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No. 15-114705-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.

v.

COWLEY COUNTY, KANSAS,
Defendant-Appellee/Cross-Appellant,
AND
KANSAS DEPARTMENT OF WILDLIFE, PARKS AND TOURISM AND BOLTON TOWNSHIP,
Defendants-Appellees,
(ELAINE SELENKE AS HEIR-AT-LAW OF COURTNEY BREWER, DECEASED)
Appellee/Cross-Appellee

PLAINTIFF-APPELLANT/CROSS-APPELLEE'S REPLY AND CROSS-APPELLEE'S BRIEF TO DEFENDANT-APPELLEE/ CROSS-APPELLANT COWLEY COUNTY, KANSAS BRIEF

Appeal from the District Court of Cowley County, Kansas
The Honorable Nicholas St. Peter
District Court Case Nos. 12-CV-99-W, 12-CV-185-W and 13-CV-46-W

Jeffery L. Carmichael, #11085
MORRIS, LAING, EVANS, BROCK & KENNEDY, CHARTERED
300 N. Mead, Suite 200
Wichita, KS 67202-2745
Telephone: (316) 262-2671
Facsimile: (316) 262-6226
Oral Argument Requested

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Patterson's allegations regarding the Nature of the Case, Issues on Appeal and Statement of the Facts are contained in Appellant's Brief, and in the interests of avoiding duplication of same are referenced here in their entirety.

APPELLANT'S REPLY BRIEF

I. Introduction

As the County admitted in its brief, and as is more fully evaluated in Patterson's Reply Brief to Bolton Township, the district court's ruling "essentially means that no governmental entity has the duty to erect traffic control devices on the township portion of 322nd Road." (Cross-Appellant's Brief, p. 9). The County attempts to take the district court's ruling even further, and argues that no governmental entity has any duty to erect traffic control devices on any portion of 322nd Road east of 111th Road. The County further attempts to argue that there is no duty on the part of any governmental entity to erect any traffic control device anywhere in the state, unless that traffic control device is a Standard under the MUTCD. This would mean a governmental entity could avoid erecting any of the following types of warning signs with no risk of liability: "Truck Rollover," "Hill Blocks View," "Narrow Bridge," "One Lane Bridge," "Freeway or Expressway Ends," "Bump," "Dip," "No Center Line," and all "Shoulder" signage, among many others. *See generally* MUTCD Chapter 5C. Warning Signs. The majority of warning signs are not classified as Standard under the language of the MUTCD, but without them, there would be a significant increase in injury.

This basis for immunity as argued for by the County would have dangerous ramifications for all roads in the State of Kansas. *Carpenter v. Johnson* and its subsequent interpretations established that the evaluation of whether the placement of a warning sign

was discretionary or mandatory depends upon the totality of the circumstances involved, and may not be determined as a matter of law without regard thereto. 231 Kan. 783, 790, 649 P.2d 400 (1982). Patterson has presented ample evidence to support her claim that the warning signs, and the engineering study to determine the same, were mandatory. The district court erred in granting summary judgment to the County on its claims of discretionary function immunity, and the decision should be reversed.

II. The Trial Court Erred in Granting Summary Judgment to Cowley County, as the Question of Cowley County's Duty to Place a Road Sign Should Be Decided By a Jury.

In *Finkbiner v. Clay County*, a plaintiff sued both the county and township when he drove his pickup truck over the end of a township road and into a dry creek bottom. 238 Kan. 856, 857, 714 P.2d 1380 (1986). Finkbiner, similarly to Patterson and Brewer in this case, turned onto a township road that he had not previously traveled. *Id.* There were no signs or markers on the township road. *Id.* The township road terminated with a drop-off into a riverbed of the Republic River. *Id.* The plaintiff, who was traveling at approximately 40-50 miles per hour at the time, drove into the riverbed, damaging his vehicle and causing him personal injuries. *Id.* The plaintiff then sued the county and the township claiming that both had failed to place the proper warning signs pursuant to statutory requirements. *Id.*

