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.

BRIEF 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

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NATURE OF THE CASE

Appellee Cowley County, Kansas ("Cowley County" or "the County") cannot concur with the Nature of the Case as set forth in appellant Rochelle Patterson's brief because Patterson's description is tainted by factual and legal argument. *Cf.* SUP. CT.

R. 6.02(a)(2) (describing information properly included in Nature of the Case in appellant's brief).

This consolidated appeal arises out of three wrongful death actions brought by the heirs of two individuals who were killed in a single-vehicle accident. The defendants are three governmental entities. All parties filed motions for summary judgment and the district court entered a 55-page order granting summary judgment to two defendants but denying the motion of the third—Cowley County.

Recognizing that various of its rulings were questions of first impression or may be counter to existing precedent and authorities, the district court, *sua sponte,* made the findings necessary under K.S.A. 60-2102(c) for an immediate interlocutory appeal. Cowley County and one of the plaintiffs—Patterson—sought and obtained leave from this Court to proceed with interlocutory appeals on the issues that had been decided adversely to them. The Court thereafter designated Patterson as the Appellant/Cross-Appellee and Cowley County as the Appellee/Cross-Appellant. All other parties are Appellees and/or Cross-Appellees.

STATEMENT OF THE CASE

In setting forth her statement of the facts, Patterson has elected to simply repeat verbatim the majority of the Statement of Uncontroverted Facts from her district court summary judgment motion. (R. Vol. 1, pp. 1181-1186). Patterson appears to justify this approach by referring to this Court's *de novo* standard of review of a summary judgment ruling. (Appellant's Brief, p. 3).

In connection with its order on summary judgment, the district court made specific Findings of Uncontroverted Fact based upon the statements of uncontroverted facts that had been submitted by all the parties pursuant to Supreme Court Rule 141. (R. Vol. 1, pp. 2834-2841). Patterson has not contested any of the district court's findings and the facts as found by the court therefore control this appeal. In this regard, the present case is like *Kansas Public Employees Retirement System v. Russell*, 269 Kan. 228, 229, 5 P.3d 525 (2000), where the Court said:

> In granting summary judgment . . . the district court made extensive findings of fact. On appeal, [appellant] included a lengthy statement of facts in its brief, but it did not specify any of the trial court's findings as contested. It is settled that unappealed determinations of fact are final and conclusive. (citation omitted).

The facts set forth below are therefore drawn largely from the district court's factual findings.

322nd Road

In southern Cowley County, there is an east-west road known as 322nd Road. This road runs parallel to the Kansas-Oklahoma border, one mile north of the border. For the most part, 322nd Road is a paved county road maintained by Cowley County. However, a few miles east of Highway 77, and just east of where 322nd Road intersects 111th Road, the pavement ends. About 600 feet prior to the end of the pavement, Cowley County has erected a "Pavement Ends" sign. (R. Vol. 1, pp. 2835-2836, 2838).

Cowley County's responsibility for 322nd Road ceases at the point the pavement ends, and the road then becomes a dirt township road under the jurisdiction of Bolton Township. Approximately one-quarter mile east of where the pavement ends, the township road dead ends at the banks of the Arkansas River. (R. Vol. 1, pp. 2835-2837).

At the point where the township road ends, it is in the midst of the Kaw Wildlife Area, which is operated as a recreational area by the Kansas Department of Wildlife, Parks and Tourism (KDWPT) under a lease with the United States Department of the Army, which owns the land. (R. Vol. 1, pp. 2837-2838).

The Accident

During the early morning hours of November 19, 2010, a motor vehicle occupied by Jason Patterson and Cortney Brewer was traveling east on 322nd Road. Both occupants were intoxicated beyond the level that would allow them to lawfully operate a motor vehicle. Which of them was driving and which was the passenger is in dispute, but that dispute is not material to this appeal. (R. Vol. 1, pp. 2834-2835, 2839).

Patterson and Brewer proceeded east on 322nd Road past the point where the pavement ends and the road becomes a dirt township road. They continued east into the Kaw Wildlife Area, traveling at a speed of 10-12 miles per hour, and appear to have applied the brakes just prior to reaching the river. However, the right front tire of the vehicle slipped over the edge of the river bank causing the vehicle to flip end-

over-end and drop approximately 12 feet into the Arkansas River. Both Patterson and Brewer died as a result of the accident. (R. Vol. 1, pp. 2834, 2839).

The Lawsuits

On June 12, 2012, Rochelle Patterson, on behalf of two of the surviving minor children of Jason Patterson, commenced a wrongful death lawsuit in Cowley County District Court (Case No. 12-CV-99-W) against Cowley County and KDWPT. Essentially, the petition alleged that the defendants had been negligent in failing to erect adequate warning signs or barriers indicating that 322nd Road ended at the Arkansas River, and that this alleged negligence was the cause of the accident and Jason Patterson's death. (R. Vol. 1, pp. 1-5; *see also* pp. 107-112). The petition later was amended to add Bolton Township as a defendant under the same theory. (R. Vol. 1, pp. 150-156).

On November 19, 2012, Elaine Selenke, the surviving mother of Cortney Brewer and the representative of her estate, commenced a wrongful death action in Cowley County District Court (Case No. 12-CV-185-W) against KDWPT, Cowley County and Bolton Township. Like the Patterson suit, the Selenke petition alleged that the defendants had failed to properly warn that 322nd Road ended at the Arkansas River. (R. Vol. 1, pp. 2929-2933). Selenke latter commenced an essentially identical action (Case No. 13-CV-46-W) against only Cowley County and Bolton Township.[1] (R. Vol. 1, pp. 2318-2224).

[1] The commencement of a second action appears to have had something to do with the timing of Selenke's pre-suit notices to the municipalities required by K.S.A. 12-105b(d).

On June 7, 2013, the district court, on its own motion, entered an order consolidating all three cases for purposes of discovery. The court further stated that the question of whether the cases would continue to be consolidated for trial would be determined at the time of the pretrial conference. (R. Vol. 1, pp. 266-271).

The cases continued to be consolidated for purposes of entering a single pretrial order on February 20, 2015. The pretrial order stated that the question of whether there would be separate or joint trials would be addressed after dispositive motions had been ruled upon. (R. Vol. 1, p. 1171).

Summary Judgment Motions

All parties filed motions seeking complete or partial summary judgment. All in all, more than two dozen briefs addressing dispositive motions were presented to the district court. (R. Vol. 1, pp. 1176-1343, 1350-1928, 1931-2975, 2701-1819). For purposes of this appeal, it is necessary to focus only on the defendants' motions for summary judgment, and only upon those grounds upon which the court actually ruled.

1. Cowley County defended or sought summary judgment on the following pertinent grounds:

    a. The County had no duty to erect any warning signs on the township road portion of 322nd Road (R. Vol. 1, pp. 1375-1381);

    b. The two signs which plaintiffs contended the County should have posted on the county road portion of 322nd Road—an advisory speed plaque affixed to the "Pavement Ends" sign and a separate "Dead End" or "No Outlet" sign—are both optional under the Manual on Uniform Traffic Control Devices (MUTCD). As such,

the decision of whether to post these signs was left to the discretion of the County and the County was therefore immune from liability under K.S.A. 75-6104(e), the discretionary function exception to liability under the Kansas Tort Claims Act (KTCA) (R. Vol. 1, pp. 1381-1390);

c. As the accident occurred in a recreational area, the County was immune from liability under K.S.A. 75-6104(o), the recreational property exception to liability under the KTCA (R. Vol. 1, pp. 1391-1396);

d. The County was further immune from liability under K.S.A. 75-6104(k), which creates an exception to liability under the KTCA by relieving a governmental entity of the obligation to inspect property it does not own to determine whether that property contains a hazard (R .Vol. 1, pp. 1390-1391).

2. Bolton Township defended or sought summary judgment on the following pertinent grounds:

a. The Township had no duty to place traffic control devices or other warning signs on any portion of 322nd Road (R Vol. 1, pp. 2429-2430;

b. The township was immune under the KTCA recreational property exception, K.S.A. 75-6104(o) (R. Vol. 1, pp. 1613-1621);

c. The township was immune under the Recreational Use Act, K.S.A. 58-3201, *et seq*., which limits the liability of landowners who make land and water areas available to the public for recreational purposes (R. Vol. 1, pp. 1893-1895);

3. KDWPT defended or sought summary judgment on the following pertinent grounds:

a. KDWPT had no duty to place traffic control devices or other warning signs on any portion of 322nd Road (R. Vol. 1, pp. 1916-1923);

b. KDWPT was immune under the KTCA recreational property exception, K.S.A. 75-6104(o) (R. Vol. 1, pp. 1924-1925);

c. KDWPT was immune under the Recreational Use Act (R. Vol. 1, p. 1925);

d. The plaintiffs' claims against KDWPT were barred by the ten-year statute of repose, K.S.A. 60-513(b) (R. Vol. 1, pp. 1923-1924).

The district court's rulings on these motions were as follows:

1. Cowley County

a. The County had no duty to erect any warning signs on the township road portion of 322nd Road (R. Vol. 1, pp. 2848-2849);

b. (i) The County had discretion to determine whether an optional advisory speed plaque should have been affixed to the "Pavement Ends" and, because of this discretion, cannot be held liable under the KTCA for deciding not to do so (R. Vol. 1, pp. 2859-2867);

(ii) Even though the placement of a "Dead End" or "No Outlet" sign is optional under the MUTCD, the County may or may not have had discretion to decide whether to post such a sign on the county road portion of 322nd Road a mile west of the scene of the accident, but it cannot be determined whether this placement was mandatory or discretionary until the jury first determines the proximate cause of the accident (R. Vol. 1, pp. 2859-2867);

c. The County is not entitled to immunity for recreational property, because it does not operate the Kaw Wildlife Area and had no role in integrating 322nd Road into the Wildlife area (R. Vol. 1, pp. 2868-2872);

d. The County is not entitled to immunity based upon the statutory provision that relieves it of an obligation to make an inspection, because there is a fact question as to whether it could determine that a hazard existed on the township road without making an inspection (R. Vol. 1, pp. 2876-2877).

