IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Boonstra, PJ, and Ronayne Krause and Swartzle, JJ

W A FOOTE MEMORIAL HOSPITAL, doing business as ALLEGIANCE HEALTH,

Plaintiff-Appellee,

v

MICHIGAN ASSIGNED CLAIMS PLAN AND MICHIGAN AUTOMOBILE INSURANCE PLACEMENT FACILITY,

Defendants-Appellees,

JOHN DOE INSURANCE COMPANY,

Defendant.

Supreme Court Docket No. 156622

Court of Appeals Docket No. 333360

Lower Court Case No. 15-008218-NF

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AMICUS CURIAE BRIEF OF THE MICHIGAN COUNTY ROAD COMMISSION SELF-INSURANCE POOL

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INTRODUCTION

Amicus Curiae Michigan County Road Commission Self-Insurance Pool ("MCRCSIP" or the "Pool") sought leave to address the second issue identified by this Court in its May 25, 2018 Order: whether the Court of Appeals correctly concluded that this Court's decision in *Pohutski v City of Allen Park*, 465 Mich 675, 696 (2002), has been "effectively repudiated" in the context of judicial decisions of statutory interpretation, see *Spectrum Health Hospitals v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503 (2012); *Wayne County v Hathcock*, 471 Mich 445, 484 n 98 (2004); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587 n 57 (2005).

Pohutski has been utilized to decide whether to apply judicial precedent prospectively only on the basis of what is "fair" and "reasonable" in light of the "total situation" presented to the reviewing court. To make that evaluation, *Pohutski* reaffirmed and applied a four-part test consisting of a "threshold" question whether the decision clearly established a new principle of law, followed by a balancing of three factors: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *Pohutski*, 465 Mich at 696.

Pohutski's framework is sensible where this Court exercises its judicial power as the ultimate steward of Michigan's common law. By way of example, in *Pohutski*, the Court was evaluating whether to apply a change to the ***common law*** retroactively, i.e., the abrogation of a well-established common law exception to governmental immunity. That said, the *Pohutski* framework has proved to be unworkable in the context presented here: when courts evaluate whether to apply a judicial interpretation of ***the civil law*** retroactively. In the latter context, principles of federalism weigh against giving judges the power of the legislative pen to

determine that a statute whose language has not changed means different things depending on the date the statute is being applied. There is no question that courts have the ability and the duty to interpret statutes. However, when they do so, they must exercise restraint to decide only what the law is and has always been, not what it once was but should no longer be. This distinction is already present in this Court's existing precedent, as seen in *Hathcock, Devillers and Spectrum*, and should be reaffirmed by this Court here.

This Court should, for the sake of consistency and clarity, affirm the Court of Appeals' conclusion that for cases of judicial interpretation of statutes, the *Pohutski* test does not apply. This Court should also conclude that outside of this context, such as where the Court overturns or changes existing common law, the *Pohutski* test for retroactivity should be employed. Therefore, the Pool respectfully requests that this Court affirm the Court of Appeals, such that *Spectrum* and its immediate predecessors control the retroactivity of cases construing statutes or other civil law, and *Pohutski* controls the retroactivity of cases changing the common law.

STATEMENT OF APPELLATE JURISDICTION

On October 12, 2017, Plaintiff-Appellant filed an application for leave to appeal the August 31, 2017 judgment of the Court of Appeals. This Court issued an Order on May 25, 2018 directing "the Clerk to schedule oral argument on whether to grant the application or take other action." MCR 7.305(H)(1). As such, this Court has exercised its discretionary jurisdiction over this matter and may so consider or take other action on the Application as it indicated in its Order directing the same.

STATEMENT OF *AMICUS CURIAE* INTEREST

The Michigan County Road Commission Self-Insurance Pool ("MCRCSIP" or the "Pool") has, for the past 33 years, provided general liability and auto coverage to Road Commissions within the State. It's present Membership includes the Boards of County Road Commissioners for the Counties of Alcona, Alger, Allegan, Alpena, Antrim, Arenac, Baraga, Barry, Bay, Benzie, Branch, Cass, Charlevoix, Cheboygan, Chippewa, Clare, Clinton, Crawford, Delta, Dickinson, Eaton, Emmet, Genesee, Gladwin, Gogebic, Grand Traverse, Gratiot, Hillsdale, Houghton, Huron, Ionia, Iosco, Iron, Isabella, Kalkaska, Kent, Keweenaw, Kalamazoo, Lake, Lapeer, Leelanau, Lenawee, Livingston, Luce, Mackinac, Manistee, Marquette, Mason, Mecosta, Menominee, Midland, Missaukee, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oceana, Ogemaw, Ontonagon, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw, Sanilac, Schoolcraft, Shiawassee, St. Clair, St. Joseph, Tuscola, Van Buren, Washtenaw, and Wexford.

As expressly permitted under PA 1951, the Pool's main objectives are focused on the unique exposures of its Members. It is axiomatic that this includes a particularized interest in aspects of the law which may impact the day-to-day operations or exposure to liability arising from those operations. Jurisprudence affecting governmental immunity, stare decisis, and consistent construction and application of the County Road Law and GTLA are not only important to Members of the Pool, but have a tangible daily impact on its operations. Ultimately, the Pool strives to advocate for a predictable legal process that benefits its Members and the public they serve.

