



Effect of MUTCD on Tort Liability of Government Transportation Agencies

DETAILS

96 pages | 8.5 x 11 | PAPERBACK

ISBN 978-0-309-28428-8 | DOI 10.17226/22244

AUTHORS

Larry W. Thomas

BUY THIS BOOK

FIND RELATED TITLES

Visit the National Academies Press at NAP.edu and login or register to get:

- Access to free PDF downloads of thousands of scientific reports
- 10% off the price of print titles
- Email or social media notifications of new titles related to your interests
- Special offers and discounts



Distribution, posting, or copying of this PDF is strictly prohibited without written permission of the National Academies Press. (Request Permission) Unless otherwise indicated, all materials in this PDF are copyrighted by the National Academy of Sciences.

NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Legal Research Digest 63

EFFECT OF MUTCD ON TORT LIABILITY OF GOVERNMENT TRANSPORTATION AGENCIES

This report was prepared under NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs," for which the Transportation Research Board is the agency coordinating the research. The report was prepared by Larry W. Thomas, The Thomas Law Firm, Washington, DC. James B. McDaniel, TRB Counsel for Legal Research Projects, was the principal investigator and content editor.

The Problem and Its Solution

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report continues NCHRP's practice of keeping departments up-to-date on laws that will affect their operations.

Applications

The most recent version of the *Manual on Uniform Traffic Control Devices* (MUTCD) was adopted by the U.S. Department of Transportation on December 16, 2009, to be effective January 15, 2010. The final rulemaking (74 *Federal Register* 66729) also required that, within 2 years of the effective date, states adopt the MUTCD as their legal state standard for traffic control devices. The MUTCD, administered by the Federal Highway Administration since 1971, has been revised a number of times over the years, with the most recent previous edition being adopted in 2003. The 2009 revision made changes to some compliance dates, as well as language changes, that may impact on states' possible tort liability.

This research was undertaken to inform practitioners about the current status of tort liability involving governmental transportation agencies arising from the application and development of the MUTCD.

Research explores the basis for tort liability arising before and after adoption of the MUTCD. This includes issues relating to governmental immunity, such as mandatory versus permissive language and the "planning/operational" test to determine governmental liability, which are considered and discussed in *NCHRP Legal Research Digest 38: Risk Management for Transportation Programs Employing Written Guidelines as Design and Performance Standards* (1997). Virtually all states and localities permit a plaintiff to sue a public entity for negligence, subject, however, to certain limitations and exceptions. As discussed in this digest, tort claims acts that apply to transportation departments and other public entities generally include a discretionary function exemption to immunize public entities for alleged negligence when exercising their discretion. In addition, a state's tort claims act or other state statute may include additional exceptions to the liability of transportation departments.

Issues that are addressed include: 1) the effect of the MUTCD on the manner in which government tort liability has developed; 2) the extent to which federal, state, and other governments have adopted tort claims acts and laws that have waived or greatly curtailed sovereign immunity; and 3) the impact of peculiar state laws.

This digest should be useful to highway attorneys, safety officials, budget planners, and state highway officials in general.

CONTENTS

- I. Introduction, 3
- II. The 2009 Revision of the MUTCD, 4
 - A. The MUTCD as the National Standard, 4
 - B. Overview of the 2009 MUTCD, 4
 - C. MUTCD's Standards, Guidance, Options, and Support, 5
 - D. Discussion of Some Specific Changes in the 2009 MUTCD, 5
 - E. Revision 1 of the MUTCD, 9
 - F. Revision 2 of the MUTCD, 10
 - G. Dates of State Adoption of the 2009 MUTCD, 10
- III. State Reaction to the 2009 MUTCD, 11
 - A. Changes Identified as Being Potentially Beneficial, 11
 - B. Changes Identified as Being Potentially Detrimental, 11
- IV. The 2009 MUTCD's Effect on Government Tort Liability, 12
 - A. The MUTCD and the Use of Engineering Judgment, 12
 - B. Mandatory Provisions of the MUTCD, 13
 - C. Nonmandatory Provisions of the MUTCD, 14
 - D. Transportation Departments' Obligations Under Other State Statutes, 15
- V. Tort Claims Against Transportation Departments Before and After the 2009 MUTCD, 16
 - A. Claims After the 2009 MUTCD, 16
 - B. Tort Claims Prior to the 2009 MUTCD, 18
- VI. The MUTCD and Tort Liability of Transportation Departments, 18
 - A. Liability Under Tort Claims Acts, 18
 - B. Extent of the Waiver of Government Tort Immunity, 19
 - C. Transportation Departments' Defenses to Claims Involving the MUTCD, 20
 - D. Whether Departments Have a Duty to Provide Traffic Control Devices, 21
 - E. Whether a Duty Arises When There Is a Dangerous Condition, 22
 - F. The Standard of Care and the MUTCD, 25
 - G. Whether a Violation of the MUTCD Constitutes Negligence *Per Se*, 26
 - H. The MUTCD and Proximate Cause, 27
 - I. Contributory Negligence or Comparative Fault, 28
 - J. Role of the Jury in MUTCD Cases, 28
- VII. Immunities of Transportation Departments When Using Their Discretion in Applying the MUTCD, 29
 - A. The MUTCD and the Discretionary Function Exemption, 29
 - B. The Discretionary–Ministerial Distinction, 33
 - C. Whether to Distinguish Between Functions and Acts in Performing Functions, 34
 - D. Whether Prioritizing by a Transportation Department Is a Defense in an MUTCD Case, 34
 - E. The Requirement that There Be an Actual Exercise of Discretion, 35
 - F. The Exercise of Discretion and Recordkeeping, 36
- VIII. Traffic Control Devices Under the MUTCD and the Exercise of Discretion, 37
 - A. The MUTCD and Immunity for a Negligent Plan or Design, 37
 - B. Design Immunity Statutes, 39
 - C. The MUTCD and Liability for Highway Maintenance, 41
 - D. The MUTCD and Liability for Signs and Warning Signs, 42
 - E. The MUTCD and Liability for Traffic Signals, 44
 - F. The MUTCD and Liability for Stop Signs and Speed Limit Signs, 46
 - G. The MUTCD and Liability for Pavement Markings, 47
 - H. Statements in the MUTCD Regarding Barriers and Guardrails, 48
- Conclusion, 49
- Appendix A: Survey of Transportation Departments, A1
- Appendix B: Summary of Survey Responses of Transportation Departments, B1
- Appendix C: List of Transportation Departments Responding to the Survey, C1

EFFECT OF MUTCD ON TORT LIABILITY OF GOVERNMENT TRANSPORTATION AGENCIES

By Larry W. Thomas, The Thomas Law Firm, Washington, DC

I. INTRODUCTION

The Manual on Uniform Traffic Control Devices (MUTCD or Manual) has been at issue in many tort actions against transportation agencies by motorists, bicyclists, or pedestrians for a transportation department's alleged violation of one or more provisions of the Manual.¹ The extent of a transportation agency's tort liability differs from state to state because of the lack of uniformity of state tort claims acts and other relevant statutes and judicial interpretation of the same. Transportation agencies thus need to be aware of the effect of the MUTCD on their potential liability in tort under their own state's laws.

The first MUTCD was published in 1935.² Subsequent revisions appeared thereafter but "a completely rewritten MUTCD premiered in 1971."³ The 1971 version included definitions of *shall*, *should*, and *may* for the first time.⁴ The 1971 edition and revisions thereafter were occurring at approximately the same time that state laws were being enacted, waiving sovereign immunity to a certain extent, which applied to the tort liability of transportation departments and other public entities. In virtually all states and localities, a tort claims act may permit a plaintiff to sue a public entity for negligence, subject, however, to certain limitations and exceptions.⁵ As discussed

in this digest, tort claims acts that apply to transportation departments and other public entities generally include a discretionary function exemption to immunize public entities for alleged negligence when exercising their discretion. In addition, a state's tort claims act or other state statute may include additional exceptions to the liability of transportation departments.

The 2009 edition of the MUTCD defines traffic control devices "as all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, bikeway, or private road open to public travel."⁶ Even though they significantly affect traffic operations and safety, some highway design features are not specifically included in the Manual as traffic control devices, such as curbs, median barriers, guard rails, and speed humps.⁷

Sections I and II of the digest discuss the 2009 edition of the MUTCD. Section I discusses the meaning of key terms in the MUTCD that are mandatory, such as Standards, except to the extent they are modified elsewhere in the Manual, and guidance and other statements that are not mandatory. Section I also analyzes some of the specific changes that the Federal Highway Administration (FHWA) made in the 2009 MUTCD and reviews Revisions 1 and 2 of the 2009 MUTCD, which FHWA adopted in 2012. Section II discusses the state transportation departments' reaction to the 2009 edition, including revisions that the departments believe are beneficial to their ability to defend against tort claims, as well as those that they believe may result in increased tort liability.

Section III analyzes the 2009 MUTCD's effect on government tort liability, such as the Manual's approval of the departments' use of engineering

¹ The MUTCD is available at <http://mutcd.fhwa.dot.gov/pdfs/2009r1r2/mutcd09r1r2editionhl.pdf> and is referred to hereafter as the "2009 MUTCD."

² Federal Highway Administration, The Evolution of MUTCD, available at <http://mutcd.fhwa.dot.gov/kno-history.htm>.

³ *Id.*

⁴ *Id.*

⁵ Some states such as Delaware and Wyoming still retain sovereign immunity in tort for highway functions. See *Quickel v. New Castle County*, 2002 Del. Super. LEXIS 173 (Super. Ct. Del., New Castle 2002) (dismissing action against the DOT because DEL. CONST. art. I, § 9 provides for sovereign immunity of the State that is an absolute bar to suit unless waived by the legislature); *White v. State*, 784 P.2d 1313 (Wyoming 1989) (upholding WYO. STAT. ANN. § 1-39-120, which provided immunity from suit for design, construction, and maintenance of highway and holding that WYO. CONST. art. 1, § 8 did not grant an unconditional right to sue the State). WYO. STAT. ANN. § 1-39-

120, Exclusions from Waiver of Immunity, providing that:

- (a) The liability imposed by W.S. 1-39-106 through 1-39-112 does not include liability for damages caused by:
 - (i) A defect in the plan or design of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area;
 - (ii) The failure to construct or reconstruct any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area; or
 - (iii) The maintenance, including maintenance to compensate for weather conditions, of any bridge, culvert, highway, roadway, street, alley, sidewalk or parking area.

⁶ 2009 MUTCD, *supra* note 1, at 1-1.

⁷ *Id.* § 1A.08, at 3.

judgment in applying the MUTCD, and the Manual's mandatory and nonmandatory provisions. Section III also discusses state statutes that may affect, limit, or even immunize transportation departments for their decisions regarding their use or omission of traffic control devices.

Section IV reviews a sampling of cases and outcomes for approximately the past 3 years in which opinions are available on tort claims arising under the 2009 MUTCD and prior editions of the Manual.⁸ For cases since the effective date of the 2009 MUTCD, the digest relies primarily on information provided by state departments of transportation (DOTs) in response to a survey of the departments conducted for the digest.

Section V discusses tort liability of transportation departments in relation to the MUTCD, including the effect of the MUTCD on the liability of transportation departments under state tort claims acts, defenses asserted by transportation departments in MUTCD cases, and the duties and standard of care applicable to departmental decisions on the use of traffic control devices subject to the Manual. Section V also examines whether the existence of a dangerous highway condition implicating a traffic control device affects transportation departments' tort liability for alleged infractions of the MUTCD.

Sections VI and VII discuss immunities that transportation departments may have when applying the MUTCD. Section VI discusses the discretionary function exemption appearing in many state tort claims acts, whether departments may prioritize whether and when to install or provide traffic control devices, and whether there must be evidence that a department actually exercised its discretion in making a decision concerning a traffic control device to qualify for immunity. Section VI also reviews the policies of transportation departments on making and retaining records of decisions on the use of traffic control devices. Section VII discusses whether departments have immunity for an alleged negligent plan or design of a highway involving the use of traffic control devices; whether they may claim immunity for negligent maintenance of traffic control devices; and whether they have immunity from tort claims resulting from their decisions specifically in regard to the use of signs, signals, pavement markings, and other traffic control devices.

Twenty-one state transportation departments responded to a survey that was conducted to obtain information for the digest. The results of the survey were not intended to serve as the basis for an empirical study or analysis. Rather, the survey sought to gather information from transportation departments on the 2009 MUTCD and related issues, including information on tort claims

against the departments arising under the latest edition of the Manual. The transportation departments' responses to the survey are discussed throughout the digest and are summarized in Appendix B. The digest includes two tables, the first of which is based on a sampling of cases from the period 2010–2013 arising under the 2003 MUTCD and prior editions of the Manual. The second table is based on a compilation of MUTCD cases from the period 2005–2013 that was provided by the New York State Department of Transportation (NYSDOT) in response to the survey.

II. THE 2009 REVISION OF THE MUTCD

A. The MUTCD as the National Standard

FHWA is authorized to prescribe standards for traffic control devices on all roads open to public travel pursuant to 23 United States Code (U.S.C.) §§ 109(d), 114(a), 217, 315, and 402(a). Consequently, the 2009 MUTCD promulgated by FHWA “is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel.”⁹ In the MUTCD, the phrase “open to public travel” “includes toll roads and roads within shopping centers, airports, sports arenas, and other similar business and/or recreation facilities that are privately owned but where the public is allowed to travel without access restrictions.”¹⁰

To remain eligible for federal highway and highway safety program funds, a state must adopt the national MUTCD as a state regulation, adopt a state MUTCD that is approved by the U.S. Secretary of Transportation as being in “substantial conformance”¹¹ with the national MUTCD, or adopt the national MUTCD in conjunction with a state supplement.¹²

B. Overview of the 2009 MUTCD

The 2009 MUTCD is comprised of an introduction, nine parts, and two appendices. There are chapters within each part and sections within each chapter. The first chapter in each part is entitled *General* and provides an overview and relevant information on the contents of each part,

⁹ 23 C.F.R. § 655.603(a).

¹⁰ 23 C.F.R. pt. 655 subpt. F. *See also* Oliver v. Ralphs Grocery Co., 654 F.3d 903, 909–10 (9th Cir. 2011).

¹¹ For the meaning of “substantial conformance,” *see* Federal Highway Administration, Traffic Control Devices on Federal-Aid and Other Streets and Highways; Standards, Final Rule, 71 Fed. Reg. 75,111 (Dec. 14, 2006).

¹² *See* 23 U.S.C. §§ 109(d), 402(c); 23 C.F.R. § 655.603(b)(3).

⁸ *See* discussion in §§ IV.A and B of the digest.

such as its purpose, definitions associated with the part, and the part's application to traffic control devices. The chapters that follow a general chapter address specific aspects of the subject of each part of the Manual.

The nine parts of the MUTCD are Part 1, General; Part 2, Signs; Part 3, Markings; Part 4, Highway Traffic Signals; Part 5, Traffic Control Devices for Low-Volume Roads; Part 6, Temporary Traffic Control; Part 7, Traffic Control for School Areas; Part 8, Traffic Control for Railroad and Light Rail Transit Grade Crossings; and Part 9, Traffic Control for Bicycle Facilities.¹³ For example, Part 2 of the MUTCD regulates everything concerning signs, such as when they are used, how they are used, how they must appear, and the specific wording that must be used.

As discussed in Section II.C below, of particular importance to the digest and the tort liability of transportation departments are the MUTCD's statements that are identified in the Manual as Standards, Guidance, Options, and Support.

C. MUTCD's Standards, Guidance, Options, and Support

As explained by an Ohio court, the MUTCD is "organized to differentiate between 'Standards that must be satisfied...Guidances, that should be followed...and Options that may be applicable for the particular circumstances of a situation.'"¹⁴ Only those provisions that are designated as Standards are mandatory.¹⁵

In the MUTCD a statement that is a Standard signifies "required, mandatory, or specifically prohibitive practice regarding a traffic control device."¹⁶ Standards typically use the verb *shall* and never use the terms *should* or *may*.¹⁷ Standards are "sometimes modified by Options."¹⁸

A guidance statement in the Manual is a "statement of recommended, but not mandatory, practice in typical situations, with deviations allowed if engineering judgment or engineering study indicates the deviation to be appropriate."¹⁹ Guidance statements typically use the verb *should* and never use the terms *shall* or *may*.²⁰

¹³ The first appendix is entitled, Congressional Legislation, and the second appendix is entitled, Metric Conversions.

¹⁴ *Yonkings v. Piwinski*, 2011-Ohio-6232, at 23 (2011).

¹⁵ *Am. Family Mutual Ins. Co. v. Outagamie County*, 2012 WI App 60 at 19, 341 Wis. 2d 413, 426, 816 N.W.2d 340, 347 (2012) (citation omitted).

¹⁶ 2009 MUTCD, *supra* note 1, at 10.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

Guidance statements are also sometimes modified by Options.²¹

Although Standards are mandatory, guidance statements are not mandatory, as held also in an Ohio case. In *Walters v. Columbus*,²² the court considered a guidance statement on "STOP Sign Application" in Section 2B.05 of the Ohio MUTCD. The court ruled that the phrase in the section—"should be used if engineering judgment indicates that one or more of the listed conditions exists"—means that the placement of the stop sign at issue was discretionary and not mandatory.²³

As stated, standards and guidance statements may be modified by Options.²⁴ An Option is a "statement of practice that is a permissive condition and carries no requirement or recommendation."²⁵ Options typically use the verb *may* and never use the terms *shall* or *should*.²⁶

The final type of statements found in the MUTCD are Support statements, which are "informational" and do "not convey any degree of mandate, recommendation, authorization, prohibition, or enforceable condition."²⁷ Support statements do not use the verbs *shall*, *should*, or *may*.²⁸

D. Discussion of Some Specific Changes in the 2009 MUTCD

1. Provisions of the MUTCD that Were Elevated to Standards

On December 16, 2009, FHWA published the revised MUTCD in the *Federal Register*.²⁹ Some statements in the 2003 MUTCD were recategorized as Standards in the 2009 edition. For example, in Part 1 containing general provisions applicable to the MUTCD in Section 1A.08 regarding the Authority for Placement of Traffic Control Devices, FHWA elevated the following provision from a guidance statement to a Standard: "Signs and other devices that do not have any traffic control purpose that are placed within the highway

²¹ *Id.*

²² 2008 Ohio 4258 (2008).

²³ *Id.* at 23–24.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ Federal Highway Administration, National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision; Final Rule, 74 Fed. Reg. 66,730, 66780-84 (Dec. 16, 2009), available at <http://www.gpo.gov/fdsys/pkg/FR-2009-12-16/html/E9-28322.htm>, hereinafter referred to as the "2009 Final Rule–MUTCD."

right-of-way shall not be located where they will interfere with, or detract from, traffic control devices.”³⁰

Several statements in Part 2 on Signs became Standards. For example, in Section 2A.18 on Mounting Height, the statement in paragraph 01 that “[t]he provisions of this Section shall apply unless specifically stated otherwise for a particular sign or object marker elsewhere in this Manual,” although originally proposed as a guidance statement, was set as a Standard.³¹ In the same section, the following statement in paragraph 05 was adopted as a Standard:

The minimum height, measured vertically from the bottom of the sign to the top of the curb, or in the absence of curb, measured vertically from the bottom of the sign to the elevation of the near edge of the traveled way, of signs installed at the side of the road in business, commercial, or residential areas where parking or pedestrian movements are likely to occur, or where the view of the sign might be obstructed, shall be 7 feet.³²

In Section 2B.02, Design of Regulatory Signs, the statement in paragraph 01 was converted to a Standard: “Regulatory signs shall be rectangular unless specifically designated otherwise. Regulatory signs shall be designed in accordance with the sizes, shapes, colors, and legends contained in the ‘Standard Highway Signs and Markings’ book (see Section 1A.11).”³³

In Section 2B.40 on One Way Signs (Section 2B.37 of the 2003 MUTCD), FHWA

change[d] paragraph 03 to a STANDARD to require, rather than recommend, that at an intersection with a divided highway having a median width of 30 feet or more, ONE WAY signs be placed on the near right and far left corners of each intersection with the directional roadways to reflect recommendations from the Older Driver handbook.³⁴

In Section 2B.42 applicable to Divided Highway Crossing Signs (R6-3, R6-3a), the statement in paragraph 05 that “[t]he Divided Highway Crossing sign shall be located on the near right corner of the intersection, mounted beneath a STOP or YIELD sign or on a separate support” was elevated from an Option to a Standard.³⁵

In Section 2C.09, the statement in paragraph 01 was elevated to a Standard: “The use of the Chevron Alignment (W1-8) sign (see Figures 2C-1 and 2C-2) to provide additional emphasis and guidance for a change in horizontal alignment shall be in accordance with the information shown in Table 2C-5.”³⁶

In Section 2E.31 on Interchange Exit Numbering (Section 2E.28 in the 2003 MUTCD), FHWA in paragraph 04 “replace[d] an OPTION with a STANDARD stating that interchange exit numbering shall use the reference location exit numbering method and that the consecutive exit numbering method shall not be used.”³⁷ The change was adopted “because only 8 of the 50 States still use consecutive exit numbering and, based on past public comment and inquiries, the vast majority of road users now expect reference location exit numbering.”³⁸

Also in Section 2E.31, FHWA

change[d] a GUIDANCE statement in the 2003 MUTCD to a STANDARD statement to require that a left exit number (E1-5bP) plaque be used at the top left edge of the sign for numbered exits to the left to alert road users that the exit is to the left, which is often not expected. This change also required that the “LEFT” portion of the message be black on a yellow background.³⁹

In Section 2J.04 on the Number and Size of Signs and Logo Sign Panels (Section 2F.04 of the 2003 MUTCD), FHWA adopted “OPTION and STANDARD statements to permit the use of, and provide the associated requirements for, additional logo sign panels of the same specific service type when more than six businesses of a specific service type are eligible for logo sign panels at the same interchange.”⁴⁰

FHWA adopted Section 2J.10 on Signs at Intersections, which consolidates option and standard statements from the 2003 MUTCD as a Standard.⁴¹ FHWA explained that “the consolidated STANDARD continues to allow the action message or directional arrow to be either (1) above the logos on the same line as the service type, or (2) below the logos.”⁴² Although these statements were consolidated into a Standard, the states are

³⁰ 2009 Final Rule–MUTCD, *supra* note 29, at 66735; MUTCD, *supra* note 1, at 4.

³¹ 2009 Final Rule–MUTCD, *supra* note 29, at 66742; MUTCD, *supra* note 1, at 42.

³² 2009 Final Rule–MUTCD, *supra* note 29, at 66742; MUTCD, *supra* note 1, at 42.

³³ 2009 Final Rule–MUTCD, *supra* note 29, at 66742; MUTCD, *supra* note 1, at 45.

³⁴ 2009 Final Rule–MUTCD, *supra* note 29, at 66751; MUTCD, *supra* note 1, at 77.

³⁵ 2009 Final Rule–MUTCD, *supra* note 29, at 66752; MUTCD, *supra* note 1, at 82.

³⁶ 2009 Final Rule–MUTCD, *supra* note 29, at 66759; MUTCD, *supra* note 1, at 112.

³⁷ 2009 Final Rule–MUTCD, *supra* note 29, at 66777; MUTCD, *supra* note 1, at 212.

³⁸ 2009 Final Rule–MUTCD, *supra* note 29, at 66777; *see* MUTCD, *supra* note 1, at 212.

³⁹ 2009 Final Rule–MUTCD, *supra* note 29, at 66777; MUTCD, *supra* note 1, at 212.

⁴⁰ 2009 Final Rule–MUTCD, *supra* note 29, at 66791; MUTCD, *supra* note 1, at 317.

⁴¹ 2009 Final Rule–MUTCD, *supra* note 29, at 66792; *see* MUTCD, *supra* note 1, at 319.

⁴² *Id.*

allowed to keep their existing signs until they need to be replaced, at which time the replacement sign must comply with the 2009 MUTCD.⁴³

In Part 3, Markings, Section 3B.08, Extensions Through Intersections or Interchanges, paragraph 06, which had recommended “that edge lines should not be extended through major intersections or major driveways as solid lines” was changed from a guidance statement to a Standard.⁴⁴

In Part 6, Temporary Traffic Control, Section 6F.60, Portable Changeable Message Signs, paragraph 07 was elevated to a Standard to require “that Portable Changeable Message signs comply with specific chapters and tables in the MUTCD.”⁴⁵

In Section 6F.71 on Longitudinal Channelizing Devices, the statement in paragraph 07 was changed to a Standard: “If used for pedestrian traffic control, longitudinal channelizing devices shall be interlocked to delineate or channelize flow. The interlocking devices shall not have gaps that allow pedestrians to stray from the channelizing path.”⁴⁶

2. Standards Changed to a Guidance or Other Statement

Some Standards were changed to a Guidance or other type of statement in the 2009 MUTCD. For example, in Part 1 (General), Section 1A.10 applicable to Interpretations, Experimentations, Changes, and Interim Approvals, the statement in paragraph 20 was reduced from a Standard to a Guidance statement: “A local jurisdiction, toll facility operator, or owner of a private road open to public travel using a traffic control device or application under an interim approval that was granted by FHWA either directly or on a state-wide basis based on the State’s request should inform the State of the locations of such use.”⁴⁷

In Part 2 on Signs, Section 2B.20, Mandatory Movement Lane Control Signs (R3-5, R3-5a, R3-7, and R3-20), the statement in paragraph 05 on the use of R3-5 and R3-5a signs and whether supplemental plaques should be added was reduced from a Standard to a guidance statement.⁴⁸

⁴³ *Id.*

⁴⁴ 2009 Final Rule–MUTCD, *supra* note 29, at 66798; MUTCD, *supra* note 1, at 371–74.

⁴⁵ 2009 Final Rule–MUTCD, *supra* note 29, at 66834; MUTCD, *supra* note 1, at 599.

⁴⁶ 2009 Final Rule–MUTCD, *supra* note 29, at 66836; MUTCD, *supra* note 1, at 610.

⁴⁷ 2009 Final Rule–MUTCD, *supra* note 29, at 66736; MUTCD, *supra* note 1, at 7.

⁴⁸ 2009 Final Rule–MUTCD, *supra* note 29, at 66748; MUTCD, *supra* note 1, at 63.

In Sections 2D.31 on Advance Route Turn Assembly (Section 2D.29 of the 2003 MUTCD) and 2D.40 on Location of Destination Signs (Section 2D.35 of the 2003 MUTCD), FHWA adopted changes to allow for more flexibility.⁴⁹ The placement of signs was reduced from a Standard to a Guidance statement “to recommend, rather than require, that the signs be installed at the distances stated therein” and “to provide more flexibility for the placement of these various signs, particularly as it relates to rural areas.”⁵⁰

In Part 3, Markings, Section 3B.02 that applies to No-Passing Zone Pavement Markings and Warrants, FHWA changed a Standard in paragraph 16 to a Guidance statement: “The minimum lane transition taper length should be 100 feet in urban areas and 200 feet in rural areas.”⁵¹ An identical statement in paragraph 05 of Section 3B.10, Approach Markings for Obstructions, also was reduced to a Guidance statement.⁵²

The statement in paragraph 02 of Section 3I.03, Island Marking Application, that “[p]avement markings as described in Section 3B.10 for the approach to an obstruction may be omitted on the approach to a particular island based on engineering judgment,” was converted from a Standard to a Guidance statement.⁵³

In Part 6, Temporary Traffic Control, Section 6C.07 applicable to Termination Area, the Standard in paragraph 01 was changed to a Support statement: “The termination area is the section of the highway where road users are returned to their normal driving path. The termination area extends from the downstream end of the work area to the last TTC device such as END ROAD WORK signs, if posted.”⁵⁴

Also, in Section 6F.04 on Sign Maintenance, paragraphs 01 and 02, which state that “[s]igns should be properly maintained for cleanliness, visibility, and correct positioning” and that “[s]igns that have lost significant legibility should be promptly replaced,” were changed from a Standard to guidance statements.⁵⁵

In Section 6F.60, Portable Changeable Message Signs, paragraph 01 that discusses the design and

⁴⁹ 2009 Final Rule–MUTCD, *supra* note 29, at 66767; MUTCD, *supra* note 1, at 153, 158.

⁵⁰ 2009 Final Rule–MUTCD, *supra* note 29, at 66767.

⁵¹ 2009 Final Rule–MUTCD, *supra* note 29, at 66797; MUTCD, *supra* note 1, at 354.

⁵² 2009 Final Rule–MUTCD, *supra* note 29, at 66799; MUTCD, *supra* note 1, at 376.

⁵³ 2009 Final Rule–MUTCD, *supra* note 29, at 66,804-05; MUTCD, *supra* note 1, at 430.

⁵⁴ 2009 Final Rule–MUTCD, *supra* note 29, at 66,830; MUTCD, *supra* note 1, at 555.

⁵⁵ 2009 Final Rule–MUTCD, *supra* note 29, at 66,833; MUTCD, *supra* note 1, at 583.

application of Portable Changeable Message Signs was converted from a “STANDARD to SUPPORT because this statement just provides information, rather than requirements.”⁵⁶

3. Other Changes to the MUTCD Allowing for the Exercise of Discretion

In the Introduction to the MUTCD discussing the term *Standard*, FHWA changed the statement in paragraph 09 to a guidance statement to provide that “[t]he States should adopt Section 15-116 of the UVC, which states that, ‘No person shall install or maintain in any area of private property used by the public any sign, signal, marking, or other device intended to regulate, warn, or guide traffic unless it conforms with the State manual and specifications adopted under Section 15-104.’”⁵⁷

In Part 1 (General), Section 1A.10, Interpretations, Experimentations, Changes, and Interim Approvals, although there were requests for a Standard, the statement in paragraph 21 was added as a guidance statement:

[a] local jurisdiction, toll facility operator, or owner of a private road open to public travel that is requesting permission to experiment or permission to use a device or application under an interim approval should first check for any State laws and/or directives covering the application of the MUTCD provisions that might exist in their State.⁵⁸

In Section 2A.03, Standardization of Application, FHWA retained the guidance statement in paragraph 02 to provide that “[s]igns should be used only where justified by engineering judgment or studies, as provided in Section 1A.09.” In paragraph 03, the Manual states that “[r]esults from traffic engineering studies of physical and traffic factors should indicate the locations where signs are deemed necessary or desirable.”⁵⁹

In Section 2A.07, applicable to Retroreflectivity and Illumination, “the FHWA delete[d] the existing and proposed guidance about illumination of overhead signs, because the minimum maintained retroreflectivity levels for overhead signs that were adopted as Revision 2 of the 2003 MUTCD provide for adequate performance of these signs. Highway agencies can determine to illuminate overhead signs based on their own policies or on studies of specific problem areas.”⁶⁰

⁵⁶ 2009 Final Rule–MUTCD, *supra* note 29, at 66,834; MUTCD, *supra* note 1, at 598.

⁵⁷ 2009 Final Rule–MUTCD, *supra* note 29, at 66735; MUTCD, *supra* note 1, at I-2.

⁵⁸ 2009 Final Rule–MUTCD, *supra* note 29, at 66739; MUTCD, *supra* note 1, at 7.

⁵⁹ MUTCD, *supra* note 1, at 27.

⁶⁰ 2009 Final Rule–MUTCD, *supra* note 29, at 66739.

In Section 2B.10, STOP Sign or YIELD Sign Placement, a guidance statement was added as paragraph 16 that “STOP or YIELD signs should not be placed farther than 50 feet from the edge of the pavement of the intersected roadway.”⁶¹ In paragraph 16, although there was a request to delete the requirement that “[i]f a raised splitter island is available on the left-hand side of a multi-lane roundabout approach, an additional YIELD sign should be placed on the left-hand side of the approach,”⁶² FHWA chose instead to incorporate the provision as a guidance statement.⁶³

In Section 2B.13 on Speed Limit Sign (R2-1), FHWA added several Support and Option statements to allow for deference to local policies and discretion in the use of speed limit signs.⁶⁴

In Section 2B.18, paragraph 09 on the placement of and installation of turn prohibition signs in conjunction with traffic control signals was converted from an Option to a guidance statement.⁶⁵

At the end of Section 2B.20 (Section 2B.21 in the 2003 MUTCD) on Mandatory Movement Lane Control Signs, FHWA added an option statement on the use of new turn lane signs at the upstream end of the turn lane taper of mandatory turn lanes “to give agencies flexibility to use these new signs to designate the beginning of mandatory turn lanes where needed for enforcement purposes.”⁶⁶ Furthermore, paragraph 05 of the same section was implemented as a guidance statement to “recommend, rather than require, that R3–5 series supplemental plaques...for R3–5 series lane control signs on two-lane approaches be mounted above the associated R3–5 sign, for consistency with a similar statement in Section 2B.20.”⁶⁷

In Sections 2B.37 (Do Not Enter Sign) and 2B.38 (Wrong Way Sign), formerly Sections 2B.34 and 2B.35 in the 2003 MUTCD, the FHWA added support statements that allow for “lower mounting heights for Do Not Enter and Wrong Way signs as a specific exception when an engineering study indicates that it would address wrong-way movements at freeway/expressway exit ramps.”⁶⁸

⁶¹ 2009 Final Rule–MUTCD, *supra* note 29, at 66741; MUTCD, *supra* note 1, at 53.

⁶² 2009 Final Rule–MUTCD, *supra* note 29, at 66744.

⁶³ 2009 Final Rule–MUTCD, *supra* note 29, at 66744; MUTCD, *supra* note 1, at 54.

⁶⁴ MUTCD, *supra* note 1, at 57–58.

⁶⁵ 2009 Final Rule–MUTCD, *supra* note 29, at 66747; MUTCD, *supra* note 1, at 61.

⁶⁶ 2009 Final Rule–MUTCD, *supra* note 29, at 66748; *see* MUTCD, *supra* note 1, at 63.

⁶⁷ 2009 Final Rule–MUTCD, *supra* note 29, at 66748; *see* MUTCD, *supra* note 1, at 63.

⁶⁸ 2009 Final Rule–MUTCD, *supra* note 29, at 66750; *see* MUTCD, *supra* note 1, at 75–76.

FHWA added Section 2B.56 on Ramp Metering Signs. Although FHWA had proposed to add a Guidance statement on the recommended use of new regulatory signs that should accompany ramp control signals, FHWA adopted the language as an option statement to “allow[] agencies to determine whether the use of the signs is appropriate for their conditions based on enforcement experience.”⁶⁹

FHWA changed paragraph 03 in Section 2C.50 on Non-Vehicular Warning Signs (Section 2C.41 of the 2003 MUTCD) from an option to a guidance statement to recommend only the “use of warning signs supplemented with plaques with the AHEAD or XX FEET legend when they are used with or in advance of a pedestrian, snowmobile, or equestrian crossing to inform road users that they are approaching a point where crossing activity might occur.”⁷⁰

FHWA adopted Section 2E.23 on Signing for Intermediate and Minor Interchange Multi-Lane Exits with an Option Lane “to provide recommendations on the types of signing to be used at intermediate and minor multi-lane exits where there is an operational need for the presence of an option lane for only the peak period.”⁷¹ The reasoning was that based on past experience and comments, the “provision provides flexibility and guidance on the signing for such locations where the Overhead Arrow-per-Lane or diagrammatic signs are not practicable due to various considerations.”⁷²

FHWA originally had proposed in Section 3B.03 with respect to Other Yellow Longitudinal Pavement Markings to change the first option to a guidance statement to “recommend for certain conditions, rather than just permit, the use of arrows with two-way left-turn lanes.”⁷³ FHWA adopted paragraph 04 as a guidance statement but relocated the text describing the placement locations for two-way left turn lane-use arrow pavement markings to Section 3B.20.⁷⁴

In Part 4 on Highway Traffic Signals, FHWA adopted Chapter 4F on Pedestrian Hybrid Beacons “with three sections that describe the application, design, and operation of pedestrian

hybrid beacons, and with three new figures.”⁷⁵ Chapter 4F was adopted “to give agencies additional flexibility by providing an alternative method for control of pedestrian crosswalks that has been found by research to be highly effective.”⁷⁶

Finally, because some of the MUTCD provisions do not translate easily to parking lots and parking garages, “the FHWA exempt[ed] parking spaces and driving aisles in parking lots, both privately and publicly owned, from MUTCD” requirements.⁷⁷

E. Revision 1 of the MUTCD

Since 2009 FHWA has made at least two important revisions of the MUTCD. As originally published, the 2009 edition of the MUTCD stated that Standards “shall not be modified or compromised based on engineering judgment or engineering studies,”⁷⁸ a provision that FHWA deleted in a rule published on May 14, 2012.⁷⁹ In its final rule FHWA explained that this “prohibition has always been inherent in the meaning of Standards, but the FHWA is aware of cases where the lack of explicit text to this effect has resulted in the misapplication of engineering judgment or studies. Some agencies believed that Standards could be ignored based on engineering judgment or an engineering study, which is not the case.”⁸⁰

Nevertheless, FHWA’s final rule specifically clarified the definition of the term *Standard* in the MUTCD, as well as the use of *engineering judgment and studies* in relation to Standards in the application of traffic control devices.⁸¹ The effect of the final rule and Revision 1 is 1) to omit certain language that was included in the 2009 MUTCD, and 2) to restore language that appeared in the 2003 MUTCD but was deleted in the 2009 edition.⁸²

First, FHWA removed the sentence “[s]tandard statements shall not be modified or compromised based on engineering judgment or engineering study,” which had been added to Section 1A.13 on definitions of headings, words, and phrases.⁸³ Sec-

⁶⁹ 2009 Final Rule–MUTCD, *supra* note 29, at 66755; MUTCD, *supra* note 1, at 97.

⁷⁰ 2009 Final Rule–MUTCD, *supra* note 29, at 66764; MUTCD, *supra* note 1, at 130.

⁷¹ 2009 Final Rule–MUTCD, *supra* note 29, at 66776; MUTCD, *supra* note 1, at 203.

⁷² 2009 Final Rule–MUTCD, *supra* note 29, at 66776.

⁷³ 2009 Final Rule–MUTCD, *supra* note 29, at 66797; MUTCD, *supra* note 1, at 354.

⁷⁴ 2009 Final Rule–MUTCD, *supra* note 29, at 66797; MUTCD, *supra* note 1, at 354.

⁷⁵ 2009 Final Rule–MUTCD, *supra* note 29, at 66826; MUTCD, *supra* note 1, at 509–12.

⁷⁶ 2009 Final Rule–MUTCD, *supra* note 29, at 66826.

⁷⁷ 2009 Final Rule–MUTCD, *supra* note 29, at 66733.

⁷⁸ 2009 Final Rule–MUTCD, *supra* note 29, at 66737.

⁷⁹ National Standards for Traffic Control Devices; the Manual on Uniform Traffic Control Devices for Streets and Highways; Revision, 77 Fed. Reg. 28,456, 28,457 (May 14, 2012).

⁸⁰ *Id.*

⁸¹ *Id.* The final rule became effective on June 13, 2012.

⁸² *Id.*

⁸³ *Id.* at 28457.

ond, FHWA restored three guidance sentences that were included in Section 1A.09, Engineering Study and Engineering Judgment, of the 2003 edition but were deleted in the 2009 edition. The guidance sentences FHWA restored that now are a part of the 2009 MUTCD are:

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 engineering judgment. Thus, while this Manual provides Standards, Guidance, and Options for design and applications of traffic control devices, this Manual should not be considered a substitute for engineering judgment. Engineering judgment should be exercised in the selection and application of traffic control devices, as well as in the location and design of roads and streets that the devices complement.⁸⁴

FHWA stated that “[t]he inclusion of such language will continue our current practice under Official Interpretation 1(09)–1 (I) to allow deviations from a STANDARD only on the basis of either an engineering study or the application of engineering judgment.”⁸⁵

F. Revision 2 of the MUTCD

The second important revision of the 2009 MUTCD concerns compliance dates in Table I–2. On May 14, 2012, FHWA published a second final rule that revised

Table I–2 of the MUTCD by eliminating the compliance dates for 46 items (8 that had already expired and 38 that had future compliance dates) and extends and/or revises the dates for 4 items. The target compliance dates for 8 items that are deemed to be of critical safety importance will remain in effect.⁸⁶

In the final rule FHWA explained, moreover, that “[w]hen new provisions are adopted in a new edition or revision of the MUTCD, any new or reconstructed traffic control devices installed after adoption are required to be in compliance with the new provisions.”⁸⁷ However, unless FHWA establishes compliance dates for upgrading existing devices, such “[e]xisting devices already in use that do not comply with the new MUTCD provisions are expected to be upgraded by highway agencies over time to meet the new provisions.”⁸⁸

G. Dates of State Adoption of the 2009 MUTCD

The version of the Manual in effect at the time of any alleged violation of the Manual is the ver-

sion that applies in a tort action.⁸⁹ Of the 21 states that responded to the survey, 18 had adopted the 2009 MUTCD.⁹⁰ Of those departments that had adopted the 2009 MUTCD, eight adopted it in 2012, five did so in 2011, and one in 2010. Several states reported that they adopted their own version that is in substantial conformance with the MUTCD.⁹¹ The term “substantial conformance” means that a state MUTCD or supplement conforms at a minimum to the standards included in the national MUTCD.⁹² For example, Missouri has developed an FHWA-approved Engineering Policy Guide (EPG) that is in substantial conformance with the MUTCD.⁹³

⁸⁹ *Shope v. City of Portsmouth*, 2012 Ohio 1605, at 20 (2012).

