No. 15-114705-A
(Consolidated with No. 15-114707-A)

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

ROCHELLE PATTERSON, mother and next best friend of Nicolette Patterson, a minor, and Gavin Patterson, a minor,

Plaintiff/Appellant/Cross-Appellee,

vs.

COWLEY COUNTY, KANSAS,

Defendant/Appellee/Cross-Appellant,

and

KANSAS DEPARTMENT OF WILDLIFE, PARKS AND TOURISM and BOLTON TOWNSHIP,

Defendants/Appellees,

and

ELAINE SELENKE, as heir at law of Cortney Brewer, deceased,

Plaintiff/Appellee/Cross-Appellee.

REPLY BRIEF (TO SELENKE) OF APPELLEE/CROSS-APPELLANT COWLEY COUNTY, KANSAS

Interlocutory Appeal from the District Court of Cowley County, Kansas
Hon. Nicholas St. Peter, Judge
District Court Case Nos. 12-CV-99-W, 12-CV-185-W & 13-CV-46-W

Charles E. Millsap - #09692
FLEESON, GOOING, COULSON & KITCH, L.L.C.
1900 Epic Center, 301 North Main
Wichita, Kansas 67202
(316) 267-7361
cmillsap@fleeson.com
Attorneys for Cowley County, Kansas

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Appellee Cowley County, Kansas ("Cowley County" or "the County") submits this reply brief in support of its cross-appeal in this matter. This reply is directed at the responsive arguments contained in the brief of appellee/cross-appellee Elaine Selenke which was filed on June 20, 2016. The County has previously filed a reply to the responsive brief of appellant/cross-appellee Rochelle Paterson.

As an appellee/cross-appellee, Selenke is allowed to do two things: respond to the issues raised in appellant Patterson's brief, and respond to the issues raised in cross-appellant Cowley County's brief. Selenke's brief goes beyond these boundaries.

Part of Patterson's appeal is her contention that the County had a duty to erect an advisory speed placard on its portion of 322nd Road. Patterson addressed this issue at pages 10-22 of her opening brief. It is the only issue she raised as to Cowley County.

Selenke's "response" brief does not discuss this issue in any manner. Rather, Selenke argues that Cowley County had a duty to erect some sort of traffic control device on the ***township*** portion of 322nd Road. (Selenke's Brief, pp. 19-25). This has never been a contention of Patterson either in the district court or on appeal. Selenke has therefore attempted to inject into this appeal an issue that is not encompassed by the Petition for Interlocutory Appeal filed by Patterson and granted by the Court. The Court has already entered several orders addressing the scope of this appeal and Selenke should not be allowed to circumvent those orders and raise new issues under the guise of a "response." For this reason alone, the Court should ignore the argument contained at pages 19-25 of Selenke's brief.

Nevertheless, and in the alternative to filing yet another motion to strike, the County will address all of the issues contained in Selenke's brief which attempt to impose liability on the County.

ARGUMENT AND AUTHORITIES

I.
THE COUNTY HAS NO RESPONSIBILITY FOR PLACING SIGNAGE ON THE PORTION OF 322ND ROAD WHICH IS NOT WITHIN ITS JURISDICTION

There is no dispute that the portion of 322nd Road east of the point were the pavement ends is a township road rather than a county road. The district court set forth the uncontroverted facts in this regard in its Court Ruling on Motions for Summary Judgment, concluding that, "[t]he portion of 322nd Road where the pavement ends, to the Arkansas River, was never taken into the county road system and remains a township road." (R. Vol. 1, pp. 2835-2837). *See also* K.S.A. 68-101(c) and (e) ("'County roads' means all roads designated as such by the board of county commissioners . . . . 'Township roads' are all roads within a township not within a county road unit county other than federal, state and county roads.").

Notwithstanding that the unpaved portion of 322nd Road is not a county road, Selenke contends that Cowley County had a duty to erect signage on the unpaved portion. This position is contrary to Kansas statutes and caselaw.

K.S.A. 8-2005(a) states as follows:

> Local authorities ***in their respective jurisdictions*** shall place and maintain such traffic-control devices upon highways ***under their jurisdiction*** as they may deem necessary to indicate and to carry out the provisions of this act or local traffic ordinances or to regulate, warn or guide traffic. All such traffic-control devices hereafter erected shall conform to the state manual and specifications.

A township road is not in or under the jurisdiction of the county and therefore a county has no duties with regard to traffic control devices on those roads. *See* K.S.A. 68-526(a) ("In all counties not operating under the county road unit system the township board shall have the general charge and supervision of all township roads and township culverts in their respective townships.").

Selenke has previously described *Finkbiner v. Clay County*, 238 Kan. 856, 714 P.2d 1380 (1986), as "remarkably similar" to the case at hand. (*See* R. Vol. 1, p. 3117). And on this particular issue, it certainly is. The plaintiff in *Finkbiner* sued a county and a township for injuries he suffered when he drove his pickup truck over the end of a township road and into a dry river bottom. He claimed that the county and township were both negligent for failing to properly place warning signs in accordance with statutory requirements.

The district court granted summary judgment to the county and the Supreme Court affirmed. Citing K.S.A. 8-2005, the Court first noted that local authorities were responsible for traffic control devices "under their jurisdiction." 238 Kan. at 860. Thus, the Court observed, it is first necessary to determine "what governmental entities are responsible for the safety of travelers upon the road." 238 Kan. at 860-61. In the case before it, the Court found that it was uncontroverted that the road down which the plaintiff drove before falling into the river bed was a township road. Consequently, the Court found that the county had no duty to erect warning signs about an alleged hazard on a township road:

> Since all parties agree that the Township alone was responsible for the township road, ***the County cannot be liable for failure to place signs warning of a dead end on the township road***. A township, having the exclusive care and control of a street or road, has a duty to maintain that road or street for the safe passage of persons and property. ***Other governmental entities cannot be held liable for failure to maintain that road safely***. *City of Eudora v. Miller*, 30 Kan. 494, 2 Pac. 685 (1883).

238 Kan. at 861 (emphasis added).

Selenke seeks to escape the effect of K.S.A.8-2005(a) and *Finkbiner* in two ways.

First, she cites to a number of statutes in Chapter 68 of the Kansas Statutes Annotated which impose certain duties on the county engineer that extend to township roads, and extrapolates from these statutes that the county has a duty to erect signs on township roads. Notably, ***none*** of the statutes cited by Selenke refer to traffic control devices. Two rules of statutory construction apply here. First, under the maxim *expressio unius est exlusio alterius* (the inclusion of one thing implies the exclusion of another), the Court may infer that when the legislature imposed certain duties on the county engineer concerning township roads but did *not* impose a duty regarding traffic control devices, that the exclusion was intentional. *See, e.g., Richards v. Schmidt*, 274 Kan. 753, 758, 56 P.3d 274 (2002). Similarly, "[a] specific statute controls over a general statute." *Nuessen v. Sutherlands*, 51 Kan. App. 2d 616, 619, 352 P.3d 587 (2015). Here, K.S.A. 8-2005(a) specifically deals with the placement of traffic control devices and limits a county's authority to the roads within its

jurisdiction. This statute controls over the more general statutes in Chapter 68 which do not reference traffic control devices.

