ELECTRONICALLY FILED
2016 Feb 25 AM 12:00
CLERK OF THE APPELLATE COURT
CASE NUMBER: 114705

No. 15-114705-A

IN THE COURT OF APPEALS
OF THE STATE OF KANSAS

ROCHELLE PATTERSON, MOTHER AND NEXT BEST FRIEND OF NICOLETTE PATTERSON, A MINOR, AND GAVIN PATTERSON, A MINOR
Plaintiff-Appellant/Cross-Appellee.

v.

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

BRIEF OF PLAINTIFF-APPELLANT/CROSS-APPELLEE

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

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I. NATURE OF THE CASE AND NATURE OF THE APPEALED ORDER

This is an interlocutory appeal of the trial court's Order of October 22, 2015, granting in part and denying in part Patterson's Motion for Partial Summary Judgment as to all defendants in this action. This is a wrongful death action in which Plaintiff Patterson asserted claims arising from the deaths of Jason Patterson on November 19, 2010. On the date in question, a motor vehicle occupied by Patterson and Courtney Brewer traveled down a road in Cowley County, Kansas, in the Bolton Township, commonly known as 322nd Road. That road dead-ended in the Arkansas River. It is undisputed that neither Cowley County nor Bolton Township, both of which had control of that roadway put up warning signs or barricades to alert users of the roadway to fact that the road ended in the river. As the vehicle occupied by Patterson and Brewer traveled down that roadway on the evening of November 19, 2010, it was traveling 10 to 12 miles per hour when it began to brake just prior to reaching the riverbank. The front right tire of the vehicle then slid over the edge of the river bank, the vehicle fell down the 12-15' vertical bank of the river, landed on its front end on the river's edge and then fell on its roof in the Arkansas River. The two occupants of the vehicle drowned and were found deceased some eight to nine hours later.

At the time of the ruling on October 22, 2015, the trial court had before it Patterson's Motion for Partial Summary Judgment; Selenke's Motion for Partial Summary Judgment; the Kansas Department of Wildlife, Parks, and Tourism's Motion for Summary Judgment; Cowley County's Motion for Summary Judgment; and Bolton Township's Motion for Summary Judgment. Patterson and Selenke argued that each defendant's legal duty with respect to 322nd Road could be defined as a matter of law. Defendant KDWPT argued that it was entitled to immunity on several theories, and also that the Plaintiffs'

claims were barred by the statute of repose. Defendant Cowley County argued that it had no duty for certain portions of 322nd Road, and that to the extent it had any duty, it was entitled to immunity under several theories. Finally, Defendant Bolton Township argued that it was entitled to recreational use immunity.

The trial court consolidated the above-referenced motions for purposes of the hearing that ultimately resulted in the appealed Order. As to Cowley County, the court found that it had jurisdiction over and duty for the portion of 322nd Road that was a county road, and that it was not entitled to any recreational use immunity as a matter of law as to that portion of the road. The court did find, however, that the county was entitled to discretionary function immunity with respect to Patterson's claim that the City did not place an advisory speed placard on the portion of the road that it controlled. As to Bolton Township, the court found the Township was not entitled to recreational use immunity either under the Kansas Tort Claims act or the Kansas statutes. The court granted summary judgment to Bolton Township on the issue of duty, though, finding the Township had no legal duty to place signs on the portion of 322nd Road that was a Township road.

In making its ruling, the trial court recognized that it was being asked to resolve what it believed was a conflict between binding Kansas Supreme Court precedent and legislative action occurring after that precedent was set. The trial court further recognized that any decisions it made regarding duty potentially impacted the outcome of the entire case, and consequently certified this matter for an interlocutory appeal on those issues. Patterson accordingly is appealing the trial court's grant of partial summary judgment to Cowley County and the trial court's grant of summary judgment as to Bolton Township.

Patterson is not appealing the Court's ruling on issues related to KDWPT. When Patterson made her initial investigation and demand of these claims, the County Engineer had reported that the County would work on 322nd Road on the part of the roadway after the pavement ended and east to the river, only if KDWPT asked for such work. Based on that statement, Plaintiff Patterson asserted claims against KDWPT. Discovery in this case disclosed the statements of the County Engineer were not accurate. Based on the misstatements by the County Engineer and the legal rulings by the Court relating to KDWPT, Patterson is not appealing that part of the Trial Court's ruling relating to KDWPT.

II. ISSUES ON APPEAL

A. Did the trial court err when it found that Defendant Cowley County was entitled to discretionary function immunity with respect to Patterson's claim that the County failed to place certain warnings or signs on the portion of 322nd Road within its jurisdiction?

B. Did the trial court err when it found that Defendant Bolton Township had no statutory duty to place traffic control devices on the portions of 322nd Road within its jurisdiction?

III. STATEMENT OF THE FACTS

The following statement of facts are taken from plaintiff, Rochelle Patterson's Motion for Summary Judgment. Because this is an appeal from entry of judgment following a motion for summary judgment, the standard of review is *de novo*. The statement of facts are as follows:

A. County Road 322

1. On April 18, 1873 the Cowley County Commission granted a Petition of County Electors to open a road called "Section Line Road of South Fairman." As described and laid out, this road extended from the Southwest Corner of the Southwest

Quarter of Section 7, Township 35 South, Range 3 East and ran along the section line through Range Ford East to the Arkansas River. See Def. Cowley County's Answers to Plaintiff's Second Interrogatories, No. 21 and attachments attached as Exhibit "A." (Rec. Vol. 1, pp.1207-1217).

2. In 1917 the Kansas Legislature enacted a new set of laws relating to roads and highways found at Kansas Session Laws, Ch. 264, §15. This section of the Kansas Session Laws created and required a classification of roads in the counties, accordingly to the relative importance as "County Roads" or "Township Roads." The Section Line Road of South Fairman did not meet the criteria for a "county road" and was not designated as such by the County. Therefore, it was and remained a township road. A current version of this classification for non-county unit road system counties, such as Cowley County, if found at K.S.A. 68-506. *See* Def. Cowley County's Answers to Plaintiff's Second Interrogatories, No. 21 and attachments attached as Exhibit "A." (Rec. Vol. 1, pp.1207-1209).

3. The County never designated the entire portion of Section Line Road of South Fairman up to the bank of the Arkansas River as a county road. However, on April 4, 1955 the Cowley County Commission enacted a Resolution which provided as follows:

> "Whereas, the present township road (SF Fairman Road) is unsuitable and inadequate for present traffic demands;
>
> Now, therefore, be resolved and added that portion of said township road described as follows to the county road system:
>
> Beginning at the Northwest Corner of the East Half of the

> Northeast Quarter of Section 13, Township 35 South, Range 4 East of the 6th p.m., Cowley County, Kansas, thence West approximately Five and Three Quarter Miles to the Intersection with U.S. Highway 77, one mile North of the Kansas-Oklahoma line.
>
> Passed and Subscribed this 4th day of April, 1955."
>
> The Board of County Commission of Cowley County, Kansas."

See Def. Cowley County's Answers to Plaintiff's Second Interrogatories, No. 21 and attachments attached as Exhibit "A." (Rec. Vol. 1, pp.1207-1217).

4. Pursuant to that Resolution, the County took into the county road system that described portion of County Road 322 and has maintained that portion of Section Line Road of South Fairman as described above, which lies west of the unpaved portion of the road at issue in this case and continues west to Highway 77. *See* Def. Cowley County's Answers to Plaintiff's Second Interrogatories, Interrogatory No. 21 and attachments attached as Exhibit "A." (Rec. Vol. 1, pp. 1207-1217).

