IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARILYN R. GUNTHER, a single woman, Appellant, v. STATE OF WASHINGTON and JEFFERSON COUNTY, Respondents.	No. 41576-3-II UNPUBLISHED OPINION

Van Deren, J. — Marilyn Gunther appeals the summary judgment dismissal of her negligence claim against the State arising from her injuries sustained in a bicycle accident in Port Townsend. Gunther contends that material fact questions preclude summary judgment. We agree, reverse, and remand.

Facts

On July 24, 2006, Marilyn Gunther and a companion spent the day touring the Port Townsend area by bicycle. At the end of the day, Gunther and her companion decided to ride back to the Port Townsend ferry terminal to catch the 6:00 p.m. ferry. To do so, they decided to ride in the bicycle lane that adjoined the eastbound lane of highway SR 20, with Gunther following her companion on his bicycle. In this location, SR 20 was a two-lane highway with (1) one westbound lane, (2) one eastbound lane, (3) a bicycle lane separated from the eastbound lane

by a painted white line, and (4) a sidewalk parallel to the bicycle lane. The speed limit was 25 miles per hour.

As Gunther rode along the bicycle lane, she saw a white informational sign notifying her that the bicycle lane was ending.[1] Gunther and her companion continued traveling in the bicycle lane and, after approximately 40 feet, saw a yellow warning sign notifying motorists that they would have to share the road with bicyclists.

Some distance later, and approximately 150 yards before the ferry terminal, the bicycle lane ended and the white line that separated the bicycle lane from the eastbound lane of traffic made a gradual curve to the edge of the sidewalk. When approaching the end of the bicycle lane from the west, as Gunther did, the end of the bicycle lane was visible for more than 500 feet. An eastbound, right-turn-only lane replaced the bicycle lane. The turn lane was 11.5 feet wide, flanked on one side by a sidewalk and Puget Sound, and it continued approximately 460 feet, until it turned right into the ferry terminal.

After Gunther and her companion came to the end of the bicycle lane, they continued riding on the road. Gunther then observed a car enter the turn lane ahead of her companion and she felt unsafe. Gunther's companion then left the highway and "jump[ed]" onto the sidewalk at a low point in the curb that appeared to be a driveway-type opening. Clerk's Papers (CP) at 33. The height of the curb at that point was two and one half inches.

Rather than continue riding on the road to the ferry terminal or stopping her bicycle and lifting it onto the sidewalk, Gunther decided to attempt the same jump that she saw her

[1] Because bicyclists have the right to ride on roads without a bicycle lane, this sign did not mean that Gunther had to exit the road. *See* 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.").

companion perform.[2] Gunther recognized that she would, in fact, have to "jump" because the curb and sidewalk were not flush with the road. CP at 30. When Gunther approached the curb, however, she did not "jump" high enough and her bicycle did not clear the curb. CP at 34. She fell and sustained injuries.

Gunther sued the State of Washington on September 22, 2009, alleging that her fall was the result of negligence by the State.[3] The State admits that it was responsible for maintaining the roadway and curb at the accident site.

The State moved for summary judgment on August 17, 2010. Gunther requested a continuance to conduct discovery. The trial court granted Gunther's request, continuing the hearing until November 5, 2010. The court also permitted additional briefing.

Gunther submitted no discovery requests and did not file any supplemental briefing before the November 5, 2010, hearing. At that hearing, the trial court granted the State's summary judgment motion, dismissing Gunther's complaint with prejudice.[4] Gunther appeals.

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[2] Gunther conceded at her deposition that she "probably could have" "kept going straight on the roadway if [she]'d wanted to." CP at 35.

[3] Gunther's suit included Jefferson County. On October 16, 2009, the trial court granted Jefferson County's CR 12(b)(6) motion to dismiss because Gunther's accident occurred in Port Townsend, and not in unincorporated Jefferson County. Gunther did not sue the city of Port Townsend.

