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## CONCLUSION

For the reasons discussed, we conclude that the district court did not err in ordering H.M. to testify and in exercising its contempt power to enforce its order. We observe that the fact that the State *may* compel H.M. to testify does not necessarily mean that it *should*. But that question must be left to the judgment and discretion of the prosecutor.

AFFIRMED.

WRIGHT, J., not participating.

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BRIAN SHIPLEY, APPELLANT, V. DEPARTMENT OF ROADS, AN AGENCY OF THE STATE OF NEBRASKA, AND CASS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES.

KENNETH E. STODDARD AND SONDRA K. STODDARD, GUARDIANS OF JAMIN L. STODDARD, AN INCAPACITATED PERSON, APPELLANTS, AND NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, AN AGENCY OF THE STATE OF NEBRASKA, APPELLEE, V. DEPARTMENT OF ROADS, AN AGENCY OF THE STATE OF NEBRASKA, AND CASS COUNTY, NEBRASKA, A POLITICAL SUBDIVISION OF THE STATE OF NEBRASKA, APPELLEES.

813 N.W.2d 455

Filed May 11, 2012. Nos. S-11-293, S-11-294.

1. **Summary Judgment.** Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.
2. **Summary Judgment: Appeal and Error.** In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.
3. **Administrative Law: Judgments.** Interpretation of the Manual on Uniform Traffic Control Devices presents a question of law.
4. **Judgments: Appeal and Error.** When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.

5. **Political Subdivisions Tort Claims Act: Tort Claims Act: Immunity: Waiver.** Both the Political Subdivisions Tort Claims Act and the State Tort Claims Act provide limited waivers of sovereign immunity, which are subject to statutory exceptions.
6. **Political Subdivisions Tort Claims Act: Tort Claims Act.** The discretionary function exception is expressed in nearly identical language in the State Tort Claims Act, see Neb. Rev. Stat. § 81-8,219(1) (Supp. 2007), and the Political Subdivisions Tort Claims Act; thus, cases construing the state exception apply as well to the exception granted to political subdivisions by Neb. Rev. Stat. § 13-910(2) (Supp. 2007).
7. ____: ____. The purpose of the discretionary function exception of the Political Subdivisions Tort Claims Act or the State Tort Claims Act is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.
8. ____: ____. The discretionary function exception of the Political Subdivisions Tort Claims Act or the State Tort Claims Act extends only to basic policy decisions made in governmental activity, and not to ministerial activities implementing such policy decisions. The exception does not extend to the exercise of discretionary acts at an operational level.
9. ____: ____. A court engages in a two-step analysis to determine whether the discretionary function exception of the Political Subdivisions Tort Claims Act or the State Tort Claims Act applies. First, the court must consider whether the action is a matter of choice for the acting employee. If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.
10. **Summary Judgment.** Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.

Appeals from the District Court for Cass County: RANDALL L. REHMEIER, Judge. Affirmed.

James R. Welsh and Christopher Welsh, of Welsh & Welsh, P.C., L.L.O., for appellants.

Jon Bruning, Attorney General, and Douglas L. Kluender for appellee State.

Charles W. Campbell, of Angle, Murphy & Campbell, P.C., L.L.O., for appellee Cass County.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

STEPHAN, J.

On June 5, 2005, Jamin L. Stoddard and Brian Shipley were injured in a collision with a train owned by the Burlington Northern Santa Fe Railway Company (BNSF) at a grade crossing in Cass County, Nebraska. Stoddard's guardians and Shipley brought actions against the Nebraska Department of Roads (NDOR) and Cass County (County) under the State Tort Claims Act (STCA)[1] and the Political Subdivisions Tort Claims Act (PSTCA),[2] alleging that the governmental entities negligently designed the grade crossing and negligently failed to install various warning devices. The district court for Cass County entered summary judgment in favor of the State and the County. Stoddard's guardians and Shipley appeal from that judgment. The principal issue is whether the negligence claims fall within the discretionary function exceptions to the limited waiver of sovereign immunity under the PSTCA and the STCA.

