STATE OF MICHIGAN

COURT OF APPEALS

VERA SEKULOV, Personal Representative of the Estate of RADE SEKULOVSKI, Deceased,

Plaintiff-Appellant,

v

CITY OF WARREN and COUNTY OF MACOMB,

Defendant-Appellees.

FOR PUBLICATION
May 14, 2002
9:00 a.m.

No. 228159
Macomb Circuit Court
LC No. 98-000497-NP

Updated Copy
August 16, 2002

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

TALBOT, J. (*concurring in part and dissenting in part*).

I would affirm the trial court's grant of summary disposition for both defendants. I agree that summary disposition was properly granted in favor of defendant city of Warren for the reasons stated in the majority opinion. However, I would also affirm the trial court's grant of summary disposition in favor of defendant Macomb County on the basis of *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 NW2d 702 (2000), and *Hanson v Mecosta Co Bd of Co Rd Comm'rs*, 465 Mich 492; 638 NW2d 396 (2002), which I believe apply retroactively and are dispositive of plaintiff's claims.

In determining whether the general rule of retroactive application applies to *Nawrocki*, it is necessary to address the threshold question whether the *Nawrocki* decision clearly established a new principle of law. *Pohutski v Allen Park*, 465 Mich 675, 696-697; 641 NW2d 219 (2002). Accordingly, the relevant inquiry is whether our Supreme Court overruled clear and uncontradicted case law when it overruled *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996). *Lincoln v General Motors Corp*, 461 Mich 483, 491; 607 NW2d 73 (2000), citing *Michigan Educational Employees Mut Ins Co v Morris*, 460 Mich 180, 189; 596 NW2d 142 (1999). I would hold that it did not.

The *Pick* decision was neither clear nor uncontradicted. In overruling the decision, the *Nawrocki* Court noted that *Pick* constituted a departure from the interpretative principles of *Ross v Consumers Power Co (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984), "that the immunity conferred on governmental agencies is broad with narrowly drawn exceptions." *Nawrocki*, *supra* at 149, 177-178. *Nawrocki* corrected an erroneous interpretation of MCL 691.1402(1) that was contrary not only to the established principles of *Ross*, but also to the plain

language of the statute. *Nawrocki*, *supra* at 175, 180, 183. "[A] purpose of clarifying existing law is sufficient for the retroactive application of a rule of law." *Chow v O'Keefe*, 217 Mich App 102, 105; 550 NW2d 833 (1996). See *Lindsey v Harper Hosp*, 455 Mich 56, 68-69; 564 NW2d 861 (1997); *Bolt v City of Lansing (On Remand)*, 238 Mich App 37, 44; 604 NW2d 745 (1999).

Notably, the *Nawrocki* Court prefaced its analysis by observing that "[t]he failure to consistently follow *Ross*, specifically with regard to the interpretation and application of the highway exception, has precipitated an exhausting line of confusing and contradictory decisions." *Nawrocki*, *supra* at 149. The Court recognized that "these conflicting decisions have provided precedent that both parties in highway liability cases may cite as authority for their opposing positions." *Id.* at 149-150. The Court stated that "[t]his area of the law cries out for clarification," which it attempted to provide in the *Nawrocki* decision. *Id.* at 150. Clearly, *Pick* was not settled precedent. Accordingly, because *Nawrocki* does not satisfy this threshold criterion, *Nawrocki* has retroactive application.

Similarly, the Supreme Court in *Hanson* applied the plain language of subsection 1402(1) and the principles articulated in *Nawrocki* in rejecting the plaintiff's claim that the government has a duty to correct design defects in the road. *Hanson*, *supra* at 503. The prior case law cited in the *Hanson* dissent contains mere dicta on this issue and therefore carries no precedential authority. *Hanson*, *supra* at 501, n 7. Because *Hanson* did not overrule clear and uncontradicted prior case law, retroactive application is appropriate.

On the authority of *Nawrocki* and *Hanson*, plaintiff's claim fails. Plaintiff's claim of inadequate signage, traffic control devices, or lighting fails to plead facts in avoidance of governmental immunity. *Nawrocki*, *supra* at 183-184. Further, plaintiff's claim that the county failed to correct design defects and make improvements to the roadway and crosswalk also is inadequate to avoid governmental immunity. *Hanson*, *supra* at 503-504. Our Supreme Court "emphasized in *Nawrocki* that the highway exception does not permit claims based on conditions arising from such points of hazard, and that the only permissible claims are those arising from a defect in the actual roadbed itself." *Id.* at 503, citing *Nawrocki*, *supra*. The highway exception to governmental immunity is inapplicable and Macomb County is entitled to summary disposition. *Hanson*, *supra* at 503; *Nawrocki*, *supra* at 182-183; MCR 2.116(C)(7) and (C)(8).

/s/ Michael J. Talbot