More pointedly, as Amicus Curiae in this matter, the Pool has a concrete and particularized interest in the resolution of issue number two as explained in this Court's Order granting oral argument on the Application, entered May 25, 2018 (i.e., whether "the Court of

Appeals correctly concluded that this Court's decision in *Pohutski v City of Allen Park*, 465 Mich 675, 696 (2002), has been 'effectively repudiated' in the context of judicial decisions of statutory interpretation"). Two recent directly-conflicting published opinions of the Court of Appeals regarding the retroactivity of *Streng v Board of Mackinac County Road Commissioners*, 315 Mich App 449; 890 NW2d 680 (2016), have led to deep uncertainty in the retroactive application of the law as applied to the Pool's Membership. Compare *Brugger v Midland Co Bd of Rd Commrs*, ___Mich App___; ___NW2d___ (2018) (Docket No. 337394), with *Harston v Co of Eaton*, ___Mich App___; ___NW2d___ (2018) (Docket No. 338981). The result of these cases is that Pool Members have been the recipients of irreconcilable decisions on the retroactivity of *Streng*, which can be explained only by the difference in makeup of the appellate panels. This schism in the law is untenable, and can only be repaired by this Court.

STATEMENT OF ISSUES PRESENTED

Amicus Curiae adopt Defendants-Appellees statement of the questions presented.

STATEMENT OF FACTS

For purposes of this Brief, the Pool assumes the facts as presented in the Court of Appeals' Opinion. *W A Foote Mem Hosp v Michigan Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017).

STANDARD OF REVIEW

The Pool adopts Plaintiff-Appellant's standard of review as stated in its Application.[1]

[1] The de novo standard was likewise implicitly applied by Defendants-Appellees in their briefings.

ARGUMENT

The retroactivity question presented in this case is one that has both immediate and future implications for the Pool. Confusion and inconsistency by the lower courts in applying this Court's retroactivity jurisprudence have recently led to the Pool's Members receiving irreconcilable judicial opinions on whether they are entitled to governmental immunity from tort claims arising from alleged highway defects. To tell one county road commission that it is immune from the claim based on the plaintiff's failure to provide proper written notice, while at the same time telling another county road commission that it is not immune from the claim based on the same failure in notice, is inherently unprincipled and unfair.

To bring order to this chaos, this Court must send clear direction to the lower courts on the meaning of its various retroactivity precedents. Fortunately, this clear direction can be given without overturning existing precedent. That is because the approach outlined in *Pohutski* is not inconsistent with the approach described in *Devillers*, *Hathcock* and *Spectrum.* The key to reading the cases together is to recognize their different contexts. In *Pohutski*, this Court had to decide whether to make a change in the ***common law*** retroactive or prospective only. In the other cases, this Court had to decide whether to make a change in a judicial interpretation of ***the civil law*** retroactive or prospective only. This Court need look no further than the bedrock principle of our system of government—the separation of powers—to recognize that while courts should and do have wide latitude in creating, revising and applying the common law, they are not nearly so unfettered in interpreting and applying the law drafted by the people's chosen representatives: our elected legislators.

The Pool respectfully submits that much of the judicial gnashing of teeth over retroactivity decisions is rooted in the perceived effect of the decision on a particular litigant's expectations. Disappointed expectations, to a degree, are commonplace after any judicial

decision "changing" the law, or what was perceived to be the law. However, courts have never taken the approach that a litigant's disappointed expectations are alone enough to warrant making a decision apply only in the future. In fact, doing so creates an entirely different set of disappointed expectations—those of the opposing party and, potentially, any other party with litigation pending who may be denied rights or responsibilities under the law.

Ultimately, applying the retroactivity analysis described in *Spectrum* to cases of judicial interpretation of statutes, and other civil law, creates a clear rule that restores order, meets the reasonable expectations of litigants on both sides of an issue, and is most consistent with our federalist system of government by preventing courts from subverting the will of the people's elected legislative representatives. At the same time, adhering to the *Pohutski* framework to decide retroactivity issues in cases that involve changes to the common law does not extend the power of the judiciary into other branches of government, and is an entirely appropriate exercise of the judiciary's power to cultivate the rule of law in areas where the concomitant branches of government have not tread.

I. THE RELATIONSHIP BETWEEN COMMON LAW AND CIVIL LAW

Recognizing the distinction between common and civil law is essential to a cogent discussion of this Court's retroactivity jurisprudence. It has been said that this Court has judicial "authority" under the Constitution when interpreting the civil law (statutes, etc.). In other words, when called upon to decide a matter of civil law, this Court determines what the law is, not what the law ought to be.[2] *Marbury v Madison,* 5 U.S. (1 Cranch) 137, 177, 2 LEd 60 (1803). See also

[2] "This Court lacks the authority to alter a statute simply because it is confident that such alteration will better fulfill some supposed purpose." *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 84; 718 NW2d 784 (2006) (Markman, J., concurring).

Cameron v Auto Club Ins Ass'n, 476 Mich 55, 66; 718 NW2d 784 (2006).[3] Conversely, as "the principal steward of Michigan's common law," this Court has judicial "power" to apply, interpret, modify, or abrogate all or part of the common law to appropriately meet the needs presented by the times and issues before the Court. *Price v High Pointe Oil Co, Inc*, 493 Mich 238, 258-259; 828 NW2d 660 (2013) (it is "axiomatic that our courts have the constitutional authority to change the common law in the proper case," and this authority is traceable to Const. 1963, art. 3, § 7).