⁹⁰ Responses of Arizona DOT (adopted on Jan. 13, 2012 (as modified by the Arizona Supplement to the 2009 MUTCD), available at [http://azdot.gov/docs/business/arizona-supplement-to-the-manual-on-uniform-traffic-control-devices-\(2009-mutcd-edition\).pdf](http://azdot.gov/docs/business/arizona-supplement-to-the-manual-on-uniform-traffic-control-devices-(2009-mutcd-edition).pdf)); Arkansas Highway and Transportation Department (stating that the “Arkansas Highway Commission, in 2004, formally adopted the latest edition of the MUTCD and all current and future updates, revisions or new editions approved by the FHWA”); Caltrans (Jan. 13, 2012); Iowa DOT (reporting that the 2009 MUTCD has been adopted by administrative rule with exceptions. *See* 760 IOWA ADMIN. CODE 130.1); Kansas DOT (Dec. 16, 2011); Michigan DOT (adopted a Michigan version of the MUTCD on Dec. 1, 2011, that is in substantial compliance with the MUTCD); Nebraska Department of Roads (Apr. 26, 2012); Nevada DOT (*citing* NEV. REV. STAT. § 484A.430 and NEV. ADMIN. CODE § 408.144); New Hampshire DOT (Jan. 2012); New York State DOT (2010); Oklahoma DOT (Apr. 2, 2012); Pennsylvania DOT (Feb. 2012); Texas DOT (stating that its MUTCD adopted on Dec. 8, 2011, is in “substantial compliance” with the 2009 national MUTCD); Virginia DOT (Jan. 1, 2012); Washington DOT (Dec. 19, 2011); and Wisconsin DOT (May 25, 2011).

⁹¹ Responses of Indiana DOT (stating that Indiana adopted an Indiana version of the 2009 MUTCD in Nov. 2011 that was revised in Oct. 2012); Ohio DOT; Michigan DOT; Missouri Highway and Transportation Commission (adopted an Engineering Policy Guide (EPG)); Texas DOT; Utah DOT (stating that in Jan. 2012 the Utah MUTCD was found to be in substantial compliance with the 2009 national MUTCD); and Washington State DOT (stating that the MUTCD was adopted with modifications by the department on Dec. 19, 2011).

⁹² *See* 23 C.F.R. § 655.603(b)(1).

⁹³ Response of Missouri Highway and Transportation Commission (stating that FHWA approved the EPG by letter dated Dec. 30, 2011, and that the Commission has not adopted the national MUTCD in Missouri since 2001).

⁸⁴ *Id.* at 28458.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

III. STATE REACTION TO THE 2009 MUTCD

A. Changes Identified as Being Potentially Beneficial

Transportation departments were asked whether there were changes in the 2009 MUTCD that may be beneficial in reducing tort claims or verdicts against the departments.⁹⁴ Ten departments stated that there were some,⁹⁵ but 11 departments stated that the 2009 MUTCD would not assist in reducing tort claims or liability.⁹⁶

The departments that identified potentially beneficial changes in the 2009 MUTCD noted in particular Revisions 1 and 2 of the MUTCD. According to the California Department of Transportation (Caltrans),

[t]he inclusion of some traffic control devices (and their policies) into the 2009 MUTCD...reduces tort liability when those devices have been prevalent and in use on the roadways but were not included in previous manuals nor accepted as official policy. The newly included devices...aren't necessarily new but...their inclusion in the MUTCD encourages uniformity.⁹⁷

Indiana's response was that

[R]evisions 1 and 2 to the 2009 MUTCD...will have the effect of reducing the potential for liability. With respect to revision 1, the 2011 Indiana MUTCD had its own definition of Standard, but it is anticipated that the revised definition in the 2009 MUTCD will also help to support the agency's position in a tort claim. As far as revision 2, the elimination of 46 compliance deadlines in the 2009 National (and 2011 Indiana) MUTCD will support the agency's position in a potential tort claim concerning those traffic control devices where a specific compliance deadline was eliminated.⁹⁸

The Arizona DOT agreed that "[t]he changes in Revisions 1 & 2 modifying the definition of Standard and the application of engineering judgment"⁹⁹ are potentially significant in reducing the department's tort liability with respect to the MUTCD. In its response, the Virginia DOT high-

lighted the revision of Section 1A.13 regarding standards.¹⁰⁰

Other departments noted changes as being potentially beneficial in reducing potential tort liability, including the clarification of the definitions of the terms Standard, Guidance, Option, and Support;¹⁰¹ the clarification of the relationship between those terms and the use of the terms *shall*, *should*, and *may*;¹⁰² the addition of sentence 05 in Section 2A.19 on lateral offset;¹⁰³ and the clarification of horizontal alignment curve warning signs.¹⁰⁴

B. Changes Identified as Being Potentially Detrimental

Thirteen transportation departments reported that in their opinion there were changes in the 2009 MUTCD that may result in an increase in tort liability of transportation departments.¹⁰⁵

Of particular concern to the departments is the increase in the number of Standards and the more frequent use of the term *shall* in the Manual. The Indiana DOT stated that there are many new standards and guidance statements that increase the potential for liability.¹⁰⁶ NYSDOT stated that "[r]igid standards provide a *prima facie* case of liability."¹⁰⁷ The Missouri Highway and Transportation Commission stated that "[t]here are a lot more 'shall' conditions in the 2009 version than earlier versions," a change that means that there is "less discretion in the field to use engineering judgment."¹⁰⁸ The Texas DOT also suggested that there will be an increase in claims because of

¹⁰⁰ Response of Virginia DOT. The Virginia DOT's response to the survey included a disclaimer stating that "[t]he responses provided to this survey do not constitute a legal opinion nor represent the opinion of attorneys for the agency."

¹⁰¹ Response of Nebraska Department of Roads.

¹⁰² Response of Nebraska Department of Roads.

¹⁰³ *Id.*

¹⁰⁴ Response of Alabama DOT (*citing* §§ 2C.05, 2C.06, 2C.07, and 2C.08, and tbls. 2C-4 and 2C-5).

¹⁰⁵ Responses of Alabama DOT, Arizona DOT, Caltrans, Indiana DOT, Kansas DOT, Nebraska Department of Roads, New Hampshire DOT, New York State DOT, Ohio DOT, Texas DOT, Virginia DOT, Washington State DOT, and Wisconsin DOT.

¹⁰⁶ Response of Indiana DOT (explaining that "INDOT has a substantial inventory of guardrail and the overwhelming majority of this guardrail is without delineators").

¹⁰⁷ Response of New York State DOT.

¹⁰⁸ Response of Missouri Highway and Transportation Commission.

⁹⁴ Responses of Alabama DOT, Arizona DOT, Caltrans, Indiana DOT, Kansas DOT, Nebraska Department of Roads, New York State DOT, Washington State DOT, and Wisconsin DOT.

⁹⁵ Responses of Alabama DOT, Arizona DOT, Caltrans, Indiana DOT, Kansas DOT, Nebraska Department of Roads, New York State DOT, Virginia DOT, Washington State DOT, and Wisconsin DOT.

⁹⁶ Responses of Arkansas Highway and Transportation Department, Iowa DOT, Nevada DOT, Ohio DOT, Oklahoma DOT, Michigan DOT, New Hampshire DOT, Pennsylvania DOT, Texas DOT, Utah DOT, and Virginia DOT.

⁹⁷ Response of California (citing new warning signs included in ch. 2C).

⁹⁸ Response of Indiana DOT.

⁹⁹ Response of Arizona DOT.

“[t]he substantial increase in the number of SHALL statements (44%).”¹⁰⁹

Other Standards and requirements in the MUTCD cited by the departments concerned the Standards that require 85th percentile speeds in addition to other speeds;¹¹⁰ the curve/turn sign Standards;¹¹¹ the requirement of a speed study for setting speed limits;¹¹² the “[a]ddition of minimum retroreflectivity,” which may result in increased tort liability;¹¹³ and the requirements for added traffic signal faces.¹¹⁴ Caltrans pointed out that the

ball-bank criteria used to determine comfortable speeds on curves has been changed to 12/14/16, [thus] changing and increasing warning speeds on curves with a potential for motorists to inadvertently go faster on the curve not knowing that the [change in criteria] increased the warning speed[,] not any physical change on the roadway.¹¹⁵

Some of the provisions cited or reasons given by the defendants for their view that the 2009 MUTCD could potentially result in an increase in tort liability, as well as an increase in costs, concerned signing and types of signs: for example, the “[r]equirement for [an] increase in sign sizes and [an] increase in letter heights...will increase costs”;¹¹⁶ the requirements for additional and larger regulatory signs at intersections;¹¹⁷ the new Standards on minimum sign sizes;¹¹⁸ Table 2C.5 on mandatory curve signing;¹¹⁹ and, as noted, the modification of retroreflectivity requirements.¹²⁰ Caltrans pointed to the change in the “use of various horizontal alignment signs from [an] option to...speed criteria” that results in some warning signs being recommended, as opposed to being optional in the previous MUTCD, and others being required, as opposed to being optional in the previous MUTCD.¹²¹ Caltrans also commented on the compliance dates in the Manual, such as “warning signs in the field [that] need to comply with this new policy by 2019.”¹²²

The Washington State DOT commented on “the risk in shall statements/standards for lesser prior-

ity control elements.”¹²³ The Kansas DOT stated that there are Standards included in the Manual that should be eliminated because they do not also provide for the specific traffic control to be provided.¹²⁴ Kansas suggested that Section 6A.01, which states that “the needs and control of all road users shall be an essential part of highway construction,”¹²⁵ and Section 6A.01, which does not “tell a highway agency how to sign a construction zone,” could result in juries being allowed to decide whether the sections had been violated in a particular situation.¹²⁶

IV. THE 2009 MUTCD’S EFFECT ON GOVERNMENT TORT LIABILITY

A. The MUTCD and the Use of Engineering Judgment

One of the important features of the MUTCD is that it provides for the use of an engineering study or engineering judgment in determining whether and how to use a particular traffic control device. Section 1A.09 sets forth the Standard and Guidance for the use of an engineering study and engineering judgment, terms that are defined in Section 1A.13.

The MUTCD defines “Engineering Judgment” to mean “the evaluation of available pertinent information, and the application of appropriate principles, provisions, and practices as contained in this Manual and other sources, for the purpose of deciding upon the applicability, design, operation, or installation of a traffic control device.”¹²⁷ The definition states that “[e]ngineering judgment *shall* be exercised by an engineer, or by an individual working under the supervision of an engineer, through the application of procedures and criteria established by the engineer” and that “[d]ocumentation of engineering judgment is not required” (emphasis added).¹²⁸

An engineering study is defined as “the comprehensive analysis and evaluation of available pertinent information, and the application of appropriate principles, provisions, and practices as contained in this Manual and other sources, for the purpose of deciding upon the applicability, design, operation, or installation of a traffic control device.”¹²⁹ Once more, the definition states that “[a]n engineering study *shall* be performed by an engineer, or by an individual working under

¹⁰⁹ Response of Texas DOT.

¹¹⁰ Response of Arizona DOT.

¹¹¹ Response of New Hampshire DOT.

¹¹² *Id.*

¹¹³ Response of Nebraska Department of Roads.

¹¹⁴ Response of Arizona DOT.

¹¹⁵ Response of Caltrans.

¹¹⁶ Response of Alabama DOT.

¹¹⁷ Response of Arizona DOT.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Response of Washington State DOT.

¹²¹ Response of Caltrans.

¹²² *Id.*

¹²³ Response of Washington State DOT.

¹²⁴ Response of Kansas DOT.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 2009 MUTCD, *supra* note 1, at 14.

¹²⁸ *Id.*

¹²⁹ *Id.*

the supervision of an engineer, through the application of procedures and criteria established by the engineer” but that “[a]n engineering study shall be documented” (emphasis added).¹³⁰

Of interest is that FHWA has stated that, with respect to Section 1A.09 regarding the use of an engineering study or engineering judgment, it has received comments that the existing Standard should be removed. The comments are that the Standard “is a general provision for all devices in the Manual that is inconsistent with numerous specific requirements elsewhere in the MUTCD that specific devices must be installed and [that] such requirements are ‘legal requirements.’”¹³¹ FHWA observed also that some have commented that the Standard “may not be consistent with the Guidance statement that immediately follows it.”¹³² Nevertheless, FHWA states that although it “agrees that this STANDARD statement is not easily understood by users of the MUTCD outside of the legal profession,” the Standard “has been the subject of important court interpretations regarding the applicability of the MUTCD and has legal significance beyond its plain meaning.”¹³³

The MUTCD’s allowance for the use of an engineering study or engineering judgment affects whether there is a basis for a transportation agency’s tort liability regarding its use of traffic control devices. For example, the Standard in Section 1A.09(02) states that the “Manual describes the application of traffic control devices, but shall not be a legal requirement for their installation.” Guidance provided in Section 1A.09(03)-(05) states:

03 *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 engineering judgment. Thus, while this Manual provides Standards, Guidance, and Options for design and applications of traffic control devices, this Manual should not be considered a substitute for engineering judgment. Engineering judgment should be exercised in the selection and application of traffic control devices, as well as in the location and design of roads and streets that the devices complement (emphasis added).*

04 Early in the processes of location and design of roads and streets, engineers should coordinate such location and design with the design and placement of the traffic control devices to be used with such roads and streets.

According to a North Carolina court, the North Carolina DOT has established a policy whereby certain “triggering events” require an engineering study:

¹³⁰ *Id.*

¹³¹ 2009 Final Rule–MUTCD, *supra* note 29, at 66735.

¹³² *Id.*

¹³³ *Id.*

While the MUTCD and State law do not mandate when [an] engineering study should be conducted, the [DOT] follows its policy and procedure and conducts engineering studies as a result of specific triggering events. These triggering events include accident investigations where the facts indicate that road designs, signs, or other factors controlled by [the DOT] may be implicated, patterns of traffic accidents based on the severity as determined by the Highway Safety Improvement Program, individuals’ requests including those of law enforcement and those studies initiated by [the DOT] when it has reason to believe a study is warranted.¹³⁴

The courts agree that the MUTCD defers to a transportation department’s exercise of engineering judgment. In *Truman v. Griese*,¹³⁵ involving an alleged violation of the duty to install traffic control signs pursuant to state law (South Dakota Codified Laws (SDCL) § 31-26-6), the court stated that “[t]he State has not waived sovereign immunity or consented to suit for any omission of signs that occurred during the initial engineering and design of Four Corners.”¹³⁶ The court further held that “the MUTCD signage designs do not require direct adherence. Instead, [the] MUTCD defers to engineering judgment and studies when making sign placement decisions.”¹³⁷ Moreover, the plaintiff “failed to provide specific governing provisions from the MUTCD or any other standard uniform traffic practice for intersections like Four Corners.”¹³⁸

B. Mandatory Provisions of the MUTCD

Prior cases involving the MUTCD have noted the importance of the use of the term *shall*, as the term signifies that a duty is mandatory. As discussed by an Ohio court, there are situations in which the MUTCD imposes mandatory duties. The court explained that the

Manual’s Section 2B.09 discusses several instances in which yield signs “may” be used instead of stop signs. However, the provision also states that a yield sign “shall be used to assign right-of-way at the entrance to a roundabout intersection.” Regarding “DO NOT ENTER” signs, Section 2B.34 states that such sign “shall be used where traffic is prohibited from entering a restricted roadway.” Section 2B.37 states that except as noted in the “Option,” the “ONE WAY” sign “shall be used to indicate streets or roadways upon which vehicular traffic is allowed to travel in one direction only.” Similarly, Section 2C.22 provides that “Low Clearance” signs “shall be used to warn road

¹³⁴ *Turner v. N.C. Dep’t of Transp.*, 733 S.E.2d 871, 875, n.14 (N.C. 2012).

¹³⁵ 2009 SD 8, 762 N.W.2d 75 (2009).

¹³⁶ *Id.* at 79.

¹³⁷ *Id.* at 86 (referring to MUTCD §§ 2A.03 (Standardization of Application), 2B.05 (STOP Sign Applications), and 2B.08 (YIELD Sign Applications)).

¹³⁸ *Id.* at 82.

users of clearances less than 300 mm (12 in.) above the statutory maximum vehicle height.” (Emphasis added.)¹³⁹

In that case the court held that the stop sign at issue was not a traffic control device mandated by the Ohio MUTCD and that therefore the City was immune from tort liability.¹⁴⁰

However, it must be noted that in construing a standard in the MUTCD, other provisions of the MUTCD may need to be considered in deciding whether a requirement is mandatory in a given situation. As a recent MUTCD case stresses,

“[t]he effect of the word ‘shall’ may be determined by the balance of the text of the statute or rule.” ...In an examination of the text of SDCL 31-28-6, it is only when that public official in the exercise of his or her discretion determines that the public highway contains “any sharp turn, blind crossing or other point of danger on such highway” based upon “standard uniform traffic control practices” that he or she “shall erect and maintain...a substantial and conspicuous warning sign.”¹⁴¹

In sum, consistent with the MUTCD and cases construing the MUTCD, the use of the word *shall* signifies that a duty under the Manual is mandatory, but the triggering of the duty may depend on other findings or decisions that may be within the department’s discretion, based, for example, on the use of an engineering study or engineering judgment.

C. Nonmandatory Provisions of the MUTCD

Numerous courts have held that provisions of the Manual are not mandatory. For example, in a case in which it was alleged that the MUTCD requires pavement markings on roadways approaching a railroad crossing, the court held that the Manual “describes the application of traffic control devices,” but there is no “legal requirement for their installation.”¹⁴² Furthermore, “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 engineering judgment.”¹⁴³

Thus, a variation from the recommendations of the MUTCD may not necessarily create, for example, an “actionable ‘condition of sign’ claim” under state law.¹⁴⁴ In a Texas case involving the design of an underpass and the placing of signage

and signals, the court ruled that the transportation agency was not liable.¹⁴⁵ First, the department had exercised engineering judgment in placing the signage and signals, and, second, the MUTCD provisions at issue were not mandatory.¹⁴⁶ Consequently, there was no waiver of the transportation department’s immunity in allegedly having failed to comply with the MUTCD.¹⁴⁷

On appeal the Supreme Court of Texas affirmed the court’s judgment that dismissed the plaintiffs’ claims under the Texas Tort Claims Act. The court also reversed the decision that held that the department did not have immunity for the plaintiffs’ special defect claim. Under the facts of the case, the plaintiffs’ collision with a concrete guardrail did not come within the meaning of the special defect exception, as construed by Texas courts, to the department’s immunity.¹⁴⁸

Other courts have found that provisions of the MUTCD in particular cases are nonmandatory.¹⁴⁹ In a Louisiana case, the court rejected an argument that the MUTCD that was followed by the parish’s traffic engineer “mandates that traffic control devices must give adequate time for the driver to properly respond.”¹⁵⁰

In a New Hampshire case, the court ruled that Section 4D.02 of the 2003 MUTCD on responsibility for operation and maintenance did not establish a mandatory duty.¹⁵¹ The section included guidance that provided:

Prior to installing any traffic control signal, the responsibility for the maintenance of the signal and all of the appurtenances, hardware, software, and the timing plan(s) should be clearly established. The responsible agency should provide for the maintenance of the traffic control signal and all of its appurtenances in a competent manner.

To this end the agency should:

...

D. Provide for alternate operation of the traffic control signal during a period of failure, using flashing mode or manual control, or manual traffic direction by proper authorities as might be required by traffic volumes or congestion, or by erecting other traffic control devices.¹⁵²

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 252–53 (citations omitted).

¹⁴⁷ *Id.* (citations omitted).

¹⁴⁸ *Tex. Dep’t of Transp. v. Perches*, 388 S.W.3d 652, 656 (Tex. 2012).

¹⁴⁹ *Truman*, 762 N.W.2d at 82; *Daigle v. Parish of Jefferson, So. 3d 55*, 61–62 (La. 2009); *Ford v. N.H. Dep’t of Transp.*, 163 N.H. 284, 37 A.3d 436, 447 (2012); *Nealon v. City of Omaha*, 2009 Neb. App. LEXIS 63, at 9 (2009).

¹⁵⁰ *Daigle*, 30 So. 3d at 61–62.

¹⁵¹ *Ford*, 163 N.H. at 296, 37 A.3d at 447.

¹⁵² *Id.* at 296, 37 A.3d at 446.

¹³⁹ *Walters v. City of Columbus*, 2008 Ohio 4258, at 22 (2008).

¹⁴⁰ *Id.* at 23 (citing OHIO REV. CODE 2744.02(A)).

¹⁴¹ *Truman*, 762 N.W.2d at 82 (footnote omitted) (citation omitted).

¹⁴² *Shipley v. Dep’t of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

¹⁴³ *Id.*

¹⁴⁴ *Texas Dep’t of Transp. v. Perches*, 339 S.W.3d 241, 249 (Tex. 2011) (citation omitted) (some internal quotation marks omitted).

The court held that “[t]he plain language of this section does not create a mandatory duty. [W]hile the word ‘shall’ establishes a mandatory duty, the word ‘should’ requires [the DOT] to use its discretion and...judgment.”¹⁵³ The court held that “[t]he MUTCD provision upon which the plaintiff relies is ‘Guidance,’ and is, ‘therefore only a recommended practice, not a mandate upon government decision makers.’”¹⁵⁴

In a Nebraska case, the court held that the MUTCD did not require the City to provide pedestrian signals at the intersection where the accident occurred.¹⁵⁵ In Ohio the courts have held that “the term ‘public roads’ as defined by Ohio statute does not include...traffic control devices unless the traffic control devices are *mandated* by the Ohio [MUTCD].”¹⁵⁶ In that case the stop sign was not mandated by the Manual.¹⁵⁷

D. Transportation Departments’ Obligations Under Other State Statutes

In addition to the MUTCD, other state statutes may apply to the tort liability of transportation departments. Thirteen of 21 departments responding to the survey reported that under the law of their state, regardless of the MUTCD, there is a statutory or judicially imposed duty to install or provide signs, pavement markings, traffic signals, or other traffic control devices.¹⁵⁸ The stat-

utes, however, must be consulted to ascertain the scope of any duty and any exceptions. For example, California Street and Highway Code Section 27 “impose[s] a general duty to maintain roads in safe condition, but the specifics are left to the discretion of highway authorities.”¹⁵⁹ In Iowa, as recognized in *McLain v. State*,¹⁶⁰ there are three exceptions to immunity for failure to place a traffic control device: “(1) failure to maintain a device; (2) installation of a misleading sign; and (3) where the exigencies are such that ordinary care would require the State to warn of dangerous conditions by other than inanimate objects.”¹⁶¹

The New Hampshire DOT advised that under its state code there is potential liability “only for speed limits (RSA 265:60 for work zone speed limits) that is probably consistent with [the] MUTCD.”¹⁶² The Virginia DOT reported that “Virginia statutes have been modified to address many requirements of the MUTCD and/or to adopt the MUTCD. The law is crafted to mirror or ensure non-conflict with the MUTCD and in some cases dictates use of signs, etc.”¹⁶³ Furthermore,

§§ 27-65-107 (14) and (16) and § 27-52-101, *et seq.*); Indiana DOT (*citing* IND. CODE §§ 9-21-4-2, 9-21-3-4, 9-21-3-6, and 9-13-2-117 (defining a traffic control device)); Kansas DOT (*citing* KAN. STAT. ANN. §§ 8-2003, 8-2004, and 8-2005); Ohio DOT (*citing* OHIO REV. CODE §§ 4511.10, 4511.11, 4511.21, 4511.09, and 5501.31); Michigan DOT (*citing* Michigan Vehicle Code, MICH. COMP. LAWS 257.1, *et seq.* that “requires MDOT to place traffic control devices as it shall deem necessary” and MICH. COMP. LAWS 257.609); Oklahoma DOT (only “Merge Now,” “Slow Traffic Right Lane,” “Speed Limits,” “School Zone Speed Limits,” and county road speed limits county-wide at department’s entry points); New Hampshire DOT; Pennsylvania DOT (stating that “case law requires highways to be kept reasonably safe for intended, foreseeable use (*citing* Snyder v. Harmon, 562 A.2d 307 (Pa. 1984)); Texas DOT (stating that “[s]tate law requires all traffic control devices to be compliant with the Texas MUTCD (Texas Transportation Code Section 544.002”)); Virginia DOT; Washington State DOT (*citing* WASH. REV. CODE ch. 47.36.030); and Wisconsin DOT. Four departments responded that there was no such duty in their states. Responses of Alabama DOT, Missouri Highway and Transportation Commission, Nebraska Department of Roads, and Utah DOT. Two departments did not respond to the question but provided additional information as set forth in App. B. Responses of Arizona DOT and New York State DOT.

¹⁵⁹ Response of Caltrans.

¹⁶⁰ 563 N.W.2d 600, 604 (Iowa 1997).

¹⁶¹ Response of Iowa DOT.

¹⁶² Response of New Hampshire.

¹⁶³ Response of Virginia DOT. The Virginia DOT’s response to the survey included a disclaimer stating that “[t]he responses provided to this survey do not consti-

¹⁵³ *Id.* at 447 (*citing* Dunlap v. W.L. Logan Trucking Co., 161 Ohio App. 3d 51, 2005 Ohio 2386, 829 N.E.2d 356, 361 (Ohio Ct. App. 2005) (interpreting Ohio’s manual); Lawton v. City of Pocatello, 126 Idaho 454, 461, 886 P.2d 330, 337–38 (1994) (interpreting earlier version of MUTCD); and Johnson v. Agency of Transp., 180 Vt. 493, 494, 904 A.2d 1060, 1063 (2006) (only MUTCD “Standards” are binding on Vermont’s Agency of Transportation).

¹⁵⁴ *Ford*, 163 N.H. at 297, 37 A.3d at 447 (*quoting* Dane County v. O’Malley, 2008 WI App 121, 313 Wis. 2d 524, 756 N.W.2d 479, 2008 Wis. App. LEXIS 481, at 6 (Wis. Ct. App. June 19, 2008)).

¹⁵⁵ Nealon v. City of Omaha, 2009 Neb. App. LEXIS 63 at 9 (Neb. Ct. App. 2009). Interpreting § 4D-3 of the MUTCD, the court held further:

The plain language of subsection 4D-3(3) of the manual states that pedestrian signal indications are required when traffic lights are not visible to pedestrians or are not in a position that would adequately serve a pedestrian. We conclude that this entire subsection refers to the physical location and positioning of a traffic signal, rather than the particular settings of an individual traffic signal. The “position” of a traffic signal is most clearly read to refer to the signal’s location. *Id.* at 12–13.

¹⁵⁶ Yonkings v. Piwinski, 2011 Ohio 6232 at 22 (2011).

¹⁵⁷ *Id.* See also Shope v. City of Portsmouth, 2012 Ohio 1605, at 22 (2012).

¹⁵⁸ Responses of Caltrans; Arkansas Highway and Transportation Department (*citing* ARK. CODE ANN.

the department stated that “[t]here are also sections in the Code of Virginia that establish specific requirements for traffic signage.”¹⁶⁴ The Wisconsin DOT’s response identified other statutes that are applicable to the department.¹⁶⁵

On the other hand, six transportation departments reported that there are statutes in their states that *exempt* the department from liability specifically for not providing certain highway features, such as signs, pavement markings, traffic signals, or other devices.¹⁶⁶ For example, Iowa Code Section 668.10(1)(a) provides:

1. In any action brought pursuant to this chapter, the state or a municipality shall not be assigned a percentage of fault for any of the following:

a. The failure to place, erect, or install a stop sign, traffic control device, or other regulatory sign as defined in the uniform manual for traffic control devices adopted pursuant to section 321.252. However, once a regulatory device has been placed, created, or installed, the state or municipality may be assigned a percentage of fault for its failure to maintain the device.

Finally, 13 departments reported that there were no other state statutes that exempted the department from potential tort liability regarding their decisions on the use of traffic control devices.¹⁶⁷

tute a legal opinion nor represent the opinion of attorneys for the agency.”

¹⁶⁴ *Id.*

¹⁶⁵ Response of Wisconsin DOT (*citing* WIS. STAT. § 86.06 (2012) (highways closed to travel; penalties); WIS. STAT. § 83.025(2) (2012) (county trunk system shall be marked and maintained by the county); Wis. Stat. § 84.03(1)(c) (2012) (stating that

[o]n any highway, street or bridge hereafter constructed, reconstructed or improved with state or federal aid under this chapter, the location, form and character of informational, regulatory and warning signs, curb and pavement or other markings, and traffic signals installed or placed by any public authority or other agency shall be subject to the approval of the department; and the department is directed to approve only such installations as will promote the safe and efficient utilization of the highways, streets and bridges.

WIS. STAT. § 84.106(3) (scenic byways program; marking of highways); and WIS. STAT. § 86.19(1) (2013) (highway signs, regulation, and prohibition)).

¹⁶⁶ Responses of Indiana DOT; Iowa DOT (*citing* winter maintenance immunity (IOWA CODE § 668.101(1)(b)) and design immunity (IOWA CODE § 669.14(8)); Michigan DOT (*citing* MICH. COMP. LAWS § 691.1401, *et seq.* and common law); Nevada DOT (*citing* NEV. REV. STAT. ch. 41); Virginia DOT; and Wisconsin DOT.

¹⁶⁷ Responses of Alabama DOT (noting that the department has “sovereign immunity as an agency of the State”), Arkansas Highway and Transportation Department, Caltrans, Indiana DOT, Missouri Highway and Transportation Commission, Ohio DOT, Nebraska Department of Roads, New York State DOT, Oklahoma

V. TORT CLAIMS AGAINST TRANSPORTATION DEPARTMENTS BEFORE AND AFTER THE 2009 MUTCD

A. Claims After the 2009 MUTCD

Nine state transportation departments that responded to the survey reported that since the 2009 revision of the MUTCD they have had tort claims commenced against them that involved an alleged violation of the 2009 MUTCD.¹⁶⁸ However, as noted in Section I.F of the digest, of 18 DOTs responding to the survey that have adopted the 2009 MUTCD or a state version in substantial conformance with the national MUTCD, many did not do so until 2011 and 2012. Consequently, there are not many cases involving the 2009 MUTCD in which there are reported decisions.

Arkansas reported that it has had one case regarding improper placement of a sign during temporary construction or maintenance operations that implicated Part 6 of the MUTCD, a case whose outcome the department only said had “favorable and unfavorable” aspects.¹⁶⁹

Caltrans reported on two cases. In one case, the “plaintiff alleged there should have been a ‘Narrow Bridge Ahead’ sign on a highway running along a cut slope, elevated from surrounding area and flanked on either side by [a] guardrail.”¹⁷⁰ At issue was the 2009 MUTCD Section 2C.20, Narrow Bridge Sign (W5-2). The case settled after the court denied Caltrans’ motion for summary judgment. In the second case, the issue was the 2006 California MUTCD, Section 2C.41, Pedestrian Warning Sign (W11A-2). Although the plaintiff alleged that the W54 pedestrian crossing signs placed in advance of the crosswalk were “deficient

DOT, Pennsylvania DOT, Texas DOT, Utah DOT, and Washington State DOT.

¹⁶⁸ Responses of Arkansas Highway and Transportation Department, Caltrans, Kansas DOT, Iowa DOT, Indiana DOT, New York State DOT, Pennsylvania DOT (stating that the cases are numerous but that the department does not have records to provide information on claims), Washington State DOT, and Wisconsin DOT. Nine departments reported that there had been no claims filed against the department since the 2009 revision. Responses of Alabama DOT, Michigan DOT, Nebraska Department of Roads, Ohio DOT (stating that it is not an “MUTCD state”), Oklahoma DOT, New Hampshire DOT, Texas DOT, Virginia DOT, and Utah DOT.

¹⁶⁹ Response of Arkansas Highway and Transportation Department.

¹⁷⁰ Response of Caltrans.

and substandard,” the court granted Caltrans’ motion for summary judgment.¹⁷¹

Kansas reported that it has had:

- Two cases that settled alleging that temporary striping on an Interstate did not comply with Sections 3B.04, 6A.01, 6F.77, and 6F.78 of the MUTCD.

- Two cases decided in favor of the department alleging that a pilot car operation was not signed in accordance with Sections 6A.01, 6F.58, and 6C.13 and the Notes and Figure for Section 6H-10 of the MUTCD.

- One case alleging that a railroad crossing was not signed according to unspecified sections of the MUTCD. The plaintiff dismissed the case with prejudice.

- One case alleging that a divided highway intersection was neither signed nor striped in accordance with as yet unspecified sections of the MUTCD. This case was still in the discovery phase.

- One case alleging that a stop-controlled intersection was not signed in accordance with as yet unspecified sections of the MUTCD. This case also was still in the discovery phase.

None of the foregoing cases in Kansas has resulted in a reported decision.

Indiana reported having cases that involved allegations of negligent design, negligent maintenance, negligent signage, flooding, and signage blocked by vegetation, but provided no information on the number or outcome of the cases. At issue were MUTCD provisions on highway design, maintenance, and repair, as well as signing and grade intersection markings.

Missouri reported that the department has “had more than 140 cases involving tort claims filed since 2009,” although apparently not necessarily arising under the 2009 MUTCD.¹⁷² Missouri does not

track cases specifically by allegations of negligence because what we normally see in pleadings is numerous allegations of negligence, *i.e.*, there was a dangerous condition and the state failed to fix it or warn of it. Sometimes the allegation will specifically state that a EPG or MUTCD standard was violated, but many times the allegations in the petition are fairly general.¹⁷³

TxDOT stated that the department has not been sued “very much over MUTCD standards”; that the department does “see it being raised a lot in

lawsuits against our contractors in construction zone cases”; but that “[c]ontractors have immunity from liability under Texas Civil Practice and Remedies Code 97.002 (limit on liability of certain highway, road, and street contractors).”¹⁷⁴ However, the department also advised that the “TxMUTCD is specifically referenced in the contract documents as a controlling authority for traffic control devices and procedures, and we have seen Plaintiff’s counsel becoming very creative in cherry picking clauses and general standards to show [that] the contractor was NOT in compliance with the MUTCD.”¹⁷⁵

The Washington State DOT reported that in its cases the plaintiffs’ allegations involved failure to sign properly or to install signal channelization, or involved curve warnings and sign placement. At issue in the cases were Chapter 2 and “chapter 4 warrants” of the 2009 MUTCD.¹⁷⁶

The Wisconsin DOT reported that “[t]he state routinely receives notices of claim in which the plaintiffs allege some defect in signing, generally. Typically, specific provisions of the MUTCD are not cited as being applicable in the notice of claim and pleading stages of a case where we would have records of the specific MUTCD violation allegations.”¹⁷⁷ None of the Wisconsin cases involving the 2009 MUTCD had proceeded to trial as of the date of this digest.

In addition to cases reported in response to the survey, a number of MUTCD cases were located that were filed or decided after the effective date of the 2009 MUTCD, although as indicated in Table A, only one decision located for the digest did not involve prior editions of the MUTCD. Thus, in an Idaho case, the plaintiff (Woodworth) was struck by a vehicle while pushing a shopping cart across a street in Nampa, Idaho, where there was no marked pedestrian crosswalk.¹⁷⁸ Although the claim arose prior to the 2009 MUTCD, the court only cited to the 2009 edition, including revisions 1 and 2.¹⁷⁹

The plaintiff alleged that the State was negligent because it failed to perform an engineering study at the location of the accident and “do what the study, if performed, would have shown to be necessary.”¹⁸⁰ However, the Supreme Court of Idaho agreed with the district court and the State that the gravamen of the complaint was that the

¹⁷⁴ Response of Texas DOT.

¹⁷⁵ Response of Texas DOT.

¹⁷⁶ Response of Washington State DOT.

¹⁷⁷ Response of Wisconsin DOT.

¹⁷⁸ Woodworth v. State, 154 Idaho 362, 298 P.3d 1066 (2013).

¹⁷⁹ *Id.* at 366 n.4, 298 P.3d at 1070 n.4.

¹⁸⁰ *Id.* at 364, 298 P.3d at 1068 (internal quotation marks omitted).

¹⁷¹ Salas vs. Dep’t of Transp., 198 Cal. App. 4th 1058, 129 Cal. Rptr. 3d 690 (2011) (court’s opinion not mentioning the MUTCD).

¹⁷² Response of Missouri Highway and Transportation Commission.

¹⁷³ Response of Missouri Highway and Transportation Commission.

claims arose out of the plan or design for the construction or improvement of a state highway for which the State had immunity under the Idaho Tort Claims Act.¹⁸¹ The court stated, however, that “although immunity under I.C. § 6-904(7) is broad and long lasting, it does not absolutely bar negligence claims related to the plan or design of a State highway where the plaintiff can point to a specific statute or a mandatory provision of the MUTCD that has been violated.”¹⁸² But the court held that the plaintiff did not provide any support for his claim that the State

had a duty to perform a study or was negligent in failing to perform an engineering study. After careful examination of the Idaho Code and MUTCD provisions cited by Woodworth the only provision that mentions an engineering study is § 2C.01.01 of the MUTCD. Section 2C addresses “Warning Signs and Object Markers,” and subpart .01 states “[t]he use of warning signs shall be based on an engineering study or on engineering judgment.” However, § 2C.01 does not create any duty to conduct an engineering study, it merely requires that an engineering study or engineering judgment be used in the event warning signs are erected.¹⁸³

Thus, the court affirmed the district court’s grant of summary judgment for the State in ruling that Woodworth failed to show that the State had been negligent in its failure to conduct an engineering study at the location of the accident. Lastly, in any event, the State’s High Accident Location monitoring program fulfilled any duty that the State had to Woodworth to improve and maintain its highways.¹⁸⁴

Including the Idaho case with the cases reported by the states in response to the survey, admittedly a very small sample of cases, and omitting cases that were settled, there are six cases involving the 2009 MUTCD for which information could be obtained as of the time of this digest. Of the six cases, it appears that five resulted in decisions favorable to the transportation departments (83 percent), with one decision partly favorable to the plaintiff.

B. Tort Claims Prior to the 2009 MUTCD

Table 1 is a sampling of cases and outcomes for the period January 2010 to April 2014 involving the 2003 or earlier editions of the MUTCD. Of the 30 cases included in Table 1, 8 (79 percent) were decided in favor of the transportation departments.

Table 2 is a list of MUTCD cases and outcomes decided between 2005 and 2012 that was provided by NYSDOT in response to the survey. Of 27 cases

¹⁸¹ *Id.* at 364, 298 P.3d at 1068 (citing IDAHO CODE, § 6-904(7)).

¹⁸² *Id.* at 366, 298 P.3d at 1070.

¹⁸³ *Id.*, 154 Idaho at 367, 298 P.3d at 1071.

¹⁸⁴ *Id.*

included in Table 2, 20 (or 74 percent) were decided in favor of the department.

Once more, the two tables consist only of a sampling of very recent cases for which there is a known result, including unreported or nonpublished opinions. Nevertheless, the two tables, plus the previous six cases discussed in Section V.A, comprise a total of 62 cases. Of course, it is not known how many cases were decided without an opinion, settled, or otherwise withdrawn or dismissed.

VI. THE MUTCD AND TORT LIABILITY OF TRANSPORTATION DEPARTMENTS

A. Liability Under Tort Claims Acts

Other articles have discussed in detail the tort liability of transportation departments.¹⁸⁵ The principles of tort liability will be discussed hereafter only to the extent that they are relevant to the defense of MUTCD cases. However, to summarize briefly, because of the doctrine of sovereign immunity, either at common law or by reason of a state constitutional or statutory provision, transportation departments and other public entities were historically protected from tort liability. Municipal corporations were usually liable only for negligence in the performance of their proprietary functions—activities for which a fee was charged—but not for the performance of their governmental functions, such as providing and maintaining streets and highways.

By the 1960s and 1970s, most state legislatures had enacted some form of a tort claims act, sometimes in response to the judicial abrogation in the state of sovereign immunity.¹⁸⁶ The tort claims acts that were enacted may apply to the state as well as counties and municipalities, or there may be separate legislation applicable to the tort liability of units of local government.¹⁸⁷ Seventeen of 21 transportation departments that responded to the survey reported that their state has a tort

¹⁸⁵ LARRY W. THOMAS, TORT LIABILITY OF HIGHWAY AGENCIES (National Cooperative Highway Research Program, Selected Studies in Transportation Law, Vol. 4, 2003), hereinafter referred to as “THOMAS.”

¹⁸⁶ RICHARD JONES, RISK MANAGEMENT FOR TRANSPORTATION PROGRAMS EMPLOYING WRITTEN GUIDELINES AS DESIGN AND PERFORMANCE STANDARDS (National Cooperative Highway Research Program, Legal Research Digest No. 38, 1997), hereinafter referred to as “JONES.”

¹⁸⁷ See, e.g., the Illinois Local Governmental and Governmental Employees Tort Immunity Act, 745 ILL. COMP. STAT. 10/3-104 (2013).

claims act or similar legislation that applies to claims against the department.¹⁸⁸

B. Extent of the Waiver of Government Tort Immunity

The liability of a public entity in tort varies from state to state depending on the extent to which the state legislature has waived immunity, as well as on the courts' interpretation of the applicable legislation.¹⁸⁹ Numerous cases have involved the MUTCD and whether under the circumstances there was a waiver of governmental immunity. Even in states that permit a plaintiff to sue a public entity for negligence, there may be exceptions, exemptions, and exclusions. For example, the Illinois Local Governmental and Governmental Employees Immunity Act has "an extensive list of immunities based on specific governmental functions."¹⁹⁰ As observed by the North Carolina court in *Turner, supra*, the DOT may be sued for negligence only as provided in the tort claims act.¹⁹¹

In states in which there is a waiver of sovereign immunity to some extent for tort claims, because such legislation is in derogation of the common law, typically the courts strictly construe the legislation. An example of strict interpretation is *Nawrocki v. Macomb County Road Commission*,¹⁹²

in which the Supreme Court of Michigan held that "prior decisions of this Court...improperly broadened the scope of the highway exception" to governmental immunity.¹⁹³ The court held that it was "duty bound to overrule past decisions that depart from a narrow construction and application of the highway exception."¹⁹⁴ In reinterpreting the highway exception to immunity in the Michigan statute, the court ruled that a pedestrian stated a claim when alleging "that she was injured by a dangerous or defective condition of the *improved portion* of the highway designed for vehicular travel." (Emphasis added.)¹⁹⁵ However, the highway exception did not mean that "the state or a county road commission [had] a duty to install, maintain, repair, or improve traffic control devices, including traffic signs."¹⁹⁶ The court stated that the highway exception did not give rise to duties, even as to "integral parts of the highway" that are "outside the actual roadbed, paved or unpaved, designed for vehicular travel."¹⁹⁷ The court held that "[t]raffic device claims, such as inadequacy of traffic signs, simply do not involve a dangerous or defective condition in the *improved portion* of the highway designed for vehicular travel." (Emphasis added.)¹⁹⁸

The court acknowledged, however, that there are other Michigan statutes that impose a duty separate from the highway exception for the installation, maintenance, repair, or improvement of traffic signs.¹⁹⁹ Nevertheless, the statutes provide that the state and local authorities are to perform these duties as they "*deem necessary*."²⁰⁰ The court held that the phrase "deem necessary" "is the language of discretion, not the imposition of a duty, the breach of which subjects the agencies to tort liability—as opposed, perhaps, to political liability."²⁰¹

As stated, the extent of a transportation department's liability for alleged violations of the MUTCD varies from state to state.²⁰² For example, in *Bookman v. Bolt*,²⁰³ at the time of the accident the City had two construction projects in progress and had planned to install a traffic signal at the intersection in question after the completion of

¹⁸⁸ Responses of Arkansas Highway and Transportation Department (citing ARK. CODE § 19-10-201, *et seq.*); Caltrans (citing CAL. GOV'T CODE, § 810, *et seq.*); Indiana DOT (citing IND. CODE § 34-14-3); Iowa DOT (citing IOWA CODE, ch. 669); Kansas DOT (citing KAN. STAT. ANN. § 75-6101, *et seq.*); Michigan DOT (citing MICH. COMP. LAWS § 691.1401, *et seq.*); Missouri Highway and Transportation Commission (citing MO. REV. STAT. § 537.600); Nebraska Department of Roads (citing NEB. REV. STAT. § 81-8, 2009); Nevada DOT (citing NEV. REV. STAT. ch. 41); New York State DOT (citing N.Y. COURT OF CLAIMS ACT and *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960)); Ohio DOT (citing OHIO REV. CODE § 2743, *et seq.*); Oklahoma DOT (citing OK. STAT. tit. 51, §§ 151-258); Pennsylvania DOT (citing 42 PA. CONS. STAT. §§ 8521-8528); Texas DOT (citing TEX. CIV. PRAC. & REM. CODE, ch. 101); Utah DOT (citing UTAH CODE §§ 63G-7-101-7-904); Washington State DOT (citing WASH. REV. CODE, ch. 4.92); and Wisconsin DOT. Three departments did not respond to the question. Responses of Alabama DOT, Arizona DOT, and New Hampshire DOT.