Selenke's second argument rests on her assertion that the County retains an "easement" over the township portion of 322nd Road. From this premise, she extrapolates that the county also retained the duty to "maintain" and therefore erect traffic control devices on that portion of the road. Again, the law does not support her argument.

Selenke correctly points out that only a county may lay out county or township roads and that what is now 322nd Road was originally laid out by Cowley County in the 1870s.[1] She then states that, "[t]he county continues to hold the road easement to this day." (Selenke's Brief, p. 23). She cites no authority for this proposition other than to assert that the County never "vacated" the road. (*Id.*).

But Selenke does not challenge the district court's findings, based upon uncontroverted facts, that when the legislature created and required the classification of roads in counties in 1917, the entirety of what is now 322nd Road was designated as a township road. When, in 1955, Cowley County took over a portion of 32nd Road, it did so only up to the where the pavement currently ends, leaving the remainder as a township road. (R. Vol. 1, p. 2835). Selenke cites no authority

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[1] Notably, at the time the road was laid out, the pertinent Kansas statute required that, after laying out a road, the county commissioners, "shall issue their order ***to the trustees of the respective townships in which such road is located***, directing them to cause the same to be opened for the public travel." L. 1874, ch. 108, § 6 (emphasis added). Thus, from the beginning, townships were given charge of the roads within their boundaries.

suggesting that this sequence of events was not effective to divest the County of any ownership interest of the township portion of 322nd Road and that formal "vacation" was required in order to do so.[2]

Selenke's argument is similar to that advanced in *Peterson v. Morris County*, No. 103,742, 2011 WL 6311796 (Kan. Ct. App. Dec. 9, 2011) (unpublished; attached hereto), where the plaintiffs attempted to argue that Morris County was the owner of a particular rural road referred to as RS 1902. One of the plaintiffs' arguments was that under K.S.A. 19-212 and 68-102(a), only the county had the power to lay out the road, and that by virtue of this power, it retained ownership and responsibility for it. The Court disagreed:

> Plaintiffs assert that under this statute, any roads not located in incorporated areas are owned or controlled by the county. Plaintiffs misinterpret this provision to justify a leap of logic. The fact the county has the statutory power to lay out, alter, or discontinue roads in various townships does not give the county title or responsibility for all roadways outside city limits . . . .

2011 WL 6311796, at *4.

Moreover, even if the County continued to hold an easement over the township portion of 322nd Road, that would not override the explicit directive of K.S.A. 8-2005(a) that local authorities are only responsible for the placement of traffic control

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[2] The process for vacating roads is set forth in K.S.A. 68-102, *et seq*. Once this process is complete, ownership of the road reverts to the adjoining landowners. *See, e.g., Winkel v. Miller*, 288 Kan. 455, 456-57, 205 P.2d 688 (2009); *McGrew v. Stewart*, 51 Kan. 185, 32 P. 896 (1893). This process does not have to be followed in order for a road laid out by the county to become a township road. Rather, it merely must be designated as such. K.S.A. 68-506(a).

devices on roads "***under their jurisdiction***." (emphasis added). By definition, a road designated as a township road is under the jurisdiction of the township, not the county. That is the entire purposes of the classification system called for in K.S.A. 68-506(a).

II.
SELENKE'S ARGUMENTS REGARDING DISCRETIONARY FUNCTION IMMUNITY REQUIRE NO FURTHER RESPONSE

Like Patterson, Selenke makes no effort to defend the district court's reasoning for denying summary judgment to the County on the basis of discretionary function immunity, i.e., that it cannot be determined whether the County possessed discretion to place Dead End or No Outlet sign on its portion of the road until the jury determines whether the absence of such a sign was the proximate cause of the accident. As previously argued by the County, the district court's ruling in this regard improperly made the legal question of whether the County had a duty, subordinate to the fact question of causation. Selenke's brief does not dispute this argument.

The plain language of K.S.A. 8-2005(a) requires local authorities to erect traffic control devices "as they may deem necessary . . . ." This is a clear grant of discretion. In *Kershenbaum v. Fasbinder*, No. 97,399, 2007 WL 4158180, at *2 (Kan. Ct. App. Nov. 21, 2007) (unpublished; attached hereto), the court construed the term "shall deem necessary or proper" in a trust instrument. The appellant argued that the inclusion of the word "shall" meant that the trustee did not have discretion. In light of the accompanying term "deem," the court disagreed:

> In our view, the term "shall" is not to be viewed in an isolated manner, but rather as a part of the entire phrase "such sum or sums as the testamentary trustee(s) shall deem necessary or proper." The key phrase following "shall" is "deem," which is generally defined as "to consider, think, or judge." BLACK'S LAW DICTIONARY 446 (8th ed. 2004). ***All of these infinitives are synonymous with discretion.*** . . . Fasbinder's argument is contrary to the common understanding of the term "deem" . . . .

2007 WL 4158180, at *3. The local authority's discretion is limited only in that "[a]ll such traffic-control devices hereafter erected shall conform to the state manual and specifications." K.S.A. 8-2005(a). As has been previously demonstrated, the state manual—the Manual of Uniform Traffic Control Devices (MUTCD)—did not require the placement of any further warning sign by the County, and its discretion was therefore unhindered. It is thus entitled to immunity under K.S.A. 75-6104(e).

Selenke's brief adds nothing of substance to the discretionary function issue that has not already been addressed by the briefs of Patterson and Cowley County. Accordingly, the County will not further repeat its arguments here.

III.
SELENKE HAS NOT IDENTIFIED A VALID BASIS FOR THE COUNTY TO BE DEPRIVED OF RECREATIONAL USE IMMUNITY

Again, much of what is contained in Selenke's brief regarding recreational use immunity has already been addressed in the County's prior briefing and those arguments need not be repeated. Suffice it to say that Selenke has provided no basis for holding that a government entity who has a close enough relationship to a

recreational facility to be sued for an accident occurring therein should not be entitled to immunity under the Kansas Tort Claims Act. Certainly nothing within the language of the exemption compels that result and it would be improper to add a condition not prescribed by the legislature. *See Robinson v. City of Wichita Employees' Retirement Board of Trustees*, 291 Kan. 266, Syl. ¶ 6, 241 P.3d 15 (2010) (The court "will not speculate on legislative intent and will not read the [statutory] provision to add something not readily found in it."); *Casco v. Armour Swift–Eckrich*, 283 Kan. 508, Syl. ¶ 6, 154 P.3d 494 (2007) ("A statute should not be read to add that which is not contained in the language of the statute or to read out what, as a matter of ordinary language, is included in the statute."). Particularly with regard to recreational immunity, the Supreme Court has said that, "the statutory language granting immunity to governmental facilities 'intended or permitted' to be used for recreational purposes should be read broadly, and Kansas courts should not impose additional hurdles to immunity that are not specifically contained in the statute." *Lane v. Atchison Heritage Conference Center, Inc.*, 283 Kan. 439, 445, 153 P.3d 541 (2007).

Selenke does add an argument that even Patterson did not believe was justified, that being that the County is not entitled to recreational use immunity because its failure to place an additional traffic control device constitutes gross and wanton negligence, thereby making recreational use immunity unavailable. *See* K.S.A. 75-6104(o). Notably, in making this argument, Selenke has not even provided the Court

with the standards applicable to gross and wanton negligence and relies primarily on "facts set forth in Selenke's first brief"—a brief which does not exist. (Selenke's Response, p. 40).