The critical point is: this Court's application of the retroactivity framework in *Devillers* and *Hathcock* is reflective of its role in those cases—as the expositor of the law as it was intended by those who enacted or ratified it. Likewise, with regard to matters of common law, it is appropriate for a Court to apply the retroactivity framework described in *Pohutski*—a framework that permits flexibility and fluidity in a manner reflective of the nature of the common law itself. Confusion from the bench and bar ensues when this critical distinction between the job of a Court interpreting a statute and the job of a Court when interpreting the common law are ignored. Clarity can be seen when *Pohutski* is properly left only to the realm of common law interpretation and application, and when *Devillers* and *Hathcock* are applied to all matters involving interpretation of the civil law, such as in *Spectrum* (statutory interpretation) and *Foote* (same).

A. Defining The Common Law

The "common law" is comprised of rules of law which do not rest for their authority upon any express or positive statute or other written declaration, but rather upon statements of principles found in the decisions of the courts. "Common law is the law of necessity and is

[3] *Cameron* was overruled on other grounds *Regents of Univ of Michigan v Titan Ins Co*, 487 Mich 289; 791 NW2d 897 (2010); however, *Regents* was subsequently found to be wrongly decided and overruled by *Joseph v Auto Club Ins Ass'n*, 491 Mich 200; 815 NW2d 412 (2012).

applied in the absence of controlling statutory law." 5 Mich. Civ. Jur. Common and Civil Law § 1. Michigan adopted the English common law in existence on that date in its earliest constitution. See, e.g., *Phillips v Mirac, Inc*, 470 Mich 415, 425-429; 685 NW2d 174 (2004). Thus, common law is a type of law founded on custom or a system of rules of decision not affected by statutes; it is judge-made law.

As law founded on custom, "[t]he common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions." *Bugbee v Fowle*, 277 Mich 485, 492; 269 NW 570 (1936) (quotation omitted). The common law grows and changes to meet the demands of changing social and economic conditions; it is always a work in progress and typically develops incrementally, gradually evolving as individual disputes are decided and existing common law rules are reconsidered and adapted to current needs in light of changing times and circumstances. See *Price*, 493 Mich at 257-264. "There is no question that both this Court and the Legislature have the constitutional power to change the common law." *Placek v Sterling Hts*, 405 Mich 638, 656; 275 NW2d 511 (1979). "[W]hen dealing with judge-made law, this Court in the past has not disregarded its corrective responsibility in the proper case," and has "heretofore believed that rules created by the court could be altered by the court." *Id.* at 656–657. "However, this Court has also explained that alteration of the common law should be approached cautiously with the fullest consideration of public policy and should not occur through sudden departure from longstanding legal rules." *Price*, 493 Mich at 259.

B. <u>The Civil Law</u>

In contrast to the common law, the civil law is comprised of the Constitution, statutes, and other acts by legislative bodies. Statutes *must* be interpreted in conformance with their express terms even if they conflict with the common law; it is "axiomatic that the Legislature has the authority to abrogate the common law." *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378,

389; 738 NW2d 664 (2007). Further, if a statute and the common law conflict, the common law must yield. *Id*.

Nevertheless, "[w]e will not lightly presume that the Legislature has abrogated the common law. Nor will we extend a statute by implication to abrogate established rules of common law." *Velez v Tuma*, 492 Mich 1, 11; 821 NW2d 432 (2012) (citation omitted). When the legislature abrogates the common law, it should speak in no uncertain terms. *Id*. Whether a statutory scheme preempts, changes, or amends the common law is a question of legislative intent.

It is clear from the above that this Court's authority over and relationship to the common law is unique. This Court applies its own jurisprudence and equitable principles to the common law; it is accepted that the common law is fluid and adaptable. With regard to constitutional or statutory application, however, even when overruling a prior decision, this Court is simply returning the law to what it always was. See *Robinson v City of Detroit*, 462 Mich 439, 463–468; 613 NW2d 307 (2000). *Co of Wayne v Hathcock*, 471 Mich 445, 483–484; 684 NW2d 765 (2004) ("Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963). It therefore follows that the retroactivity framework would (and should) be applied differently to those cases involving change to the common law as opposed to those interpreting and applying constitutional or statutory language.

II. MICHIGAN'S RETROACTIVITY FRAMEWORK: *POHUTSKI, DEVILLERS, HATHCOCK* AND *SPECTRUM*.

The distinction between common law and civil law has been adequately reflected in this Court's existing retroactivity precedents. Therefore, the question for the Court in the instant

matter should be viewed as simply clarifying that *Pohutski* applies to decisions interpreting the common law, whereas *Devillers* and *Hathcock* apply to decision interpreting the civil law.

A. The *Pohutski* Retroactivity Framework Applies Where the Common Law Is Interpreted.

In *Pohutski*, this Court considered whether "the trespass-nuisance exception to governmental immunity, as a common-law tort-based exception, survived the governmental tort liability act." *Pohutski v City of Allen Park*, 465 Mich 675, 685; 641 NW2d 219 (2002). After reflecting on previous decisions holding that the common law exception remained intact, the *Pohutski* Court ultimately held that these cases were wrongly decided and that the historic trespass-nuisance exception was no longer viable based on the plain statutory language of the Governmental Tort Liability Act ("GTLA").

In carefully reconsidering whether the common law was abrogated by statute, the *Pohutski* Court enumerated the then five statutory exceptions to governmental immunity as found in the GTLA in conjunction with the principle expressed in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 158; 615 NW2d 702 (2000) ("There is one basic principle that must guide our decision today: the immunity conferred upon governmental agencies is broad, and the statutory exceptions thereto are to be narrowly construed.")

