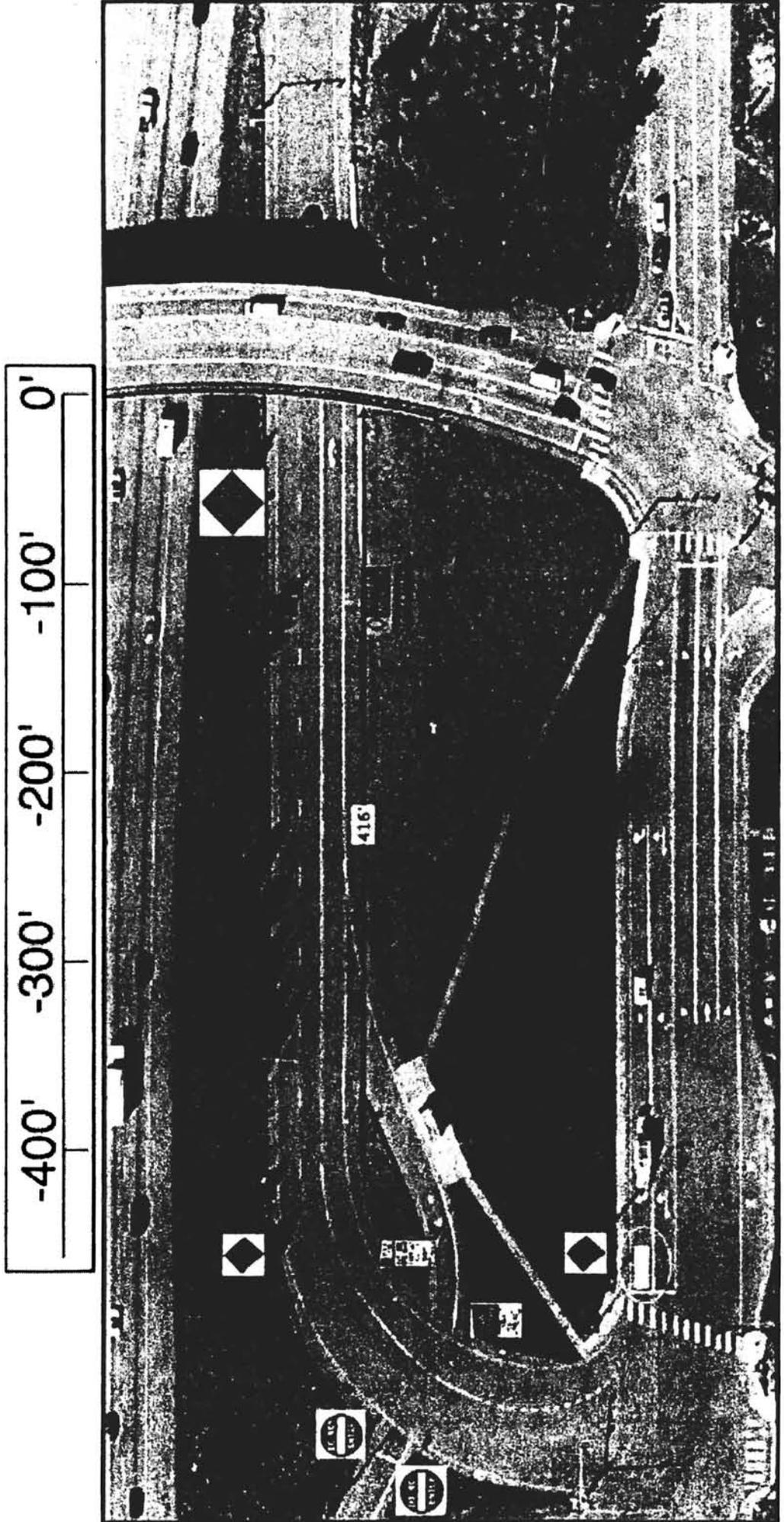
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