The necessary showing to establish gross and wanton negligence, such that recreational use immunity will not apply, was stated in *Robison v. State of Kansas*, 30 Kan. App. 2d 476, 479, 43 P.3d 821 (2002):

> The Robisons next argue that evidence of gross and wanton negligence was presented to overcome the recreational use exception. Wanton conduct is established by the mental attitude of the wrongdoer rather than by the particular negligent acts. *Friesen v. Chicago, Rock Island & Pacific Rld.*, 215 Kan. 316, 322, 524 P.2d 1141 (1974). ***Wantonness requires that there be a realization of imminent danger and reckless disregard, indifference, and unconcern for probable consequences.*** 215 Kan. at 323, 524 P.2d 1141.

(emphasis added). *See also Jackson v. City of Norwich*, 32 Kan. App. 2d 598, 601, 85 P.3d 1259 (2004). Where no reasonable jury could conclude that a municipality's conduct was wanton, summary judgment is appropriate. *Soto v. Bonner Springs*, 291 Kan. 73, 83, 238 P.3d 278 (2010).

Here, there is no evidence that the County was aware of an imminent danger on 322nd Road and recklessly disregarded it. Although Selenke insists that the condition in the Kaw Wildlife Areas was highly dangerous and that a deadly accident was imminent, the facts demonstrate that 322nd Road has ended at the river since the road was laid out over 140 years ago and there is no evidence that there has ever been

an accident similar to this one. This is important, because as this Court has said in examining whether a municipality's conduct was gross and wanton so as to deprive it of recreational use immunity, "[n]otice is a factor." *Lanning by and through Lanning v. Anderson*, 22 Kan. App. 2d 474, 480, 921 P.2d 813, *rev. denied*, 260 Kan. 994 (1996).

In *Lanning*, the minor plaintiff was struck by a discus during middle school track practice. In order to evade recreational use immunity that would otherwise have applied, the plaintiff argued that the school district and its employee track coaches were guilty of gross and wanton negligence. Although a jury found that this level of negligence existed, the Court of Appeals reversed, relying primarily on the fact that no prior incidents had occurred which would place the defendants on notice of an imminently dangerous condition:

> In the instant action, there had been no prior accident or close call that might have given the coaches notice of the imminence of danger. Cf. *[Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 392, 836 P.2d 1222 (1992)] (holding that summary judgment was inappropriate where employees of a golf club had knowledge of a prior accident occurring at the same location). Discus practice had been held at the middle school playground approximately 10 times in the spring of 1993 without incident. There was no notice of imminent danger.

Lanning, 22 Kan. App. 2d at 480.

Over a century of experience demonstrated that there was no imminent danger caused by the condition of 322nd Road in the Kaw Wildlife Area. It was only when

individuals intoxicated far beyond the ability to safely and legally operate a motor vehicle chose to travel into the area in the middle of the night that a danger was created. Tragic as this accident may be, it certainly was not the result of any gross or wanton negligence on the part of the defendants.

III.
SELENKE HAS NOT IDENTIFIED A VALID BASIS FOR THE COUNTY TO BE DEPRIVED OF INSPECTION IMMUNITY

Selenke's final argument, concerning the County's entitle to inspection immunity under K.S.A. 75-6104(k), requires little response. Her first point is that because of the County's alleged easement which exists all the way to the Arkansas River, the area in question is the County's property. This argument is addressed above and no further response is required.

Selenke also cites statutes demonstrating that a county engineer has the *authority* to inspect township roads.[3] However, that is not the point. Government officials at all levels have the authority to inspect property owned by others. What K.S.A. 75-6104(k) does is relieve the government of liability for failing to do so.

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[3] The authority granted by the statutes upon which Selenke relies is not as broad as she suggests. K.S.A. 68-502(3) authorizes the county engineer to "visit and inspect the highways and culverts in each township of the county or district ***which have been reported as unsafe or in need of repair***, and ***advise and direct the township board*** and the road overseer of each township as to the best methods of construction, repair, maintenance and improvement of such highways and culverts;" (emphasis added). Thus, the county engineer is not required to inspect a township unless he receives a report of an unsafe condition. That did not occur here. Moreover, even if an unsafe condition is observed, the engineer's role is limited to that of an advisor ***to the township*** which is responsible for remedying the condition.

Here, by seeking to hold the County liable for not warning about a condition on township road, the plaintiffs are necessarily arguing that the County should have inspected the property to determine whether and what traffic control device was warranted. The MUTCD would not allow the placement of a device without such an inspection and Selenke's own expert stated recognized that such an inspection would have been necessary. As set forth in Selenke's own uncontroverted facts:

> 79. Traffic Engineer Tim Aziere reported that, "The MUTCD requires an engineering study or engineering judgment for the determination of proper implementation of traffic control devices. ***An engineering review of the site conditions prior to this incident would have revealed the obviously dangerous condition at the riverbank*** and addressed the issue." (citation omitted).
>
> 80. Traffic Engineer Tim Aziere testified that "any competent engineer ***that would have gone to this site*** prior to the accident would have identified the hazard and taken measures to fix it. (citation omitted).
>
> 81. Traffic Engineer Tim Aziere testified:
>
> Q. Do you have an opinion whether any competent engineer ***who examined the hazard*** would conclude that proper warnings needed to be provided?
>
> A. I believe that a competent engineer would make that determination.
>
> Q. And what about the county road worker using common sense?
>
> A. I think with that situation it even goes beyond what an engineer would suggest. I think it's almost common knowledge. (citation omitted).

(R. Vol. 1, p. 2359).

Thus, according to Selenke's expert, a examination of the site in the Kaw Wildlife Area would have been a prerequisite to the placement of any warning device by the County. Plaintiffs cannot hold the County liable for failing to conduct such an inspection.

CONCLUSION

For the reasons stated above and in Cowley County's prior briefs, the district court's order refusing to grant Cowley County summary judgment should be reversed and the case remanded with directions to enter judgment in the County's favor.

Respectfully submitted,

FLEESON, GOOING, COULSON & KITCH, L. L. C.

By /s/ Charles E. Millsap

Charles E. Millsap - #09692
cmillsap@fleeson.com
Lyndon W. Vix - #12375
lvix@fleeson.com
Attorneys for Appellee/Cross Appellant Cowley County

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of July, 2016, I submitted the foregoing Reply Brief of Appellee/Cross-Appellant Cowley County, Kansas, to the Clerk of the Appellate Courts for filing via the judicial branch electronic filing system and that on the same day a true and correct copy of said brief was emailed to:

Jeffery L. Carmichael
jcarmichael@morrislaing.com
MORRIS, LAING, EVANS, BROCK
& KENNEDY, CHARTERED
300 N. Mead, Ste. 200
Wichita, Kansas 67202-2745

Donald Arthur McKinney
damlaw1@cox.net
MCKINNEY LAW FIRM, INC.
5 Douglas Avenue
Wichita, KS 67207-1002

John Wesley Smith
wes.smith@ag.ks.gov
Assistant Attorney General
OFFICE OF ATTORNEY GENERAL DEREK SCHMIDT
Memorial Building, 2nd Floor
120 SW 10th Avenue
Topeka, KS 66612-1597

Edward L. Keeley
ekeeley@mcdonaldtinker.com
MCDONALD TINKER, SKAER, QUINN
& HERRINGTON, P.A.
300 W. Douglas Avenue, Suite 500
Wichita, Kansas 67202-2909

/s/ Lyndon W. Vix
Lyndon W. Vix

Attachment A

Peterson v. Morris County,
No. 103,742, 2011 WL 6311796
(Kan. Ct. App. Dec. 9, 2011)

264 P.3d 1059 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Carl Matt PETERSON and D.J. Bacon, Appellants,
v.
MORRIS COUNTY; City of Emporia; Chase County; and Kahola Homeowners Association, Inc., Appellees.

