STATE OF MICHIGAN

COURT OF APPEALS

ELEANOR COLEMAN, as Personal Representative of the Estate of JOSEPH F. COLEMAN, deceased, DORIS M. EDWARDS, as Personal Representative of the Estate of JAMES A. EDWARDS, deceased, and BARBARA SNYDER, as Personal Representative of the Estate of EDWIN SNYDER, deceased,

UNPUBLISHED
July 26, 1996

Plaintiffs-Appellants,

v

No. 165806
LC No. 88-3493

STATE OF MICHIGAN, DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

Before: Holbrook, P.J., and Taylor and Nykamp,* JJ.

PER CURIAM.

Plaintiffs appeal as of right an order granting summary disposition to defendant pursuant to MCR 2.116(C)(10) (no genuine issue of material fact entitling the moving party to judgment as a matter of law). We vacate and remand.

In the early morning hours on May 4, 1986, three men were killed in an automobile accident at the intersection of Gratiot Avenue and 21 Mile Road in Macomb County. Plaintiffs are the widows and personal representatives of the estates of the three men. As plaintiffs' decedents were traveling north on Gratiot Avenue, a driver who had been drinking alcohol ran a flashing red light at a speed of 65 to 70 m.p.h., in excess of the speed limit, and broadsided plaintiffs' decedents' vehicle.

Plaintiffs sued the Department of Transportation, alleging that the intersection had not been maintained so that it was reasonably safe and convenient for public travel as required by the highway exception to governmental immunity. MCL 691.1402; MSA 3.996(102). At the time the accident

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* Circuit judge, sitting on the Court of Appeals by assignment.

occurred, the light at the intersection flashed yellow for Gratiot Avenue traffic and flashed red for 21 Mile Road traffic. Plaintiffs alleged that the intersection was not reasonably safe and fit for public travel because there was a higher accident rate at the intersection during the midnight to 6 a.m. flashing operation of signals as opposed to the 6 a.m. to midnight period when the yellow-red-green cycle was in operation for vehicles traveling on both roads.

This was a Court of Claims case. Pursuant to MCL 600.6443; MSA 27A.6443 "the case shall be heard by the judge without a jury." Accord *Barbour v DSS* 172 Mich App 275, 280; 431 NW2d 482 (1988) and *Freissler v State Highway Comm*, 53 Mich App 530, 533-540; 220 NW2d 141 (1974). Nevertheless, the court impaneled an advisory jury which was unable to reach a verdict after a two-week trial. Defendant moved for a mistrial and plaintiffs' counsel agreed. Plaintiffs' counsel then asked that the parties be able to submit proposed findings of facts and conclusions of law so the court could decide the case. The court said that it wanted a hearing to determine what was going to be done. Plaintiffs subsequently filed a motion asking the court to render findings of facts and conclusions of law based on the evidence that had been adduced at trial. Plaintiffs' counsel pointed out that they had spent $25,000 for the expert opinion testimony they had presented at trial and that the trial had been emotionally draining for the three widows. Defendant opposed plaintiffs' motion, stating that it wanted the case retried in front of another jury.

Rather than complying with MCR 2.517(A)(1), which requires a court to find the facts and reach conclusions of law and enter an appropriate judgment in cases that are tried without a jury or with an advisory jury, the court inexplicably denied plaintiffs' motion without giving any reasons and set the matter for retrial. Defendant subsequently filed a motion for summary disposition arguing there was no genuine issue of material fact as to its liability for the deaths of plaintiffs' decedents. The trial court granted defendant's motion on the basis that defendant did not have a duty to improve the traffic signal at the intersection and because defendant was not "the" proximate cause of the accident.

Plaintiffs argue that the court engaged in improper factfinding in deciding defendant's motion for summary disposition. Defendant concedes that the trial court may have engaged in factfinding when it found the existing signal was adequate but argues this was within the court's authority since it had heard the trial on the merits and was sitting as the factfinder. Defendant argues as follows in its appellate brief:

> Having heard that entire trial, as the finder of fact, the court could and should have resolved the case by issuing its findings of fact and conclusions of law. Instead it declared a mistrial due to the inability of the <u>advisory</u> jury to come to a verdict.
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> * * *
>
> It would have been a tremendous waste of judicial resources to retry the entire case so that the court could hear all the same evidence again, presented in the same fashion, in order to render the decision it was capable of rendering already. [Emphasis in the original.]

Defendant's position on appeal is very disturbing. If defendant genuinely believes the court "should have" decided the case by issuing findings of facts and conclusions of law, we are at a loss to understand why it opposed plaintiffs' motion which asked the court to do this very thing. If defendant genuinely believes it would be a tremendous waste of judicial resources to retry the case, we do not understand why it opposed plaintiffs' motion to have the court decide the case and why it argued that there should be a second trial. Yet, when the court subsequently engaged in factfinding to defendant's benefit while ruling on defendant's motion for summary disposition, defendant then changes its position and claims on appeal that this was acceptable because the court should have decided the case as factfinder after the trial. Defendant criticizes the trial court in its appellate brief for doing what it asked the court to do in the first place. This Court does not look favorably on such behavior by a litigant, especially a state agency.

We simply will not let defendant argue that it was harmless error for the trial court to find facts in ruling on its motion for summary disposition where defendant specifically and successfully opposed plaintiffs' request to have the court do this very thing prior to defendant filing a motion for summary disposition. Cf. *Living Alternatives v DMH*, 207 Mich App 482, 484; 525 NW2d 466 (1994) (a party may not take a position in the trial court and subsequently seek redress on appeal based on a position contrary to that taken in the trial court). Defendant has conceded that the court found facts in ruling that the existing signal at the intersection was adequate. A trial court may not resolve facts in deciding a motion for summary disposition. *Arbelius v Poletti*, 188 Mich App 14, 18; 469 NW2d 436 (1991). Therefore this portion of the court's summary disposition ruling was error.

The trial court also granted summary disposition to defendant because defendant was not "the" proximate cause of the accident. Such a determination is not a ground for granting defendant summary disposition. Defendant may be liable if its failure to maintain the highway in a manner reasonably safe and convenient for public travel was merely "a" proximate cause of the accident. The fact that defendant was not "the" proximate cause of the accident did not entitle defendant to summary disposition. *Colovos v Dept of Transportation*, 450 Mich 860; __ NW2d __ (1995); *Dedes v Asch*, 446 Mich 99, 106, n 2; 521 NW2d 488 (1994).

Given the unique procedural posture of this case, we find that a remand to the trial court for issuance of findings of facts and conclusions of law, based upon the evidence adduced at trial and in light of the recent Supreme Court decisions in *Colovos, supra,* and *Pick v Szymczak*, 451 Mich 607; ___ NW2d ___ (1996), is appropriate. We note that *Pick* held that a duty to provide adequate traffic control devices at known points of hazard arises under the highway exception to governmental tort liability act. *Pick, supra,* at 622-623.

Vacated and remanded for issuance of findings of facts, conclusions of law and an appropriate judgment. MCR 2.517(A). We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Clifford W. Taylor
/s/ Wesley J. Nykamp