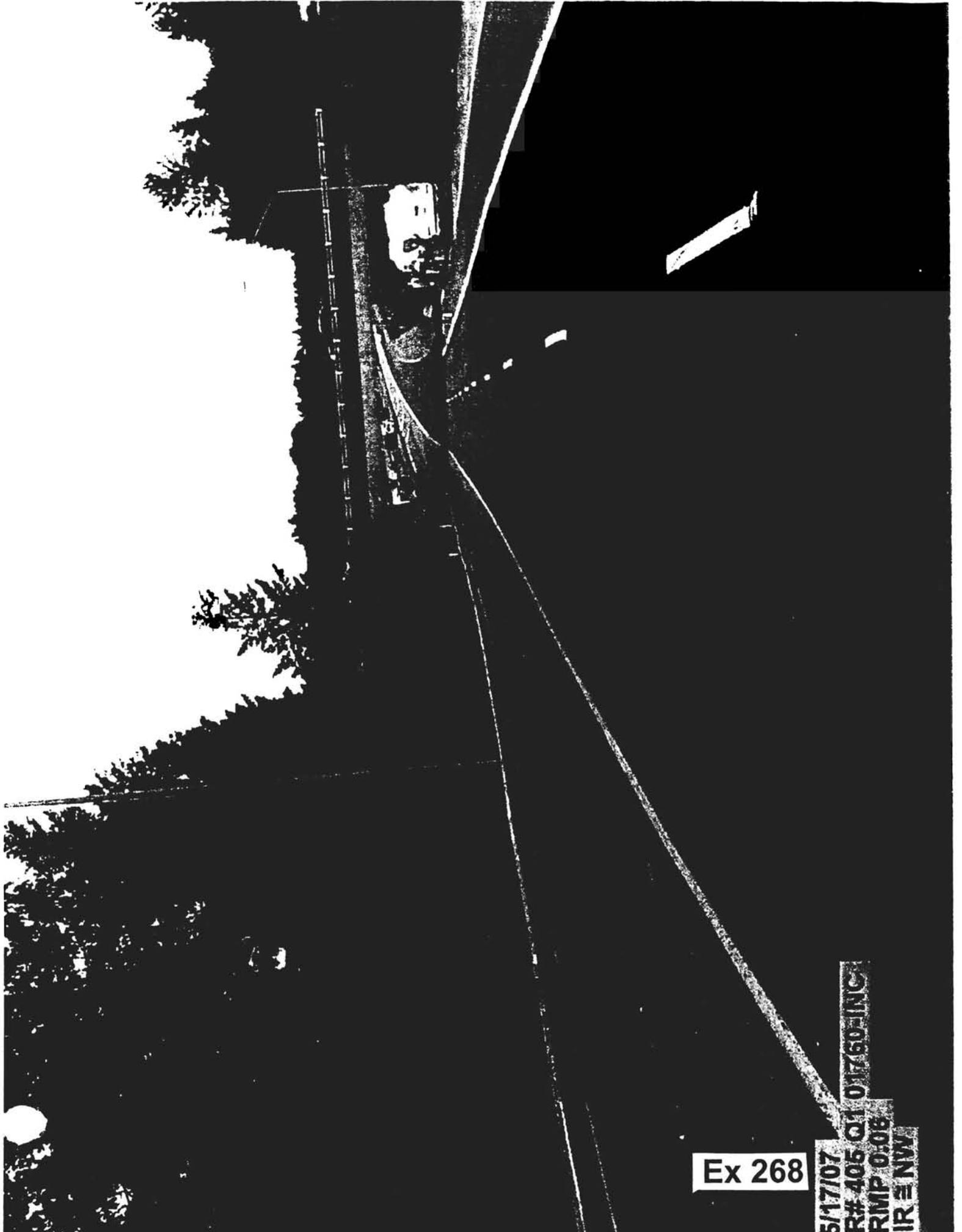




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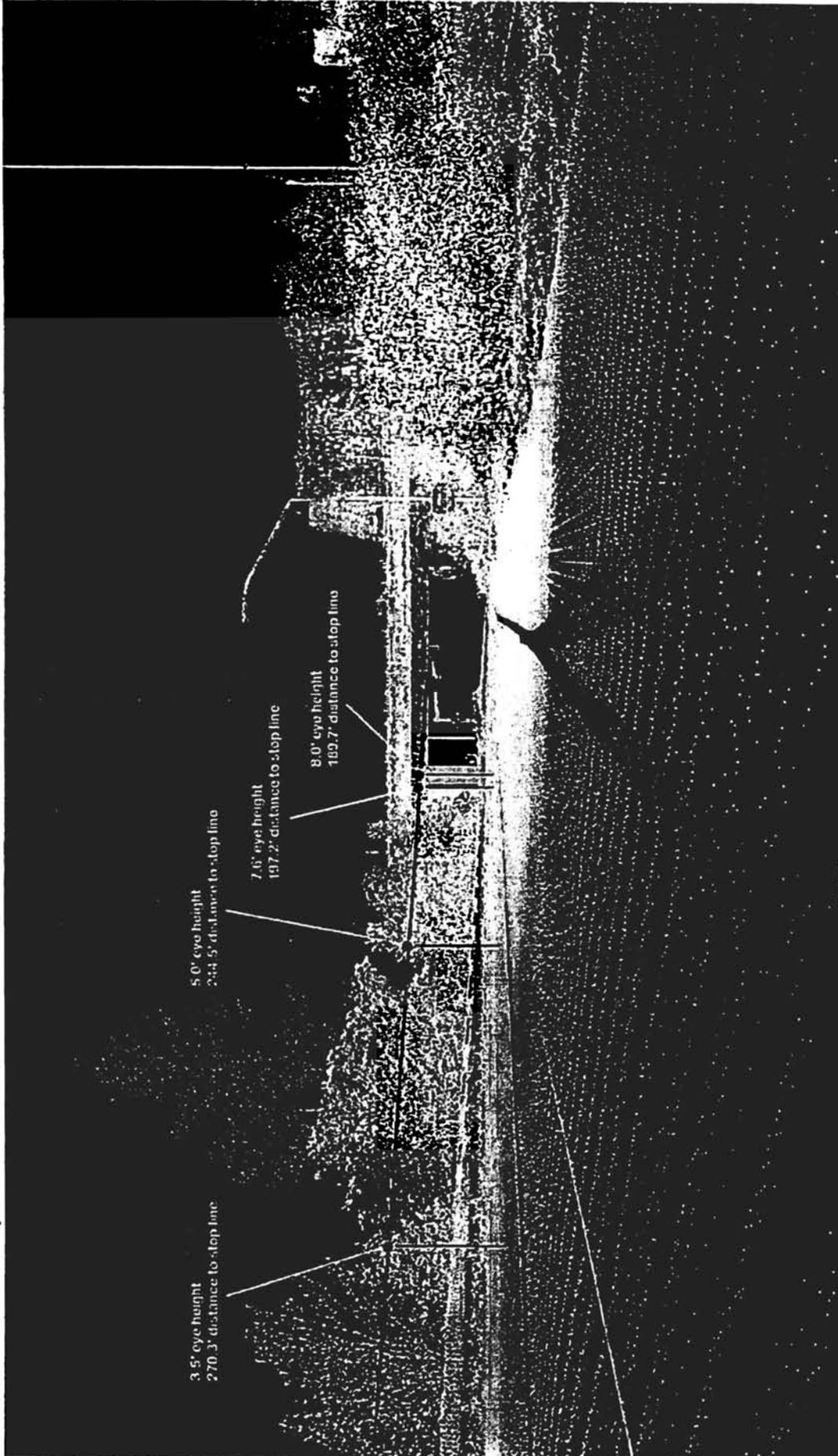