¹⁸⁹ JONES, *supra* note 186. The digest concludes that the largest number of states fall into the category of having abrogated immunity in a substantial or general way.

¹⁹⁰ *Sexton v. City of Chicago*, 976 N.E.2d 526, 540 (2012) (some internal quotation marks omitted).

¹⁹¹ *Turner v. N.C. DOT*, 733 S.E.2d 871, 874 (2012).

¹⁹² 463 Mich. 143, 615 N.W.2d 702 (2000).

¹⁹³ *Id.* at 151, 615 N.W.2d at 707.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 172, 615 N.W.2d at 717.

¹⁹⁶ *Id.* at 173, 615 N.W.2d at 717.

¹⁹⁷ *Id.* at 176, 615 N.W.2d at 719.

¹⁹⁸ *Id.* at 183, 615 N.W.2d at 723.

¹⁹⁹ *Id.* at 181, 615 N.W.2d at 721.

²⁰⁰ *Id.* at 181, 615 N.W.2d at 721, 722.

²⁰¹ *Id.* at 181–82, 615 N.W.2d at 722 (footnote omitted).

²⁰² See JONES, *supra* note 186.

²⁰³ 881 S.W.2d 771 (Tex. 1994).

construction.²⁰⁴ Warning signs were posted, but the City had not installed a traffic signal.²⁰⁵ The City argued that it had sovereign immunity because the City was not required by law to install a traffic signal, and that any “failure to install a traffic signal was the result of discretionary action.”²⁰⁶ The appellate court agreed that the City had sovereign immunity and affirmed the trial court’s grant of a summary judgment in favor of the City.²⁰⁷ As held in another MUTCD case, “[w]hen the City first installs a traffic signal is no less discretionary than *whether* to install it.” (Emphasis added.)²⁰⁸

A transportation department or other entity also may have statutory immunity from liability for the failure to provide traffic control devices.²⁰⁹ A state tort claims act or other statute may provide that a public entity is not liable “for an injury caused by the failure to provide ordinary traffic signals, signs, markings or other similar devices.”²¹⁰ As illustrated by the *Nawrocki* case, *supra*, even if a state legislature has consented to tort claims against the state or other public entities, the state’s consent to suit does not necessarily mean that the state has consented to being held liable for the alleged wrong at issue. For instance, a statute may waive immunity for a dangerous condition caused by a pothole but not for one caused by the absence of a guardrail.²¹¹

²⁰⁴ *Id.* at 773.

²⁰⁵ *Id.*

²⁰⁶ *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.056(1) and (2) (Vernon 1986) (discretionary powers) and § 101.061(a)(1) (Vernon 1986) (traffic and road-controlled devices)).

²⁰⁷ *Id.* at 774, 775.

²⁰⁸ *Fort Bend County Toll Road Authority*, 316 S.W.3d 114, 121 (In. 2010) (holding that a toll road authority retained discretion regarding when to install warning flashers) (citation omitted).

²⁰⁹ See, e.g., IOWA CODE § 668.10 (2013) (governmental exemptions).

²¹⁰ *Smith v. State*, Dep’t of Transp., 247 N.J. Super. 62, 588 A.2d 854 (1991). See also *Kosoff-Boda v. County of Wayne*, 45 A.D. 3d 1337, 1338, 845 N.Y.S.2d 612, 613 (2007) (holding that the defendant submitted evidence that its signs were installed in accordance with the MUTCD, that it conducted periodic reviews of traffic volume, that it had not received any written complaints concerning the intersection, and that there had been only one reported accident near the intersection in the 2 years prior to the plaintiff’s accident); *Racalbuto v. Redmond*, 46 A.D. 3d 1051, 1052, 847 N.Y.S.2d 283, 285 (2007) (holding that the County had qualified immunity when the County had reviewed the highway plan and placed signs near an intersection that alerted motorists of a curve and the upcoming intersection).

²¹¹ See, e.g., 42 Pa. CONS. STAT. § 8522(b)(5):

C. Transportation Departments’ Defenses to Claims Involving the MUTCD

Fourteen transportation departments that responded to the survey identified defenses that they commonly assert in cases brought against them in which a plaintiff has alleged that the department violated one or more provisions of the MUTCD.²¹²

The defense noted most often by the departments is that the department’s action or decision in question involved the exercise of discretion and therefore is immune. The departments argue that they have immunity under their tort claims acts,²¹³ that “[n]o exception to governmental immunity applies,”²¹⁴ that they have “qualified immunity,”²¹⁵ or that they have immunity under a design immunity statute.²¹⁶

Second, the transportation departments argue that because they exercised reasonable engineering judgment in accordance with the MUTCD, their decisions are discretionary and therefore immune from liability. A department may use its own engineers or retain an outside expert to testify that the department observed the requirements or guidance in the MUTCD or that any deviation from the MUTCD was based on reasonable engineering judgment.²¹⁷

A dangerous condition of highways under the jurisdiction of a Commonwealth agency created by potholes or sinkholes or other similar conditions created by natural elements, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the Commonwealth agency had actual written notice of the dangerous condition of the highway a sufficient time prior to the event to have taken measures to protect against the dangerous condition. Property damages shall not be recoverable under this paragraph.

See also 42 PA. CONS. STAT. § 8542(b)(4):

A dangerous condition of Commonwealth agency real estate and sidewalks, including Commonwealth-owned real property, leaseholds in the possession of a Commonwealth agency and Commonwealth-owned real property leased by a Commonwealth agency to private persons, and highways under the jurisdiction of a Commonwealth agency, except conditions described in paragraph (5) [above].

²¹² See App. B.

²¹³ Responses of Indiana DOT, Nebraska Department of Roads (citing NEB. REV. STAT. 81-8, 219), Ohio DOT, and Oklahoma DOT.

²¹⁴ Response of Michigan DOT.

²¹⁵ Response of New York State DOT.

²¹⁶ Response of Caltrans (citing CAL. GOV’T CODE § 803.6 and CAL. GOV’T CODE § 803.2 (trivial risk)).

²¹⁷ Responses of Missouri Highway and Transportation Commission and Texas DOT (identifying “[t]he immunities afforded to the discretion inherent in engineering decisions and the decisions to implement devices”).

Third, the departments argue that the MUTCD provisions at issue are not mandatory,²¹⁸ that they are only guidance, not a standard.²¹⁹ One department stated that the MUTCD is not a legal requirement to install any sign; that a diagram or picture in the Manual is not a requirement; and that the Manual does not obligate the department to create a traffic control plan or include more than one warning sign in a given area.²²⁰ In addition, transportation departments in some states are able to rely on statutory immunity for traffic control devices²²¹ or the state's tort claims act's "immunities regarding discretion and signing."²²² The Nebraska Department of Roads also mentioned its immunity for weather conditions.²²³

Fourth, insofar as basic principles of tort liability and MUTCD defenses are concerned, the departments defend on the basis that the plaintiff has failed to show that there was a duty to install or provide a traffic control device at the location of the accident, and, even if there were such a duty, the departments complied with their standard of care²²⁴ because their actions complied with²²⁵ or substantially conformed to the Manual.²²⁶ One department also noted that it may argue that the plaintiff wrongly interpreted the MUTCD or that the cited section of the MUTCD does not apply.²²⁷

Several departments noted that their defenses in MUTCD cases include the plaintiff's contributory negligence²²⁸ or comparative fault,²²⁹ "even if the department's conduct was 'below [the] stan-

dards and guidance in the MUTCD."²³⁰ Several departments stated that they defend on the basis that they had no notice of an alleged dangerous condition,²³¹ that an alleged infraction of the MUTCD was not the proximate cause of the plaintiff's accident,²³² or that the negligence of a third party was an "efficient intervening cause."²³³

Before discussing the departments' defense that their actions are discretionary under the MUTCD and immune from liability, Section D discusses the departments' defenses that are important in tort cases generally and are just as important in cases involving the MUTCD.²³⁴

D. Whether Departments Have a Duty to Provide Traffic Control Devices

In general a public entity has a duty of reasonable care to construct and maintain its public improvements such as highways in a reasonably safe condition,²³⁵ or to provide adequate warning to a motorist of any danger that is present.²³⁶ The

²³⁰ Response of Indiana DOT.

²³¹ Response of Missouri Highway and Transportation Commission; New York State DOT; and Washington State DOT (lack of reasonable notice and/or insufficient time to correct the alleged deficiency).

²³² Responses of Kansas DOT, Oklahoma DOT, and Washington State DOT.

²³³ Response of Nebraska Department of Roads.

²³⁴ Assuming that state law authorizes a tort action against a transportation department, a plaintiff must allege and prove the essential elements of any tort claim: 1) that the department owed a duty to the plaintiff; 2) that the department committed a breach of its duty of care to the plaintiff; and 3) that the department's negligence was the proximate cause of the plaintiff's injuries. A plaintiff also must prove damages caused by the alleged negligence and the plaintiff's injury. *See Turner*, 733 S.E.2d at 874 (stating required elements of a tort claim in North Carolina). *See also Skulich*, 82 So. 3d at 470–71. In *Skulich* the court noted that in Louisiana to recover against the State or other public entity under LA. REV. STAT. § 9:2800, a plaintiff must prove that

(1) the thing that caused her damages was in DOTD's custody; (2) the thing was defective due to a condition that created an unreasonable risk of harm; (3) DOTD possessed actual or constructive notice of the defect, and failed to take corrective measures to remedy the defect within a reasonable period of time; and (4) the defect was a cause in fact of the plaintiff's injuries. (Citations omitted.)

²³⁵ 65 N.Y. Jur. 2d, *Highways, Streets, and Bridges* § 375, at 163–64.

²³⁶ *Taylor-Rice v. State*, 91 Haw. 60, 979 P.2d 1086, 1095–96 (1999); *Goodermote v. State*, 856 S.W.2d 715, 720 (Tenn. 1993) ("The State has a duty to exercise reasonable care under all the attendant circumstances in planning, designing, constructing and maintaining the State system of highways."); *Hash v. State*, 247 Mont.

²¹⁸ Responses of Wisconsin DOT and Kansas DOT.

²¹⁹ Response of Wisconsin DOT.

²²⁰ *Id.*

²²¹ Response of Iowa DOT (*citing* IOWA CODE § 668.10(1)(a)).

²²² Response of Kansas DOT.

²²³ Response of Nebraska Department of Roads.

²²⁴ Responses of Missouri Highway and Transportation Commission (compliance with the Missouri EPG), Oklahoma DOT, and Utah DOT.

²²⁵ Response of Missouri Highway and Transportation Commission (regarding the Missouri EPG).

²²⁶ Responses of Indiana DOT (no breach of the Manual), Oklahoma DOT (no violation occurred), and Wisconsin DOT. Both *Morales v. State of La.*, Dep't of Transp. and Dev., 92 So. 3d 460, 463 (La. App. 2012) and *Skulich v. Fuller*, 82 So. 3d 467 (La. 2011), are examples of compliance with the standards of the MUTCD. In *Skulich* the plaintiff's expert was unable to identify any standard in the MUTCD that was violated. *Skulich*, 82 So. 3d at 472.

²²⁷ Response of Arkansas Highway and Transportation Department.

²²⁸ Responses of Indiana DOT and Nebraska Department of Roads.

²²⁹ Response of Kansas DOT.

Pennsylvania DOT stated in response to the survey that Pennsylvania “case law requires highways to be kept reasonably safe for [their] intended, foreseeable use.”²³⁷ However, with respect to the MUTCD and a transportation department’s duty to a motorist, as one court has held, “the MUTCD may be used as ‘a tool for assessing a breach of duty only after a legal duty has already been established. It cannot be used to create a legal obligation’” under state law.²³⁸

Warning signs, traffic lights, pavement markings, and other devices are important features of safe roads and highways. However, for a plaintiff to maintain a tort action against a transportation department, the plaintiff must show that the department owed a duty to the plaintiff that the defendant negligently performed or failed to perform.²³⁹ The showing of both the existence of a duty and its breach are critical, because “[w]ithout duty, there can be no breach of duty, and without breach of duty there can be no liability.”²⁴⁰

The courts have held that in the absence of statute, a public entity responsible for highways has no general duty to install or provide highway signs, signals, or markings. Indeed, numerous cases have held that the failure to provide traffic control devices is not actionable, particularly if a public entity had discretion regarding what kind of action or response was appropriate.²⁴¹ As a Mississippi court has held, “[t]he placement, or non-placement, of warning signs is a discretionary act, involving a choice that must be based upon public policy and other considerations.”²⁴² In that

case the court ruled that the plaintiff provided no evidence that the placement of the signs and the maintenance of the crosswalk were anything other than discretionary functions.²⁴³ In fact, the court said that the plaintiff’s argument that the City had used its funds for other crosswalks was “a prime example of when [a] decision is based upon a policy judgment of someone and is not a statutorily imposed duty.”²⁴⁴

However, there is authority holding that after a decision is made to provide signs, signals, or markings, there is a duty to maintain them with reasonable care.²⁴⁵ Moreover, when a highway agency is required to maintain highways free of hazards, the agency’s duty may include the proper maintenance of directional signs, signals, stop signs, and other devices.²⁴⁶

E. Whether a Duty Arises When There Is a Dangerous Condition

1. Whether There Is Immunity for a Dangerous Highway Condition

A transportation department may have a duty to install or provide a traffic control device when it has actual or constructive notice of a dangerous condition. One court has held that a dangerous highway condition of which a transportation department has notice “abrogates immunity.”²⁴⁷ In Nebraska a state statute “denies sovereign immunity if the condition is not corrected by the governmental entity within a reasonable time.”²⁴⁸ Eight departments that responded to the survey reported that they did not have immunity in such circumstances.²⁴⁹

There is, however, other ambivalent or contrary authority. Six of the transportation departments that responded to the survey in fact reported that

497, 501, 807 P.2d 1363, 1365–66 (1991) (“The State’s duty to keep its highways in a reasonably safe condition extends to the paved portion of the roadway, to the shoulders and the adjacent parts thereof, including guardrails.”).

²³⁷ Response of Pennsylvania DOT.

²³⁸ *Hodges v. Attala County*, 42 So. 3d 624, 626 (Miss. 2010) (quoting *Chisolm v. Miss. DOT*, 942 So. 2d 136 (Miss. 2006) (internal citations omitted)).

²³⁹ See 79 N.Y. Jur. 2d, *Negligence* § 16.

²⁴⁰ *Id.*

²⁴¹ *French v. Johnson County*, 929 S.W.2d 614, 617 (Tex. App. 1996) (holding in a case involving an accident on a bridge built in 1943 that the County’s failure to install guardrails, replace the bridge, or post warnings after the date of the tort claims act did not constitute an act or omission waiving immunity and that the decision not to post warning signs was discretionary); *Urow v. District of Columbia*, 316 F.2d 351 (D.C. Cir. 1963) (no liability for failure to exercise discretionary legislative powers to control traffic at an intersection).

²⁴² *Hankins v. City of Cleveland*, 90 So. 3d 88, 94–95 (Miss. 2011) (citation omitted) (internal quotation marks omitted).

²⁴³ *Id.*

²⁴⁴ *Id.* at 95.

²⁴⁵ *Chart v. Dvorak*, 57 Wis. 2d 92, 203 N.W.2d 673, 677–78 (1973).

²⁴⁶ *Messerschmidt v. City of Sioux City*, 654 N.W.2d 879, 883 (Iowa 2002) (construing IOWA CODE § 668.10(1) to mean that when a regulatory device has been set up, “the state or municipality may be assigned a percentage of fault for its failure to maintain the device”).

²⁴⁷ *Am. Family Mut. Ins. Co. v. Outagamie County*, 2012 WI App 60 at 25, 341 Wis. 2d 413, 428, 816 N.W.2d 340 (2012).

²⁴⁸ Response of Nebraska Department of Roads (citing NEB. REV. STAT. § 81-8, 219(9)).

²⁴⁹ Responses of Arizona DOT; Missouri Highway and Transportation Commission (citing MO. REV. STAT. 537.600), Ohio DOT, New Hampshire DOT, Pennsylvania DOT, Texas DOT, Utah DOT, and Washington State DOT.

their departments have immunity if they fail to correct or give notice of a dangerous condition in connection with a highway or related facility involving a traffic control device.²⁵⁰ According to the Nevada DOT,

[t]here exists Nevada case law holding that the State is immune from suit for negligence with respect to dangerous conditions of which it does not have notice. However, there also exists Nevada case law holding that the State's immunity does not apply to a failure to act reasonably after learning of a hazard or to operational functions, such as the duty to maintain a stop sign.²⁵¹

The Arkansas Highway and Transportation Department stated that although the department has immunity in circuit court pursuant to Art. 5, § 20 of the Arkansas Constitution, the State Claims Commission has jurisdiction under Ark. Code Ann. 19-10-204 and could find liability under these circumstances.²⁵²

In contrast, in Illinois there is authority holding that a transportation department has absolute immunity even when it has notice and fails to respond to a dangerous condition. For example, in Illinois the courts have held “that it is improper to import the ‘discretionary/ministerial distinction’ into sections of the Tort Immunity Act that do not specifically reference it”;²⁵³ that “a local governmental entity has absolute immunity under section 3-104 [of the Act] for an ‘initial failure to erect a traffic warning device’”;²⁵⁴ and that Illinois courts “have repeatedly held that ‘[w]hile section 11-304 of the Illinois Vehicle Code...impose[s] an obligation[] upon municipalities to post various warning signs, section 3-104 of the Tort Immunity Act absolutely immunizes local public entities from any tort liability for failing to fulfill those duties.”²⁵⁵

2. Definition of a Dangerous Condition

What constitutes a dangerous condition may depend on the facts as well as judicial interpretation of the applicable law. As held in one case in-

²⁵⁰ Responses of Alabama DOT; Arkansas Highway and Transportation Department; Iowa DOT (*citing* IOWA CODE § 668.10(1)(a)); Michigan DOT (*citing* MICH. COMP. LAWS § 691.1407); Nebraska Department of Roads (stating that “Neb. Rev. Stat. § 81-8,219(9) denies sovereign immunity if the condition is not corrected by the governmental entity within a reasonable time”); and Oklahoma DOT (*citing* OK. STAT. tit. 51, §§ 155(5) and (15)).

²⁵¹ Response of Nevada DOT.

²⁵² Response of Arkansas Highway and Transportation Department.

²⁵³ *Sexton v. City of Chicago*, 976 N.E.2d 526, 549 (2012) (citation omitted).

²⁵⁴ *Id.* at 550 (citations omitted).

²⁵⁵ *Id.* at 549 (citations omitted).

volving the MUTCD, the plaintiff failed to prove that the intersection at issue presented an unreasonable risk of harm.²⁵⁶ In some states the term “dangerous condition” may be defined by statute. In Wisconsin “[t]he known danger exception abrogates immunity in situations where an obviously hazardous situation exists and ‘the nature of the danger is compelling and known to the [public] officer and is of such force that the public officer has no discretion not to act.’”²⁵⁷ Even if there are situations known to be dangerous, it has been held that a transportation department still has “discretion as to the mode of response.”²⁵⁸

In California the issue is addressed in several sections of the California Government Code. Section 830 defines the term “dangerous condition”: it “means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used.” Under Section 835(a) of the Code, a public entity may be held “liable for injury caused by a dangerous condition of its property,” subject to other conditions stated in the statute, if “[t]he public entity had actual or constructive notice of the dangerous condition as further specified under Section 835.2,” as the following discusses.²⁵⁹

With respect to traffic control devices, Section 830.2 of the Code provides that “[a] condition is not a dangerous condition...if the trial or appellate court...determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature...that no reasonable person would conclude that the condition created a substantial risk of injury.” Pursuant to Section 830.4 a condition is not a dangerous one “merely because of the failure to provide regulatory traffic control signals, stop signs, yield right-of-way signs, or speed restriction signs, as described by the Vehicle Code, or distinctive roadway markings as described in Section 21460 of the Vehicle Code.” Moreover, Section 830.8 provides that “[n]either a public entity nor a public employee is liable under this chapter for an injury caused by the failure to provide traffic or warning signals, signs, markings or devices described in the Vehicle Code.”

However, Section 830.8 also creates an exception for a dangerous condition:

²⁵⁶ *Daigle v. Parish of Jefferson*, 30 So. 3d 55, 63 (2009).

²⁵⁷ *Am. Family Mut. Ins. Co.*, 2012 WI App. 60 ¶ 25, 341 Wis. 2d 413, 428–29, 816 N.W.2d 340, 348 (2012) (citation omitted).

²⁵⁸ *Id.* at 29, 341 Wis. 2d at 430, 816 N.W.2d at 349 (citation omitted).

²⁵⁹ CAL. GOV'T CODE § 835(a).

Nothing in this section exonerates a public entity or public employee from liability for injury proximately caused by such failure if a signal, sign, marking or device (*other than one described in Section 830.4*) was necessary to warn of a dangerous condition which endangered the safe movement of traffic and which would not be reasonably apparent to, and would not have been anticipated by, a person exercising due care. (Emphasis added.)

As for notice, Section 835.2(a) and 835.2(b) state what is required for a public entity to have actual notice or constructive notice of a dangerous condition. There are, however, various qualifiers. For example, under Section 834.4(b), “[a] public entity is not liable under subdivision (b) of Section 835 for injury caused by a dangerous condition of its property if the public entity establishes that the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable,” subject to other conditions set forth in the statute.

If nothing else, the above provisions demonstrate the importance of reviewing applicable statutes in determining whether the installation or omission of a traffic control device constitutes a dangerous condition, as that term may be both defined and limited by state law. Nevertheless, although applicable statutes and judicial decisions must be consulted, it appears that the majority rule is that when a transportation department has notice of a dangerous condition, the responsible agency must respond, such as by correcting the condition or providing adequate warning of the condition.

3. Requirement that the Department Had Notice of a Dangerous Condition

Whether under the common law or as required by statute, a transportation department may have a duty to correct a dangerous condition or otherwise to take appropriate action when the department acquires notice of the condition.²⁶⁰ One of the defenses asserted by transportation departments in MUTCD cases is that they had no notice of the

²⁶⁰ *Diakite v. City of New York*, 42 A.D. 3d 338, 339, 840 N.Y.S.2d 33, 34 (2007) (holding that the City was not liable for failure to inspect an iron fence built in the 1800s and for failure to maintain it when there was no history of similar accidents concerning the fence); *Mickle v. N.Y. State Thruway Auth.*, 182 Misc. 2d 967, 975, 701 N.Y.S.2d 782, 788–89 (1999) (stating that “prior accidents is only one method by which a claimant may prove notice that a dangerous condition existed and that the defendant had constructive notice of it,” as “a claimant may prove that the defect was so obvious and had existed for such a period of time that a defendant should have discovered and corrected it”); *Gregorio v. City of New York*, 246 A.D. 2d 275, 677 N.Y.S.2d 119, 122 (1998) (holding that a City is not immune from liability when it had notice that a barrier was defective).

existence of a dangerous condition. Eighteen of 21 transportation departments that responded to the survey stated that in their state they are potentially liable for failing to respond to a dangerous condition that implicates a traffic control device when they have notice of the condition.²⁶¹

A public entity responsible for highways thus may have a duty to post signs warning of a dangerous condition when the location is inherently dangerous or when they are otherwise prescribed by law.²⁶² Not surprisingly, the courts have held that whether there is a duty to provide warning signs, traffic signals, or pavement markings depends on the nature and circumstances of the condition of the road. In contrast to the decision in *Sexton, supra*, it has been held in another Illinois case that a statutory exemption for discretionary acts ordinarily does *not* relieve a public entity of liability for failing to warn of a condition known to be dangerous to the traveling public.²⁶³

²⁶¹ Responses of Alabama DOT; Arizona DOT; Arkansas Highway and Transportation Department; Caltrans (citing CAL. GOV'T CODE § 835); Iowa DOT; Missouri Highway and Transportation Commission; Nebraska Department of Roads; Ohio DOT; Oklahoma DOT (citing OK. STAT. tit. 51, § 155(15) and tit. 51, § 155(5)); New Hampshire DOT; New York State DOT; Pennsylvania DOT; Texas DOT (stating that “Texas Civil Practice and Remedies Code section 101.060 specifically addresses the basis and extent of tort liability for Traffic Control devices and their initial placement and malfunctions once placed”); Utah DOT; Virginia DOT; Washington State DOT; and Wisconsin DOT. Only three departments stated that they were not potentially liable under the aforesaid circumstances. Responses of Alabama DOT; Indiana DOT; and Michigan DOT. See also *Louisville Gas and Elec. Co. v. Roberson*, 212 S.W.3d 107, 109 (Ky. 2006), stating:

In general, government is charged with a duty of ordinary care with respect to highway safety. This duty requires government to keep highways “in a reasonably safe condition for travel, to provide proper safeguards, and to give adequate warning of dangerous conditions in the highway. This includes the duty to erect warning signs and to erect and maintain barriers or guardrails at dangerous places on the highway to enable motorists, exercising ordinary care and prudence, to avoid injury to themselves and others.”

Id. (footnote omitted). See also *Colovos v. Dep't of Transp.*, 205 Mich. App. 524, 517 N.W.2d 803 (Mich. Ct. App. 1994) (holding that the State had no duty to erect signs or warning devices unless these were located on the improved portion of the road).

²⁶² *Owen v. Burlington N. & Santa Fe R.R.*, 153 Wash. 2d 780, 788, 108 P.3d 1220, 1224 (2005).

²⁶³ *Snyder v. Curran Twp.*, 167 Ill. 2d 466, 657 N.E.2d 988 (1995) (discretionary immunity did not insulate township from liability for improper placement of a road sign). See also *Am. Family Mut. Ins. Co.* 2012 WI App 60 at 25, 341 Wis. 2d at 428, 816 N.W.2d 340,349; *Sexton v. City of Chicago*, 976 N.E.2d 526, 549 (2012).

Actual notice is not always required, as constructive notice may be sufficient.²⁶⁴ Under the Louisiana statute, constructive notice means “the existence of facts which infer actual knowledge.”²⁶⁵ Because public entities are deemed to have knowledge of their own actions, it has been held that they do not have to have notice of their own faulty design, construction, maintenance, or repair of a highway.²⁶⁶ In a New York case, the court rejected NYSDOT’s argument, which in the court’s view suggested that the State could “create a dangerous condition but nevertheless avoid liability for injuries it caused because it was not fully aware of or did not appreciate the danger.”²⁶⁷ In entering a judgment in favor of the claimants on the issue of liability, the court also held that compliance with the MUTCD does not eliminate the possibility of other negligence that was the proximate cause of the claimants’ injuries.²⁶⁸

It is usually a question of fact whether a public entity had actual notice or whether the condition had existed for a sufficient amount of time that the public entity may be charged with notice.²⁶⁹ The period of required notice may be prescribed by statute. In New Hampshire, “there is limited liability[] and sovereign immunity until notified of a deficiency,” but the department “need[s] to develop a plan to correct within 4 days.”²⁷⁰ In the absence of a statute, there is no precise guidance on the required notice that a public entity must have before being held liable for failing to respond to a dangerous condition.²⁷¹

²⁶⁴ *Hiland v. State*, 879 N.E.2d 621, 627 (Ind. 2008) (stating that a “minimum standard must be met, even with respect to roads that are decades, if not centuries, old” but that “whether a particular road was in a reasonably safe condition at the time of a particular accident is a question of fact best decided by a factfinder”); *Woolen v. State*, 256 Neb. 865, 593 N.W.2d 729 (1999); *Aetna Cas. & Sur. Co. v. State*, 712 So. 2d 216 (La. 1998); *Harkness v. Hall*, 684 N.E.2d 1156 (Ind. 1997); *Templeton v. Hammond*, 679 N.E.2d 1368 (Ind. 1997); *Burgess v. Harley*, 934 S.W.2d 58 (Tenn. 1996).

²⁶⁵ *Skulich v. Fuller*, 82 So. 3d 467, 471 (2011) (citations omitted).

²⁶⁶ *Coakley v. State*, 26 Misc. 2d 431, 435, 211 N.Y.S.2d 658, 663 (1961); *Morales v. N.Y. State Thruway Auth.*, 47 Misc. 2d 153, 262 N.Y.S.2d 173 (1965).

²⁶⁷ *Dispenza v. State*, 28 Misc. 3d 1205(A), 957 N.Y.S.2d 635, N.Y. Misc. LEXIS 2839, at 46 (2010).

²⁶⁸ *Id.* at 51–52.

²⁶⁹ *See, e.g.*, 65 N.Y. Jur. 2d, *Highways, Streets, and Bridges* § 381, at 171–73.

²⁷⁰ Response of New Hampshire DOT.

²⁷¹ *See Gaines v. Long Island State Park Comm’n*, 60 A.D. 2d 724, 725, 401 N.Y.S.2d 315, 317 (1977) (holding that a 34-hour delay in detecting a large pothole on a

In *Hankins*, involving alleged improper signage and maintenance of a crosswalk in violation of the MUTCD, the plaintiff “failed to present any evidence that the City or [the university] had any notice of any claimed defect or had the opportunity to protect or warn of the defect.”²⁷² In other cases, the courts have held that there was no basis for liability because the highway agency either acquired notice the same day of the accident or had taken action within a few hours of having received notice of the dangerous condition.²⁷³

F. The Standard of Care and the MUTCD

Assuming that a plaintiff has established that a transportation department owed the plaintiff a duty with respect to a traffic control device at the location of an accident, a plaintiff must establish that the department had an “obligation to conform to a particular standard of conduct toward another to which the law will give recognition and effect.”²⁷⁴ Transportation departments that responded to the survey reported that one of the defenses on which they rely in MUTCD cases is that they complied with the MUTCD in a given situation and therefore conformed to the applicable standard of care.

First, although a transportation department may have a general duty to maintain roads in a safe condition as “outlined in the MUTCD and the DOT’s policies,”²⁷⁵ the Manual “is not a legal basis for a statutory negligence action,” but rather may be “evidence bearing upon the general duty to exercise reasonable care.”²⁷⁶

Second, the MUTCD is not a “substitute for engineering judgment.”²⁷⁷ Instead, as the plaintiff’s expert conceded in one case, the MUTCD “contemplates the exercise of engineering judgment in determining whether to use a particular traffic

major highway was sufficient to charge a public entity with notice of a dangerous condition).

²⁷² *Hankins v. City of Cleveland*, 90 So. 3d 88, 96 (Miss 2011).

²⁷³ *Lawson v. Estate of McDonald*, 524 S.W.2d 351 (Tex. 1975); *Tromblee v. State*, 52 A.D. 2d 666, 381 N.Y.S.2d 707 (1976). *See Ferris v. County of Suffolk*, 174 A.D. 2d 70, 76, 579 N.Y.S.2d 436, 441 (1992) (stating that there was “no evidence that the condition, one loose plank out of many, was so patently defective that a town employee must have been put on notice of the potential danger”).

²⁷⁴ *See also* 65 N.Y. Jur. 2d, *Highways, Streets, and Bridges* § 364, *et seq.*

²⁷⁵ *Turner v. N.C. DOT*, 733 S.E.2d 871, 876 (2012).

²⁷⁶ *Chandradat v. State*, 830 N.E.2d 904 (Ind. 2005) (footnote omitted).

²⁷⁷ *Shipley v. Dep’t of Roads*, 283 Neb. 832, 813 N.W.2d 455 (2012).

control device at a particular location.”²⁷⁸ In cases involving an alleged breach of the MUTCD, there must be evidence presented by one having engineering or other specialized knowledge. Such expertise is not within the common knowledge of jurors, as traffic engineers must comply with a Manual that “is several hundred pages long and [that] contains numerous arcane subparts.”²⁷⁹ The degree of skill and knowledge required to perform traffic control cannot be imparted to jurors by lay witnesses.²⁸⁰

Third, according to a Louisiana court, it is “well-settled law that compliance with the provisions of the MUTCD, which is mandated by La. R.S. 32:235, is *prima facie* proof of DOTD’s absence of fault when an injured motorist attempts to predicate DOTD’s liability on improper signalization or road marking. ...[P]rima facie proof is sufficient only if not rebutted or contradicted.”²⁸¹ In a New York case, an expert testified that based on New York’s MUTCD “he calculated the sight distance across the corners of the subject intersection.”²⁸² The court held that the town “met its *prima facie* burden of establishing that it constructed and maintained the subject intersection in reasonably safe condition.”²⁸³

Finally, if a transportation agency demonstrates that it has met its standard of care by complying with the MUTCD, the burden shifts to the plaintiff to demonstrate otherwise.²⁸⁴ As held in a Georgia case, expert testimony on behalf of the plaintiff is required to overcome the transportation department’s showing that the department was in compliance with the MUTCD.²⁸⁵

In one case located for this digest, it was held that a transportation department’s compliance with the MUTCD may not be sufficient. The court held that “the State’s failure to comply with the Manual is evidence of negligence, *i.e.*, breach of duty,” but “compliance with the mandatory provisions of the Manual is not all that is needed for the State to meet its duty and...the State is still bound to exercise ordinary care in selecting

the appropriate traffic control device for the circumstances.”²⁸⁶

G. Whether a Violation of the MUTCD Constitutes Negligence *Per Se*

Although a plaintiff may argue that a violation of a mandatory provision of a safety code or standard constitutes negligence *per se*,²⁸⁷ in cases involving the MUTCD a violation of the Manual is usually received by the court as evidence of negligence, not negligence *per se*.²⁸⁸ Of 21 transportation departments responding to the survey, 17 reported that they had not been involved in a case in which a court had ruled that a violation of the MUTCD constituted negligence *per se*.²⁸⁹

The Iowa DOT noted that in *Gipson v. State*²⁹⁰ the court held that a violation of the MUTCD constitutes evidence of negligence rather than negligence *per se*.²⁹¹ In *Esterbrook v. State of Idaho*,²⁹² the court took the opportunity to clarify that the doctrine of negligence *per se* applies only in a case in which there was a violation of a mandatory provision of the Manual.

In previous cases we have stated that the Manual on Uniform Traffic Control Devices (MUTCD) has the force of law. ...We have also stated that violation of this Manual is *per se* negligence. ...However, in both *Bingham* and *Curtis*, the Court was considering mandatory provisions of the MUTCD. In these decisions, we did not intend to imply that all provisions in the MUTCD were mandatory, or that the Department did not have discretion to implement the optional provisions in the Manual. In order to constitute negligence as a matter of law, a statute or regulation must clearly define the required standard of conduct.²⁹³

²⁸⁶ *Kirkwood v. State*, 16 Neb. App. 459, 748 N.W.2d 83 (2008) (holding that the State was negligent in failing to comply with the MUTCD in placing stop signs and other warning devices at an intersection when the State failed to have a stop line at the intersection and placed a “Stop” sign outside the driver’s line of vision) (citation omitted).

²⁸⁷ *Thomas*, *supra* note 185, § 5.B.4.

²⁸⁸ *Esterbrook v. State of Idaho*, 124 Idaho 680, 863 P.2d 349 (1993).

²⁸⁹ Responses of Alabama DOT, Arkansas Highway and Transportation Department, Caltrans, Indiana DOT, Iowa DOT, Kansas DOT, Michigan DOT, Missouri Highway and Transportation Commission, Nebraska Department of Roads, New Hampshire DOT, Oklahoma DOT, Pennsylvania DOT, Texas DOT, Utah DOT, Virginia DOT, Washington State DOT, and Wisconsin DOT. The Nevada DOT stated that it does not track such information.

²⁹⁰ 419 N.W.2d 369, 371–72 (Iowa 1988).

²⁹¹ Response of Iowa DOT.

²⁹² 124 Idaho 680, 863 P.2d 349 (1993).

²⁹³ *Id.* at 682, 863 P.2d at 351 (citations omitted).

²⁷⁸ *Id.* at 463.

²⁷⁹ *Macintosh v. Staker Paving & Constr. Co.*, 2009 UT App 96, at 3, 4 (2009).

²⁸⁰ *Id.*

²⁸¹ *Morales v. State of La., Dep’t of Transp. and Dev.*, 92 So. 3d 460, 463 (La. 2012).

²⁸² *Lehane v. Town of East Greenbush*, 2008 N.Y. Misc. LEXIS 9210 (Unrept.), at 7 (2008).

²⁸³ *Id.* at 5 (citation omitted).

²⁸⁴ *Macintosh*, 2009 UT App at 2.

²⁸⁵ *Sadler v. DOT*, 311 Ga. App. 601, 606 n.22, 716 S.E.2d 639, 643 n.22 (2011).

In *Esterbrook* the court held that the jury instructions were improper because “they implied that optional provisions in the traffic manuals were mandatory and that a violation of those provisions was negligence as a matter of law.”²⁹⁴

In *Hodges v. Attala County*,²⁹⁵ a Mississippi court held that it was not negligence *per se* when the plaintiffs argued that the MUTCD “placed the responsibility for the placement and maintenance of traffic control devices with the governmental body.”²⁹⁶ Moreover, “[e]ven if Attala County had a duty to ‘insure’ the maintenance of the warning signs at the construction site, how it chose to fulfill that duty would be discretionary, and the County would be immune from liability.”²⁹⁷ On the other hand, the Ohio DOT explained in response to the survey that “failure to comply with a known ministerial duty, such as maintaining a stop sign, can result in liability. So, failure to replace a stop sign, for example, could lead to liability.”²⁹⁸

H. The MUTCD and Proximate Cause

A motorist may allege that an accident was caused by the pavement condition, by inadequate warning signs or signals, or by other highway conditions. Although a violation of a safety standard may be the proximate cause of an accident,²⁹⁹ a plaintiff is obligated to prove that a specific violation of the MUTCD was the proximate cause of the accident. Several transportation departments that responded to the survey noted that the failure of a plaintiff to prove proximate cause is an important defense in a MUTCD case.³⁰⁰

Regardless of the alleged cause of the accident, a plaintiff must prove both causation in fact and

legal cause.³⁰¹ In *Garcia v. Department of Transportation*,³⁰² the court explained that

[t]here are two elements of proximate cause: cause in fact and legal causation. ...Cause in fact concerns the actual consequences of an act. On the other hand, legal causation is grounded in the determination of how far the consequences of a defendant’s act should extend and focuses on whether the connection between the defendant’s act and the result is too remote or inconsequential to impose liability.³⁰³

Whether the alleged negligence was the cause in fact of an accident may be tested by asking whether the injury would have occurred but for the defendant’s negligence.³⁰⁴ If an accident occurred on pavement that is alleged to have been defective, then it must be shown that the defect in fact was the cause of the accident.³⁰⁵ Furthermore, the evidence must show that “the injury was a natural and probable consequence of the negligent act, which, in light of the attending circumstances, could have been reasonably foreseen or anticipated.”³⁰⁶ If a third party were an intervening cause of the plaintiff’s accident, it is still possible that “the original wrongdoer may be held liable even though other independent agencies intervene between his negligence and the ultimate result.”³⁰⁷

The courts have held in some cases arising under the MUTCD that the alleged acts or omissions

³⁰¹ *Estate of Day by Strosin v. Willis*, 897 P.2d 78, 81 (Alaska 1995).

³⁰² *Garcia*, 161 Wash. App. 1, 270 P.3d 599 (Wash. Ct. App. 2011).

³⁰³ *Id.* at 41, 270 P.3d at 606 (citations omitted).

³⁰⁴ 2 FOWLER HARPER, FLEMING JAMES & OSCAR GRAY, THE LAW OF TORTS 2d § 20.2, at 91 (1989).

³⁰⁵ *Id.* at 85–86; 4 SYDNEY CHARLES SCHWEITZER & JOSEPH RASCH, CYCLOPEDIA OF TRIAL PRACTICE § 827, at 66 (2d ed., Lawyers Cooperative, 1970–72).

³⁰⁶ *Chandradat v. State*, 830 N.E.2d 904, 909 (2005) (footnotes omitted). *See also* *Larkins v. Hayes*, 267 A.D. 2d 524, 525, 699 N.Y.S.2d 213, 214 (1999).