Where a plaintiff claims both the county's and the township's failure to warn him, as required by the MUTCD, of a hazard that was not self-evident caused his injuries, it is necessary to determine: (1) what governmental entities are responsible for the safety of travelers upon the road; (2) whether or not a hazard exists; (3) whether or not the hazard is self-evident; and (4) if the hazard is not self-evident, whether the responsible governmental entity made the correct decision in determining the proper signs or barricades needed to

warn travelers in order to provide adequate time for the driver to perceive, identify, decide, and perform any necessary maneuver. *Id.* at 860-61. Furthermore, PIK Civil 122.04 specifies that a governmental entity can have a duty to warn travelers, and uses very similar language to instruct the jury:

> You must decide if (governmental entity) had a duty to warn travelers of a road hazard. In making the decision you must determine:
>
> 1 If a hazard existed; and,
>
> 2 If a hazard did exist, whether the hazard was self-evident.
>
> If you find that no hazard existed, or that there was a hazard but it was self-evident, (governmental entity) was not required to place signs to warn travelers.
>
> If you find that a hazard existed and that it was not self-evident, then you must determine whether (governmental entity) provided a proper sign or barricade needed to warn travelers in order to provide adequate time for the driver to perceive, identify, decide, and perform any necessary maneuver.

This standard, as established in *Finkbiner* and as applied to this day, cannot be avoided by the County through attempts to divert focus onto statutory amendments and the internal framework of the MUTCD.

In this case, as in *Finkbiner*, a jury must hear evidence to decide that the hazard was not self-evident, and that Cowley County made the incorrect decision in determining proper signs or barricades necessary on the portion of 322nd Road east of 111th Road until the pavement ends. Cowley County, and no other governmental entity, is responsible for the portion of 322nd Road east of 111th Road until the pavement ends. *See* Def. Cowley County's Answers to Plaintiff's Second Interrogatories, Interrogatory No. 21 and attachments attached as Exhibit "A." (Rec. Vol. 1, pp. 1207-1217). The Arkansas River is

located at the end of 322nd Road. See Def. Cowley County's Answers to Plaintiff's Second Interrogatories, No. 21 and attachments attached as Exhibit "A." (Rec. Vol. 1, pp.1207-1217). There are no barriers or signs to mark the end of 322nd road at the Arkansas River. *See* Depo. Stewart Schrag, p.37, l.11 - p.38, l.17 attached as Exhibit "K" (Rec. Vol. 1, p.1321-1323). *See also* Depo. Exb. 20 attached as Exhibit "L" (Rec. Vol. 1, pp.1325). The end of the roadway was not apparent to drivers heading east on 322nd Road in the dark. *See* Expert Report of Thomas L. Alcorn, M.S., P.E. PTOE, attached as Exhibit "M" (Rec. Vol. 1, pp.1327-1338). The record demonstrates that there is sufficient evidence for a jury to conclude that Cowley County is a responsible governmental entity for a portion of 322nd Road; the presence of the river without barricades or warnings constitutes a hazard; and the Arkansas River is not a self-evident hazard when traveling on 322nd Road at night. The ultimate question of whether the County fulfilled its duty to determine the proper signs or barricades needed to warn travelers in order to provide adequate time for the driver to perceive, identify, decide, and perform any necessary maneuver must, therefore, be presented to the jury.

The *Finkbiner* court held that it could not be determined as a matter of law that the hazard was not self-evident and that the local governmental entities were immune. *Finkbiner v. Clay Cty.*, 238 Kan. 856, 861 (1986). The court held that the "trial court erred when it determined that both the County and the Township were immune from liability under K.S.A. 75–6104(d). Whether a governmental entity had a duty must be determined under the totality of the circumstances. This is a question of fact which must be determined by a jury." *Id.* In the current action, as in *Finkbiner*, the district court erred in granting the County summary judgment in its claim for immunity, as the County's duty to erect road

signs in the totality of circumstances present in this case is a question that must be decided by a jury.

III. The Placement of the Road Signs Was Not a Matter of Discretion, and Thus Cowley County Is Not Entitled to Discretionary Immunity.

"To determine whether or not the failure to place [] signs is within the exercise of discretion which is excepted from liability" requires examining "the duty of the governmental entities." *Carpenter v. Johnson*, 231 Kan. 783, 786–87, 649 P.2d 400, 404 (1982). The Court held that such duties arise from the legislative requirement that "[t]he secretary of transportation shall adopt a manual and specifications for a uniform system of traffic-control devices." *Id.* at 787; K.S.A. § 8-2003. The secretary adopted the Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD), thereby obliging state and local authorities to "place and maintain such traffic-control devices." *Carpenter* at 787; K.S.A. §§ 8-2004(a) & 8-2005(a). From the Court's prior holdings, one thing is clear: "Simply stated . . . the discretionary function exception is not applicable in those situations where a legal duty exists, either by case law or by statute, which the governmental agency is required to follow." *Dougan v. Rossville Drainage Dist.*, 243 Kan. 315, 322, 757 P.2d 272 (Kan. 1988).