[4] The November 5 hearing was originally set for 2:00 p.m., but was renoted for 1:00 p.m., with mail notice to Gunther. When the case was called at 1:00 p.m., Gunther was not present. The court briefly recessed to give Gunther additional time to appear. When court reconvened, Gunther had not appeared or attempted to contact the court, so the trial court proceeded with the hearing, granting the State's summary judgment motion based on the briefing.

In her brief to this court, Gunther raised the issue of whether the trial court erred in conducting the summary judgment hearing in her absence and whether that circumstance denied her due process. But her failure to include any argument on the matter in her brief waived this issue. *See State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) (reviewing court will

DISCUSSION

I. Standard of Review

"We review summary judgment orders de novo and perform the same inquiry as the trial court." *Owen v. Burlington N. & Santa Fe R.R. Co*., 153 Wn.2d 780, 787, 108 P.3d 1220 (2005); *Hisle v. Todd Pac. Shipyards Corp*., 151 Wn.2d 853, 860, 93 P.3d 108 (2004). We examine the pleadings, affidavits, and depositions before the trial court and consider the facts and reasonable inferences in the light most favorable to the nonmoving party.[5] *Owen*, 153 Wn.2d at 787; *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995). Summary judgment is proper if the record before the trial court establishes that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. CR 56(c); *Owen*, 153 Wn.2d at 787. Gunther is the nonmoving party, so we will view all facts and reasonable inferences in the light most favorable to her. *Owen*, 153 Wn.2d at 787. But the nonmoving party may not rely on speculation, argumentative assertions, or on having her affidavits considered at face value; for after the moving party submits adequate affidavits, the

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not review issues for which inadequate argument has been briefed or only passing treatment has been made), *abrogated in part on other grounds by Crawford*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ; *Timson v. Pierce County Fire Dist. No. 15*, 136 Wn. App. 376, 385, 149 P.3d 427 (2006) (same).

[5] The day before we were scheduled to consider this appeal, Gunther filed a motion to substitute color photocopies for the black and white reproductions of color photographic exhibits that the trial court clerk provided in the clerk's papers. Many essential details are not clear in the black and white reproductions in the clerk's papers. "RAP 9.10 allows a party to supplement the record transmitted to [the appellate] court with materials that are already part of the record that was before the trial court." *State v. Madsen*, 153 Wn. App. 471, 485, 228 P.3d 24 (2009). We grant Gunther's motion because such substitution permits us to accurately review what was presented to the trial court at the summary judgment hearing. Accordingly, we direct that the color photocopies attached to Gunther's motion be substituted for the corresponding black and white reproductions at pages 120 through 136 of the clerk's papers.

nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine material fact issue exists. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986).

II. Material Questions of Fact Preclude Summary Judgment

A. *Manual of Uniform Traffic Control Devices*

Gunther argues that the State breached its duty to keep the roadway safe for ordinary travel because the State failed to follow the mandates and directions of the Washington State Department of Transportation's *Manual of Uniform Traffic Control Devices* (MUTCD) regarding proper marking of the pavement and posting of mandated signs at the end of the bicycle lane. She alleges that such failure was negligence as a matter of law. We disagree.

To prevail on her negligence claim, Gunther must show (1) that the State owed her a legal duty, (2) that the State negligently breached its duty, and (3) that the breach was the proximate cause of Gunther's alleged injury. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609, 224 P.3d 795 (2009) (citing *Ruff*, 125 Wn.2d at 704). "Today, governmental entities are held to the same negligence standards as private individuals." *Owen*, 153 Wn.2d at 787; *Keller v. City of Spokane*, 146 Wn.2d 237, 242-43, 44 P.3d 845 (2002). "Liability for negligence does not require a direct statutory violation, though a statute, regulation, or other positive enactment may help define the scope of a duty or the standard of care." *Owen*, 153 Wn.2d at 787.