³⁰⁷ *Chandradat*, 830 N.E.2d at 910. The court stated that “[t]he key to determining whether an intervening agency has broken the original chain of causation is to decide whether, under the circumstances, it was reasonably foreseeable that the agency would intervene in such a way as to cause the resulting injury”; that “reasonably foreseeable intervening acts do not break the chain of causation and the ‘original wrongful act will be treated as a proximate cause’”; and that “the foreseeability of an intervening cause and, thus, whether the defendant’s conduct is the proximate cause of the plaintiff’s injuries, is a question of fact for the jury’s determination.” (Citations omitted); *Tex. Dep’t of Transp. v. Olsen*, 980 S.W.2d 890, 893 (Tex. 1998) (noting that there may be more than one proximate cause of an accident).

²⁹⁴ *Id.* at 683, 863 P.2d at 352.

²⁹⁵ 42 So. 3d 624 (Miss. 2010).

²⁹⁶ *Id.* at 626.

²⁹⁷ *Id.* at 628.

²⁹⁸ Response of Ohio DOT (*citing* *Pavlik v. Kinsey*, 81 Wis. 2d 42, 259 N.W.2d 709 (1977) (court concluding that a breach of a ministerial duty was inferred from the complaint’s allegations that the defendant state employees who set up a detour route on which the plaintiff was injured failed to follow national traffic standards, place appropriate signs, and safely construct a temporary road)).

²⁹⁹ *Nevins v. Ohio Dep’t of Highways*, 132 Ohio App. 3d 6, 23, 25, 724 N.E.2d 433, 443, 445 (1998) (remanding the case because the trial court failed to state separately the amounts of individual compensatory damages, funeral and burial expenses, and survival claims as required).

³⁰⁰ Responses of Kansas DOT; Oklahoma DOT; and Washington State DOT.

of the transportation departments were not the proximate cause of an accident. In a New York case, the plaintiff's expert testified that the City should have painted the road in question as a four-lane rather than a two-lane road, so that the plaintiff would not have attempted to pass a tractor-trailer on the right side.³⁰⁸ In defending the claim the City submitted an affidavit of the City's traffic planner, who relied on the 1983 MUTCD.³⁰⁹ Although the court held that the City had "qualified immunity" for highway planning, the court also held that the City's action was not the proximate cause of the accident.³¹⁰ Rather, the cause of the accident was the plaintiff's attempt to pass a tractor-trailer on the right as it was turning into a driveway.³¹¹ In an Ohio case, the Ohio Department of Public Safety's failure to replace a sign was not the proximate cause of an accident.³¹² Rather, the court held that the plaintiff's failure "to look ahead of her vehicle" and observe traffic conditions was the proximate cause.³¹³

I. Contributory Negligence or Comparative Fault

It is well settled that motorists must be "vigilant in their observances and avoidances of defects and obstructions likely to be encountered."³¹⁴ Although beyond the scope of this digest, as the transportation departments that responded to the survey reported, the departments also defend MUTCD cases on the basis of the plaintiff's contributory negligence or comparative fault.

In sum, questions of duty, proof of observance of the standard of care by being in compliance with the MUTCD, and the absence of an alleged violation of the MUTCD as the proximate cause of an accident, as well as the contributory negligence of the plaintiff or the intervening negligence of a third party, are important defenses in cases arising under the MUTCD.

J. Role of the Jury in MUTCD Cases

The judicial opinions in which the MUTCD was invoked by the plaintiff as a basis for a tort claim against a transportation department say little or nothing about the role of the jury. As discussed in the digest, if there are issues arising under the

MUTCD that permit a department to exercise its discretion, including its engineering judgment, a jury question should not be presented. As the courts have held, the question of whether a transportation department has a duty to the plaintiff with respect to traffic control devices "is generally a question of law for the court to decide."³¹⁵ Only if a plaintiff demonstrates that the department had a duty to the plaintiff and committed a breach of that duty does "a particular act or omission" become a "question of fact for the jury."³¹⁶

Notwithstanding what is a generally clear division in the MUTCD between mandatory and non-mandatory duties, the responses to the survey suggest that in some cases juries are being allowed to decide questions or cases that arguably should have been decided or dismissed by the courts. According to the Kansas Department of Transportation (KDOT), "[t]he MUTCD has too much gray area allowing plaintiffs to hire an expert willing to testify that KDOT violated a provision of the MUTCD," thus inhibiting KDOT's success in using the discretionary and signing exceptions to its tort claims act.³¹⁷ The Washington State DOT stated that there is an increase in the MUTCD's "requirements that have limited safety benefit but [that] can be construed by plaintiff's expert as such."³¹⁸

The possibility that a case is one that would be allowed to go to a jury may affect a department's defense of MUTCD claims. As one DOT reported, "most cases settle prior to trial because of joint and several liability and the risk incurred by 'should' statements being perceived by juries as 'shall' statements."³¹⁹

Notwithstanding a transportation department's immunity for the exercise of its discretion, there may be questions for a jury to decide when a plaintiff alleges the presence of a known dangerous condition and that the transportation department failed to correct it or provide adequate warning of the danger. In *Lampe v. Taylor*,³²⁰ for example, the issue was whether the plaintiff presented "substantial evidence" that a collision could have been prevented because of the City's knowledge acquired over a 5-year period prior to Lampe's accident that there had been four other virtually identical collisions at the intersection. An expert testified that maximum signal visibility helps to prevent the accidental or inadvertent running of red lights and that the City "failed to meet the standard of care in designing the inter-

³⁰⁸ *Elmer v. Kratzer*, 249 A.D. 2d 899, 901, 672 N.Y.S.2d 584, 585 (1998).

³⁰⁹ *Id.* at 900, 672 N.Y.S.2d at 585.

³¹⁰ *Id.* at 901, 672 N.Y.S.2d at 586.

³¹¹ *Id.* at 902, 672 N.Y.S.2d at 586.

³¹² *Shortridge v. Ohio Dep't of Public Safety*, 90 Ohio Misc. 2d 50, 53, 696 N.E.2d 679, 681 (1997).

³¹³ *Id.* at 54, 696 N.E.2d at 682.

³¹⁴ *Finkelstein v. Brooks Paving Co.*, 107 So. 2d 205, 207 (1958) (citations omitted).

³¹⁵ *Chandradat v. State*, 830 N.E.2d 904, 908 (2005).

³¹⁶ *Id.*

³¹⁷ Response of Kansas DOT.

³¹⁸ Response of Washington State DOT.

³¹⁹ *Id.*

³²⁰ 338 S.W.3d 350 (Mo. 2011).

section because the two signals were not continuously visible for 270 feet as required by the Manual.³²¹ After a jury returned a verdict in favor of the plaintiff, the trial court denied the City's motion for judgment notwithstanding the verdict.

The appellate court on review explained that under Missouri Revised Statutes Section 537.600.1(2), the immunity of a public entity is waived, subject to other conditions set forth in the statute, "if the plaintiff establishes that the property was in dangerous condition at the time of the injury" and the "public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition."³²² The court held that there was "conflicting expert testimony about whether the City's placement of the 'signal ahead' sign complied with the requirements of the Manual and thereby met the applicable standard of care."³²³ However, "[i]t was up to the jurors to determine the weight and believability of this expert testimony," a conflict in the evidence that the jury resolved in favor of the plaintiff.³²⁴ The court ruled that the waiver under Section 537.600.1(2) was "absolute" and affirmed the jury verdict for the plaintiff.³²⁵

VII. IMMUNITIES OF TRANSPORTATION DEPARTMENTS WHEN USING THEIR DISCRETION IN APPLYING THE MUTCD

A. The MUTCD and the Discretionary Function Exemption

Of the 21 transportation departments that responded to the survey, 14 stated that their state tort claims act or similar legislation includes an exemption from tort liability for a public entity's performance of or failure to perform a discretionary function.³²⁶ However, five departments stated

that their state's tort claims act did not include a discretionary function exemption.³²⁷ Even if a state tort claims act does not have an exemption for discretionary action, some courts have held that the state and its agencies are still immune for their decisions that are discretionary in nature as long as the decision-making involves the evaluation of broad policy factors.³²⁸

Transportation departments are more likely to have immunity for decisions that involve the exercise of discretion, such as whether or when to install or provide traffic control devices.³²⁹ For example, in Texas there is no waiver of immunity for claims based on a governmental unit's failure to place a traffic or road sign, signal, or warning device because the failure to do so is a result of the government's discretionary action.³³⁰ In contrast, transportation departments are more likely to incur liability for a defect in the highway sur-

(citing OK. STAT. tit. 51, § 155(5)); Texas DOT (citing TEX. CIV. PRAC. & REM. CODE § 101.056); Utah DOT (citing UTAH CODE § 63G-7-301(5)(a)); Virginia DOT (citing VA. CODE § 33.1-70.1 and stating "[i]n limited circumstances"); Washington State DOT; and Wisconsin DOT. The Wisconsin DOT noted that WIS. STAT. § 893.80 "establishes the claims process against units of government, such as counties and municipalities, which maintain roads. WisDOT does not maintain the state highway system, we contract with counties to perform that work for the state." The department also noted that § 893.82 "deals with claims against state employees who allegedly committed torts and that § 893.83 'deals with local government liability for snow and ice removal. Again, the counties maintain WisDOT highways under a contract with WisDOT'").

³²⁷ Responses of Alabama DOT, Arkansas Highway and Transportation Department, Michigan DOT, Missouri Highway and Transportation Commission, and Pennsylvania DOT. Two departments did not respond to the question. Responses of Arizona DOT and New Hampshire DOT.

³²⁸ *Miotke v. Spokane*, 101 Wash. 2d 307, 334, 678 P.2d 803, 819 (1984) (stating that in *Evangelical United Brethren Church v. State*, 67 Wash. 2d 246, 407 P.2d 440 (1965), the court created a narrow exception to governmental immunity from tort liability in instances when officials engage in discretionary acts in accordance with a four-part inquiry). Response of New York State DOT (citing *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960)).

³²⁹ *Bickner v. Raymond Turnpike*, 2008 SD 27, P13, 747 N.W.2d 668, 672 (S.D. 2008) (holding that a town's decision to remove a warning sign and not replace it was discretionary and therefore immune from liability).

³³⁰ *Fort Bend County Toll Rd. Auth. v. Olivares*, 316 S.W.3d 114 (Tex. 2010).

³²¹ *Id.* at 358.

³²² *Id.* at 357 (quoting MO. REV. STAT. § 537.600.1(2) (2000) (footnote omitted)).

³²³ *Id.* at 359.

³²⁴ *Id.*

³²⁵ *Id.* at 357 (citing MO. REV. STAT. § 537.600.2 (2000)).

³²⁶ Responses of Caltrans (citing CAL. GOV'T CODE § 820.2 concerning discretionary acts); Indiana DOT (citing IND. CODE § 34-14-3-3(7)); Iowa DOT (citing IOWA CODE § 669.14(1)); Kansas DOT (citing KAN. STAT. ANN. § 75-6104(e)); Nebraska Department of Roads (citing NEB. REV. STAT. § 81-8,219(1)); Nevada DOT (citing NEV. REV. STAT. ch. 41); New York State DOT (identifying qualified immunity for discretionary action and citing *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960)); Ohio DOT (citing OHIO REV. CODE § 2743.02 and the "public duty doctrine"); Oklahoma

face³³¹ or for the failure to correct or give adequate warning of a known dangerous condition in or on the highway.³³² Whether a governmental decision is discretionary and entitled to immunity is a question of law decided by the court.³³³

With respect to the meaning of the discretionary function exemption or equivalent state doctrine,³³⁴ although the courts have difficulty defining what amounts to discretionary actions, they have attempted to provide guidance.³³⁵ The courts tend to follow one of three approaches when deciding which functions qualify for immunity. The approaches are derived principally from the U.S. Supreme Court's decisions, all involving the Federal Tort Claims Act (FTCA), in *Dalehite v. United States*,³³⁶ *Indian Towing Co. v. United States*,³³⁷ and *United States v. Gaubert*.³³⁸ It appears that a majority of the state courts follow the *Dalehite* approach, some follow *Indian Towing*, and some have adopted the *Gaubert* analysis of discretion.³³⁹

1. *Dalehite*—The Planning/Operational Dichotomy

In *Dalehite*, the Supreme Court held that government decisions that are made at a planning—rather than operational—level involve the exercise of discretion within the meaning of the discretionary function exemption and, therefore,

³³¹ *Nawrocki v. Macomb County Rd. Comm'n*, 463 Mich. 143, 184, 615 N.W.2d 702, 723 (2000).

³³² *Id.*

³³³ *Truman v. Griese*, 762 N.W.2d 75, 85 (2009).

³³⁴ *See, e.g., Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960).

³³⁵ Federal cases are collected in “Claims Based on Construction and Maintenance of Public Property as within Provision of 28 U.S.C. 2680(a) Excepting from Federal Tort Claims Act Claims Involving ‘Discretionary Function or Duty,’” 37 A.L.R. FED. 537.

³³⁶ 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953).

³³⁷ 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

³³⁸ 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

³³⁹ *But see Johnson v. Dep’t of Transp.*, 2004 UT App 284, P22 n.4, 98 P.3d 773, 780 n.4 (2004) (stating that a “decision to allow the lane adjacent to the cutouts to remain open at night was clearly not a discretionary function since the decision was made by a UDOT on-site inspector who acts at the operational level,” and *following* *Trujillo v. Utah Dep’t of Transp.*, 1999 Utah App. 227, 986 P.2d 752, 760 n.2 (Utah 1999) (rejecting the *Gaubert* analysis in holding that the U.S. Supreme Court’s interpretation of the discretionary function exemption in the FTCA was not binding on Utah’s interpretation of its tort claims act and in ruling that the court would continue to follow the planning/operational dichotomy)).

are exempt from liability.³⁴⁰ Thus, in one MUTCD case, the court held that the discretionary function exemption “does not extend to the exercise of discretionary acts at an operational level.”³⁴¹ As a state court later explained, if the “work involved no marshaling of state resources, no prioritizing of competing needs, no planning, and no exercise of policy-level discretion,” then the activity is likely to be held to be operational in nature.³⁴²

Of 21 transportation departments that responded to the survey, 5 reported that the courts in their state follow the *Dalehite* planning- versus operational-level dichotomy³⁴³ and 8 departments stated that their courts did not follow *Dalehite*.³⁴⁴

2. *Indian Towing*—Negligent Implementation of a Planning-Level Decision

Only one transportation department reported that its state follows the Supreme Court’s interpretation in *Indian Towing* of the discretionary function exemption in the FTCA.³⁴⁵ Eleven departments specifically responded that their state courts do not follow the *Indian Towing* precedent.³⁴⁶

³⁴⁰ *Dalehite*, 346 U.S. at 42, 73 S. Ct. at 971, 97 L. Ed. 1444.

³⁴¹ *Shibley v. Dep’t of Roads*, 283 Neb. 832, 813 N.W.2d 455, 462 (2012).

³⁴² *Defoor v. Evesque*, 694 So. 2d 1302, 1306 (Ala. 1997).

³⁴³ Responses of Indiana DOT (*citing* *Hanson v. County of Vigo*, 659 N.E.2d 1123 (Ind. 1996)); Iowa DOT; Nebraska Department of Roads; Oklahoma DOT; *Randell v. Tulsa ISD No. 1*, 889 P.2d 1264 (Okla. 1994); *Robinson v. City of Bartlesville Bd. of Educ.*, 700 P.2d 1013 (Okla. 1985); and *Walker v. City of Moore*, 837 P.2d 876 (Okla. 1992)); and Washington State DOT. Five departments stated that the question was not applicable to their department. Responses of Alabama DOT (*citing* sovereign immunity), Arkansas Highway and Transportation Department, Michigan DOT, New York State DOT, and Pennsylvania DOT. Two departments did not respond to the question. Responses of Arizona DOT and New Hampshire DOT.

³⁴⁴ Responses of Caltrans; Kansas DOT; Missouri Highway and Transportation Commission (no discretionary function exemption); Nebraska Department of Roads; Ohio DOT; Texas DOT (stating, however, that “although not cited, the same rationale has been applied to appellate opinions on § 101.056); Utah DOT; and Wisconsin DOT.

³⁴⁵ Response of Iowa DOT.

³⁴⁶ Responses of Caltrans, Indiana DOT; Kansas DOT; Missouri Highway and Transportation Commission (no discretionary function exemption); Nebraska Department of Roads; Ohio DOT; Oklahoma DOT; Texas DOT (stating, however, that “[a]ppellate decisions have fine tuned a distinction between planning

In *Indian Towing*, the Supreme Court held that once the government makes a decision at the planning or policy level, the discretion is exhausted and any negligence thereafter in implementing the decision is not protected by the discretionary function exemption in the FTCA.

3. *Gaubert*—Discretion Exercised at Both the Planning and Operational Levels

Some state courts follow the Supreme Court's 1991 decision in *Gaubert*,³⁴⁷ in which the Court held that there is now no distinction between planning- and operational-level actions and the possible exercise of immune governmental discretion.³⁴⁸ Thus, the *Gaubert* Court expanded the area of discretionary immunity beyond that exercised at the so-called planning level.

In *Gaubert*, first, the Court held that “if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation.”³⁴⁹ Second, “[i]f the employee violates [a] mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.” (Emphasis added.)³⁵⁰ Third, “if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations.”³⁵¹ Moreover, the Court held that “it must be presumed that the agent's acts are grounded in policy when exercising that discretion.”³⁵² Under *Gaubert*, it is not the status or level of the governmental actor that determines whether the discretionary exemption applies; rather, it is the nature of the conduct or decision-making.

and implementation of discretionary acts”); Utah DOT; Washington State DOT; and Wisconsin DOT. Five departments stated that the question was not applicable to their department. Responses of Alabama DOT (sovereign immunity), Arkansas Highway and Transportation Department, Michigan DOT, New York State DOT, and Pennsylvania DOT. Two departments did not respond to the question. Responses of Arizona DOT and New Hampshire DOT.

³⁴⁷ 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

³⁴⁸ *Id.* at 324, 111 S. Ct. at 1274, 113 L. Ed. 2d at 347–48.

³⁴⁹ *Id.* at 347.

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.* at 348.

In *Aguehoude v. District of Columbia*,³⁵³ involving a claim by a pedestrian struck at an intersection controlled by a traffic signal, the District of Columbia Court of Appeals held that the setting of the signal lights was an exercise of discretion. The court observed that when “an employee fails to follow an established policy, because the existence of a set policy means that all discretion has been removed from the employee, ...the employee's actions would...be ministerial” and not immune from liability.³⁵⁴ After “[f]inding that the setting of yellow intervals is a discretionary function,”³⁵⁵ the court next turned to the question of whether there was a specific or mandatory directive for employees to follow in setting the timing interval.³⁵⁶ The court, finding none, concluded that the employees were exercising discretion and that any alleged mismeasurement at the intersection by the District's employees that may have contributed to an improper traffic light setting was irrelevant.³⁵⁷

Four transportation departments that responded to the survey advised that the courts in their state now follow the Supreme Court's decision in *Gaubert*.³⁵⁸ Nine departments reported that

³⁵³ 666 A.2d 443 (D.C. App. 1995). See also *Tucci v. District of Columbia*, 956 A.2d 684, 691 (D.C. 2008) (stating that the court had previously rejected an “attempt to blur the distinction between discretionary and ministerial functions by ‘isolating each component of a decision’” and citing *Aguehoude v. District of Columbia*, 666 A.2d 443 (D.C. 1995)).

³⁵⁴ *Aguehoude v. District of Columbia*, 666 A.2d 443, 450 (D.C. 1995).

³⁵⁵ *Id.* at 451.

³⁵⁶ *Id.*

³⁵⁷ *Id.* It may be noted that there was a vigorous dissent in *Aguehoude* by Judge Schwelb and that the Iowa Supreme Court disagreed with the court's analysis in *Aguehoude*. See *Graber v. City of Ankeny*, 656 N.W.2d 157 (Iowa 2003) (reversing summary judgment for the City and remanding).

³⁵⁸ The Nevada DOT advised that in *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007), a medical malpractice case, the Nevada Supreme Court examined NEV. REV. STAT. 41.032(2) and discretionary immunity and adopted the Federal *Berkovitz-Gaubert* test. The *Martinez* court held that

[u]nder the *Berkovitz-Gaubert* test, the decision to create and operate a public hospital and the college of medicine are the type of decisions entitled to discretionary-function immunity, because those decisions satisfy both prongs of the *Berkovitz-Gaubert* test; namely, they involve elements of judgment and choice, and they relate to social and economic policy. But, while a physician's diagnostic and treatment decisions involve judgment and choice, thus satisfying the test's first criterion, those decisions generally do not include policy considerations, as required by the test's second criterion. In this case, as Dr. Martinez did not engage in policy-making decisions in his treatment

their state courts do not follow *Gaubert*.³⁵⁹ The Nebraska Department of Roads explained that “[t]he *Dalehite* and *Gaubert* holdings have been adopted in Nebraska..., but they have not been directly cited in any case involving the MUTCD.”³⁶⁰ KDOT reported that its courts “sort of” follow the *Gaubert* decision and advised that

[t]he Kansas discretionary exception applies “whether or not the discretion is abused and regardless of the level of discretion involved.” KSA 75-6104(e). The courts focus on whether the decision is one that the legislature intended to put beyond judicial review. The nature and quality of the discretion exercised is examined to determine if the exception applies. The closer the decision is to a policy decision the closer it is to being beyond judicial review.³⁶¹

The Iowa DOT stated that its Supreme Court in *Metier v. Cooper*³⁶² “applied the [*Dalehite*] planning/operational dichotomy and held [that] the placement of a deer crossing sign was not immunized by the discretionary function exception. However, now the Iowa Supreme Court applies the two step analysis of *Gaubert*.”³⁶³

There are other state courts that have not adopted the Supreme Court’s approach in *Gaubert*.³⁶⁴ In *Trujillo v. Utah Department of*

Transportation,³⁶⁵ the Supreme Court of Utah expressly declined to embrace the *Gaubert* decision. In *Trujillo*, the court ruled that the transportation department’s formulation of a traffic control plan to use barrels rather than barriers at an accident location was not a policy-level decision.³⁶⁶ Moreover, the court held that the failures to reduce speed in a construction zone as called for in the construction plan, investigate accidents, or consider corrective action in response to notice of a dangerous condition were all operational-level activities.³⁶⁷

In *Tseu ex rel. Hobbs v. Jeyte*,³⁶⁸ the Supreme Court of Hawaii stated that it had never adopted the reasoning in *Gaubert* and that it would be “directly contrary to its previous holdings on the discretionary function exception under Hawaii law to do so.”³⁶⁹ Other state courts continue to apply the *Dalehite* planning–operational test of discretion, sometimes without even mentioning the later *Gaubert* case.³⁷⁰ Nevertheless, the *Gaubert* analysis of the discretionary function exemption is more favorable to transportation departments and other public entities. The approach in *Gaubert* allows for immune discretion to be exercised at all levels of a public entity’s decision-making, including at the so-called operational level. Nevertheless, based on the survey and case law, it appears that more state courts follow the analysis in *Dalehite* rather than the approach in *Gaubert* in construing a state tort claims act’s discretionary function exemption.³⁷¹

of Mr. Maruszczak, he is not entitled to immunity from suit under NRS 41.032(2).

Id. at 447, 168 P.3d at 729 (footnote omitted).

³⁵⁹ Responses of Caltrans, Indiana DOT, Missouri Highway and Transportation Commission (no discretionary function exemption), Ohio DOT, Oklahoma DOT, Texas DOT, Utah DOT, Washington State DOT, and Wisconsin DOT. Five departments said that the decision was not applicable in their jurisdiction. Responses of Alabama DOT (sovereign immunity), Arkansas Highway and Transportation Department, Michigan DOT, New York State DOT, and Pennsylvania DOT. Two departments did not respond to the question. Responses of Arizona DOT and New Hampshire DOT.

³⁶⁰ Response of Nebraska Department of Roads (*citing* *Jasa by Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994), and *First Nat’l Bank of Omaha v. State*, 241 Neb. 267, 488 N.W.2d 343 (1992)).

³⁶¹ Response of Kansas DOT.

³⁶² 378 N.W.2d 907, 910 (Iowa 1985). The Iowa DOT also cited *Schneider v. State*, 789 N.W.2d 138, 147 (Iowa 2010) (flooding) and *Davison v. State*, 671 N.W.2d 519, 521–22 (Iowa App. 2003) (highway maintenance), but noted that *Indian Towing* was quoted with approval in *Schmitz v. City of Dubuque*, 682 N.W.2d 70, 74 (Iowa 2004) (bike trail construction).

³⁶³ *Metier v. Cooper*, 378 N.W.2d 907, 910 (Ia. 1985).

³⁶⁴ See *Trujillo v. Utah Dep’t of Transp.*, 1999 Ut. App. 227, 986 P.2d 752 (1999); *Tseu ex rel. Hobbs v. Jeyte*, 88 Haw. 85, 90, 962 P.2d 344, 349 (1998); and *Rick v. State Dep’t of Transp. & Dev.*, 630 So. 2d 1271 (La. 1994).

³⁶⁵ 1999 Utah App. 227, 986 P.2d 752 (Utah 1999).

³⁶⁶ *Id.* at 33, 986 P.2d at 762.

³⁶⁷ *Id.* at 34, 986 P.2d at 762.

³⁶⁸ *Tseu ex rel. Hobbs*, 88 Haw. 85, 962 P.2d 344 (1998).

³⁶⁹ *Id.* at 89, 962 P.2d at 348.

³⁷⁰ *Taylor-Rice v. State*, 91 Haw. 60, 979 P.2d 1086, 1104 (1999) (failure to replace a guardrail was operational-level act with no mention of *Gaubert*); *State v. Livengood*, 688 N.E.2d 189, 196 (Ind. App. 1997) (design and installation of replacement of a portion of a guardrail to comply with a safety standard was operational-level task and not immune); and *Schroeder v. Minnesota*, 1998 Minn. App. LEXIS 1436 (1998) (Unrept.) (decision to patch pavement where it met a bridge was an operational-level activity).

³⁷¹ *Johnson v. Dep’t of Transp.*, 2004 UT App 284, P22 n.4, 98 P.3d 773, 780 n.4 (Utah App. 2004) (stating that a “decision to allow the lane adjacent to the cutouts to remain open at night was clearly not a discretionary function since the decision was made by a UDOT on-site inspector who acts at the operational level” and following *Trujillo v. Utah Dep’t of Transp.*, 1999 Utah App. 227, 986 P.2d 752, 760 n.2 (Utah 1999), which rejected the *Gaubert* approach).

B. The Discretionary–Ministerial Distinction

Some courts in MUTCD cases also rely on the discretionary–ministerial distinction in deciding government tort liability. It has been held that the issue of whether a duty is a ministerial one is a question of law for the court to decide.³⁷²

[A] ministerial act is defined as absolute, certain, and imperative, involving merely the execution of a specific duty arising from fixed designated facts or the execution of a set task imposed by a law prescribing and defining the time, mode, and occasion of its performance with such certainty that nothing remains for judgment or discretion, being a simple, definite duty arising under and because of stated conditions and imposed by law.³⁷³

Four departments that responded to the survey reported that in their states the courts use the discretionary–ministerial test of immunity to determine a transportation department’s or other public agency’s tort liability.³⁷⁴ KDOT stated that there are a number of decisions in Kansas holding that the discretionary exception does “not apply to a ministerial act.”³⁷⁵ Nine departments reported that the discretionary–ministerial test is not used in their states.³⁷⁶

Similar to the Supreme Court’s holding in *Gaubert*, one court has held that “[i]n order to find a duty ‘ministerial,’ we must find a ‘governing rule or standard’ so clear and specific that it directs the government actor without calling upon the actor to ascertain how and when to implement that rule or standard.”³⁷⁷ In that case, however, the court held that the omission of warning signs was not a violation of a ministerial duty. “[I]n order to establish a ministerial duty under this statute, ‘standard uniform traffic control practices’ must exist and delineate at which specific

points signs must be erected at this type of intersection.”³⁷⁸

In *Ford v. New Hampshire Department of Transportation*,³⁷⁹ the court also distinguished between discretionary and ministerial functions:

As the introduction to the MUTCD explains, those portions of the manual that are termed “Guidance” refer to “a statement of recommended, but not mandatory, practice in typical situations.” ...By contrast, those portions of the manual that are designated “Standards” refer to “a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device.” *Id.* at I-2; see *Johnson v. Agency of Transp.*, 180 Vt. 493, 904 A.2d 1060, 1063 (Vt. 2006) (only MUTCD “Standards” are binding on Vermont’s Agency of Transportation). The MUTCD provision upon which the plaintiff relies is “Guidance,” and is, “therefore only a recommended practice, not a mandate upon government decision makers.”³⁸⁰

An example is the case of *American Family Mutual Insurance Co. v. Outagamie County*,³⁸¹ which involved the County’s use of two “flaggers” at the time of road construction in 2009. In discussing the ministerial duty exception to governmental immunity,³⁸² the court explained that “[a] duty is ministerial, as opposed to discretionary, if it is ‘absolute, certain and imperative, involving merely the performance of a specific task...the law...prescribes.’”³⁸³ The court held that the plaintiffs failed to demonstrate “any statute, regulation, or policy” that imposed a specific duty on the County.³⁸⁴ Moreover, “[h]ow to safely control traffic in a construction zone is an inherently discretionary decision.”³⁸⁵ Whatever duty the County had was “not precise and detailed enough to eliminate the County’s discretion.”³⁸⁶ The court observed that the standard in the 2003 MUTCD did not say “anything about the number of flaggers a municipality must use in a given situation. It does not state that one flagger cannot control multiple directions of traffic.”³⁸⁷

³⁷² *Am. Family Mut. Ins. Co.*, 2012 WI App 60 at 22, 816 N.W.2d 340, 348 (2012).

³⁷³ *Hansen v. South Dakota DOT*, 1998 SD 109, 584 N.W.2d 881, 886 (citation omitted) (internal quotation marks omitted).

³⁷⁴ Responses of Caltrans; Oklahoma DOT (*citing* *Walker v. City of Moore*, 1992 Okla. 73, 837 P.2d 876 (1992)); Washington State DOT; and Wisconsin DOT.

³⁷⁵ Response of Kansas DOT.

³⁷⁶ Responses of Indiana DOT, Iowa DOT, Michigan DOT, Missouri Highway and Transportation Commission, Nebraska Department of Roads, Nevada DOT, Ohio DOT, Pennsylvania DOT, and Utah DOT. Three departments advised that the question was not applicable to them. Responses of Alabama DOT (sovereign immunity), Arkansas Highway and Transportation Department, and Virginia DOT. Two departments did not respond. Responses of Arizona DOT and New Hampshire DOT.

³⁷⁷ *Truman v. Griese*, 762 N.W.2d 75, 81 (2009).

³⁷⁸ *Id.* at 82. See also *Ford v. N.H. DOT*, 163 N.H. 284, 37 A.3d 436 (2012) (the court’s opinion distinguishing between discretionary and ministerial functions with respect to the MUTCD).

³⁷⁹ 163 N.H. 284, 37 A.3d 436 (N.H. 2012).

³⁸⁰ *Id.*, 163 N.H. 284, 37 A.3d at 446.

³⁸¹ 2012 WI App 60, 341 Wis. 2d 413, 816 N.W.2d 340 (2012).

³⁸² WIS. STAT. § 893.80(4).

³⁸³ *Am. Family Mut. Ins. Co.*, 2012 WI App. 60, at 11, 341 Wis. 2d at 422 (citation omitted).

³⁸⁴ *Id.* at 13, 341 Wis. 2d at 423.

³⁸⁵ *Id.* at 14, 341 Wis. 2d at 423.

³⁸⁶ *Id.* at 15, 341 Wis. 2d at 424.

³⁸⁷ *Id.* at 21, 341 Wis. 2d at 427.

C. Whether to Distinguish Between Functions and Acts in Performing Functions

A 2013 case holds that if a function is discretionary or ministerial, every act of the government in performing the function is likewise discretionary or ministerial. Thus, if a transportation department is liable for the performance of maintenance activity, all acts in the performance of the maintenance function are also nondiscretionary and may not be used to carve out an exception so as to create, for example, immunity for decisions that involve some discretion in the performance of a maintenance function.

In *Little v. Mississippi Department of Transportation*,³⁸⁸ the Supreme Court of Mississippi overruled prior, conflicting precedents in the state when it ruled in a case involving personal injuries and property damage caused by a tree that had fallen across the highway. Little alleged that the Mississippi DOT was negligent in “(1) failing to adequately maintain, repair, and inspect the highway; (2) failing to remove dead or dangerous trees near the road; and (3) failing to properly patrol, find, and remove the leaning tree before it fell.”³⁸⁹ The issue was whether the Department had immunity under the discretionary function exemption in the Mississippi Tort Claims Act (MTCA).³⁹⁰ The Mississippi Supreme Court reversed and remanded the circuit court’s dismissal of the case, affirmed by the Court of Appeals, that the Department was entitled to immunity.

First, the court strictly construed the language in the discretionary function exemption³⁹¹ in holding that “[t]he language of Section 11-46-9(1)(d) requires us to look at the function performed—not the acts that are committed in furtherance of that function—to determine whether immunity exists.”³⁹² The *Little* court held that “[a] ministerial function is one that is ‘positively imposed by law,’”³⁹³ and held further that when a function is a ministerial function, “there is no immunity for the acts performed in furtherance of the function.”³⁹⁴

Second, the court distinguished the *Little* case from its decision in *Mississippi Transportation Commission v. Montgomery*,³⁹⁵ because in *Mont-*

gomery, although the court held that the duty to maintain highways is not discretionary, the legislature had “extended discretion” to the placement of warning signs.³⁹⁶ The court observed that in *Montgomery*, absent the existence of immunity for the placement of warning signs, the Commission would not have had immunity for highway maintenance.³⁹⁷

Third, the principle of law reversed by the *Little* court was its prior holding that “while a certain act may be mandated by statute, how that act is performed can be a matter of discretion.”³⁹⁸ Now, however, every act performed in furtherance of a governmental function follows the immunity or lack thereof that attaches to the function: “It is the *function* of a governmental entity—not the *acts* performed in order to achieve that function—to which immunity does or does not ascribe under the MTCA.”³⁹⁹

Therefore, if “a statute mandates the government or its employees to act, all acts fulfilling that duty are considered mandated as well, and neither the government nor its employees enjoys immunity.”⁴⁰⁰ The DOT is not entitled to immunity for any specific act or acts committed in furtherance of a function. In this case there could be no immunity for an act taken in performing a function that is a ministerial function.⁴⁰¹ However, as in the case of sign placement, “[i]f the Legislature...wishes to ascribe immunity to acts rather than functions, it is certainly free to do so, but it has not done so yet.”⁴⁰²

D. Whether Prioritizing by a Transportation Department Is a Defense in an MUTCD Case

For some courts, discretion in the implementation of a safety feature could be affected by a governmental unit’s prioritizing of conditions that need attention, the balancing of funding priorities, scheduling, consideration of traffic patterns, and other matters.⁴⁰³ In a Texas case, the court stated that “to impose liability for the failure to timely implement a discretionary decision could penalize a governmental unit for engaging in prudent planning and paralyze it from making safety-related decisions.”⁴⁰⁴ The same “ration-

³⁸⁸ 129 So. 3d 132 (Miss. 2013).

³⁸⁹ *Id.* at 134–35.

³⁹⁰ *Id.* at 135.

³⁹¹ MISS. CODE ANN. § 11-46-9(1)(d) (Rev. 2012) (providing that a government entity and its employees are immune from liability for claims arising from “the exercise or performance or the failure to exercise or perform a discretionary function or duty”).

³⁹² *Little*, 129 So. 2d at 136.

³⁹³ *Id.* (citation omitted).

³⁹⁴ *Id.*

³⁹⁵ 80 So. 3d 789 (Miss. 2012).

³⁹⁶ *Little*, 129 So. 2d at 137 (quoting *Montgomery*, 80 So. 3d at 798).

³⁹⁷ *Id.* (quoting *Montgomery*, 80 So. 3d at 798).

³⁹⁸ *Id.* (citation omitted).

³⁹⁹ *Id.* at 138 (emphasis in original).

⁴⁰⁰ *Id.* (quoting *Montgomery*, 80 So. 3d at 798).

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Fort Bend County Toll Road Auth. v. Olivares*, 316 S.W.3d 114, 120 (2010).

⁴⁰⁴ *Id.*

ale...likewise applies to [the authority's] decision regarding when to install the planned traffic-monitoring cameras because a governmental unit's plans regarding the safety features of a roadway are discretionary."⁴⁰⁵

There is, however, some contrary authority. A federal district court in the District of Columbia in a MUTCD case "rejected the government's invocation of general 'economic considerations,'" reasoning that "[b]udgetary constraints...underlie virtually all government activity," and that to permit general economic concerns to trigger the discretionary function exception "would allow the exception to swallow the [Federal Tort Claims Act's] sweeping waiver of sovereign immunity."⁴⁰⁶

E. The Requirement that There Be an Actual Exercise of Discretion

Important to the discretionary function exemption in some states is that a public entity, if challenged, must be able to prove that it actually exercised its discretion before making a decision; that the discretion it made involved policy considerations; and/or that the public entity consciously balanced the risks and benefits of the proposed decision. In a 1997 California case, it was held that a detailed plan drawn up by a competent engineering firm and approved by the city engineer in the exercise of his discretionary authority is "persuasive evidence" of the element of prior approval.⁴⁰⁷

However, more recently in *Casella v. Township of Manalapan*,⁴⁰⁸ a New Jersey court reversed the grant of a summary judgment for the township because the record did not demonstrate that any governmental official or body actually approved the specific location of the stop line and sign at issue. Furthermore, no plans were produced indicating a particular design for the placement of the stop line and sign at the intersection. There was no "documentation remotely demonstrat[ing] that the installation complied with MUTCD standards, or, more importantly, that anyone acting on defendant's behalf, concluded that it did and approved the placement."⁴⁰⁹

In another New Jersey case involving the state's tort claims act and the MUTCD, the court held that for the governmental entity to qualify for immunity there must be a showing of the actual

exercise of quasi-legislative or quasi-judicial decision-making.⁴¹⁰ Although the New Jersey statute grants immunity for the failure to provide signals and signs,⁴¹¹ the record "provide[d] no basis for a determination that the decision to use the 90-degree left turn signs at issue is subject to N.J.S.A. 59:2-3(a) immunity. It was clearly an *operational decision* and, as such, subject to the standards set forth in N.J.S.A. 59:4-2." (Emphasis added.)⁴¹² The court held that a dangerous condition may have been created when the county installed signs that were misleading.⁴¹³

In an Indiana case, *Hanson v. County of Vigo*,⁴¹⁴ a vehicle struck the young plaintiff while she was riding her bicycle in an intersection.⁴¹⁵ The county board had approved a plan for the placement and replacement of signs on county roads; however, the board approved the plan without deliberation.⁴¹⁶ Hanson conceded that the County's decision to place and replace signs at intersections was a discretionary function and therefore immune, but argued that the County had been negligent in implementing the decision, in particular "for failing to prioritize placement at unmarked intersections prior to replacing signs at intersections which were currently marked."⁴¹⁷

The court stated that it relied on the "planning-operational' standard" in construing the discretionary function exemption in the Indiana Tort Claims Act.⁴¹⁸ However, the County failed to introduce evidence "proving that implementation of the plan had been considered by the Board," or that the Board "consciously balance[d] risks and benefits of the Board's decision."⁴¹⁹ Rather, "it was the *county engineer* who decided how to implement the Board's plan...but his *actions did not rise to the level of executive judgments* that should be afforded protection under the governmental immunity doctrine." (Emphasis added.)⁴²⁰ The court remanded the case for a "determination of

⁴¹⁰ *Fitzgerald v. County of Sussex*, 2008 N.J. Super. Unpub. LEXIS 2029 (2008).

⁴¹¹ *Id.* at 13.

⁴¹² *Id.* at 15 (citation omitted).

⁴¹³ *Id.* at 19.

⁴¹⁴ 659 N.E.2d 1123 (Ind. App. 1996).

⁴¹⁵ *Id.* at 1125.

⁴¹⁶ *Id.* See also *Madden v. Ind. Dep't of Transp.*, 832 N.E.2d 1122, 1128 (Ind. 2005) (stating that "nor may we find discretionary function immunity based solely on testimony by a representative of the governmental entity that meetings were held[] without written documentation of the meetings").

⁴¹⁷ *Hanson*, 659 N.E.2d at 1126.

⁴¹⁸ *Id.* (citing IND. CODE § 34.4-16.5-3).

⁴¹⁹ *Id.*

⁴²⁰ *Id.* (citation omitted).

⁴⁰⁵ *Id.* at 121 (citation omitted).

⁴⁰⁶ *Haynes*, 539 F. Supp. 2d 393, at 403 (D. D.C. 2008) (internal quotation marks omitted) (following *Cope v. Scott*, 310 U.S. App. D.C. 144, 45 F.3d 445, 451 (D.C. Cir. 1995)).

⁴⁰⁷ *Grenier v. City of Irwindale*, 57 Cal. App. 4th 931, 940, 67 Cal. Rptr. 2d 454, 459 (Cal. App. 1997).

⁴⁰⁸ 2011 N.J. Super. Unpub. LEXIS 957, at 1 (2011).

⁴⁰⁹ *Id.* at 13-14.

whether the Board engaged in a decision-making process regarding the implementation of the sign plan” and whether “the implementation decision resulted from a conscious balancing of risks and benefits.”⁴²¹

It may be recalled that under the MUTCD no documentation is required of engineering judgments, but that documentation is required of engineering studies.⁴²² However, to have the benefit of discretionary immunity in some states, a transportation department may need records or other proof that discretion actually was exercised in making a decision involving the MUTCD.

F. The Exercise of Discretion and Recordkeeping

The foregoing discussion demonstrates the importance in some jurisdictions of being able to prove that a transportation department exercised its discretion prior to making a decision, including a decision involving the MUTCD.

First, 12 transportation departments reported that they have adopted a policy or statement of procedures to be followed concerning how their department’s employees or others acting on behalf of the department (e.g., a contractor) are to comply with the MUTCD.⁴²³

INDOT described its policy, which is intended to assure its department’s compliance with the MUTCD.