"If the conditions specified by the MUTCD as warranting the placement of a traffic control device are satisfied, then the placement of the device is a matter of professional judgment; no discretion is involved." *Force By & Through Force v. City of Lawrence, Kan.*, 17 Kan. App. 2d 90, 99, 838 P.2d 896 (1992). In *Carpenter v. Johnson*, the court held, "It is apparent from our reading of the Manual on Uniform Traffic Control Devices that state and local highway engineers are guided by rather detailed recommendations in *placement of warning signs*." 231 Kan. at 788 (emphasis added).

The *Force* court distinguished *Carpenter* because "it [was] uncontroverted that the MUTCD contain[ed] no language that determine[d] when a protected left-turn signal [was] to be placed at an intersection." *Force*, 17 Kan. App. 2d at 97. The Court highlighted that "[t]here [was] no determination to be made as to conditions under which signing [was] required." *Id.* at 97–98. In the absence of *any* MUTCD guidance, the failure to place a protected left-turn signal was within the discretion of the City and immune under the KTCA. Similarly, the Supreme Court upheld a trial court's directed verdict in favor of a defendant county "[b]ased on the total lack of evidence presented by the plaintiffs to support the proposition that some type of sign was mandated at [an] intersection." *Toumberlin v. Haas*, 236 Kan. 138, 142, 689 P.2d 808 (1984) ("Plaintiffs had presented absolutely no engineering testimony that the placement of any type of sign at the intersection was warranted or required under the terms of the [MUTCD]." (emphasis added)). In contrast, Patterson's expert opinions in this case demonstrate that there was clear information provided by the MUTCD concerning the placement of traffic signs on the portions of 322nd Road controlled by the County. This is not a case like *Toumberlin* where there is a total lack of evidence or engineering testimony to establish that placement of a sign was warranted or required under the terms of the MUTCD.

While the County attempts to sidetrack the discussion with a technical evaluation of whether the MUTCD provides Standards, Guidance, or Options regarding the concerned signs, the controlling opinions do not require such technicalities. Though the *Kastendieck* and *Acosta* opinions, a District of Kansas and unpublished appellate opinion respectively, cited by the County do take the nature of the guidance provided into account, that is not the law established by the *Carpenter* decision and its subsequent interpretations. The

Carpenter court and its controlling interpretations specified that it must be shown that the MUTCD provided recommendations and guidance, and under the terms of such guidance the placement of a sign was warranted. Unlike the protected left-turn signal and intersection signage concerned in *Force* and *Toumberlin*, the MUTCD includes clear direction regarding the use of the speed advisory sign at issue in the instant case, and the MUTCD certainly includes clear direction concerning a responsible entity's duty to conduct a traffic engineering study. MUTCD 2C.08; 2C.30.

Even if this Court were to determine that the County was exercising some discretion here, that would not be the end of the County's responsibility. Kansas courts have held "it is the nature and quality of the discretion exercised which should be the focus .... The test is whether the judgment of the governmental employees is of the nature and quality which the legislature intended to put beyond judicial review." *Force*, 17 Kan.App.2d at 99 (quoting *Robertson v. City of Topeka*, 231 Kan. 358, 361-62, 644 P.2d 458 (1982) (internal quotation marks omitted)). In *Robertson*, the Supreme Court discussed with approval a Sixth Circuit opinion that found the public policy behind the federal tort claims act was "protection at the policy formulation level." 231 Kan. at 361 (citing *Downs v. United States*, 522 F.2d 990, 997 (6th Cir. 1975) (holding that FBI agents' actions did not fall within the discretionary function exception to federal tort claims act because the FBI handbook governed the agents' actions, and therefore the actions could not have been "discretionary."). Patterson submits here that any "discretion" exercised by the County or other defendants with respect to 322nd Road was not the type of discretion "which the legislature intended to put beyond judicial review;" any discretion exercised in the decision over placement of road signs designed to keep roads safe for public travel is not discretion

exercised at the "policy formulation level." The County had a duty to keep its open roads safe for travel. That duty was not fulfilled, and the County must be held responsible for that failure.