5. The Board of County Commissioners is empowered to vacate any country or township road by following statutory procedures. *See* K.S.A. 68-102. The County has taken no such affirmative action to vacate the portion of Section Line Road of South Fairman which begins at the end of the blacktop portion of the County Road and continues to the Arkansas River. *See* Def. Cowley County's Answers to Plaintiff's Second Interrogatories, Interrogatory No. 21 and attachments attached as Exhibit "A." (Rec. Vol. 1, pp.1207-1217).

6. That portion of County Road 322 from where the paved portion ends and then east to the Arkansas River that was not taken into the County Road System and remained a township road. *See* ¶1-5 above and the attachments thereto.

7. The first north/south road west of the end of the pavement on County Road 322 is 111th Road and that road is a township road. *See* Kaw Wildlife Area Map attached as Exhibit "B" (Rec. Vol. 1, pp.1219) and Roadmap of Bolton Township, Cowley County Kansas attached as Exhibit "C" (Rec. Vol. 1, pp.1221).

B. Signage

8. None of the defendants placed any regulatory nor warning signs at the intersection of 322nd Road and 111th Road in Cowley County, Kansas nor, were any warnings placed on County Road 322 from the intersection of 111th Road east to the Arkansas River other than the "pavement ends" signs placed by the County. *See* Depo. Exb. 102, attached as Exhibit "H" (Rec. Vol. 1, pp.1311); Depo. Arthur Bacastow, p.55, l.11 - p.56, l.20 attached as Exhibit "I" (Rec. Vol. 1, p.1313-1316).

9. Cowley County Road 322 as it proceeded east from Highway 77 to the Arkansas River was a public roadway. *See* Def. *See* Def. Kansas Department of Wildlife, Parks and Tourism's Response to Request for Admission No. 1 attached as Exhibit "J" (Rec. Vol. 1, p.1317-1319).

10. Cowley County Road 322 as it proceeded east from Highway 77 to the point where it reached the Arkansas River was open for use by the general public. Def. *See* Def. Kansas Department of Wildlife, Parks and Tourism's Response to Request for Admission No. 2 attached as Exhibit "J" (Rec. Vol. 1, p.1317-1319).

11. Cowley County Road 322 as it proceeded east from Highway 77 to the point where it reached the Arkansas River was accessible to the general public. Def. *See* Def. Kansas Department of Wildlife, Parks and Tourism's Response to Request for Admission No. 3 attached as Exhibit "J" (Rec. Vol. 1, p.1317-1319).

12. Cowley County Road 322 as it proceed east from Highway 77 to the Arkansas River in Cowley County, Kansas had no barriers or signs to mark the end of the road at the Arkansas River and had no warning signs along the way that a dangerous condition existed on that roadway on November 18, 2010. *See* Depo. Stewart Schrag, p.37, l.11 - p.38, l.17 attached as Exhibit "K" (Rec. Vol. 1, p.1321-1323). *See also* Depo. Exb. 20 attached as Exhibit "L" (Rec. Vol. 1, pp.1325).

13. County Road 322 as it approached the Arkansas River without warning signs or barriers to warn a driver of the drop-off and the proximity of the river to the end of the roadway was a dangerous condition that would not be apparent to drivers driving to the east on County Road 322 in the dark. *See* Expert Report of Thomas L. Alcorn, M.S., P.E. PTOE, attached as Exhibit "M" (Rec. Vol. 1, pp.1327-1338).

14. The State of Kansas has adopted the Model Uniform Traffic Control Device Standards (MUTCD) in its most current form to be applicable to all Kansas roadways, including County Road 322. *See* K.S.A. 8-2003.

15. Dale Steward, County Engineer before November 2010, agreed that the MUTCD was applicable to all streets, highways, bikeways, private roads, open to public use regardless of the type of public agency or official owner having jurisdiction over the road and that the 2009 Edition of the MUTCD was the version applicable to this case.

See Depo. Dale Steward, p.225, l.1 - p.226, l.20 attached as Exhibit "N" (Rec. Vol. 1, p.1340-1342).

16. Traffic control devices on a road are to notify road users of necessary information and to provide warning and guidance needed for safe use of that roadway. *See* Depo. Dale Steward, p.225, l.1 - p.226, l.20 attached as Exhibit "N" (Rec. Vol. 1, p.1340-1342).

17. In order for a traffic control device to be effective, it needs to meet five basic requirements according to the MUTCD including: that it fulfills a need, that it commands attention, that it conveys a clear simple message, that the command respects from road users and gives adequate time for proper response. *See* Depo. Dale Steward, p.225, l.1 - p.226, l.20 attached as Exhibit "N" (Rec. Vol. 1, p.1340-1342).

18. The MUTCD sets the standard for barricades to be used to warn and alert road users of the terminus of a roadway and that standard in the MUTCD requires an engineering study or engineering judgment. *See* Depo. Dale Steward, p.229, l.12 - p.230, l.17 attached as Exhibit "N" (Rec. Vol. 1, p.1340-1343).

19. Because none of the defendants have admitted any responsibility for that portion of County Road 322 from where the last intersection with 111 Road east to the Arkansas River, none of these defendants performed any type of an engineering study nor exercised any engineering judgment over what should have been done to warn drivers using that portion of that roadway of the dangerous condition or danger that existed there. See the Pretrial Order filed in this case and the contentions of each of the Defendants. (Rec. Vol. 1, p.1135-1173).

20. In accordance with the expert opinion provided in this case, signs should have been provided at the intersection of County Road 322 and the intersection of County Road 111 and additional signage between that intersection and the Arkansas River to warn drivers of the dead-end and the approaching Arkansas River and the danger it posed. *See* Expert Report of Thomas L. Alcorn, M.S., P.E. PTOE, attached as Exhibit "M" (Rec. Vol. 1, pp.1327-1338).

21. At the point at which County Road 322 intersects the Arkansas River, there should have been traffic control devices to warn drivers of the dead end and to mark the end of the roadway. There should have been object markers and barriers pursuant to the MUTCD to warn drivers of the end of the roadway. *See* Expert Report of Thomas L. Alcorn, M.S., P.E. PTOE, as Exhibit "M" (Rec. Vol. 1, pp. 1327-1338).

22. The failure to provide adequate signage and barriers and to warn of the proximity of the river and the danger of that location and the drop-off at the river bank into the river was the cause of Jason Patterson's death on November 18, 2010. *See* Expert Report of Thomas L. Alcorn, M.S., P.E. PTOE, attached as Exhibit "M" (Rec. Vol. 1, pp.1327-1338).

IV. ARGUMENT AND AUTHORITIES

A. Standard of Review

On review, this Court applies the same rules on the parties' summary judgment motions as are applied by the district court:

> Summary judgment is appropriate when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The trial court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When

> opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied.

Miller v. Westport Ins. Corp., 288 Kan. 27, 32, 200 P.3d 419 (2009) (quoting *Farha v. City of Wichita,* 284 Kan. 507, 511, 161 P.3d 717 (2007)) (citations and internal quotation marks omitted). If the parties agree that there is no factual dispute, this Court applies a de novo standard of review. *Lehman v. City of Topeka*, 50 Kan.App.2d 115, 118, 323 P.3d 867 (2014). Where the decision involved requires an interpretation of statutes, however, this Court exercises unlimited review. *Jeanes v. Bank of America, N.A.*, 296 Kan. 870, 873, 295 P.3d 1045 (2013).

Here, the issues raised in Patterson's interlocutory appeal concern the County's legal duty to place signs pursuant to Kansas law and the MUTCD, and the Township's legal duty pursuant to Kansas law to maintain its roadways in a safe manner for travelers. Those matters require this Court to interpret Kansas statutes, and therefore this Court exercises unlimited review.

B. The Trial Court Erred When It Ruled in Cowley County's Favor on the Issue of Discretionary Function Immunity.

1. Liability Remains the Rule Rather than the Exception under the Kansas Tort Claims Act, and the County's Actions With Respect to 322nd Road Do Not Automatically Qualify for Protection as Discretionary Functions.