- The Indiana Design Manual (IDM) recommends that INDOT designers and our consultants refer to the MUTCD for proper selection and detailing of permanent and temporary traffic control devices.
- Our standard electronic ([E]xcel based) program for performing traffic signal studies (warrant analysis) incorporates all the MUTCD warrant criteria. Our policy on signal study preparation and QA review requires output from this program and ties INDOT’s Traffic Engineering staff to compliance. The policy directly refers to [the] Indiana Code that incorporates the MUTCD.

- INDOT’s Standard Construction Specifications incorporate the MUTCD with regard to temporary traffic control devices, signing, and pavement markings. So INDOT’s contractors are also obligated to comply.

- INDOT’s Work Zone Traffic Control Guidelines provides requirements and recommendations for INDOT performed maintenance work. It is based on and refers to the MUTCD.⁴²⁴

INDOT also stated that “[c]hanges in intersection control, parking restrictions, speed limits and lane control are documented through the Official Action (Executive Order) process”; that “[r]equests for non-standard signs are accompanied by a description and need for the sign”; that Roadway Safety Audits (studies) on specific locations may lead to [a] change in traffic control devices,” the reasoning for which will be given in a report; and that “[s]ome programmatic, state wide safety initiatives are undertaken after study,” initiatives for which the department will have records.

Second, 13 departments reported that when making decisions on whether to install, replace, or change a traffic control device at a given location or to do so as part of a highway safety plan, the departments keep a record of what they considered or evaluated prior to making the decision and taking action.⁴²⁵ TxDOT advised that its record-keeping “depends upon the type of traffic control device and the status of the location.”⁴²⁶ The department stated that “there is no requirement to keep records for all devices installed,” but that “[l]ocal offices do document this type of information for justification purposes—especially traffic studies [and] signal warrants.”⁴²⁷

The Arizona DOT reported that that “[i]n general, no,” it does not keep records. However,

[i]n limited situations where compliance with a Guidance or Standard is infeasible, documentation of a variance is sometimes provided on plans or drawings. For example, where the location of a warning sign cannot conform to Table 2C-4 (such as a W4-1 merge warning sign where the distance in the table would place it in advance of the

⁴²¹ *Id.* at 1127.

⁴²² 2009 MUTCD, *supra* note 1, at 14.

⁴²³ Responses of Arizona DOT; Arkansas Highway and Transportation Department; Iowa DOT; Indiana DOT; Michigan DOT; Nevada DOT (stating that the department complies with NEV. REV. STAT. § 484A.430 and NEV. ADMIN. CODE § 408.144); New York State DOT (*citing* Highway Design Manual); Ohio DOT; Texas DOT; Utah DOT; Virginia DOT; and Wisconsin DOT. Eight departments had not adopted such a policy or statement of procedures. Responses of Alabama DOT; Caltrans; Kansas DOT; Nebraska Department of Roads; Oklahoma DOT; New Hampshire DOT; Pennsylvania DOT; and Washington State DOT (stating, however, that a policy or procedure was part of the department’s “standards/specifications/design manual”).

⁴²⁴ Response of Indiana DOT.

⁴²⁵ Responses of Alabama DOT, Caltrans, Indiana DOT, Iowa DOT, Kansas DOT, Michigan DOT, Missouri Highway and Transportation Commission, New York State DOT (stating that the project file reflects the basis for the decision), Oklahoma DOT, Pennsylvania DOT, Utah DOT, Virginia DOT, and Washington State DOT. Four departments stated that whether to keep records depends on the circumstances. Responses of Nebraska Department of Roads, Ohio DOT, Texas DOT, and Wisconsin DOT. Four departments reported that such records are not kept. Responses of Arizona DOT, Arkansas Highway and Transportation Department, Nevada DOT, and New Hampshire DOT.

⁴²⁶ Response of Texas DOT.

⁴²⁷ *Id.*

exit ramp) [] a note is made in the plans of the variance.⁴²⁸

The Virginia DOT stated that in some cases the records indicate the decision-maker and the basis for the decision; for example, in setting speed limits and truck restrictions.⁴²⁹

The Wisconsin DOT also said that “[i]t depends...If the decision requires an engineering study or evaluation, there may be documentation. If the decision simply involves application of agency standards, no documentation would be created. If an exception to standards is approved, documentation is required.”⁴³⁰

Other departments that maintain records stated that their procedures or documentation include:

- Traffic warrant studies, speed studies, and design calculations.⁴³¹
- “The evaluation, decisions and records [that] should be documented in Traffic Investigation Reports.”⁴³²
- “A traffic study or analysis with recommendations [that] is completed.”⁴³³
- “If work is done per a contract, records regarding the development of the plans [that] are maintained until the letting of the project.”⁴³⁴
- “If work is done by State forces or a contract agency, the reason for the work [that] is documented on the work order.”⁴³⁵

Third, 15 departments reported that when records are kept, they keep a record of who made the decision and the basis of the decision.⁴³⁶ In Indiana, “[i]n general the documentation will show who made the decision or authorized [it] and why the decision was made.”⁴³⁷ Iowa noted that any “traffic control daily diary is made part of the

permanent project records.”⁴³⁸ In Kansas, the records that are maintained “contain the name of the individual or the department making the decision.”⁴³⁹ In Utah, “[t]he traffic studies state the basis for the decision and are signed by the engineer.”⁴⁴⁰ In Wisconsin, “[f]ormal decisions are not issued. Rather, the decisions would be documented in diaries, email messages, or other documentation in many instances.”⁴⁴¹

Fourth, the period of time that any such departmental documentation is maintained varies, ranging from 3⁴⁴² to 5,⁴⁴³ 7,⁴⁴⁴ or 10⁴⁴⁵ years, or for an unlimited time.⁴⁴⁶ One department stated that records are retained until reconstruction.⁴⁴⁷ The Virginia DOT stated that records are kept “[i]ndefinitely for speed limits and truck restrictions; [that the period] varies for other traffic studies, but three years is a typical limit, unless a different period is required under law or by the agency/state retention policies.”⁴⁴⁸

VIII. TRAFFIC CONTROL DEVICES UNDER THE MUTCD AND THE EXERCISE OF DISCRETION

A. The MUTCD and Immunity for a Negligent Plan or Design

If there is one area of government activity that generally is considered to be immune as a protected exercise of discretion, it is highway planning and designing.⁴⁴⁹

⁴²⁸ Response of Arizona DOT.

⁴²⁹ *Id.*

⁴³⁰ Response of Wisconsin DOT.

⁴³¹ Response of Alabama DOT.

⁴³² Response of Caltrans.

⁴³³ Response of Kansas DOT.

⁴³⁴ Response of Michigan DOT.

⁴³⁵ Response of Michigan DOT.

⁴³⁶ Responses of Alabama DOT, Arizona DOT, Caltrans, Indiana DOT, Iowa DOT, Kansas DOT, Michigan DOT, Missouri Highway and Transportation Commission, New York State DOT, Pennsylvania DOT, Texas DOT, Utah DOT, Virginia DOT, Washington State DOT, and Wisconsin DOT. Other departments indicated that they do not keep a record of such information. Responses of Arkansas Highway and Transportation Department, Nevada DOT, Oklahoma DOT, and New Hampshire DOT.

⁴³⁷ Response of Indiana DOT.

⁴³⁸ Response of Iowa DOT.

⁴³⁹ Response of Kansas DOT.

⁴⁴⁰ Response of Utah DOT.

⁴⁴¹ Response of Wisconsin DOT.

⁴⁴² Response of Indiana DOT.

⁴⁴³ Responses of Oklahoma DOT (minimum of 5 years, then retained pursuant to the policies of the Oklahoma Department of Libraries); Texas DOT (“on average, records are kept for five years”); Utah DOT (then “archived”).

⁴⁴⁴ Responses of Michigan DOT, Missouri Highway and Transportation Commission, and Wisconsin DOT.

⁴⁴⁵ Response of Caltrans.

⁴⁴⁶ Responses of Arizona DOT (“indefinitely”), Pennsylvania DOT (“infinity”), and Washington State DOT.

⁴⁴⁷ Response of New York State DOT.

⁴⁴⁸ Response of Virginia DOT.

⁴⁴⁹ *Laabs v. City of Victorville*, 163 Cal. App. 4th 1242, 1267, 78 Cal. Rptr. 3d 372, 393 (Cal. App. 2008) (holding that with respect to the City’s placement of a luminaire too close to the roadway, summary judgment for the City was proper as the evidence established that the City had design immunity as a matter of law), *modified and rehearing denied*, 2008 Cal. App. LEXIS 995 (Cal. App., July 7, 2008); *Fla. Dep’t of Transp. v.*

The term *design* is included many times in Standards in the 2009 MUTCD, as well in guidance, support, and option statements. In Section 1A.07(01) of the MUTCD regarding responsibility for traffic control devices, a Standard is included providing that “[t]he responsibility for the design, placement, operation, maintenance, and uniformity of traffic control devices *shall* rest with the public agency or the official having jurisdiction, or, in the case of private roads open to public travel, with the private owner or private official having jurisdiction.” (Emphasis added.)⁴⁵⁰ The Manual includes a Standard in Section 1A.10(01) regarding interpretations, experimentations, changes, and interim approvals stating that “[d]esign, application, and placement of traffic control devices other than those adopted in this Manual *shall* be prohibited unless the provisions of this Section are followed.” (Emphasis added.)⁴⁵¹ In Section 2A.06(07) on the design of signs, another Standard states that “[u]niformity in design *shall* include shape, color, dimensions, legends, borders, and illumination or retroreflectivity.” (Emphasis added.)⁴⁵²

Insofar as guidance statements are concerned, Section 1A.09(03) of the MUTCD includes guidance statements regarding the use of an engineering study and engineering judgment. The section states that “[e]ngineering judgment should be exercised in the selection and application of traffic

control devices, as well as in the location and design of roads and streets that the devices complement.”⁴⁵³ In Section 2A.03(04) of the Manual, guidance is included stating that “[r]oadway geometric design and sign application should be coordinated so that signing can be effectively placed to give the road user any necessary regulatory, warning, guidance, and other information.”⁴⁵⁴

The term *design* appears in option statements such as in Section 2A.17(03) regarding overhead sign installation. The Section states: “The following conditions (not in priority order) may be considered in an engineering study to determine if overhead signs would be beneficial: A. Traffic volume at or near capacity, B. Complex interchange design, C. Three or more lanes in each direction.”⁴⁵⁵

The term *design* appears in support statements, such as in Section 2C.08(08) on advisory speed plaques (W13-1P). The Section states that “[t]he 16, 14, and 12 degrees of ball-bank criteria [discussed in paragraph 07] are comparable to the current AASHTO horizontal curve design guidance. Research has shown that drivers often exceed existing posted advisory curve speeds by 7 to 10 mph.”⁴⁵⁶

As noted, many of the transportation departments responding to the survey reported that they defend MUTCD cases on the basis that they have immunity.⁴⁵⁷ That is, the departments also defend cases on the basis that a specific plan or design decision or action arising under the MUTCD was discretionary and thus not subject to tort liability.⁴⁵⁸ Moreover, as discussed in this part of the digest, besides having immunity under a discretionary function exemption of a tort claims act, some departments may have immunity pursuant to a design immunity statute or other state statute.

Cases have held that there is immunity for alleged negligence in connection with a wide range of design decisions, including approval of designs and specifications,⁴⁵⁹ a decision to adhere

Allen, 768 So. 2d 496, 497 (Fla. 4th DCA 2000) (holding that denial of defendant’s motion for a summary judgment was error because before the government’s sovereign immunity is waived, “there must be a known hazard so serious and so inconspicuous to a foreseeable plaintiff that it virtually constitutes a trap,” which the intersection in question was not), *review denied*, 789 So. 2d 343 (Fla. 2001); Higgins v. State, 54 Cal. App. 4th 177, 187–88, 62 Cal. Rptr. 2d 459, 465–66 (Cal. App. 1997) (evidence established that the absence of a median barrier was a design choice made by the State and that there were no “changed circumstances” to defeat the State’s immunity); Shand Mining, Inc. v. Clay County Board of Comm’rs, 671 N.E.2d 477, 480 (Ind. App. 1996) (holding that the county was entitled to immunity under a statutory provision dealing with a loss caused by the design of a highway if the loss occurs at least 20 years after the highway was designed, when there was no evidence that the county had altered or redesigned the highway since then), *reh’g denied* (Feb. 13, 1997); and Cygler v. Presjack, 667 So. 2d 458, 461 (Fla. 4th DCA 1996) (affirming a summary judgment for the department and holding that the government was not liable for failing to provide a traffic-regulating or -separating device or barrier).

⁴⁵⁰ 2009 MUTCD, *supra* note 1, at 2.

⁴⁵¹ *Id.* at 4.

⁴⁵² *Id.* at 28.

⁴⁵³ *Id.* at 4.

⁴⁵⁴ *Id.* at 27.

⁴⁵⁵ *Id.* at 41.

⁴⁵⁶ *Id.* at 112.

⁴⁵⁷ See discussion in Section V.C of the digest.

⁴⁵⁸ *Id.*

⁴⁵⁹ Delgadillo v. Elledge, 337 F. Supp. 827 (E.D. Ark. 1972) (approval of designs and specifications was discretionary and, therefore, immune); Hughes v. County of Burlington, 99 N.J. Super. 405, 240 A.2d 177 (1968) (decision to omit emergency shoulders); Fitzgerald v. Palmer, 47 N.J. 106, 219 A.2d 512 (1966) (decision by the State not to design its overpasses with wire fences).

to a former design during reconstruction,⁴⁶⁰ a decision on whether to use barriers,⁴⁶¹ or a decision on setting speed limits.⁴⁶² In *Sexton*, an Illinois court agreed with the City that “the plaintiff’s claim was based upon a theory of negligent design in the traffic control preemption system,” for which the governmental defendant had absolute immunity.⁴⁶³

However, as held by the Supreme Court of South Carolina in *Summer v. Carpenter*,⁴⁶⁴ design immunity does not immunize decisions that were not made; that is, “the injury-producing feature must have been a part of the plan approved by the governmental entity” for design immunity to be applicable.⁴⁶⁵ In New York, the courts have held that public entities may not claim immunity when there was inadequate study of a plan or design, or when the approval of a plan or design was arbitrary or unreasonable.⁴⁶⁶

B. Design Immunity Statutes

Some states have statutes that specifically provide for immunity for the design of public improvements such as highways.⁴⁶⁷ Six transpor-

tation departments that responded to the survey reported that their states have a statute that exempts the department from any claims involving the design of a highway or related features or facilities, i.e., a specific design immunity statute.⁴⁶⁸ Other departments, however, advised that their states do not have such a statute.⁴⁶⁹

In *Hankins v. City of Cleveland*,⁴⁷⁰ a MUTCD case involving alleged improper signage and warnings, the court discussed Mississippi’s statute under which a government entity has plan or design immunity. Under Mississippi Code Annotated § 11-46-9(1)(p), a governmental entity and its employees acting within the scope of their employment are not liable for any claim:

Arising out of a plan or design for construction or improvements to public property, including but not limited to, ...highways, roads, streets, ...where such plan or design has been approved in advance of the construction

struction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

MO. REV. STAT. § 537.600.1(2) (2013) (waiving sovereign immunity to a certain extent for dangerous conditions but providing that for roads designed and constructed prior to September 12, 1977, a public entity

shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.

N.J. STAT. ANN. tit. 59, § 4-6 (2013) (providing that

a. Neither the public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of public property, either in its original construction or any improvement thereto, where such plan or design has been approved in advance of the construction or improvement by the Legislature or the governing body of a public entity or some other body or a public employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved.

⁴⁶⁸ Responses of Indiana DOT (*citing* IND. CODE § 34-13-3-3(10) (granting immunity to a governmental entity in situations where an independent contractor was performing a delegable duty); Iowa DOT (*citing* IOWA CODE § 669.14(8) (design immunity)); Kansas DOT (*citing* KAN. STAT. ANN. § 75-6104(m)); Michigan DOT (*citing* MICH. COMP. LAWS § 691.1401, *et seq.* and the common law); Nevada DOT (*citing* NEV. STAT., ch. 41); and Ohio DOT (*citing* OHIO REV. CODE § 2743.02).

⁴⁶⁹ Responses of Alabama DOT, Arkansas Highway and Transportation Department, Missouri Highway and Transportation Commission, Nebraska Department of Roads, New York State DOT, Oklahoma DOT, Pennsylvania DOT, Texas DOT, Utah DOT, Washington State DOT, and Wisconsin DOT.

⁴⁷⁰ 90 So. 3d 88 (Miss. 2011).

⁴⁶⁰ *Richardson v. State*, Dep’t of Roads, 200 Neb. 225, 263 N.W.2d 442 (1978), *supp. op.*, 200 Neb. 781, 265 N.W.2d 457 (1978). *See also* *Maresh v. State*, 241 Neb. 496, 518, 489 N.W.2d 298, 314 (1992) (holding that design decisions are discretionary but that the “failure to warn would be actionable, as it embodies no discretionary functions, and the doctrine of state immunity does not apply”).

⁴⁶¹ *Alvarez v. State*, 79 Cal. App. 4th 720, 738–39, 95 Cal. Rptr. 2d 719, 732–33 (Cal. App. 1999) (design immunity not lost because of an absent barrier, although approved for eventual installation because of higher traffic volume); *Higgins v. State*, 54 Cal. App. 4th 177, 62 Cal. Rptr. 2d 459 (1997) (upheld immunity for a barrier because it was a design decision).

⁴⁶² *Fuller v. Dep’t of Transp.*, 89 Cal. App. 4th 1109, 107 Cal. Rptr. 2d 823 (Cal. App. 2001), *review denied*, 2001 Cal. LEXIS 6287 (Cal. Sept. 12, 2001).

⁴⁶³ *Sexton v. City of Chicago*, 976 N.E.2d 526, 529 (2012).

⁴⁶⁴ 328 S.C. 36, 43, 492 S.E.2d 55, 58 (1997).

⁴⁶⁵ *Grenier v. City of Irwindale*, 57 Cal. App. 4th 931, 940–41, 67 Cal. Rptr. 2d 454, 459 (Cal. App. 1997).

⁴⁶⁶ *Romeo v. New York*, 1997 N.Y. Misc. LEXIS 576, at 9 (N.Y. Ct. Cl. 1997) (Unrept.) (holding that the State failed to conduct an adequate study of an intersection); *but see* *Redcross v. State*, 241 A.D. 2d 787, 789–90, 660 N.Y.S.2d 211, 213–14 (1997) (holding that the placement of a pedestrian control button was not plainly inadequate or lacking a reasonable basis).

⁴⁶⁷ *See* CAL. GOV’T CODE § 830.6 (2013) (subject to certain provisos and conditions set forth in the statute that

[n]either a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a con-

or improvement by the legislative body or governing authority of a governmental entity or by some other body or administrative agency, exercising discretion by authority to give such approval, and *where such plan or design is in conformity with engineering or design standards in effect at the time of preparation of the plan or design.*⁴⁷¹

Even though the defendants failed to show that they had complied with the necessary elements for plan or design immunity,⁴⁷² the court affirmed the dismissal of the case on a second basis—the defendants Delta State University and the City had immunity under the discretionary function exemption of the Mississippi statute.⁴⁷³

As stated in *Sadler v. Department of Transportation of the State of Georgia*,⁴⁷⁴ in Georgia the State's

design-standards exception shields the State and its agencies from liability for losses that result from “[t]he plan or design for construction of or improvement to highways, roads, streets, bridges, or other public works [when] such plan or design is prepared in substantial compliance with generally accepted engineering or design standards in effect at the time of preparation of the plan or design.”⁴⁷⁵

In *Sadler*, the plaintiffs alleged that the Georgia DOT negligently analyzed an intersection and bypass; “negligently managed, designed, and maintained the intersection”; “failed to comply with generally accepted design standards”; and “failed to provide proper traffic-control devices and signals at the intersection.”⁴⁷⁶ The court held that the DOT had immunity because the evidence established that the design complied with the 1988 edition of the MUTCD.⁴⁷⁷

In contrast, in *Linton v. Missouri Highways and Transportation Commission*,⁴⁷⁸ a federal court found that the signs on the highway where a vehicle crashed into a concrete railing of an overpass failed to follow the standards in the MUTCD. Although the signs complied with the 1971 standards when the exit was built in 1976, it did not comply with the 1988 standards, an important issue inasmuch as the ramp was resurfaced and re-signed in 1984.⁴⁷⁹

⁴⁷¹ *Hankins v. City of Cleveland*, 90 So. 3d 88, 93 (Miss. 2011). *See also* *Woodworth v. State*, 154 Idaho 362, 298 P.3d 1066 (2013), discussed in Section IV.A.

⁴⁷² *Id.*

⁴⁷³ *Id.* (citing MISS. CODE ANN. § 11-4-9(1)(d)).

⁴⁷⁴ 311 Ga. App. 601, 716 S.E.2d 639 (Ga. 2011).

⁴⁷⁵ *Id.* at 603–04, 716 S.E.2d at 641 (quoting GA. CODE ANN. § 50-21-24 (10)).

⁴⁷⁶ *Id.* at 602–03, 716 S.E.2d at 640–41.

⁴⁷⁷ *Id.* at 604, 716 S.E.2d at 642.

⁴⁷⁸ 980 S.W.2d 4 (Mo. 1998).

⁴⁷⁹ Stephen R. Bough & M. Blake Heath, *When an Outdated Design Finally Needs to be Put to Bed: The Government's State of the Art Defense in Road Design*

Although design immunity is recognized generally, some courts have held that there is an exception to design immunity if the public entity had notice⁴⁸⁰ of a dangerous condition of a public improvement because of its design and failed to take appropriate action.⁴⁸¹ As discussed in Section V.E, a court may hold that a public entity had a duty to correct a dangerous condition or to give adequate notice of it to the traveling public.⁴⁸²

A Missouri statute waives sovereign immunity for accidents caused by a dangerous condition of the highway when a plaintiff is able to demonstrate

that the injury directly resulted from the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of harm of the kind of injury which was incurred, and that either a negligent or wrongful act or omission of an employee of the public entity within the course of his employment created the dangerous condition or a public entity had actual or constructive notice of the dangerous condition in sufficient time prior to the injury to have taken measures to protect against the dangerous condition.⁴⁸³

Commentators argue that the Missouri “waiver of sovereign immunity for dangerous conditions ‘establishes an absolute waiver of immunity...and abolishes any distinction between governmental and proprietary acts as a test of governmental liability.’”⁴⁸⁴ They further contend that “[t]he neg-

Cases, 67 J. MO. B. 268, 271, 272 (2011), hereinafter referred to as “Bough & Heath.”

⁴⁸⁰ If a dangerous condition was not of the State's own making, it must have had actual or constructive notice and a reasonable opportunity to take remedial action with respect thereto; however, it has been held that when the dangerous condition was of the State's own making, notice is not required. *Johnson v. State*, 636 P.2d 47, 52 (Alaska 1981).

⁴⁸¹ *Thompson v. Coates*, 694 So. 2d 599 (La. 1997) (stating that the design of a highway causing hydroplaning may result in a dangerous condition). *Compton v. City of Santee*, 12 Cal. App. 4th 591, 600, 15 Cal. Rptr. 2d 660, 665 (1993) (holding that the City that was entitled to design immunity for a bridge also could not be held liable for failing to warn that the design was dangerous), and *Alvarez v. State*, 79 Cal. App. 4th 720, 738, 95 Cal. Rptr. 2d 719, 732 (1999) (affirming a grant of a summary judgment for the State in a case involving the plaintiff's claim that the absence of a median barrier constituted a dangerous condition).

⁴⁸² *City of St. Petersburg v. Collom*, 419 So. 2d 1082, 1086 (Fla. 1982); *see also* *Clarke v. Fla. Dep't of Transp.*, 506 So. 2d 24 (Fla. 1987); *Greene v. State, Dep't of Transp.*, 465 So. 2d 560 (Fla. 1985); and *State Dep't of Transp. v. Brown*, 497 So. 2d 678 (Fla. 1986).

⁴⁸³ *Bough & Heath, supra* note 479, at 270 (quoting MO. REV. STAT. § 537.600.1(2) (2010 Supp.)).

⁴⁸⁴ *Id.*

ligence of a driver will not defeat a claim based on a negligent design theory. Instead, the evidence will only allow MHTC to apportion fault between itself and the driver.”⁴⁸⁵ Nevertheless, the authors concede that

[a] plaintiff suing MHTC (or any other governmental entity that maintains a road) for negligent design of a roadway or highway may still not be successful, even if he has established all of the requirements for a dangerous condition listed in § 537.600.1(2), since MHTC still may have the *state of the art defense*

in cases involving design and construction prior to September 12, 1977. (Emphasis added.)⁴⁸⁶

In other states a statute may preclude a public entity’s liability for inadequate design when there is a dangerous condition. A Colorado case, *Swieckowski v. City of Fort Collins*,⁴⁸⁷ involved the absence of warnings or barriers that would have indicated the presence of a ditch that was perpendicular to a section of the road where the accident occurred. Colorado’s Governmental Immunity Act (GIA)⁴⁸⁸ provides

that a person injured because of the dangerous condition of a public roadway may not recover against the governmental agency that owns the roadway when the cause of the dangerous condition is not due to negligent maintenance or construction by the governmental agency. *It also prohibits recovery when the danger to the public posed by the condition is due solely to inadequate design.* (Emphasis added.)⁴⁸⁹

The court held that the City was immune under the GIA.⁴⁹⁰ First, the failure to “maintain” means only “a failure to restore a roadway to the state in which it was originally constructed.”⁴⁹¹ Accordingly, “[b]ecause the roadway remained unchanged, the City did not repair the roadway[] and is immune from any claims of negligence for allowing the condition to exist.”⁴⁹²

Second, because “the danger posed by the roadway’s abrupt transition at the ditch was attributable solely to design,” the City was immune under

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.* The state-of-the-art defense is based on MO. REV. STAT. § 537.600.1(2), which provides in part that in claims for

the negligent, defective or dangerous design of a highway or road, ...*designed and constructed prior to September 12, 1977*, the public entity shall be entitled to a defense which shall be a complete bar to recovery whenever the public entity can prove by a preponderance of the evidence that the alleged negligent, defective, or dangerous design reasonably complied with highway and road design standards generally accepted at the time the road or highway was designed and constructed.

⁴⁸⁷ 934 P.2d, 1380, 1383 (Colo. 1997).

⁴⁸⁸ 10A COLO. REV. STAT. §§ 24-10-101–120 (1988).

⁴⁸⁹ *Swieckowski*, 934 P.2d at 1382.

⁴⁹⁰ 10A COLO. REV. STAT. § 24-10-103(1).

⁴⁹¹ *Swieckowski*, 934 P.2d at 1385.

⁴⁹² *Id.* at 1386.

the GIA to claims for inadequate design;⁴⁹³ that is, the ditch was a physical feature that was part of the design of the improved roadway.⁴⁹⁴ The court was critical of the City’s failure to prevent an accident that “was readily predictable and could have been easily avoided”; however, the City had immunity even if the City was negligent in failing to consider the physical features in the design of the improved roadway.⁴⁹⁵ The GIA also “preclude[d] liability for a public entity’s failure to post signs on a public highway.”⁴⁹⁶

C. The MUTCD and Liability for Highway Maintenance

Many of the provisions in the MUTCD regarding maintenance reviewed for the digest regarding maintenance are in the form of guidance statements. For example, Section 1A.05(01) and (02) on maintenance of traffic control devices states that “[f]unctional maintenance of traffic control devices should be used to determine if certain devices need to be changed to meet current traffic conditions,” and that “[p]hysical maintenance of traffic control devices should be performed to retain the legibility and visibility of the device, and to retain the proper functioning of the device.”⁴⁹⁷ Guidance statements in Section 2A.22(01) and (02) advise that “[m]aintenance activities should consider proper position, cleanliness, legibility, and daytime and nighttime visibility”; that “[d]amaged or deteriorated signs, gates, or object markers should be replaced”; and that “[t]o assure adequate maintenance, a schedule for inspecting (both day and night), cleaning, and replacing signs, gates, and object markers should be established.”⁴⁹⁸

Section 4D.02 sets forth the MUTCD’s provisions on responsibility for operation and maintenance.

⁴⁹³ *Id.*

⁴⁹⁴ *Id.* at 1387.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.* See also *Estate of Grant v. State*, 181 P.3d 1202, 1207 (Colo. 2008) (stating that “[i]f the state undertakes an upgrade and follows a certain design, any inadequacies that may result from that design do not waive immunity simply because there previously may have been a safer design available”); *Medina v. State*, 35 P.3d 443, 448 (Colo. 2001) (holding that in Colorado it is the development of a dangerous condition of a public highway, subsequent to the initial design and construction of the highway, that creates a duty on the part of the State to return the road to “the same general state of being, repair, or efficiency as initially constructed”) (internal quotation marks omitted) (citation omitted).

⁴⁹⁷ 2009 MUTCD, *supra* note 1, at 2.

⁴⁹⁸ *Id.* at 44.

nance. A guidance statement in Paragraph 01 states that

[p]rior to installing any traffic control signal, the responsibility for the maintenance of the signal and all of the appurtenances, hardware, software, and the timing plan(s) should be clearly established. The responsible agency should provide for the maintenance of the traffic control signal and all of its appurtenances in a competent manner.⁴⁹⁹

In the same section, the Manual advises agencies to have “properly skilled maintenance personnel available without undue delay for all signal malfunctions and signal indication failures.”⁵⁰⁰

The MUTCD advises in Section 5G.01(01) that “[t]he safety of road users, including pedestrians and bicyclists, as well as personnel in work zones, should be an integral and high priority element of every project in the planning, design, maintenance, and construction phases,” and that “[p]art 6 should be reviewed for additional criteria, specific details, and more complex temporary traffic control zone requirements.”⁵⁰¹

Section 6F.04(01) and (02) on sign maintenance advises that “[s]igns should be properly maintained for cleanliness, visibility, and correct positioning,” and that “[s]igns that have lost significant legibility should be promptly replaced.”⁵⁰²

In states in which the courts follow the Supreme Court’s interpretation in *Gaubert* of the FTCA’s discretionary function exception, state employees may make decisions on a day-to-day basis at the operational level that still may come within the protection of the discretionary function exception. Thus, under *Gaubert*, so-called “housekeeping” functions, presumably meaning those performed at the operational level, may be protected from liability as an exercise of discretion.⁵⁰³ It appears, however, that a majority of state courts follow the planning–operational dichotomy in *Dalehite*, pursuant to which only discretion exercised at the planning level is likely to be immune from liability.

⁴⁹⁹ *Id.* at 449.

⁵⁰⁰ *Id.* at 450.

⁵⁰¹ *Id.* at 544.

⁵⁰² *Id.* at 583.

⁵⁰³ See *State v. Abbott*, 498 P.2d 712, 720 (Alaska 1972) (adhering to the *Dalehite*-reasoning and holding that day-to-day “housekeeping” functions are generally not discretionary). See also *Dep’t of Transp. & Pub. Facilities v. Sanders*, 944 P.2d 453, 456 (Alaska 1997) (stating that the court identifies “discretionary” acts or functions by examining whether the act or function can be described as ‘planning’ or ‘operational,’ that a “planning decision is one that involves policy formulation,” whereas “an operational decision involves policy execution or implementation”).

ity.⁵⁰⁴ As discussed in Section VI.C, there is recent authority holding that maintenance activity is a ministerial function not protected by a discretionary function exemption in a tort claims act and that all acts in the performance of a ministerial function likewise are not protected from liability by the discretionary function exemption.

The mere labeling of an activity as being either a design or a maintenance function has been rejected as an unsatisfactory test to determine whether an activity is immune from liability for negligence under a discretionary function exception.⁵⁰⁵ Thus, a state’s tort claims act and judicial precedents must be reviewed to determine whether state law immunizes public entities for negligence in the performance of operational-level activities that arguably may include highway maintenance. Even under a *Gaubert*-type of analysis, transportation departments would not be protected from liability under a discretionary function exemption when there is a violation of an applicable mandatory policy or standard.

D. The MUTCD and Liability for Signs and Warning Signs

Much of the MUTCD is devoted to signs and warning signs and includes applicable Standards,

⁵⁰⁴ See, e.g., *Trujillo v. Utah Dep’t of Transp.*, 1999 Utah App. 227, 986 P.2d 752 (1999); *Tseu ex rel. Hobbs v. Jeyte*, 88 Haw. 85, 962 P.2d 344 (1998); and *Rick v. State Dep’t of Transp. & Dev.*, 630 So. 2d 1271 (La. 1994). Cases holding that a public entity’s failure to provide warning signs at a given location did not involve the exercise of discretion include *Metier v. Cooper Transport Co.*, 378 N.W.2d 907, 910–11 (Iowa 1985); *Stanley v. State*, 197 N.W.2d 599 (Iowa 1972) and *Ehlinger v. State*, 237 N.W.2d 784 (Iowa 1976). But see *Seiber v. State*, 211 N.W.2d 698 (Iowa 1973) (holding that a policy determination not to erect signs along state highways warning of deer involved the exercise of protected discretion).

⁵⁰⁵ *Day v. City of Canby*, 143 Or. App. 341, 349, 922 P.2d 1269, 1274 (Or. Ct. App. 1996) (stating that “[i]n some cases, a determination of whether immunity applies is not possible until it is known how the particular decision was made” but that “[in] other cases, a mere description of the decision in question will make it clear that governmental discretion was necessarily involved”); *Little v. Wimmer*, 303 Or. 580, 588, 739 P.2d 564, 569 (1987) (evidence of how the decision was made is necessary to establish the state’s immunity); *Stevenson v. State Dep’t of Transp.*, 290 Or. 3, 619 P.2d 247 (Or. 1980) (reinstating a verdict for the plaintiff without regard to whether a dangerous condition was the result of a faulty design or of negligent maintenance, as there was nothing “in the record to suggest that the responsible employees of the highway division made any policy decision of the kind we have described as the exercise of governmental discretion”).

as well as guidance, option, and support statements.⁵⁰⁶ In *Johnson v. Alaska*,⁵⁰⁷ one issue was whether the City was negligent in the signing of a railroad crossing where an accident occurred. The Supreme Court of Alaska reiterated that it followed the *Dalehite* “planning–operational level test to determine whether a particular governmental function was within the ambit of the discretionary function exemption.”⁵⁰⁸ The State did not have immunity because “the design decision made by the state in applying the reconstruction plans of the road and crossing were operational decisions.”⁵⁰⁹ Likewise, “the decision to sign [was] operational and hence not immune.”⁵¹⁰

More recently, in *Chandradat, supra*, an Indiana court applied the planning–operational test in a MUTCD case in holding that “the placement of the signs was not part of the planning for Phase VI of the construction; instead, it was part of the implementation. The State is not immune from negligence that results in the implementation part of a project.”⁵¹¹ In another case involving the MUTCD, the court held that a dangerous condition was created by the City’s action in placing signals that obstructed a highway user’s view.⁵¹²

In *Hayes v. United States*,⁵¹³ also applying the MUTCD, the court relied on the Supreme Court’s test in *Gaubert*.

The rationale behind the discretionary function exception, as the Supreme Court explained in *United States v. Gaubert*, is that “when established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion.” ...In such cases, there is no waiver of sovereign immunity and the government is protected from suit. By contrast, if

⁵⁰⁶ See 2009 MUTCD, *supra* note 1, ch. 2, at 27–346.

⁵⁰⁷ 636 P.2d 47 (Alaska 1981).

⁵⁰⁸ *Id.* at 64. See also *id.* at 65.

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.* at 66. See also *Guerrero v. Alaska Hous. Fin. Corp.*, 123 P.3d 966, 981 (Alaska 2005) (stating that Alaska cases “have placed certain kinds of government actions on the operational side of the operational/planning balance,” such as highway maintenance, the painting of lane markings on highways, and the posting of highway signs).

⁵¹¹ *Chandradat v. State*, 830 N.E.2d 904, 911 (Ind. 2005) (citation omitted).

⁵¹² *Lampe v. Taylor*, 338 S.W.2d 350, 359 (2011). See also *Shuttleworth v. Conti Constr. Co.*, 193 N.J. Super. 469, 474, 475 A.2d 48, 51 (1984) (holding that a jury question was presented regarding whether the county was guilty of “palpably unreasonable” conduct in allowing a sign to become obscured by vegetation after installation).

⁵¹³ 539 F. Supp. 2d 393 (D.D.C. 2008).

there is no discretionary function involved, the United States has waived its sovereign immunity and the federal district courts have subject matter jurisdiction over the claim.⁵¹⁴

In *Hayes*, the court’s interpretation of the MUTCD, as well as the National Park Service (NPS) Sign Manual, was that

these documents set forth only recommendations, not mandatory standards regarding sign placement. The first chapter of the Sign Manual, entitled “purpose and applicability,” states that the manual is merely a “guide, and that it is the ‘individual park manager...[who] has the responsibility for determining whether or not a sign is necessary or appropriate at a given location.’”⁵¹⁵

Furthermore, although the “[p]laintiff makes much of the MUTCD’s discussion of ‘end-of-roadway’ conditions, ...[t]hat discussion...states only that ‘[a]ppropriate advance warning signs should be used’—not that they must be used. ...The discussion, therefore, is merely a recommendation, not a mandatory standard which precludes a finding of discretion.”⁵¹⁶

Although the MUTCD’s provisions regarding the signs at issue were nonmandatory and thus discretionary, the court held that the government still could be held liable. The government failed to satisfy the second prong of the *Gaubert* analysis:

[T]he question is not whether the challenged decision involved policy considerations but whether the nature of the decision is grounded in such considerations. ...While NPS may, in fact, consider economic, engineering and aesthetic concerns in deciding whether and in what manner to place signs along the portion of the Rock Creek Park Trail in question, *the government has failed to demonstrate how the nature of these sign placement decisions implicates and is grounded in public policy concerns.* (Emphasis added.)⁵¹⁷

In other cases, a transportation department’s decisions regarding signing have been held to be discretionary and immune from tort liability.⁵¹⁸ In a Louisiana case, the court held that “[i]n all situations, the decision to erect a warning sign is discretionary on the part of DOTD.”⁵¹⁹ In an Ohio case, the court held that there was no liability because the placement of the signs in question was not mandatory, and thus they did not come

⁵¹⁴ *Id.* at 400 (citation omitted).

⁵¹⁵ *Id.* at 401.

⁵¹⁶ *Id.* (quoting MUTCD § 3C.04).

⁵¹⁷ *Id.* at 402 (citations omitted).

⁵¹⁸ See, e.g., *Ireland v. Crow’s Nest Yachts, Inc.*, 552 N.W.2d 269, 273–74 (Minn. Ct. App. 1996) (holding that an engineer’s decision not to install a “distance plaque” on the approach to a curve was discretionary).

⁵¹⁹ *Lee v. State ex rel. Dep’t of Transp. & Dev.*, 701 So. 2d 676, 679 (La. 1997).

“within the scope of a ‘public road’ as defined in the applicable statute.”⁵²⁰

Of course, a public entity is not “responsible for all injuries resulting from any risk posed by the roadway or its appurtenances, only those caused by an unreasonable risk of harm to others.”⁵²¹ Nevertheless, in many states there is a duty to provide traffic control devices at the location of a dangerous condition of which a transportation department had or should have had notice.⁵²² A transportation department may have immunity as long as a sign, signal, marking, or other device was not necessary to warn of a dangerous condition that would not have been reasonably apparent to and would not have been anticipated by a person exercising due care.⁵²³ Likewise, in many states a statutory exemption in a tort claims act for discretionary acts does not relieve a public entity of liability for failing to give adequate warning of or to correct a condition known to be dangerous to the traveling public.⁵²⁴

Of course, the absence of a sign must have been the proximate cause of the accident in question.⁵²⁵

⁵²⁰ *Shope v. City of Portsmouth*, 2012 Ohio 1605, at P22 (2012) (citing OHIO REV. CODE § 2744.01(H)).

⁵²¹ *Lee*, 701 So. 2d at 678 (stating that “[i]t is well-settled that a governmental authority that undertakes to control traffic at an intersection must exercise a high degree of care for the safety of the motoring public”).

⁵²² CAL. GOV’T CODE § 830.4.

⁵²³ *See, e.g.*, CAL. GOV’T CODE § 830.8.

⁵²⁴ *Hensley v. Jackson County*, 227 S.W.3d 491 (Mo. 2007) (negligent maintenance or failure to repair a downed stop sign as constituting a dangerous condition); *Norman v. N.C. Dep’t of Transp.*, 161 N.C. App. 211, 218, 588 S.E.2d 42, 48 (N.C. Ct. App. 2003), *review dismissed*, 358 N.C. 235, 595 S.E.2d 153 (2004); *Commonwealth v. Babbitt*, 172 S.W.3d 786, 794 (Ky. 2005) (holding that the State had “no duty to provide warning signs, guardrails, or barriers when an unusual or dangerous condition does not exist,” nor had a “duty to erect guardrails or barriers of sufficient strength to withstand any degree of force”). *See also* *Coyne v. Dep’t of Transp.*, 182 N.J. 481, 867 A.2d 1159 (2005) (remanding to the trial court in a case involving an accident when the department had stationed a truck with a flashing “Left Lane Closed Ahead” sign for a determination of whether the department’s actions were “palpably unreasonable,” a term not defined in the State’s tort claims act).

⁵²⁵ *Cianciola v. State*, 38 A.D. 3d 1296, 1297, 834 N.Y.S.2d 755, 756 (2007); *Harkness v. Hall*, 684 N.E.2d 1156 (Ind. 1997) (holding that the failure of a county to maintain and sign a highway was the proximate cause of the accident); *Kennedy v. Ohio Dep’t of Transp.*, 63 Ohio Misc. 2d 328, 331, 629 N.E.2d 1101, 1103 (Ct. Cl. 1992) (holding that the transportation department established that the road’s traffic control devices con-

In *Daigle, supra*, a case involving the MUTCD, the court held that the plaintiff failed to prove that the intersection presented an unreasonable risk of harm.⁵²⁶

E. The MUTCD and Liability for Traffic Signals

A significant part of the MUTCD is devoted to traffic signals.⁵²⁷ Although there is some contrary authority,⁵²⁸ it appears that in most jurisdictions a transportation department has immunity for the initial decision regarding whether to install traffic signals and other devices.⁵²⁹ Cases have held that a state’s decision-making concerning the providing or placing of such devices is within the sound discretion of the responsible public entity and is thereby protected by a discretionary function exception.⁵³⁰ In a Texas case the court stated that

formed to the Ohio MUTCD and that the decedent, who was intoxicated, drove past three separate barricades closing the area where a machine was parked across the roadway).