IV. The County's Incorrect Classification of the Concerned Portion of 322nd Road as a Low-Volume Road Is Both Disingenuous and Unsuccessful.

In its classification of the portion of 322nd Road east of 111th Road as a low volume road, the County attempts to bootstrap an unsuccessful argument from its summary judgment motion into the appellate record. However, as the County itself admits, the district court's order specifically found that "322nd Road *east of the pavement* is a low volume road." (R. Vol. 1, p. 2839) (emphasis added). Thus, all references that refer to that portion of 322nd Road east of 111th Road as a low volume road are unsupported by the record. The County then attempts to downplay the stringency of the requirements for a low volume road and to apply those purportedly lower standards to the entirety of the portion of 322nd Road for which Patterson alleges the County is liable.

However, even should the portion of 322nd Road east of 111th Road be categorized as a low volume road, The MUTCD contemplates several warning signs specifically relevant to low volume roads. In comparison to the myriad types of warning signs contemplated for all roads or streets other than low-volume roads, there are only eleven types of warning signs specifically identified as relevant for a low-volume road. MUTCD 5C.02-5C.12. Both Advisory Speed Plaques and Dead End or No Outlet signs are included, as they are of particular relevance in low volume contexts. MUTCD 5C.10, 5C.11. Furthermore, the County's engineer, Dale Steward, testified that 322nd Road as it proceeds east and turns into a gravel road is a Type C road under the MUTCD. *See* Depo of Dale Steward, p.192, lns.11 – p.194, ln.6 (Rec. Vol. 1, p.2229-2230). Mr. Steward indicated

that the expectation of a driver on a Type C road would be that the road ahead of the driver would be consistent with the previous half-mile to mile that the driver had just passed. *See* Depo of Dale Steward, p.196, lns.9-15 (Rec. Vol. 1, p.2230).

The classifications of the portion of 322nd Road east of 111th Road as a low volume road would make the use of an advisory speed plaque and a dead end sign *more* necessary, not less. The road's classification as a Type C road would also increase the necessity of such signs, as they would be the only way to notify a driver that the road ahead would not be consistent with the previous half-mile. The County's attempt to use the low-volume road descriptor as support for its claim that it owes no duty on the road thus fails entirely.

V. The County was Required to Conduct an Engineering Study.

Cowley County is responsible under the MUTCD and Kansas statutes for placing and maintaining traffic control devices on the portion of 322nd Road east of 111th Road, up to the point where the pavement ends. *See* Cowley County's Motion for Judgment Judgement. (Rec. Vol. 1, 1375). In accordance with the expert opinion provided in this case, signs should have been provided at the intersection of County Road 322 and the intersection of County Road 111 and additional signage between that intersection and the Arkansas River to warn drivers of the dead-end and the approaching Arkansas River and the danger it posed. *See* Expert Report of Thomas L. Alcorn, M.S., P.E. PTOE, attached as Exhibit "M" (Rec. Vol. 1, pp.1327-1338).

The County's engineer, Mr. Steward, specifically testified that on low volume roads such as 322nd Road, the use of warning signs should be based on an engineering study or engineering judgment. (*Id.*). Mr. Steward admitted that the MUTCD Manual in effect at the time of Jason Patterson's death specified that the decision to place a particular control

device in a particular location was to be made either on the basis of an engineering study, or based upon the application of engineering judgment, and that the MUTCD was not to be used as a substitute for engineering judgment. *See* Depo of Dale Steward, p.226, lns.14-20 (Rec. Vol. 1, p.2234). According to Cowley County's own engineer, as well as Patterson's expert Mr. Alcorn, the use of an engineering study or engineering judgment is a *mandatory* act under the MUTCD. *See* Depo of Dale Steward, p.230, lns.5-17 (Rec. Vol. 1, p.2235). Furthermore, an engineering study is required to establish an advisory speed. MUTCD 2C.08 (Rec. Vol. 1, p. ___).

