

STATE OF MICHIGAN  
IN THE SUPREME COURT

LYNN PEARCE, Personal Representative of the  
Estate of BRENDON PEARCE, Deceased,

Plaintiff/Appellant,

-vs-

THE EATON COUNTY ROAD COMMISSION,

Defendant/Appellee

and

LAWRENCE BENTON, Personal Representative  
of the Estate of MELISSA SUE MUSSER,  
Deceased and PATRICIA JANE MUSSER,

Defendants.

SUPREME COURT  
DOCKET NO.

COURT OF APPEALS  
DOCKET NO. 338990

EATON COUNTY CIRCUIT  
COURT FILE NO. 16-29-NI

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**APPLICATION FOR LEAVE TO APPEAL**

**\*\*\*ORAL ARGUMENT REQUESTED\*\*\***

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STATEMENT OF APPELLATE JURISDICTION

This is an Application for Leave to Appeal. This Court has jurisdiction pursuant to MCR 7.303(B)(1) to review by appeal after a decision by the Court of Appeals.

On June 7, 2018 the Court of Appeals issued its Opinion and Order reversing the Trial Court's denial of Appellee's Motion for Summary Disposition and remanded the case for further proceedings consistent with its Opinion.

This Appeal involves a legal principle of major significance to the State's jurisprudence i.e. whether this Court's decision in *Pohutski v City of Allen Park*, 465 Mich 675; 641 N.W. 2d 219 (2002), has been "effectively repudiated" in the context of judicial decisions of statutory interpretation. See *W.A. Foote Memorial Hospital v Michigan Assigned Claims Plan*, 321 Mich App 159; 909 N.W. 2d 38 (2017).

To the extent that the Court of Appeals relied upon *Foote* in reversing the Trial Court's denial of Appellant's Motion for Summary Disposition, such reliance is clearly erroneous, conflicts with the Court of Appeals' decision in *Brugger v Midland County Board of Road Commissioners*, \_\_\_\_\_ Mich App \_\_\_\_\_; \_\_\_\_\_ N.W. 2d \_\_\_\_\_; 2018. WL 2222848 (2018) and will cause material injustice. The decision of the Court of Appeals also conflicts with this Court's decisions in *Williams v Detroit*, 364 Mich 231; 111 N.W. 2d 1 (1961), *Placek v City of Sterling Heights*, 405 Mich 638; 275 N.W. 2d 511 (1979), *Murray v Beyer Memorial Hospital*, 409 Mich 217, 222-223; 293 N.W. 2d 341 (1980), *Tebo v Havlik*, 418 Mich 350; 343 N.W. 2d 181 (1984), *Hyde v University of Michigan Board of Regent*, 426 Mich 223; 393 N.W. 2d 847 (1986), *Riley v Northland Geriatric Center*, 431 Mich 632; 433 N.W. 2d 787 (1988), *Lindsey v Harper Hospital*, 455 Mich 56; 564 N.W. 2d 861 (1997), *Pohutski, supra*, and *Bezeau v Palace Sports and Entertainment, Inc.*, 487 Mich 455; 795 N.W. 2d 797 (2010). MCR 7.305(B)(3) and (5)(a),(b).

This Application is being timely filed within 42 days of the Court of Appcals' final Order.  
MCR 7.305(C)(2)(a).

**STATEMENT OF QUESTION PRESENTED**

- I. **DID THE COURT OF APPEALS ERR IN RULING THAT THE PRESENT APPEAL IS CONTROLLED BY *W.A. FOOTE MEMORIAL HOSPITAL v MICHIGAN ASSIGNED CLAIMS PLAN*, 321 MICH APP 159; 909 N.W. 2D 38 (2017) RATHER THAN *BRUGGER v MIDLAND COUNTY BOARD OF ROAD COMMISSIONERS*, \_\_\_\_\_ MICH APP \_\_\_\_\_; \_\_\_\_\_ N.W. 2D \_\_\_\_\_; 2018 WL 222848 (2018) FOR PURPOSES OF THE PROSPECTIVE OR RETOACTIVE APPLICATION OF *STRENG v BOARD OF MACKINAC COUNTY ROAD COMMISSIONERS*, 315 MICH APP 499; 890 N.W. 2d 680 (2016)?**

The Trial Court was not asked this specific question but ruled that *Streng* applied prospectively.

