STATE OF MICHIGAN

COURT OF APPEALS

THOMAS P. MCCARTHY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant,

and

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellee.

UNPUBLISHED
April 4, 1997

No. 198951
Court of Claims
LC No. 91-013173-CM

ON REMAND

Before: Taylor, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Defendant Michigan Department of Transportation (MDOT) appeals as of right a portion of a judgment rendered against it in favor of plaintiff. In supplemental briefs filed after remand from the Supreme Court, the parties have advised this Court that the judgment has been partially satisfied. At this juncture, the only portion of the judgment on appeal is an award in plaintiff's favor against defendant MDOT in the sum of $6,439,446.40 for future medical expenses.

In our previous opinion, we reversed the judgment of the lower court based on governmental immunity. In doing so, we found it unnecessary to address defendant's other issues on appeal.

On further appeal, the Supreme Court in lieu of granting leave to appeal remanded the case for reconsideration in light of *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996). On remand, defendant MDOT does not reargue governmental immunity but rather asserts an issue that was previously raised but not decided by this Court.

I

The dispositive issue raised on remand is whether the lower court erred in ruling that no-fault insurance medical benefits are not a collateral source for which defendant MDOT is entitled to a setoff pursuant to MCL 600.6303; MSA 27A.6303. We hold that the lower court erred in ruling that such benefits are not a collateral source. Accordingly, we reverse and vacate that portion of the judgment that denies a setoff for no-fault insurance medical benefits.[1]

It is clear that no-fault insurance medical benefits are a collateral source for which defendant is entitled to a setoff. MCL 600.6303(4); MSA 27A.6303(4) provides in pertinent part:

> As used in this section, "collateral source" means benefits received or receivable from an insurance policy. . . .

Nevertheless, the lower court refused to allow defendant MDOT to set off this collateral source because of a contractual lien asserted by defendant Auto Club Insurance Association. The circuit court reasoned as follows:

> . . . Defendant's [MDOT] attempt to reduce its liability by application of MCL 600.6303; MSA 27A.6303 is misplaced. ACIA [Auto Club Insurance Association] has a contractual lien on the proceeds of this recovery. Notice was timely given and ACIA is pursuing its claims. That act provides that:
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> > collateral source does not include benefits paid or payable by a . . . legal entity entitled by contract to a lien against the proceeds of a recovery by a plaintiff in a civil action for damages, if the contractual lien has been exercised . . . MCL 600.6303(5); MSA 27A.6303(5).
>
> The statute prohibits this reduction.

In *Great Lakes American Life Ins Co v Citizens Ins Co,* 191 Mich App 589; 479 NW2d 20 (1991), we held that contractual reimbursement rights are subject to the restrictions and limitations of the no-fault act. Further, we held that contractual liens that conflict with MCL 500.3116; MSA 24.13116 are unenforceable.

By operation of § 3116 of the no-fault act, a no-fault insurer may claim reimbursement from its insured's tort recovery in three situations, only. As stated in *Great Lakes*, *supra* at 596:

> It is now clear that an insurance carrier responsible for no-fault benefits may realize reimbursement for an insured's third-party tort claim only in the following situations: (1) accidents occurring outside the state, (2) actions against uninsured owners or operators, or (3) intentional torts. *Auto Club Ins Ass'n v Henley,* 130 Mich App 767, 770; 344 NW2d 363 (1983).

Great Lakes was subsequently followed by our Court in *Citizens Ins Co v Pezzani & Reid Equip Co, Inc (On Remand)*, 202 Mich App 278; 507 NW2d 833 (1993). Although plaintiff argues that "this ruling in the *Pezzani* case is absolutely incorrect," we disagree and note that *Pezzani* is precedentially binding pursuant to AO 1996-4. See also *Citizens Ins Co of America v Tuttle*, 411 Mich 536, 552; 309 NW2d 174 (1981).

Based on the above authority, it is clear that defendant Auto Club Insurance Association does not possess a valid contractual lien for reimbursement of future medical expenses arising out of plaintiff's tort recovery. Accordingly, the lower court erred in ruling that defendant MDOT was not entitled to set off this collateral source. MCL 600.6303; MSA 24.6303.