The County repeatedly attempts to conflate the standards provided by the MUTCD with the existence of any duty on its part to maintain the safety of the roadways. It argues that no engineering study must ever be conducted, unless a decision to place a sign has already occurred. This cannot be decided to be the standard, as it would leave many Kansas roadways unevaluated and unprotected. The County further attempts to characterize the testimony of Patterson's experts regarding decisions made after the completion of an engineering study as evidence that those decisions fall under the discretionary immunity umbrella. However, this attempt to confuse the issue fails, as the requirements of the MUTCD for an advisory speed sign alone required an engineering study to be conducted. Considering the totality of the circumstances, the County was required to conduct engineering study, and to take all mandated action thereupon.

VI. Conclusion

The *Carpenter* decision, and its subsequent controlling interpretations, clearly established that discretionary immunity cannot be granted as a matter of law without careful evaluation of the totality of the circumstances. Those circumstances include clear

guidance from the MUTCD regarding placement of advisory speed placards and implementation of engineering studies, as well as expert engineering testimony that such studies and signs were necessary. These facts establish that the County's action was not discretionary, but simply a matter of professional judgment which is not immune to liability under the Kansas Tort Claims Act. The County has a duty to keep its open roads safe for travel. That duty was not fulfilled, and Jason Patterson lost his life as a result. Accordingly, the Trial Court's grant of summary judgment in favor of Cowley County must be reversed and partial summary judgment entered in favor of Patterson as to the County's duty and liability for its portion of 322nd Road.

CROSS-APPELLEE'S BRIEF

STATEMENT OF THE ISSUES
RAISED BY COWLEY COUNTY'S CROSS-APPEAL

1. Whether the decision whether or not to place a Dead End or No Outlet sign is an exercise of professional judgment or discretion for purposes of immunity from liability under K.S.A. 75-6104(e) and (h).

2. Whether the district court correctly ruled that Cowley County, as a governmental entity uninvolved in operating or integrating a recreational area, was not entitled to immunity from liability under K.S.A. 75-6104(o).

3. Whether the district court correctly ruled that Cowley County was not entitled to immunity from liability under K.S.A. 75-6104(k).

ARGUMENT AND AUTHORITIES

I.
STANDARD OF REVIEW

Patterson concurs with the statement of the standard of review contained in Patterson's brief.

II.
THE DISTRICT COURT CORRECTLY HELD THAT THE QUESTION OF COWLEY COUNTY'S DUTY TO ERECT WARNING SIGNS MUST GO BEFORE A JURY.

As was discussed in detail in Appellant's Reply Brief above, the question of whether the totality of the circumstances resulted in a duty on the part of Cowley County to erect a "Dead End" or "No Outlet sign is a question for the jury. "Whether a governmental entity had a duty must be determined under the totality of the circumstances. This is a question of fact which must be determined by a jury." *Finkbiner*, 238 Kan. at 861

(1986). The County argues that this decision is inconsistent with the District Court's granting of immunity regarding the County's failure to conduct an engineering study and to erect an advisory speed sign. Patterson concurs that the rulings are inconsistent, but submits that the necessary remedy is to reverse the District Court's ruling regarding the engineering study and advisory speed sign, and send all questions before the jury.

III.
THE DISTRICT COURT CORRECTLY HELD THAT THE COUNTY IS NOT ENTITLED TO RECREATIONAL USE IMMUNITY

The County argues that because the "accident" here occurred within the Kaw Wildlife Area, it is entitled to recreational use immunity under K.S.A. 75-6104(o). That subsection states that a governmental entity is not liable for injuries occurring "from the use of any public property intended or permitted to be used as a park, playground, or open area for recreational purposes...." The County's position is flawed for two reasons: (1) the injury caused by the county took place on the paved portions of 322nd Road, and (2) those portions of 322nd road are neither a feature nor an integral part of the Kaw Wildlife Area, they are a public county road.

The County has repeatedly disclaimed any ownership or responsibility for the road or adjacent property beyond the point on 322nd Road where the pavement ends. It is therefore difficult to understand how the County would be entitled to recreational use immunity for portions of a County Road that are not within the Kaw Wildlife Area. The county cannot claim to benefit both from the disclaimer of responsibility for events on that property, and the immunity provided therefrom. The District Court granted summary judgment to KDWPT on the basis of K.S.A. 75-6104(o), as Patterson's death was caused in part by injuries sustained in the Kaw Wildlife Area. This is not inconsistent with the

ruling that the County is not entitled to the same protection, as the injuries caused by Cowley County's acts and omissions were not caused in the Kaw Wildlife Area. The injuries caused by Cowley County were caused by the failure to erect proper signage, and that failure took place on the paved portions of 322nd Road.

