

STATE OF MICHIGAN
COURT OF APPEALS

CHRISTINA M. DURAM, guardian of MARTIN R.
DURAM, and DAVID C. DREYER, JR.,

UNPUBLISHED
November 30, 1999

Plaintiffs-Appellants,

v

No. 206419
Court of Claims
LC No. 96-716347-CM

DEPARTMENT OF TRANSPORTATION,

Defendant-Appellee.

Before: Fitzgerald, P.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiffs appeal of right the Court of Claims' order granting summary disposition in favor of defendant under MCR 2.116(C)(10) in this negligence action involving the highway exception to governmental immunity, MCL 691.1402; MSA 3.996(102). We affirm.

I

The accident in the instant case occurred on February 12, 1995, at the intersection of 44th Street, S.E., and Broadmoor, S.E. (M-37) in Kentwood, Michigan. The intersection's traffic signal operated in a solid, three-color mode (red/ yellow/ green) during the day and evening, changing to a red/yellow flashing operation from 12:30 a.m. to 5:30 a.m. The accident occurred at around 12:35 a.m., shortly after the signal switched to the red/yellow flashing mode. Plaintiffs alleged that Douglas Behrens, the driver of a Ford Bronco traveling eastbound on 44th Street, either failed to stop at the red flashing light, or stopped and proceeded into the intersection and struck the Toyota Tercel occupied by plaintiffs, who had the flashing yellow light as they drove northbound on M-37. The speed limit on M-37 at the time of the accident was higher than fifty miles per hour, and on 44th Street was approximately forty or forty-five miles per hour.

Plaintiffs' complaint alleged that defendant breached its duty to keep the intersection in reasonable repair and in reasonably safe condition and fit for public travel by failing to conduct a comprehensive investigation of traffic conditions and physical characteristics at this intersection to obtain data necessary to properly design and operate the intersection, failing to operate the traffic signal in a

normal mode around the clock, failing to operate the signal within accepted national standards and practices and those of good engineering practice, and operating the traffic signal in a flashing mode.

Defendant's motion for summary disposition argued that plaintiffs had failed to state a claim under the highway exception because the intersection was reasonably safe for public travel in that there was a traffic control device that was adequate to safely control traffic when obeyed, and that plaintiffs could not prove proximate cause because the accident may have happened even had the light been in its three-color operation and the running of the flashing red light was an intervening and superseding cause.

Defendant relied on *Wechsler v Wayne Co Bd Rd Comm*, 215 Mich App 579; 546 NW2d 690 (1996), remanded in light of *Pick v Szymczak*, 451 Mich 607; 548 NW2d 603 (1996), 455 Mich 862 (1997), app dis (No. 204994, order issued 1-20-98)¹, to support its argument that the intersection at issue was reasonably safe. In *Wechsler*, a majority of a panel of this Court concluded that a "governmental agency fulfills its statutory obligation by providing traffic-control devices or signs that permit ordinarily prudent motorists to navigate and negotiate the road with reasonable safety." *Id.* at 600. Defendant asserts that under *Wechsler* it only has "a duty to install adequate traffic controls," and that "traffic signals are to be evaluated with a presumption of compliance."

The Court of Claims granted summary disposition:

THE COURT: I am going to grant the motion for summary disposition. Because the issue here is proximate cause, proximate cause of this collision was the other driver entering the intersection in violation of the Plaintiffs' right-of-way. What effect, if any, different signage would have had, is speculation.

I also agree with the Plaintiffs –with the Defendants on their arguments. I agree with them that this is indeed similar to the Roberts² case which arose in this Court and affirmed by the Court of Appeals. And I agree that the Defendant's duty is not simply implicated in this collision.

II

Plaintiffs first argue that the question whether defendant breached its duty to make the intersection in question reasonably safe for public travel is one of fact and that the circuit court improperly determined that defendant's duty was not implicated in this collision.

Defendant has a duty to maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. MCL 691.1402; MSA 3.991(102). That duty includes providing adequate traffic control devices or warning signs at, or in regard to, points of hazard. *Pick, supra* at 624. "Point of hazard" or "point of special danger" is defined as

any condition that directly affects vehicular travel on the improved portion of the roadway so that such travel is not reasonably safe. To be 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. We reemphasize, however, that such conditions need not be physically part of the roadbed itself. [*Id.* at 623.]