## I. BACKGROUND

### 1. ACCIDENT

The accident occurred at a grade crossing on Beach Road, which is located in Cass County, Nebraska, approximately 2 miles north and one-half mile west of the city of Plattsmouth. Beach Road is a two-lane road that runs in a north-south direction. Two BNSF railroad tracks running generally in an east-west direction intersect with Beach Road at the grade crossing. On the date of the accident, the County owned and controlled the right-of-way included within Beach Road and BNSF owned, controlled, and maintained the crossing.

In 2004, Shipley moved to a house north of Plattsmouth on Colt Drive. Colt Drive runs in an east-west direction parallel to the railroad tracks. Shipley's home was just north and approximately one block west of the crossing. In order to travel from Shipley's home to Plattsmouth, one would proceed east on Colt Drive to Beach Road, then south through the grade crossing to U.S. Highway 75.

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[1] Neb. Rev. Stat. §§ 81-8,209 to 81-8,235 (Reissue 2003 & Supp. 2007).

[2] Neb. Rev. Stat. §§ 13-901 to 13-927 (Reissue 2007).

Stoddard, who is Shipley's uncle, resided in Plattsmouth for most of his life, including at the time of the accident. Stoddard and Shipley were close and spent time together every day before June 5, 2005. When they went places together, it was normal practice for Stoddard to drive and to use Beach Road to access Shipley's home. According to Shipley, when Stoddard's vehicle would approach the crossing, Stoddard typically stopped about 5 feet from the tracks, looked both ways, and then proceeded through the crossing. If a train was approaching, Stoddard would usually stop and wait for the train to clear the crossing.

On June 5, 2005, Stoddard, Shipley, and another passenger were returning to Shipley's home after attending church in Bellevue, Nebraska. As the vehicle operated by Stoddard proceeded north on Beach Road, a westbound train was approaching the crossing. Shipley, who was in the rear seat on the passenger side of the vehicle, does not recall seeing the train involved in the collision.

As it approached the crossing, the train was traveling at a speed of 40 miles per hour and sounding its whistle. An eyewitness observed Stoddard's vehicle proceed at a constant speed toward the crossing. But the train's engineer and conductor both testified that Stoddard first applied the brakes and then accelerated in an attempt to "beat the train."

Stoddard's vehicle and the train collided on the north set of tracks. At the time of the accident, the sky was clear and sunny, and the road was dry. Stoddard and Shipley were severely injured in the collision, and the other passenger was killed.

### 2. Truck Wash Facility

In September 2003, the County issued a permit for the construction of a truck wash facility in the southeast quadrant of the Beach Road crossing. When completed, the north edge of the facility was approximately 56 feet south of the south rail of the crossing.

In the opinion of several experts, the truck wash facility caused the crossing to be severely sight restricted for motorists proceeding north on Beach Road. Experts opined that the crossing did not comply with the minimum sight distances set

out by title 415 of the Nebraska Administrative Code. Title 415 required all new highway-rail grade crossings to meet certain sight distance requirements.

Experts also found that the crossing did not comply with the American Association of Highway and Transportation Officials' "A Policy on Geometric Design of Highways and Streets" (AASHTO Green Book) sight distance table. Experts acknowledged that the AASHTO Green Book contained industry standards and did not constitute a mandatory legal authority. Title 428 of the Nebraska Administrative Code, which the County highway superintendent regarded as a mandatory standard, includes minimum design standards for certain rural state highways and notes that the AASHTO Green Book "should be used for other design criteria."[3]

### 3. Paving Beach Road

In March 2004, the manager of the truck wash facility asked the County to pave a portion of Beach Road that included the segment just south of the crossing. The facility offered to pay 50 percent of the cost. The project was proposed to and accepted by the County's board of commissioners on May 4, 2004. Although the former County highway superintendent was unsure about precisely when the paving project was completed, the current highway superintendent stated that it was completed before the facility paid its 50-percent share with a check dated May 14, 2004.