Defendant/Appellee, THE EATON COUNTY ROAD COMMISSION answers “no”.

Plaintiff/Appellant LYNN PEARCE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED, contends the answer to this question should be “yes”.

**ORDER APPEALED FROM, STATEMENT OF ERROR AND RELIEF SOUGHT**

**ORDER APPEALED FROM**

This Application for Leave to Appeal arises by virtue of the Court of Appeals' June 7, 2018 Opinion and Order issued in the case of ESTATE OF BRENDON PEARCE by LYNN PEARCE, Personal Representative vs. EATON COUNTY ROAD COMMISSION, et. al. A copy of the Opinion and Order which was released for publication is annexed hereto as Exhibit A. The case involved consolidated Appeals by the EATON COUNTY ROAD COMMISSION although the current Application pertains to Court of Appeals Docket No: 338990, only.

In order to have a full appreciation of the evolution of the present appeal, the Court should have an understanding of the somewhat complex and convoluted procedural history of what otherwise would be a relatively straightforward wrongful death claim.

Plaintiff's Complaint was filed January 11, 2016 alleging that MELISSA SUE MUSSER was negligent in the operation of the motor vehicle owned by PATRICIA JANE MUSSER and that THE EATON COUNTY ROAD COMMISSION had failed to maintain the roadway in reasonable repair.

The ROAD COMMISSION filed its Answer and Affirmative Defenses February 2, 2016. Affirmative Defense #5 specifically alleges:

“ 5. The Plaintiff has failed to comply with the mandatory notice provisions set forth in MCL 691.1404.”

The above referenced statute is contained within the Governmental Tort Liability Act (GTLA) (MCL 691.1401 *et seq.*).

Defendant's First Motion for Summary Disposition, argued in the Trial Court on April 28, 2016, involved a single issue i.e. whether Plaintiff's Notice was sufficient under the GTLA. Plaintiff argued that she had met the heightened statutory notice requirements of the GTLA and

the Trial Court so agreed by virtue of its Order Denying Defendant's Motion for Summary Disposition which was entered on May 26, 2016.

Although a Stipulation and Order to Allow Plaintiff's First Amended Complaint was entered April 4, 2016, the Amended Complaint was not actually filed until May 23, 2016. The ROAD COMMISSION'S Answer to Plaintiff's First Amended Complaint and Affirmative Defenses were filed June 1, 2016. Again, Affirmative Defense #5 states:

“ 5. The Plaintiff has failed to comply with the mandatory notice provisions set forth in MCL 691.1404.”

An identical Affirmative Defense was asserted in Defendant's Answer to the Complaint filed by RYAN HARSTON and again in the Answer to HARSTON'S First Amended Complaint. It was not until the ROAD COMMISSION filed its Answer and Affirmative Defenses in the consolidated claim of JOSEPH GRINAGE that the ROAD COMMISSION raised the issue of allegedly defective notice under the Highway Code (MCL 220.1 *et seq.*) for the first time.

This additional affirmative defense, which serves as the basis for the ROAD COMMISSION'S Second Motion for Summary Disposition, was raised as part of its fifth answer on July 26, 2016, more than six months after the Pearce litigation was initiated.

The Court should note that Appellant does not any longer argue that Plaintiff/Appellee's notice was deficient. To the contrary, after its many technical and procedural machinations, Appellant now claims that service of the required notice was deficient.

In any event, following denial of the ROAD COMMISSION'S First Motion for Summary Disposition, Defendant then filed its Appeal of Right to the Michigan Court of Appeals on June 14, 2016. The allegedly defective notice under the Highway Code was not raised at that time

either. Plaintiff, in turn, filed her Motion for Immediate Consideration, Motion to Affirm and Brief on Appeal on October 6, 2016.