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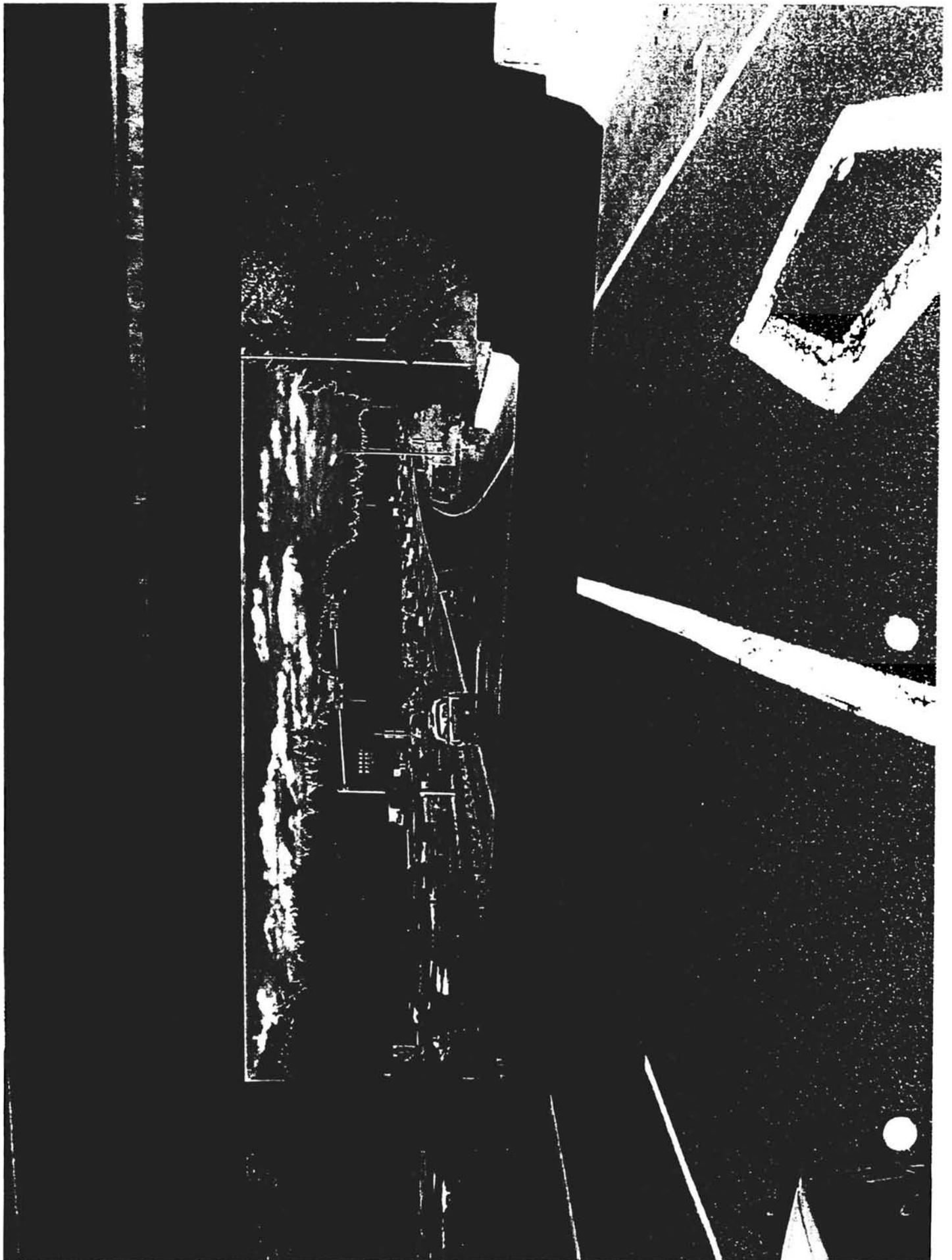