The *Pick* Court rejected the plaintiffs' "implied claim that all crossroads intersections intrinsically qualify as points of hazard." *Id.* at 623 n 15.

While it is arguable that plaintiffs presented sufficient evidence to create a genuine issue whether the intersection was reasonably safe for public travel at the time of the accident,³ we conclude that pursuant to MCR 7.215 (H)(1) this case is controlled by *Wechsler*,⁴ and *Helmus v Michigan Dep't of Transportation*, ___ Mich App ___; ___ NW2d ___ (Docket No. 206576, issued 10/26/99).

Applying *Wechsler* and *Helmus*, the intersection was not a special point of hazard but was an ordinary intersection controlled by a traffic control device that permitted ordinarily prudent motorists to navigate and negotiate the road with reasonable safety. Defendant therefore discharged its duty as a matter of law. The fact that a different signal would have obviated the accident does not assist in determining whether the existing traffic-control measure made the highway reasonably safe. *Wechsler* at 600, *Helmus*, slip op at 2. *Helmus* disposes of the causation issue as well. *Id.* at 3-4.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Martin M. Doctoroff
/s/ Helene N. White

¹ While *Wechsler* was on remand to this Court, the parties stipulated to a dismissal.

² *Roberts v Dep't of Transportation*, unpublished opinion per curiam (No. 191727, issued April 29, 1997), was issued on April 29, 1997, before the Supreme Court remanded *Wechsler* to this Court for reconsideration in light of *Pick*, *supra*, by order dated July 15, 1997.

³ Plaintiffs attached to their response to defendant's motion deposition testimony of their two experts. Sheldon Pivnik, a traffic engineer, testified that 44th Street carries traffic to the airport, that M-37 carries traffic away from a factory that has a late night shift, and that the intersection of the two roads had a significant accident history. Pivnik testified that studies indicated that there is greater observance of a normally operating traffic signal than of a flashing red signal. Plaintiff's accident reconstruction expert, Thomas Bereza, testified that he worked in the Traffic Services Division of the Michigan State Police for ten years and had studied intersections based on accident histories. He testified that he had done consulting work on several serious accidents that occurred at the intersection in question, and that the severity of the accidents at this intersection dramatically increases once the light goes to flashing mode. Bereza also testified that based on his twenty three years with the Michigan State Police, people are more likely to run a flashing red light than a solid red light. He testified that based on personal

experience, the volume of traffic using the airport increased greatly over the previous few years and that the traffic volumes in the area at 12:35 a.m. had dramatically increased over volume four or five years ago. Both experts testified that the heavier late-night volume of traffic was on 44th Street, and that the flashing yellow light should have been on that street, rather than on M-37. Bereza testified that Behrens was driving at approximately thirty miles per hour when his vehicle struck plaintiffs', and that he thus tended to believe that Behrens either did a rolling stop or slowed down for the intersection and then went through it.

Pivnik opined that the intersection was not reasonably safe:

Q What is it about the flashing light, in your opinion, that makes it not reasonably safe?

A . . . the reason to have a traffic signal installed, in the first place, is to ensure the orderly and safe movement of traffic. . . by actually assigning a go period to a particular movement, while withholding the movement to the opposing traffic, to ensure that no conflicts occur. That's the prime reason for a traffic signal.

When you do away with that stop and go movement, what you're doing is you're taking away the ability to assign the right-of-way to a particular movement, and you're putting more of a burden on the driver.

The feeling that I have, and it seems to be a general feeling in the industry, is that if you do something like that, appropriate engineering studies should be conducted, on a regular basis, to make sure that while shifting the burden to the driver himself, that you're putting the driver in a very poor position, and you're doing away with the duty that you have to provide a safe operation for the driver.

In looking over the accident history, I find that for each year, starting from the time in 1990, at least – 1991, in particular, that the flashing period, there was still a consistent pattern of preventable accidents that were occurring during the flashing operation.

They were not centered around any particular time. They actually seem to have a spread during the whole time of the flashing operation.

In addition, I looked at the vehicle volumes, and am very concerned, because the vehicle volume for the movement on 44th Street always remained high and actually above the minimum warrant that was established for the creation of flashing operation. And it seemed that the volume on 44th Street always tended to be higher than the volume on M37, on Broadmoor.