2. Bolton Township

a. The Township had no duty to place traffic control devices or other warning signs on any portion of 322nd Road. This ruling essentially means that no governmental entity has the duty to erect traffic control devices on the township road portion of 322nd Road. Bolton Township was awarded summary judgment on this basis (R. Vol. 1, pp. 2849-2851);

b. Having granted the Township summary judgment, it was not necessary for the court to rule on the Township's second ground. But the court nevertheless held that the Township would not be entitled to immunity for recreational property, because it does not operate the Kaw Wildlife Area and had no role in integrating 322nd Road into the Wildlife area (R. Vol. 1, pp. 2868-2872);

c. The Township would likewise not be entitled to immunity under the Recreational Use Act because there is insufficient evidence to establish that Patterson and Brewer were on the township road in the Kaw Wildlife Area for recreational purposes (R. Vol. 1, pp. 2877-2878).

3. KDWPT

a. KDWPT had no duty to place traffic control devices or other warning signs on any portion of 322nd Road. KDWPT was awarded summary judgment on this basis (R. Vol. 1, pp. 2851-2854);

b. KDWPT was also entitled to summary judgment based upon the recreational property exception to liability in the

KTCA. KDWPT did not commit any wanton act that would deprive it of this immunity (R. Vol. 1, pp. 2868-2876);

c. KDWPT would not be entitled to immunity under the Recreational Use Act because there is insufficient evidence to establish that Patterson and Brewer were in the Kaw Wildlife Area for recreational purposes (R. Vol. 1, pp. 2877-2878);

d. KDWPT was also entitled to summary judgment based upon the statute of repose because the condition of the relevant portion of the Kaw Wildlife Area had not changed in over ten years (R. Vol. 1, pp. 2855-2858).

The district court concluded its decision by stating that, "the court believes there is substantial ground for difference of opinion on the issue of jurisdiction and duty. . . . Therefore, the Court finds that this court's decision on the issue of jurisdiction and duty of 322nd Road, as well as such other rulings as the court deems necessary to the resolution of these issues, should be determined by the Appellate Court, pending further disposition of the case." (R. Vol. 1, pp. 2879-2880).

The Interlocutory Appeals

Thereafter, Patterson filed an application for interlocutory review in this Court (Appeal No. 114,705), seeking to challenge the entry of judgment in favor of Bolton Township, as well as that portion of the district court's ruling holding that the County was immune from liability for its decision to not place a speed advisory plaque on 322nd Road. The County also filed an application (Appeal No. 114,707) seeking to pursue interlocutory review of the district court's rulings which denied summary

judgment to the County. The Court granted both applications and thereafter consolidated them under Appeal No. 114,705, designating Patterson as Appellant/Cross-Appellee, the County as Appellee/Cross-Appellant, Bolton Township and KDWPT[2] as Appellees, and Selenke as Appellee/Cross-Appellee.

Following this Court's decision to allow the interlocutory appeals, the district court entered an order staying the proceedings before it until the appeals have been resolved. (R. Vol. 1, pp. 2926-2929).

APPELLEE'S BRIEF

STATEMENT OF THE ISSUE
RAISED BY PATTERSON'S APPEAL

1. Whether the district court correctly ruled that Cowley County had discretion to determine whether a speed advisory plaque should be placed on 322nd Road, or whether an engineering study should be performed, and was therefore entitled to immunity on these aspects of the plaintiffs' claims.

[2] Although KDWPT has been designated as an Appellee with regard to Patterson's appeal, Patterson has confirmed that she is not appealing the rulings which granted summary judgment to KDWPT. (Appellant's Brief, p. 3). This concession would seem to remove KDWPT as a party to the appeal.

ARGUMENT AND AUTHORITIES

I.
STANDARD OF REVIEW

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

II.
THE DISTRICT COURT CORRECTLY RULED THAT COWLEY COUNTY COULD NOT BE LIABLE FOR ITS FAILURE TO INSTALL AN ADVISORY SPEED PLAQUE OR CONDUCT AN ENGINEERING STUDY, BECAUSE THE COUNTY HAD NO NON-DISCRETIONARY DUTY TO DO EITHER.

In this appeal, Patterson asserts that a hazard existed in the Kaw Wildlife Area at the point where the township road ends at or near the bank of the Arkansas River. Jason Patterson and Cortney Brewer died in this recreational area when their vehicle plunged into the river while being driven by someone—be it Patterson or Brewer—who was so intoxicated that they would be presumed, as a matter of law, to be incapable of safely driving the motor vehicle. *See* K.S.A. 8-1005(b). *See also Divine v. Groshong*, 235 Kan. 127, 136, 679 P.2d 700 (1984) (applying presumption in civil case).

As noted above, Cowley County maintains a county road, 322nd Road, that leads up to the township road and the recreational area. Patterson contends that the County breached a duty to recognize the alleged hazard on the township road and within the state's recreational area, and to install traffic control signs on the county road warning of that condition.

To support her negligence claim against the County, Patterson relies upon three alleged omissions by the County on the portion of 322nd Road over which it had jurisdiction: (a) a failure to install a Dead End or No Outlet sign; (b) a failure to affix an advisory speed plaque onto the existing Pavement Ends sign; and (c) a failure to conduct an engineering study. The district court held that, depending upon the jury's resolution of the factual question of proximate cause, the County might be liable for alleged omission (a). That ruling is part of the County's cross-appeal. The district court did rule, however, that the County was entitled to judgment as to alleged omission (b). And while the Court did not directly enter a ruling on alleged omission (c), it treated that contention as part and parcel of (b), and did not find that the lack of an engineering study created a basis for liability on behalf of the County. Patterson's appeal is based upon those rulings.

An analysis of Patterson's appeal arguments must begin with a recognition of the required elements of her claim against the County. In a negligence case, a plaintiff must establish a duty, breach of the duty, and a causal connection between the duty breached and the claimed damages. The existence of a duty is a question of law. *C.J.W. v. State*, 253 Kan. 1, Syl. ¶ 1, 853 P.2d 4 (1993).

Next, because the County is a municipality, the immunity provided to the County under the Kansas Tort Claims Act, K.S.A. 75-6101, *et seq.*, must be considered. In particular, the KTCA provides governmental entities, including municipalities, with immunity for "any claim based upon the exercise or performance

or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved;" K.S.A. 75-6104(e). Even more specifically relevant here is immunity for the discretionary placement of road signs set forth in K.S.A. 75-6104(h), which provides that there is no liability for:

> the malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction or removal. Nothing herein shall give rise to liability arising from the act or omission of any governmental entity in placing or removing any [traffic or road signs], signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity;

It is against this backdrop that Patterson's claims of negligence against the County based upon the lack of an advisory speed plaque and engineering study must be examined.

A. The Advisory Speed Plaque Claim

On the County's portion of 322nd Road, there were no posted speed limit signs. By statute, the speed limit on that road was 55 miles per hour. K.S.A. 8-1558(a)(3). The County had installed a Pavement Ends sign[3] on its portion of 322nd Road, advising motorists that ahead, at the point where 322nd Road turns into a

[3] At some earlier time the County obviously exercised some engineering judgment in regard to this portion of 322nd Road when it decided to install this Pavement Ends sign. The County also installed object markers on 322nd Road. (R .Vol. 1, p. 1518).

township road and as it proceeds into the recreational area, the surface of the road changes from asphalt pavement to dirt and gravel. Patterson, through her two experts, contends that the County should have affixed an advisory speed plaque on the Pavement Ends sign to warn motorists that they should reduce their speed as they head down the dirt road and into the wildlife area.

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

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

(emphasis added).

In turn, K.S.A. 8-2003 directs the secretary of transportation to adopt a manual that "shall correlate with and so far as possible conform to the system set forth in the most recent edition of the manual on uniform traffic-control devices for streets and highways and other standards issued or endorsed by the federal highway administrator." The manual referred to in the statute is the Manual on Uniform Traffic Control Devices (MUTCD). *Lay v. State Department of Transportation*, 23 Kan. App. 2d 211, 213, 928 P.2d 920 (1996) ("KDOT is required to adopt a manual which conforms as much as possible to the most recent edition of the Manual on Uniform Traffic Control Devices (MUTCD) for streets and highways."), *rev. denied*, 261 Kan. 1085 (1997). The MUTCD applies throughout the state to all roadways.

"[T]he adoption by the State Highway Commission of the 'Manual on Uniform Traffic Control Devices for Streets and Highways' imposes the obligation of uniformity set forth therein throughout the State of Kansas on its roads and highways." *Waits v. St. Louis-San Francisco Railway Co.*, 216 Kan. 160, 175, 531 P.2d 22 (1975).[4]

The traffic control installation practices set forth by the MUTCD are divided into three different categories: "Standard," "Guidance," and "Option." The difference between these categories is significant and described in § 1A.13:[5]

> When used in this Manual, the text headings of Standard, Guidance, Option, and Support shall be defined as follows:
>
> A. Standard—a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device. All Standard statements are labeled, and the text appears in bold type. The verb "shall" is typically used. The verbs "should" and "may" are not used in Standard statements. Standard statements are sometimes modified by Options.
>
> B. Guidance—a statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate. All Guidance statements are labeled, and the text appears in unbold type. The verb "should" is

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[4] The MUTCD provides that traffic control devices are intended to provide "the reasonable and prudent road user" with information necessary to efficiently and lawfully use streets and highways. MUTCD § 1A.02.06. (R. Vol. 1, p. 1544). The driver of the vehicle here in question—be that Patterson or Brewer—was not a reasonably and prudent road user as a matter of law due to his or her intoxication.

[5] As indicated in fn. 4, certain excerpts from the MUTCD are found in the record on appeal at Vol. 1, pp. 1541-1553 and will be cited to there when available. The entire manual is available at: http://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd2009r1r2edition.pdf

typically used. The verbs "shall" and "may" are not used in Guidance statements. Guidance statements are sometimes modified by Options.

C. Option—a statement of practice that is a permissive condition and carries no requirement or recommendation. Option statements sometime contain allowable modifications to a Standard or Guidance statement. All Option statements are labeled, and the text appears in unbold type. The verb "may" is typically used. The verbs "shall" and "should" are not used in Option statements.[6]

(R. Vol. 1, p. 1547).

Any obligation on the part of the County to install traffic control devices must derive from the MUTCD. As provided in § 1A.10 the MUTCD, "[p]lacement of traffic control devices other than those adopted in the Manual shall be prohibited unless the provisions of the Section (for experimental, interim approval and use) are followed."

