STATE OF MICHIGAN

COURT OF APPEALS

THOMAS P. McCARTHY,

Plaintiff-Appellee,

v

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant-Appellant,

and

AUTO CLUB INSURANCE ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED

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

ON REMAND

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

TAYLOR, J. (concurring).

This case is before us on remand from the Supreme Court for reconsideration in light of its opinion in *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), reversing the prior Court of Appeals opinion in *Pick v Szymczak*, 203 Mich App 138; 511 NW2d 694 (1993). 453 Mich 901 (1996). Our original opinion reversed a judgment for plaintiff finding defendant was entitled to governmental immunity on the basis of the Court of Appeals opinion in the *Pick* case. *McCarthy v Michigan Dep't of Transportation*, unpublished memorandum opinion of the Court of Appeals, issued May 5, 1995 (docket no. 159087). On remand, I would again find that defendant was entitled to governmental immunity and for this reason I concur in reversal.

Defendant's brief on remand states: "Whether this [case] falls under the [new] *Pick* standard is not an issue easily answered by the record made in this matter" and fails to argue it further, choosing to focus on a set-off issue. In its post-remand brief, defendant has clearly not adequately briefed the issue the Supreme Court commanded us to consider on remand; however, it has not waived the governmental immunity defense either. Further, it argued it was entitled to governmental immunity in its earlier briefs.

Moreover, the Supreme Court expressly ordered us to reconsider this case in light of *Pick*.[1] Notwithstanding defendant's misgivings, I find that the record is sufficient to allow such a review.

Plaintiff was severely injured in a one car accident that was the result of preferential icing on the Rouge River Bridge. The trial court found that a single yellow warning sign stating "BRIDGE MAY BE ICY" was inadequate to warn and remind motorists of the dangers presented by preferential icing and entered a $10,312,505.37 judgment in plaintiff's favor. Thereafter, defendant paid plaintiff his nonmedical future damages, a sum of approximately three million dollars.[2] Thus, in light of defendant's payment, the only issue for us to consider is whether plaintiff is entitled to future medical expenses of $6,439,446.40.

The Supreme Court's opinion in *Pick* held that governmental agencies have a duty to place adequate warning signs at points of known hazard under the highway exception to governmental immunity. 451 Mich 619. Assuming, arguendo, that a point of known hazard was involved,[3] the only issue remaining for a determination of liability under *Pick* is whether the one warning sign "BRIDGE MAY BE ICY" was adequate. I am persuaded that defendant is entitled to governmental immunity because of the extremely unusual fact that the Supreme Court has already determined the alleged inadequacy of this sign on this bridge was not a proximate cause of a factually indistinguishable accident. *Colovos v MDOT*, 450 Mich 861 (1996). To my mind, that settles the matter.

The *Colovos* case was also a preferential icing case that was tried two years earlier before the same trial judge as the case at bar. It involved the same sign and bridge as the instant case. At the conclusion of the case, the trial judge concluded that the signage was inadequate but that this inadequate signage was not a proximate cause of the accident. On appeal, this Court stated in *Colovos*, 205 Mich App 524; 517 NW2d 803 (1994), that the "BRIDGE MAY BE ICY" sign was a proximate cause of the accident but, nevertheless, affirmed the judgment of no cause of action because the Court of Appeals opinion in *Pick*, required it under the first-out rule, now Administrative Order No. 1996-4. The *Colovos* case was then appealed to the Supreme Court and the Supreme Court affirmed a no cause of action judgment, as mentioned above, with the succinct holding that the sign was not a proximate cause of the accident. 450 Mich 861. In the instant case, in his opening statement, counsel for the plaintiff stated the *Colovos* case had involved the same sign and the same bridge, and that there were no changes made between the time of the *Colovos* accident in 1987 and the time of plaintiff's accident in January 1989. In deciding this case, the trial court agreed that the accidents in the *Colovos* case and this one were factually similar having occurred on the same bridge, and involving the very same sign. However, the judge concluded this time in his conclusions of law that the inadequate signage was a proximate cause of the accident. While the Supreme Court had not yet ruled in *Colovos* and, thus, the trial judge could not have conformed his ruling to their holding, we know what the Supreme Court did and can--and indeed should--conform ours. We should conclude that this sign was not a proximate cause of this accident. This conclusion cannot be avoided by misdescribing the finding of adequacy of the signage and the finding of proximate cause as issues of fact that are therefore subject to the deferential clearly erroneous standard. These were conclusions of law. Whether drivers saw the sign or not, whether it was posted at the proper height, whether it met size standards, etc., are findings of fact.[4] The signs adequacy and whether it was a proximate cause of the accident, however, can only be