"The MUTCD provides at least some evidence of the appropriate duty." *Owen*, 153 Wn.2d at 787; *see also* RCW 47.36.030(1) (imposing duty on secretary of transportation to adopt uniform state standard for signs and other traffic control devices used on state highways and directing that such signs "shall conform as nearly as practicable to the manual of specifications for

the manufacture, display, and erection of uniform traffic control devices for streets and highways"); WAC 468–95–010 (noting secretary of transportation's adoption of the MUTCD); *Kitt v. Yakima County*, 93 Wn.2d 670, 672, 611 P.2d 1234 (1980) (noting prior adoption of MUTCD). Moreover, the State, as the governmental entity responsible for the roadway here, owes a duty to all travelers, whether negligent or fault-free, to maintain its roadways in a condition safe for ordinary travel.[6] *Owen*, 153 Wn.2d at 786-87 (citing *Keller*, 146 Wn.2d at 249).

In her response to the State' summary judgment motion and in her appellant's brief, Gunther relies on sections of the MUTCD addressing dedicated bicycle lanes that continue through intersections, how such bicycle lanes should be marked, and what signage should be used when vehicle right turn lanes are present at such intersections. Gunther particularly relies on a sign appearing in MUTCD Figures 9C-1, 9C-3, and 9C-4 that reads, "BEGIN RIGHT TURN LANE [DIRECTIONAL ARROW] YIELD TO BIKES." CP at 200, 203, 204. But in each of these figures a separate, dedicated *through* bicycle lane continues beyond the intersection and the figures show where a sign should be placed in this circumstance. That is not the circumstance here. As Gunther acknowledges, the dedicated bicycle lane here ended before the vehicle turn lane began. Accordingly, the MUTCD provisions that Gunther cites do not apply and, thus,

[6] The governmental entity's duty to eliminate an inherently dangerous or misleading condition is part of the overarching duty to provide reasonably safe roads for the people of this state to drive upon. *Owen*, 153 Wn.2d at 788 (citing *Keller*, 146 Wn.2d at 249). Such "inherently dangerous formulation recognizes that '[a]s the danger becomes greater, the actor is required to exercise caution commensurate with it.'" *Owen*, 153 Wn.2d at 788 (alteration in original) (quoting *Ulve v. City of Raymond*, 51 Wn.2d 241, 246, 317 P.2d 908 (1957)). Accordingly, the existence of an unusual hazard may require the entity responsible for the roadway to exercise greater care than would be sufficient in other settings. *Owen*, 153 Wn.2d at 788.

Gunther's contention that the State has failed to comply with the MUTCD fails.

B. Duty To Make Roadway Safe for Ordinary Travel

Gunther also argues that in addition to a duty to comply with the MUTCD's requirements, the State had a general duty to act reasonably in making the roadway safe for ordinary travel; and that the State breached that duty because the "drop-curb" was not flush with the pavement, thereby creating a "dangerous condition."[7] Br. of Appellant at 31. We hold that this issue presents a material fact question that precludes summary judgment.

In *Owen*, our Supreme Court reversed the trial court's summary judgment dismissal of claims against the city of Tukwila in a wrongful death action where decedents were killed in a car-train collision at a railroad crossing. 153 Wn.2d at 783-84. The *Owen* court held that "[w]hether the roadway was reasonably safe for ordinary travel is, in this case, a material question of fact."[8] *Owen*, 153 Wn.2d at 788. The court also noted that "'issues of negligence and proximate cause are generally not susceptible to summary judgment.'" *Owen*, 153 Wn.2d at 788 (quoting *Ruff*, 125 Wn.2d at 703). Moreover, whether a condition is inherently dangerous or misleading is generally a question of fact; as is the adequacy of the government's attempt to take corrective action. *Owen*, 153 Wn.2d at 788. If reasonable minds can differ, the question of fact is one for the trier of fact, and summary judgment is not appropriate. *Owen*, 153 Wn.2d at 789.