In its summary judgment ruling, the district court found, as an uncontroverted fact, that "322nd Road east of the pavement is a low volume road." (R. Vol. 1, p. 2839). This finding is correct but is also too limited. In its summary judgment

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[6] Section 1A.13 also defines the portions of the MUTCD labeled as "Support" which are not intended to provide guidance but rather information and explanations expounding on the three categories of guidance:

> Support—an informational statement that does not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition. Support statements are labeled, and the text appears in unbold type. The verbs "shall," "should," and "may" are not used in Support statements.

(R. Vol. 1, p. 1547).

motion, the County stated as an uncontroverted fact that "[t]he portion of 322nd Road ***east of 111th Road*** is a low volume road." (R. Vol. 1, p. 1355). That statement was not controverted by Patterson. (R. Vol. 1, p. 2181). This means that all of the portions of 322nd Road upon which Patterson contends that the County should have installed signage were on a low volume road. Given that fact, Part 5 of the MUTCD (Traffic Control Devices for Low-Volume Roads) applies. (R. Vol. 1, p. 1552).

In her brief, Patterson elected not to provide the Court with a reference to what Part 5 of the MUTCD says about the use of advisory speed plaques on low volume roads. This was no oversight, since the specific language of that Part belies Patterson's argument that the MUTCD warranted, required or advised the use of such a sign. Section 5C.10 deals with advisory speed plaques for low volume roads. It is an "Option" only, and it reads as follows:

> **Section 5C.10 Advisory Speed Plaque (W13-1P)**
>
> Option:
>
> 01 An Advisory Speed (W13-1P) plaque (see Figure 5C-1) ***may be mounted below a warning sign*** when the condition requires a reduced speed.

(R. Vol. 1, pp. 1553) (emphasis added).[7]

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[7] The distinction between low volume and non-low volume roads is largely irrelevant to the issue presented here. Part 2 of the MUTCD deals with non-low volume roads. Like § 5C.10, § 2C.08 provides that the use of advisory speed plaques for non-low volume roads is also just an Option, and is not a mandatory Standard or even a recommended Guidance. (R. Vol. 1, p. 1551). The Section goes on to provide, as a Standard, that an advisory speed plaque shall not be installed until the advisory speed has been determined by an engineering study. (*Id.*).

Thus, under the MUTCD, where a condition on a road requires a reduced speed, there is an Option—not a requirement, or even a recommendation—for the installation of an advisory speed plaque. The MUTCD provides no "detailed recommendation" about when such an Option should be considered. From Patterson's own appeal argument it is obvious that the installation of an advisory speed plaque is an Option, pursuant to which a governmental authority is required to exercise discretion.

In *Kastendieck v. Morris County Board of Comm'rs*, 934 F. Supp. 387 (D. Kan. 1996), Gene and Lisa Kastendieck were passengers in a pickup truck that left the roadway on the curve of a rural Morris County road. They were killed, and their heirs brought a wrongful death negligence claim against the county claiming that the county was negligent in its placement of traffic control devices, including its failure to place adequate delineators along the curve. 934 F. Supp. at 389. The county argued that it was immune from liability under the discretionary function immunity provided in the KTCA. 934 F. Supp. at 391.

The court began by with a discussion of discretionary function immunity and observed that this exception to immunity applies "when no mandatory guidelines exist to govern the defendant's conduct." 934 F. Supp. at 391. The court then turned its attention to the MUTCD which controls "a governmental entity's duty to place and maintain traffic control devices." *Id.* The court noted that "under the MUTCD, some decisions regarding traffic control devices are mandated, some are discretionary, and

others are a matter of professional judgment rather than discretion." 934 F. Supp. at 392.

After reviewing the MUTCD provisions regarding the placement of curve delineators on the curve in question, the Court concluded:

> The County argues that its decisions regarding placement of delineators along the curve were discretionary and thus cannot subject it to liability. The court agrees that the initial decision whether to use delineators is discretionary. ***The language in the MUTCD on this point is permissive: "Delineators may be used. . . ."*** MUTCD § 3D–1. No other language in the chapter on delineation indicates that delineators are mandatory or that the decision to use them would be one of professional judgment rather than discretion.

Id. (emphasis added).

Like the MUTCD's treatment of the use of curve delineators in the *Kastendieck* case—which the court found to be an Option and permissive, rather than mandatory— the use of a speed advisory plaque (as well as a Dead End or No Outlet sign) on a low volume road is an Option. It is permissive and creates no mandatory duty. Thus, the placement of these devices is a matter of discretion.

To the same effect is this Court's decision in *Acosta v. Harris*, No. 71,015, 1995 Kan. App. Unpub. LEXIS 861 (Kan. Ct. App. Jan. 27, 1995) (unpublished),[8] where the plaintiffs claimed that the City of Wichita was negligent in failing to install various traffic control devices at an intersection. 1995 Kan. App. Unpub. LEXIS 861,

[8] All unpublished cases cited herein are attached hereto in accordance with Supreme Court Rule 7.04(g)(2)(C).

at *2. In response, the city argued that it was within its discretion in not placing these devices. 1995 Kan. App. Unpub. LEXIS 861, at *5.

The plaintiffs retained an expert who pointed to two provisions in the MUTCD which he contended created a duty on the party of the city to erect certain traffic control devices. Upon reviewing these provisions, the Court observed that:

> Paragraph 3B-17 uses the term "should" and paragraph 2B-37 utilizes the term "may." Paragraph 1A-5 of the MUTCD defines the term "should" as referring to an advisory condition, "recommended but not mandatory," while the term "may" is defined as a permissive condition. . . .
>
> In interpreting the applicable provisions of the MUTCD, this court finds that the MUTCD did not mandate the placement of the signage [plaintiff's expert] opined would have prevented the plaintiff's injuries and that the City was exercising its discretionary function in designing the subject intersection. The plaintiff's claim is barred by the discretionary function exception of the KTCA.

1995 Kan. App. Unpub. LEXIS 861, at *8-9.

Acosta therefore stands for the proposition that unless a MUTCD instruction is a Standard—using "shall" language—no mandatory duty is created. A Guidance (using "should" language) and an Option (using "may" language) simply cannot deprive a governmental authority of the discretion to decide whether the device should be installed. Because the advisory speed plaque which Patterson contends should have been affixed to the County's Pavement Ends sign is only listed as an Option in the MUTCD, the County is entitled to immunity under the KTCA.

But there is a more basic reason why Patterson is not entitled to proceed with a negligence claim against Cowley County based on the failure to install an advisory speed plaque. There is no evidence whatsoever that would support a factfinder's conclusion that the lack of such a plaque had any causal connection with this accident. Patterson's own evidence, through her expert, Thomas L. Alcorn, establishes that the vehicle was "traveling very slowly when it went over the bank" and that the vehicle and its driver "probably only needed a few extra feet and it would have stopped before dropping into the river." (R. Vol. 1, p. 1521). Mr. Alcorn acknowledged that speed was not a factor in this accident and that the lack of an advisory speed plaque played no causative role in the accident:

> Q. In your opinion sir, did the speed of this vehicle play any causative role in the accident?
>
> A. No.
>
> * * *
>
> Q. You did not conclude in this particular case, did you, that had there been the lower speed placard, or whatever you call it, beneath the "Pavement Ends" signs, that that alone would have created a different result in this accident, did you?
>
> A. No, I did not.

(R .Vol. 1, pp. 1504, 1506-1507).

It is fundamental that if a plaintiff asserting a negligence claim does not sufficiently establish an essential element of its case on which he or she has the

burden of proof, the defendant is entitled to summary judgment. *Dozier v. Dozier*, 252 Kan. 1035, 1041, 850 P.2d 789 (1993). The plaintiff cannot evade summary judgment on the hope that something may develop at trial. *In re Estate of Brodbeck*, 22 Kan. App. 2d 229, 236, 915 P.2d 145, *rev. denied,* 260 Kan. 993 (1996). Here, Patterson had no evidence that the lack of a reduced speed plaque caused the accident in question and, in fact, the evidence she presented established the contrary. Even if the County had a duty to post such a plaque—which it did not—it would be entitled to summary judgment. *See Kastendieck*, 934 F. Supp. at 393 ("Furthermore, the court concludes that there is no evidence from which a reasonable jury could find the county's actions [in failing to place curve delineators], even if non-discretionary and negligent, were the proximate cause of this accident.").

B. The Engineering Study Claim

Patterson contends that the County could be found to have been negligent and liable for damages simply as a result of a failure to conduct a engineering study on its portion of 322nd Road. (Appellant's Brief, p. 20-22). As noted above, the district court did not make a specific ruling on this theory, treating it together with the claim that additional traffic control devices should have been in place. This is only logical since the lack of an engineering study, in and of itself, could not cause any injury. Rather, it would be the failure to do something in response to the study that could only arguably be the basis for a negligence claim. And if there was no duty to place a speed

advisory plaque, as the district court held, then no additional basis for liability can rest upon the lack of an engineering study.[9]

Patterson attempts to build an argument around the engineering study issue by subtly attempting to rewrite, with the help of her expert, a portion of the MUTCD. And what is particularly noteworthy about this argument is that even Patterson's own experts admitted that after the performance of such an engineering study, the County would have been left with nothing more than the exercise of discretion to determine what, if any, Options for additional signage it might elect to install.

As noted above, Patterson cannot establish the proximate cause element of a negligence claim by simply pointing to a lack of an engineering study. Such a study, standing alone and without a resulting decision to install further traffic control devices, could not have influenced the driving of the person behind the wheel in this accident. Rather, the question would be whether, following an engineering study, the County would have had a non-discretionary duty under the MUTCD to install a Dead End or No Outlet sign, or an advisory speed plaque. Even Patterson's own experts admit that the answer to this question is no.

For the entire century-plus history of what is now called 322nd Road, there is no evidence of any prior accident at the intersection of that road and the Arkansas

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[9] Notably, Patterson made no allegations whatsoever in the Pretrial Order regarding the lack of an engineering study. (R. Vol. 1, pp. 1136-1137). Selenke made a generalized allegation of this sort aimed at all defendants (R. Vol. 1, p. 1142) but she has not appealed from the district court's adverse ruling.