understood as a conclusions of law that we review de novo.[5] Accordingly, given the Supreme Court's holding in *Colovos*, I would reverse the trial court's legal conclusion that the inadequate sign was a proximate cause of the accident.

Such a result is supported by *Wechsler v Wayne County Rd Comm*, 215 Mich App 579, 600; 546 NW2d 690 (1996) (fact that better signals or signs might have prevented an accident is irrelevant to determining whether the actual existing sign nonetheless made the highway reasonably safe). The fact that a different sign might have been better or that two signs might have made the highway safer is simply not a ground upon which liability may be placed on defendant in this case. *Colovos, supra; Wechsler, supra*.

As stated in our original opinion in this case "In view of our disposition of this (the governmental immunity) issue, we need not address defendant's remaining issues on appeal." This time, having similarly disposed of this case on the governmental immunity issue, I, unlike my colleagues, do not find it necessary to address the setoff issue. Nevertheless, because they address the issue, I will briefly comment. First, I note that their discussion of the setoff issue does not distinguish between the merits of allowing a no-fault insurer's lien as to a motorist versus a nonmotorist tortfeasor. The authority cited by them is *Citizens Ins Co v Pezanni & Reid Equip Co, Inc (On Remand)*, 202 Mich App 278; 507 NW2d 833 (1993). While this case treats motorist and nonmotorist tortfeasors the same, it is devoid of analysis. This is no mere quibble because the policy to prevent set-off with a motorist tortfeasor (to eliminate motorist versus motorist tort litigation which was the impetus for the no-fault act) is not present with the non-motorist tortfeasor. Further, the prohibition of the set-off provision in the no-fault act would appear to be confined to limiting set-off only in the motorist versus motorist context. The reason for this is that the no-fault act is a self-contained legislative scheme designed to deal with auto tort litigation which suggests that is was never intended to address traditional non-motorist third-party tort actions. In any case, it would be appropriate at some point for this Court or the Supreme Court to focus on the distinctions between these types of tortfeasors and to give consideration to the arguments supporting the auto insurer's position in these types of cases.

/s/ Clifford W. Taylor

[1] Judge Griffin's statement that I am doing something sua sponte is wholly inaccurate. I consider defendant's potential liability pursuant to the new *Pick* standard because the Supreme Court ordered such a review.

[2] The February 1994 Senate Fiscal Agency report on lawsuits against the State of Michigan indicates that plaintiff was paid 2.9 million dollars in fiscal year 1992-1993.

[3] Judge Markey has stated in her footnote that I apparently agree that the preferential icing was a point of hazard. This is incorrect. I am merely assuming, for the purpose of the argument, that such was the case. It is unnecessary for me to decide if this was or was not a point of hazard.

[4] Moreover, an effort to avoid the *Colovos* holding cannot be legitimately premised upon distinctions in drivers and their abilities. That is, we cannot indicate that negligence can be found on the basis that an inexperienced driver would not have seen the sign but deny liability when the driver is more experienced. The reason is that driving is a state-licensed activity and, because of this, the law presumes minimal competence and knowledge which a driver cannot avoid by pleading ignorance. It is, in fact, based upon this concept of the lowest common denominator driver that requirements are established for size, placement, coloration, etc., of signage.

[5] Thus, I disagree with Judge Markey's characterization of the trial court's holding as being a finding of fact subject to the clearly erroneous standard.