[7] Gunther now asserts that "she did not know of the dangerous condition of the drop-curb until after the fact." Br. of Appellant at 31. But she admitted in her declaration in response to the State's summary judgment motion that "[she] did notice that the recessed portion of the curb was not flush with the pavement, but it appeared at all times to be about [one] inch different." CP at 114.

[8] Plaintiff opposing summary judgment provided the trial court with responsive evidence including experts' opinions regarding conditions at the crossing noting: multiple train tracks, use by high-speed trains, high train and car traffic at the crossing, nearby traffic signals causing frequent queuing of cars over the tracks, and a road incline that limited track visibility. *Owen*, 153 Wn.2d at 789.

More recently in *Xiao Ping Chen v. City of Seattle*, Division One of our court applied *Owen* in reversing the trial court's grant of summary judgment to the city in a negligence action, explaining as follows:

> A municipality has a duty to all travelers to maintain its roadways in conditions that are safe for ordinary travel. Whether roadway conditions are reasonably safe for ordinary travel depends on the circumstances surrounding a particular roadway. Although relevant to the determination of whether a municipality has breached its duty, evidence that a particular physical defect in a roadway rendered the roadway dangerous or misleading or evidence that a municipality was in violation of a law concerning roadway safety measures are not essential to a claim that a municipality breached the duty of care owed to travelers on its roadways. *A trier of fact may conclude that a municipality breached its duty of care based on the totality of the circumstances established by the evidence*. Xiao Ping Chen adduced several pieces of evidence raising a genuine issue as to whether the city of Seattle failed to maintain in a reasonably safe condition the crosswalk in which her now-deceased husband, Run Sen Liu, was struck by an oncoming car. Therefore, the city was not entitled to summary judgment on Chen's negligence claim.

153 Wn. App. 890, 894, 223 P.3d 1230 (2009) (emphasis added), *review denied*, 169 Wn.2d 1003 (2010).

The *Chen* court determined that the plaintiff need not identify a particular defect in the roadway to defeat summary judgment. Rather, "consideration of all of the surrounding circumstances is necessary to determine whether a particular roadway presented an unsafe condition." *Chen*, 153 Wn. App. at 909.

> In determining whether a dangerous condition exists at a roadway and whether a municipality has breached its duty to maintain a roadway in a safe condition, the trier of fact may infer that a breach has occurred based on the totality of the relevant surrounding circumstances, regardless of whether there is proof that a defective physical characteristic in the roadway rendered the roadway inherently dangerous or inherently misleading. That Chen may not have put forth evidence that the crosswalk itself contained a defective physical characteristic making the crosswalk misleading or dangerous is not dispositive.

Chen, 153 Wn. App. at 909.

Chen's responsive evidence included reports of past accidents in the crosswalk, multiple citizen requests for a traffic light, expert witness opinions that the crosswalk presented a dangerous condition, and various studies supporting the dangerousness of the crosswalk in question. 153 Wn. App. at 909-11. None of that is present here. Instead, Gunther submitted photographs verifying that the recessed curb is not flush with the pavement and protrudes above the pavement some two and one half inches. Although Gunther's evidence did not show that such a gap fails to meet design standards nor did she present expert testimony that such gap creates a hazardous condition for bicycles, *Chen* indicates that a fact finder may infer, after consideration of the totality of the surrounding circumstances and evidence, that the State breached its duty of care in this context. Thus, we hold that summary judgment was not proper because material issues of fact remain to be resolved.

C. Assumption of Risk Argument

Gunther also argues that the trial court improperly granted summary judgment based on her assumption of risk when she attempted to jump the curb. We disagree with Gunther's characterization of the trial court's ruling and only briefly address this issue.