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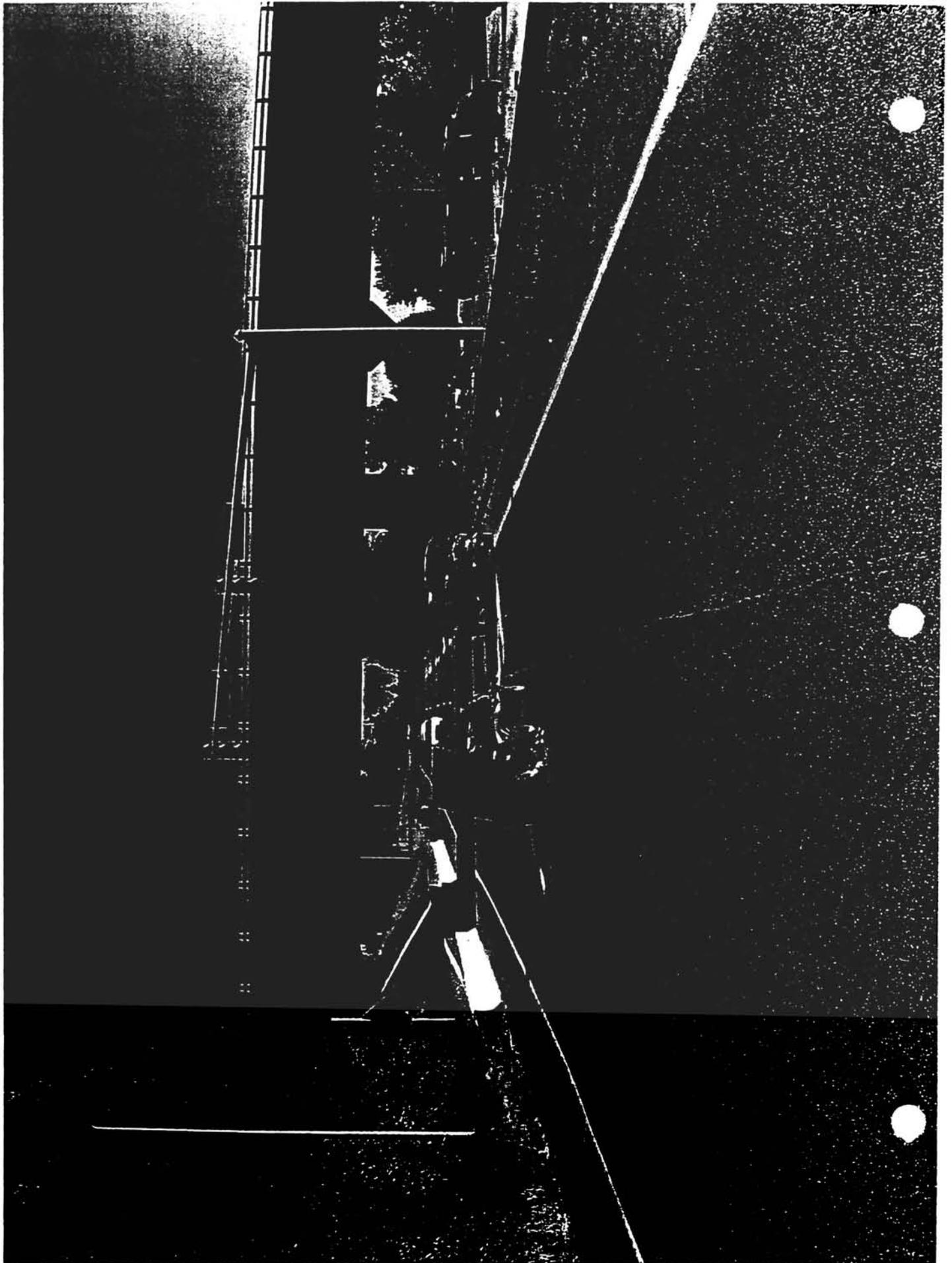