No Kansas case has ever applied the recreational use immunity exception to a public road. Were the County's expansive argument for the application of the recreational use immunity the law, the immunity would have been applied pervasively to roads all over the state used to access recreational areas. The County relies on *Poston v. Altoona-Midway U.S.D. No. 387*, in asserting that the recreational use immunity should extend to Cowley County due to 322nd Road's physical proximity to the Kaw Wildlife Area. The *Poston* case found that recreational use immunity applied to injuries sustained by the plaintiff while exiting a school commons after visiting the adjacent gymnasium. 286 Kan. 809, 189 P.3d 517 (2008). The commons area was immediately outside the gymnasium, was used to serve concessions during recreational events, and was connected to the gymnasium by plan as the principal means of physical access to the gym. *Id.* at 815-816.

In contrast, the paved portions of 322nd Road east of 111th Road are not located in the Kaw Wildlife area, they are a portion of a public county road. The road pre-dates the Kaw Wildlife area, and was not created to allow access to same. The paved portions of 322nd Road are separated from the Kaw Wildlife Area by the township road, for which Cowley County has also disclaimed all responsibility. Not only is the county road not inherently recreational, but it is also not an integral part of a recreational facility. It serves no recreational purpose. Every recreational area in the state is accessible, to some degree, via the use of public roads, and yet no Kansas court has ever granted the protections of this

immunity to a public road. This denial is not a coincidence, as the purpose of the recreational use immunity is not to shield governmental entities like the County from properly maintaining public roads.

The purpose of K.S.A. 75–6104(*o*) is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of ordinary negligence. *Jackson ex rel. Essien v. Unified Sch. Dist. 259, Sedgwick Cty.*, 268 Kan. 319, 331, 995 P.2d 844, 852 (2000). This encourages governmental entities to build recreational facilities for the benefit of the public without fear that they will be unable to fund them because of the high cost of litigation. *Id.* "The benefit to the public is enormous. The public benefits from having facilities in which to play such recreational activities as basketball, softball, or football, often at a minimal cost and sometimes at no cost. The public benefits from having a place to meet with others in its community." *Id.* As was discussed extensively above, the County has a duty to keep its open roads safe for travel. The recreational use immunity was enacted specifically to protect all governmental entities for assuming that duty with respect to recreational areas. It was not intended to abrogate the County's existing duty on existing roads near subsequently designated recreational areas.

Furthermore, the District of Kansas has held that the recreational use immunity only applies if the injury occurred *because* the area was being used for a recreational purpose. *Unzueta v. Steele*, 291 F. Supp. 2d 1230, 1240 (D. Kan. 2003) (stating "The alleged injury occurred while the auditorium was being used for a recreational purpose, but not because the auditorium was being used for a recreational purpose." in finding that the K.S.A. 75-6104(o) did not apply). In this case, Patterson and Brewer were injured because there was

no warning that the road on which they were driving ended in a river. Neither their drive nor their fall down the riverbank could be classified as "recreational."

This public county road, just like all public county roads in the State of Kansas, was not a recreational area built for the benefit of the public to provide a community space, and thus the District Court correctly ruled that Cowley County is not entitled to the recreational use immunity provided by K.S.A. 75-6104(o). The District Court's ruling on this point should be affirmed.

IV.
THE DISTRICT COURT CORRECTLY HELD THAT THE COUNTY IS NOT ENTITLED TO FAILURE TO INSPECT IMMUNITY

The County argues that it is entitled to immunity pursuant to K.S.A. 75-6104(k), which states that a governmental entity is not liable for damages resulting from the failure to make an inspection of property other than that of the entity's, to determine whether the property contains a hazard to public health or safety. Patterson argued that the County was aware that the Arkansas River lay at the end of 322nd Road, and that no inspection of the Township's portion of the road, or of the Kaw Wildlife Area would be necessary to further establish the existence of this hazard. The District Court held that the need for an inspection was a question of fact for the jury. The County argues that its knowledge of the Arkansas River's position at the end of 322nd Road is not enough to have known it needed to take action. This position is contrary to Kansas law.