No. 103,742.
|
Dec. 9, 2011.

Appeal from Morris District Court; Steven L. Hornbaker, Judge.

Attorneys and Law Firms

Karen K. McIlvain, of Madison, for appellants.

Blaise Plummer, city attorney, for appellee City of Emporia.

William A. Kassebaum, county counselor, for appellee Morris County.

William T. North, county attorney, for appellee Chase County.

Christine A. Louis, Stephen M. Kerwick, and Mikel L. Stout, of Foulston Siefkin LLP, of Wichita, for appellee Kahola Homeowners Association, Inc.

Before GREENE, C.J., ATCHESON, J., and BRAZIL, S.J.

MEMORANDUM OPINION

GREENE, C.J.

***1** Carl Matt Peterson and D.J. Bacon (plaintiffs) appeal the district court's summary judgment against them and in favor of all appellees on plaintiffs' claims for declaratory, injunctive, and monetary relief based upon their premise that a road known as RS 1902, including the portion of the road over the bridge across Kahola dam was a public road, ownership and control of which could not be conveyed by its purported owner, the City of Emporia, to the Kahola Homeowners Association, Inc. (KHA). We reject plaintiffs' challenges to the district court's judgment and affirm the district court.

FACTUAL AND PROCEDURAL BACKGROUND

In 1936, the City of Emporia (the City) purchased private property located approximately 23 miles northwest of Emporia and overlapping the Chase and Morris County boundaries. Two deeds transferring fee title to the property to the City—dated in 1935 and 1936—were recorded in the Morris County Register of Deeds office.

With a grant for 55% of the cost of construction from the federal Works Progress Administration (WPA), the City then built a dam to create a reservoir (Lake Kahola) on a portion of the property to serve as a water source and for recreational use. The City constructed a road designated later as RS 1902, together with a bridge over the dam and spillway for use of lake visitors and for access to maintain the dam. The majority of the road, including the bridge, is in Morris County, with the southern portion of the road in Chase County. The City's name is on the bridge. After its initial construction, RS 1902 and the bridge became the sole property of the City. None of the minutes from meetings of the Morris County Board of Commissioners from 1935–1937 reference any dedication of RS 1902.

Plaintiffs are ranchers who own property near Lake Kahola. Peterson owns land east and southeast of the lake. Bacon owns land to the north and west of the lake, and rents land southwest of the lake, originally from the City and now from the KHA.

On March 1, 1988, the City entered into a 25–year lease agreement with the KHA, then known as the Lake Kahola Cabin Owners Corporation, to keep and maintain all improvements of any kind and "appurtenances thereto" in good condition and repair; in exchange the KHA was to receive all rents due from the subleases of cabins built on the lake. The lease required the property be "used solely for recreational and cabin site purposes and incidental uses" at reasonable rates. The metes and bounds description of the property did not reserve

or exclude any roads, bridges, or appurtenances from the lease. Since 1988, the City contracted out road maintenance at Lake Kahola in amounts of less than $20,000 annually, but those maintenance costs were reimbursed to the City by the KHA.

Beginning in 2003 as the lease agreement was coming to an end, the City held meetings and study sessions to discuss the future of the Lake Kahola property. The discussions ranged from amending and renewing the lease with the KHA to selling the entire property. In late 2005, the property was appraised at a value of $1,825,000. The Emporia Gazette newspaper published a series of news articles on the possible sale of Lake Kahola beginning March 9, 2006.

***2** The City Commission of Emporia "published" notice on March 9, 2006, that a vote would be taken to decide whether to sell Lake Kahola and all its appurtenances at a meeting scheduled for April 5, 2006. (Plaintiffs dispute the sufficiency of this notice because it was a news article rather than an official legal notice.). During that meeting, the city attorney discussed the process for taking bids, and the City Commission received public comment about the potential sale. At this meeting, the City Commission voted to issue a request for proposals for the sale of Lake Kahola. Plaintiffs did not attend this or any other city commission meeting, although one of them was aware from the newspaper that the sale was being considered.

On April 26, 2006, the City granted KHA the option to purchase Lake Kahola and any improvements encompassing the 820 acres in Morris and Chase counties and agreed to complete an inspection of the dam as a condition of the sale. In October 2006, the City approved Resolution No. 3265 declaring Lake Kahola surplus property and authorizing the sale of the property as in the best interest of the City. That same date, a real estate purchase contract was signed by the City and KHA. Both the option and the real estate purchase agreements describe the same real property-by section, township, and range numbers. The purchase agreement specifically included title to "all public and private streets, road, avenues, alleys and passageways ... in front of or abutting the land ... and all appurtenances belonging or in any way appertaining to the land."

Prior to and after purchasing the Lake Kahola property, the KHA reviewed bridge inspection reports, including a 2006 report by BG Consultants and a 2008 bridge inspection report by Morris County. Based upon these reports, the KHA was concerned with the continued deterioration of the spillway bridge, which was accelerated by its repeated use by heavy vehicles. After conversations with City and state officials regarding the bridge, the KHA formally adopted a 5–ton weight limit on the bridge and posted signs indicating the limit. The restrictions limited Bacon and Peterson from readily traveling to their properties with heavy trucks allegedly necessary to their ranching operations, thus provoking this litigation.

In November 2008, plaintiffs filed a petition in Morris County District Court alleging in material part that RS 1902 was dedicated and accepted for public use under common law and/or constituted a county road by implied dedication or prescriptive easement. In the alternative, plaintiffs alleged that if the road and bridge were properly owned by KHA, the restrictions KHA placed on the bridge traffic were arbitrary and they were entitled to injunctive relief as the restrictions caused irreparable harm and interfered with plaintiffs' farming operations. Plaintiffs also sought mandamus relief requiring Morris County to maintain control over the road and bridge. Both Morris and Chase Counties, as well as the City answered, denied the operative allegations, and disclaimed any interest in the road and bridge, *but* KHA sought to have its ownership validated as to the subject properties.

***3** After the defendants filed motions for summary judgment, the district court issued its memorandum decision adopting all parties' statements of uncontroverted facts and the reasoning set forth in the defendants' motions, specifically finding in material part that the City legally sold the lake and all appurtenances to KHA in 2006.

Plaintiffs timely appeal from the order granting summary judgment.