River. There is no evidence than the township, the state, a citizen or anyone else ever reported to the County what they perceived to be a hazardous condition on that township road, either before or after the development of the Kaw Wildlife Area. In short, nothing occurred that would have caused the County to conduct an engineering study in that area to evaluate the issue of additional traffic control devices. And, as discussed above, had a study been conducted, at the end of it the County would simply have been left with the exercise of discretion to consider the MUTCD "Option" (no requirement—not even a recommendation) for additional signage.

As defined by the MUTCD at § 1A.13.03.65, an "engineering study" is:

> [T]he comprehensive analysis and evaluation of available pertinent information, and the application of appropriate principles, provisions, and practices as contained in this Manual and other sources, for the purpose of deciding upon the applicability, design, operation, or installation of a traffic control device. An engineering study shall be performed by an engineer, or by an individual working under the supervision of an engineer, through the application of procedures and criteria established by the engineer. An engineering study shall be documented.

With regard to warning signs, § 2C.02 of the MUTCD provides:

Standard:

01 The use of warning signs shall be based on an engineering study or on engineering judgment.

Guidance:

02 *The use of warnings signs should be kept to a minimum as the unnecessary use of warning signs tends to breed disrespect for all signs. . . .*

In Patterson's brief, she offers repeated references to the fact that the former Cowley County Engineer and her own experts testified that "the decision to use a particular device at a particular location should be based on an engineering study or the application of engineering judgment." (Appellant's Brief, pp. 16, 18). That is no revelation. That is precisely what § 2C.02 of the MUTCD says and there is no need for an experts' interpretation of that language. With this Standard in mind, Patterson then cleverly twists the language and attempts to turn it into a mandatory requirement that an engineering study must be conducted on the entirety of a jurisdiction's roadways in order to determine whether or not to install any of the hundreds of traffic control devices described in the MUTCD. The Manual most certainly does not so provide. Patterson has not cited one case or other authority to support the proposition that prior to an actual decision to use a traffic control device, a jurisdiction is required to conduct an engineering study, the absence of which can give rise to a breach of duty and a negligence claim against the jurisdiction.

On page 20 of her Brief, Patterson argues that the County did nothing to ever determine what traffic control devices were necessary for 322nd Road. That statement is obviously false. It is uncontroverted that the County installed a Pavement Ends sign and object markers on that road, the installation of which required the exercise of engineering judgment. What the County did not do, and was not required to do, was to conduct an engineering study in order to support the use of additional signage. Prior to this accident, nothing had occurred that would have caused the

County to conduct such a study and there is nothing in the MUTCD that would have imposed a duty on the County to do so simply because it had jurisdiction over the road.

A careful review of the structure of the MUTCD demonstrates the interplay between the use of Options and engineering studies. For example, § 2C.08 (R. Vol. 1, p. 1551) demonstrates that jurisdictions have an option to use an advisory speed plaque, and if such a decision is made, the advisory speed shall be established by an engineering study. The MUTCD's definitions of "Standard," "Guidance," and "Option," set forth at pages 16-17, *supra*, are also significant. The first two categories of guidelines make specific reference to engineering studies. For a "Standard" (a required, mandatory practice), an engineering study cannot be used to modify or compromise the use of the instruction. For a "Guidance" (a recommended practice in typical situations), deviations are allowed based on engineering studies. However, in the definition of "Option" (a permissive condition that carries no requirement or recommendation), there is no mention of an engineering study. There is nothing in the MUTCD, either in the definition of "Option" or elsewhere, that indicates that an engineering study can turn an "Option" into a required practice.

What is most important about Patterson's argument concerning the lack of an engineering study is that even her own experts admit that after completion of any engineering study the County would have conducted on 322nd Road, the County still would have had no Standards (requirements) or Guidance (recommendations) under

the MUTCD to install any additional signage. It would have had nothing more than an Option, which by definition is "a statement of practice that is a permissive condition and carries no requirement or recommendation." (R. Vol. 1, p. 1547).

In fact, both of Patterson's experts admitted that following an engineering study by the County, it would have been required *to then exercise discretion* in deciding whether or not to install any further signage. Mr. Aziere admitted that after he conducted his engineering study, he was required to exercise discretion, and did exercise discretion in then reaching conclusions about what type of additional signage he felt would be appropriate for the road. (R. Vol. 1, pp. 1563). And he does not suggest that another engineer who might reach different discretionary conclusions would be incompetent or negligent. (R. Vol. 1, pp. 1562). Mr. Alcorn admitted the same: "So after you do (an engineering study), then I agree that discretion can be used (for decisions on traffic control devices)." (R. Vol. 1, p. 3197). This is the very type of act and function for which our legislature has clearly provided a governmental entity like the County should be immune.

While Patterson offers no authority to support the assertion of a negligence claim based on the lack of an engineering study (where the result of the study would have done nothing more than offer the authority Options about signage), the Supreme Court of Idaho recently rejected such a theory. In *Woodworth v. Idaho Transportation Board*, 298 P.3d 1066 (Idaho 2013), Woodworth was a pedestrian who was struck by a vehicle while he was crossing a state highway. He brought a

negligence claim against the state, complaining about a lack of marked pedestrian crosswalks in the area where he was struck. 298 P.3d at 1067.

Woodworth alleged that the state was negligent "for its failure to perform any engineering study and to do what the study, if performed, would have shown to be necessary." 298 P.3d at 1068. The district court granted the state summary judgment based upon statutory immunity and the Idaho Supreme Court affirmed. In applying the provisions of the MUTCD to Woodworth's claim, the Court said:

> [I]n his Complaint, Woodworth does not provide any language to support his claim that the State had a duty to perform a study or was negligent in failing to perform an engineering study. After careful examination of the Idaho Code and MUTCD provisions cited by Woodworth the only provision that mentions an engineering study is § 2C.01.01 of the MUTCD. Section 2C addresses "Warning Signs and Object Markers," and subpart .01 states "[t]he use of warning signs shall be based on an engineering study or on engineering judgment." ***However, § 2C.01 does not create any duty to conduct an engineering study, it merely requires that an engineering study or engineering judgment be used in the event warning signs are erected.*** As a result, we find that Woodworth has failed to support his allegation that the State was negligent in its failure to conduct an engineering study.

298 P.3d at 1071 (emphasis added).

The MUTCD imposes no duty that would have required Cowley County to perform an engineering study on 322nd Road prior to this accident and the plaintiffs' allegations in this regard cannot serve as the basis for any valid negligence claim against the County.

C. The Cases Relied Upon by Patterson Do Not Support Her Claims.

Patterson cites only three cases in support of the portion of her appeal aimed at Cowley County: *Carpenter v. Johnson*, 231 Kan. 783, 649 P.2d 400 (1982); *Toumberlin v. Haas*, 236 Kan. 138, 689 P.2d 808 (1984); and *Force v. City of Lawrence*, 17 Kan. App. 2d 90, 838 P.2d 896 (1992). Of these three cases, *Carpenter* is the only one in which the court did not determine, as a matter of law, that the governmental entity having jurisdiction over a road was immune from liability under the discretionary function immunity found in the Kansas Tort Claims Act.

Patterson cites *Carpenter* to support her argument that the question of discretionary immunity should not be determined as a mater of law. Specifically, Patterson argues that professional judgment, rather than governmental discretion, is used in an instance where the MUTCD sets forth "rather detailed recommendations in placement of warning signs." (Appellant's Brief, p. 12). Therein lies the problem for Patterson. She can point to no portion of the MUTCD where detailed recommendations are provided for the installation of an advisory speed plaque (or a Dead End or No Outlet sign) on a low volume road. This Court should be guided, as Kansas courts have always been, by the MUTCD's definitions and use of the terms Standard, Guidance and Option. Where the MUTCD provides no more than an Option for the use of a traffic control device, it has not presented "detailed recommendations" for the placement of a particular traffic control device. Only Standards, and perhaps Guidance, could be viewed as such. By the MUTCD's own

definitions, an Option is not a recommendation. *See Kastendieck v. Morris County Board of Comm'rs*, 934 F. Supp. 387, 392 (D. Kan. 1996); *Acosta v. Harris*, No. 71,015, 1995 Kan. App. Unpub. LEXIS 861, at *8-9 (Kan. Ct. App. Jan. 27, 1995)

At issue in *Carpenter* was the county and state's failure to erect a curve warning sign. The curve sign described in § 2C-5 of the version of the MUTCD then in effect stated that such a sign "is intended for use where engineering investigations of roadway, geometric and operating conditions show the recommended speed on the curve to be within 30 and 60 miles per hour and equal to or less than the speed limit established for that section of highway." 231 Kan. at 788. These were very detailed specifications that could be calculated by engineers using a ball-bank meter that shows banks of 10 degrees or more at 30 miles per hour. 231 Kan. at 790.

There are no such equivalent detailed specifications for use of an advisory speed plaque on a low volume road. As noted in the *Carpenter* decision, the state's Maintenance Manual for Signs that was in effect when the road was built said that curve signs and advisory speed plaques ***shall*** be used when the ball-bank meter on a particular curve gives certain readings. 231 Kan. at 790. There is no equivalent directive of any sort in this case. No "shall" or even "should" recommendations exist anywhere that would support Patterson's claims. This effectively distinguishes the present case from *Carpenter*.

Patterson also cites to the Kansas Supreme Court's decision in *Toumberlin*. That case actually demonstrates that the unprecedented analysis employed by the

district court in this case—which holds that discretionary immunity will apply as a matter of law only where there is no proximate cause between accident and lack of signage—is flawed.

Toumberlin involved an uncontrolled, open intersection accident. The County was sued for failing to place warning signs at the intersection and failing to clear brush growing along the right of way at the intersection. 236 Kan. at 139. The plaintiff presented no evidence that traffic control devices were legally required under the MUTCD and the county engineer said that in his professional judgment the intersection did not require signage. 236 Kan. at 140.

At the close of the plaintiff's evidence, the Court found that the county was immune from liability under the discretionary function immunity found in the KTCA. But it nevertheless allowed the jury to consider the fault of the County in rendering its verdict, and the jury found the County to be 20% at fault. 236 Kan. at 140. On appeal, the Court allowed that fault attribution to the County to stand, thereby finding that there was evidence to support the existence of proximate cause between the alleged conduct of the County and the accident. Yet, in spite of that proximate cause evidence, the Court also found, as a matter of law, that the County was entitled to discretionary function immunity. 236 Kan. at 144.