"[A]ssumption of risk" is a general rubric encompassing a cluster of different concepts. *Gregoire v. City of Oak Harbor*, 170 Wn.2d 628, 636, 244 P.3d 924 (2010). Four types of assumption of risk operate in Washington: (1) express,[9] (2) implied primary,[10] (3) implied

[9] "Express assumption occurs when parties agree in advance that one of them is under no obligation to use reasonable care for the benefit of the other and will not be liable for what would otherwise be negligence." *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 496, 834 P.2d 6 (1992). "When such a plaintiff is injured by one of the risks for which he or she has agreed to forgo suit, the claim will be barred because that risk was assumed by the plaintiff." *Scott*, 119 Wn.2d at 496.

[10] "Implied *primary* assumption of risk arises where a plaintiff has impliedly consented (often in

unreasonable, and (4) implied reasonable assumption of risk.[11] *Gregoire*, 170 Wn.2d at 636. The presence of a finding of negligence, combined with a finding of assumption of risk in any particular case, has different legal effects, depending on the type of risk assumed and how it was assumed.

"The first two types, express and implied primary assumption of risk, arise when a plaintiff has consented to relieve the defendant of a duty—owed by the defendant to the plaintiff—regarding specific known risks." *Gregoire*, 170 Wn.2d at 636. Express and implied primary assumption of risk may operate as a bar to recovery as to the risks assumed. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 496-98, 834 P.2d 6 (1992). Implied reasonable and implied unreasonable assumption of risk "apportion a degree of fault to the plaintiff and serve as damage-reducing factors." *Gregoire*, 170 Wn.2d at 636.

Assumption of risk is an affirmative defense that must be pleaded in the answer. *See* CR 8(c). Here the State's answer only alleged a failure of *causation*, not assumption of risk.[12]

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advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks." *Scott*, 119 Wn.2d at 497.

[11] [I]implied reasonable and unreasonable assumption of risk arise where the plaintiff is aware of a risk that already has been created by the negligence of the defendant, yet chooses voluntarily to encounter it. In such a case, plaintiff's conduct is not truly consensual, but is a form of contributory negligence, in which the negligence consists of making the wrong choice and voluntarily encountering a known unreasonable risk.

Scott, 119 Wn.2d at 499 (quoting *Leyendecker v. Cousins*, 53 Wn. App. 769, 773-74, 770 P.2d 675 (1989)).

[12] The State's answer stated that plaintiff's alleged injuries and damages, "if any, were proximately caused or contributed to by the fault of the plaintiff. Defendant's liability, if any is later determined, should be reduced by the contributory fault of Plaintiff pursuant to Chapter 4.22 RCW." CP at 7.

Assumption of risk was never argued to the trial court.

In granting summary judgment to the State, the trial court agreed with the State that there was no causation, but articulated the proximate cause of Gunther's injuries as her "choice" to jump the curb.[13] Report of Proceedings (Nov. 5, 2010) at 5. In her opening brief, Gunther mischaracterizes the trial court's comment as the trial court's erroneous decision that she assumed the risk as a matter of law. But, as noted, assumption of risk was never argued to the trial court or relied upon by the trial court in granting summary judgment. Accordingly, Gunther's argument that the trial court's erroneous application of assumption of risk renders summary judgment improper fails.[14]

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[13] The trial court opined:

> But the duty told by the State is to exercise ordinary care to keep the public ways in reasonably safe condition for ordinary travel, and there simply isn't any indication that the State of Washington at this particular I guess recess and the curb in the city of Port Townsend was in any way not an unreasonable safe condition. There's no indication that the existence of the curb and the way it was was, you know, the proximate cause of an accident to Ms. Gunther, decided that she was going to try to, to use the phrase "jump the curb," go over the curb and get on the sidewalk. That was certainly no negligence on the part of the State of Washington that would have caused her to have to go over the curb to get on the sidewalk. That was a choice she made.

Report of Proceedings (Nov. 5, 2010) at 4-5.