### 4. Warning Signals Present at Crossing

At the time of the accident, there were no automatic traffic control devices in place at the Beach Road crossing. There was an advance warning sign, installed and maintained by the County, approximately 400 feet south of the crossing. There was also a crossbuck warning sign installed and maintained by BNSF on the east side of Beach Road, approximately 15 feet south of the south rail of the crossing. There was no placard on the crossbuck indicating the presence of two sets of tracks, and

[3] 428 Neb. Admin. Code, ch. 2, § 001.04 (2002).

there was no crossbuck on the west side of Beach Road south of the crossing. Also, there was no pavement marking on Beach Road south of the crossing to warn northbound traffic that the crossing was ahead.

### 5. Claims Against State and County

As relevant to this appeal, Stoddard's guardians and Shipley allege that the County and the State caused the accident and their injuries by (1) failing to install pavement markings on Beach Road to warn of the approaching crossing, (2) failing to improve the sight restriction caused by the truck wash facility, and (3) failing to warn northbound traffic of that sight restriction. The pavement marking claim is based upon an alleged violation of the 2000 version of the Manual on Uniform Traffic Control Devices (Manual). The sight restriction claim is based upon alleged violations of titles 415 and 428 of the Nebraska Administrative Code, as adopted by NDOR, and design standards set forth in the AASHTO Green Book.

### 6. Order Granting Summary Judgment

The County and the State each filed a motion for summary judgment, arguing sovereign immunity barred the claims against them. In its order granting the motions, the district court determined that all claims relevant to this appeal were barred by the discretionary function exception because the alleged failures were discretionary by nature. The court specifically found that neither title 415 nor title 428 applied to the issues of the case and held that the Manual was the controlling legal standard.

The court found summary judgment was also proper on the pavement markings claim because the absence of pavement markings did not cause the accident. And the court found that the failure to improve sight restrictions claim was barred as a failure to inspect claim under § 13-910(3) and as a claim based upon the issuance of a permit under § 13-910(4). The court reasoned that had the County not issued the permit, the facility would not have been constructed. The court

denied motions to alter or amend the summary judgment order filed by Stoddard's guardians and Shipley, and they perfected timely, separate appeals, which we consolidated for argument and disposition.

## II. ASSIGNMENTS OF ERROR

Stoddard's guardians and Shipley assign, restated and summarized, that the district court erred in granting summary judgment on their claims regarding (1) the failure to install pavement markings to warn of the existence of the crossing, (2) the failure to improve sight restrictions, and (3) the failure to warn motorists that the Beach Road crossing was a blind crossing. Stoddard's guardians and Shipley also challenge the district court's finding that neither title 415 nor title 428 applied to this case.

## III. STANDARD OF REVIEW

[1,2] Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.[4] In reviewing a summary judgment, an appellate court views the evidence in the light most favorable to the party against whom the judgment is granted and gives such party the benefit of all reasonable inferences deducible from the evidence.[5]

[3,4] Interpretation of the Manual presents a question of law.[6] When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court.[7]

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[4] *Geddes v. York County*, 273 Neb. 271, 729 N.W.2d 661 (2007); *Brodine v. Blue Cross Blue Shield*, 272 Neb. 713, 724 N.W.2d 321 (2006).

[5] *Id.*

[6] See, *Tadros v. City of Omaha*, 269 Neb. 528, 694 N.W.2d 180 (2005); *Kirkwood v. State*, 16 Neb. App. 459, 748 N.W.2d 83 (2008).

[7] *Thomas & Thomas Court Reporters v. Switzer, ante* p. 19, 810 N.W.2d 677 (2012); *Ginapp v. City of Bellevue*, 282 Neb. 1027, 809 N.W.2d 487 (2012).

