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UNPUBLISHED

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

ON REMAND

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

MARKEY, J. (concurring),

I concur in the result engendered by the analyses of both of my colleagues; however, I agree only in part with each of their discussions.

Initially, I agree with Judge Taylor that because this matter is before us on remand from the Supreme Court for reconsideration in light of *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), it is incumbent for us to do as instructed. On the other hand, I agree with Judge Griffin that *Pick* does not resolve this case. Defendant initially raised the issue of governmental immunity, that issue was appealed to the Michigan Supreme Court, and it remains a viable issue properly, and indeed mandatorily, before us on remand. Although defendant MDOT's supplemental brief after remand on the governmental immunity issue is extremely succinct, MDOT had addressed the issue thoroughly in earlier filings. Moreover, the Supreme Court in *Pick* relied on cases cited and discussed by MDOT previously and in its holding simply clarifies its position on the signage issue as it relates to governmental immunity. Thus, we cannot in any way conclude that MDOT waived the governmental immunity issue.

The *Pick* court premised the pertinent part of its analysis on the earlier decision of *Salvati v State Highway Dep't*, 415 Mich 708; 330 NW2d 64 (1982), and stated:

> The six justices unanimously agreed, however, that the governmental duty of maintenance with regard to public roads encompassed a duty to provide warning signs:
>
> "A governing unit may incur liability under the broad concept of 'traffic sign maintenance'. . . for failing to erect any sign or warning device at a point of hazard, . . . *or for placing a sign which inadequately informs approaching motorists of a hazard*. [*Salvati*, 415 Mich 715 (Coleman, J., joined by Fitzgerald, C.J. and Ryan, J.).]
>
> A governmental agency having jurisdiction of a highway has the obligation to post traffic signs and to warn motorists at points of special danger. Liability may arise for failing to erect a sign or barrier warning at a point of hazard, *or for posting a sign which inadequately warns of an approaching danger*. [*Id.* at 721 (Levin, J., joined by Kavanagh and Williams, JJ.) (citations omitted).]" [*Pick, supra* at 618 -619; emphasis added.]

Pick goes on to define point of hazard "as any condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe. To constitute a point of hazard for purposes of the highway exception, the condition must be one that uniquely affects vehicular travel on the improved portion of the roadway, as opposed to a condition that generally affects the roadway and its surrounding environment." *Pick, supra* at 623.

Here, the trial court, sitting as a court of claims, made specific factual findings as to the hazard of preferential icing on the bridge at issue[1] and that the one "**BRIDGE MAY BE ICY**" diamond-shaped yellow sign placed before the entrance of the bridge was not seen by the seven witnesses in this case or any of the persons involved in the accident in *Colovos v MDOT*, 450 Mich App 861; 539 NW2d 375 (1995), an accident at issue that occurred two years earlier on the same stretch of bridge and also involved the same sign and preferential icing.

As a result of its factual findings, the Court of Claims found that the single sign was an inadequate warning constituting a breach of defendant's statutory duty as it "was not adequate to fulfill the purposes for which it was intended. As placed, the sign has repeatedly failed to attract the attention of passing motorists, and therefore, failed to fulfill the purposes for which it was intended. The failure to adequately alert drivers to icing conditions constitutes a breach of defendant's statutory duty and was a proximate cause of the accident and Thomas McCarthy's injuries and damages."

In contrast, in *Colovos*, this same trial court found that although the defendant had breached its statutory duties as articulated herein, it found that the drivers in *Colovos* were *already* driving in a prudent manner so that the breach did not constitute a proximate cause of their injuries. Ultimately, the Michigan Supreme Court affirmed on that basis. *Colovos, supra*.

A trial court's findings of fact may not be set aside unless they are clearly erroneous. *Tuttle v Dep't of State Highways*, 397 Mich 44, 46; 243 NW2d 244 (1976). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id*. The record below will not allow me to find the trial court's factual determination to be "clearly erroneous." Moreover, in its legal conclusion, the trial court found that the bridge, with its existing sign, "failed to fulfill the purposes for which it was intended", language which nearly echoes that previously cited from *Pick*. Cf. *Wechsler v Wayne County Rd Comm*, 215 Mich 579, 590, 594-595, 600; 546 NW2d 690 (1996), wherein a properly functioning stop light was found "suitable and appropriate to the task" on an area of highway not considered a "special hazard" so that there was no duty to make a "reasonably safe highway" safer by the installation of "extraordinary traffic-control devices." Upon de novo review of the trial court's legal conclusion, I can find no error. See *Burgess v Clark*, 215 Mich App 542, 545; 547 NW2d 59 (1996); *Krueger v Lumbermen's Mutual Casualty Co*, 112 Mich App 511, 514-515 and n2; 316 NW2d 474 (1982). Thus, because plaintiff is entitled to prevail on the governmental immunity issue, we must next address the set-off question.

Defendant MDOT argues that it is entitled to a set-off for the medical benefits paid and to be paid to plaintiff as a result of the injuries he suffered in the automobile accident because those benefits constitute a collateral source. I agree and with respect to that issue, I join in and concur with the analysis and conclusion reached by Judge Griffin.

/s/ Jane E. Markey

[1] Apparently, both Judge Taylor and Judge Griffin agree that the preferential icing which occurred here was, in fact, a point of hazard.