STANDARDS OF REVIEW

Summary judgment may be granted only when the pleadings, depositions, interrogatory answers, admissions, and affidavits show that there is no genuine issue as to any material fact and that the party seeking relief is entitled to judgment as a matter of law. The trial court must resolve all facts and inferences drawn from

the evidence in favor of the party opposing judgment. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish disputed facts on the issues raised. On appeal, the appellate courts apply the same rules. Where reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. *Osterhaus v. Toth,* 291 Kan. 759, 768, 249 P.3d 888 (2011).

Plaintiffs' arguments involve the interpretation of various statutes.

Statutory interpretation is a question of law subject to unlimited review on appeal. *City of Mulvane v. Henderson,* 46 Kan.App.2d 113, 117, 257 P.3d 1272 (2011). The purpose and intent of the legislature governs when the intent can be ascertained from the statute. *Harris Enterprises, Inc. v. Moore,* 241 Kan. 59, Syl. ¶ 1, 734 P.2d 1083 (1987). Words in common usage should be given their natural and ordinary meaning in construing a statute. *City of Lenexa v. City of Olathe,* 233 Kan. 159, 165, 660 P.2d 1368 (1983).

DID THE DISTRICT COURT ERR IN FINDING THE SUBJECT ROAD AND BRIDGE WERE OWNED BY THE CITY?

Plaintiffs initially challenge the finding that the subject road and bridge were the property of the City prior to the 2006 sale to KHA. They suggest that the properties were public roadways owned by the counties, thus depriving the City of any claim of ownership and voiding the sale to KHA. As noted above, it is not disputed that the properties were originally owned in fee simple by the City, but plaintiffs argue usage of the road and bridge together with certain actions and inactions of the counties over the years should result in public rights to the roadway. Plaintiffs' claims in this regard are based primarily on the operation of statutes and the doctrines of implied dedication and prescriptive easement.

Did the county gain ownership of the road by operation of statute?

First, plaintiffs rely on K.SA. 19–212 to assert that Morris County owns RS 1902. That statute provides, in pertinent part: "The board of county commissioners of each county shall have the *power,* at any meeting; ... [t]o lay out, alter or discontinue any road running through one or more townships in such county, and also perform such other duties respecting roads as may be provided by law." (Emphasis added.) K.S.A. 19–212. The county commissioners may lay out a road upon the petition of any adjacent landowner or under its own authority when deemed necessary by the commissioners. K.S.A. 68–102(a). If the county intends to lay out or alter a road without a petition by landowners, it must give notice by publication in the county's official newspaper and by certified mail to "each owner of property adjoining the road." K.S.A. 68–102a.

***4** Plaintiffs assert that under this statute, any roads not located in incorporated areas are owned or controlled by the county. Plaintiffs misinterpret this provision to justify a leap of logic. The fact the county has the statutory *power* to lay out, alter, or discontinue roads in various townships does not give the county title or responsibility for all roadways outside city limits —especially roads that are privately owned. In fact, K.S.A. 19–212 *Tenth* demonstrates the error of plaintiffs' reasoning—it expressly grants the county commissioners the power to "enter into contracts with any *landowners* for the construction and maintenance of underpasses, bridges and drainageways under and across any county road in connection with the locating, opening, laying out, construction or alteration of any *county* road running across or through such landowner's land," thereby contemplating there could be *other* roads—and limiting this power to enter into contracts in connection *only* with "county" roads. (Emphasis added.)

Here, there is no evidence that either county entered into contracts or otherwise exercised any power to declare RS 1902 to be a county road. Nor is there any evidence of a petition by adjoining landowners for dedication or a notice that either county was seeking to declare the subject road and bridge a county road. The mere existence of county *authority* to open or dedicate roads within the county proper does not establish the *exercise* of that authority.

Plaintiffs similarly rely on K.S.A. 68–1104 as a source of the county's ownership of or responsibility for RS 1902 and the spillway bridge. That statute simply requires the board of county commissioners to "construct, reconstruct, repair and maintain all *county* bridges and *county* culverts located on *county* roads and township roads." (Emphasis

added.) A "county bridge" is defined as a bridge located on a county or township road. K.S.A. 68–1107(a). A "county road" is a road "*designated* as such by the board of county commissioners." (Emphasis added.) K.S.A.2009 Supp. 68–101(c). Again, although this statute imposes the responsibility on the county to maintain bridges on county and township roads, it does not function to give title or maintenance responsibility over privately owned bridges and culverts simply because they are located in unincorporated portions of the county.

Plaintiffs also rely on the statute governing the classification of roads in counties and townships to support their argument that the county owned the road and bridge. Under K.S.A. 68–515b, a county may adopt a county road unit system. If such a system is adopted, all roads and highways in the county must be classified, constructed, and maintained according to a specific classification system. K.S.A.2009 Supp. 68–516. With the adoption of a county road unit system, all *townships* within the county must relinquish to the county commissioners all money and equipment accumulated by them for road construction and maintenance purposes. K.S.A. 65–516a and K.S.A. 65–516b. Thereafter, those townships have no further authority to construct or maintain any roads and that authority rests solely with the county commissioners. See Kan. Atty. Gen. Op. No. 85–132, 1985 WL 204824, *1 (1985). There is no express or implied statutory relinquishment of roads owned by municipalities or individuals.

***5** It is undisputed that Morris County, where the bridge and largest section of RS 1902 is located, adopted the county road unit systems in 1945. Therefore, roads and highways in Morris County were required to be classified under K.S.A.2009 Supp. 68–516. A 2002 KDOT map admitted into evidence shows RS 1902 at the dam of Lake Kahola was listed on the map as a rural secondary road. The record does not reveal any direct evidence that Morris County took any action to so classify the road, nor does the map alone support any such inference.

Even if Morris County had notified KDOT that RS 1902 should be classified as a rural secondary road, plaintiffs have failed to present any evidence that Morris County has at any time assumed control over the road from the City. Plaintiffs have provided no evidence to dispute Morris County's evidence that it did not expend money to establish, maintain, or improve the road or bridge. The only evidence of any Morris County involvement was that Morris County periodically inspected the bridge after 1981. However, there is no evidence Morris County considered or attempted to carry out any of the inspector's recommendations for signage, safety barriers, or the like. Based on the record on appeal, any public moneys for construction and maintenance were paid by the City (with a federal WPA grant), not Morris County.

Plaintiffs have presented no legal authority that any action taken by Morris County with respect to classification of the road was legally sufficient to transform the road from property of the City to a county road. The City has held fee title to the property since 1935 and maintained RS 1902 until it leased the lake property to the KHA in 1988. Thereafter, the City continued to maintain the road, but was reimbursed for those expenses by the KHA. Plaintiffs presented no facts to dispute the City's ownership and maintenance activities. Absent an official platting or exercise of eminent domain to obtain rights to the roadway, the various statutes asserted by plaintiffs do not divest the City of its ownership rights (or maintenance obligations) for RS 1902 and the spillway bridge prior to the sale to KHA.

Did the road become a county road by implied dedication?
Plaintiffs next make rather confusing arguments that RS 1902 and the bridge became a county road by implied dedication. Their arguments are flawed in two respects.