Defendant Cowley County filed a Motion for Summary Judgment and memorandum of law in support claiming that it had no clearly-defined, non-discretionary, mandatory duty to erect *any* traffic control devices to warn drivers of the fact that 322nd Road east of the end of the pavement dead-ended in the Arkansas River. Cowley County

admits that it is the agency or official having jurisdiction over the portions of 322nd Road designated as a County Road, which include the portion of 322nd Road up to the point where the pavement ends. *See* Cowley County's Motion for Judgment Judgement. (Rec. Vol. 1, p.1375).

Patterson agrees that Cowley County is responsible under the MUTCD and Kansas statutes for placing and maintaining traffic control devices on this portion of 322nd Road, and agrees for purposes of this interlocutory appeal that Cowley County is not responsible for the portions of 322nd Road east of the end of the pavement, which are the jurisdiction of Bolton Township. Nevertheless, despite its admission that it is the entity responsible for placing and maintaining traffic-control devices on 322nd Road up to the end of the pavement, Cowley County argued in its summary judgment briefs that Patterson cannot maintain a negligence claim against it based upon its failure to place and maintain the proper traffic-control devices, because it had no non-discretionary or mandatory duty to do so. Patterson disagrees.

As the trial court acknowledged, Cowley County's claim of discretionary immunity for failure to place traffic control devices relied upon the Kansas Tort Claims Act found in K.S.A. 75-6104. The Act provides immunity for failure to perform "discretionary functions," and provides in part that "A governmental entity or employee acting within the scope of the employee's employment shall not be liable for damages resulting from ... (e). Any claim based upon the exercise or performance where the failure to exercise or perform a discretionary function or duty on the part of a government agency or employee, whether or not the discretion is abused, and regardless of the level of discretion involved." Cowley County's claim further relied on subsection (h) of the KTCA, which provides that "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 sign, signal, or warning device] when such placement or removal is the result of a discretionary act of the governmental entity."

The State of Kansas adopted the Manual on Uniform Traffic-Control Devices (MUTCD) in K.S.A. 8-2003, which required that the "secretary of transportation shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this act for use upon highways within this state." In *Carpenter v. Johnson*, 231 Kan. 783, 649 P.2d 400 (1982), the Supreme Court ruled that professional judgment, rather than governmental discretion, was used in an instance where the MUTCD set forth "rather detailed recommendations in placement of warning signs." *Id.* at 788. Ultimately the Court in *Carpenter* declined to uphold summary judgment on the issue of sign placement, finding "[w]hether or not the placement of a warning sign on the particular curve in controversy herein was discretionary or mandatory depends upon the totality of the circumstances involved and may not be determined as a matter of law without regard thereto." *Id.* at 790.

In *Tombourlin v. Haas*, 236 Kan. 138, 689 P.2d 808 (1984) the Supreme Court defined the general duty of a governmental entity to maintain roadways in a safe manner and extended the "totality of the circumstances" test elaborated by *Carpenter*, stating

> There can be no doubt that even with the repeal of statutory liability for defects in the highways, a duty to maintain the highways remains under the general liability for negligence created by the KTCA. Although the scope of that duty is to be determined on a case-by-case basis and no hard and fast rule can be stated which would cover all possible future factual situations, *Carpenter* makes it clear that the Manual on Uniform Traffic Control Devices is to be used as a guide for state and local highway engineers in exercising their professional judgment as to any particular highway problem. However, whether a particular set of facts falls within any of the

> exceptions created by K.S.A. 1983 Supp. 75-6104 must be determined by considering the "totality of the circumstances" in the particular case.

Id. at 144 (quoting *Carpenter v. Johnson*, 231 Kan. 783, 790, 649 P.2d 400 (1982)). Subsequently, this Court in *Force v. City of Lawrence, Kan.*, 17 Kan.App.2d 90, 99, 838 P.2d 896 (1992) explained that "[d]iscretion in the erection of traffic-control devices exists but under certain specified conditions may be preempted by the MUTCD. If the conditions specified by the MUTCD as warranting the placement of a traffic-control device are satisfied, then the placement of the device is a matter of professional judgment; no discretion is involved."

The trial court in this instance recognized that pursuant to *Force, Collins, and Carpenter*, subsection (h) of the KTCA allowing for discretionary immunity on decisions of sign placement does not apply where the MUTCD contains *some guidelines* for placing signage in particular circumstances. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2868). This is true because "the existence of guidelines for a particular situation alters the decision to place a sign from a discretionary decision to a decision based upon professional judgment." *See* Court's Ruling on Motions for Summary Judgment (citing *Bezek*, The Kansas Tort Claims Act: The Evolving Parameters of Governmental Tort Liability, 66 OCT J. Kan. B.A. 30). *See* Court's Ruling on Motions for Summary Judgment (Rev. Vol. 1, p.2864). The trial court then attempted to reconcile the potentially inconsistent results of *Tombourelin's* observation that a totality of the circumstances analysis is appropriate, but a decision as a matter of law may be upheld on appeal, by observing "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." *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2865).

Keeping in mind that Cowley County was only responsible for placing and maintaining traffic control devices on the portion of 322nd Road that ends at the pavement, there are two signs that Patterson's expert opines should have been placed on the road but were not – a "dead end" or "no outlet" sign at the intersection of 322nd Road and 111th Road to warn of the end of the road, and an advisory speed sign under the existing "Pavement Ends" sign that had been previously placed by Cowley County. (Rec. Vol. 1, p.1364-1366; 1369). Cowley County argued that it was entitled to summary judgment as to the advisory speed placard because Patterson's experts admitted that speed played no role in the deaths of Jason Patterson and Courtney Brewer. Cowley County argued that it was entitled to summary judgment as to the "no outlet" or "dead end sign" that should have been located at the intersection of 322nd and 111th Road because they did not have a duty to place or maintain that sign under the MUTCD.

The trial court's observations here led it to the conclusion that in this instance, Cowley County was entitled to summary judgment on Patterson's claim that an advisory speed placard should have been placed under the existing "Pavement Ends" sign because the failure to place an advisory speed placard was not the "proximate cause" of Jason Patterson's death. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2866). In other words, the trial court believed that because the speed placard itself could not have prevented the injury, the court could determine the issue of discretionary function immunity as to that sign as a matter of law. The trial court seems to base its conclusion upon Cowley County's contention that Patterson's expert "acknowledged" that the speed

of the vehicle in question was not a factor in causing the accident. *See* Court's Ruling on Motions for Summary Judgment (Rev. Vol. 1, p.2866). During his deposition, Patterson's expert Thomas Alcorn testified that in his opinion the speed of the vehicle itself did not play a "causative role" in the accident. *See* Depo. of Thomas Alcorn (Rec. Vol. 1, p.1504, lns.21-24). Mr. Alcorn never testified that an advisory speed placard was irrelevant to the causation of the accident. In fact, Mr. Alcorn testified in this fashion:

> Q: A moment ago, maybe 50 minutes ago, you indicated to me you didn't conclude that speed was a causative factor in this accident. That being the case, can you explain to me why you include in your report criticisms of my client or these gentlemen's client regarding the posting of speed here?
>
> A: Oh, sure. It leads to the traffic control study. I can tell it's not been done. It's just somebody has run out and put up a sign and that's pretty much it, that this roadway has never been looked at for the conditions that exist.
>
> Q: You didn't 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.