The Court of Appeals issued its Order granting Plaintiff's Motion for Immediate Consideration and granting Plaintiff's Motion to Affirm on October 25, 2016 for the reason that the question to be reviewed "is so unsubstantial as to need no argument or formal submission.". MCR 7.211(C)(3). Defendant then filed an Application for Leave to Appeal to the Michigan Supreme Court on December 6, 2016. Defendant again failed to assert the allegedly defective notice under the Highway Code in its application. This Court denied Application for Leave to Appeal on June 27, 2017, specifically ruling "we are not persuaded that the questions presented should be reviewed by this Court."

Obviously, the failure by Appellant to plead this issue in its first four Answers and its failure to raise this argument in its first Dispositive Motion, first Court of Appeals Brief and its first Supreme Court Brief speaks volumes as to the reliance on established case law that all Michigan Courts and litigants, including THE EATON COUNTY ROAD COMMISSION and Plaintiff/Appellee, held until *Streng v Board of Mackinac County Road Commission*, 315 Mich App 449; 890 N.W. 2d 680 (2016) was decided which, for the first time in almost 50 years, held that the provisions of the Highway Code rather than the GTLA, applied to litigation involving County Road Commissions.

The ROAD COMMISSION then filed its Second Motion for Summary Disposition on March 10, 2017 claiming defective notice on behalf of HARSTON, GRINAGE and PEARCE under the Highway Code.

Specifically, with respect to PEARCE, the ROAD COMMISSION did not claim that the notice was not sufficient either under the Highway Code nor the heightened requirements under

the GTLA, nor that the notice was not timely, nor that it did not have actual notice of the nature and extent of the claimed defect nine months prior to the fatal car accident which forms the basis of this litigation. The ROAD COMMISSION claims that service of the notice was deficient in that PEARCE failed to serve “the clerk” at the same time the chairperson of the ROAD COMMISSION was served. The ROAD COMMISSION relies on this technical argument despite the fact that “the clerk”, in fact, was served by HARSTON and GRINAGE within the 120 day period set forth within the GTLA.

The ROAD COMMISSION’s Second Motion for Summary Disposition was argued April 28, 2017. The Trial Court then issued its Opinion and Order Denying the second Dispositive Motion on June 6, 2017. The Court reasoned that:

“Plaintiffs in this case followed the well-established rule of law at the time their suits were filed, and it would be detrimental to the administration of justice to bar their claims now based on a change in the interpretation of this law. As such, this Court finds that it would be improper to give *Streng* retroactive effect. Thus, under the law prior to *Streng*, the Plaintiffs filed proper notice and Defendant’s Motion for Summary Disposition must be denied \*\*\*.” (Opinion and Order of the Trial Court dated June 6, 2017 is annexed hereto as Exhibit B)

It is of paramount importance for this Court to appreciate that the only rulings from the Eaton County Circuit Court are the following:

1. “[P]rompt and proper notice was given by the Plaintiff (Pearce) to the Eaton County Road Commission \*\*\*” (See the May 5, 2016 Opinion and Findings of the Trial Court annexed hereto as Exhibit C) (referring to the notice requirements of the GTLA).
2. “[I]t would be improper to give *Streng* retroactive effect\*\*\*.” (See the June 6, 2017 Order of the Eaton County Circuit Court)(The ruling which is the subject of the present appeal) (Exhibit B).

The ROAD COMMISSION then filed its second Appeal to the Court of Appeals on June 27, 2017. PEARCE filed her Brief on Appeal on December 21, 2017. The Appeal was submitted

on Case Call on June 5, 2018. On June 7, 2018 the Court of Appeals issued its Order reversing the Trial Court's denial of the ROAD COMMISSION'S Second Motion for Summary Disposition and remanded for proceedings consistent with its Opinion.

Despite recognizing that in May, 2018 a different panel of the Court of Appeals concluded that *Streng* applies prospectively to litigation for defective roads against County Road Commissions (*Brugger, supra*) and despite of the fact that the *Brugger* Court dealt with an identical factual and legal situation as presented in the present Appeal, the *PEARCE* Court determined that the application of *Streng* was retroactive and that it was bound by the Court of Appeals decision in *Foote*.