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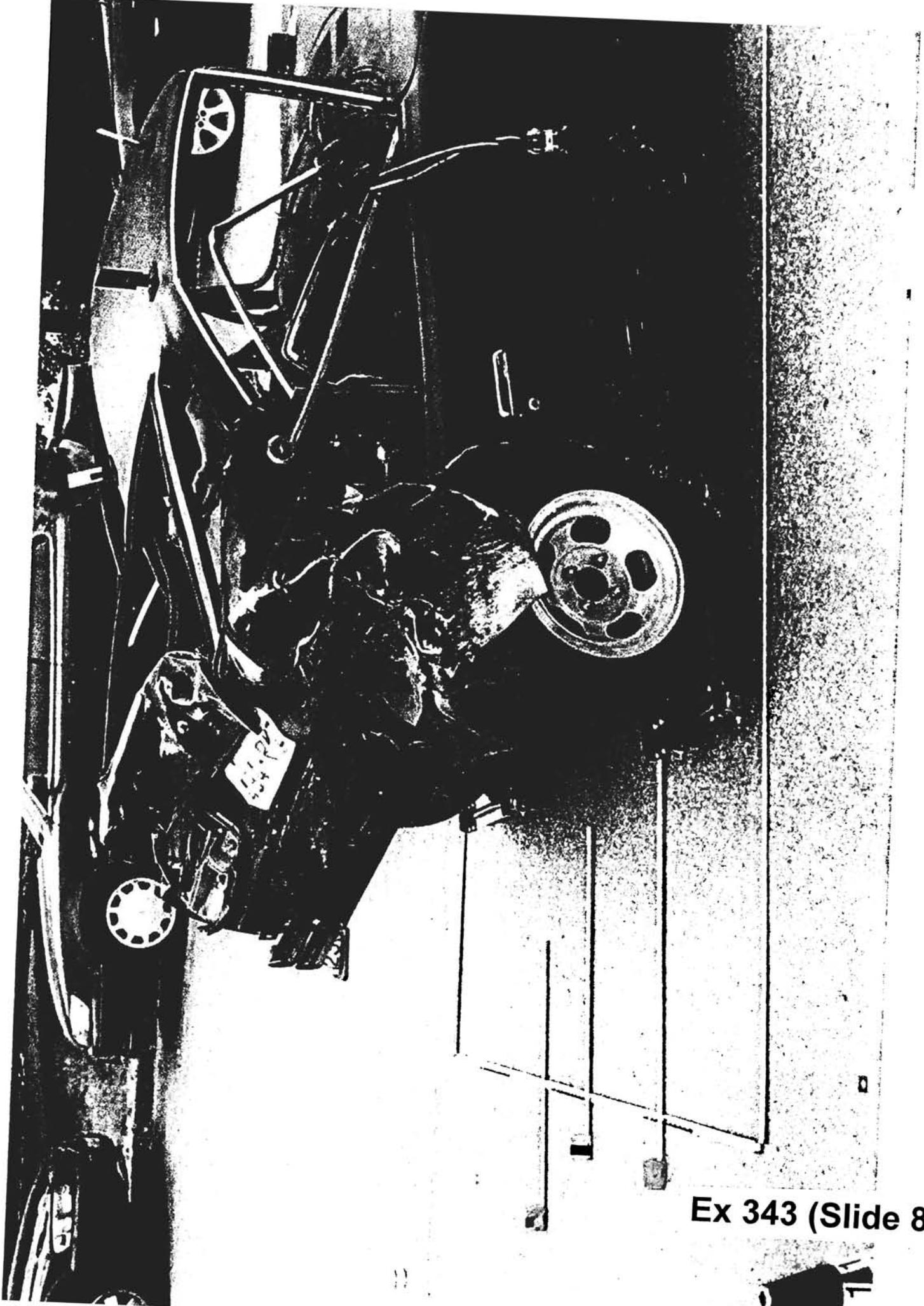
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Ex 343 (Slide 8)

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Ex 13