Immunity under K.S.A. 75-6104(k) does not apply if the governmental entity had knowledge of the existence of a dangerous condition, and did nothing to correct the condition. *Brock v. Richmond-Berea Cemetery Dist.*, 264 Kan. 613, 619-620, 957 P.2d 505 (1998). The fact that the County had no affirmative duty to inspect the property of others

does not result in immunity from liability for conditions of which they were fully aware, and took no action to guard against. The County was fully aware of the Arkansas River, there was no need to conduct an inspection to confirm that 322nd Road ended at the banks of the river. Every map of the 322nd Road in the record shows the road ending in the river.

The County has been aware of the layout of the road and the river since the road was opened in 1873. See Def. Cowley County's Answers to Plaintiff's Second Interrogatories, No. 21 and attachments attached as Exhibit "A." (Rec. Vol. 1, pp.1207-1217) (emphasis added). The County never vacated the other portions of the road, nor took actions to persuade the Township to vacate the road. *See* Def. Cowley County's Answers to Plaintiff's Second Interrogatories, Interrogatory No. 21 and attachments attached as Exhibit "A." (Rec. Vol. 1, pp.1207-1217). The County knew that the road in question ended in the river, then, at least as early as 1873 when the road was dedicated.

The County argues that it is unreasonable to impose a general duty to erect warning signs for hazards located on property owned by others without inspecting the property. However, this misstates the District Court's ruling. The immunity provided by K.S.A. 75-6104(k) is either for failure to conduct an inspection, or for negligently conducting an inspection. Thus, no immunity can be granted if the situation did not call for an inspection. The District Court's decision not to grant the County the protections of K.S.A. 75-6104(k) does not impose any sort of duty on the County to erect signs, those duties are addressed elsewhere. However, Patterson asserts that the general knowledge of the hazard of the Arkansas River located at the end of a county road precluded any need for inspection. The County asserts that any hazard would have to be established through an inspection, and an

evaluation of all the circumstances surrounding the end of the road. The District Court correctly held that the need for an inspection is a question for the jury.

V. Conclusion

For the above and foregoing reasons, Rochelle Patterson, Appellant/Cross-Appellee respectfully requests that the Court reject Cowley County's Cross-Appeal for the reasons set forth above and for such other and further relief as the Court deems just and equitable.

Respectfully submitted,

MORRIS, LAING, EVANS, BROCK & KENNEDY, Chartered

By: /s/ Jeffery L. Carmichael
Jeffery L. Carmichael #11085
Attorney for Plaintiff-Appellant/Cross-Appellee
Rochelle Patterson, Mother and Next Best Friend
of Nicolette Patterson, a minor
and Gavin Patterson, a minor

CERTIFICATE OF SERVICE

The undersigned hereby certifies a true and correct copy of the above and foregoing **Plaintiff-Appellant/Cross-Appellee's Reply and Cross-Appellee's Brief to Defendant-Appellee/Cross-Appellant Cowley County, Kansas' Brief** was deposited in U.S. Mail, properly addressed to:

Edward L. Keeley
McDonald, Tinker, Skaer, Quinn & Herrington
300 West Douglas, Suite 500
Wichita, Kansas 67202
Attorney for Defendant
Bolton Township

Anne Gepford Smith
John Wesley Smith
Assistant Attorney General
Office of ATtorney General Derek Schmidt
Memorial Building, 2nd Floor
120 SW 10th Avenue
Topeka, Kansas 66612-1597
Attorney for Defendant
Kansas Department of Wildlife, Parks and Tourism

Charles E. Millsap
Lyndon W. Vix
Fleeson, Gooing, Coulson & Kitch
301 North Main, Suite 1900
Wichita, Kansas 67202
Attorney for Defendant
Cowley County, Kansas

Donald McKinney
Attorney at Law
5 Douglas Avenue
Wichita, Kansas 67207
Attorney for Plaintiff
Elaine Selenke

and the original being filed electronically with:

Ms. Heather Smith
Clerk of the Appellate Courts
Kansas Judicial Center
301 S.W. 10th Avenue
Topeka, KS 66612

on this 21st day of April, 2016.

By: /s/ Jeffery L. Carmichael
Jeffery L. Carmichael, #11085