STATE OF MICHIGAN

COURT OF APPEALS

COLLEEN ADAMS, for herself, and as legal guardian for RICHARD ADAMS, Plaintiffs-Appellants, v DEPARTMENT OF TRANSPORTATION, Defendant-Appellee.	FOR PUBLICATION October 11, 2002 9:00 a.m. No. 230268 Court of Claims LC No. 98-016967-CMI Updated Copy January 3, 2003

Before: Sawyer, P.J., and Hood, Jansen, O'Connell, Zahra, Kelly, and Murray, JJ.

JANSEN, J. (*dissenting*).

I respectfully dissent. I would hold that this Court's majority opinion in *Sekulov v Warren*, 251 Mich App 333; 650 NW2d 397 (2002), was correct and would follow its reasoning.

When *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), was decided, the specific issue whether a governmental agency had the duty to provide traffic control devices or warning signs was, in the words of the majority opinion, "still unsettled." In *Pick*, *id.* at 619, a four-justice majority definitively decided that governmental agencies have the duty to provide adequate warning signs or traffic control devices at known points of hazard under the highway exception of the governmental tort liability act, MCL 691.1402. This holding in *Pick* was clear and established a new principle of law because the Supreme Court had never previously decided this specific issue in a majority opinion. Indeed, the majority opinion in *Pick* set forth the previous cases of the Supreme Court that dealt with the question of street lights, warning signs, and traffic control devices and noted that all involved plurality decisions.[1] Therefore, it is clear that in *Pick* the Supreme Court held definitively, for the first time, that a governmental agency had the duty to provide adequate warning signs or traffic control devices at known points of hazard under the highway exception to governmental immunity.

[1] The decisions were *Scheurman v Dep't of Trans*, 434 Mich 619; 456 NW2d 66 (1990), *Salvati v Dep't of State Hwys*, 415 Mich 708; 405 NW2d 856 (1982), and *Tuttle v Dep't of State Hwys*, 397 Mich 44; 243 NW2d 244 (1976).

The Supreme Court's reasoning in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), for overruling *Pick*—that *Nawrocki* represents a "return" to the "plain language" of the statute—is simply irrelevant with respect to whether *Nawrocki* is to be given retroactive or prospective application. The first question to be addressed is whether the decision clearly established a new principle of law. *Pohutski v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). As previously stated, *Pick* clearly established a new principle of law because the Supreme Court had not decided the matter of whether governmental agencies had a duty to provide warning signs and traffic control devices. The other factors to be weighed in determining whether a decision should not be applied retroactively are (1) the purpose served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Id.; Lesner v Liquid Disposal, Inc*, 466 Mich 95, 108-109; 643 NW2d 553 (2002).

In *Nawrocki*, as in *Pohutski*,[2] the Supreme Court purported to return to the plain language of the governmental immunity statute and correct the erroneous interpretation set forth in *Pick*. In *Pohutski*, the Court concluded that giving its decision prospective application would further the purpose of correcting an error in the interpretation of MCL 691.1407. See *Pohutski, supra* at 697. Similarly, giving *Nawrocki* prospective application would further the purpose of correcting an error in the interpretation of MCL 691.1402. Also, because *Pick* definitively decided that governmental agencies had a duty to provide adequate warning signs and traffic control devices at known points of hazard, all courts, as well as all governmental agencies so responsible, had to follow this interpretation of the statute. See *Pohutski, supra* at 697 (prospective application would acknowledge the reliance by courts and insurance companies on the longstanding interpretation of MCL 691.1407 set forth in *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 NW2d 205 [1988]).[3] Lastly, the administration of justice would be better served by giving *Nawrocki* prospective application only because the Legislature did not amend § 2 of the governmental tort liability act in light of *Pick*. See *Craig v Larson*, 432 Mich 346, 353; 439 NW2d 899 (1989) (silence by the Legislature following judicial interpretation of a statute suggests consent to that interpretation).

The fact that the Supreme Court in *Nawrocki* did not expressly state that the holding was to be given prospective application only is completely inconsequential. This is not a factor to determine retroactive or prospective application of a decision and, moreover, the Supreme Court itself has given its own decisions prospective application in later opinions. See, e.g., *People v Sexton*, 458 Mich 43; 580 NW2d 404 (1998), giving prospective application to *People v Bender*, 452 Mich 594; 551 NW2d 71 (1996).

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[2] The Court in *Pohutski* addressed § 7 of the governmental tort liability act, MCL 691.1407, rather than MCL 691.1402 as in *Nawrocki*.

[3] In *Lesner, supra* at 109, the Supreme Court stated that the case it was overruling had been controlling authority for over 6 1/2 years and there thus appeared to be widespread reliance on the case being overruled. Likewise, in the present situation, *Pick* had been controlling authority and relied on for four years.

I would conclude that *Sekulov* was correctly decided and that *Nawrocki* should be given prospective application only. I would reverse the trial court's grant of summary disposition in favor of defendant and remand for further proceedings.

Hood, J., concurred.

/s/ Kathleen Jansen
/s/ Harold Hood