It is notable that in *Toumberlin*, the county was found to be immune from liability as a matter of law based on discretionary function immunity, because the plaintiff presented no evidence that signs of any type were "legally required under the

Manual on Uniform Traffic Control Devices . . . ." 236 Kan. at 140. The very same holds true in the present case. There is no evidence that Cowley County was legally required under the MUTCD to install an advisory speed plaque or any other traffic control device on 322nd Road.

The final case cited by Patterson is *Force*, which involved the alleged failure of the City of Lawrence and KDOT to install a protected left-turn signal at a highway intersection. 17 Kan. App. 2d at 91-92. The use of a left-turn signal is allowed by the MUTCD, but the district court found that the manual "does not set forth any conditions upon which a traffic signal with left-turn phasing is required. The MUTCD sets forth no criteria whatsoever concerning the issue of left-turn phasing or signaling." 17 Kan. App. 2d at 92. Based upon the fact that the MUTCD did not contain any standards for installation of a left turn signal, the district court concluded that the placement was discretionary and that the governmental defendants were therefore immune from liability under the KTCA. 17 Kan. App. 2d at 93.

On appeal, this Court reviewed prior decisions regarding the placement of traffic control devices. The Court distinguished *Carpenter* as follows:

> The *Carpenter* decision is distinguishable from the present case. In *Carpenter*, the Supreme Court referred to specific language from the MUTCD and the Maintenance Manual on Signs and Markers for Highways in Kansas that indicates turn signs and curve signs are to be used whenever certain specified conditions were met. The court noted that the MUTCD and the Maintenance Manual on Signs and Markers for Highways in Kansas were adopted by the Department of

> Transportation to carry out the policy declared by the legislature and have the force and effect of laws. 231 Kan. at 789, 649 P.2d 400. In the present case, it is uncontroverted that the MUTCD contains no language that determines when a protected left-turn signal is to be placed at an intersection. There is no determination to be made as to conditions under which signing is required.

17 Kan. App. 2d at 97-98.

The Court found persuasive the holdings in *Toumberlin* and *Collins v. Board of Douglas County Commr's*, 249 Kan. 712, 822 P.2d 1042 (1991), which it found stood for the rule that, "the duty to place a sign is discretionary where no mandated duty or guideline exists." *Force*, 17 Kan. App. 2d 98. The Court therefore affirmed the grant of summary judgment to the governmental entities despite the fact that the plaintiff had presented the opinion of an expert that a left-turn signal was justified, and would have probably prevented the accident. 17 Kan. App. 2d at 92. In the absence of a mandatory duty created by the MUTCD or some other authority, this was not enough to defeat discretionary immunity.[10]

Force makes clear that the erection of traffic-control devices is discretionary, but that under certain specified conditions this discretion may be preempted by the MUTCD. If the conditions specified by the MUTCD as warranting the placement of

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[10] In *Force*, plaintiff also argued that the City and KDOT were negligent in failing to make updated traffic counts at the intersection, and failing to review the intersection's accident history. This Court rejected these as alternative grounds to support a negligence claim. "[E]ach of these allegations is a part of the general allegation that the City and KDOT were negligent in failing to install a left-turn arrow at the intersection." 17 Kan. App. 2d at 92. The same can be said of Patterson's alternative ground of a lack of an engineering study in support of her negligence claim against Cowley County.

a traffic-control device are satisfied, then the placement of the device is a matter of professional judgment and no discretion is involved. In the present case, there are no Standards and no Guidance in the MUTCD indicating that an advisory speed plaque should be used in a particular circumstances. There are no detailed recommendations telling an engineer when and where to use such a sign. The same can be said for a Dead End or No Outlet sign. Their uses are presented as mere Options, and the decision whether or not to exercise that option is a pure matter of discretion.

Through her appeal, Patterson has failed to come forward with legal or factual support for her negligence claim against Cowley County based on breaches of the alleged duties to install an advisory speed plaque or conduct an engineering study. The fact that Patterson has retained experts who opine that an engineering study should have been conducted and that additional signage should have been selected as an Option does not defeat Cowley County's discretionary immunity defense. *See Acosta*, 1995 Kan. App. Unpub. LEXIS 861, at *8-9 ("While the appellant's expert is eminently qualified to offer his opinion concerning the application of the MUTCD, it is the function of the court to interpret it."). The district court was correct in finding that the County could not be liable on these theories.

CROSS-APPELLANT'S BRIEF

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

1. Whether, as a matter of law, when the Manual on Uniform Traffic Control Devices states that the placement of a Dead End or No Outlet sign is an "Option," the decision of whether to erect such a sign is left to the discretion of the governmental authority, so that the authority is immune from liability for its decision under K.S.A. 75-6104(e) and (h).

2. Whether only those governmental entities who operate a recreational area, or have a role in integrating a feature into the recreational area, are entitled to immunity from liability under K.S.A. 75-6104(o).

3. Whether a governmental entity that is immune from liability under K.S.A. 75-6104(k) for failing to inspect private property and warn of conditions located on that property, loses that immunity if it becomes generally aware of a hazard by means other than inspection.

ARGUMENT AND AUTHORITIES

I.
STANDARD OF REVIEW

Cowley County's cross-appeal challenges the district court's denial of summary judgment to the County under three exceptions to liability set forth in the

Kansas Tort Claims Act. There is no disagreement as to the material facts pertinent to these issues; rather, the parties disagree as to how the law applies to those facts. Under these circumstances, the Court's standard of review is *de novo*. *See Cook v. Gillespie*, 285 Kan. 748, 754, 176 P.2d 144 (2008) (when there is no disagreement over the material facts, court reviews denial of summary judgment *de novo*); *Lyons ex rel. Lawing v. Holder*, 38 Kan. App. 2d 131, 135, 163 P.3d 343 (2007) ("appellate court reviews application of facts to the law under a *de novo* standard"); *In re Marriage of Traster*, 301 Kan. 88, 98, 339 P.3d 778 (2014) (interpretation of statute is a question of law subject to unlimited review).

II.
THE COUNTY HAD DISCRETION AS TO WHETHER TO PLACE AN ADDITIONAL WARNING SIGN ON ITS PORTION OF 332ND ROAD AND IS IMMUNE FROM LIABILITY FOR ITS DECISION.

This issue is very similar to the issue involved in Patterson's appeal against Cowley County.

In addition to the speed advisory plaque discussed in Patterson's appeal, the plaintiffs argued in the district court that the County was negligent in not posting a Dead End or No Outlet sign on its portion of 322nd Road. Like the speed advisory plaque, the placement of a "Dead End" or "No Outlet" sign is an "Option" under § 5C.11 of the MUTCD (R. Vol. 1, p. 1553). In the district court, the County moved for summary judgment arguing that because both an advisory speed plaque and a Dead End or No Outlet sign are categorized as Options in the MUTCD, the County

had discretion as to whether to install these signs and has immunity from liability for its failure to decide to do so. As noted above, the district court granted the County's motion regarding the speed advisory plaque, but denied it as to the Dead End or No Outlet sign.[11]

If both types of signs are Options under the MUTCD, how could the district reach a different result for one than the other? As shown above, when the MUTCD only provides a traffic control as an Option, no mandatory duty is created and the governmental entity cannot be liable for its failure to exercise its discretion to adopt the Option. The district court, however, was convinced that *Carpenter v. Johnson*, 231 Kan. 783, 649 P.2d 400 (1982), required it to look beyond the MUTCD to the "totality of the circumstances" to determine whether the County's decision to not place a "Dead End" or "No Outlet" sign was discretionary. (R. Vol. 1, pp. 2862-2865).

In an attempt to reconcile the authorities before it, the district court concluded, "it would appear that when MUTCD does not require placement of the sign ***and where placement [of] the sign would not have prevented injury***, then the court can determine the issue as a matter of law." (R. Vol. 1, p. 2865) (emphasis added). The Court then applied its two-prong test to the two types of signs the plaintiffs alleged

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[11] According to plaintiffs' experts, this sign should have been placed a *full mile* ahead of the point where the accident in question occurred, in order to warn of a hazzard that existed on Bolton Township's road in the midst of property operated by KDWPT. Thomas Alcorn acknowledged, however, that a "Dead End" or "No Outlet" sign a mile west of the accident site would not warn a driver that the road ends in the river, i.e., the allegedly dangerous condition in the Kaw Wildlife Area. (R. Vol. 1, p. 1497).

the County should have placed on its portion of 322nd Road. Because there was no question that neither sign was required under the MUTCD, the court looked to the second prong of its newly-fashioned test—whether placement of the sign would have prevented the accident:

> Because the failure to place the advisory speed placard did not cause or contribute to the plaintiffs [sic] injuries and because placement of this sign was not mandatory under the MUTCD the court finds that Cowley County is entitled to discretionary immunity on this portion of their claimed negligence. However, the court believes that a determination of alleged negligence for a failure to place the "DEAD END/NO OUTLET["] sign should be a matter for a jury to determine.

(R Vol. 1, pp. 2866-67).

With due respect to the district court, its differentiation between optional signs based upon whether or not the absence of the sign was the proximate cause of the accident is contrary to both law and logic.

As discussed extensively above, the legislature has directed that decisions regarding the placement of signs be made in accordance with the MUTCD. When the MUTCD presents placement as an Option that *"may"* be considered, the decision is left to the governing authority. This is the epitome of discretion. *Compare Estate of Belden v. Brown County*, 46 Kan. App. 2d 247, 291, 261 P.3d 943 (2011) ("Discretionary function immunity under the KTCA comes into play when a government actor makes a choice among policy options in addressing a given set of circumstances.") *with Thomas v. Shawnee County Board of Comm'rs*, 293 Kan. 208,

235, 262 P.3d 336 (2011) ("Where there is a clearly defined *mandatory* duty or guideline, the discretionary function exception is not applicable." [emphasis by the Court, internal quotes omitted]). The discretion granted by the MUTCD cannot simply disappear with the benefit of hindsight. *See Dunlap v. W.L. Logan Trucking Co.,* 829 N.E.2d 356, 363 (Ohio App.) (court will not second guess authority's decision to not utilize a particular traffic control option even if the "implementation of one of the other options would have prevented the accident in this case"), *appeal denied*, 835 N.E.2d 728 (Ohio 2005).