See Depo. of Thomas Alcorn (Rec. Vol. 1, p.1506, ln.12 – p.1507, ln.6). The trial court's opinion overlooks the point that Patterson's expert witness testified that the advisory speed placard was indicative of a lack of an engineering study having been done on the 322nd Road. As noted by the trial court, Patterson claims that Cowley County was negligent in fulfilling its duties under the MUTCD in more than one respect. To be sure, Patterson contends that Cowley County failed to comply with the MUTCD when it failed to place the appropriate "dead end/no outlet" and advisory speed placards identified by Patterson's expert as being directed by the MUTCD under these circumstances. But, Patterson also contends that Cowley County failed to comply with the MUTCD because it failed to

perform any engineering study on 322nd Road that would have informed the County of what signs were and were not required or advised under the circumstances. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2865-2866).

It is an uncontroverted fact in this case that no entity ever performed an engineering study on 322nd Road to determine what signage or other control devices were appropriate for the safe travel of passengers upon that road. *See* Statement of Uncontroverted Facts, ¶19. As noted above, Kansas has adopted the MUTCD as the state standard for the design, installation and maintenance of traffic control devices upon public roads. *See* Statement of Uncontroverted Facts, ¶14. "Traffic control devices" are defined as "signs, signals, markings, and other devices used to regulate, warn, or guide traffic." *See* Expert Report of Thomas L. Alcorn, M.S., P.E. PTOE, (Rev. Vol. 1, p.1330). The MUTCD as adopted by the State of Kansas provides that the responsibility for the design, placement, operation, maintenance, and uniformity of traffic control devices rests with the public agency or official with control over the road in question. *See* Expert Report of Thomas L. Alcorn, M.S., P.E., PTOE (Rec. Vol. 1, p.1332-1333). In the case of 322nd Road to the end of the pavement, the entity with control over the road was certainly Cowley County.

Patterson's expert Thomas Alcorn explained that the MUTCD "describes the application of traffic control devices and indicates 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. Jurisdictions with responsibility for traffic control that do not have engineers on their staffs should seek engineering assistance from others." *See* Expert Report of Thomas L. Alcorn, M.S., P.E., PTOE (Rec. Vol. 1, p.1333). With respect to safe speeds on 322nd Road, Mr. Alcorn opined:

> The MUTCD indicates the speed limit and/or safe speed of 322nd Road, including the paved and the dirt section of roadway should be determined by an engineering study taking into consideration roadway characteristics, condition, grade, sight distance, and 85th percentile speed. The 55 mph un-posted speed limit for the paved portion of 322nd Road appears reasonable. Let's evaluate the conditions that exist on 322nd Road with respect to the MUTCD. Section 2B.13, Speed Limit Sign (R2-1), indicates "*After an engineering study has been made in accordance with established traffic engineering practices*, the Speed Limit sign shall display the limit established by law, ordinance, regulation as adopted by the authorized agency." *In this case it is clear that the engineering studies for speed were not done and the speed limit or safe speed for either section of roadway was not established or posted.* It also has to be recognized that the condition of the roadway changes requiring reductions in speed for the different conditions.

See Expert Report of Thomas L. Alcorn, M.S., P.E., PTOE (Rec. Vol. 1, p.1335-1336) (emphasis added).

This section of Mr. Alcorn's report dovetails with his deposition testimony that he could tell a traffic engineering study had never been done by the County (or any other entity, for that matter) with respect to 322nd Road because no advisory speed placard was posted under the "Pavement Ends" sign. Not only is missing the speed placard therefore important in the sense that it shows the impact of the County's failure to perform the mandatory engineering study required by the MUTCD; but, also because it shows that as a result of the lack of an engineering study, the count failed to give motorists on 322nd Road crucial information about the state of the upcoming roadway. Ultimately Mr. Alcorn concluded that "the failure on the part of the government entities responsible for the maintenance of 322nd Road to properly install, inspect, maintain and adjust traffic control devices *as determined by an engineering study* to warn motorists of the dangerous conditions that existed, close off the roadway at the river and their failure to comply with the MUTCD is the cause of this accident." (Rec. Vol. 1, p.1338) (emphasis added).

The County's engineer, Dale Steward, testified that 322nd Road as it proceeds east and turns into a gravel road is a Type C road under the MUTCD. *See* Depo of Dale Steward, p.192, lns.11 – p.194, ln.6 (Rec. Vol. 1, p.2229-2230). He indicated that the expectation of a driver on a Type C road would be that the road ahead of the driver would be consistent with the previous half-mile to mile that the driver had just passed. *See* Depo of Dale Steward, p.196, lns.9-15 (Rec. Vol. 1, p.2230). A driver would also expect that it would be difficult to pass another vehicle on a Type C Road. *(Id.)* Consequently, Mr. Steward agreed that an engineering study would be needed to determine the need for traffic control devices relative to a driver's perception and expectations of the road. *See* Depo of Dale Steward, p.197, lns.9-24 (Rev. Vol. 1, p.2231). Mr. Steward then specifically testified that on low volume roads such as 322nd Road, the use of warning signs should be based on an engineering study or engineering judgment. (*Id.*). Mr. Steward admitted that the MUTCD Manual in effect at the time of Jason Patterson's death specified that the decision to place a particular control device in a particular location was to be made either on the basis of an engineering study, or based upon the application of engineering judgment, and that the MUTCD was not to be used as a substitute for engineering judgment. *See* Depo of Dale Steward, p.226, lns.14-20 (Rev. Vol. 1, p.2234). According to Cowley County's own engineer, then, as well as Patterson's expert Mr. Alcorn, the use of an engineering study or engineering judgment is a *mandatory* act under the MUTCD. *See* Depo of Dale Steward, p.230, lns.5-17 (Rev. Vol. 1, p.2235).

While the County contends that an engineering study was not mandatory until the point where an agency would decide that it was going to place a sign, both the MUTCD and the testimony and opinions of Patterson's expert as well as the County's own engineer

indicate that the MUTCD requires an agency with control of a roadway to conduct a traffic engineering study *prior* to the decision to place or remove any traffic control device. "The MUTCD requires an engineering study or engineering judgment for the determination of proper implementation of traffic control devices." *See* Expert Report of Tim Aziera (Rec. Vol. 1, p.1568). According to the Manual, "the decision to use a particular device at a particular location should be based on an engineering study or the application of engineering judgment. *See* Expert Report of Thomas L. Alcorn, M.S., P.E., PTOE (Rec. Vol. 1, p.1522). Even Cowley County's engineer agreed that the Manual in effect at the time of Jason Patterson's death stated "the decision to use a particular device at a particular location should be made on the basis of either an engineering study or the application of the engineering judgment. *See* Depo. of Dale Stewart, p.227, ln.3 – p.228, ln.11 (Rec. Vol. 1, p.1410). Cowley County's engineer further agreed that the MUTCD was not a substitute for engineering judgment, indicating that part of the MUTCD dictated that "while the manual provides standards, guidance, and options for design and applications of traffic control devices, the manual ... should not be considered as a substitute for engineering judgment." (*Id.*). Finally, when asked "[w]ould you agree that the edition of the manual sets a standard which is that the use of warning signs shall be based on an engineering study or on engineering judgment?" Cowley County's engineer testified that the MUTCD did, in fact, set forth that standard, and that it was a *required* or *mandatory* standard. *See* Depo. of Dale Stewart, p.228, lns.4-11 (Rec. Vol. 1, p.1410) (emphasis added).

The testimony of Cowley County's engineer, Patterson's experts and the MUTCD itself all establish that the traffic engineering study is necessary to inform the agency's initial decision to place the control device – without the traffic engineering study, the

agency is not operating with the appropriate information to determine whether or not a traffic control device is necessary. Mr. Alcorn testified in his deposition "[t]he traffic engineering study is what determines what your options [under the MUTCD] are going to be." *See* Depo. of Thomas L. Alcorn, (Rec. Vol. 1, p.1500, ln.16 – p.1501, ln.3) (*see also* (Rec. Vol. 1, p.1511, lns.7-14) (stating "[i]f you do a traffic engineering study and we go out there and look at it and we look at the river and the road, then that's what should be taken into consideration.")).