## IV. ANALYSIS

### 1. Legal Framework

[5,6] Both the PSTCA and the STCA provide limited waivers of sovereign immunity,[8] which are subject to statutory exceptions.[9] If a statutory exception applies, the claim is barred by sovereign immunity.[10] Here, we are concerned with what is commonly known as the discretionary function exception. The STCA provides that it shall not apply to

> [a]ny claim based upon an act or omission of an employee of the state, exercising due care, in the execution of a statute, rule, or regulation, whether or not such statute, rule, or regulation is valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a state agency or an employee of the state, whether or not the discretion is abused[.][11]

The PSTCA includes a similar provision,[12] and we have held that because of the similarity, cases construing the STCA exception are equally applicable to the discretionary function exception in the PSTCA.[13]

[7-9] The purpose of the discretionary function exception is to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.[14] The discretionary function exception extends only to basic policy decisions made in governmental activity, and not to ministerial activities

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[8] See, *Doe v. Board of Regents*, 280 Neb. 492, 788 N.W.2d 264 (2010); *Geddes, supra* note 4; *Bojanski v. Foley*, 18 Neb. App. 929, 798 N.W.2d 134 (2011).

[9] *Id*. See §§ 13-910 and 81-8,219.

[10] See, *Doe v. Omaha Pub. Sch. Dist.*, 273 Neb. 79, 727 N.W.2d 447 (2007); § 81-8,219. See, also, § 13-910.

[11] § 81-8,219(1).

[12] § 13-910(2).

[13] *Lawry v. County of Sarpy*, 254 Neb. 193, 575 N.W.2d 605 (1998).

[14] *Doe v. Omaha Pub. Sch. Dist., supra* note 10; *Norman v. Ogallala Pub. Sch. Dist.*, 259 Neb. 184, 609 N.W.2d 338 (2000).

implementing such policy decisions. The exception does not extend to the exercise of discretionary acts at an operational level.[15] A court engages in a two-step analysis to determine whether the discretionary function exception of the PSTCA or the STCA applies.[16] First, the court must consider whether the action is a matter of choice for the acting employee.[17] If the court concludes that the challenged conduct involves an element of judgment, it must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield.[18] With these principles in mind, we turn to the specific issues presented for review.

### 2. Pavement Marking Claim

In support of their first assignment of error, Stoddard's guardians and Shipley argue that the Manual required the County to place pavement markings on Beach Road to warn northbound motorists of the crossing ahead. They contend that the Manual imposed a legal requirement which eliminated any element of discretion on the part of County officials. NDOR is authorized by statute to adopt and promulgate rules and regulations adopting and implementing the Manual.[19] The 2000 edition of the Manual was in force and effect on June 5, 2005.

Two statutes refer to the use of the Manual by state and local authorities. Neb. Rev. Stat. § 60-6,120(1) (Reissue 2010) provides that "[NDOR] shall place and maintain, or provide for such placing and maintaining, such traffic control devices, conforming to the [M]anual, upon all state highways as it deems necessary to indicate and to carry out the Nebraska Rules of the Road or to regulate, warn, or guide traffic." Neb. Rev. Stat. § 60-6,121 (Reissue 2010) similarly provides that local authorities "shall place and maintain such traffic control

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[15] *Id.*

[16] *Doe v. Omaha Pub. Sch. Dist., supra* note 10; *Aguallo v. City of Scottsbluff*, 267 Neb. 801, 678 N.W.2d 82 (2004).

[17] *Id.*

[18] *Id.*

[19] Neb. Rev. Stat. § 60-6,118 (Reissue 2010).

devices upon highways under their jurisdictions as they deem necessary to indicate and to carry out the provisions of the Nebraska Rules of the Road or to regulate, warn or guide traffic." Section 60-6,121 further provides that "[a]ll such traffic control devices erected pursuant to the rules shall conform with the [M]anual."