The district court's test creates an impossible dilemma for governmental entities because, notwithstanding the directives of the MUTCD, they cannot determine whether they have a mandatory duty to erect a traffic control device until a subsequent accident demonstrates that the failure to do so proximately caused an accident. In fact, under the district court's holding, the placement of a sign could *never* be discretionary, because even if placement is only an Option under the MUTCD, it might retroactively become mandatory if later shown to have been the proximate cause of an accident. This essentially reads K.S.A. 75-6104(h) out of the KTCA, because that subsection clearly contemplates that there are instances when a governing authority has discretion to place a sign and is to be relieved of liability for its decision not to do so.

Moreover, as discussed above, the Kansas Supreme Court's decision in *Toumberlin v. Haas*, 236 Kan. 138, 689 P.2d 808 (1984), demonstrates that a

governmental entity may be entitled to immunity for its decision not to place a sign *even though* the lack of the sign is found to be a proximate cause of an accident so that a jury may place a percentage of fault on the immune entity. *See* pp. 31-33, *supra*.

Once the district court determined that the placement of a Dead End or No Outlet sign was merely an Option under the MUTCD and not mandatory, its inquiry should have ceased. As a matter of law, there can be no liability for a governmental entity which, in its discretion, elects to not exercise an option presented to it. The district court's denial of summary judgment to Cowley County on this issue should be reversed.

III.
BECAUSE THIS ACCIDENT OCCURRED ON RECREATIONAL LAND, THE COUNTY IS IMMUNE FROM LIABILITY.

K.S.A. 75-6104(o) provides that a governmental entity is immune from liability "for any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or employee thereof is guilty of gross and wanton negligence proximately causing such injury."[12]

The district court correctly determined that the Kaw Wildlife Area is public property used as an "open area for recreational purposes," and that even though 322nd Road is not itself recreational in nature, it had been integrated into the recreational

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[12] Patterson has never contended that any act or omission of Cowley County constituted gross or wanton negligence. While Selenke made such a claim, there is no evidence to support such a finding.

area to enhance the recreational purpose. *See Poston v. Altoona-Midway U.S.D. No. 387*, 286 Kan. 809, 814-16, 189 P.3d 517 (2008) (feature of property that is not inherently recreational but is an integral part of the recreational facility is "collectively intended" to serve a recreational purpose and falls within recreational immunity). The court further found that the deaths of Patterson and Brewer resulted from their use of that area. It therefore granted summary judgment to KDWPT on this basis. However, the court denied summary judgment to Cowley County (and Bolton Township) because it concluded that the purpose of the immunity provided by this statutory provision would only be satisfied if the provision is limited to a party "who participates in the plan or design or integration of their non-recreational property with recreational property . . . ." (R. Vol. 1, p. 2872).

The district court cited no authority for its determination in this regard and the ruling is directly contrary to the language of the statute. K.S.A. 75-6104(o) provides immunity for "[a] governmental entity," for "any claim for injuries" when that claim arises from "any public property" used for recreational purposes. All of these terms carry a plain and unambiguous meaning. There is nothing in the statute that requires the governmental entity to have a particular relationship to the recreational property and the district court's imposition of this additional requirement violates a fundamental tenet of statutory construction:

> When a statute is plain and unambiguous, this court must give effect to its express language rather than determine what the law should or should not be. The court will not

> speculate on legislative intent and will not read the statute to add something not readily found in it.

Graham v. Dokter Trucking Group, 284 Kan. 547, 554, 161 P.3d 695 (2007).

If the legislature wanted to limit the immunity under subsection (o) to particular governmental entities, it clearly could have done so as it did with regard to subsection (p), which provides immunity for "the natural condition of any unimproved public property ***of the governmental entity***." (emphasis added). There is no corresponding requirement that the recreational property referenced in subsection (o) be the property "of" the entity seeking immunity.

Moreover, the district court's interpretation creates an anomalous situation whereby a governmental entity that is actually charged with maintaining a recreational facility cannot be liable for a dangerous condition existing therein, while another governmental agency can be held liable for not warning about the same condition.

"Immunity under the recreational use exception ***depends entirely upon the character of the property upon which the injury occurred***, not upon the nature of the activity performed." *Stone ex rel. Stone v. City of La Cygne*, No. 88,996, 2003 WL 1961969, at *1 (Kan. Ct. App. Apr. 11, 2003) (unpublished), *rev. denied*, 276 Kan. 974 (2003) (emphasis added). Here, the district court looked beyond the character of the property in determining that Cowley County was not sufficiently involved with the property to claim immunity. There is no statutory or other support for this holding and it should be reversed so that judgment may be entered in favor of Cowley County.

IV.
COWLEY COUNTY IS IMMUNE FROM LIABILITY BECAUSE IT HAD NO DUTY TO INSPECT AND WARN OF A HAZARD EXISTING ON PROPERTY IT DOES NOT OWN.

The KTCA provides immunity to a governmental entity for

> the failure to make an inspection, or making an inadequate or negligent inspection, of any property other than the property of the governmental entity, to determine whether the property complies with or violates any law or rule and regulation or contains a hazard to public health or safety;

K.S.A. 75-6104(k).

In response to Cowley County's motion for summary judgment under this provision, the plaintiffs argued that it was not necessary for the County to make an inspection of the township road and the Kaw Wildlife Area in order to determine that there was a hazard because it was common knowledge that 322nd Road ended at the Arkansas River. The district court found that "whether an inspection was needed is really a question of fact" and denied Cowley County's motion in this regard. (R. Vol. 1, p. 2877).

As a matter of law, it is unreasonable to suggest that Cowley County had a duty to erect warning signs for hazards on property owned by others without inspecting that property. It is not for a jury to determine what steps the County must take before erecting signs. The mere knowledge that a road eventually ends is insufficient to allow a governmental entity to evaluate whether a warning sign—and what warning sign—is appropriate. Rather an "inspection" "means an investigation, or examination

for the purpose of determining whether any property other than property of a governmental entity . . . constitutes a hazard to public health or safety." *Siple v. City of Topeka*, 235 Kan. 167, 172, P.2d 190 (1984) (emphasis added). General knowledge of a condition cannot substitute for the type of inspection that would have to be done before the County could determine whether a hazzard exists that would warrant the placement of some sort of warning sign.

For example, the "Guidance" which accompanies the "Option" to place a "Dead End" or "No Outlet" sign under the MUTCD states that:

> If used, these signs should be placed at a location that gives drivers of large commercial or recreational vehicles an opportunity to select a different route or turn around.

(R. Vol. 1, p. 1553). Cowley County would not be able to determine whether a "Dead End" or "No Outlet" sign should be placed at the point where the pavement ends without inspecting the property it does not own to determine whether there is sufficient space somewhere along the township road to allow large vehicles to turn around.

Contrary to the district court's holding, actual knowledge of a hazardous condition on property not owned by a governmental entity does not eliminate inspection immunity. In *Sisk v. National Railroad Passenger Corp.*, 647 F .Supp. 861 (D. Kan. 1986), an automobile collided with a train at a crossing in Cimarron and the driver of the automobile died. His heirs sued the railroad for, among other things, "failing to maintain the crossing free of weeds and shrubs which limited sight distance

. . . ." 647 F. Supp. at 862. The heirs also sued the City of Cimarron for, among other things, "failing to remove brush and shrubs from the crossing . . . ." *Id.*

Given the fact that the brush and shrubs were alleged to be a cause of the accident, it is clear that they were not hidden, but were open and obvious for all, including the city, to see. Nevertheless, the court held that the city was entitled to immunity on this claim because "K.S.A. 75-6104(j)[13] immunizes the city from liability for failure to inspect property which does not belong to the government to determine whether it contains a hazard to public safety." *Id.* at 863. Thus, the fact that the city may have had actual knowledge of the alleged hazzard did not preclude it from claiming inspection immunity.

No prudent governmental authority would presume to warn of a hazard without a proper inspection, and the authority's decision whether or not to conduct such an inspection cannot be the basis for liability. Nor can general knowledge of a condition substitute for the inspection and impose a duty on the authority. The district court erred in denying summary judgment to Cowley County on this basis.

CONCLUSION

For the reasons stated above, Cowley County requests as follows:

(1) That the Court affirm the district court's grant of summary judgment to Cowley County on plaintiffs' theory that an advisory speed plaque

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[13] The inspection immunity provision was previously found in subsection (j).

should have been placed on the County's portion of 322nd Road or that an engineering study should have been performed;

(2) That the Court reverse the district court's refusal to grant summary judgment to Cowley County on plaintiffs' theory that a Dead End or No Outlet sign should have been placed on the County's portion of 322 Road, because Cowley County is immune under the discretionary funcation exception to liability under the KTCA;

(3) That the Court reverse the district court's refusal to grant summary judgment to Cowley County pursuant to the recreational immunity exception to liability under the KTCA;

(4) That the Court reverse the district court's refusal to grant summary judgment to Cowley County pursuant to the inspection immunity exception to liability under the KTCA;

(5) That the case be remanded to the district court with directions to enter judgment in favor of Cowley County on all of plaintiffs' claims.

Respectfully submitted,

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

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2016, I submitted the foregoing 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:

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Attachment A

Acosta v. City of Wichita,
1995 Kan. App. Unpub. LEXIS 861
(Kan. Ctr. App. Jan. 27, 1995)

7 of 7 DOCUMENTS

DIANE L. ACOSTA and RIGOBERTO R. ACOSTA, Mother and Father, and Natural Guardians of JOSE L. ACOSTA, a Minor, Appellants, v. MILDRED G. HARRIS, Defendant, and CITY OF WICHITA, Appellee.

No. 71,015

COURT OF APPEALS OF KANSAS

1995 Kan. App. Unpub. LEXIS 861

January 27, 1995, Opinion Filed

NOTICE: NOT DESIGNATED FOR PUBLICATION.

PLEASE CONSULT THE KANSAS RULES FOR CITATION OF UNPUBLISHED OPINIONS.

PRIOR HISTORY: [*1]

Appeal from Sedgwick District Court; PAUL BUCHANAN, judge.

DISPOSITION: Affirmed.

COUNSEL: José Hurlstone-Peggs, of William L. Fry, P.A., of Wichita, for appellants.

Douglas J. Moshier, senior assistant city attorney, for appellee.

JUDGES: Before ROYSE, P.J., LARSON, J., and GLENN D. SCHIFFNER, District Judge, assigned.