With the aforementioned in mind, the Court held:

> With this principle in mind, we hold that the plain language of the governmental tort liability act does not contain a trespass-nuisance exception to governmental immunity. Trespass-nuisance simply is not one of the five exceptions to immunity set forth in the governmental tort liability act. As stated above, we are bound by the clear and unambiguous statutory text; we lack constitutional authority to impose on the people of this state our individual policy preferences regarding the availability of lawsuits arising from the operation of a sewage system. We must "seek to faithfully construe and apply those stated public policy choices made by the Legislature" in drafting the governmental tort liability act. We are mindful that, because immunity necessarily implies that a "wrong"

> has occurred, some harm caused by a governmental agency may lack a remedy. Although governmental agencies have many duties regarding the services they provide to the public, a breach of those duties is compensable under the statute only if it falls within one of the statutorily created exceptions. [*Pohutski*, 465 Mich at 689–690.]

Of utmost import: essential to the Court's holding was its conclusion that *the common law had changed. S*pecifically, this Court determined that—contrary to a prior Opinion of the Court—the common law exception to governmental immunity had been abrogated by the Legislature. In other words, in overturning case law to the contrary, the Court was not modifying the GTLA, the meaning of which had not changed. Rather, it the Court found that the common law was modified by act of legislation.

It was in this context—in the context of announcing *a change to long-standing common law*—that the Court quoted the following from *Williams v Detroit*, 364 Mich 231, 265-266; 111 NW2d 1 (1961) (opinion of Justice Edwards in which Justices Talbot Smith, T.M. Kavanagh and Souris concurred):

> This Court has overruled prior precedent many times in the past. In each such instance the Court must take into account the total situation confronting it and seek a just and realistic solution of the problems occasioned by the change.

Of course, in *Williams*, in a split decision, the Supreme Court completely abrogated decades of common law by overruling the doctrine of governmental immunity for future cases by a majority of the court. *Id.* Following the framework set forth in *Williams*, after a monumental shift in the common law, the *Pohutski* Court held that "our decision shall have only prospective application."

It was in this same context (i.e., a fundamental shift in established common law) that the Court articulated principles supporting this decision from previous cases where similar scenarios

were considered. *Id*. See *Hyde v Univ of Michigan Bd of Regents*, 426 Mich 223, 237–238, 240; 393 NW2d 847 (1986) (discussing limited retroactive application of cases overruling the well-established principle of common law that "operation of a public general hospital was . . . a governmental function); *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997) (distinguishing scenarios involving only pure statutory interpretation from those involving a 'settled precedent' such as the opinion in *Williams*); *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984) (" 'It is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances. The involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result.' "), quoting *Williams*, 364 Mich at 265-266 (opinion of Justice Edwards in which Justices Talbot Smith, T.M. Kavanagh and Souris concurred).

The Court went on to apply the "factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Pohutski*, 465 Mich at 696. Likewise, in the civil context (and again in the face of a change in the common law), *Pohutski* recognized an additional threshold question: "whether the decision clearly established a new principle of law." *Id*. See also *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 644–64; 433 NW2d 787 (1988) (Griffin, J.) ("The United States Supreme Court [has] made clear that state courts are not precluded by the federal constitution from determining whether *their own law-changing decisions* should be applied retroactively or prospectively.") (emphasis added).

As discussed above, in *Pohutski*, although the Court was giving meaning to the plain statutory text, its holding was that a statute had abrogated the common law. This is what was meant by the Court in so stating that, with regard to the "threshold question:"

> [a]lthough this opinion gives effect to the intent of the Legislature that may be reasonably be inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in *Hadfield* and *Li.* [*Id*.]

In other words, the threshold question turned on the inextricable nature of the *Pohutski* opinion in effectuating a major change (i.e., a new principle) with regard to the common law. Likewise the three factors each hinged on the effect abrogation of the common law principle would have—not a change in statutory language or meaning, which, again, remained unchanged. *Id*. at 697-699.

As such, the "threshold question" was dependent on a decision that had the effect of changing the common law; thus, application of each factor considered the aforementioned change. As is clear from the case law referenced therein, this Court has consistently held that the exigent circumstances sufficient to warrant consideration of the factors from *Pohutski* must involve a fundamental change in the common law. Conversely, when the Court has considered statutory or constitutional interpretation *without* implication of abrogation of the common law, the *Pohutski* test does not apply.

The Supreme Court has recognized

> A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions. Indeed, there are cases intimating, too broadly[], that it must give them that effect; but never has doubt been expressed that it may so treat them if it pleases, whenever injustice or hardship will thereby be averted. On the other hand, it may hold to

> the ancient dogma that the law declared by its courts had a Platonic or ideal existence before the act of declaration, in which event the discredited declaration will be viewed as if it had never been, and the reconsidered declaration as law from the beginning. The alternative is the same whether the subject of the new decision is common law . . .or statute. The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. [*Great N Ry Co v Sunburst Oil & Ref Co*, 287 US 358, 364-365; 53 S Ct 145, 149; 77 L Ed 360 (1932).]