Any arguments made by Cowley County characterizing the applicable MUTCD sections as non-mandatory "guidance" are therefore irrelevant in light of its failure to perform the required traffic engineering study for 322nd Road. Without that engineering study, Cowley County could never have appropriately come to the conclusion that an advisory speed sign or dead-end sign was or was not mandatory in any given area. Mr. Alcorn testified that any application of discretion would necessarily have to come *after* the conclusion of a traffic engineering study. *See* Depo. of Thomas L. Alcorn, p.54, ln.14 – p.55, ln.21 (Rec. Vol. 1, p.2743). Mr. Alcorn indicated "the manual is very specific. It's mandated by federal law, by state law, applicable to all public roads and streets. It mandates that an engineering study be performed before decisions are made on traffic-control devices." *See* Depo. of Thomas L. Alcorn, p.56, lns.8-25 (Rec. Vol. 1, p.2743).

2. Cowley County Cannot Show, as a Matter of Law, that It Is Entitled to Immunity For Its Failure to Conduct an Engineering Study and Failure to Place an Advisory Speed Placard.

The uncontroverted facts do not show that Cowley County exercised discretion in the placement of signs – rather, the uncontroverted facts show that Cowley County *did nothing* to determine what traffic control devices were necessary on 322nd Road. That

failure to perform its most basic function under the MUTCD and do a traffic engineering study was a fatal omission that led to Jason Patterson's death. In *Force*, the Court of Appeals recognized that where "the conditions specified by the MUTCD as warranting the placement of traffic control devices are satisfied, then the placement of the device is a matter of professional judgment; no discretion is involved. The MUTCD specifies the minimum standards for safety." *Force*, 17 Kan.App.2d at 99. The MUTCD sets out the standard for warnings and barricades that should be used to protect motorists facing the end of a roadway. The standards set forth in the MUTCD to protect motorists require that an engineering study be done to determine the appropriate signs or barricades to accomplish the task at hand. *See* Statement of Uncontroverted Facts, ¶18. It is uncontroverted that Cowley County did not conduct an engineering study or exercise any engineering judgment in its placement of control devices on 322nd Road; it certainly did not do so with respect to the advisory speed placard as indicated by Mr. Alcorn's testimony. Where the MUTCD sets forth the standard, and a government agency fails to follow it, that failure is not a discretionary function immune from action – it is a matter of professional judgment subject to tort liability.

It also cannot be said as a matter of law in this case that the lack of an advisory speed placard played no causative role in the death of Jason Patterson. While Patterson's expert may have opined that the vehicle's speed played no causative role in the accident, he did not offer such opinions as to the placement of the advisory speed placard. The fact of the matter is, no living party knows precisely what happened on the evening that Jason Patterson and Courtney Brewer drowned in the Arkansas River. But, we do know that Cowley County's engineer testified that a driver on a road such as 322nd would expect that

the road ahead of the driver would be consistent with the previous half mile to mile that the driver had just passed.

Without the appropriate warning signs indicated by the MUTCD after performance of a traffic engineering study, how would a driver unfamiliar with the area know that the road ahead of him or her would differ markedly than the last half-mile to mile that he or she had just driven? That is a question of fact that can only be determined by a jury, and that question of fact alone should preclude summary judgment in Cowley County's favor as to the advisory speed placard and failure to conduct an engineering study.

The trial court therefore erred when it decided to limit Patterson's claims of negligence against Cowley County to the claim for failure to place a "dead end/no outlet" sign. It is not just the County's failure to place traffic control devices on 322nd Road that constitutes negligence here. It is also the County's failure to conduct a traffic engineering study on 322nd Road to even determine what control devices were appropriate that constitutes negligence. The jury is entitled to hear about those claims.

C. The Trial Court Erred in Its Determination that Bolton Township Had No Duty to Place Signs on 322nd Road.

1. Bolton Township Never Claimed It Was Entitled to Judgment as a Matter of Law on the Element of Duty.

As a preliminary matter it should be noted that Bolton Township filed two affirmative motions for summary judgment. The first, filed on or about March 2, 2015, argued only that summary judgment should be granted to Bolton Township because it was entitled to recreational use immunity under the KTCA. (*See generally* Rec. Vol. 1, p.1602 - 1775). The second motion for summary judgment, filed on or about the same date, argued only that Bolton Township was entitled to summary judgment because it had recreational

use immunity pursuant to K.S.A. 58-3201 et seq. (*See generally* Rec. Vol. 1, p.1892-1896). Recreational use immunity under the KTCA or other Kansas statutes was therefore the only issue on which Bolton Township claimed that it was entitled to judgment as a matter of law. The trial court recognized that at the hearing on the parties' various motions for summary judgment, and the Township took that position during the hearing, when its counsel stated "I want to just again emphasize that we don't have – or this court does not have to resolve all those authority issues, because we believe, and we contend simply because it was ... an accident within the Kaw Wildlife Area; that the Kaw Wildlife Area was a recreational area under the recreational immunity statute. And that is simply all that's necessary under the law." (Transcript of Court's Ruling on Motions for Summary Judgment, Rec. Vol. 2, p.51, lns.4-14). Bolton Township went on to argue "the real reason summary judgment should be granted to the defendants is the recreational immunity." (Transcript of Court's Ruling on Motions for Summary Judgment, Rec. Vol. 2, p.51, ln.23 – p.52, ln.9). The trial judge later noted on the record that Bolton Township was not asking for a finding, as a matter of law, that it had no duty to place traffic control devices on 322nd Road:

> The Court: Let me ask you from point of procedure here: In your motion for summary judgment, the only basis that you argue for relief that I see is recreational immunity. Correct?
>
> Mr. Keeley: That's correct.
>
> The Court: So you have not asked this Court to grant you a judgment of finding of no duty as a matter of law.
>
> Mr. Keeley: That's correct.
>
> The Court: Okay.
>
> Mr. Keeley: That's right.

(Transcript of Court's Ruling on Motions for Summary Judgment, Rec. Vol. 2, p.150, ln.16 – p.151, ln.2).

Given the fact that Bolton Township specifically represented to the trial court that it was not seeking a ruling as a matter of law as to its duty to place traffic control devices on 322nd Road, the trial court erred in effectively granting summary judgment to Bolton Township on those grounds. The statute upon which the trial court rested its decision as to the Township was raised by Bolton Township solely in response to Patterson's affirmative Motion for Partial Summary Judgment as to the duties of the parties to place traffic control devices on 322nd Road. Rule 141 of the Supreme Court Rules for District Courts provides that a motion for summary judgment must be accompanied by a memorandum or brief stating "concisely, in separately numbered paragraphs, the uncontroverted contentions of fact on which the movant relies." Sup. Ct. Rule 141(a)(1). Bolton Township's response to Patterson's Motion for Partial Summary Judgment was just that – a response. It set forth no unique statement of controverted facts upon which Bolton Township purported to rely for its claim that it had no legal authority to place traffic control signs on its portion of 322nd Road. *See* Bolton Township's Response to Patterson's Motion for Summary Judgment (Rec. Vol. 1, p.2419). It set forth no affirmative claim for relief as to K.S.A. 8-2005. (*Id.*).

Because Bolton Township raised these issues as a defense, rather than an affirmative claim to summary judgment, the rules were different and the issue was briefed entirely differently by Patterson than if Bolton Township had made clear that it was actively seeking summary judgment as to the issue of its duty to place traffic control devices. Consequently, the trial court should not have granted Bolton summary judgment

as to Patterson's claims on the issue of duty. That relief was never requested by Bolton; a summary judgment on those grounds was not properly before the court; and Patterson did not have an opportunity to fully brief that issue as if it was responding to Bolton Township's claim for summary judgment because Bolton did not brief the issue in compliance with Supreme Court Rule 141(a)(1).