OPINION

MEMORANDUM OPINION

Per Curiam: This is an interlocutory appeal by Diane L. Acosta and Rigoberto R. Acosta, parents of Jose L. Acosta, from an order of the district court granting summary judgment in favor of the City of Wichita (City). The appellants argue the district court erred in finding the alleged wrongful acts and omissions fell within the discretionary function exception to liability in the Kansas Tort Claims Act (KTCA), *K.S.A. 1993 Supp. 75-6104(e).*

On July 6, 1989, Jose Acosta was injured when he was struck by a car driven by defendant Mildred G. Harris. Acosta was in an unmarked crosswalk regulated by a traffic light at the corner of 25th Street and North Arkansas Avenue in Wichita. A van was stopped at a red light for Arkansas Avenue traffic, between the unmarked east-west crosswalk and north curb of 25th Street. Acosta walked behind the van. As Acosta was crossing in the unmarked crosswalk [*2] with the walk sign for pedestrians reading "walk," defendant Harris turned left from 25th Street onto Arkansas Avenue and struck him.

Acosta's parents filed suit on his behalf alleging negligence against Harris, and negligence and maintaining a nuisance against the City.

Plaintiffs retained Paul Graves, a consulting engineer. Graves was traffic engineer for the City from 1957 to 1980 and was partly responsible for construction of the intersection. He opined that the City "was negligent in its failure to erect and maintain the warranted traffic control devices in conformance with the MUTCD [Manual on Uniform Traffic Control Devices] (and other recognized traffic engineering authorities) in the exercise of professional engineering judgment. This failure was a major contributing factor in the occurance [*sic*] of this accident."

Graves believed, in his professional engineering judgment, the MUTCD required the City to install: (1) a "STOP HERE ON RED" sign; (2) stop lines; and (3) marked crosswalks at the subject intersection.

The MUTCD provisions cited by Graves state:

> **"1A-4 Engineering Study Required**
>
> "The decision to use a particular device at a particular location should be made on the basis [*3] of an engineering

study of the location. Thus, while this Manual provides standards for design and application of traffic control devices, the Manual is not a substitute for engineering judgment. It is the intent that the provisions of this Manual be standards for traffic control devices installation, but not a legal requirement for installation.

"Qualified engineers are needed to exercise the engineering judgment inherent in the selection of traffic control devices . . . ."

"1A-5 Meanings of 'Shall,' 'Should' and 'May'

"In the Manual sections dealing with the design and application of traffic control devices, the words 'shall,' 'should' and 'may' are used to describe specific conditions concerning these devices. To clarify the meanings intended in this manual by the use of these words, the following definitions apply:

"1. SHALL-a *mandatory* condition. Where certain requirements in the design or application of the device are described with the 'shall' stipulation, it is mandatory when an installation is made that these requirements be met.

"2. SHOULD-an *advisory* condition. Where the word 'should' is used, it is considered to be advisable usage, recommended but not mandatory.

"3. MAY-a *permissive* [*4] condition. No requirement for design or application is intended.

. . . .

"2A-1 Function of Signs

"Signs should be used only where warranted by facts and field studies. Signs are essential where special regulations apply at specific places or at specific times only, or where hazards are not self-evident.

. . . .

"2A-4 Standardization of Application

. . . .

"Determination of the particular sign or signs to be applied to a specific condition shall ordinarily be made in accordance with the criteria set forth in the following pages. However, engineering judgment is essential to the proper use of signs, the same as with other traffic control devices. Traffic engineering studies may indicate that signs would be unnecessary at certain locations. The judgment resulting from traffic engineering studies of physical and traffic factors should be depended upon to determine locations where signs are deemed necessary.

"2B-37 Traffic Signal Signs

"To supplement traffic signal control, auxiliary signs of the type illustrated are often desirable or necessary for the instruction of pedestrians and drivers. . . .

. . . .

"Signal instruction signs may be needed at certain locations to clarify signal control, [including] [*5] . . . STOP HERE ON RED . . . for observance of signal limit lines.

"3B-17 Stop Lines

. . . .

"Stop lines should be used in both rural and urban areas where it is important to indicate the point, behind which vehicles are required to stop, in compliance with a STOP sign, traffic signal, officers' direction, or other legal requirement.

"3B-18 Crosswalks and Crosswalk Lines

. . . .

"Crosswalks should be marked at all intersections where there is substantial conflict between vehicle and pedestrian movements." Manual on Uniform Traffic Control Devices (1988 ed.).

Appellant argues the trial court erred in granting summary judgment in favor of the City. He asserts that because the City exercised professional judgment in the design of the intersection, it is not immune from liability. He argues the City was negligent in failing to properly mark and sign the intersection. The City claims the decision to mark and sign the intersection is a discretionary function for which it is immune from liability under the KTCA.

The trial court held the alleged wrongful acts and omissions fell within the discretionary function exception of the KTCA, *K.S.A. 1993 Supp. 75-6104(e)*, and entered summary judgment for the [*6] City.

Summary judgment is proper where there is no genuine issue as to a material fact and the moving party is entitled to judgment as a matter of law. *Force v. City of Lawrence, 17 Kan. App. 2d 90, 93, 838 P.2d 896, rev. denied 251 Kan. 937 (1992)*. The trial court is required to resolve all facts and inferences in the light most favorable to the nonmoving party. *Hurlbut v. Conoco, Inc., 253 Kan. 515, 520, 856 P.2d 1313 (1993)*.

The KTCA makes governmental liability the rule and immunity the exception. *Collins v. Board of Douglas County Comm'rs, 249 Kan. 712, 720, 822 P.2d 1042 (1991)*. A governmental entity, however, is not liable for damages resulting from:

> "(e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved;
>
> . . .
>
> "(h) the malfunction, destruction or unauthorized removal of any traffic or road sign, signal or warning device unless it is not corrected by the governmental entity responsible within a reasonable time after actual or constructive notice of such malfunction, destruction [*7] or removal. *Nothing herein shall give rise to liability arising from the act or omission of any governmental entity in placing or removing any of the above signs, signals or warning devices when such placement or removal is the result of a discretionary act of the governmental entity.*
>
> . . . .
>
> "(m) the plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved in advance of the construction or improvement by the governing body of the governmental entity or some other body or employee exercising discretionary authority to give such approval and if the plan or design was prepared in conformity with the generally recognized and prevailing standards in existence at the time such plan or design was prepared." (Emphasis added.) *K.S.A. 1993 Supp. 75-6104*.

When established, an exception to liability constitutes a jurisdictional bar. *Carpenter v. Johnson, 231 Kan. 783, 786, 649 P.2d 400 (1982)*.

The Secretary of Transportation adopted the MUTCD, in accordance with *K.S.A. 8-2003*. *Carpenter, 231 Kan. at 787*. Local authorities, in conformance with the state manual, "shall place and maintain [*8] such traffic-control devices upon highways under their jurisdiction as they may deem necessary to . . . regulate, warn or guide traffic." *K.S.A. 8-2005*.

The Kansas Supreme Court has addressed on several occasions whether the placement or failure to place traffic signs is a discretionary function within the meaning of the KTCA or is the exercise of professional judgment within established guidelines. In *Collins, 249 Kan. 721*, the court held that the duty to place a sign is discretionary where no mandated duty or guideline exists. In his deposition testimony, Graves cited paragraphs 3B-17 and 2B-37 of the MUTCD as the authority for his opinion that the MUTCD mandated the City to install (1) a "STOP HERE ON RED" sign; (2) stop lines; and (3) marked crosswalks at the subject intersection.

Paragraph 3B-17 uses the term "should" and paragraph 2B-37 utilizes the term "may." Paragraph 1A-5 of the MUTCD defines the term "should" as referring to an advisory condition, "recommended but not mandatory," while the term "may" is defined as a permissive condition.

While the appellant's expert is eminently qualified to offer his opinion concerning the application of the MUTCD, it is the function of the [*9] court to interpret it. In interpreting the applicable provisions of the MUTCD, this court finds that the MUTCD did not mandate the placement of the signage Graves opined would have prevented the plaintiff's injuries and that the City was exercising its discretionary function in designing the subject intersection. The plaintiff's claim is barred by the discretionary function exception of the KTCA.

The appellant's allegation of nuisance was not certified for interlocutory appeal. The issue certified by the district court was whether the City was immune under *K.S.A. 1993 Supp. 75-6104(e)*. Because the issue was not certified, it will not be considered on appeal. See *American States Ins. Co. v. Hanover Ins. Co., 14 Kan. App. 2d 492, 501, 794 P.2d 662 (1990)*.

Affirmed.

Attachment B

Stone ex rel. Stone v. City of La Cygne,
No. 88,996, 2003 WL 1961969
(Kan. Ct. App. Apr. 11, 2003),
rev. denied, 276 Kan. 974 (2003)

2003 WL 1961969
Only the Westlaw citation is currently available.

Court of Appeals of Kansas.

Scott STONE, a Minor, By and Through his Natural Father and Next Friend Ricky V. Stone, and Ricky V. Stone, Individually, Appellants,
v.
CITY OF LA CYGNE, Kansas, A Kansas Municipality, Appellee.

No. 88,996.
|
April 11, 2003.

Appeal from Linn District Court; Richard M. Smith, judge. Opinion filed April 11, 2003. Affirmed.

Attorneys and Law Firms

Gregory M. Dennis, of Kent T. Perry & Co., L.C., of Overland Park, and Carston C. Johannsen, of Gould Law Offices Chtd., L.L.C., of Lenexa, for appellants.

J. Steven Pigg and Kristine A. Polansky, of Fisher, Patterson, Sayler & Smith, L.L.P., of Topeka, for appellee.

Before RULON, C.J., LEWIS and GREEN, JJ.

MEMORANDUM OPINION

PER CURIAM.

***1** Plaintiffs, Scott Stone and Ricky Stone, appeal a summary judgment ruling in favor of the defendant, the City of La Cygne, Kansas. The plaintiffs contend the recreational use exception of the Kansas Tort Claims Act (KTCA) is inapplicable in this case and the district court improperly found there was insufficient evidence of gross and wanton conduct to submit the case to a jury.

A detailed discussion of the underlying facts is not necessary for this court to resolve the issues presented.