Therefore, it may be said that Michigan, by virtue of this Court's consistent guidance, has determined that on matters of common law the issue of retroactivity is left to the wisdom of a court of supreme jurisdiction. However, in keeping with principles of federalism, which dictates that overruling an erroneous interpretation of statutory or constitutional law simply returns our law to that which existed before the interpretation was made in error and which was mandated by the statutory or constitutional text, the threshold question and subsequent determination of retroactivity is not appropriate in other contexts. Compare *Co of Wayne v Hathcock*, 471 Mich 445, 483–484; 684 NW2d 765 (2004) (correcting an interpretation of the Michigan Constitution) with *Gladych v New Family Homes, Inc*, 468 Mich 594, 599–608; 664 NW2d 705 (2003) (discussing retroactive nature of a decision correcting the erroneous belief that statutes of limitations were 'procedural' in nature and thus left to the powers inherent to this Court) and *McDonald v Farm Bureau Ins Co*, 480 Mich 191; 747 NW2d 811 (2008) (prospective application of change in law with regard to judicial tolling).

B. The Retroactivity Framework from *Hathcock*, *Devillers*, and *Spectrum* Applies Where the Civil Law Is Interpreted.

In contrast to the retroactivity analysis in *Pohutski* are two cases decided shortly thereafter: *Co of Wayne v Hathcock*, 471 Mich 445, 483–484; 684 NW2d 765 (2004), and *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586–87; 702 NW2d 539 (2005). As was held in Pohutski, decisions are retroactive unless "exigent circumstances" justify the "extreme measure"

of prospective-only application. *Devillers*, 473 Mich at 586. And, as is exemplified in *Hathcock* and *Devillers*, where a precisely drafted statute, unambiguous on its face, is interpreted by this Court for the first time, there has not been a 'change' in the law. "Where the Legislature has passed an unambiguous statute, that statute is the law. Our role is to enforce the law as written."[4] *People v Doyle*, 451 Mich 93, 113; 545 NW2d 627 (1996). Decisions involving issues of first impression do not inherently justify giving it only prospective application where the decision does not announce a new rule of law or change existing law, but merely provides an interpretation that has not previously been the subject of an appellate court decision. *Lindsey*, 455 Mich at 68.

1. *Hathcock*: Interpretation of Constitutional Law.

Hathcock considered an interpretation of the Michigan Constitution which had been Supreme Court precedent for 23 years. In overruling the previous decision (*Poletown*), Justice Young, writing for the Court, explained the clear delineation between the Court's objectives in interpreting the Constitution, which are easily juxtaposed to those principles regarding retroactivity explained in *Pohutski*:

> The primary objective in interpreting a constitutional provision is to determine the text's original meaning to the ratifiers, the people, at the time of ratification. This rule of "common understanding" has been described by Justice Cooley in this way:
>
> > "A constitution is made for the people and by the people. The interpretation that should be given it is that which reasonable minds, the great mass of the people themselves, would give it. 'For as the Constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people, and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense

[4] "We return the law, as is our duty, to what we believe the citizens of this state reading these statutes at the time of enactment would have understood the motor vehicle exception to governmental immunity and the employee provision of the governmental immunity act to mean." *Robinson v Detroit*, 462 Mich 439, 468; 613 NW2d 307 (2000).

> most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed.' "

In short, the primary objective of constitutional interpretation is to realize the intent of the people by whom and for whom the constitution was ratified.

* * *

Justice Cooley has justified this principle of constitutional interpretation in this way:

> [I]t must not be forgotten, in construing our constitutions, that in many particulars they are but the legitimate successors of the great charters of English liberty, whose provisions declaratory of the rights of the subject have acquired a well-understood meaning, which the people must be supposed to have had in view in adopting them. We cannot understand these provisions unless we understand their history, and when we find them expressed in technical words, and words of art, we must suppose these words to be employed in their technical sense. When the law speaks of an ex post facto law, it means a law technically known by that designation; the meaning of the phrase having become defined in the history of constitutional law, and being so familiar to the people that it is not necessary to employ language of a more popular character to designate it. The technical sense in these cases is the sense popularly understood, because that is the sense fixed upon the words in legal and constitutional history where they have been employed for the protection of popular rights. [*Hathcock*, 471 Mich at 468–469.]

Hathcock considered this Court's eminent domain jurisprudence at the time the Constitution was ratified. However, because *Poletown's* "conception of a public use—that of "alleviating unemployment and revitalizing the economic base of the community"—has no support in the Court's eminent domain jurisprudence before the Constitution's ratification, its interpretation of "public use" in art. 10, § 2 could not reflect the common understanding of that phrase among those sophisticated in the law at ratification. *Hathcock*, 471 Mich at 482–483. Consequently, this Court overruled *Poletow*n and remanded the matter for proceedings consistent with the Court's

opinion. *Id.* at 484 ("[B]because *Poletown* itself was such a radical departure from fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence leading up to the 1963 Constitution, we must overrule *Poletown* in order to vindicate our Constitution, protect the people's property rights, and preserve the legitimacy of the judicial branch as the expositor—not creator—of fundamental law.")

The Court recognized that, in the twenty-three years since *Poletown*, state and local government actors have relied on its broad, but erroneous, interpretation of art. 10, § 2. Nevertheless, the Court found the decision would not be subject to any prospective or limited retrospective application, holding that:

> Our decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963. Our decision simply applies fundamental constitutional principles and enforces the "public use" requirement as that phrase was used at the time our 1963 Constitution was ratified. Therefore, our decision to overrule *Poletown* should have retroactive effect, applying to all pending cases in which a challenge to *Poletown* has been raised and preserved. [*Hathcock*, 471 Mich at 483–484.]

Therefore, this Court held that a 23-year-old precedent of this Court interpreting the Constitution was nevertheless retroactive, not even meeting the threshold test for prospective application as described in *Pohutski*.