2. The Trial Court's Ruling and Certification of Interlocutory Appeal Were Based on a Perceived Conflict Between Supreme Court Case Law and the Kansas Statutes.

The ruling being appealed here is the trial court's finding "that Bolton Township had no statutory duty to place traffic control devices on 322nd Road." *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2882). The trial court in its opinion recognized that 322nd Road from the end of the pavement is a "township road." K.S.A. 68-101(e) defines township roads as "[a]ll roads within a township, not within a county road unit, other than federal, state and county roads." K.S.A. 68-124 clearly specifies that "[i]t shall be the duty of the Township Board of the township in which the road is located to repair, place and keep in condition for travel such roads or highway." This seems to be consistent with the language of K.S.A. 68-526(a), which specifies that in counties such as Cowley County that are not operating under the county unit road system, "the Township Board shall have the general charge and supervision of all township roads and township culverts in their respective townships." Both of these statutes seem to be further consistent with K.S.A. 8-2005(a), which reads "[l]ocal authorities in their respective jurisdictions shall place and maintain such traffic control devices upon highways under their jurisdiction as they deem necessary to … warn or guide traffic …."

Having recognized those statutes, the trial court focused in K.S.A. 8-2005(c), as amended in April, 2003, and K.S.A. 68-526(b) as amended in 2003. K.S.A. 8-2005(c), as amended, reads:

> In townships located in Douglas, Johnson, Riley, Shawnee and Sedgwick Counties, the Township Board shall place and maintain traffic control devices, other than regulatory signs, on township roads under the Board's jurisdiction. In addition, such Township Board shall place and maintain regulatory signs on township roads under the Board's jurisdiction, consistent with the resolutions of the Board of County Commissioners of the county in which the township is located. A regulatory sign is a sign setting forth regulation that subjects the operator of the motor vehicle to fine, imprisonment or both.

K.S.A. 68-526(b), as amended, reads "In townships located in Douglas, Johnson, Riley, Shawnee and Sedgwick Counties, the Township Board shall place and maintain traffic control devices and guidance, warning and regulatory signs on all township roads provided by K.S.A. 8-2005 and amendments thereto." The trial court was troubled by these two statutes as well as the language of K.S.A. 8-1432, which defines "local authorities" as "[t]he Kansas turnpike authority, and every city, county, and other local board or anybody having authority to adopt ordinances or regulations relating to vehicular traffic under the Constitution and the laws of the State of Kansas."

Fearing that there was a potential conflict between the statutes placing responsibility on Township Boards to keep Township Roads in safe condition for travel, and statutes which the trial court believed limited that authority only to townships in certain counties, the trial court turned to the legislative history of the amendments to K.S.A. 8-2005(c) to determine whether Bolton Township in this case had a duty to place traffic control devices. In doing so, the trial court indicated its finding "that it is clear that the purpose and intent of the original proposed amendment was to address the exact issue that

we have presented in this case. Unfortunately the legislature did not adopt the amendment as presented." *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p. 2847).

The trial court compared the above-referenced statutes to the binding authority established by *Finkbiner v. Clay County,* 238 Kan. 856 (1986), in which the Kansas Supreme Court held that a township board was a local authority within the meaning of K.S.A. 8-2005, which would have both the authority and duty to place and maintain traffic control devices upon the public roadways within its jurisdiction. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2846). Despite that binding authority, the trial court expressed that it felt constrained to rule, based upon the amendments to K.S.A. 8-2005 and the definition of "local authority" under K.S.A. 8-1432, that Bolton Township had no legal statutory duty to place traffic control devices , guidance, or other warnings upon 322nd Road, a township road. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2849-2851).

The court, in making this ruling, recognized that "there is substantial ground for difference of opinion on the issue of duty and jurisdiction." *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2879). The court further indicated its belief that the ultimate resolution of the apparent conflict between *Finkbiner* and the legislative action that occurred after "rests with a higher court." (*Id.*). The court therefore certified this matter for interlocutory review, noting the potential that any incorrect decision as Bolton Township's liability would negatively impact a jury verdict or other judgment in the case. This Court is therefore tasked with resolving what the trial court perceived as an apparent conflict between the Kansas Supreme Court's holding in *Finkbiner* and the Kansas statutes

concerning traffic control device placement. Patterson submits that *Finkbiner* and the Kansas statutes are, in fact, consistent with each other, but that both the case law and the statutes place the responsibility for maintenance of traffic control devices on township roads squarely on the shoulders of the township board having control over the road.

3. *Finkbiner* is binding precedent and provides that Bolton Township is the local authority with a duty to place traffic control devices on 322nd Road.

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

On review, the Supreme Court determined first that it could not be stated as a matter of law whether either the county or the township were immune under the KTCA for their failure to place signs or erect a barricade on that road, because "[w]hether a governmental entity had a duty must be determined under the totality of the circumstances. This is a question of fact which must be determined by a jury." 238 Kan. at 861. But, the Court then acknowledged that all parties in the case had agreed that the township alone was

responsible for the portions of the road that constituted a township road. Having acknowledged that fact, the Court opined

> the County cannot be liable for failure to place warning signs warning of a dead end on the township road. A township, having the exclusive care and control of a street or road, has a duty to maintain that road or street for the safe passage of persons and property. Other governmental entities cannot be held liable for failure to maintain that road safely.

238 Kan. at 861 (citing *City of Eudora v. Miller,* 30 Kan. 494, 2 P. 685 (1883)). Given the fact that the township was the only possible responsible local authority over that roadway, the Court thus concluded "it is a question *only as to the Township* whether, under the totality of the circumstances, it should have placed a warning sign." *Id.* (emphasis added).

In so holding, the Court in *Finkbiner* specifically considered the statutory responsibility placed upon townships for township roads by K.S.A. 8-2003, 8-2005, and the MUTCD. The Court noted that K.S.A. 8-2003 required the secretary of transportation to adopt a manual and specifications for a uniform system of traffic-control devices. *Id.* at 859-60. The Court recognized that the MUTCD was adopted by the secretary in order to fulfill that mandate. *Id.* The Court then recognized that K.S.A. 8-2005 requires "local authorities" to place and maintain such traffic-control devices as they deem necessary to carry out the provisions of the act. *Id.* at 860. In other words, the Kansas statutes specifically tasked local authorities with the responsibility to comply with the MUTCD. The Supreme Court in *Finkbiner* clearly contemplated that a township was a "local authority" pursuant to K.S.A. 8-2005 who had responsibility to comply with the MUTCD. Nevertheless, the trial court here based its opinion of no duty upon a belief directly contrary to the *Finkbiner* opinion, finding that Bolton Township was not a local authority with respect to any of its township roads.

4. The trial court's decision is contrary to *Finkbiner* and contrary to legislative intent with respect to non-county unit road systems.

In his ruling on the parties' motions for summary judgment, the trial court noted that his opinion was contrary to the binding precedent of *Finkbiner*, but indicated he felt he was obligated to rule in Bolton Township's favor based upon his reading of the applicable Kansas statutes. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, pp.2879-2880). The trial court's opinion seems to be based in part on what Patterson would submit is an incorrect Attorney General Opinion, Attorney General Opinion 97-25, which concludes that a township is not a "local authority" pursuant to K.S.A. 8-1432 and therefore has no authority to place warning or traffic control signs on its own roadways. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2847). In the trial court's opinion, pursuant to the 2003 amendments to K.S.A. 8-2005(c), only townships located in five counties are deemed "local authorities" with the duty to place traffic control devices and/or regulatory signs on township roads -- the issue as to who maintains traffic control devices on township roads in the other 31 counties who have not adopted the county unit road system, is, according to the trial court, unresolved. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2844 and Rec. Vol. 1, p.2848). It follows based on the trial court's interpretation of the statutes that in those 31 counties without a county unit road system, there is *no local authority* with the responsibility for maintaining traffic control devices on those roads, because the county is not responsible for township roads, and townships are not authorized to place traffic control devices. Not only is this an illogical result in this particular case, it would be an illogical result in *every* case involving a township road in every one of those 31 unnamed counties. It would effectively leave

thousands of miles of township roads throughout the state of Kansas completely uncontrolled. That could not have been the intent of the Kansas Legislature.