First, an implied dedication is a dedication by the *owner of the real estate* for public use and acceptance by the public. *Cemetery Association v. Meninger,* 14 Kan. 312, 316 (1875); see also *Carlson v. Burkhart,* 271 Kan. 856, 861–62 (implied dedication existed when public regularly used road and owner did not object—and in fact approved—of the public use and the county maintained the road). In *Meninger,* the court discussed the two elements of implied dedication:

> "In the different cases reported stress is laid upon one or the other of these matters, according to the character of the questions involved. Thus, where the former owner is attempting to obstruct a way, the important matter is, whether he has once actually made a dedication, and so estopped from obstructing it.... On the other hand, where the authorities are prosecuted for not repairing a highway, the important question ... often is, whether the public have accepted the dedication.... For the mere

fact that a land-owner has dedicated certain land to the use of the public, does not necessarily cast upon an unwilling public the duty of improving and keeping it in repair." 14 Kan. at 316.

*6 Thus, cases involving implied dedication normally involve private owners of land seeking to have government officials maintain a road on their land, or other members of the public seeking to have a road on another private person's land impliedly dedicated as a public way because of use of the road by nonowners. These circumstances are not present here. There is no evidence Morris County accepted the road as a public way at any time.

Second, even if the City's action in laying out RS 1902 and the bridge was an implied dedication of land, it was the City that maintained the road. Thus, even if the road was dedicated, there was no governmental action that inured to the public; that is, the City's operation and maintenance of the road outside its corporate limits and as a quasi-private fee-title owner does not qualify as "public maintenance." Moreover, the City owned and maintained the road only for specific purposes and for a restricted group of users. Under general principles, any attempt to dedicate land to a group encompassing less than the general public is not a public dedication. *Wagon Wheel Landowners Ass'n, Inc. v. Wallace,* 17 Kan.App.2d 395, 399, 838 P.2d 361, *rev. denied* 252 Kan. 1094 (1992).

Did the road become a county road by prescriptive easement?

Plaintiffs' reliance on prescriptive easement principles also fails. To establish a public road by prescription, the road in question must have been used by the public "with the actual or implied knowledge of the landowner, *adversely under claim or color of right,* and not merely by the owner's permission, and continuously and uninterruptedly, for the period required to bar an action." (Emphasis added.) *Kratina v. Board of Commissioners,* 219 Kan. 499, 502, 548 P.2d 1232 (1976).

The primary factor to recognize a public road by prescription over *private* land, to show the adversity of ownership, is when *public officials* take positive action, such as improving or maintaining the road. See *Brownback v. Doe,* 44 Kan.App.2d 938, 943, 241 P.3d 1023 (2010) (road located on defendant's land; evidence road had only been ditched and graded twice by local county in 100 years was insufficient to establish a prescriptive public road as requested by neighboring landowner); *Schroeder v. Urban,* 13 Kan.App.2d 164, 167, 766 P.2d 188 (1988), *rev. denied,* 244 Kan. 738 (1989) (dispute by adjoining landowners over road; evidence showing township maintained, graded and elevated road for more than 40 years established prescriptive public road); *Biggs Feed and Grain, Inc. v. City of Waverly,* 3 Kan.App.2d 423, 424, 596 P.2d 171 (1979) (plaintiff filed action to quiet title in tracts of land on which various streets were located; city established prescriptive interest by proving the roads had existed for over 45 years and the city had exclusively and continuously performed maintenance on the roads for 19 years).

The cases relied upon by plaintiffs fail to establish that a county or private individual can obtain a prescriptive easement over land, even rural land, *owned by a municipality outside its corporate limits.* Kansas courts have consistently recognized that the theory of adverse possession—upon which a prescriptive roadway analysis is based—cannot divest a governmental entity of title to real property. See *Gauger v. State,* 249 Kan. 86, 92, 815 P.2d 501 (1991) (right of way of abandoned railroad reverted to adjoining landowner—the State; purchaser who bought land purporting to include the reverted right of way could not acquire public land by adverse possession); *Wood v. M.K. & T. My. Co.,* 11 Kan. 323, 348 (1873) (cannot acquire public land by adverse possession); *Riverside Drainage Dist. of Sedgwick County v. Hunt,* 33 Kan.App.2d 225, 230–31, 99 P.3d 1135 (2004) (easement interest held by public drainage district could not be obtained by successor landowner through adverse possession absent clear abandonment by district).

*7 In summary, we conclude Morris County holds no title or interest in RS 1902 by operation of statute, by implied dedication, or by prescriptive easement. Thus, the district court did not err in finding that RS 1902 and the spillway bridge were not owned or under the control of Morris County.

DID THE DISTRICT COURT ERR IN CONCLUDING THAT THE CITY'S SALE OF THE PROPERTIES IN 2006 TO KHA WAS VALID?

Plaintiffs next argue that the district court erred in finding the City lawfully sold RS 1902 and the spillway bridge to the KHA. Plaintiffs contend that the City failed to comply

with K.S.A. 12–504 *to vacate* RS 1902. They assert that even if the City owned the fee property, it was required to comply with that statute. Plaintiffs also contend that because they were not aware the potential sale involved the roadway, in addition to the reservoir property, they cannot be estopped to challenge the transaction.

Plaintiffs misconstrue the operative statute governing municipal vacation. K.S.A. 12–504 applies only to the vacation of municipal property located within the confines of a city's incorporated area. The statute provides in relevant part:

> "Whenever the governing body of the city *in which any of the following are located* or whenever the owner or owners of any townsite ..., or of any addition ..., or the governing *body in which the following are located,* or the owner or owners of the lands adjoining on both sides of any street ... in any city or any addition thereto, desires to have the same vacated ..., or any addition or part of an addition to be vacated hereunder, from the boundaries of the city *wherein situated,* the governing body of such city or the city planning commission shall give public notice of the same by a publication in a newspaper of general circulation in ... the official city newspaper in which is situated the place, tract or tracts, street, alley, or public reservation sought to be vacated or excluded.... Such notice shall be published at least one time at least 20 days prior to the date of the hearing." (Emphasis added.)

The City contends the statute, by its explicit terms, only applies to streets, alleys, and other City property *within the City limits.* We agree. Plaintiffs do not respond to this argument on appeal and have cited no legislative history or caselaw to suggest application of this statutory scheme for City-owned property *outside* the city limits.

In fact, the governing body of a city is empowered to purchase real estate for the use of the city, and has virtually unfettered power to sell and convey city-owned real property "as may be deemed conducive to the interests of the city." K.S.A. 12–101 *Third.* K.S.A. 12–16,103 specifically allows the governing body of a city to acquire real estate by (1) purchasing or receiving a gift of a fee interest in property; (2) by condemnation; or (3) by dedication. When the city holds real estate *in fee simple,* it may sell such real estate when it is no longer needed for public purposes; K.S.A. 12–16,103 specifically permits such a sale to include real estate acquired for "construction of municipal water supply structures or reservoirs and land adjacent thereto, streets, sanitary and storm sewer systems." The statute sets forth no required notice or other procedures for the sale of fee simple property held by the city. Thus we perceive no problem with the City's sale of the properties, with or without notice to the public or to plaintiffs.