2. *Devillers*: Statutory Interpretation Absent Common Law.

Similarly, in *Devillers*, 473 Mich at 586–587 this Court considered a splinter in the law that had permitted judicial tolling to be applied to the No Fault Act. See, e.g., *Lewis v Detroit Auto Inter-Ins Exch*, 426 Mich 93; 393 NW2d 167 (1986), overruled by *Devillers*. In other words, the Court was not considering whether a statute had abrogated a separate and distinct

common law doctrine, but whether a common law principle had been improperly grafted onto a clear statutory mandate. In finding that the *Lewis* line of cases were in dereliction of the plain statutory language, this Court held that

> [s]tatutory-or contractual-language must be enforced according to its plain meaning, and cannot be judicially revised or amended to harmonize with the prevailing policy whims of members of this Court. The Lewis majority impermissibly legislated from the bench in allowing its own perception concerning the lack of "sophistication" possessed by no-fault claimants, as well as its speculation that the average claimant expects payment without the necessity for litigation, to supersede the plainly expressed legislative intent that recovery of PIP benefits be limited to losses incurred within the year prior to the filing of the lawsuit.
>
> Although a claimant may well find himself in a bind similar to that of the Lewis plaintiffs, and of the plaintiff in the case at bar, should that claimant delay the commencement of an action (as permitted by § 3145) more than one year beyond the accident leading to the injury, our observation is simply this: the Legislature has made it so. The Lewis Court acted outside its constitutional authority in importing its own policy views into the text of § 3145(1). "[T]he constitutional responsibility of the judiciary is to act in accordance with the constitution and its system of separated powers, by exercising the judicial power and only the judicial power." [*Devillers*, 473 Mich at 582–583.]

As such, this Court overruled *Lewis* and its progeny finding that the "one-year-back rule of MCL 500.3145(1) must be enforced by the courts of this state as our Legislature has written it, not as the judiciary would have had it written." *Id.* at 586.

On the matter of retroactivity, the Court found that no "exigent circumstances" of the sort warranting the "extreme measure" of prospective-only application were present. *Id.*

> As we reaffirmed recently in *Hathcock*, prospective-only application of our decisions is generally " 'limited to decisions which overrule clear and uncontradicted case law.'" *Lewis* is an anomaly that, for the first time, engrafted onto the text of § 3145(1) a tolling clause that has absolutely no basis in the text of the statute. *Lewis* itself rests upon case law that consciously and

> inexplicably departed from decades of precedent holding that contractual and statutory terms relating to insurance are to be enforced according to their plain and unambiguous terms. Thus, *Lewis* cannot be deemed a "clear and uncontradicted" decision that might call for prospective application of our decision in the present case. Much like *Hathcock*, our decision here is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority-here, the "one-year-back" limitation of MCL 500.3145(1). Accordingly, our decision in this case is to be given retroactive effect as usual and is applicable to all pending cases in which a challenge to *Lewis*'s judicial tolling approach has been raised and preserved. [*Id*. at 586.]

3. ***Spectrum*: Consistent Application of the *Hathcock and Devillers* Retroactivity Framework.**

As illustrated above, therefore, *Spectrum* is squarely in line with this Court's jurisprudence in *Hathcock* and *Devillers*. In *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Michigan*, 492 Mich 503, 535–536; 821 NW2d 117 (2012), this Court overruled several opinions which misinterpreted the plain statutory language in the No-Fault Act. After establishing the errors in the prior opinions, this Court concluded that "[t]he general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law." *Id*. (citation omitted).[5] The Court listed one exception to this scenario: when "statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be

[5] "[W]hen dealing with an area of the law that is statutory . . . it is to the words of the statute itself that a citizen first looks for guidance in directing his actions. This is the essence of the rule of law: to know in advance what the rules of society are. Thus, if the words of the statute are clear, the actor should be able to expect, that is, rely, that they will be carried out by all in society, including the courts. In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction. The reason for this is that the court in distorting the statute was engaged in a form of judicial usurpation that runs counter to the bedrock principle of American constitutionalism, i.e., that the lawmaking power is reposed in the people as reflected in the work of the Legislature, and, absent a constitutional violation, the courts have no legitimacy in overruling or nullifying the people's representatives. Moreover, not only does such a compromising by a court of the citizen's ability to rely on a statute have no constitutional warrant, it can gain no higher pedigree as later courts repeat the error." *Robinson v Detroit*, 462 Mich 439, 467–468; 613 NW2d 307 (2000).

invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision." *Id*. at 536. Thus, while applying a particular exception in the face of lower court opinions and a plurality decision, this Court affirmed that the exceptions to retroactive application *must involve extreme and particularized facts*. In other words, unless it would run afoul of other constitutional protections (i.e., the right to contract), decisions of this Court were retroactive in effect. And, as this Court has instructed, the exigent circumstances cannot be of the petitioner's own making. The validity of *Spectrum* is supported by like opinions that generally find statutory interpretation is not a "new rule of law." See, e.g., *Hathcock*, 471 Mich at 484 n 98.