⁵²⁶ *Daigle v. Parish of Jefferson*, 30 So. 3d 55, 63 (La. 2009).

⁵²⁷ *See* 2009 MUTCD, *supra* note 1, pt. 4, Traffic Signals, at 433–529.

⁵²⁸ Annotation, *Highways: Governmental Duty to Provide Curve Warnings or Markings*, 57 A.L.R. 4th 342, §§ 4, 5(a) and (b).

⁵²⁹ *Boub v. Township of Wayne*, 183 Ill. 2d 520, 536, 702 N.E.2d 535, 543 (1998) (stating that “[o]ur cases have found immunity under section 3-104 of the Tort Immunity Act...for the initial failure to provide specific warning devices”); *see also* *Weiss v. N.J. Transit*, 128 N.J. 376, 608 A.2d 254, 257 (1992) (holding that “the explicit grant of immunity for failure to provide traffic signals under N.J.S.A. 59:4-5 ‘will prevail over the liability provisions’” of the tort claims act in a case in which the plaintiff alleged that the public authorities were independently negligent in delaying the implementation of a plan to install a traffic signal at a railroad crossing) (citation omitted). *See* *Pandya v. State, Dep’t of Transp.*, 375 N.J. Super. 353, 370, 867 A.2d 1236, 1245 (2005) (stating that the court agreed with the plaintiffs that “the lane markings at issue here do not fall within the immunity of N.J.S.A. 59:4-5, because the issue...involved the State’s action in affirmatively creating two allegedly dangerous lanes”).

⁵³⁰ *Kohl v. City of Phoenix*, 215 Ariz. 291, 295, 160 P.3d 170, 174 (Ariz. 2007) (holding that the City had absolute immunity in a wrongful death action involving a bicyclist when the City made a decision to use computer software to rank intersections requiring traffic signals and to establish other criteria); *City of Grapevine v. Sipes*, 195 S.W.3d 689 (Tex. 2006) (holding that the City had immunity after it decided to install a traffic signal and after a reasonable period of time still failed to do so); *McDuffie v. Roscoe*, 679 So. 2d 641, 645

“[w]hen the City first installs a traffic signal is no less discretionary than whether to install it.”⁵³¹ Thus, the toll road authority “retained discretion regarding *when* to install warning flashers” that were at issue in the case.⁵³²

Immunity extends beyond the decision whether and when to install or provide traffic control devices. In *Bjorkquist v. City of Robbinsdale*,⁵³³ the plaintiff claimed that the timing of the clearance interval between a change of the traffic light from red to green was unduly brief and that the improper timing of the light change was the proximate cause of the accident.⁵³⁴ The plaintiff asserted that the timing of the change of the lights was a ministerial decision made at the operational level, and, therefore, was not immune from judicial review.⁵³⁵ The court held that “[t]here is no obligation to time the lights in a particular way. Rather, that decision is arrived at after weighing competing interests.”⁵³⁶ The decision regarding the length of the clearance interval of the lights was part of the planning process and as such was a discretionary decision protected by the discretionary function exemption.⁵³⁷

After a public entity decides to provide traffic signals, it has been held that there is a duty

(Ala. 1996) (stating that the court could “not agree that posting warning signs was a ministerial function”); *French v. Johnson County*, 929 S.W.2d 614, 617 (Tex. 1996) (stating that the decisions not to install guardrails, replace a bridge, or post warning signs were discretionary decisions and that the tort claims act did not waive governmental immunity for such decisions). *But see Jacobs v. Board of Comm’rs*, 652 N.E.2d 94, 100 (Ind. 1995) (reversing the grant of a summary judgment for the County and holding that the County failed to establish that it had engaged in a systematic process to determine when and where to place warning signs).

⁵³¹ *Fort Bend County Toll Road Auth.*, 316 S.W.3d 114, 121 (2010) (citation omitted).

⁵³² *Id.*

⁵³³ 352 N.W.2d 817 (Minn. Ct. App. 1984). In *Bjorkquist*, the court noted that “[t]ort immunity for municipalities was abolished by statute in 1963 subject to [a] few exceptions.” *Id.* at 818. *See also Zank v. Larson*, 552 N.W.2d 719 (Minn. 1996) (holding that the City’s determination as to the timing of traffic control signals was discretionary).

⁵³⁴ *Bjorkquist*, 352 N.W.2d at 818. The plaintiff conceded that the decision whether to install a traffic control device at an intersection was discretionary in nature and was exempt from liability under the discretionary function exception of the Minnesota Tort Claims Act.

⁵³⁵ *Id.*

⁵³⁶ *Id.*

⁵³⁷ *Id.* (citing MINN. STAT. § 466.03(6) (1982)).

to maintain them in good working order.⁵³⁸ Nevertheless, at least one case was located in which the court held that a municipality is not liable even for the failure to maintain a traffic signal.⁵³⁹ Again, in most jurisdictions a public entity may not be immune from liability if it has failed to respond to a known dangerous condition.⁵⁴⁰ If there is no showing of a malfunction prior to the accident, a public entity may not be held liable because of the absence of any showing of actual or constructive notice.⁵⁴¹ After having notice of a malfunction, a public entity has a reasonable time within which to take corrective action.⁵⁴²

⁵³⁸ *Montgomery County v. Voorhees*, 86 Md. App. 294, 303, 586 A.2d 769, 774 (Md. 1991) (alleged faulty traffic light); *Forest v. State*, 493 So. 2d 563 (La. 1986) (absence of amber flashing lights contributed to a finding of liability); *Robinson v. State, Dep’t of Transp.*, 465 So. 2d 1301 (Fla. 1985); and *Stephen v. Denver*, 659 P.2d 666 (Colo. 1983). *See also* Annotation, *Liability of Highway Authorities Arising Out of Motor Vehicle Accident Allegedly Caused by Failure to Erect or Properly Maintain Traffic Control Device at Intersection*, 34 A.L.R. 3d 1008, 1015,

The strongest cases for recovery have been those in which the highway authority failed within a reasonable time to replace a traffic sign which had been removed by unauthorized persons, to re-erect or repair a sign which had fallen down or had been knocked down or bent over, or to replace a burned out bulb in an electric traffic signal.

⁵³⁹ *Radosevich v. County Comm’rs of Whatcom County*, 3 Wash. App. 602, 476 P.2d 705 (Wash. 1970).

⁵⁴⁰ *Nawrocki*, 463 Mich. 143, 180, 615 N.W.2d 702, 721 (2000) (holding that the state or county road commissions have no duty to install, maintain, repair, or improve traffic control devices, including traffic signs, and that their liability is limited to the repair of dangerous or defective conditions within the actual roadway); *Starr v. Veneziano*, 560 Pa. 650, 659, 747 A.2d 867, 873 (2000) (stating that no evidence was presented that a traffic control device would have prevented the accident); *Harkness v. Hall*, 684 N.E.2d 1156, 1160 (Ind. 1997) (holding that there is a duty to maintain signs or signals in good working order); and *Bendas v. Township of White Deer*, 531 Pa. 180, 185, 611 A.2d 1184, 1187 (1992) (holding that the Commonwealth’s duty to make highways reasonably safe included erecting traffic control devices or otherwise correcting dangerous conditions).

⁵⁴¹ *Zuniga v. Metro. Dade County*, 504 So. 2d 491, 492 (Fla. 1987) (holding that there was no showing of actual or constructive notice of a malfunction of a traffic control signal).

⁵⁴² *City of Atlanta v. Landmark Envtl. Indus.*, 272 Ga. App. 732, 733, 613 S.E.2d 131, 135 (Ga. 2005) (*citing* *Bowman v. Gunnells*, 243 Ga. 809, 256 S.E.2d 782 (1979) (stating that there was nothing “in the record to show any like malfunction before the accident [and]

F. The MUTCD and Liability for Stop Signs and Speed Limit Signs

The MUTCD includes in Chapter 2 numerous provisions concerning stop signs, including Standards that are applicable.⁵⁴³ For example, in Section 2B.04 regarding the right-of-way at intersections, the Manual includes a Standard that states in part that stop signs

shall not be used in conjunction with any traffic control signal operation, except in the following cases:

- A. If the signal indication for an approach is a flashing red at all times;
- B. If a minor street or driveway is located within or adjacent to the area controlled by the traffic control signal, but does not require separate traffic signal control because an extremely low potential for conflict exists; or
- C. If a channelized turn lane is separated from the adjacent travel lanes by an island and the channelized turn lane is not controlled by a traffic control signal. (Emphasis added.)

As for speed limit signing, the MUTCD includes, for example, a Standard in Section 2B.13 applicable to a “Speed Limit Sign (R2-1)” that states:

01 Speed zones (other than statutory speed limits) *shall* only be established on the basis of an engineering study that has been performed in accordance with traffic engineering practices. The engineering study *shall* include an analysis of the current speed distribution of free-flowing vehicles.

02 The Speed Limit (R2-1) sign (see Figure 2B-3) *shall* display the limit established by law, ordinance, regulation, or as adopted by the authorized agency based on the engineering study. The speed limits displayed *shall* be in multiples of 5 mph.

03 Speed Limit (R2-1) signs, indicating speed limits for which posting is required by law, *shall* be located at the points of change from one speed limit to another. (Emphasis added.)

Many guidance, option, and support statements are included as well in the Manual regarding both stop signs and speed limit signs.

First, as for stop signs, although the MUTCD contains some mandatory provisions, in general the courts have held that a decision whether to erect a stop sign is a discretionary decision and immune from judicial review under the discretionary function exemption in a state tort claims act.⁵⁴⁴ In *Gonzales v. Hollins*,⁵⁴⁵ the question was

there [was] no genuine issue of material fact as to the County’s actual or constructive notice”).

⁵⁴³ See other parts of the MUTCD, *supra* note 1, including pt. 5, Traffic Control Devices for Low-Volume Roads.

⁵⁴⁴ *Tell City v. Noble*, 489 N.E.2d 958 (Ind. 1986) (holding that the decision of the City not to install a “Stop” sign or other form of traffic control at an inter-

whether the City’s action in changing a traffic control device to a static stop sign was a discretionary activity within the meaning of the discretionary function exemption in the Minnesota Tort Claims Act.⁵⁴⁶ The court held that

[t]he City’s decision to replace the semaphore with a stop sign and through street configuration was the result of a planning decision made after balancing various factors including safety testing, traffic patterns and budget concerns. Absent proof that the City had notice of a dangerous condition, the act was discretionary.⁵⁴⁷

The court in *Walters, supra*, interpreting Section 2B.05 of the MUTCD on “STOP Sign Application,” held that the placement of the stop sign at the intersection in question was “discretionary and not mandatory”⁵⁴⁸ because the Section “states that stop signs ‘should’ be used if engineering judgment indicates that one or more of the listed conditions exist.”⁵⁴⁹

In *Alexander v. Eldred*,⁵⁵⁰ the City of Ithaca argued that its decision whether to install a stop sign was not “justiciable.”⁵⁵¹ The New York Court of Appeals held that municipalities do not have absolute immunity when exercising their discretion⁵⁵²; rather, a plaintiff may succeed “on proof that the plan either was evolved without adequate study or lacked [a] reasonable basis.”⁵⁵³ In *Alexander*, the plaintiff’s evidence established that the City had failed to review traffic counts that were less than 18-years-old for the intersection in question and that New York’s MUTCD required a “Stop” sign at the intersection.⁵⁵⁴ However, the “most critical evidence” was the city engineer’s erroneous belief that “the city had no

section was discretionary and immune from judicial review under the Indiana Tort Claims Act).

⁵⁴⁵ 386 N.W.2d 842 (Minn. 1986). See *Nguyen v. Nguyen*, 565 N.W.2d 721, 723 (Minn. 1997) (“Discretionary immunity applies in this case because the challenged conduct, the County’s decision to delay the intersection improvements, occurred at the planning level.”).

⁵⁴⁶ *Gonzales*, 386 N.W.2d 842, 844 (1986) (*citing* MINN. STAT. § 466.03(6)).

⁵⁴⁷ *Id.*, 386 N.W.2d at 846.

⁵⁴⁸ *Walters v. City of Columbus*, 2008 Ohio 4258 at 20 (2008).

⁵⁴⁹ *Id.* at 22.

⁵⁵⁰ 63 N.Y.2d 460, 472 N.E.2d 996, 483 N.Y.S.2d 168 (1984).

⁵⁵¹ *Id.* at 465, 472 N.E.2d at 998, 483 N.Y.S.2d at 170.

⁵⁵² *Id.* at 466, 472 N.E.2d at 998, 483 N.Y.S.2d at 170.

⁵⁵³ *Id.* (citation omitted).

⁵⁵⁴ *Id.* at 466, 472 N.E.2d at 998–99, 483 N.Y.S.2d at 171.

power to install a stop sign on a private road.”⁵⁵⁵ The court held that “[i]f the municipality proceeds in direct contravention, or ignorance, of all legitimate interpretations of the law, its plan of action is inherently unreasonable.”⁵⁵⁶

As for speed limit signs, likewise, it has been held that a decision to post a speed limit sign is a protected planning-level activity rather than an unprotected operational-level activity.⁵⁵⁷ In *Kolitch v. Lindedahl*,⁵⁵⁸ the Supreme Court of New Jersey agreed with the State that “it cannot be a tort to communicate accurately a properly established speed limit” and “that the setting of the speed limit in the first instance is a discretionary function.”⁵⁵⁹ Furthermore, the court, in discussing the planning–operational test and whether discretion had been exercised under the discretionary function exemption, stated:

The posting of a sign is merely one form of acting on the decision to set a certain limit, a decision that is discretionary in nature and therefore entitled to immunity. Thus, both the decision and the act of implementation are one and the same for the purposes of the statute.⁵⁶⁰

The court also relied on New Jersey Statutes Annotated 59:4-5, which exonerates a public entity “for an injury caused by the failure to provide ordinary traffic signals, signs, markings or other similar devices.”⁵⁶¹

However, a New York appellate court held that under the circumstances of that case, “[t]he posted advisory speed signs are not binding and were customarily ignored, which fact was known to the State. ...[T]he State’s failure to post mandatory speed limit signs at this dangerous intersection may be deemed a proximate cause of the accident.”⁵⁶²

Finally, although there is some judicial authority to the contrary, after a public entity provides a warning sign, traffic signal, “Stop” sign, or other device, it has a duty to maintain the device in

good working order and a failure to do so is not protected by a discretionary function exemption.⁵⁶³

G. The MUTCD and Liability for Pavement Markings

The MUTCD’s provisions on pavement markings are found principally in Part 3 of the Manual, but appear in other parts of the MUTCD as well. Although the MUTCD includes Standards that apply to pavement markings, in Section 3A.01(01) entitled, “Functions and Limitations,” a support statement provides that

[m]arkings on highways and on private roads open to public travel have important functions in providing guidance and information for the road user. Major marking types include pavement and curb markings, delineators, colored pavements, channelizing devices, and islands. In some cases, markings are used to supplement other traffic control devices such as signs, signals, and other markings. In other instances, markings are used alone to effectively convey regulations, guidance, or warnings in ways not obtainable by the use of other devices.⁵⁶⁴

As previously noted, the courts have held that there is no waiver of sovereign immunity and/or that no duty is created by a nonmandatory provision of the MUTCD. In a case involving the MUTCD, it was alleged 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.”⁵⁶⁵ The court, however, held that the appellants had ignored another Standard in Section 1A.09 of the Manual.

“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 Standards, Guidance, and Options for

⁵⁵⁵ *Id.* 63 N.Y.2d at 466, 472 N.E.2d at 999, 483 N.Y.S.2d at 171.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Dep’t of Transp. v. Konney*, 587 So. 2d 1292, 1294 (Fla. 1991) (holding that the State and County were not liable because their “decisions relating to the installation of appropriate traffic control methods and devices or the establishment of speed limits are discretionary decisions”).

⁵⁵⁸ 100 N.J. 485, 497 A.2d 183 (1985).

⁵⁵⁹ *Id.* at 494, 497 A.2d at 187.

⁵⁶⁰ *Id.* at 495, 497 A.2d at 188.

⁵⁶¹ *Id.* at 496, 497 A.2d at 189.

⁵⁶² *Scheemaker v. State*, 125 A.D. 2d 964, 510 N.Y.S.2d 359, 360 (1986).

⁵⁶³ See *Bussard v. Ohio Dep’t of Transp.*, 31 Ohio Misc. 2d 1, 507 N.E.2d 1179 (Ct. Cl. 1986); *Bryant v. Jefferson City*, 701 S.W.2d 626 (Tenn. 1985); and *Dep’t of Transp. v. Neilson*, 419 So. 2d 1071 (Fla. 1982) (holding that the failure to maintain traffic control devices in proper working order once installed constituted negligence at the unprotected, operational level).

⁵⁶⁴ 2009 MUTCD, *supra* note 1, at 347.

⁵⁶⁵ *Shipley v. Dep’t of Roads*, 813 N.W.2d 455, 463 (2012) (stating that the plaintiffs relied 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”).

design and application of traffic control devices, this Manual should not be considered a substitute for engineering judgment.”⁵⁶⁶

There are other cases holding that a public entity has immunity for its decisions regarding pavement markings.⁵⁶⁷ It has been held that special pavement markings may not be required at an intersection when the evidence does not establish that a hazardous or dangerous condition existed.⁵⁶⁸ On the other hand, there are precedents holding a transportation agency liable for improper, inadequate, or misleading pavement markings.⁵⁶⁹ In addition, in some jurisdictions the courts may regard some decisions on pavement marking as operational-level activities that are not protected by a discretionary function exemption.⁵⁷⁰

In *Dispenza v. State of New York*,⁵⁷¹ the plaintiffs alleged that the transportation department was negligent in failing to post warnings that there was wet paint on the highway as a result of pavement striping operations. In entering a judgment in favor of the claimants on the issue of liability, the court held that compliance with the MUTCD in that case did not eliminate the possi-

bility of other negligence that was the proximate cause of the claimants’ injuries.⁵⁷²

H. Statements in the MUTCD Regarding Barriers and Guardrails

The MUTCD states in Section 1A.08(05) that “curbs, median barriers, guardrails, speed humps or tables...are *generally not included*” in the Manual. (Emphasis added.)⁵⁷³ Although both terms do appear in the Manual, the term “guardrail” is used infrequently. The term “barriers,” particularly in regard to signing, is noted in several sections of the MUTCD. For example, Section 2C.65(01) regarding object markers for obstructions adjacent to the roadway includes a support statement providing that “[o]bstructions not actually within the roadway are sometimes so close to the edge of the road that they need a marker.”⁵⁷⁴ Section 2G.13(01) on guide signs for egress from preferential lanes to general-purpose lanes includes a standard stating that

[f]or barrier-separated, buffer-separated, and contiguous preferential lanes where egress is restricted only to designated points, post-mounted Advance Guide and post-mounted Intermediate Egress Direction signs...shall be installed in the median or on median barriers that separate two directions of traffic prior to and at the intermediate exit points from the preferential lanes to the general-purpose lanes. (Emphasis added.)⁵⁷⁵

Section 3F.03(08) of the MUTCD concerning delineator application includes a guidance statement indicating that “[a] series of delineators should be used wherever guardrail or other longitudinal barriers are present along a roadway or ramp.”⁵⁷⁶ Barriers also are mentioned in other sections of the Manual.⁵⁷⁷

None of the provisions in the MUTCD appear to address when it is necessary to use guardrails and barriers. Nevertheless, to the extent that a violation of a provision of the MUTCD (e.g., on signing) implicates barriers or guardrails, it should be noted that transportation departments have suc-

⁵⁶⁶ *Id.*

⁵⁶⁷ *Elmer v. Kratzer*, 249 A.D. 2d 899, 672 N.Y.S.2d 584, 585–86 (1998) (holding that the City was immune for its decision to classify a road as a truck route that the City had painted as a two-lane rather than as a four-lane road); *State Dep’t of Highways & Pub. Transp. v. Carson*, 599 S.W.2d 852, 854 (Tex. 1980) (holding that there was no liability for alleged faulty or misleading pavement markings).

⁵⁶⁸ *Stornelli v. State*, 11 A.D. 2d 1088, 206 N.Y.S.2d 823 (1960); *Egnoto v. State*, 11 A.D. 2d 1089, 206 N.Y.S.2d 824 (N.Y. App. 4th Dep’t 1960).

⁵⁶⁹ *Pandya v. State*, Dep’t of Transp., 375 N.J. Super. 353, 370, 867 A.2d 1236 (N.J. Super. Ct. 2005) (reversing the grant of a summary judgment and agreeing with the plaintiffs that the lane markings at issue “do not fall within the immunity of N.J.S.A. 59:4-5, because the issue here involved the State’s action in affirmatively creating two allegedly dangerous lanes”); *Fisher v. State*, 268 A.D. 2d 849, 702 N.Y.S.2d 418 (2000) (holding that misleading pavement marking violated the MUTCD).

⁵⁷⁰ *Rogers v. State*, 51 Haw. 293, 459 P.2d 378 (1969) and *State v. I’Anson*, 529 P.2d 188 (Alaska 1974) (both courts holding that pavement marking is operational-level maintenance activity that is not immune from liability).

⁵⁷¹ 28 Misc. 3d 1205(A), 957 N.Y.S.2d 635, 2010 N.Y. Misc. LEXIS 2839 (2010).

⁵⁷² *Dispenza v. State of New York*, 28 Misc. 3d 1205(A), 957 N.Y.S.2d 635, 2010 N.Y. Misc. LEXIS 2839, at 51–52 (2010).

⁵⁷³ 2009 MUTCD, *supra* note 1, at 3.

⁵⁷⁴ *Id.* at 135.

⁵⁷⁵ *Id.* at 270.

⁵⁷⁶ *Id.* at 424.

⁵⁷⁷ *Id.* at 552 (stating in § 6C.02(02) regarding temporary traffic control zones (TTC), a support statement, that

[a] work zone is an area of a highway with construction, maintenance, or utility work activities. A work zone is typically marked by signs, channelizing devices, barriers, pavement markings, and/or work vehicles. It extends from the first warning sign or high-intensity rotating, flashing, oscillating, or strobe lights on a vehicle to the END ROAD WORK sign or the last TTC device.

cessfully defended cases on the basis that decisions involving barriers or guardrails are discretionary in nature as planning-level decisions.⁵⁷⁸

Thus, it has been held that the failure to erect a guardrail did not constitute a dangerous condition of commonwealth realty;⁵⁷⁹ that the failure to erect a guardrail was not a “dangerous condition of the streets” for purposes of the “streets exception” to governmental immunity under a tort claims act,⁵⁸⁰ and that there was no liability for failing to provide a median barrier, particularly when there was no showing of changed conditions between the time of the reconstruction of the roadway and the accident.⁵⁸¹

Similarly, in *Helton v. Knox County*, the court held that “the decision not to install guardrails despite the recommendations of state inspectors falls within the discretionary function exception.”⁵⁸² In *Dahl v. State of New York*,⁵⁸³ the court held that “the claimants failed to establish, through proof of prior similar accidents, violations of mandatory safety standards, or any other evidence, that the absence of guide rails in the vicinity of the accident lacked any reasonable basis.”⁵⁸⁴ On the other hand, the courts have held that a public entity may be held liable for an injury caused by a dangerous condition of its property and that a public entity’s failure to erect median barriers to prevent cross-median accidents may result in liability.⁵⁸⁵

In *Dean, supra*, the plaintiff alleged that her accident would have been mitigated or avoided if there had been a guardrail at the location of the

accident.⁵⁸⁶ At issue was Section 8522(b)(4) of the Pennsylvania Judicial Code, known as the real estate exception, that waives immunity for damages arising from a dangerous condition of the Commonwealth’s “real estate, highways, and sidewalks.”⁵⁸⁷ The Supreme Court of Pennsylvania held that the DOT did not have a duty to erect guardrails on its roads and that the DOT’s failure to install guardrails did not come within the real estate exception to sovereign immunity.⁵⁸⁸ The court held that

the absence of a guardrail cannot be said to be a dangerous condition of the real estate that resulted in a reasonably foreseeable injury.... Stated differently, the lack of a guardrail does not render the highway unsafe for the purposes for which it was intended, *i.e.*, travel on the roadway.⁵⁸⁹

In sum, the majority view is that transportation departments’ decisions on whether and when to provide signs and warning signs, traffic signals, stop signs, speed limit signs, pavement markings, or other traffic control devices are policy-level decisions that are immune from liability. Moreover, the MUTCD permits transportation departments to use an engineering study or engineering judgment when making decisions on the use of traffic control devices. Some states’ statutes specifically exonerate transportation agencies for failure to provide certain traffic control devices such as traffic signals. However, the courts have held a transportation department liable for an accident that was proximately caused by the department’s failure to provide a traffic control device as needed or required by the MUTCD when the department had notice of a dangerous condition. After a transportation department provides safety features or devices, it is generally held that the department has a duty to maintain them in good and serviceable condition.

CONCLUSION

As discussed in the digest, the MUTCD affects the tort liability of transportation departments in respect to their decisions on the use of traffic control devices. Although there are standards in the MUTCD that are mandatory, the other statements in the Manual identified as guidance, option, and support statements are not mandatory. Moreover, transportation departments are expressly permitted by the MUTCD to use their engineering judgment or an engineering study in the selection and application of traffic control devices,

⁵⁷⁸ *State, Dep’t of Transp. v. Vega*, 414 So. 2d 559, 560 (Fla. 1982) (holding that the DOT “enjoyed sovereign immunity in its decision not to erect a guardrail”). See also *State v. San Miguel*, 2 S.W.3d 249, 251 (Tex. 1999); *Cyglar v. Presjack*, 667 So. 2d 458 (Fla. 1996); *Newsome v. Thompson*, 202 Ill. App. 3d 1074, 560 N.E.2d 974 (1990).

⁵⁷⁹ *Dean v. Commonwealth, Dep’t of Transp.*, 561 Pa. 503, 508, 751 A.2d 1130, 1134 (2000).

⁵⁸⁰ *Lockwood v. Pittsburgh*, 561 Pa. 515, 751 A.2d 1136 (2000).

⁵⁸¹ *Sutton v. Golden Gate Bridge*, 68 Cal. App. 4th 1149, 81 Cal. Rptr. 2d 155 (1998).

⁵⁸² 922 S.W.2d 877, 887 (Tenn. 1996).

⁵⁸³ 45 A.D. 3d 803, 805, 846 N.Y.S.2d 329, 330 (2007).

⁵⁸⁴ *Id.*

⁵⁸⁵ *Ducy v. Argo Sales Co.*, 25 Cal. 3d 707, 159 Cal. Rptr. 835, 602 P.2d 755, 760 (1979) (holding that the language of CAL. GOV’T CODE § 835 “refute[d] the state’s argument that it [was] under no ‘duty’ to protect the public against dangers that are not created by physical defects in public property” and that under the circumstances in that case the State was liable for failure to provide an adequate median barrier).

⁵⁸⁶ *Dean v. Commonwealth of Pa., Dep’t of Transp.*, 561 Pa. 503, 512, 751 A.2d 11130, 1134 (2000).

⁵⁸⁷ 42 PA. CONS. STAT. § 8522(b)(4).

⁵⁸⁸ *Dean*, 561 Pa. at 512, 751 A.2d at 1134.

⁵⁸⁹ *Id.*

as well as when they design roads and streets that the devices complement.

Although transportation departments have concerns regarding some of the changes that were made to the 2009 MUTCD, it appears that in most states that the departments have immunity when exercising their discretion, particularly at the planning level, in the application of traffic control devices. Whether a transportation department has immunity usually is a question of law for the court. Besides possibly having immunity under a tort claims act and/or a design immunity statute, transportation departments may be protected by other state statutes from liability claims involving traffic control devices. In some states, however, a department may not have immunity for the exercise of discretionary functions unless the department is able to make a satisfactory showing that it actually exercised its discretion. The digest discusses documentation that transportation departments are making and maintaining on their decisions about the use of traffic control devices. Such documentation may be necessary in those states in which the courts require that a transportation agency or other public entity demonstrate that it actually exercised its discretion and that its action was approved by the appropriate body authorized to do so.

In many states transportation departments may be held liable for failure to correct or give adequate warning of a dangerous condition of the highway. Thus, the digest discusses whether there is an exception to discretionary or design immunity whereby a transportation department may be held liable for the absence of a traffic control device or the use of a noncompliant one that resulted in a dangerous condition of which the transportation department had notice.

As of the time of the digest, very little information and reported cases are available on claims arising under the 2009 MUTCD. However, based on information provided by DOTs in response to the survey and a sampling for the period between the effective date of the MUTCD and April 2014 on cases arising under the 2003 MUTCD or prior editions, it appears, particularly at the appellate level for the most recent 3-year period, that transportation departments have been relatively successful in defending against MUTCD claims.

TABLE 1
CASES (JANUARY 2010–APRIL 2014) ARISING UNDER THE 2003
MUTCD OR EARLIER OR UNIDENTIFIED EDITIONS

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
<i>Albertson v. Fremont County</i> , 834 F. Supp. 2d 1117 (D. Idaho 2011)	Whether Fremont County is liable for negligence per se for failing to comply with the requirements of the MUTCD on a snow trail.	a) Accident occurred on February 1, 2009. b) MUTCD edition not clearly stated or identified. c) MUTCD specific provisions not identified.	Fremont County's motion granted on plaintiffs' claim for negligence per se and denied as to plaintiffs' claim for ordinary negligence.	Partially in favor of the County. Outcome on the ordinary negligence claim not known.
<i>Am. Family Mut. Ins. Co. v. Outagamie County</i> , 816 N.W.2d 340 (Wis. Ct. App. 2012)	Whether the County had a ministerial duty to use more than one flagger at an intersection so that each flagger could face the direction of the traffic he or she was controlling.	a) Accident appears to have occurred in May 2009. b) Court applied the 2003 MUTCD. c) MUTCD § 6E–2.	Summary judgment for the County affirmed.	For the County.
<i>Casella v. Township of Manalapan</i> , 2011 N.J. Super. Unpub. LEXIS 957 at *1 (N.J. Super., App. Div. 2011)	Whether the Township negligently designed, erected, and maintained a “Stop” sign that created a dangerous condition at the intersection.	a) Accident occurred on July 20, 2006. b) MUTCD edition not clearly stated or identified. c) Specific provisions of the MUTCD not identified.	Holding there was no evidence that the installation complied with MUTCD standards or that anyone had approved the placement; that evidence was inadequate to support summary judgment for immunity under N.J.S.A. 59:4-6(a).	For the Plaintiff. Ultimate outcome not known.

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
			Summary judgment for the Township reversed.	
<i>Daigle v. Jefferson</i> , 30 So. 3d 55 (La. App. 2009), writ denied, 29 So. 3d 1262 (La., Mar. 26, 2010)	Whether an alleged defect created an unreasonable risk of harm and a dangerous condition.	a) Accident occurred on June 25, 1999. b) Court applied the 1988 MUTCD. c) MUTCD specific sections not identified.	Holding that jury's finding that defects in the roadway did not present an unreasonable risk of harm was not manifestly erroneous or clearly wrong. Judgment for the Parish affirmed.	For the Parish.
<i>Elmer v. Wisconsin County Mut. Ins. Co.</i> , 800 N.W.2d 957 (Wis. Ct. App. 2011)	Whether the County failed to erect proper signage at the construction site and failed to prepare a formal traffic control plan.	a) Accident occurred on October 9, 2006. b) Court assumed that the 2003 MUTCD applied. c) MUTCD §§ 6C.01; 6C.04.	Summary judgment for the County affirmed.	For the County.
<i>Ford v. New Hampshire Dep't of Transp.</i> , 37 A.3d 436 (N.H. 2012)	Whether the New Hampshire DOT had a duty to provide an alternate operation of a traffic-control signal during a period of failure.	a) Accident occurred on December 12, 2008. b) Court applied the 2003 MUTCD. c) MUTCD § 4D.02D.	Affirmed the granting of the DOT's motion to dismiss.	For the DOT.
<i>Gunther v. State</i> , 169 Wash. App. 1042 (Ct. App. 2012)	Whether the State violated its duty to comply with the MUTCD's requirements for	a) Accident occurred on July 24, 2006. b) MUTCD edition not	Held that the trial court erred in granting the State's summary judgment motion;	In favor of the Plaintiff.

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
	bicycle lanes; whether the State had a general duty to act reasonably in making the roadway safe for ordinary travel; and whether the State breached that duty because the “drop-curb” was not flush with the pavement, thereby creating a “dangerous condition.”	clearly stated or identified. c) MUTCD Figures 9C-1, 9C-3, and 9C-4.	reversed and remanded.	Ultimate outcome not known.
<i>Hankins v. Cleveland</i> , 90 So. 3d 88 (Miss. Ct. App. 2011)	Alleged improper signage and warnings and that the City and Delta State University (DSU) were negligent and failed to maintain proper roadway conditions and were negligent regarding design, maintenance, warnings, proper safety practices, proper traffic control devices, and signage at the crosswalk.	a) Accident occurred on December 3, 2007. b) MUTCD edition not identified. c) MUTCD specific provisions not identified.	Affirmed the dismissal of the case because defendants Delta State University and the City had immunity under the discretionary function exemption of the Mississippi Tort Claims Act. Affirmed summary judgment for DSU and the City.	For the State (DSU) and the City
<i>Hodges v. Attala County</i> , 42 So. 3d 624 (Miss. Ct. App. 2010)	Survivors' wrongful death action alleged that warning signs/barriers were missing	a) Accident occurred on May 16, 2007.	Summary judgment for the County affirmed.	For the County.

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
	and that a construction company and the County were liable for failure to warn or protect against a known dangerous condition.	b) MUTCD edition not identified. c) Specific provisions of the MUTCD not identified.		
<i>Lampe v. Taylor</i> , 338 S.W.3d 350 (Mo. Ct. App. 2011)	Whether the City had knowledge that was acquired over a 5-year period prior to Lampe's accident that there had been four other virtually identical collisions at the intersection and whether the City complied with MUTCD provisions regarding maximum signal visibility.	a) Accident occurred on October 6, 2001. b) Court applied the 2001 "Millennium Edition" of the MUTCD. c) MUTCD specific provisions not identified.	Jury verdict for plaintiff affirmed.	For the Plaintiff
<i>Marsha v. Texas Dep't of Transp.</i> , 2012 Tex. App. LEXIS 3857 (Tex. App. 2012)	Alleged that TxDOT failed to remove high vegetation; failed to require private land-owner to remove the vegetation; and failed to designate the area as a no-passing zone.	a) Accident occurred on July 9, 2008. b) MUTCD edition not identified. c) MUTCD § 3B.02.	Trial court's order granting TxDOT's plea to the jurisdiction affirmed.	For the DOT.
<i>McManus v. Yong Kun Kim, the State of</i>	Whether the DOT failed to properly erect	a) Accident occurred on	Summary judgment for the DOT affirmed.	For WSDOT.

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
<i>Washington</i> , 2012 Wash. App. LEXIS 814 (Ct. App. 2012), <i>review denied</i> , 175 Wash. 2d 1019, 290 P.3d 994 (Wash., Oct. 30, 2012)	and maintain traffic control devices at an intersection.	August 25, 1990. b) Court applied the 1988 MUTCD. c) MUTCD § 1A-4.		
<i>Minato v. King County</i> , 170 Wash. App. 1052 (Ct. App. 2012), <i>affirming</i> , 2012 Wash. App. LEXIS 2360 (Wash. Ct. App., Oct. 1, 2012)	Whether the County failed to post adequate signage to warn Cedar River Trail (CRT) users to reduce speed and to inform them of a curve's severity.	a) Accident occurred in October 2007. b) MUTCD edition not clearly stated or identified. c) MUTCD § 2B.01.	Summary judgment for the County affirmed.	For the County.
<i>Morales v. Davison Transp. Services, Inc. and Morales v. State of Louisiana, Dep't of Transp. and Dev.</i> , 92 So. 3d 460 (La. Ct. App. 2012)	Whether the DOTD is liable for improper signalization or road marking for mobile operations.	a) Accident occurred on November 7, 2007. b) MUTCD edition not clearly stated or identified. c) MUTCD §§ 6G.01, 6G.02.	Summary judgment for the DOTD affirmed.	For the DOT.
<i>Pohl v. County of Furnas</i> , 682 F.3d 745 (8th Cir. 2012)	Whether the County violated its duty because a sign was not retroreflective and was placed too close to curve to warn nighttime drivers.	a) Accident occurred in December 2007. b) Court applied the 2003 MUTCD. c) MUTCD § 1A.13(62) and Table 2C-4.	Affirming the judgment of the district court apportioning 60 percent of negligence to the County and 40 percent to Michigan resident, resulting in award of \$407,163.68 in damages.	For the Plaintiff.

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
<i>Sadler v. Dep't of Transp. of Georgia</i> , 311 Ga. App. 601, 716 S.E.2d 639 (Ga. Ct. App. 2011)	Whether the Georgia Department of Transportation (GDOT) was negligent in failing to place a traffic signal at an intersection.	<p>a) Accident occurred in 2005.</p> <p>b) Court appears to have applied the 1988 MUTCD.</p> <p>c) MUTCD § 6F-1.</p>	Affirmed granting of GDOT's motion to dismiss.	For the DOT.
<i>Sexton v. Chicago</i> , 976 N.E.2d 526 (Ill. App. 2012)	Alleged that the City negligently failed to use a blank-out sign or a warning signal to alert drivers that they would be crossing a train track immediately after making a right turn.	<p>a) Accident occurred on February 10, 2004.</p> <p>b) Testimony that in 2004 the City had not officially adopted the MUTCD and had used it only as a reference tool.</p> <p>c) MUTCD § 8B.08 and other sections not specifically identified.</p>	Trial court's entry of judgment N.O.V. in favor of the City affirmed.	For the City.
<i>Skulich v. Fuller</i> , 82 So. 3d 467 (La. Ct. App. 2011)	Whether the DOTD failed to provide appropriate signs and traffic signals at an intersection that contributed to the accident.	<p>a) Accident occurred on June 24, 2004.</p> <p>b) MUTCD edition not clearly stated or identified.</p> <p>c) MUTCD §§ 2A.03, 2A.15, and 2A.16.</p>	Summary judgment for the DOTD affirmed.	For the DOTD.
<i>Shipley v. Dep't of Roads</i> , 283 Neb. 832, 813	Whether the MUTCD required	a) Accident occurred on June 5, 2005.	Holding that the Manual describes the application of traffic	For the Department of Roads.

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
N.W.2d 455 (Neb. 2012)	pavement markings on roadways approaching a railroad crossing.	<p>b) Court applied the 2000 MUTCD.</p> <p>c) MUTCD §§ 1A.09 and 8B.16.</p>	<p>control devices, but there is no legal requirement for their installation and that 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 engineering judgment.</p> <p>Affirmed a summary judgment for Nebraska Department of Roads and Cass County.</p>	
<i>Shope v. Portsmouth</i> , 2012 Ohio 1605 *P1 (Ohio Ct. App. 2012)	Alleged that the City had a duty to place and maintain traffic control devices in accordance with the MUTCD but failed to do so on or around or at the end of the street in question.	<p>a) Accident occurred on October 18, 2008.</p> <p>b) Court applied the 2005 MUTCD.</p> <p>c) MUTCD §§ 2-C and 3-C.</p>	<p>Holding that there was no liability because the placement of the signs in question was not mandatory and thus did not come within the scope of a “public road” as defined in the applicable statute.</p> <p>Reversed the judgment below and held that the trial court erred in denying Portsmouth's motion for summary judgment.</p>	For the City.
<i>Soni v. Township of Woodbridge</i> , 2012 N.J. Super. Unpub. LEXIS 1621 (N.J. App. 2012)	Alleged that the Township knew about flooding in an underpass during heavy rainfalls; that the Township should have closed the street on the date of the accident; and	<p>a) Accident occurred on April 15, 2007.</p> <p>b) MUTCD edition not identified.</p> <p>c) MUTCD sections not specifically identified.</p>	Summary judgment for the township reversed and remanded.	<p>For the Plaintiffs.</p> <p>Ultimate outcome not known.</p>

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
	the Township's temporary traffic control and use of traffic cones did not comply with the MUTCD.			
<i>Tarutis v. Seattle</i> , 158 Wash. App. 1030 (Wash. Ct. App. 2010)	Whether the City had no duty to plaintiff because it was not required by statute or otherwise to install a marked crosswalk.	a) Accident occurred on February 17, 2005. b) MUTCD edition not clearly stated or identified. c) MUTCD specific provisions not identified.	Summary judgment for the City denied.	For the Plaintiff. Ultimate outcome not known.
<i>Texas Dep't of Transp. v. Perches</i> , 339 S.W.3d 241 (Tex. App. 2011), <i>aff'd in part, rev'd in part, claim dismissed</i> , 388 S.W.3d 652, 656 (Tex. 2012)	Alleged with respect to plaintiffs' negligence claim against the Texas Department of Transportation (TxDOT) that at the time of the collision the traffic signs, road signs, and signal/warning devices on the roadways approaching and on the Bicentennial Ramp were incorrect, improper, improperly placed, confusing, and	a) Accident occurred on November 6, 2008. b) MUTCD edition not identified. c) MUTCD §§ 2C-09 and 2E-18.	Holding that the department was not liable for the exercise of engineering judgment in placing signage and signals; that the department had exercised engineering judgment in placing the signage and signals at issue; that the MUTCD provisions at issue were not mandatory; and that there was no waiver of the transportation department's immunity. Supreme Court of Texas reversed the appellate court's affirmance of the trial court's ruling that	For the DOT.