***8** Plaintiffs alternatively rely on K.S.A. 12–1301, which controls the disposition of park property by a municipality. K.S.A. 12–1301 requires notice to be published for at least 2 consecutive weeks in the official city newspaper before a city can trade or sell city park property. The City notes that park designation for this property was expressly abandoned in 1988, but the record on appeal fails to substantiate this contention. Nevertheless, under 12–1301, the only basis to abate a noticed sale of park property is by a protest petition signed by not less than 10% of the qualified electors of the city. K.S.A. 12–1301. Thus, plaintiffs have no standing, as nonresidents of the City, to challenge the sufficiency of the City's action or inaction under K.S.A. 12–1301.

In summary, the municipal vacation statutes simply don't apply here, and the City has clear statutory authority to sell or convey such properties with or without notice. If the property remained designated as park property, the plaintiffs had no standing to object to the sale. We perceive no legal obstacle to the City's sale of the road and bridge to the KHA.

Plaintiffs have raised other challenges to the district court's judgment, but our conclusions above have mooted all other challenges. We are not persuaded that the district court erred in validating KHA's title to the properties.

Affirmed.

All Citations

264 P.3d 1059 (Table), 2011 WL 6311796

End of Document

Attachment B

Kershenbaum v. Fasbinder,
No. 97,399, 2007 WL 4158180
(Kan. Ct. App. Nov. 21, 2007)

170 P.3d 922 (Table)
Unpublished Disposition
(Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.)
Court of Appeals of Kansas.

Richard M. KERSHENBAUM, Trustee of the Leo M. Kershenbaum Revocable Trust Dated June 10, 1997 (as Amended), Appellee,
v.
Florence FASBINDER, Appellant.

No. 97,399.
|
Nov. 21, 2007.

Appeal from Douglas District Court; Stephen N. Six, judge. Opinion filed November 21, 2007. Affirmed.

Attorneys and Law Firms

David R. Frensley, of David R. Frensley, PC, of Kansas City, Missouri, and Thomas L. Thurston, of Dwyer, Dykes & Thurston, LC, of Overland Park, for appellant.

Jeffrey R. King, of Lathrop & Gage LC, of Overland Park, for appellee.

Before GREENE, P.J., MCANANY, J., and LARSON, S.J.

MEMORANDUM OPINION

PER CURIAM.

***1** Florence Fasbinder, beneficiary of the Leo M. Kershenbaum Revocable Trust dated June 10, 1997, appeals the district court's declaratory judgment against her and in favor of the trustee, Richard M. Kershenbaum, on her claims that she was entitled to support payments from the trust pursuant to its express provisions. Both parties agree that the trust is not ambiguous, thus requiring this court to construe and apply the unambiguous language of the trust instrument. We construe the language as did the district court, concluding that support payments to Fasbinder were within the discretion of the trustee; thus, we affirm.

Factual and Procedural Background

Leo M. Kershenbaum created a revocable trust to support himself and his wife and to distribute his estate after he and his wife died. As part of the testamentary distribution, Leo provided for the creation of four separate testamentary trusts, naming four lifetime beneficiaries, and he funded one of the trusts with $100,000 for his sister, Florence Fasbinder. Leo named his son, Richard Kershenbaum, as both the trustee and the remainder beneficiary of these trusts. Leo subsequently amended the trust and increased Fasbinder's trust amount to $200,000. The trust contained the following provision regarding beneficiary support:

> "Until each respective trust terminates, the testamentary trustee(s) shall pay to the beneficiaries or for their benefit, from the income or principal of that beneficiary's trust, such sum or sums as the testamentary trustee(s) shall deem necessary or proper to provide for that beneficiary's suitable support, health and maintenance, adding any unused income to the principal at the end of each year."

Leo died April 5, 2002. On February 4, 2004, Fasbinder's son wrote a letter to Richard as trustee demanding payment of $3,000 per month from the trust for Fasbinder's support and maintenance. Richard replied and requested information on Fasbinder's assets and other income. Fasbinder refused and asserted that Richard was *required* to distribute the trust funds for her support without considering her assets or other income.

Unable to resolve their disagreement, Richard filed a declaratory judgment action requesting the district court interpret the contested trust language. After the pleadings closed, Fasbinder moved for summary judgment. The district court heard arguments on the respective motions and ultimately issued a memorandum order concluding that the trust language created a discretionary trust because the language was more similar to language in *Myers v. Kansas Dept. of SRS,* 254 Kan. 467, 866 P.2d 1052 (1994), than in *State ex rel. Secretary of SRS v.*

Jackson, 249 Kan. 635, 822 P.2d 1033 (1991), or *Godfrey v. Chandley,* 248 Kan. 975, 982, 811 P.2d 1248 (1991).

Several months later, Fasbinder moved the court to modify its memorandum opinion to resolve all outstanding issues. The court modified its decision by granting Richard's declaratory judgment petition and dismissing Fasbinder's outstanding claims. Fasbinder appeals.

Standard of Review and General Rules of Interpretation

***2** The interpretation of a will or trust is a question of law over which an appellate court has unlimited review. *Miller v. Kansas Dept. of S.R.S.,* 275 Kan. 349, 353, 64 P.3d 395 (2003); see K.S.A. 58a–112 ("The rules of construction that apply in this state to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property."). An appellate court is not bound by the district court's interpretation. See *State v. Bryan,* 281 Kan. 157, 159, 130 P.3d 85 (2006) (appellate court not bound by district court's interpretation of criminal statute); *Unrau v. Kidron Bethel Retirement Services, Inc.,* 271 Kan. 743, 763, 27 P.3d 1 (2001) (appellate court not bound by district court's contract interpretation).

The fundamental rule in interpreting a trust document is to implement the settlor's intent. If the trust language is plain and unambiguous, then the settlor's intent can be ascertained from language used. If the trust language is ambiguous, then the court must place itself in nearly the same position as the settlor and use the language of the entire document to ascertain the settlor's intent and to construe the ambiguous provision. *McGinley v. Bank of America, N.A.,* 279 Kan. 426, 437, 109 P.3d 1146 (2005).

Did the District Court Err in Construing the Disputed Provision as Creating a Discretionary Trust?

Kansas recognizes both discretionary trusts and support trusts. A discretionary trust is established when the settlor gives the trustee the discretion to make distributions from the trust and the beneficiary has no legal authority to force the trustee to make a distribution from either the income or principal to the beneficiary. *Miller,* 275 Kan. at 354; see also Restatement (Second) Trusts § 155, comment b (1957) ("In a discretionary trust it is the nature of the beneficiary's interest rather than a provision forbidding alienation which prevents the transfer of the beneficiaries interest .") In contrast, a support trust is established when the trustee "is required to inquire into the basic support needs of the beneficiary and provide those needs." *Miller,* 275 Kan. at 354. In the case of a support trust, the beneficiary has the legal right to demand payment for support. 275 Kan. at 354; see Restatement (Second) Trusts § 154 (1957).