[14] Upon remand, the parties' theories and the evidence presented at trial will determine what instructions are warranted, including whether an instruction on assumption of risk should be given. As we explained in *Alston v. Blythe*:

> [A] trial court may instruct on both contributory negligence and assumption of risk *if* the evidence produced at trial is sufficient to support two distinct findings: (a) that the plaintiff consented to relieve the defendant of one or more duties that the defendant would otherwise have owed to the plaintiff, and (b) that the plaintiff failed to exercise ordinary care for his or her own safety. In most situations, however, the evidence will support only the second of these findings, and "an instruction on contributory negligence is all that is necessary or appropriate."

88 Wn. App. 26, 34, 943 P.2d 692 (1997) (footnotes, and citations omitted) (quoting *Dorr v. Big Creek Wood Prods., Inc.*, 84 Wn. App. 420, 426, 927 P.2d 1148 (1996)).

Nevertheless, Gunther's conduct and the portion of fault, if any, to be allocated between the State and Gunther remain material fact questions that preclude summary judgment. As indicated in *Owen*, Gunther's alleged negligent conduct in jumping the curb does not preclude her negligence claim against the State for the alleged dangerous condition of the roadway and curb.

> It is well established that [the State] owes a duty to all travelers, whether negligent or fault-free, to maintain its roadways in a condition safe for ordinary travel. [Plaintiff] alleges a breach of that duty and a resulting injury. Any negligence on the part of the [injured party] is irrelevant to whether a material question of fact regarding the alleged breach of [the State]'s duty survives summary judgment. That is not to say that any negligence on the part of the [injured party] is irrelevant to the cause of action and may be raised by the [State] when appropriate. *See* RCW 4.22.005.

Owen, 153 Wn.2d at 786-87 (one citation omitted); *see Kirk v. Washington State Univ.*, 109 Wn.2d 448, 456, 746 P.2d 285 (1987) ("plaintiff's assumption of certain known risks in a sport or recreational activity does not preclude recovery for injuries resulting from risks not known or not voluntarily encountered").

We hold that the trial court erred in granting the State's summary judgment motion and we reverse and remand for further proceedings.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

I concur:

Worswick, C.J.

ARMSTRONG, J. (dissenting) — Because Marilyn Gunther presented no evidence that the State breached any duty of care it owed her, I would affirm the trial court's summary judgment in the State's favor.

Issues of negligence "'are generally not susceptible to summary judgment.'" *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 788, 108 P.3d 1220 (2005) (quoting *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995)). "Questions of fact may be determined as a matter of law 'when reasonable minds could reach but one conclusion.'" *Owen*, 153 Wn.2d at 788 (quoting *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985)). The majority is correct that to prevail on her negligence claim, Gunther must show (1) that the State owed her a legal duty, (2) that the State negligently breached its duty, and (3) that the breach was the proximate cause of Gunther's alleged injury. *Boguch v. Landover Corp.*, 153 Wn. App. 595, 609, 224 P.3d 795 (2009) (citing *Ruff*, 125 Wn.2d at 704). Because Gunther offered no evidence that the State breached any duty of care, her claim fails.

The State has a general duty to act reasonably in making the roadway and curb safe for ordinary travel. *See* RCW 47.24.020[15]; *Owen*, 153 Wn.2d at 787 (citing *Keller v. City of Spokane*, 146 Wn.2d 237, 249, 44 P.3d 845 (2002)). Gunther, however, produced no evidence showing that the State breached this duty. *See Owen*, 153 Wn.2d at 786. Unsupported declarations that the State breached a duty are insufficient since "bare assertions that a genuine material [factual] issue exists will not defeat a summary judgment motion in the absence of actual evidence." *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 93, 993 P.2d 259 (2000).

[15] The legislature amended this statute after the date of the accident. The amendments do not change our analysis, thus, we use the current version of the statute.