C. ***Foote*, Which Determined Whether This Court's Earlier Interpretation of a Statute Should Be Retroactively Applied, Correctly Followed the *Hathcock* and *Devillers* Framework.**

Regarding the above described application and principles, Amicus Curiae encourage this Court to find that *Foote* struck the correct balance with regard to retroactivity. As has been well briefed (and need not be repeated *ad nausem* here), *Foote* considered the retroactive application of the statutory construction in *Covenant*. While Amicus Curiae takes no position on the particular subject matter of *Covenant*, the retroactivity analysis employed in *Foote* is entirely consistent with other cases that construe statutes. Amicus Curiae respectfully request this Court to make one key clarification to the *Spectrum* analysis: it is not that *Pohutski* was effectively repudiated by *Spectrum*; rather, it is that *Pohutski* was never intended to determine retroactivity of decisions interpreting civil law.

It is not without mention that some Courts have interpreted the disposition of the case which established a new principle of law to be binding precedent in and of itself. See, e.g., *Ewing v Detroit*, 252 Mich App 149, 176; 651 NW2d 780 (2002); *Adams v Dept of Transp*, 253

Mich App 431, 439–440; 655 NW2d 625 (2002) (in declining to address retroactivity and simultaneously applying the holding to the pending action "strongly indicates the Supreme Court's intent that Nawrocki be given retroactive application."). In explaining the details of this method, one panel observed that "opinions that apply retroactively apply to all cases 'still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule[s].' " *McNeel v Farm Bureau Gen Ins Co of Michigan*, 289 Mich App 76, 94–95; 795 NW2d 205 (2010), quoting *Harper v Virginia Dep't of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993). On the other hand, opinions that apply prospectively only "do not apply to cases still open on direct review, but do not even apply to the parties in the cases in which the rules are declared." *McNeel*, 289 Mich App at 94, citing *Pohutski*, 465 Mich at 699. Applying this analysis, the appellate court found that it was "clear that this Court has already concluded that *Griswold* did not apply prospectively only because it applied its holding to the three cases consolidated in *Griswold* and ruled that the plaintiffs in all three cases were entitled to penalty interest, irrespective of whether the claims were reasonably in dispute." *McNeel*, 289 Mich App at 95, citing *Griswold Properties, LLC v Lexington Ins Co*, 276 Mich App 551, 566-567; 741 NW2d 549 (2007).

D. MCRCSIP's Particular Interest: Retroactive Application of *Streng*

The discretionary nature of *Pohutski's* retroactivity test—when applied out of its intended context of the common law—has made the civil law vulnerable to expansive and internally conflicting interpretations between different appellate panels. See, e.g., *Johnson v White*, 261 Mich App 332, 337; 682 NW2d 505 (2004); *Hall v Novik*, 256 Mich App 387, 395–397 n 6; 663 NW2d 522 (2003) (footnoting difficulty with finding meaning in *Pohutski's* application). Thus, the bench and bar alike have struggled (sometimes in published opinions) to apply the fluid and

flexible *Pohutski* "factors" to the civil law, which is not intended to change apart from a subsequent act of a legislative body.

A concrete illustration of the confusion from the bench caused by misapplication of *Pohutski*, and one that directly affects the Pool's Membership, is the debate over the retroactivity of *Streng v Bd of Mackinac Co Rd Com'rs*, 315 Mich App 449; 890 NW2d 680 (2016). Since *Streng* was decided in 2016, two separate panels of the Court of Appeals have weighed in on its retroactivity, each issuing a published opinion. One panel applied *Pohutski* and found, after balancing *Pohutski's* flexible factors, that *Streng* should be applied prospectively only. The other published opinion applied *Spectrum* and *Foote*, and concluded that *Pohutski* does not apply to precedent interpreting statutes, and therefore, held that *Streng* is fully retroactive. Otherwise stated, the panels reached opposite results and the Opinions directly conflict. One of these cases (which actually consolidated two separate appeals) is pending on application before this Court presently. Another like case (not yet decided by the Court of Appeals) is currently being briefed. In other words, the very issue of retroactivity before the Court in this case will directly impact three cases on a wholly separate underlying topic presently pending in the appellate courts.

More specifically, the *Streng* Court held that notice regarding a highway defect claim against a county road commission (as opposed to against the State, a city, or a village) must be provided pursuant to the 60-day notice period in MCL 224.21, rather than the 120-day period found under MCL 691.1404. On May 15, 2018, the Court of Appeals issued *Brugger v Midland Co Bd of Rd Comm'rs*,___Mich App___; ___NW2d___(2018), concluding that "Streng should be given prospective-only application and that therefore, the 120-day notice provision of MCL 691.1404(1) is applicable to this case." Specifically, the Court of Appeals found that

> [t]he rules governing retroactivity are found in *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002). In *Pohutski*, the Michigan Supreme

> Court acknowledged the general rule that judicial decisions are given full retroactive effect. *Id.* at 695, 641 N.W.2d 219. However, "a more flexible approach is warranted where injustice might result from full retroactivity." *Id.* at 696, 641 N.W.2d 219. Such injustice may result where a holding overrules settled precedent. *Id.* There are three factors to be weighed in determining whether retroactive application is appropriate:
>
> > (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. In the context of civil context, ... this Court ... recognized an additional threshold question whether the decision clearly established a new principle of law. [*Pohutski*, 465 Mich at 696, 641 N.W.2d 219 (citations omitted).]
>
> Because our Supreme Court in *Rowland* did not explicitly overrule binding precedent establishing the 120-day notice requirement of the GTLA, as the governing provision in actions against county road commission defendants, and no case has been decided based upon MCL 224.21(3) for at least 46 years, we conclude that *Streng* effectively established a new rule of law departing from the longstanding application of MCL 691.1401 by Michigan courts. [*Id*.]