In *McCormick v. City of Norfolk*,[20] we read the phrase "as they deem necessary" in § 60-6,121 as the Legislature's grant of discretion to political subdivisions in the installation of traffic control devices. We noted that the installation of such devices "involves balancing the competing needs of pedestrian safety, engineering concerns, commerce, and traffic flow—which in itself involves safety issues—with limited financial resources. These decisions are normally the type of economic, political, and social policy judgments that the discretionary function exception was designed to shield."[21]

But here, Stoddard's guardians and Shipley contend that the Manual specifically requires pavement markings on roadways approaching a railroad crossing and that therefore, County officials had no discretion in whether to place the markings on Beach Road. They rely on a "Standard" in the Manual, found at paragraph 8B.16, which states in part: "Identical markings shall be placed in each approach lane on all paved approaches to highway-rail grade crossings where signals or automatic gates are located, and at all other highway-rail grade crossings where the posted or statutory highway speed is 60 km/h (40 mph) or greater." But this argument ignores another standard in the Manual, found at paragraph 1A.09, which states: "This Manual describes the application of traffic control devices, but shall not be a legal requirement for their installation." Immediately following this standard is a "Guidance" which states that "[t]he 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 engineering judgment" and, further, that while the Manual "provides

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[20] *McCormick v. City of Norfolk*, 263 Neb. 693, 641 N.W.2d 638 (2002).

[21] *Id.* at 698, 641 N.W.2d at 642.

Standards, Guidance, and Options for design and application of traffic control devices, this Manual should not be considered a substitute for engineering judgment." An expert hired by Stoddard's guardians and Shipley acknowledged that the Manual contemplates the exercise of engineering judgment in determining whether to use a particular traffic control device at a particular location.

Our decision in *Tadros v. City of Omaha*[22] articulates how the Manual factors into the discretionary function exception. In that case, we reaffirmed the principle that "placement of traffic control devices is a discretionary function," but we stated that once a decision to utilize a particular device had been made, the device was "required to conform with the [M]anual."[23] Here, if the County had decided to place pavement markings on Beach Road to warn of the crossing, it would have been required to do so in the manner prescribed by the Manual. But the decision of *whether* to utilize the pavement markings at that location required the exercise of judgment and was therefore a discretionary function for which sovereign immunity was not waived. Accordingly, the district court did not err in entering summary judgment with respect to the pavement marking claim.

### 3. Sight Restriction Claim

Stoddard's guardians and Shipley alleged that the State and County were negligent in failing to improve sight restrictions at the crossing. Several experts opined that the truck wash facility caused the crossing to be severely sight restricted. This opinion was based upon a table in title 415 of the Nebraska Administrative Code defining the proper sight distance at a railroad crossing, as well as a similar table from the AASHTO Green Book. Stoddard's guardians and Shipley contend that these sight distance standards constitute mandatory requirements which preclude application of the discretionary function exception.

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[22] *Tadros v. City of Omaha, supra* note 6.

[23] *Id.* at 540, 694 N.W.2d at 190.

(a) Title 415

The sight restrictions in title 415 apply to "*new* public highway-rail grade crossings."[24] Title 415 became effective on December 14, 2004. The parties agree that the grade crossing existed prior to that date and is not "new." But title 415 defines "new" to include "[t]he construction of a new roadway across an existing railroad line."[25] Thus, the applicability of the title 415 sight restrictions to this case depends upon whether the Beach Road paving project was completed before or after December 14, 2004. The district court determined that the project was completed prior to May 25, 2004, and that thus, title 415 did not apply. Stoddard's guardians and Shipley argue there is a genuine issue of material fact with respect to the completion date.

In support of their motions for summary judgment, the County and the State offered the affidavit of the County's current highway superintendent, who served as the assistant superintendent from 2004 to 2007 and was familiar with the Beach Road paving project. He stated that the truck wash facility paid its share of the cost with a check dated May 14, 2004, and that based upon his recollection and review of the records, the pavement project was completed prior to the payment. Stoddard's guardians and Shipley offered the deposition of the former highway superintendent, who testified that he could not recall when the project was completed and could not make a "good guess" without seeing additional records.