Kansas law provides a division between county unit road systems and non-county unit road systems. In counties like Cowley County who are operating on a non-county unit road system, roads are classified either as county roads or township roads. *See* Statement of Uncontroverted Facts, ¶2. That division between county and township roads led to a common practice recognized by Evan H. Ice, Douglas County Counselor, in the legislative history materials cited by the trial judge in his opinion on the parties' motions. Mr. Ice indicated that the common practice in non-county unit road system counties was for the county to install and maintain "regulatory signs" along township roads, and for the townships to install and maintain "warning signs" and "guidance signs" along those roads in order to warn motorists of upcoming travel hazards or provide direction to motorists. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2892). Because the townships had no authority to pass traffic regulations and no ability to enforce traffic regulations, it would make sense for counties to handle the responsibilities over regulatory signage. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2893).

But, Mr. Ice recognized that Attorney General Opinion 97-25 was in potential conflict with the Supreme Court's opinion in *Finkbiner* and the general practice in most Kansas non-county unit road system counties, in which the townships took responsibility for placing traffic control devices and warning signs on township roads. (*Id.*). Mr. Ice pointed out that despite the fact that historically townships had been the responsible entities for maintaining traffic control devices on township roads, given the Attorney General's opinion that authority was called into question and in the event that an accident occurred

on a township road as a result of improper signage, as precisely what happened to Jason Patterson in this case, the township and county would point fingers at each other in an effort to avoid liability. (*Id.*). Consequently, Douglas County sought an amendment of K.S.A. 8-2005 through a provision known as House Bill 2150 which Mr. Ice indicated would "codify what we believe is the general approach in Kansas and will resolve the ambiguities discussed above. Townships will have the responsibility and authority to post and maintain traffic-control devices along township roads." *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, pp.2893-2894).

A review of the legislative history of the amendments to K.S.A. 8-2005 adding subsection (c) which the court relied upon to grant summary judgment to Bolton Township in this case, makes it clear the legislation was introduced with the purpose and intent of clarifying that townships had both the authority and responsibility to maintain traffic control signs on township roads in counties that were not operating within a county unit road system. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p.2895-2896). HB 2150 was intended to clarify "that in counties that have not adopted the county unit road system, townships have the responsibility and authority to place and maintain traffic control devices (including guidance and warning signs, and regulatory signs) on township roads under the jurisdiction of the township. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p. or 2900).

Given the fact that HB 2150 would affect 36 counties and signage on township roads within those 36 counties, the proponents of the amendment noted the importance "for the Legislature to clarify who has the responsibility and authority to maintain traffic control devices along township roads." (*Id.*). Clearly, the import of HB 2150 as proposed and as

promoted to the Legislature was to clarify that, contrary to the Attorney General's Opinion, townships *were* local authorities with the responsibility for placing traffic control devices on township roads. Those traffic control devices were specifically distinguished from "regulatory" signs, which required some kind of regulatory enforcement to be done by the county, and thus required county direction in terms of the placement of those signs.

The Legislature's unfortunate answer to this problem was to muddy the waters by including only certain counties within the amended statutory provisions when it adopted HB 2150. *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, p. 2885). Prior to the amendments, K.S.A. 8-2005 simply read that "[l]ocal authorities in their respective jurisdictions shall place and maintain such traffic control devices upon highways under their jurisdiction, as they may deem necessary to indicate and carry out the provisions of this act ...." Subsequent to the amendments, subsection (a) of K.S.A. 8-2005 retained that original language, while subsection (c) was added to indicate

> [i]n townships located in Douglas, Johnson, Riley, Shawnee and Sedgwick Counties, the Township Board shall place and maintain traffic control devices, other than regulatory signs, on township roads under the Board's jurisdiction. In addition, such Township Board shall place and maintain regulatory signs on township roads under the Board's jurisdiction, consistent with the resolutions of the Board of County Commissioners of the county in which the township is located. ....

K.S.A. 8-2005(c) (2003); *See* Court's Ruling on Motions for Summary Judgment (Rec. Vol. 1, pp. 2843-2844).

The trial court's interpretation of K.S.A. 8-2005(c) as amended is that the Legislature's response to the problem presented in the legislative history of HB 2150 was to ensure that only townships in the five specifically mentioned counties had any authority to place both traffic control devices *and* regulatory devices. As to the remaining townships

in the 31 non-county unit road counties, the trial court concluded that those townships, including Bolton Township, must have no authority and no duty whatsoever to place traffic control devices on township roads. Given the fact that both the Kansas legislature and Kansas courts have found that counties do not have direct responsibility for traffic control devices on township roads, the impact of the trial court's decision here cannot be understated. The trial court's interpretation of the legislation here is that on township roads such as 322nd Road, in townships that are not located within one of five counties, there would literally be *no local authority* either capable of, or responsible for placing traffic control devices to ensure that roadways are in a safe condition for travelers upon those roads.

Prior to the passage of the KTCA, Kansas had always recognized a common law duty of government entities to keep the streets reasonably safe for use. *Finkbiner*, 238 Kan. at 858. In 1887 the Kansas legislature specifically extended that responsibility to counties and townships. *Id.* Even with passage of the KTCA, Kansas did not create a hard and fast rule of immunity for all decisions or actions in placing traffic control devices. *See id.*, at 859-60. The trial court's interpretation here would therefore erode over a hundred years' worth of Kansas law holding that townships have a duty to keep township roads reasonably safe for use.

Not only would the trial court's interpretation here abrogate more than a hundred years of law regarding township responsibilities for township roadways, the trial court's interpretation would render other statutes meaningless. K.S.A. 68-526(a) clearly states "[i]n all counties not operating under the county road unit system the township board shall have the general charge and supervision of all township roads and township culverts in

their respective townships." The trial court relied upon subsection (b) of that same statute to support its conclusion that the Legislature intended to limit the authority of townships to place traffic-control devices to only townships in five specifically designated counties. But Patterson submits that both K.S.A. 8-2005(c) and K.S.A. 68-526(b) must be read not as limiting the authority of townships in 31 non-specified counties, but as granting *additional* authority to townships located within the five specifically mentioned counties. Specifically, townships in Douglas, Johnson, Riley, Shawnee and Sedgwick Counties were given the *additional* authority to place regulatory signs on township roads with the approval of the Board of County Commissioners of that county. This is the only interpretation of the statutes consistent with the legislative intent behind the amendments to the statutes, which were proposed in order to clarify that "Townships will have the responsibility and authority to post and maintain traffic control devices along township roads." (Rec. Vol. 1, p.2893).

Moreover, the trial court's decision here overlooks the importance of K.S.A. 8-2003, under which Kansas has adopted the MUTCD. Section 1A.07 of the 2009 Edition of the MUTCD, entitled "Responsibility for Traffic Control Devices," reads:

> **Standard:**
>
> **The responsibility for the design, placement, operation, maintenance and uniformity of traffic control devices shall rest with the public agency or official having jurisdiction, or, in the case of private roads open to public travel, with the private owner or private official having jurisdiction**.