The majority finds persuasive that Gunther provided photographs of the alleged dangerous condition created by the "recessed curb" not sitting flush with the pavement. Majority at 9. The photographs show a curb that adjoins the street and is two-and-a-half inches higher than the street. Nothing in the photographs demonstrates that the curb was negligently designed, constructed, or maintained; nor do the photos suggest that the curb would deceive a reasonable person as to its height. And Gunther declared only that she saw her riding partner jump from the street to the curb, and she thought she could do the same. Gunther presents no evidence that this was anything other than a simple misjudgment on her part.

The majority cites *Owen* and *Chen*; neither supports Gunther's claim. In *Owen*, 153 Wn.2d at 784-85, the decedents stopped on train tracks at a railroad crossing and were unable to move off of the tracks due to the guardrails and traffic conditions. The decedents were killed in a car-train collision at the railroad crossing. *Owen*, 153 Wn.2d at 785. Owen submitted expert testimony that the railroad crossing at issue was dangerous because of the road conditions and the volume of vehicle and train traffic. *Owen*, 153 Wn.2d at 789. Additionally, Owen presented lay witness testimony that the railroad crossing sign caused vehicles to stop on the train tracks, increasing the likelihood of the guardrails trapping a car as a train approaches. *Owen*, 153 Wn.2d at 789. Based on the testimony of the witnesses, the *Owen* court held that "a reasonable jury could conclude the roadway was not maintained in a condition reasonably safe for ordinary travel or was inherently dangerous or misleading . . . ." *Owen*, 153 Wn.2d at 790.

Similarly, in *Xiao Ping Chen v. City of Seattle*, 153 Wn. App. 890, 911, 223 P.3d 1230 (2009), Division One of this court held that the plaintiff provided sufficient evidence to survive summary judgment. There, a car hit the decedent when he was walking through a marked

crosswalk on a five-lane arterial road with no stop lights, stop signs, or pedestrian signals. *Xiao Ping Chen*, 153 Wn. App. at 894-95. Chen presented evidence in support of his claim: (1) multiple accidents occurred at the same intersection and the city received numerous complaints that the intersection was difficult to navigate, (2) a federal highway administration study concluded that intersections, like the one at issue, were not safe, (3) two engineering experts' opinions that the "crosswalk did not adhere to sound engineering principles and posed a danger to pedestrians," and (4) an expert's opinion that the combination of factors at the intersection created "a dangerous condition at the crosswalk." *Xiao Ping Chen*, 153 Wn. App. at 895-98. The court found this evidence sufficient to raise genuine issues of material fact to defeat summary judgment. *Xiao Ping Chen*, 153 Wn. App. at 911.

Unlike the plaintiffs in *Owen* and *Xiao Ping Chen*, Gunther presented no expert witness testimony of a flawed design, lay testimony of a history of accidents at the curb site, or any authority demonstrating a flaw existed in the curb's design. In the absence of such evidence, Gunther's conclusory assertions in her deposition and her declaration in response to summary judgment are insufficient to show that the State breached its duty. For example, in her deposition, Gunther admits that she could have continued biking on the road or she could have stopped and lifted her bicycle onto the curb. There were no signs or road markings requiring Gunther to exit the road where she did. Gunther's opinion and the pictures she took of the road and the curb do not show the State breached its duty of care in designing, constructing, or maintaining the road and curb. Finally, Gunther points to no relevant provision of the *Manual of Uniform Traffic Control Devices* (MUTCD)[16] showing that the road and curb failed to meet design standards.

[16] Gunther did cite MUTCD provisions regarding signs for dedicated bicycle lanes that continue through intersections (figures 9C-1, 9C-3, and 9C-4). The bicycle lane in this case did not

The majority acknowledges that Gunther presented no evidence that the road and the curb "fail[] to meet design standards." Majority at 9.

Because Gunther failed to offer any evidence that the State breached its duty to provide a reasonably safe road and curb, her claim fails. I would affirm the trial court's summary judgment in the State's favor.

Armstrong, J.

continue *through* the intersection. Thus, I agree with the majority that the MUTCD provisions that Gunther cites do not apply.