[10] Conclusions based upon guess, speculation, conjecture, or a choice of possibilities do not create material issues of fact for purposes of summary judgment.[26] In *Mefferd v. Sieler & Co.*,[27] the existence of liability insurance coverage turned on the issue of whether the insured had given timely notice of a lawsuit filed against it. In support of its motion for summary

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[24] 415 Neb. Admin. Code, ch. 6, § 002.01G (2004) (emphasis supplied).

[25] *Id.*, ch. 4, § 001.18A.

[26] *Dresser v. Union Pacific RR. Co.*, 282 Neb. 537, 809 N.W.2d 713 (2011).

[27] *Mefferd v. Sieler & Co.*, 267 Neb. 532, 676 N.W.2d 22 (2004).

judgment, the insurance carrier offered the testimony of its employee stating that he had not been informed of the lawsuit until after a default judgment had been entered. In opposition to the motion, the president of the insured testified that she could not recall whether she informed the carrier of the suit before or after the default judgment. We concluded that this "equivocal testimony" did not create a genuine issue of material fact, noting that "because of its uncertainty," it did not stand contrary to the carrier's showing that it did not receive timely notice.[28]

Similarly, we conclude in this case that the former superintendent's testimony that he did not know when the Beach Road paving project was completed does not controvert the current superintendent's testimony that it was completed in May 2004, which was months prior to the effective date of title 415. Accordingly, the district court did not err in concluding that the sight restriction standards set forth in title 415 did not apply to this case.

### (b) Title 428 and AASHTO Green Book

Title 428 of the Nebraska Administrative Code includes minimum design standards for public roadways. It does not include specific sight distance requirements for railroad crossings, but it includes a note stating that the AASHTO Green Book "should be used for other design criteria."[29] The AASHTO Green Book includes a sight distance table. Based upon this table, an expert for Stoddard's guardians and Shipley opined that the Beach Road crossing was sight restricted. But we do not read title 428 or the AASHTO Green Book to impose mandatory sight distance requirements for grade crossings in Nebraska. We agree with the characterization by one of the experts hired by Stoddard's guardians and Shipley that the AASHTO Green Book sets forth guidelines which are not legal standards.

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[28] *Id.* at 537, 676 N.W.2d at 27.

[29] 428 Neb. Admin. Code, *supra* note 3.

(c) Disposition

The record does not support a claim that either the State or the County had a mandatory legal duty to improve any sight restriction at the crossing created by the truck wash facility. Any decision of whether or how to do so would necessarily involve balancing the competing needs of public safety, engineering concerns, and expenditure of public funds. We conclude that the district court did not err in finding that this claim falls within the discretionary function exceptions of the PSTCA and the STCA.

4. Failure-To-Warn Claim

Stoddard's guardians and Shipley alleged that the State and the County were negligent in failing to warn northbound vehicular traffic on Beach Road that the presence of the truck wash facility made the crossing a "blind crossing" to "any oncoming westbound locomotives and vice versa." Relying upon *Lemke v. Metropolitan Utilities Dist.*,[30] they argue the County and the State had a nondelegable duty to warn, which does not come within the discretionary function exception.

*Lemke* involved a claim against a public utility for damages caused by a natural gas explosion in a residence served by the utility. The explosion was caused by a leak in a flexible connector used by the utility to connect its natural gas line to a range in the home. There was evidence that the utility had received a specific warning from its trade association regarding dangers associated with the connector, but did not take any specific steps to warn its customers of the hazard posed by the connector. One question presented was whether the claim that the utility failed to warn its customer fell within the discretionary function exception of the PSTCA. After reviewing cases from other jurisdictions, this court held that

> when (1) a governmental entity has actual or constructive notice of a dangerous condition or hazard caused by or under the control of the governmental entity and (2) the

[30] *Lemke v. Metropolitan Utilities Dist.*, 243 Neb. 633, 502 N.W.2d 80 (1993).