See MUTCD (Rec. Vol. 1, p. 1545) (emphasis in original). No party to this case has questioned that MUTCD is the applicable standard for traffic control devices on roads and highways within the state. The MUTCD places the responsibility for compliance with its provisions directly with the "public agency or official having jurisdiction." There is no

option under the MUTCD for the state to leave no agency responsible for compliance with its provisions – some public agency must have jurisdiction. Kansas law declares that the responsible agency is the "local" agency, and Patterson submits that Bolton Township was the only appropriate "local agency" with jurisdiction over the portions of 322nd Road that were township road.

Patterson's interpretation of the statute is the only interpretation that gives effect to both K.S.A. 68-526(a) while also recognizing the responsibility placed upon a township by K.S.A. 8-2003. K.S.A. 8-2003 requires that the state adopt the MUTCD, which requires in turn that the entity having control over the roadway is the entity obligated to ensure that adequate signage is in place pursuant to the MUTCD. The MUTCD provides no exceptions where townships would not have responsibility for placing traffic control devices upon township roads where those control devices are necessary for driver safety.

The language of K.S.A. 8-2005(c) as amended, then, is more reasonably read as giving townships in the five specifically named counties the *additional* right to place regulatory signs consistent with the wishes of the applicable county commission – not to take away the rights in another 31 counties to install traffic control mechanisms. In fact, nowhere in the plain language of that provision does it remove the authority from townships in the other 31 counties to place traffic control devices pursuant to the MUTCD's requirements. Not only does Patterson's interpretation harmonize the statutes; it harmonizes the statutes with the result reached by the Supreme Court in *Finkbiner*, where the Supreme Court expressed a clear preference for holding townships responsible for the proper signage of township roads.

Not only would the trial court's interpretation of K.S.A. 8-2005(c) render 8-2003's adoption of the MUTCD meaningless, it overly narrows the definition of "local authority" found in K.S.A. 8-1432. K.S.A. 8-1432 defines a "local authority" as "[t]he Kansas turnpike authority, and every city, county, and other local board *or* anybody having authority to adopt ordinances or regulations relating to vehicular traffic ...." The trial court seems to indicate Bolton Township cannot be a local authority because K.S.A. 8-1432 does not specifically list townships as local authorities, and because townships do not have the authority to adopt ordinances or regulations relating to vehicular traffic. The trial court's interpretation, along with the Attorney General's interpretation in Attorney General Opinion 97-25 ignores the language "and other local board" which immediately proceeds the word "or" followed by "any body having authority to adopt ordinances or regulations." Patterson submits that the phrase "other local board" clearly contemplates that a township board would have the authority to place and maintain traffic control devices on roads within its jurisdiction. The location of the word "or" between "other local board" and the words "body having authority to adopt ordinances" clearly indicates that a "local board" did not need to be a body with authority to adopt ordinances or regulations in order to have the authority to place traffic control devices.

If the term "local authority" is read as encompassing the authority of township roads to place traffic control devices on roads within their jurisdiction, that interpretation is harmonious with K.S.A. 8-2003's adoption of the MUTCD, it is harmonious with the legislature's declaration that townships have the general authority over all township roads, and it is harmonious with the Supreme Court's decision in *Finkbiner* placing the responsibility with the township for placing traffic control devices upon township roads.

Moreover, it is consistent with the general practice of Kansas counties and townships as expressed by Mr. Ice in the legislative history of HB 2150, and consistent with the stated purpose and intent of HB 2150 as introduced to amend K.S.A. 8-2005.

As a general rule, courts should construe statutes to avoid unreasonable results, and should presume that the legislature does not intend to enact useless or meaningless legislation. *Miami County Bd. of Com'rs v. Kanza Rail-Trails Conservancy*, 292 Kan. 285, 322, 255 P.3d 1186 (2011) (citing *Hawley v. Kansas Dept. of Agriculture*, 281 Kan. 603, 631, 132 P.3d 870 (2006)). It is clear under Kansas law that courts will not engage in statutory construction where a statute's language or text are clear and unambiguous. Only when the language or text of the statute is unclear or ambiguous will the court turn to canons of construction or legislative history in an effort to give effect to the legislature's intent in enacting the provisions in question. *See In re K.M.H.*, 285 Kan. 53, 79, 169 P.3d 1025 (2007) (citing *CPI Qualified Plan Consultants, Inc. v. Kansas Dept. of Human Resources,* 272 Kan. 1288, 1296, 38 P.3d 666 (2002); *State v. Robinson*, 281 Kan. 538, 539-40, 132 P.3d 934 (2006)). But, a statute can be ambiguous or unclear where there is a gap in the legislation – such as when two provisions seem clear when read in isolation, but not together. *See Miami County Bd. of Com'rs*, 292 Kan. at 321-22. That is the case here – the statutory provisions relied upon by the trial court may be clear on their own, but when read together as the trial court read them, there appears to be a gap in the authority of townships in 31 counties over their township roads. It cannot have been the intent of the Legislature in this case to strip those townships of the authority and duty to place traffic control devices on thousands of miles of township roads within their respective jurisdictions – that would be a nonsensical result.

This Court must therefore "'reconcile the different provisions [here] so as to make them consistent, harmonious, and sensible.'" *Miami County Bd. of Com'rs*, 292 Kan. at 322 (quoting *In re Marriage of Ross*, 245 Kan. 591, 594 (783 P.2d 331 (1989)). The Court is free to disregard a strict "plain language" interpretation of the statute if the plain language interpretation would require the court to construe certain provisions of the statutes in a way that would defeat the purpose of the entire provision. *See id.* at 323 (rejecting party's plain language argument where the plain language interpretation would defeat the purpose of the statutory provision). In other words, this Court is free to disregard Bolton Township and the trial court's plain language interpretation of K.S.A. 8-2005(c) where the plain language interpretation would clearly destroy the intent of K.S.A. 8-2005(a) to give all local authorities the authority and responsibility for placing and maintaining traffic control devices on roadways in their jurisdiction.

It is clear here that the Legislature's intent was not to remove the duty of townships in 31 counties to maintain traffic control devices necessary for the safety of motorists on those township roads. Consequently, this Court should reject the trial court's interpretation of the statutes at issue and should hold as Patterson suggests, that a township is a "local authority" pursuant to K.S.A. 8-1432, and that Bolton Township here was responsible pursuant to K.S.A. 8-2003 and 8-2005(a) and (c) to conduct an engineering study and/or maintain the appropriate traffic control devices on 322nd Road as specified by the MUTCD.

V. CONCLUSION

The trial court erred with respect to both Bolton Township and Cowley County here. The trial court's decision to absolve Bolton Township of any liability for placing traffic control or warning devices on 322nd Road, a township road within Bolton

Township's jurisdiction, runs directly contrary to existing Supreme Court precedent and the intent of the Kansas statutes governing a government agency's duty to maintain its roadways. Further, the court's decision as to Cowley County directly ignores K.S.A. 8-2003 and its adoption of the MUTCD, which makes Bolton Township a local authority with the duty of ensuring that all roads open to the public within its jurisdiction are compliant with the MUTCD, as determined by a traffic engineering study.

The trial court erred with respect to Cowley County, as its decision to grant Cowley County discretionary function immunity as to the placement of an advisory speed placard overlooked facts that indicate the County's liability here cannot be determined as a matter of law. Further, the trial court's decision as to Cowley County directly ignores the provisions of the MUTCD and the testimony of both Patterson's experts as well as Cowley County's engineer indicating that a traffic engineering study was required or mandatory before any decisions were made as to the placement of traffic control devices on 322nd Road. It is undisputed that Cowley County never performed a traffic engineering study to determine whether an advisory speed placard was necessary at the location in question. Consequently, Cowley County failed in a mandatory duty pursuant to Kansas law, and the jury is entitled to hear Patterson's claims in that regard. For those and the foregoing reasons, Patterson respectfully requests that this Court reverse the partial summary judgment as to Cowley County and reverse the judgment as to Bolton Township, and that this Court remand the issues for jury trial.

Respectfully submitted,

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