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
	generally failed to function as intended, of which TxDOT had actual and/or constructive notice.		TxDOT had waived immunity.	
<i>Truman v. Griese</i> , 2009 SD 8, 762 N.W.2d 75 (2009)	Alleged violation of the duty to install traffic control signs pursuant to state law.	<p>a) Accident occurred on February 13, 2004.</p> <p>b) Court applied the 2003 MUTCD.</p> <p>c) MUTCD §§ 2A.03, 2B.05, and 2B.08.</p>	<p>Holding that the State had not waived sovereign immunity regarding any omission of signs that occurred during the initial engineering and design of Four Corners; that the MUTCD signage designs do not require direct adherence; that the MUTCD defers to engineering judgment and studies when making sign placement decisions; and that plaintiff failed to provide specific governing provisions from the MUTCD for intersections such as Four Corners.</p> <p>Court affirmed summary judgment for the defendants, including South Dakota Department of Transportation.</p>	For the State.
<i>Turner v. N.C. Dep't of Transp.</i> ,	Whether failing to abide by the MUTCD's	a) Accident occurred on	Affirmed the opinions and awards of the Full Commission.	For the DOT.

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
733 S.E.2d 871 (N.C. Ct. App. 2012)	taper requirements for closing down traffic lanes was the proximate cause of a collision.	December 29, 2004. b) MUTCD edition not clearly stated or identified. c) MUTCD §§ 2A.01, 2A.04.		
<i>Walters v. Columbus</i> , 2008 Ohio 4258 (Ohio App. 2008)		a) Accident occurred on July 1, 2006. b) MUTCD edition not identified. c) MUTCD §§ 2B.05, 2B.09, 2B.34, and 2C.22.	Holding that a guidance statement, for example, in Section 2B.05, STOP Sign Application, was discretionary; that a sign should be used if engineering judgment indicates that one or more of the listed conditions exists. Reversed the trial court's denial of the City's motion for summary judgment; Held that the City was entitled to immunity under R.C. § 2744.02(A).	For the City.
<i>Warning v. Joliet</i> , 974 N.E.2d 954, 2012 Ill. App. LEXIS 6872012 (App. Ct. 2012)	Whether the crosswalk sign at the scene of the accident met MUTCD standards.	a) Accident occurred on September 5, 2005. b) MUTCD edition not clearly stated or identified. c) MUTCD § 2B.03 and Table 2B-1.	Affirmed trial court's directed judgment in favor of the City.	In favor of the City.

Case & Citation	Claims	a) Date of Accident; b) MUTCD Edition; and c) MUTCD Section(s) at Issue	Decision	Final Outcome
<i>Xiao Ping Chen v. Seattle</i> , 153 Wash. App. 890, 223 P.3d 1230 (Wash. Ct. App. 2009)	Whether the City breached its duty to maintain the crosswalk in a safe condition and whether the MUTCD required it to install additional safety measures at the crosswalk.	a) Accident occurred in February 2007. b) MUTCD edition not clearly stated or identified. c) MUTCD specific provisions not identified.	Summary judgment for the City reversed.	In favor of the Plaintiff. Ultimate outcome not known.
<i>Yonkings v. Piwinski</i> , 2011 Ohio 6232 *P1 (Ohio App. 2011)	Alleged negligent, reckless, or wanton failure to timely repair or replace a downed stop sign or to otherwise warn motorists of the hazardous intersection presented.	a) Accident occurred on July 2, 2007. b) MUTCD edition not identified. c) MUTCD §§ 2B.05 and 2B.05(a).	Reversed the judgment of the trial court denying the Township's and other defendants'/appellants' motion for summary judgment, <i>inter alia</i> , as defendants were entitled to immunity.	For the Township.

TABLE 2

**NEW YORK MUTCD CASES (2005–2012) PROVIDED BY
THE NEW YORK STATE DEPARTMENT OF TRANSPORTATION**

Case & Citation	Issue	MUTCD Section(s) at Issue	Decision	Final Outcome
<i>Blaze v. New York</i> (2012-015-378)	Whether the DOT was required to have left-turn signals for both east-bound and west-bound traffic on Route 5.	Formerly 17 NYCRR §§ 271.2(f), 272.2, 272.16;	Summary judgment for the DOT granted. Plaintiff's claims dismissed.	For the DOT.
<i>Burchard v. New York</i> (2012-018-324)	Whether the DOT is liable for failing to have the appropriate distance, according to the MUTCD, between two signs.	Not Mentioned	Plaintiff's claims dismissed.	For the DOT.
<i>Bensalah v. New York</i> (2012-015-544)	Whether the DOT negligently designed highway Route 32.	17 NYCRR §§ 213.2(a)(1), 213.5(a)(3), 253.2(a)(4)	Judgment as a matter of law for the DOT granted.	For the DOT.
<i>Nichols v. New York</i> (2012-037-039)	Whether the signs at the area of the accident were confusing and not in conformance with the MUTCD.	Not Mentioned	Summary judgment for the DOT granted.	For the DOT.
<i>Politi v. New York</i> (2012-015-535)	Whether the accident was caused by the negligent design, construction, or maintenance of the highway.	17 NYCRR §§ 230.2, 231.3, 231.5	Case dismissed following a trial.	For the DOT.
<i>Giamportone v. New York</i> (2011-039-273)	Whether the construction zone present on the road at the time of the accident constituted a dangerous condition that was a proximate	17 NYCRR § 232.1	DOT's motion for summary judgment denied because triable issues of fact remain.	For the Plaintiff.

Case & Citation	Issue	MUTCD Section(s) at Issue	Decision	Final Outcome
	cause of the accident.			
<i>Pierce v. New York</i> (2011-031-049)	Whether the DOT failed to install proper signs.	Not Mentioned	Summary judgment for the DOT granted.	For the DOT.
<i>Terrazas v. New York</i> (2011-018-222)	Whether the absence of a traffic signal or pedestrian island was the proximate cause of the accident.	17 NYCRR §§ 271.2(e), 271.5, 271.6(c)	Case dismissed following a trial.	For the DOT.
<i>Champney v. New York</i> (2011-038-102)	Whether the DOT failed to comply with the MUTCD in its design and signing of the intersection.	17 NYCRR § 211	Case dismissed following a trial.	For the DOT.
<i>Dispenza v. New York</i> (2010-013-503)	Whether the DOT was negligent in failing to post warnings or take other precautions that would have prevented motor vehicles from coming into contact with still-wet paint on the roadway.	17 NYCRR § 300.3	DOT found liable following a trial because it created a dangerous condition.	For the Plaintiff.
<i>Grevelding v. New York</i> (2010-018-137)	Whether the DOT should have placed a variable message sign on a stretch of highway with accumulated snow.	17B NYCRR § 201.3	Case dismissed following a trial.	For the DOT.
<i>Merklen v. New York</i> (2010-038-102)	Whether the intersection of County Route 1 and State Route 443 was designed in conformance with the MUTCD.	Not Mentioned	Case dismissed following a trial.	For the DOT.

Case & Citation	Issue	MUTCD Section(s) at Issue	Decision	Final Outcome
<i>Olley v. New York</i> (2009-044-018)	Whether the “No Shoulder” sign at the scene of the accident was in compliance with the MUTCD.	17 NYCRR § 234.10	The DOT was found to be 50 percent liable and the plaintiff was found to be 50 percent liable, following a trial.	For the Plaintiff.
<i>Gardner v. New York</i> (2009-018-047)	Whether the DOT should have temporarily reduced the speed limit and placed warning signs at the Park Street Bridge location.	17B NYCRR §§ 201.3, 212.2, 234.9, 239.1	Case dismissed following a trial.	For the DOT.
<i>Shon v. New York</i> (2009-015-515)	Whether the DOT failed to properly maintain the roadway where the accident occurred and erect proper signage warning of the danger.	17 NYCRR § 200.1(c)	The DOT was found to be 50 percent liable and the plaintiff was found to be 50 percent liable following a trial.	For the Plaintiff.
<i>Sittner v. New York</i> (2009-031-502)	Whether the absence of a second “Stop” sign at the intersection of New York State Route 30 and New York State Route 161 was the proximate cause of the accident.	17 NYCRR §§ 211.3(7)(b)(2), 232.4(a)	Case dismissed following a trial.	For the DOT.
<i>NY Central Mutual Fire Insurance Co. v. New York</i> (2008-031-069)	Whether the DOT failed to properly design, construct, maintain, and place appropriate traffic control devices at the intersection that was the scene of the accident.	Not Mentioned	Plaintiff’s motion to file a late claim denied.	For the DOT.
<i>Beaumont v. New York</i>	Whether the DOT properly maintained a	17 NYCRR § 232.4	FedEx was found to be 80 percent liable and	For the Plaintiff.

Case & Citation	Issue	MUTCD Section(s) at Issue	Decision	Final Outcome
(2008-018-643)	"Stop" sign.		the DOT was found to be 20 percent liable.	
<i>Woods v. New York</i> (2008-010-003)	Whether the layout, signage of the exit ramp, and striping of the final curve of the exit ramp were in compliance with the MUTCD.	Not Mentioned	DOT's Motion to Dismiss granted.	For the DOT.
<i>Sanchez v. New York</i> (2008-036-401)	Whether the DOT was negligent for not placing a guide rail or other physical barrier on the median island.	Not Mentioned	Case dismissed following a 2-day trial.	For the DOT.
<i>Melkun v. New York</i> (2007-030-031)	Whether the DOT negligently failed to undertake an adequate study of the design and plan of the rail trail, as well as its final construction in the area where it crosses the State highway, and that the crossing was designed and constructed contrary to proper engineering, traffic and safety practices.	Not Mentioned	Case dismissed following a trial.	For the DOT.
<i>Levine v. New York State Thruway Authority</i> (2006-028-016)	Whether the Authority was required to erect signs making motorists aware of both known and hidden dangers when they drive through a construction site.	Maintenance and Protection of Traffic (derived from the MUTCD)	Authority liable for injuries.	For the Plaintiff.

Case & Citation	Issue	MUTCD Section(s) at Issue	Decision	Final Outcome
<i>Carlo v. New York</i> (2006-030-021)	Whether the DOT failed to properly design and maintain the roadway and install adequate pedestrian crosswalks.	Not Mentioned	Case dismissed following a trial.	For the DOT.
<i>Madore v. New York</i> (2006-030-007)	Whether the DOT negligently designed and maintained the intersection of State Route 9 and Roa Hook Road and deviated from engineering standards.	17 NYCRR §§ 272.11(b), 272.12 (a)	Case dismissed following a trial.	For the DOT.
<i>Schmidt v. New York</i> (2005-013-505)	Whether the DOT failed to maintain the traffic signal at the intersection of Lockport Road and Route 425 such that the signal simultaneously displayed green and red signals.	17 NYCRR §§ 272.9, 272.10(f)(3), 272.11, 272.12	Plaintiff was found to be 60 percent liable and the DOT was found to be 40 percent liable.	For the Plaintiff.
<i>Hinman v. New York</i> (2005-018-463)	Whether the DOT was negligent when it constructed a culvert off the shoulder of State Route 31 without a warning sign, grade cover, or guardrail.	New York State Highway Design Manual § 10.2.1.1	Case dismissed following a trial.	For the DOT.
<i>Wadsworth v. New York</i> (2005-018-458)	Whether the DOT negligently constructed, designed, and maintained the bridge overpass connecting Griffiss Park to Route 49.	New York State Department of Transportation Highway Design Manual §§ 10.4.2, 10.2.2.4(B)	Case dismissed following a trial.	For the DOT.

APPENDIX A



SURVEY QUESTIONS

NCRHP 20-6, Study Topic 19-03
EFFECT OF THE MUTCD ON TORT LIABILITY OF GOVERNMENT
TRANSPORTATION AGENCIES

Agency Name: _____

Name of Employee: _____

Job Title: _____

Contact telephone/cell phone number: _____ / _____

Email address: _____

How many years have you been with the agency? _____

Please attach additional pages as needed to respond to the following questions.

Questions

1. Has the 2009 revision of the Manual on Uniform Traffic Control Devices (MUTCD) been adopted in your state?

YES __ NO __

If your answer is Yes, please state the date or otherwise explain the status of the 2009 MUTCD in your state.

2. Since the 2009 revision of the MUTCD has your agency had any tort claims filed against it involving an alleged violation of the MUTCD?

YES __ NO __

If your answer is Yes, please state:

(a) What were the plaintiff's or plaintiffs' allegations?

(b) Which provisions of the MUTCD were at issue?

A-2

(c) What was the outcome of the case or cases?

(d) Please provide citations to any court decisions in the cases you described.

3. Are there any changes to the 2009 MUTCD that in your agency's opinion may be beneficial in reducing tort claims or verdicts against your agency?

YES __ NO __

If your answer is Yes, please explain.

4. Are there any changes to the 2009 MUTCD that in your agency's opinion that may result in an increase in tort claims or verdicts against your agency?

YES __ NO __

If your answer is Yes, please explain.

5. Has your agency adopted a policy or statement of procedures to be followed concerning how your agency's employees or others acting on behalf of your agency (e.g., a contractor) are to comply with the MUTCD?

YES __ NO __

If your answer is Yes, please provide details and, if possible, a copy of the policy or procedures.

6. When decisions are made regarding whether to install, replace, or change a traffic control device at a given location or to do so as part of a highway safety plan:

(a) Does your agency keep a record showing what the agency considered or evaluated prior to making a decision on the action to be taken?

YES __ NO __

If your answer is Yes, please provide details.

(b) If records are kept do the records state who made the decision and what the basis was for the decision?

YES __ NO __

If your answer is Yes, please provide details.

(c) For how many years are such records retained? _____

7. (a) In your state is your agency potentially liable for failing to respond to a dangerous condition in connection with a highway or related facility involving a traffic control device when the agency has actual or constructive notice of the dangerous condition?

YES __ NO __

(b) Alternatively, does your agency have immunity if the agency fails to correct or give notice of a dangerous condition in connection with a highway or related facility involving a traffic control device?

YES __ NO __

If your answer is Yes either to question 7 (a) or (b), please explain and identify any statute that applies to your agency regarding such dangerous conditions?

8. Under the law of your state or locality, regardless of the provisions of the MUTCD, is there a statutory or judicially imposed duty to install or provide warning signs, pavement markings, speed limits, traffic lights or other devices, barricades, or otherwise?

YES __ NO __

If your answer is Yes, please provide details and citations to any statutes or judicial decisions that state that such a duty exists.

9. In any of the cases before or after the 2009 revision of the MUTCD has any court ruled in a case involving your agency or other public entity to your knowledge that a violation of the MUTCD constituted negligence *per se*?

YES __ NO __

If your answer is Yes, please provide a citation or citation to the cases.

10. In defending cases brought against your agency alleging violations of the MUTCD, either before or after the 2009 revision of the MUTCD:

(a) What defenses has your agency commonly asserted?

(b) Which defenses have been particularly successful from your agency's point of view?

11. Does your state or locality have a tort claims act or similar legislation that applies to tort claims against your agency?

YES __ NO __

(a) If your answer is Yes, please provide a citation or citations.

(b) Does the state or local tort claims act or similar legislation include an exemption from tort liability for a public entity's performance of or failure to perform a discretionary function?

YES __ NO __

(c) If your answer is Yes, please provide a citation or citations.

A-4

12. In addition to a state or local tort claims act applicable to your agency are there other statutes applicable to your agency that:

(a) Exempt your agency specifically in regard to certain highway activities or responsibilities (*e.g.*, installation of warning signs, pavement marking, speed limits, traffic lights or other devices, barricades, or otherwise)?

YES __ **NO** __

(b) Exempt your agency from any claims involving the design of a highway or related features or facilities, *i.e.*, a specific design immunity statute?

YES __ **NO** __

If your answer is Yes to question 12 (a) and/or (b), please provide details.

13. In your state, assuming there is a state or local tort claims act that includes a discretionary function exemption, when the courts interpret and/or apply the exemption in a case involving the MUTCD do your courts follow the United States Supreme Court's interpretation of the Federal Tort Claims Act's discretionary function exemption as developed by any one or more of the following cases:

(a) *United States v. Dalehite*⁵⁹⁰ (establishing the planning versus operational level dichotomy)?

YES __ **NO** __

(b) *Indian Towing v. United States*⁵⁹¹ (holding that discretion is exhausted once the planning-level decision is made)?

YES __ **NO** __

(c) *United States v. Gaubert*⁵⁹² (holding that immune discretion may be exercised at any level of decision-making unless there is a regulatory directive that does not allow for the exercise of discretion).

YES __ **NO** __

If your answer is Yes to question 13 (a), (b), or (c), please provide details and a citation to any cases of which your agency is aware.

14. In addition to or in lieu of a tort claims act do the courts in your state rely on:

(a) The proprietary-governmental test or distinction to determine a transportation or other public agency's tort liability?

YES __ **NO** __

(b) The discretionary-ministerial test of immunity to determine a transportation or other public agency's tort liability?

YES __ **NO** __

⁵⁹⁰ 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), *reh'g denied*, 346 U.S. 841, 880, 74 S. Ct. 13, 117, 98 L. Ed. 362, 386, *reh'g denied*, 347 U.S. 924, 74 S. Ct. 511, 98 L. Ed. 1078 (1954).

⁵⁹¹ 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

⁵⁹² 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

If your answer to question 14 (a) or (b) is Yes, please provide details and a citation to any court decisions of which your agency is aware.

Thank you for your cooperation and for copies of any policies, procedures, or other materials provided with your responses. Please provide copies of any documents by e-mail or on a disk and/or an Internet link if they are available on line.

Please return your completed survey preferably via e-mail to:

**The Thomas Law Firm
ATTN: Larry W. Thomas
1701 Pennsylvania Avenue, N.W., Suite 300
Washington, D.C. 20006
Tel. (202) 465-5050
E-mail: lwthomas@cox.net**

APPENDIX B—SUMMARY OF SURVEY RESPONSES OF TRANSPORTATION DEPARTMENTS

1. Has the 2009 revision of the Manual on Uniform Traffic Control Devices (MUTCD) been adopted in your state?

Of 21 states responding to the survey, 18 states had adopted the 2009 MUTCD⁵⁹³ or in some instances adopted their state's own version of the MUTCD. Of those departments stating that they had adopted the MUTCD seven states had adopted the MUTCD in 2012; five did so in 2011; and one adopted the MUTCD in 2010. Several states also noted that they had adopted a version that is in substantial compliance or conformance with the MUTCD.⁵⁹⁴

For example, Missouri reported that it developed an Engineering Policy Guide (EPG) that has been found to be in “substantial conformance” with the MUTCD by letter dated December 30, 2011, from the Federal Highway Administration. Substantial conformance means that the state MUTCD or supplement shall conform as a minimum to the standard statements included in the National MUTCD. *See* 23 C.F.R. 655.603(b)(1). In Missouri, the Commission has not adopted the National MUTCD since 2001.

2. Since the 2009 revision of the MUTCD, nine state transportation departments reported that there had been tort claims filed against the department that involved an alleged violation of the MUTCD.⁵⁹⁵ Nine departments reported that there had been no claims filed against the department since the 2009 edition.⁵⁹⁶

Departments having claims were asked to provide information regarding the (a) plaintiff's or plaintiffs' allegations; (b) provisions of the MUTCD that were at issue; (c) outcome of the case or cases; and (d) citations to any court decisions.

Arkansas

Arkansas reported that there had been one case regarding improper placement of a sign during temporary construction or maintenance operations, which involved Part 6 of the MUTCD; a case whose outcome the department said had “favorable and unfavorable” aspects.

⁵⁹³ Responses of Arizona DOT (adopted on Jan. 13, 2012, as modified by the Arizona Supplement to the 2009 MUTCD, available at [http://azdot.gov/docs/business/arizona-supplement-to-the-manual-on-uniform-traffic-control-devices-\(2009-mutcd-edition\).pdf](http://azdot.gov/docs/business/arizona-supplement-to-the-manual-on-uniform-traffic-control-devices-(2009-mutcd-edition).pdf)); Arkansas Highway and Transportation Department (stating that the “Arkansas Highway Commission, in 2004, formally adopted the latest edition of the MUTCD and all current and future updates, revisions or new editions approved by the FHWA”); Caltrans (Jan. 13, 2012); Washington State DOT (Dec. 19, 2011); Iowa DOT (reporting that the 2009 MUTCD has been adopted as administrative rule with exceptions. *See* 760 IOWA ADMIN. CODE 130.1); Kansas DOT (Dec. 16, 2011); Mich. DOT (adopted on Dec. 1, 2011, a Michigan version of the MUTCD that is in substantial compliance with the MUTCD); Nebraska Department of Roads (Apr. 26, 2012); Nevada DOT (*citing* NEV. REV. STAT. § 484A.430 and NEV. ADMIN. CODE § 408.144); New Hampshire DOT (Jan. 2012); New York State DOT (2010); Oklahoma DOT (Apr. 2, 2012); Pennsylvania DOT (Feb. 2012); Texas DOT (stating that its MUTCD, adopted on Dec. 8, 2011, is in “substantial compliance” with the 2009 national MUTCD); Wisconsin DOT (May 25, 2011); and Virginia DOT (Jan. 1, 2012). The Virginia DOT's response to the survey included a disclaimer stating that “[t]he responses provided to this survey do not constitute a legal opinion nor represent the opinion of attorneys for the agency.”

⁵⁹⁴ Responses of Indiana DOT (stating that Indiana adopted “an Indiana version of the 2009 MUTCD in November 2011” that was revised in Oct. 2012); Ohio DOT; Michigan DOT; Missouri Highway and Transportation Commission (adopted an Engineering Policy Guide); Texas DOT; Utah DOT (stating that in Jan. 2012 the Utah MUTCD was found to be in substantial compliance with the national 2009 MUTCD); and Washington State DOT (stating that the MUTCD was “adopted with modifications” by the department on Dec. 19, 2011).

⁵⁹⁵ Responses of Arkansas Highway and Transportation Department, Caltrans, Kansas DOT, Iowa DOT, Indiana DOT, New York State DOT, Pennsylvania DOT (stating that the cases are numerous and that the department does not have records to provide information on claims), Washington State DOT, and Wisconsin DOT.

⁵⁹⁶ Responses of Alabama DOT, Michigan DOT, Nebraska Department of Roads, Ohio DOT (stating that it is not an “MUTCD state”), Oklahoma DOT, New Hampshire DOT, Texas DOT, Utah DOT, and Virginia DOT.

California

Caltrans reported on two cases identified as cases A and B. In case A, the

plaintiff alleged there should have been a “Narrow Bridge Ahead” sign on a highway running along a cut slope, elevated from surrounding area and flanked on either side by [a] guardrail. Plaintiff’s attorney apparently believed this made the area a bridge. Plaintiff sought to show Caltrans [was] liable based on non-compliance with the “applicable standards,” which were assumed to include the MUTCD.

At issue in case A was Section 2C.20, Narrow Bridge Sign (W5-2). Caltrans’ motion for summary judgment was denied “when plaintiff’s expert declared the location did not meet unspecified ‘standards,’” which are assumed to include the MUTCD. The case was ultimately settled. There is no citation for case A.

In case B the plaintiff “alleged [that] the W54 pedestrian crossing signs placed in advance of the crosswalk [were] deficient and substandard.” At issue was the 2006 California MUTCD, Section 2C.41, Pedestrian Warning Sign (W11A-2). The court granted Caltrans’ motion for summary judgment.⁵⁹⁷

Kansas

Kansas reported that it has had:

- Two cases alleging that temporary striping on an Interstate did not comply with the MUTCD.
- Two cases alleging that a pilot car operation was not signed in accordance with the MUTCD.
- One case alleging that a railroad crossing was not signed according to the MUTCD.
- One case alleging that a divided highway intersection was not signed nor striped according to the MUTCD.
- One case alleging that a stop-controlled intersection was not signed in accordance with the MUTCD.

As for the sections of the MUTCD that were at issue, Kansas explained that

[t]he temporary striping on Interstate cases involved 6A.01, 6F.77, 6F.78 and 3B.04. The pilot car operation cases involved 6A.01, 6F.58, 6C.13, and Notes and Figure for 6H-10. The plaintiff never made precise allegations concerning which MUTCD provisions were violated in the railroad crossing case. The cases involving the divided highway intersection and the stop controlled intersection have not reached the point in discovery where allegations concerning which MUTCD provisions were violated is known.

As for the outcome of the cases, the cases involving the temporary striping on an Interstate were settled; the two cases involving a pilot car operation resulted in defense verdicts; the case involving traffic control at a railroad crossing was dismissed with prejudice by the plaintiff; and the remaining two cases are currently in litigation. None of the cases has resulted in any appellate decisions.

⁵⁹⁷ Salas vs. Dep’t of Transp., 198 Cal. 4th 1058, 129 Cal. Rptr. 3d 690 (Cal. App. 2011).

Indiana

Indiana reported having cases that involved allegations of negligent design, negligent maintenance, negligent signage, flooding, and signage blocked by vegetation. At issue were MUTCD provisions on highway design, maintenance, and repair, as well as signing and grade intersection markings. No other details were provided.

Iowa

Iowa has had an unspecified number of claims but reported there are as yet no appellate decisions.

Missouri

Missouri, on the other hand, reported that the department has

had more than 140 cases involving tort claims filed since 2009. We do not track cases specifically by allegations of negligence because what we normally see in pleadings [making] numerous allegations of negligence, *i.e.*, there was a dangerous condition and the state failed to fix it or warn of it. Sometimes the allegation will specifically state that [an] EPG or MUTCD standard was violated, but many times the allegations in the petition are fairly general.

New York

The New York DOT provided a list of cases (see Appendix A to the digest) that are “accessible through the New York Court of Claims.” The department noted that in general, New York law favors state actors when they are exercising discretion.

Texas

Texas stated that the department has not been sued “very much over MUTCD standards,” but that the department does “see it being raised a lot in lawsuits against our contractors in construction zone cases. Contractors have immunity from liability under Texas Civil Practice and Remedies Code 97.002” (limit on liability of certain highway, road, and street contractors). The department advised that the “TxMUTCD is specifically referenced in the contract documents as a controlling authority for traffic control devices and procedures, and we have seen Plaintiff’s counsel becoming very creative in cherry picking clauses and general standards to show [that] the contractor was NOT in compliance with the MUTCD.”

Washington

The Washington State DOT reported that in its cases the plaintiffs’ allegations involved failure to sign properly, failure to install signal channelization, curve warnings, and sign placement. At issue in the cases were Chapter 2 and “chapter 4 warrants.” The department reported that “most cases settle prior to trial because of joint and several liability and the risk incurred by ‘should’ statements being perceived by juries as ‘shall’” statements.

Wisconsin

The Wisconsin DOT reported that

[t]he state routinely receives notices of claim in which the plaintiffs allege some defect in signing, generally. Typically, specific provisions of the MUTCD are not cited as being applicable in the notice of claim and pleading stages of a case where we would have records of the specific MUTCD violation allegations.

In the case files we reviewed for purposes of responding to this survey, problem driver behavior appeared to be the cause of a crash.

For example, in one case, a group of young men driving down an interstate decided to write notes on paper to induce a woman in a nearby car to call them. Digging around in the car for paper, the driver failed to notice a stopped semi truck on the highway and collided with the rear end of the truck at highway speed killing 3 of the 4 passengers. The plaintiffs have alleged that insufficient advance notice of construction on the highway caused their injuries/deaths.

In another case a trucking company alleges that a bridge with clearance well above the 14'6" minimum for signing was struck by an oversized load on a truck that failed to follow its prescribed permit route. The trucking company alleges, incorrectly, that the bridge should have had clearance signing. This claim will probably include an evaluation of Section 2C.27 Low Clearance Signs (W12-2 and W12-2a).

Several other cases involve inattentive drivers who entered intersections without regard to stop or yield signs and [were] injured. They allege the signs were negligently installed or maintained.

None of these cases have been advanced to trial at this point.

3. Transportation departments were asked whether in their opinion there were changes to the 2009 MUTCD that may be beneficial in reducing tort claims or verdicts against the department.

Ten departments answered affirmatively,⁵⁹⁸ but 10 departments responded that the revised MUTCD would not be beneficial in reducing claims or verdicts against the department.⁵⁹⁹ One department did not respond to the question.⁶⁰⁰

Alabama

Alabama stated that there could be a “[p]ossible reduction due to clarification of horizontal alignment curve warning signs,” citing Sections 2C.05, 26.06, 2C.07, and 2C.08, and Tables 2C-4 and 2C-5.

Arizona

Arizona stated that “[t]he changes in Revisions 1 & 2 modifying the definition of Standard and the application of engineering judgment are helpful.”

California

Caltrans reported that beneficial changes are

[t]he inclusion of some traffic control devices (and their policies) into the 2009 MUTCD and subsequently adopted by California [that] reduces tort liability when those devices have been prevalent and in use on the roadways but were not included in previous manuals nor accepted as official policy. The newly included devices falling into this category are the ones that aren't necessarily new but FHWA through Synthesis studies identified them as most commonly used and their inclusion in the MUTCD encourages uniformity. For example, a number of new warning signs were included in Chapter 2C.

⁵⁹⁸ Responses of Alabama DOT, Arizona DOT, Caltrans, Indiana DOT, Kansas DOT, Nebraska Department of Roads, New York State DOT, Virginia DOT, Washington State DOT, and Wisconsin DOT.

⁵⁹⁹ Responses of Arkansas Highway and Transportation Department, Iowa DOT, Nevada DOT, Ohio DOT, Oklahoma DOT, Michigan DOT, New Hampshire DOT, Pennsylvania DOT, Texas DOT, and Utah DOT.

⁶⁰⁰ Response of Missouri Highway and Transportation Commission.

Indiana

Indiana also stated that

revisions 1 and 2 to the 2009 MUTCD, issued in May of 2012, will have the effect of reducing the potential for liability. With respect to revision 1, the 2011 Indiana MUTCD had its own definition of Standard, but it is anticipated that the revised definition in the 2009 MUTCD will also help to support the agency's position in a tort claim. As far as revision 2, the elimination of 46 compliance deadlines in the 2009 National (and 2011 Indiana) MUTCD will support the agency's position in a potential tort claim concerning those traffic control devices where a specific compliance deadline was eliminated.⁶⁰¹

Nebraska

Nebraska stated that the 2009 MUTCD clarified the definitions of the terms "standard," "guidance," "option," and "support," and clarified the relationship between these terms and the terms "shall," "should," and "may." Also, the department said that the "[a]ddition of sentence 05 in Section 2A.19 is helpful."

Wisconsin

Wisconsin noted that it had had "concerns with mandatory date of compliance provisions in the original 2009 MUTCD."

4. Thirteen transportation departments reported that in their opinion there were changes to the 2009 MUTCD that may result in an increase in tort claims or verdicts against the departments.⁶⁰²

Alabama

Alabama cited the "[r]equirement for increase in sign sizes and increase in letter heights which will increase costs."

Arizona

Arizona's response specifically identified the following: standards requiring 85th percentile speeds in addition to other speeds; requirements for additional and larger regulatory signs at intersections; new standards on minimum sign sizes; Table 2C.5 on mandatory curve signing; and requirements for added traffic signal faces.

California

In Caltrans' view, the

use of various horizontal alignment signs has been changed from option to a speed criteria which results in some warning signs being recommended (as opposed to optional in [the] previous MUTCD) and others even [being] required (as opposed to optional in [the] previous MUTCD). In addition to these changes, warning signs in the field need to comply with this new policy by 2019. The ball-bank criteria used to determine comfortable speeds on curves has been changed to 12/14/16 changing and increasing warning speeds on curves with a potential for motorists to inadvertently go faster on the curve not knowing that the [change in criteria] increased the warning speed not any physical change on the roadway. This change is for criteria developed in 1930s and motorists have been accustomed to it since the 1930s. Before implementing this criteria, agencies will need public media outreach campaigns and education before making changes to signs on roadways.

⁶⁰¹ Response of Indiana DOT.

⁶⁰² Responses of Alabama DOT, Arizona DOT, Caltrans, Indiana DOT, Kansas DOT (referring to its answer to question 3), Nebraska Department of Roads, New Hampshire DOT, New York State DOT, Ohio DOT, Texas DOT, Virginia DOT, Washington State DOT, and Wisconsin DOT.

B-6

Indiana

Indiana stated that there are many new standards and guidance statements in the 2009 MUTCD that increase the potential for liability. The department said that “[o]ne example is the new guidance statement that guardrail have delineators. ...INDOT has a substantial inventory of guardrail and the overwhelming majority of this guardrail is without delineators.”

Kansas

Kansas stated:

Standard provisions that do not provide the specific traffic control to be provided should be eliminated. For instance, the provision of 6A.01 (which has been in the manual for a number of versions) provides that “the needs and control of all road users shall be an essential part of highway construction...” Thus, when a person is injured in the temporary traffic control zone, they always allege that their needs were not met and were not an essential part of the highway construction. 6A.01 doesn’t tell a highway agency how to sign a construction zone. Therefore, whether the provision has been violated or not is left to a jury.

Missouri

Missouri stated that “[t]here are a lot more ‘shall’ conditions in the 2009 version than earlier versions. Some of the engineers believe this is not helpful to our defense of lawsuits since we have less discretion in the field to use engineering judgment.”

Nebraska

Nebraska stated that the “[r]emoval of guidance from Section IA.09 stating that the manual should not be considered a substitute for engineering judgment eliminates an effective argument. Addition of minimum retroreflectivity could result in more tort claim or verdicts.”

New Hampshire

New Hampshire identified curve/turn sign standards and the requirement of a speed study for setting speed limits.

New York

New York stated that “rigid standards provide a *prima facie* case of liability.”

Texas

The Texas DOT said that it expected an increase in claims because of “[t]he substantial increase in the number of SHALL statements (44%).”

Virginia

As noted, the Virginia DOT’s response to the survey included a disclaimer stating that “[t]he responses provided to this survey do not constitute a legal opinion nor represent the opinion of attorneys for the agency.” Furthermore, the DOT’s response stated that “[w]ithout admitting potential liability or commenting on the validity of any claim, it is possible that the following could result in increased claims....”

The MUTCD imposes specific compliance dates for various requirements/sections. (See 22nd paragraph, Introduction and Table I-2) By imposing specific compliance dates instead of allowing for flexibility in programmatic replacement of devices based on end of service life or engineering judgment, the

revised MUTCD could potentially result in meritless claims associated with a failure to meet specified deadlines, even when circumstances or situations would not necessarily warrant compliance by the specified date. For instance, see the compliance date of December 31, 2019 for Sections 2C.06 through 2C.14 (Horizontal Alignment of Warning Signs).

Washington

The Washington State DOT identified “the risk in shall statements/standards for lesser priority control elements; modification of retroreflectivity requirements; lack of ability to prioritize modifications in dramatically reduced budget scenarios; [and] increasing requirements that have limited safety benefit, but can be construed by plaintiff’s expert as such.”

5. Twelve transportation departments reported that their agency had adopted a policy or statement of procedures to be followed concerning how the department’s employees or others acting on behalf of the department (e.g., a contractor) are to comply with the MUTCD.⁶⁰³ Eight departments had not adopted such a policy or statement of procedures.⁶⁰⁴

Arizona

According to Arizona,

Construction projects that were designed under the requirements of the 2003 MUTCD contained provisions in their contract documents stating that the 2003 MUTCD applied to the execution of that project. Similarly, projects that were designed under the requirements of the 2009 MUTCD contained provisions in their contract documents stating that the 2009 MUTCD applied to the execution of that project. Other operations and maintenance activities switched over to the 2009 MUTCD as of the adoption date (January 13, 2012).

Arkansas

Arkansas reported that “[t]he Arkansas Highway and Transportation Department Standard Specifications for Highway Construction Ed. 2003, Divisions 600 & 700, require contractor compliance with the MUTCD.”

Missouri

Missouri reported that “[a]s to our construction contractors and permit holders: http://www.modot.org/business/standards_and_specs/Sec0616.pdf” is applicable. The link is

to Section 616.4.1 of the Missouri Standard Specifications (Temporary Traffic Control) and the section reads that “performance and operational aspects of the devices shall be in accordance with the latest editions of the MUTCD.” Our internal employees are instructed to comply with the EPG. The National MUTCD and other national publications may also be used for guidance.

Indiana

Indiana reported that the following policies or practices encourage compliance with the MUTCD:

⁶⁰³ Responses of Arizona DOT, Arkansas Highway and Transportation Department, Iowa DOT, Indiana DOT, Michigan DOT, Nevada DOT (stating that the department complies with NEV. REV. STAT. § 484A.430 and NEV. ADMIN. CODE § 408.144), New York State DOT (citing Highway Design Manual), Ohio DOT, Texas DOT, Utah DOT, Virginia DOT, and Wisconsin DOT.

⁶⁰⁴ Responses of Alabama DOT, Caltrans, Kansas DOT, Nebraska Department of Roads, Oklahoma DOT, New Hampshire DOT, Pennsylvania DOT, and Washington State DOT (stating, however, that a policy or procedure was part of the department’s “standards/specifications/design manual”).

B-8

- The Indiana Design Manual (IDM) recommends that INDOT designers and our consultants refer to the MUTCD for proper selection and detailing of permanent and temporary traffic control devices.
- Our standard electronic (excel based) program for performing traffic signal studies (warrant analysis) incorporates all the MUTCD warrant criteria. Our policy on signal study preparation and QA review requires output from this program and ties INDOT's Traffic Engineering staff to compliance. The policy directly refers to [the] Indiana Code that incorporates the MUTCD.
- INDOT's Standard Construction Specifications incorporate the MUTCD with regard to temporary traffic control devices, signing, and pavement markings. So INDOT's contractors are also obligated to comply.
- INDOT's Work Zone Traffic Control Guidelines provides requirements and recommendations for INDOT performed maintenance work. It is based on and refers to the MUTCD.

Iowa

Iowa referred to Sections 1107.09 and 2528.01 of the Iowa DOT Standard Specifications for Highway and Bridge Construction (2012).

Michigan

Michigan observed that state "law requires all highway agencies to follow the Michigan version of the MUTCD."

Texas

Texas stated that "[e]xisting state law requires all traffic control devices to be compliant with the Texas MUTCD (Texas Transportation Code Section 544.002)."

Wisconsin

Wisconsin advised that "[r]eferences to applicable MUTCD provisions and other engineering standards are routinely incorporated into WisDOT policies and manuals. The MUTCD is specifically referenced in the manuals that are attached or linked" to the WisDOT Traffic Guidelines Manual, available at http://dotnet/dtid_bho/extranet/manuals/tgm/tgm.pdf.

However, as for departments not having adopted a policy or statement of procedures:

California

Caltrans' response was that there are not

any specialized criteria developed by California. [The] California MUTCD relies on the definition, meaning, explanation and interpretation of the Standard, Guidance, Option, Support, substantial conformance and compliance, including compliance dates set forth in the National MUTCD. [The] California DOT does exercise authority under [the Cal. Vehicle Code] 21400 and 21401 to publicize the adoption of the new version of MUTCD[] every time it occurs.

Kansas

Kansas stated that it "does not have a policy or statement of procedures to be followed [on] how to comply with the MUTCD. KDOT does utilize a highway sign manual, which is based on the MUTCD, for mainte-

nance personnel. Additionally, highway design plans, construction contracts, and other highway use permits require that there be compliance with the MUTCD.⁶⁰⁵

6. (a) Thirteen transportation departments reported that when decisions are made regarding whether to install, replace, or change a traffic control device at a given location or to do so as part of a highway safety plan the department keeps a record showing what the agency considered or evaluated prior to making a decision on the action to be taken.⁶⁰⁶ Four departments reported that such records are not kept,⁶⁰⁷ and four departments stated that whether to keep records depends on the circumstances or did not respond to the question.⁶⁰⁸

Agencies keeping records stated:

Alabama

Alabama reported that “[e]xamples of documentation include traffic warrant studies, speed studies, and design calculations.”

California

Caltrans stated that “[t]he evaluation, decisions and records should be documented in Traffic Investigation Reports.”

Indiana

Indiana reported that:

Changes in intersection control, parking restrictions, speed limits and lane control are documented through the Official Action (Executive Order) process. Requests for non-standard signs are accompanied by a description and need for the sign. Roadway Safety Audits (studies) on specific locations may lead to [a] change in traffic control devices—the reasoning will be given in a report. Some programmatic, state wide safety initiatives are undertaken after study—INDOT will have records for these initiatives. Other initiatives are undertaken based on recommendations and research findings done on a national level.

Iowa

Iowa referred to Sections 1107.09 and 2528.01 of the Iowa DOT Standard Specifications for Highway and Bridge Construction (2012).

Kansas

Kansas reported, “[a] traffic study or analysis with recommendations is completed. When KDOT’s design personnel are involved with traffic control changes, the appropriate department keeps records concerning the change.”

⁶⁰⁵ Response of Kansas DOT.

⁶⁰⁶ Responses of Alabama DOT, Caltrans, Indiana DOT, Iowa DOT, Kansas DOT, Michigan DOT, Missouri Highway and Transportation Commission, New York State DOT (stating that the project file reflects the basis for the decision), Oklahoma DOT, Pennsylvania DOT, Utah DOT, Virginia DOT, and Washington State DOT.

⁶⁰⁷ Responses of Arizona DOT, Arkansas Highway and Transportation Department, Nevada DOT, and New Hampshire DOT.

⁶⁰⁸ Responses of Ohio DOT, Nebraska Department of Roads (no response), Texas DOT, and Wisconsin DOT.

B-10

Michigan

Michigan reported that “[i]f work is done per a contract, records regarding the development of the plans are maintained until the letting of the project. If work is done by State forces or a contract agency, the reason for the work is documented on the work order.”

Missouri

Missouri said that “[t]he engineers are encouraged to keep records of their engineering study or evaluation process. The only time they are required to keep record is part of our Fatal Crash Review process.”

Pennsylvania

Pennsylvania stated that “standard traffic engineering forms were developed. The forms document the rationale for installing, replacing, or changing” traffic control devices.

Texas

Texas observed that “[i]t depends upon the type of traffic control device and the status of the location. There is no requirement to keep records for all devices installed. Local offices do document this type of information for justification purposes—especially traffic studies [and] signal warrants.”

Utah

Utah reported that “Traffic Studies are typically completed on these items. Also, Traffic Engineering Orders are established for some items.”

Washington

The Washington State DOT stated that “for traffic signs, WSDOT conducts nighttime sign reviews to determine if [a] sign lacks proper retroreflectivity [or is] missing or damaged.”