Q You were saying?

A Because of this high volume of traffic, the preventable accident, that even the flashing operation that was in there was probably not—I wouldn't even say probably, was not appropriate.

The heavier volume – the normal engineering viewpoint of traffic engineers is when you're using flashing operation, you do not control the heavier movement with a flashing red, you always control the heavier movement with a flashing yellow.

And in this case, the heavier movement was given a flashing red and not given a flashing yellow. That was a problem.

The preventable accident spread was a problem. The volume was the problem. And all of those lead me to the opinion that the signal should not have been flashing at all.

He further testified:

I don't see any really [sic] engineering evaluation. In fact, the only vehicle warrant graph that I see here is dated November 5, 1990, based on a survey taken June 27, 1989. . . .

* * *

Pivnik also testified:

. . . . If it is flashing, if it is in flashing operation, and a review of the accident history of the flashing operation indicates that there is still a series of correctable accidents occurring, then it's incumbent upon the agency to either make a test operation, and see if 24 hour operation does it, or make an appropriate engineering study to determine whether they should change the operation or change the time.

And I don't think either one was done by the operating agency. At least I haven't, in the material that has been furnished me on Request for Production, I haven't seen an engineering study or an evaluation done to reconcile these late night accidents during the flashing operation.

Bereza also opined that the intersection was not reasonably safe:

. . . the Plaintiff in this case – the vehicle was northbound on M-37 and had the right-of-way on the yellow flashing light. My analysis will clearly show that their speed was at or about 50 miles per hour, which was actually below the posted prima facie speed limit. The Bronco that came across, I believe – and not knowing where he's –could have stopped or whether he did stop –will show that his velocity was in the high 20's, around 30 miles an hour³ when the impact occurred, which tends to make me believe that he did a rolling stop or slowed down for the intersection and went on through.

. . . . I want to quantify [my opinions] in respect to the fact that I believe that the intersection was not reasonable for the conditions that existed at that time of night. My own knowledge of that area shows that the accident history, which it will verify, jumped dramatically in the severity. The severity of the accidents is something that in a signalized intersection is put into control, especially in right angle accidents. Had this intersection been maintained on a full phase, I don't believe this accident would have happened. It would have sequenced the traffic and eliminated this type of collision. Reverting down to a flashing mode basically puts us back to, literally, a Stop sign situation and a yielding situation. And I believe that the traffic counts and accident history should have been followed and noted – that the intersection was too busy for the flashing type of operation that existed.

* * *

Q Is the intersection reasonably safe if the lighting is full three-color operation?

A In the full three colors?

Q Yes.

A I believe it's as safe as the engineering principles can set it. It's a major intersection. And I've read the data where there were additional recommendations on storage lanes, left-turn phases, and everything else. And I believe that protocol has been followed. Yes. I don't believe that that's a problem.

Q Now, can you explain to me why there is a safety difference between a flashing light and a three-color light?

A The flashing light and the three-colored light literally controls [sic] and stops [sic] traffic. In other words, you don't have a conflict in the intersection from the yielding situation that may exist and people coming out from a stopped position with traffic flowing through at highway speeds – that the signals simply control that, phase it, stop the traffic, allow the traffic to go through.

And in respect to the conditions, with the addition of the plants in that area of Steelcase [sic] and Zondervan's and all of the development out around the airport and the late flights, the traffic congestion and volumes have dramatically increased, which – your own traffic counts show over a five-year period where there was, like, a 33 percent increase in traffic. I think that's enough of a flag and a warning to look at an intersection and say that having a three-phase light and putting it on flasher substantially changes the traffic control at intersection and will result – cause a resultant increase in the severity of the accidents.

So I don't believe that you can look at it as safe as a three-phase light. And having it on flasher, it only increases the severity of the cases.

One of the exhibits attached to Bereza's deposition was a letter from an anonymous citizen to defendant, apparently written in 1987, at which time the traffic signal at issue turned to blinking at 11:30 p.m. The letter suggested that because of heavy traffic and near-accidents, the switch to flashing operation should be made later, at 12:30 a.m. That change was made, apparently in 1991.

⁴ While the Supreme Court remanded *Wechsler* to this Court for reconsideration in light of *Pick*, the order of remand did not vacate this Court's decision in *Wechsler*.