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May 29, 1981

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ATTORNEY GENERAL OPINION NO. 81-125

The Honorable John E. Chandler
State Senator, First District
State Capitol, Room 128-S
Topeka, Kansas 66612

Re: Roads and Bridges -- Bridges -- Maintenance; Not
Considered as Part of Road

Synopsis: While at common law a bridge was considered to be part of the highway with which it is connected, a different result must be reached in the case of 1981 House Bill No. 2298. That bill establishes procedures for declaring certain county roads to be "minimum maintenance" roads, and further declares that no tort liability exists on the part of a governmental entity due to damages resulting from the conditions of such roads. Although such immunity may extend to damages caused by conditions on the roadbed, injuries caused by structural defects in the bridge itself would, absent any legislative intent to the contrary, still leave the governmental entity liable in tort. Cited herein: K.S.A. 68-102, 68-1126, K.S.A. 1980 Supp. 75-6104, 1981 House Bill No. 2298, §§1, 2.

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Dear Senator Chandler:

As State Senator for the First Senatorial District, which includes Atchison, Brown, Doniphan, Jackson and Jefferson Counties, you request the opinion of this office on the scope of a measure recently enacted by the Kansas Legislature. Specifically, you inquire concerning 1981 House Bill No. 2298, and whether it includes bridges in addition to roads.

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The bill in question contains two sections, the first of which establishes procedures by which a county commission may declare certain county roads to be minimum maintenance roads. While exactly what is meant by "minimum maintenance" is unclear from the language of the Act, the purpose of such proceedings is clear from section 1(f), which states:

"Whenever a road has been declared a minimum maintenance road in accordance with this section and signs have been posted thereon as provided in (d) [Minimum maintenance, travel at your own risk], the state, the county and the townships within such county and employees of such governmental entities shall be exempt from liability for any claim by any person under the Kansas tort claims act with respect to such minimum maintenance roads. No such governmental entity or employee thereof shall be liable for damages arising from such roads or their maintenance or condition."

Section 2 amends K.S.A. 1980 Supp. 75-6104 to include the above exemption in the list of activities which are excluded from the provisions of the Tort Claims Act. You wish to know whether the exemption extends to bridges on a road which is the subject of a minimum maintenance proceeding and which is in fact so declared.

At common law, a bridge was generally considered to be a part of the highway or road, the roadbed of which it supports. 11 C.J.S. Bridges §3, 39 Am.Jur.2d Highways, Streets and Bridges §11. While no decision of a Kansas court has stated this principle in so many words, it has been held that defective conditions on the roadbed and guardrail of a bridge constituted a defect in a highway for purposes of recovering damages from a county. Noblit v. Sedgwick County Comm'rs., 190 Kan. 586 (1962). The close relationship between roads and bridges was further recognized in Dubourdieu v. Delaware Township, 106 Kan. 650 (1920), where a statute at issue made counties and townships "liable for defects in bridges, culverts and highways" in certain cases. In response to an attack that the statute was unconstitutional as containing more than one subject, the court stated that:

"We think that in this act, as in all other legislation with reference to bridges and highways, the legislature considered that a bridge is part of a highway -- which it always is."

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However, in examining the measure before us, it is our opinion that a similar result cannot be reached. As in all cases where a statute is construed, the intent of the legislature, if such can be determined from the plain language of the statute, must prevail. City of Salina v. Jagers, 228 Kan. 155 (1980). Moreover, it must be presumed that the legislature had, and acted with, full knowledge as to the subject matter which the statute concerns and as to existing law and legislation on that same subject. Rogers v. Shanahan, 221 Kan. 221 (1976).

The application of such principles to this bill leads us to the conclusion that bridges should not be treated as merely as extension of the roads they support. It first may be noted that while many of the statutes contained in Chapter 68 of Kansas Statutes Annotated deal with roads, others deal solely with bridges and yet a third category deals with both. An example of this latter group is K.S.A. 68-1109, which concerns roadway dimensions on county and township bridges. Additionally, it may be seen from the Dubourdieu case that the legislature has enacted measures which deal specifically both with bridges and with roads. Yet, 1981 House Bill No. 2298 mentions only roads in its sections, although bridges could easily have been included. In light of the above, we consider this omission significant, as an indication of the limited scope of the bill.

Secondly, a consideration of the purpose and effect of the bill must, in our opinion, lead to the conclusion that bridges must be treated differently from roads. As noted above, the measure empowers county commissions to designate certain roads as minimum maintenance ones, thus reducing the duty of care the county owes to users and thereby limiting its liability. While the bill does not specify how a county's maintenance procedures may be cut back, we assume that a reduction in activities such as grading, blading and repairing of chuckholes or eroded shoulders would be involved. All of these, it should be noted, would not make the road impassable (for the road would not be formally vacated, as in K.S.A. 68-102 et seq.), but would reduce the safety factor for motorists, hence the warning signs. It also should be noted that the county would remain liable for major repairs of the type which would warrant the temporary closing of the road to all traffic. See K.S.A. 68-2101 et seq.

Bridges, on the other hand, cannot be treated in the same fashion. While the condition of a road may make it obvious that it is safe at 25 miles per hour and unsafe at 50, the

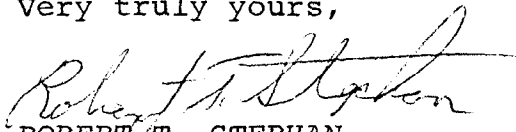
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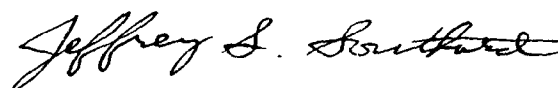
safety of a bridge is less easily ascertained by a visible inspection. While it would conceivably be possible to reduce maintenance done on the roadbed of a bridge (i.e., by grading it less often), it is another matter entirely to speak of reducing the maintenance done on the structural portion itself, for a bridge is either safe or unsafe, and if the latter, must be condemned and closed. K.S.A. 68-1126. Additionally, the Tort Claims Act provides immunity only for acts of negligence. As such, the action of a county commission in keeping open a bridge which was in less than a safe condition could constitute the kind of willful and wanton behavior not excused by statute.

While the above discussion answers your specific question, we feel constrained to express some concern as to the constitutionality of the act itself. In our view, two potentially fatal defects exist in the language of the act as it now exists. First, as noted above, there are presently no standards established for what is a minimum maintenance road, leaving it unclear as to what reduced upkeep functions would still be performed. Second, this omission also has the effect of making the statute unclear as to the duty which a county would continue to owe to motorists, i.e., how far would the road be allowed to deteriorate before the county would be liable, notwithstanding the posted warning signs.

In conclusion, while at common law a bridge was considered to be part of the highway with which it is connected, a different result must be reached in the case of 1981 House Bill No. 2298. That bill established procedures for declaring certain county roads to be "minimum maintenance" roads, and further declares that no tort liability exists on the part of a governmental entity due to damages resulting from the condition of such roads. Although such immunity may extend to damages caused by conditions on the roadbed, injuries caused by structural defects in the bridge itself would, absent any legislative intent to the contrary, still leave the governmental entity liable in tort.

Very truly yours,


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