> dangerous condition or hazard is not readily apparent to persons who are likely to be injured by the dangerous condition or hazard, the governmental entity has a nondiscretionary duty to warn of the danger or take other protective measures that may prevent injury as the result of the dangerous condition or hazard.[31]

In this circumstance, we held that the discretionary function exception did not apply. Similarly, in *Parker v. Lancaster Cty. Sch. Dist. No. 001*,[32] we held that a school district had a nondiscretionary duty to warn of an unguarded ramp or floor riser in a school building which caused the plaintiff to fall and injure herself.

But the facts of this case do not support the existence of the nondiscretionary duty to warn recognized in *Lemke* and *Parker*. The truck wash facility alleged to constitute the sight restriction "hazard" was built by a private party on private property and was thus not "caused by or under the control of" the State or the County. Moreover, prior accidents at the crossing did not place the State or the County on actual or constructive notice of any hazard posed by the truck wash facility, as Stoddard's guardians and Shipley claim. The prior accidents occurred between March 1983 and January 1995, and permits were not issued for the construction of the facility until 2003. And further, any sight restriction hazard posed by the truck wash facility was readily apparent to a northbound motorist approaching the crossing. Thus, any duty to warn on the part of the State or the County was discretionary.

## V. CONCLUSION

The issue presented by these appeals is not whether the State or the County was negligent, but whether any claimed negligence occurred in the performance of discretionary functions for which the Legislature has granted immunity. As we have previously noted, because immunity necessarily implies that a

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[31] *Id.* at 647, 502 N.W.2d at 89.

[32] *Parker v. Lancaster Cty. Sch. Dist. No. 001*, 256 Neb. 406, 591 N.W.2d 532 (1999).

"wrong" has occurred, some tort claims against governmental agencies will inevitably go unremedied.[33] Each grade crossing, like each street or highway crossing, has some inherent danger,[34] but the placement of traffic control devices is a discretionary function of a governmental entity.[35] For the reasons discussed, the district court did not err in concluding that all of the claims which are the subject of these appeals fell within the discretionary function exceptions of the PSTCA and the STCA, and we therefore affirm the judgment in each case.

AFFIRMED.

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[33] *McCormick v. City of Norfolk, supra* note 20.

[34] See *id.*

[35] See *id.* See, also, *Dresser v. Thayer County*, 18 Neb. App. 99, 774 N.W.2d 640 (2009).

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# FIELD CLUB HOME OWNERS LEAGUE, A NEBRASKA CORPORATION, AND THORNBURG PLACE NEIGHBORHOOD ASSOCIATION, AN UNINCORPORATED ASSOCIATION, APPELLANTS, V. ZONING BOARD OF APPEALS OF OMAHA ET AL., APPELLEES.

814 N.W.2d 102

Filed May 11, 2012. No. S-11-432.

1. **Jurisdiction: Appeal and Error.** An appellate court reviews de novo jurisdictional determinations that do not involve a factual dispute.
2. **Zoning.** A zoning board is an administrative body performing quasi-judicial functions.
3. **Zoning: Standing.** To apply for a variance from a zoning regulation, the applicant must have standing.
4. **Standing: Jurisdiction: Parties.** Standing refers to whether a party had, at the commencement of the litigation, a personal stake in the outcome of the litigation that would warrant a court's or tribunal's exercising its jurisdiction and remedial powers on the party's behalf.
5. ____: ____: ____. Standing is a component of jurisdiction; only a party that has standing—a legal or equitable right, title, or interest in the subject matter of the controversy—may invoke the jurisdiction of a court or tribunal.
6. **Claims: Parties.** Generally, a litigant must assert the litigant's own rights and interests, and cannot rest a claim on the legal rights or interests of third parties.