Fasbinder argues we should construe the trust as a support trust that requires payment of support without discretion in the trustee. Our initial concern with this proposed interpretation is that it requires that we ignore the phrase "as the testamentary trustee shall deem necessary or proper." Fasbinder contends the disputed provision should be construed to provide that "the trustee shall pay to the beneficiaries or for their benefit, from the income or principal of that beneficiary's trust, such sums ... for that beneficiary's suitable support, health, and maintenance." We must not construe the trust in such a manner that would render language in the instrument meaningless. See *LDF Food Group, Inc. v. Liberty Mutual Fire Ins. Co.,* 36 Kan.App.2d 853, 863, 146 P.3d 1088 (2006). If the trust provision is unambiguous, all of the words in the provision must be given effect. See *Marshall v. Kansas Med. Mut. Ins. Co.,* 276 Kan. 97, 111, 73 P.3d 120 (2003) (insurance contracts should be construed by considering "the terms of an insurance policy as a whole, without fragmenting the various provisions"); *In re Hjersted Revocable Trust,* 35 Kan.App.2d 799, 804, 135 P.2d 192, *rev. denied* 282 Kan. 789 (2006) ("The same rules apply to the construction of trusts, wills, and most other written instruments."). Fasbinder's proposed interpretation of the disputed provision cannot be reconciled with these rules.

***3** Fasbinder next argues "there is no discretionary language" in the disputed provision and that we should focus on what he characterizes as "words of action" such as the phrases *"shall* pay" and *"shall* deem necessary or proper." We disagree both with this focus and with the characterization of both these phrases as "words of action." In our view, the term "shall" is not to be viewed in an isolated manner, but rather as a part of the entire phrase "such sum or sums as the testamentary trustee(s) shall deem necessary or proper." The key phrase following "shall" is "deem," which is generally defined as "to consider, think, or judge." Black's Law Dictionary 446 (8th ed.2004). All of these infinitives are synonymous with discretion. Indeed, the trustee is mandated (shall) to

use his or her discretion to determine the "necessary or proper" sums to be paid "for the beneficiary's suitable support health and maintenance." Fasbinder's argument is contrary to the common understanding of the term "deem" and is contrary to the need to construe the language of the instrument as a whole and without undue focus on specific terms. See *Johnson County Bank v. Ross,* 28 Kan.App.2d 8, 10–11, 13 P.3d 351 (2000).

Fasbinder contends, however, that to construe the provision as discretionary is not supported by Kansas case law, citing *Elwell v.. Stewart,* 110 Kan. 218, 203 P. 922 (1922), *Schauf v. Thomas,* 209 Kan. 592, 498 P.2d 256 (1972), *Godfrey,* 248 Kan. 975, *Jackson,* 249 Kan. 635, and *Myers,* 254 Kan. 467, to support his proposed interpretation. We examine these authorities and disagree with Fasbinder's assertion.

In *Elwell,* the disputed provision stated:

> "However for the use and benefit of my mother, Derinda Elwell, during her natural life, I do hereby direct my said trustee to sell and dispose of any or all such said property as he may deem necessary for the care and maintenance of my said mother, in the event that the income from my said estate shall not be sufficient for such purpose." 110 Kan. at 219.

The issue in *Elwell* was whether the beneficiary was entitled to all of the net income or only so much as the trustee determined necessary for her care and maintenance. The court held she was so entitled to *all* the income and that it was within the discretion of the trustee whether to invade principal *to supplement this income.* If the income was not adequate for her care and maintenance he was to sell so much of the property "as he may deem necessary to make up the deficiency." 110 Kan. at 220. This authority does not support Fasbinder's argument, but rather demonstrates that "as he may deem necessary" implicates the discretion of the trustee.

In *Schauf,* the disputed provision stated:

> " 'I direct that my testamentary guardian above named shall use as much of the principal of the trust estate as may be necessary to provide for the care, maintenance and support of my said daughter ... in comfort and at the approximate standard of living to which she has been accustomed in my lifetime, including hospital and medical care in case of illness or other emergency...." ' 209 Kan. at 596.

***4** The issue was similar to that in *Elwell, i.e.,* whether all of the income was required to be paid to the beneficiary. The court held that all income should be paid to the beneficiary and that principal should be invaded "as may be necessary." *Schauf,* 209 Kan. at 600. As with *Elwell,* this authority does not support Fasbinder's argument.

In *Godfrey,* the disputed trust language provided:

> " 'B. The main purpose of the trust is to provide for the support, health and maintenance of my wife, PEGGY CHANDLEY, during her lifetime. The trust estate shall pay, monthly or at such intervals as may be agreed upon by the Trustee and my Wife, during the period of the trust such portion of the net income from the trust as may be necessary for her support, health, and maintenance. There shall be no invasion of principal." ' 248 Kan. at 978.

The court enforced a support trust, concluding the trust did not contain any language vesting the trustee with discretion to determine what was necessary for the widow's support, health, and maintenance, irrespective of her individual income. The only limitation on what was "necessary" was that the trust could not be used to pay for nonessential items. 248 Kan. at 982. The disputed language is unlike that before us; here the disputed language vests discretion in the trustee to pay amounts that he "deems necessary," whereas the disputed language in *Godfrey* required payment "as may be necessary."

In *Jackson,* the disputed trust provisions stated:

> " '(A) During the lifetime of Carrie Conner Jackson, the Trustees, in their uncontrolled discretion, shall pay to Carrie Conner Jackson the net income of the Trust. In addition, the Trustees may pay to Carrie Conner Jackson, from the principal of the Trust from time to time, such amount or *amounts as the Trustees in*

> *their uncontrolled discretion, may determine is necessary* for the purposes of her health, education, support and maintenance. The Trustees are not prohibited from invading the principal of the trust for my granddaughter, Carrie Conner Jackson, *before she has exhausted her own funds.*
>
> ....
>
> " '(C) The interest of each beneficiary and the income or principal of the trust created under this instrument shall be free from the control or interference of any creditor of a beneficiary or of any spouse of a married beneficiary and shall not be subject to attachment or susceptible of anticipation or alienation." ' (Emphasis added.) 249 Kan. at 639.

Our Supreme Court distilled the trust provision to the following language: "[T]he Trustees *shall pay* the net income and, in addition, *may pay* from the principal. The payment of the net income is not tied to any determination of need as are payments from the principal." (Emphasis added.) 249 Kan. at 641. This authority is of no support to Fasbinder's position.

In *Myers,* the sole issue focused on the interpretation of the following language:

> ***5** " 'During my son's lifetime, my trustee shall hold, manage, invest and reinvest, collect the income there from [sic][and] pay over *so much or all the net income and principal to my son as my trustee deems advisable* for his care, support, maintenance, emergencies and welfare." ' (Emphasis added.) 254 Kan. at 470.

Citing *Jackson,* Social and Rehabilitation Services' primary argument on appeal was similar to Fasbinder's, contending that the language "as my trustee deems advisable" was inconsistent with the language "shall pay" and therefore the "shall pay" language should control. *Myers,* 254 Kan. at 471–73. Ultimately, the court rejected this argument and affirmed the district court's analysis that "shall" required the trustee to make a payment *after the trustee determined the payment was necessary.* The disputed language, the court concluded, created a discretionary trust. 254 Kan. at 477. We agree with the district court in concluding that *Myers* is controlling here and cannot be reconciled with Fasbinder's proposed interpretation.

We do not view any of these cases as supportive of Fasbinder's position. The district court reached the correct conclusion that while the trust contains some mandatory language, it is limited by the trustee's discretion to determine what is necessary. The district court correctly characterized this trust as a discretionary trust and not a support trust. We conclude there was no error in so holding.

Affirmed.

All Citations

170 P.3d 922 (Table), 2007 WL 4158180

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