II

On the question of governmental immunity, I would hold that defendant MDOT has abandoned this issue. On remand, defendant MDOT does not reargue the issue of governmental immunity or cite any authority to counter plaintiff's argument that *Pick v Szymczak, supra,* is controlling. As plaintiff states in his supplemental brief on remand:

> The first time that this matter was before this Court, the entire appeal was resolved on governmental immunity grounds. The Court of Appeals case on which this Court originally relied, *Pick*, has now been reversed by the Supreme Court and that Court has also remanded this case for further proceedings.
>
> In the supplemental brief which it has filed on remand MDOT has wisely refrained from rearguing the immunity question. Instead, the defendant has confined its entire analysis to MCL 500.3116. As the defendant's silence in its supplemental brief attests, the Supreme Court's decision in *Pick* has completely resolved whatever immunity argument the defendant could offer in this case.

It is well settled that "a party may not leave it to this Court to search for authority to sustain or reject its position." *Butler v Detroit Automobile Inter-Insurance Exchange,* 121 Mich App 727, 737; 329 NW2d 781 (1982). Further, issues raised on appeal are abandoned if not supported by any authority. *People v Canter,*197 Mich App 550, 563; 496 NW2d 336 (1992); *Wojciechowski v General Motors Corp*, 151 Mich App 399, 405; 390 NW2d 727 (1986). Accordingly, I would hold that defendant MDOT has abandoned the issue of governmental immunity.

Judge Taylor's concurring opinion raises, sua sponte, an argument for defendant MDOT in support of governmental immunity. In particular, the concurring opinion would transfer the factual finding of no proximate cause in the unrelated case *Colovos v Dept' of Transportation*, 450 Mich 861; 539 NW2d 375 (1995), to the present case, thereby finding no liability. I disagree.

While this Court will occasionally affirm a lower court on the basis that it reached the correct result but for the wrong reason, see, e.g., *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991), as a general rule, we will not reverse absent a ruling by the lower court and argument on appeal.

See, generally, *Young v Young*, 211 Mich App 446, 457, n 2; 536 NW2d 254 (1995). Although this Court has board authority to "enter any judgment or order or grant further or different relief as the case may require," MCR 7.216(A)(8), we should exercise such power with caution and prudence. Without effective advocacy, mistakes of law and fact are much more likely to occur. The danger of sua sponte raising arguments and deciding cases on grounds not argued is evidenced by the resolution advocated by the concurring opinion.

It is elementary law that the necessary elements in every negligence cause of action are (1) duty, (2) breach of duty, (3) proximate cause, and (4) damages. *Roulo v Auto Club of Michigan*, 386 Mich 324; 192 NW2d 237 (1971).

Although *Colovos v Dept of Transportation*, 205 Mich App 524; 517 NW2d 803 (1994), aff'd 450 Mich 861 (1995), involved the same bridge, it involved a different plaintiff and different facts. In particular, the issue of causation in fact was dispositive in *Colovos* because of factual findings that included the determination "that both drivers were experienced and aware that bridges tend to ice over in the winter and that both drivers were aware that ice warning signs were generally placed near bridges." *Id.* at 526. Further, and most importantly, because both drivers were proceeding at a prudent speed and that given the plaintiff's notice of the dangerous condition the trier of fact could not "conclude that the presence of an additional sign would have altered the already prudent driving of [the plaintiff and other motorist] in any significant fashion." *Id.* at 526-527. See also *id.* at 529 (T. R. Thomas concurring, "I concur with the trial court that inadequate posting of signs was not a proximate cause of this accident.").

Causation in fact is normally an issue reserved for the trier of fact. *Mulholland v Dec Int'l Corp*, 432 Mich 395, 415; 443 NW2d 340 (1989). Because the facts of the present case differ from *Colovos*, the factual findings made in *Colovos* are simply inapplicable.

Reversed.

/s/ Richard Allen Griffin

[1] Judge Markey joins in section I of this opinion thereby making it the opinion of the Court.