The plaintiffs challenge the district court's interpretation of the recreational use exception to the KCTA, K.S.A.1999 Supp. 75-6104(o), arguing the exception should not extend immunity from liability to nonpublic facilities tangential, although perhaps instrumental, to recreational property. This issue involves an interpretation of the statute, which is a question of law. This court has unlimited review of such questions. See *Tullis v. Pittsburg State Univ.,* 28 Kan.App.2d 347, 350, 16 P.3d 971 (2000).

In pertinent part, K.S.A.1999 Supp. 75-6104 provides:
"A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

....

"(o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury."

Under the KCTA, government liability is the rule, and a government entity bears the burden of proving that such entity falls into one of the enumerated exceptions. See *Jackson v. U.S.D. 259,* 268 Kan. 319, 322, 995 P.2d 844 (2000). Immunity under the recreational use exception depends entirely upon the character of the property upon which the injury occurred, not upon the nature of the activity performed. Thus, if the intended or permitted use of the property is recreational, the government entity is immune from liability for ordinary negligence, even if the activity occurring at the time of the injury was not recreational. See *Barrett v. U.S.D. No. 259,* 272 Kan. 250, 257, 32 P.3d 1156 (2001).

Here, the property, broadly defined, is a public swimming pool. Although the pool is sometimes used to provide swimming instruction, its primary and intended purpose is recreation. However, the plaintiffs attempt to define the property at issue more narrowly. The plaintiffs contend that Scott Stone's injury occurred in the pool shed, access to which was restricted to only authorized personnel. Arguing that a member of the public did not have access to the pool shed absent authorization of city employees or negligence, the

plaintiffs urge this court to distinguish between the public swimming pool property and the property of the pool shed, for purposes of applying the recreational use exception.

While not entirely analogous, the reasoning of *Wilson v. Kansas State University,* 273 Kan. 584, 44 P.3d 454 (2002), is instructive. In *Wilson,* our Supreme Court considered whether the university was immune from tort liability arising from an injury occurring to a patron of the football stadium within a stadium restroom. Recognizing that the restroom was not intended for recreational purposes, our Supreme Court emphasized the relationship of the restroom to the stadium, which clearly did possess a recreational purpose. *Wilson,* 273 Kan. at ----.

***2** "The restrooms are part of the stadium. The restrooms allow people to continue enjoying the recreational purposes provided by the football games at the stadium without leaving. Likewise, the usefulness of the park is increased and the legislative purpose is advanced. As the trial court in this case noted, the restrooms are 'an integral part of a football stadium.' To the extent the legislature intended to encourage the building of recreational facilities with K.S.A.2001 Supp. 75-6104(o), extending immunity to cover negligent acts in restrooms is consistent with the legislative intent because such extension further increases the incentive to build recreational facilities." *Wilson,* 273 Kan. at ----.

Just as the restrooms facilitated the recreational purpose of the stadium by permitting spectators to remain at the stadium, so too, the machines and chemicals housed by the pool shed facilitate the recreational use of the pool. The pool could not be used at all if the water were not cleaned. Consequently, the pool shed is an integral part of the recreational use intended by the development of the city pool. Moreover, unlike restrooms attached to a recreational facility, the pool shed possesses no viable purpose apart from the swimming pool; its only function is to facilitate the use of the recreational property.

Granted, in *Wilson,* the restrooms were intended for public use, and the recreational, public use of the stadium was enhanced by the nonrecreational, public use of the on-site restrooms. In contrast, here, the public was generally prohibited from entering the pool shed. The public's access to the shed was not necessary to promote the recreational use of the pool.

In *Lewis v. Jasper Co. Comm. Unit. Sch. Dist.,* 258 Ill.App.3d 419, 196 Ill.Dec. 383, 629 N.E.2d 1227 (1994), cited with approval by our Supreme Court in *Wilson,* the Illinois Court of Appeals considered whether the recreational use exception to tort liability under the Illinois statute extended to a pump house located on a playground. Even though the pump house possessed no recreational use, the *Lewis* court determined that the exemption to tort liability should extend to an injury caused by falling against the pump house because the pump house was located on recreational property. 258 Ill.App.3d at 424.

The plaintiff attempts to distinguish *Lewis* on the basis of the location of the injuries; Lewis had fallen against the exterior of the pump house, while Scott Stone was injured by entering the pool shed. In considering the legislative purpose behind the recreational use exception, however, this distinction becomes meaningless.

Government entities are provided with immunity with respect to recreation areas in the belief that holding a government entity liable for ordinary negligence with respect to such property will discourage the creation of public recreation areas. See *Jackson v. U.S.D. 259,* 268 Kan. at 330, 995 P.2d 844. The rule proposed by the plaintiffs undermines this legislative purpose by holding government entities liable for ordinary negligence related to restricted areas of recreational property which are integral to the recreational use of that property.

***3** In *Spencer v. City of Chicago,* 192 Ill.App.3d 150, 139 Ill.Dec. 216, 548 N.E.2d 601 (1989), the plaintiff contended the city was subject to an ordinary negligence standard, rather than the heightened negligence standard under the immunity statute, because signs posted around a lagoon in the park clearly designated the lagoon was not intended to be used for recreational purposes. Rejecting the plaintiffs arguments, the *Spencer* court held the lagoon was part of the park and the city was immune from suit for ordinary negligence. The court then considered whether the plaintiff had alleged sufficient facts to demonstrate willful or wanton negligence. *Spencer,* 192 Ill.App.3d at 155-56, 139 Ill.Dec. 216, 548 N.E.2d 601.

Similarly, although the City of La Cygne had barred the general public from access to the pool shed, the restriction does not affect the nature of the pool shed as an integral part of the recreational use of the pool. Rather, the circumstances leading to an injury by a member of the public should be taken into consideration when determining whether the City's conduct constituted gross and wanton negligence.

The plaintiffs contend their evidence regarding the City's conduct in this case established a prima facie case for gross and wanton negligence and the district court should have allowed the question to be presented to a jury instead of granting summary judgment in favor of the defendant.

Summary judgment is only appropriate when a court, after reviewing the record in a light most favorable to the nonmoving party, is convinced that the case presents no issues of disputed material fact and that judgment as a matter of law is appropriate. See *Bergstrom v. Noah,* 266 Kan. 847, 871-72, 974 P.2d 531 (1999). Ordinarily, because the presence or absence of negligence in any degree is a question of fact for the jury, summary judgment should not be entered in negligence cases. See *Gruhin v. City of Overland Park,* 17 Kan.App.2d 388, 392, 836 P.2d 1222 (1992).

However, where no reasonable person could reach a different legal conclusion from the evidence available, the case may be decided as a matter of law. See *Gruhin,* 17 Kan.App.2d at 392, 836 P.2d 1222 (citing *Smith v. Union Pacific Railroad Co.,* 222 Kan. 303, 306, 564 P.2d 514 [1977]).

In order to prevail on a claim of gross and wanton negligence, the plaintiff must demonstrate "something more than ordinary negligence but less than a willful act. [Wantonness] indicates a realization of the imminence of danger and reckless disregard and indifference for the consequences." *Gruhin,* 17 Kan.App.2d at 392, 836 P.2d 1222. A plaintiff must show that a defendant had knowledge of existing conditions that would probably cause injury to another, yet acted, or refused to act, with reckless disregard as to whether that injury would occur. See *Reeves v. Carlson,* 266 Kan. 310, 315, 969 P.2d 252 (1998).

A plaintiff's knowledge of a dangerous condition may be either actual or constructive. However, evidence demonstrating an individual's failure to exercise ordinary diligence to obtain the necessary knowledge to prevent injury does not constitute wanton misconduct but merely negligence. See *Railway Co. v. Baker,* 79 Kan. 183, 187, 98 Pac. 804 (1908); 57A Am.Jur.2d, Negligence § 273, p. 304.

***4** Moreover, it is insufficient to support a claim of wanton misconduct to allege that a person knew that their conduct might place another person in danger. "The probability must be so great ... that they must be deemed to realize the likelihood that a catastrophe is imminent and yet to omit reasonable effort to prevent it because indifferent to the consequences." *Railway Co. v. Baker,* 79 Kan. at 187, 98 P. 804; see 7A Am.Jur.2d, Negligence § 281, pp. 310-11.

In the present case, the plaintiffs allege the City possessed actual knowledge that chlorine was a hazardous material and the City possessed constructive knowledge, via the Red Cross lifeguard training manual, that chlorine gas is extremely corrosive and is occasionally generated in the pump rooms of swimming pool facilities. The plaintiffs further contend the City subjected Scott Stone to the unreasonable risk of chlorine inhalation without taking proper precautions to mitigate against this known danger by providing him with protective clothing.

Knowledge that chlorine is a toxic substance does not, in itself, demonstrate a disregard or indifference to a dangerous situation. Before being combined with water, the chlorine is generally stored as a solid in tablets or sticks. There is no evidence that Scott Stone was required or expected to handle any chlorinated substances.

While the lifeguard training manual warns that chlorine gas generated by pool machinery can collect in pump or filter rooms, this warning statement is insufficient to provide notice to a reasonable person that injury by chlorine inhalation is probable. Such warning presents notice of a possibility that chlorine gas is present, but failure to take precautionary measures against possible consequences is a lack of due diligence, which is ordinary negligence, not wanton recklessness. See *Railway Co. v. Baker,* 79 Kan. at 187, 98 P. 804.

The defendant's evidence regarding the absence of chlorine gas in the pump shed in the past is not controverted. The pool attendant testified that she refilled the machine 3 or 4 times a day. Never had she seen or smelled chlorine gas when the lid of the chlorinator was removed, even on those occasions in which the lid was difficult to remove. Nothing within the lifeguard training manual, or in the cautionary statements posted on the machines and storage containers in the pump shed, indicates a probability that chlorine gas generated by the chlorinator will be released upon opening the lid.

Consequently, the plaintiffs cannot produce any evidence which demonstrates the defendant knew or reasonably should have known that there was a high risk that chlorine gas would escape from the chlorinator when Scott Stone helped the pool attendant open the chlorinator. Because the evidence, presented in a light most favorable to the plaintiff, fails

to establish that from the information available to the defendant, a reasonable person would have perceived that the pool attendant was placing Scott Stone in an unreasonably dangerous situation in which injury was probable, the district court properly granted summary judgment in favor of the defendants.

***5** Affirmed.

All Citations

Not Reported in P.3d, 2003 WL 1961969

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