Wisconsin

Wisconsin, on the other hand, explained that: “It depends. ...If the decision requires an engineering study or evaluation, there may be documentation. If the decision simply involves application of agency standards, no documentation would be created. If an exception to standards is approved, documentation is required.”

As for agencies not keeping records:

Arizona

Arizona stated that “[i]n general, no.”

In limited situations where compliance with a Guidance or Standard is infeasible, documentation of a variance is sometimes provided on plans or drawings. For example, where the location of a warning sign cannot conform to Table 2C-4 (such as a W4-1 merge warning sign where the distance in the table would place it in advance of the exit ramp), a note is made in the plans of the variance.

(b) Fifteen Transportation departments also reported that when records are kept the department keeps a record of who made the decision and what the basis was for the decision.⁶⁰⁹ Other departments indicated that they do not keep a record of such information.⁶¹⁰

Alabama

Alabama noted that “[s]tudies and designs provided by consultants require a professional engineer stamp,” and that ALDOT has a Records Retention Policy.

Arizona

Arizona stated that “[p]lans typically have an engineer’s seal or other approval signature.”

California

Caltrans stated that “[t]he Traffic Investigation Reports should be signed by licensed engineers. The decisions should be based on the current standards, guidelines and engineering judgment.”

Indiana

In Indiana “[i]n general the documentation will show who made the decision or authorized [it] and why the decision was made.” The department’s “record retention period is 3 years although in many cases records will actually be kept for a longer period of time.”

Kansas

In Kansas the records maintained “contain the name of the individual or the department making the decision.” As for the retention period, it “varies according to retention and disposition schedules.”

Michigan

Michigan stated that its “records will indicate who the project manager was for the contract or who the authorizing person was if done by work order. The basis for decision, beyond meeting new requirements in the MUTCD, may not be documented.”

Utah

Utah reported that “[t]he traffic studies state the basis for the decision and are signed by the engineer.”

Wisconsin

Wisconsin explained that “[f]ormal decisions are not issued. Rather, the decisions would be documented in diaries, email messages, or other documentation in many instances.” Moreover,

[i]f the decision requires an engineering study or evaluation, there may be documentation. If the decision simply involves application of agency standards, no documentation would be created, but the fact that a decision was made may be reflected in diaries, email messages, plans, or other documents. If an exception to standards is approved, documentation is required.⁶¹¹

⁶⁰⁹ Responses of Alabama DOT, Arizona DOT, Caltrans, Indiana DOT, Iowa DOT, Kansas DOT, Michigan DOT, Missouri Highway and Transportation Commission, New York State DOT, Pennsylvania DOT, Texas DOT, Utah DOT, Virginia DOT, Washington State DOT, and Wisconsin DOT.

⁶¹⁰ Responses of Arkansas Highway and Transportation Department, Nevada DOT, Oklahoma DOT, and New Hampshire DOT.

⁶¹¹ Response of Wisconsin DOT.

(c) The number of years that such information is maintained varied from department to department, ranging from 3⁶¹² to 5,⁶¹³ 7,⁶¹⁴ or 10⁶¹⁵ years or for an unlimited time,⁶¹⁶ but one department stated that records are retained until reconstruction.⁶¹⁷ The Arizona DOT reported that “[p]lans are retained indefinitely.” Iowa noted that the “traffic control daily diary is made part of the permanent project records.” The Virginia DOT’s response was that records are kept “[i]ndefinitely for speed limits and truck restrictions; [that the period] varies for other traffic studies, but three years is a typical limit, unless a different period is required under law or by the agency/state retention policies.”

7. (a) Eighteen transportation departments stated that in their state the department is potentially liable for failing to respond to a dangerous condition in connection with a highway or related facility involving a traffic control device when the agency has actual or constructive notice of the dangerous condition.⁶¹⁸ Only three departments stated that they were not potentially liable under the aforesaid circumstances.⁶¹⁹

Indiana

The Indiana DOT stated that its state “established this policy via common law, not statutorily.”

Nebraska

Nebraska stated that “Neb Rev Stat § 81-8, 219(9) denies sovereign immunity if the condition is not corrected by the governmental entity within a reasonable time.”

Nevada

The Nevada DOT reported:

Pursuant to NRS 41.033, no action may be brought against the State which is based upon: (a) A failure to inspect any building, structure, vehicle, street, public highway, or other public work, facility, or improvement to determine any hazards, deficiencies, or other matters, whether or not there is a duty to inspect; or (b) A failure to discover such hazard, deficiency, or other matter, whether or not an inspection is made.

The department stated that there is

Nevada case law holding that the State is immune from suit for negligence with respect to dangerous conditions of which it does not have notice. However, there also exists Nevada case law holding that the State’s immunity does not apply to a failure to act reasonably after learning of a hazard or to operational functions, such as the duty to maintain a stop sign.

⁶¹² Response of Indiana DOT.

⁶¹³ Responses of Oklahoma DOT (minimum of 5 years, then retained pursuant to the policies of the Oklahoma Department of Libraries); Texas DOT (“on average, records are kept for five years”); and Utah DOT (then “archived”).

⁶¹⁴ Responses of Michigan DOT, Missouri Highway and Transportation Commission, and Wisconsin DOT.

⁶¹⁵ Response of Caltrans.

⁶¹⁶ Responses of Pennsylvania DOT (“infinity”) and Washington State DOT.

⁶¹⁷ New York State DOT.

⁶¹⁸ Responses of Alabama DOT; Arizona DOT; Arkansas Highway and Transportation Department; Caltrans (citing CAL. GOV’T CODE § 835); Iowa DOT; Missouri Highway and Transportation Commission; Nebraska Department of Roads; Ohio DOT; Oklahoma DOT (citing OK. STAT. tit. 51 § 155(15), and tit. 51, § 155(5)); New Hampshire DOT; New York State DOT; Pennsylvania DOT; Texas DOT (stating that “Texas Civil Practice and Remedies Code section 101.060 specifically addresses the basis and extent of tort liability for Traffic Control devices and their initial placement and malfunctions once placed”); Utah DOT; Virginia DOT; Washington State DOT; and Wisconsin DOT.

⁶¹⁹ Responses of Alabama DOT, Indiana DOT, and Michigan DOT.

New Hampshire

New Hampshire stated that “there is limited liability, and sovereign immunity until notified of a deficiency, but we need to develop a plan to correct within 4 days.”

Pennsylvania

Pennsylvania stated that “case law requires highways to be kept reasonably safe for [their] intended, foreseeable use.”

Virginia

The Virginia DOT explained that

[w]ithout admitting or denying that the agency would be liable in the situations described, ...the Virginia General Assembly has chosen to waive the sovereign immunity of the Commonwealth only to the extent set forth in the Virginia Tort Claims Act, (*see* § 8.01-195.1 *et seq* of the Code of Virginia); otherwise sovereign immunity is preserved.

(b) Six departments reported that their departments have immunity when the agency allegedly fails to correct or give notice of a dangerous condition in connection with a highway or related facility involving a traffic control device,⁶²⁰ whereas eight departments reported that they did not have immunity in such circumstances.⁶²¹ Four departments did not respond specifically to the question but in some instances provided additional information as discussed below.⁶²² Three departments did not answer this part of the question.⁶²³

For those responding that they did not have immunity but that provided additional information:

Arkansas

In Arkansas, the department has immunity in circuit court pursuant to Art. 5, § 20 of the Arkansas Constitution. However, the State Claims Commission has jurisdiction under Ark. Code Ann. 19-10-204 and could find liability “under these circumstances.”

California

Caltrans stated that it depends on the traffic control devices and cited Government Code Section 830.4 (failure to provide traffic control signals or signs); Government Code Section 803.6 (design immunity); and Government Code Section 803.8 (failure to provide traffic or warning signals).

8. Thirteen departments reported that under the law of their state, regardless of the provisions of the MUTCD, there is a statutory or judicially imposed duty to install or provide warning signs, pavement markings, speed limits, traffic lights or other devices, barricades, or otherwise.⁶²⁴

⁶²⁰ Responses of Alabama DOT; Arkansas Highway and Transportation Department; Iowa DOT (*citing* IOWA CODE § 668.10(1)(a)); Michigan DOT (*citing* MICH. COMP. LAWS § 691.1407); Nebraska Department of Roads (stating that “Neb. Rev. Stat. § 81-8,219(9) denies sovereign immunity if the condition is not corrected by the governmental entity within a reasonable time”); Oklahoma DOT (*citing* OK. STAT. tit. 51, § 155(15) and tit. 51, § 155(5)).

⁶²¹ Responses of Arizona DOT, Missouri Highway and Transportation Commission (*citing* MO. REV. STAT. 537.600), Ohio DOT, New Hampshire DOT, Pennsylvania DOT, Texas DOT, Utah DOT, and Washington State DOT.

⁶²² Caltrans, Indiana DOT, New York State DOT, and Wisconsin DOT.

⁶²³ Kansas DOT, Nevada DOT, and Virginia DOT (referring to its answer to part (a) of the question).

⁶²⁴ Caltrans; Arkansas Highway and Transportation Department (*citing* ARK. CODE ANN. 27-65-107, (14), (16), and ARK. CODE ANN. 27-52-101, *et seq.*); Indiana DOT (*citing* IOWA CODE §§ 9-21-4-2, 9-21-3-4, 9-21-3-6, and 9-13-2-117 (defining a traffic control device); Kansas DOT (*citing* KAN. STAT. ANN. § 8-2003, KAN. STAT. ANN. § 8-2004, and § 8-2005); Ohio DOT (*citing* OHIO REV. CODE §§ 4511.10, 4511.11, 4511.21, 4511.09, and 5501.31); Michigan DOT (*citing* the Michigan

B-14

California

Caltrans stated that such a duty exists “[n]ot specifically, but in general,” and that “Street and Highway Code Section 27 impose[s] a general duty to maintain road in safe condition, but the specifics are left to the discretion of highway authorities....”

Iowa

Iowa reported that there

are three exceptions to immunity for failure to place a traffic control device recognized in *McLain v. State*, 563 N.W.2d 600, 604 (Iowa 1997):

- (1) failure to maintain a device;
- (2) installation of a misleading sign; and
- (3) where the exigencies are such that ordinary care would require the State to warn of dangerous conditions by other than inanimate objects.

New Hampshire

New Hampshire advised there is potential liability regardless of the MUTCD “only for speed limits (RSA 265:60 for work zone speed limits, which is probably consistent with [the] MUTCD).”

Virginia

The Virginia DOT answered the question in some detail:

Virginia statutes have been modified to address many requirements of the MUTCD and/or to adopt the MUTCD. The law is crafted to mirror or ensure non-conflict with the MUTCD and in some cases dictates use of signs, etc.... Overall, § 33.1-12 of the Code of Virginia generally provides the Commonwealth Transportation Board with the duty and authority to promulgate regulations governing traffic and pursuant to that statutory duty and authority the CTB has adopted a regulation adopting the MUTCD. (See 24 VAC 30-315-10.) In addition, § 46.2-830 of the Code of Virginia provides that the Commissioner of Highways may classify, designate, and mark state highways and provide a uniform system of traffic control devices for such highways under the jurisdiction of the Commonwealth and that such system of traffic control devices shall correlate with and, so far as possible, conform to the system adopted in other states.

There are also sections in the Code of Virginia that establish specific requirements for traffic signage. For instance, there are requirements for speed limit signs when speeds depart from statutory default speeds. The list below may not be exhaustive but provides examples of statutes that set forth requirements related to this question.

The Virginia DOT provided citations to statutes concerning any duty with respect to speed limit signs that include Code of Virginia Sections 46.2-800.2, 46.2-804, 46.2-873, 46.2-873.1, 46.2-877, 46.2-878, 46.2-878.2, 46.2-883, and 46.2-1300. As for the duty to install or provide warnings signs, barricades, and other

Vehicle Code, MICH. COMP. LAWS 257.1, *et seq.* that “requires MDOT to place traffic control devices as it shall deem necessary,” and MICH. COMP. LAWS 257.609); Oklahoma DOT (only “Merge Now,” “Slow Traffic Right Lane,” “Speed Limits,” “School Zone Speed Limits,” and county road speed limits are county wide at department’s entry points); New Hampshire DOT; Pennsylvania DOT (stating that “case law requires highways to be kept reasonably safe for intended, foreseeable use (*citing* Snyder v. Harmon, 562 A.2d 307 (Pa. 1984)); Texas DOT (stating that “State law requires all traffic control devices to be compliant with the Texas MUTCD (Texas Transportation Code Section 544.002”)); Virginia DOT; Washington State DOT (*citing* WASH. REV. CODE ch. 47.36.030); and Wisconsin DOT.

devices, the department referred to sections of the Code of Virginia “that may be somewhat responsive,” including Sections 33.1-210, 46.2-806, 46.2-1104, 46.2-1110, and 46.2-1312.

Wisconsin

Wisconsin provided a list of statutes and case citations, including Wisconsin Statutes Sections 349.065 (uniform traffic control devices); 86.06 (highways closed to travel); 83.025(2) (county trunk system shall be marked and maintained by the county); 84.03(1)(c); 84.106(3) (marking highways); and 86.19(1).⁶²⁵

Four departments responded that there was no such duty in their states.⁶²⁶ Two departments did not respond to the question but provided additional information.⁶²⁷

9. Seventeen transportation departments reported that before or after the 2009 MUTCD that they had not been involved in a case in which a court had ruled that a violation of the MUTCD constituted negligence *per se*.⁶²⁸ One department stated that it does not track this information.⁶²⁹

Iowa

Iowa noted that “*Gipson v. State*, 419 N.W.2d 369, 371–72 (Iowa 1988) held that a violation of the MUTCD constitutes evidence of negligence rather than negligence *per se*.”

Ohio

Ohio’s response was “maybe” and cited case authority.⁶³⁰ The department explained, however, that “failure to comply with a known ministerial duty, such as maintaining a stop sign, can result in liability. So, failure to replace a stop sign, for example, could lead to liability.”⁶³¹

10. (a) Transportation departments were asked also to provide information regarding defenses that the departments have commonly asserted in cases brought against the department agency in which it was alleged that there were violations of the MUTCD, either before or after the 2009 revision of the MUTCD. Fourteen departments responded as discussed below. Seven DOTs did not respond to the question or reported that they had no records on which to provide an answer.⁶³²

⁶²⁵ Response of Wisconsin DOT.

⁶²⁶ Responses of Alabama DOT, Missouri Highway and Transportation Commission, Nebraska Department of Roads, and Utah DOT.

⁶²⁷ Responses of Arizona DOT and New York State DOT.

⁶²⁸ Responses of Alabama DOT, Arkansas Highway and Transportation Department, Caltrans, Indiana DOT, Iowa DOT, Kansas DOT, Michigan DOT, Missouri Highway and Transportation Commission, Nebraska Department of Roads, New Hampshire DOT, Oklahoma DOT, Pennsylvania DOT, Texas DOT, Utah DOT, Washington State DOT, Virginia DOT (stating “[u]nknown but to the best of our knowledge there are no such cases), and Wisconsin DOT.

⁶²⁹ Response of Nevada DOT.

⁶³⁰ *Wax v. Dep’t of Transp.*, 2001-Ohio-1856, 2001 Ohio Misc. LEXIS 59 (Sept. 26, 2001).

⁶³¹ Response of Ohio DOT (*citing* *Pavlik v. Kinsey*, 81 Wis. 2d 42, 259 N.W.2d 709 (1977) (court concluding that a breach of a ministerial duty was inferred from the complaint’s allegations that the defendant state employees who set up a detour route on which the plaintiff was injured failed to follow national traffic standards, place appropriate signs, and safely construct a temporary road).

⁶³² Response of Alabama DOT (not applicable); Arizona DOT (no response); Nevada DOT (department does not track this information); New Hampshire DOT (not applicable); New York State DOT (no response); Pennsylvania DOT (no records available); and Virginia DOT (referring generally to the Virginia Tort Claims Act, VA. CODE § 8.01-195.1, *et seq.*).

B-16

Arkansas

Arkansas said that its defenses include that the “[c]laimant has a wrong interpretation [of] the MUTCD” and that “[t]he MUTCD section does not apply to the facts.”

California

Caltrans cited, in addition to the immunities set forth in response to item 7(b) of the survey, California Government Code Section 830.2 (“trivial risk” immunity).

Indiana

Indiana’s reported defenses were summarized as follows:

- (1) No Breach—we retain an outside expert and/or other INDOT engineers to testify [that the] MUTCD was followed or the deviation was based on reasonable engineering judgment.
- (2) ITCA immunities—namely, 20 year immunity and discretionary function.
- (3) Contributory negligence—We defend by saying even if it’s below standards and guidance in the MUTCD, Plaintiff contributed to the accident and is barred from recovery.

Iowa

Iowa cited traffic control device immunity in Iowa Code Section 668.10(1)(a).

Kansas

The response of the Kansas DOT identified a number of defenses that the department uses in MUTCD cases:

- Kansas Tort Claims Act (KTCA) immunities regarding discretion and signing.
- The comparative fault of plaintiff in the accident prohibits any recovery.
- The alleged violation of the MUTCD was not the proximate cause of the accident.
- There was no violation of mandatory MUTCD provisions (the discretionary exception to the KTCA).
- The comparative fault of others in the accident that reduces KDOT’s exposure to liability.

Michigan

Michigan observed that “[n]o exception to governmental immunity applies.”

Missouri

Missouri also identified a number of defenses that it may raise:

- The department’s compliance with the MUTCD.
- There was no notice of the alleged dangerous condition.

- Engineering judgment was used and a decision based on engineering judgment called for something different than what was in the MUTCD.
- Compliance with the EPG.

Nebraska

Nebraska's defenses include:

- Sovereign immunity exemptions in Revised Statutes of Nebraska 81-8, 219;
- Contributory negligence.
- Third-party negligence as an efficient intervening cause.

Ohio

Ohio's response referred to the "discretion of the agency" and the "use of shall, should, may requirements of Ohio's version of the MUTCD" as defenses to MUTCD claims.

Oklahoma

Oklahoma's defenses include:

- The department was not liable for a discretionary act.
- There was no violation of the MUTCD.
- The alleged violation of the MUTCD was not a proximate cause of the plaintiff's injury.
- The department is not liable for "failure to enforce the law."

Texas

Texas advised that its defenses include the defense "that engineering judgment makes the decisions discretionary," and, therefore, the State is not liable.

Utah

Utah's response stated that a primary defense is that the "standard of reasonable care was met."

Washington

The Washington State DOT noted as defenses:

- "[W]arrants are not [a] requirement for installation."
- "[P]roximate cause cannot be attributed to the traffic control device."

Wisconsin

Wisconsin stated that "[t]ypically, challenges are made regarding discretionary design decisions." Defenses asserted in Wisconsin in MUTCD cases include:

B-18

- The provision alleged to be violated was guidance, not a Standard, and therefore was discretionary, not mandatory.
- The Manual is not a legal requirement to install any sign.
- Including more than one warning sign in a given area is discretionary.
- A diagram/picture is not a requirement.
- The Manual does not obligate the department to create a traffic control plan.
- The department's actions substantially conformed to the Manual.
- The cited provisions of the Manual are not mandatory.

(b) Fifteen transportation departments reported on which defenses the departments have found to have been particularly successful from their point of view.⁶³³ Six DOTs did not respond to the question or reported that they had no records on which they could provide an answer.⁶³⁴

California

Caltrans identified two statutes as being particularly important: "Design Immunities, Government Code Section 803.6 and Trivial Risk, Government Code 803.2."

Indiana

Indiana stated that its most successful defenses have been that there was no breach of the Manual and contributory negligence.

Kansas

Kansas stated that the defenses that have been particularly successful from the agency's point of view are:

- Absence of proximate cause.
- Comparable fault.

The Kansas DOT observed that "[t]he MUTCD has too much gray area allowing plaintiffs to hire an expert willing to testify that KDOT violated a provision of the MUTCD," thus inhibiting KDOT's success in using the discretionary and signing exceptions to the Kansas Tort Claims Act.

Missouri

Missouri identified two defenses in particular as being successful:

- The department's compliance with the EPG or MUTCD.

⁶³³ Responses of Alabama DOT (not applicable), Arizona DOT (no response), Nevada DOT (department does not track this information), New Hampshire DOT (not applicable), and Pennsylvania DOT (no records available).

⁶³⁴ Responses of Alabama DOT (not applicable), Arizona DOT (no response), Nevada DOT (department does not track this information), New Hampshire DOT (not applicable), New York State DOT (no response), and Pennsylvania DOT (no records available).

- The department's lack of notice.

Nebraska

For Nebraska the most successful defenses are

- Discretionary immunity.
- Plan or design immunity.
- Immunity for weather conditions.
- There was an "efficient intervening cause."

New York

New York identified the lack of notice and qualified immunity.

Oklahoma

Oklahoma stated that particularly successful defenses are:

- There was "[n]o violation of [the] MUTCD" and/or
- The alleged violation was not the "proximate cause of [the] injury."

Texas

For the Texas DOT the defenses that are most successful are:

- "The immunities afforded to the discretion inherent in engineering decisions and the decisions to implement devices."
- "[O]fficial immunity for individuals."

Utah

Utah cited as its most successful defense the defense that the department met the required standard of reasonable care.

Washington

The Washington State DOT identified:

- Lack of reasonable notice.
- Insufficient time to correct the alleged deficiency.

Wisconsin

Wisconsin referred to its previous list of defenses as the most successful defenses.

11. (a) Eighteen transportation departments reported that their state has a tort claims act or similar legislation that applies to tort claims against the department.⁶³⁵ Three departments did not respond to the question.⁶³⁶

(b) Fourteen departments stated that their state tort claims act or similar legislation includes an exemption from tort liability for a public entity's performance of or failure to perform a discretionary function.⁶³⁷ Five departments stated that their state's tort claims act did not include a discretionary function exemption.⁶³⁸ Two departments did not respond to the question.⁶³⁹

12. (a) Six departments reported that in addition to a state claims act applicable to the department there were other applicable statutes that exempt the department specifically in regard to certain highway activities or responsibilities (e.g., installation of warning signs, pavement marking, speed limits, traffic lights or other devices, barricades, or otherwise).⁶⁴⁰ Thirteen departments reported that there were no other statutes that exempted the department regarding the foregoing highway activities or responsibilities.⁶⁴¹

Kansas

Kansas reported:

KSA 68-416a(a) provides that on city connecting links, which are certain state highways within the corporate limits of a city, that if the city receives a certain amount per lane mile for maintenance, the city is responsible for all maintenance, except for route marking signs. Kansas statutes also provide that KDOT is responsible for the state highway system, and that other governmental entities are re-

⁶³⁵ Responses of Arkansas Highway and Transportation Department (*citing* ARK. CODE §§ 19-10-201, *et seq.*); Caltrans (*citing* CAL. GOV'T CODE §§ 810, *et seq.*); Indiana DOT (*citing* IND. CODE § 34-14-3); Iowa DOT (*citing* IOWA CODE, ch. 669); Kansas DOT (*citing* KAN. STAT. ANN. §§ 75-6101, *et seq.*); Michigan DOT (*citing* MICH. COMP. LAWS §§ 691.1401, *et seq.*); Missouri Highway and Transportation Commission (*citing* MO. REV. STAT. § 537.600); Nebraska Department of Roads (*citing* NEB. REV. STAT. § 81-8,2009); Nevada DOT (*citing* NEV. REV. STAT. ch. 41); New York State DOT (*citing* N.Y. Court of Claims Act and *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960)); Ohio DOT (*citing* OHIO REV. CODE §§ 2743, *et seq.*); Oklahoma DOT (*citing* OK. STAT. tit. 51, §§ 151-258); Pennsylvania DOT (*citing* 42 PA. CON. STAT. §§ 8521-8528); Texas DOT (*citing* TEX. CIV. PRAC. & REM. CODE, ch. 101); Utah DOT (*citing* UTAH CODE §§ 63G-7-101 to 63G-7-904); Washington State DOT (*citing* WASH. REV. CODE, ch. 4.92); Virginia DOT (*citing* Virginia Tort Claims Act, VA. CODE § 8.01-195.1, *et seq.*); and Wisconsin DOT.

⁶³⁶ Responses of Alabama DOT, Arizona DOT, and New Hampshire DOT.

⁶³⁷ Responses of Caltrans (*citing* CAL. GOV'T CODE § 820.2 regarding discretionary acts); Indiana DOT (*citing* IND. CODE § 34-14-3-3(7)); Iowa DOT (IOWA CODE § 669.14(1)); Kansas DOT (*citing* KAN. STAT. ANN. § 75-6104(e)); Nebraska Department of Roads (*citing* NEB. REV. STAT. § 81-8,219(1)); Nevada DOT (*citing* NEV. REV. STAT. ch. 41); New York State DOT (identifying qualified immunity for discretionary action and *Weiss v. Fote*, 7 N.Y.2d 579, 167 N.E.2d 63, 200 N.Y.S.2d 409 (1960)); Ohio DOT (*citing* OHIO REV. CODE § 2743.02 and the "public duty doctrine"); Oklahoma (*citing* OK. STAT. tit. 51, §155(5)); Texas DOT (*citing* TEX. CIV. PRAC. & REM. CODE § 101.056); Utah DOT (*citing* UTAH CODE § 63G-7-301(5)(a)); Virginia DOT (*citing* VA. CODE § 33.1-70.1 and stating "[i]n limited circumstances"); Washington State DOT); Wisconsin DOT (WIS. STAT. § 893.80 "establishes the claims process against units of government, such as counties and municipalities, which maintain roads. WisDOT does not maintain the state highway system, we contract with counties to perform that work for the state"; noting that "Section 893.82 deals with claims against state employees who allegedly committed torts"; and stating that "Section 893.83 deals with local government liability for snow and ice removal. Again, the counties maintain WisDOT highways under a contract with WisDOT").

⁶³⁸ Responses of Alabama DOT, Arkansas Highway and Transportation Department, Michigan DOT, Missouri Highway and Transportation Commission, and Pennsylvania DOT.

⁶³⁹ Responses of Arizona DOT and New Hampshire DOT.

⁶⁴⁰ Responses of Indiana DOT; Iowa DOT (*citing* winter maintenance immunity (IOWA CODE § 668.101(1)(b)) and design immunity (Iowa Code § 669.14(8)); Michigan DOT (*citing* MICH. COMP. LAWS 691.1401, *et seq.* and common law); Nevada DOT (*citing* NEV. REV. STAT. ch. 41); and Wisconsin DOT.

⁶⁴¹ Responses of Alabama DOT (noting that the department has "sovereign immunity as an agency of the State"), Arkansas Highway and Transportation Department, Caltrans, Indiana DOT, Missouri Highway and Transportation Commission, Ohio DOT, Nebraska Department of Roads, New York State DOT, Oklahoma DOT, Pennsylvania DOT, Texas DOT, Utah DOT, and Washington State DOT.

sponsible for other highways including signing on those highways, *i.e.* city streets, township roads, and county roads.

Virginia

The Virginia DOT's response was that other statutes exempted the department in "limited circumstances" and cited relevant sections of the Virginia Code, including: Sections 33.1-70.1 (paving certain secondary roads); 46.2-920.1 (operation of tow trucks); 46.2-1212.1 (removal of vehicles/debris from accidents); 33.1-200 (paying for damages sustained to personal property by reason of work projects, etc.); and 33.1-381 (removal of certain signs by the Commissioner).

Wisconsin

Wisconsin explained that the "WisDOT is not required to enact regulations related to the placement of official signs or related to maintenance of highways. Under Wisconsin statutes, regulations are called, 'rules,' and highway signing and maintenance are exempted from general statutory requirements for agency activities to be defined by regulations."⁶⁴²

(b) Six transportation departments reported that there is a state statute that exempts the department from any claims involving the design of a highway or related features or facilities, *i.e.*, a specific design immunity statute.⁶⁴³ However, the remaining departments responding to the survey advised that the applicable law in their states did not include a specific statute providing for design immunity.⁶⁴⁴

13. (a) Transportation departments were requested to advise, assuming there is a state or local tort claims act that includes a discretionary function exemption, on how their courts interpret and/or apply the exemption in a case involving the MUTCD; for example, whether their courts follow the United States Supreme Court's interpretation of the Federal Tort Claims Act's (FTCA) discretionary function exemption as developed in *United States v. Dalehite*⁶⁴⁵ (establishing the planning versus operational level dichotomy). Five departments reported that the courts in their state follow the *Dalehite* planning versus operational level dichotomy;⁶⁴⁶ eight departments stated that their courts do not follow *Dalehite*;⁶⁴⁷ six departments said that the question was not applicable to the department;⁶⁴⁸ and two departments did not respond to the question.⁶⁴⁹

⁶⁴² Response of Wisconsin DOT (citing WIS. CODE 227.01(13)).

⁶⁴³ Responses of Indiana DOT (citing IND. CODE §34-13-3-3(10) (granting immunity to a governmental entity in situations where an independent contractor was performing a delegable duty); Iowa DOT (citing IOWA CODE § 669.14(8) (design immunity)); Kansas DOT (citing KAN. STAT. ANN. § 75-6104(m)); Michigan DOT (citing MICH. COMP. LAWS 691.1401, *et seq.* and the common law); Nevada DOT (citing NEV. STAT., ch. 41); and Ohio DOT (citing OHIO REV. CODE 2743.02).

⁶⁴⁴ Responses of Alabama DOT, Arkansas Highway and Transportation Department, Missouri Highway and Transportation Commission, Nebraska Department of Roads, New York State DOT, Oklahoma DOT, Pennsylvania DOT, Texas DOT, Utah DOT, Washington State DOT, and Wisconsin DOT.

⁶⁴⁵ 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953), *reh'g denied*, 346 U.S. 841, 880, 74 S. Ct. 13, 117, 98 L. Ed. 362, 386, *reh'g denied*, 347 U.S. 924, 74 S. Ct. 511, 98 L. Ed. 1078 (1954).

⁶⁴⁶ Responses of Indiana DOT (citing *Hanson v. County of Vigo*, 659 N.E.2d 1123 (Ind. App. 4th Dist. 1996)); Iowa DOT; Nebraska Department of Roads; Oklahoma DOT (citing *Nguyen v. State*, 844 P.2d 1209 (Okla. 1994); *Randell v. Tulsa ISD No. 1*, 889 P.2d 1264 (Okla. 1994); *Robinson v. City of Bartlesville Bd. of Educ.*, 700 P.2d 1013 (Okla. 1985); *Walker v. City of Moore*, 837 P.2d 876 (Okla. 1992)); and Washington State DOT.

⁶⁴⁷ Responses of Caltrans, Kansas DOT; Missouri Highway and Transportation Commission (no discretionary function exemption); Nebraska Department of Roads; Ohio DOT; Texas DOT (stating, however, that "although not cited, the same rationale has been applied to appellate opinions on § 101.056); Utah DOT; and Wisconsin DOT.

⁶⁴⁸ Responses of Alabama DOT (citing sovereign immunity), Arkansas Highway and Transportation Department, Michigan DOT, New York State DOT, Pennsylvania DOT, and Virginia DOT.

⁶⁴⁹ Responses of Arizona DOT and New Hampshire DOT.

(b) Only one department reported that its state courts may follow the United States Supreme Court's interpretation of the discretionary function exemption in the FTCA in *Indian Towing v. United States*⁶⁵⁰ (holding that discretion is exhausted once the planning-level decision is made).⁶⁵¹ Eleven departments specifically responded that their state courts do not follow the *Indian Towing* precedent.⁶⁵² Six departments stated that the question was not applicable to their department.⁶⁵³ Two departments did not respond to the question.⁶⁵⁴

(c) Four departments responding to the survey advised that in their state the courts now follow the United States Supreme Court's decision in *United States v. Gaubert*⁶⁵⁵ (holding that immune discretion may be exercised at any level of decision-making unless there is a regulatory directive that does not allow for the exercise of discretion).⁶⁵⁶ Nine departments reported that their state courts did not follow the *Gaubert* decision.⁶⁵⁷ However, Nebraska explained that “[t]he *Dalehite* and *Gaubert* holdings have been adopted in Nebraska in the cases cited below, but they have not been directly cited in any case involving the MUTCD.”⁶⁵⁸ Six departments said that the decision was not applicable in their jurisdiction.⁶⁵⁹ Two departments did not respond to the question.⁶⁶⁰

Kansas

Kansas reported that its courts “sort of” follow the *Gaubert* decision and advised:

The Kansas discretionary exception applies “whether or not the discretion is abused and regardless of the level of discretion involved.” KSA 75-6104(e). The courts focus on whether the decision is one that the legislature intended to put beyond judicial review. The nature and quality of the discretion exercised is examined to determine if the exception applies. The closer the decision is to a policy decision the closer it is to being beyond judicial review.

Iowa

The Iowa DOT reported that the court in

Metier v. Cooper, 378 N.W.2d 907, 910 (Iowa 1985) applied the planning/operational dichotomy and held [that] the placement of a deer crossing sign was not immunized by the discretionary function exception. However, now the Iowa Supreme Court applies the two step analysis of *Gaubert*. See *Schneider v. State*, 789 N.W.2d 138, 147 (Iowa 2010) (flooding); *Davison v. State*, 671 N.W.2d 519, 521–522 (Iowa App. 2003) (highway maintenance). *Indian Towing* was quoted with approval in *Schmitz v. City of Du- buque*, 682 N.W.2d 70, 74 (Iowa 2004) (bike trail construction).

⁶⁵⁰ 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

⁶⁵¹ Response of Iowa DOT.

⁶⁵² Responses of Caltrans; Indiana DOT; Kansas DOT; Missouri Highway and Transportation Commission (no discretionary function exemption); Nebraska Department of Roads; Ohio DOT; Oklahoma DOT; Texas DOT (stating, however, that “Appellate decisions have fine tuned a distinction between planning and implementation of discretionary acts”); Utah DOT; Washington State DOT; and Wisconsin DOT.

⁶⁵³ Responses of Alabama DOT (sovereign immunity), Arkansas Highway and Transportation Department, Michigan DOT, New York State DOT, Pennsylvania DOT, and Virginia DOT.

⁶⁵⁴ Responses of Arizona DOT and New Hampshire DOT.

⁶⁵⁵ 499 U.S. 315, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991), *on remand*, 932 F.2d 376 (5th Cir. 1991).

⁶⁵⁶ Responses of Iowa DOT and Nebraska Department of Roads (but see explanation in the text of the digest).

⁶⁵⁷ Responses of Caltrans, Indiana DOT, Missouri Highway and Transportation Commission (no discretionary function exemption), Ohio DOT, Oklahoma DOT, Texas DOT, Utah DOT, Washington State DOT, and Wisconsin DOT.

⁶⁵⁸ Response of Nebraska Department of Roads (*citing* *Jasa by Jasa v. Douglas County*, 244 Neb. 944, 510 N.W.2d 281 (1994), and *First Nat'l Bank of Omaha vs. State*, 241 Neb. 267, 488 N.W.2d 344 (1992)).

⁶⁵⁹ Responses of Alabama DOT (sovereign immunity), Arkansas Highway and Transportation Department, Michigan DOT, New York State DOT, Pennsylvania DOT, and Virginia DOT.

⁶⁶⁰ Responses of Arizona DOT and New Hampshire DOT.

Nevada

Nevada advised that in *Martinez v. Maruszezak*, 123 Nev. 433, 446–47, 168 P.3d 720 (2007), the Nevada Supreme Court “examined NRS 41.032, and discretionary immunity and adopted the Federal *Berkovitz-Gaubert* Test applied in the matter of *Berkovitz v. United States*, 486 U.S. 531, 108 S. Ct. 1954, 100 L. Ed. 2d 531 (1988).”

This federal test is helpful in differentiating between true policy decisions protected by discretionary-act immunity and other unprotected acts. *We therefore adopt the Berkovitz-Gaubert approach and clarify that to fall within the scope of discretionary-act immunity; a decision must (1) involve an element of individual judgment or choice and (2) be based on considerations of social, economic, or political policy.* In this, we clarify that decisions at all levels of government, including frequent or routine decisions, may be protected by discretionary-act immunity, if the decisions require analysis of government policy concerns. However, discretionary decisions that fail to meet the second criterion of this test remain unprotected by NRS 41.032(2)’s discretionary-act immunity.

14. (a) The departments were asked whether in addition to or in lieu of a tort claims act the courts in their state rely on the proprietary-governmental test or distinction to determine a transportation department’s or other public agency’s tort liability. Only the Texas DOT responded affirmatively.⁶⁶¹ Thirteen departments reported that the proprietary-governmental test or distinction to determine tort liability did not apply to their departments in their states.⁶⁶² Three departments reported that the question was not applicable to their department.⁶⁶³ Two departments did not respond to the question.⁶⁶⁴

(b) Four departments reported that in their states the courts use the discretionary-ministerial test of immunity to determine a transportation department’s or other public agency’s tort liability.⁶⁶⁵ Nine departments reported that the discretionary-ministerial test is not used in their states.⁶⁶⁶ Three departments advised that the question was not applicable to them.⁶⁶⁷ Two departments did not respond.⁶⁶⁸

In responding to the question several DOTs provided additional information as follows:

California

Caltrans identified California Government Code Section 820.2 (discretionary immunity of employee) and California Government Code Section 815.2(b) (applies immunity of employee to the public entity).

Kansas

Kansas said that there are a number of judicial decisions in Kansas holding that the discretionary exception does “not apply to a ministerial act.”

⁶⁶¹ Although not responding yes or no to the question, the Texas DOT replied that the discretionary-ministerial test of immunity is applicable to cities but that “all State actions are presumed to be governmental functions.”

⁶⁶² Responses of Caltrans, Indiana DOT; Iowa DOT, Michigan DOT, Missouri Highway and Transportation Commission, Nebraska Department of Roads, Nevada DOT, Ohio DOT, Oklahoma DOT, Pennsylvania DOT, Utah DOT, Washington State DOT, and Wisconsin DOT.

⁶⁶³ Responses of Alabama DOT (sovereign immunity), Arkansas Highway and Transportation Department; and Virginia DOT.

⁶⁶⁴ Responses of Arizona DOT and New Hampshire DOT.

⁶⁶⁵ Responses of Caltrans; Oklahoma DOT (*citing* Walker v. City of Moore, 837 P.2d 876 (Okla. 1992)); Washington State DOT; and Wisconsin DOT.

⁶⁶⁶ Responses of Indiana DOT, Iowa DOT, Michigan DOT, Missouri Highway and Transportation Commission, Nebraska Department of Roads, Nevada DOT, Ohio DOT, Pennsylvania DOT, and Utah DOT.

⁶⁶⁷ Responses of Alabama DOT (sovereign immunity), Arkansas Highway and Transportation Department, and Virginia DOT.

⁶⁶⁸ Responses of Arizona DOT and New Hampshire DOT.

B-24

Missouri

Missouri stated: “Our employees are protected by the official and discretionary immunity doctrines. However, the agency is still responsible for the actions of the employees assuming they are working in the scope and course of their employment.”

Wisconsin

Wisconsin stated:

In Wisconsin, the primary questions regarding liability will be “who made the decision” and “was the decision discretionary.”

Fundamental highway design decisions are governmental decisions.

Private consultants who prepare designs for states or municipalities are not held independently responsible for these governmental decisions and private engineering firms should not dictate the outcome of design decisions due to their risk management concerns. A leading case is *Estate of Lyons v. CAN, Strand Associates and Waller*, 207 Wis. 2d 448 (1996), *petition for review denied* (March 11, 1997). In that case, the court adopted the following three-part test to determine when a decision is essentially that of [the] government rather than the contractor:

1. The government approved reasonably precise specifications;
2. The contractor’s actions conformed to those specifications; and
3. The contractor warned the supervising governmental authority about the possible dangers associated with those specifications that were known to the contractor but not to the governmental officials.

APPENDIX C—LIST OF TRANSPORTATION DEPARTMENTS RESPONDING TO THE SURVEY

Alabama Department of Transportation
Arizona Department of Transportation
Arkansas Highway and Transportation Department
California Department of Transportation
Indiana Department of Transportation
Iowa Department of Transportation
Kansas Department of Transportation
Michigan Department of Transportation
Missouri Highway and Transportation Commission
Nebraska Department of Roads
Nevada Department of Transportation
New Hampshire Department of Transportation
New York Department of Transportation
Ohio Department of Transportation
Oklahoma Department of Transportation
Pennsylvania Department of Transportation
Texas Department of Transportation
Utah Department of Transportation
Virginia Department of Transportation
Washington Department of Transportation
Wisconsin Department of Transportation

ACKNOWLEDGMENTS

This study was performed under the overall guidance of the NCHRP Project Committee SP 20-6. The Committee is chaired by MICHAEL E. TARDIF, Friemund, Jackson and Tardif, LLC. Members are RICHARD A. CHRISTOPHER, HDR Engineering; TONI H. CLITHERO, Vermont Agency of Transportation; JOANN GEORGALLIS, California Department of Transportation; JAMES H. ISONHOOD, Mississippi Office of the Attorney General; THOMAS G. REEVES, Consultant, Maine; MARCELLE SATTIEWHITE JONES, Jacob, Carter and Burgess, Inc.; ROBERT J. SHEA, Pennsylvania Department of Transportation; JAY L. SMITH, Missouri Department of Transportation; JOHN W. STRAHAN, Consultant, Kansas; and THOMAS VIALI, Attorney, Vermont.

JANET MYERS provided liaison with the Federal Highway Administration, and GWEN CHISHOLM SMITH represents the NCHRP staff.

Transportation Research Board

500 Fifth Street, NW
Washington, DC 20001

NON-PROFIT ORG.
U.S. POSTAGE
PAID
COLUMBIA, MD
PERMIT NO. 88

THE NATIONAL ACADEMIES

Advisers to the Nation on Science, Engineering, and Medicine

The nation turns to the National Academies—National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and National Research Council—for independent, objective advice on issues that affect people's lives worldwide.

www.national-academies.org

Subscriber Categories: Law • Safety and Human Factors

ISBN 978-0-309-28428-8



These digests are issued in order to increase awareness of research results emanating from projects in the Cooperative Research Programs (CRP). Persons wanting to pursue the project subject matter in greater depth should contact the CRP Staff, Transportation Research Board of the National Academies, 500 Fifth Street, NW, Washington, DC 20001.