Ultimately, the *Brugger* majority found under the "flexible" approach taken from *Pohutski*, *Streng* (an opinion of the Court of Appeals) changed a long-standing statute and therefore application should be prospective. Clearly, as illustrated above, there are Opinions of this Court that disagree with the *Brugger* analysis; however, standing on the portions of *Pohutski* that espouse flexibility in retroactive determinations, the *Brugger* majority reasoned its opinion directly from the discretionary and equity-driven language in that case. This illustrates how the breadth of discretion in *Pohutski* has served to encourage courts to read statutes in way that ignores other, earlier binding opinions because, arguably, *Pohutski* has been read to imply that a court's sense of equity controls retroactivity in any type of case regardless of whether the matter is dealing with common law or civil law.

In contrast, on June 7, 2018, *Harston v Co of Eaton*, ___Mich App___; ___NW2d___(2018), (consolidated with *Estate of Brendon Pearce v. Eaton Co. Rd. Comm.*)

was issued by the Court of Appeals. The *Harston* panel found that *WA Foote* "controls this case in all respects." The panel quoted from *Spectrum* as an initial matter, stating that

> [t]he general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.' " This principle does have an exception: When a statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision. [*Id.*]

Based on *Spectrum*, the *Harston* panel concluded that *Rowland* was the underlying precedent, and, thus, *Streng* is not new law and could not be retroactive under the threshold test (it did not act as a "court of supreme jurisdiction overruling a former decision"). *Harston* also went on to apply the three-part test from *Pohutski*. Like in *Covenant*, it concluded that the first factor could support prospective application, but proper and consistent interpretation of the statutory text outweighed these reliance concerns. In a series of footnotes, the *Harston* panel explained the law upon which it relied to find *Pohutski* was inapposite, and ultimately noted that "[e]ven if we were not bound to follow *W A Foote*, we note that MCL 224.21(3) has always been the law and is currently the law. No changes have been made to this statute, so we are required to apply it as written. That is, the issue in this case concerns statutory interpretation, not retroactivity." Id. at n 7.

The Pool's Members are governmental entities charged with governance of public funds in conjunction with their statutorily obligated mandates. Overturning precedent is undoubtedly warranted on occasion—our Members have been on both sides of such opinions. However, at present, involvement in a case where the law arguably changes or is interpreted anew, necessarily means additional years of litigation to determine what version applies. It means

multiple appeals based on the same issue that may not all have the same result. Time, energy, resources, and reeducation are expended in this process without reliable outcomes. This is not only inconvenient for litigants; it is not reflective of the norms of our Judiciary and is most certainly a burden to the Court as well.

The Court of Appeals summarized the conundrum in this way as it authored a published opinion applying the flexible *Pohutski* factors:

> We may also incorporate into our analysis any other facts or considerations relevant to the instant dispute that may affect the fairness of our determination. ("resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy") (The overriding goals in determining whether to apply retroactively a new rule of law are to effectuate fairness and public policy.). ***No specific factor will control, nor will any particular result necessarily prevail from decision to decision.***
>
> "It is evident that there is no single rule of thumb which can be used to accomplish the maximum of justice in each varying set of circumstances. The involvement of vested property rights, the magnitude of the impact of decision on public bodies taken without warning or a showing of substantial reliance on the old rule may influence the result."
>
> The benefit of flexibility in opinion application is evident. If a court were absolutely bound by the traditional rule of retroactive application, it would be severely hampered in its ability to make needed changes in the law because of the chaos that could result in regard to prior enforcement under that law.... Without the flexibility to so apply the decision, it would be unlikely that much needed change could be effectuated in this state. [*Sturak v Ozomaro*, 238 Mich App 549, 559–561; 606 NW2d 411 (1999).]

Apart from the presently pending cases—that undoubtedly are of immense concern—it is the real concern that, until the *Pohutski* line of cases is addressed it is not feasible to place any reliance on whether an opinion will apply forward or backward. ***When matters of statutory interpretation or constitutional law are at issue, this Court states what the law is—and always***

was. Application of *Pohutski* in these circumstances is not appropriate. In fact, *any* prospective application places the judiciary in the role reserved for the other two branches of government:

> Indeed, if a court is free to cast aside, under the guise of equity, a plain statute . . . simply because the court views the statute as "unfair," then our system of government ceases to function as a representative democracy. No longer will policy debates occur, and policy choices be made, in the Legislature. Instead, an aggrieved party need only convince a willing judge to rewrite the statute under the name of equity. While such an approach might be extraordinarily efficient for a particular litigant, the amount of damage it causes to the separation of powers mandate of our Constitution and the overall structure of our government is immeasurable. *Devillers*, 473 Mich at 591.

This Court should, therefore, for the sake of consistency and clarity, affirm the Court of Appeals' conclusion that for cases of judicial interpretation of statutes, the *Pohutski* test does not apply. This Court should also conclude that outside of this context, such as where the Court overturns or changes existing common law, the *Pohutski* test for retroactivity should be employed. Therefore, the Pool respectfully requests that this Court affirm the Court of Appeals, such that *Spectrum* and its immediate predecessors control the retroactivity of cases construing statutes, and *Pohutski* controls the retroactivity of cases changing the common law.

RELIEF REQUESTED

WHEREFORE, for the foregoing reasons and authorities, Amicus Curiae MCRCSIP respectfully requests that this Court Affirm the decision of the Court of Appeals regarding retroactivity. Amicus Curiae MCRCSIP respectfully request any additional relief deemed necessary.

DATED: October 15, 2018

/s/ William L. Henn

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