In its conclusion, the Court of Appeals held:

“We reverse the trial court's denial of the Road Commission's motion for Summary Disposition. We hold that *Streng* applies retroactively and that Plaintiff's notices were deficient under MCL 224.21(3). We affirm the trial court's ruling that the Road Commission was not required to plead defective notice as an affirmative defense. Accordingly, we direct the trial court to grant the Road Commission's motion for Summary Disposition.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this Opinion. We do not retain jurisdiction.”

#### STATEMENT OF ERROR

The *PEARCE* Court held that it was bound by its previous decision in *Foote* which it understood called for complete retroactive application of decisions interpreting a statute. (*PEARCE* Slip Opinion at page 4). The *Foote* Court believed that this Court's Opinion in *Spectrum Health Hospitals v Farm Bureau Mutual Insurance Company of Michigan*, 492 Mich 503; 821 N.W. 2d 117 (2012) “effectively repudiated” this Court's prior decision in *Pohutski* which provides for a flexible approach to the issue of retroactive verses prospective application

of a decision where injustice might result from full retroactivity. The *Pohutski* Court established a three factor analysis to be used in determining whether a holding that overrules settled precedent may be properly be limited to prospective application. Those factors include (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 actuality, the *Spectrum* Court did not “effectively repudiate” *Pohutski* nor did *Spectrum* establish a rule of absolute retroactivity in the context of judicial decisions of statutory interpretation.

*Spectrum* dealt with two, separate actions involving First Party No-Fault benefits. Both cases involved the interpretation of MCL 500.3113(a) which bars a person from receiving PIP benefits for injuries suffered while “using a vehicle that he or she had taken unlawfully unless the person reasonably believed that he or she was entitled to use the vehicle.”

The first claim involved the “chain-of-permissive-use theory” initially adopted in *Bronson Methodist Hospital v Forshee*, 198 Mich App 617; 499 N.W. 2d 423 (1993). The second claim involved the “family-joy-riding” exception first articulated in Justice Levin’s Plurality Opinion in *Priesman v Meridian Mutual Insurance Company*, 441 Mich 60; 490 N.W. 2d 314 (1992).

In both cases the *Spectrum* Court performed a “plain language” analysis of Section 3113(a) of the No-Fault Code and determined that “any person who takes a vehicle contrary to a provision of the Michigan Penal Code – including MCL 750.413 and MCL 750.414, informally known as the “joy riding” statutes – has taken the vehicle unlawfully within the meaning of MCL 500.3113(a).” *Spectrum* at page 537. In both instances, the Court held that neither the “chain-of-possession” theory nor the “family-joy-riding” exception had any basis in the “plain language” of

the statute and, as such, both cases were reversed and remanded to the Trial Courts for entry of Summary Disposition in favor of the insurers.

The *Spectrum* Court gave a very minimal and superficial analysis of the issues of stare decisis and retroactivity. The Court noted that *Priesman* was not a majority opinion of the Supreme Court. As such, the principle of stare decisis did not apply. In other words, the Supreme Court in *Spectrum* was not bound by the plurality opinion of *Priesman*. Likewise, *Bronson* was a Court of Appeals decision and, as such, was not binding precedent in the Supreme Court.

As *Spectrum* noted, at page 536:

“The 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.” (Citing *Gentzler v Constanine Village Clerk*, 320 Mich 394, 398; 31 N.W. 2d 668 (1948).)

The Court went on to recognize an exception when:

“\*\*\*statute law has received a given construction by the Court of last resort and contracts have been made and rights acquired under them 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.*)

Accordingly, rather than adopt a blanket rule of complete retroactivity, the *Spectrum* decision recognized two, distinct situations in which the prospective application of a decision remains i.e. situations where the decision will adversely affect contractual rights and situations that would affect vested rights (such as the accrual of *PEARCE'S* Wrongful Death claim).

Obviously, the fact that a “general principle” is discussed logically leads to the conclusion that exceptions exist. In addition to the exceptions discussed in *Spectrum*, this Court has

recognized additional situations where the administration of justice calls for prospective application of decisions including, but certainly not limited to:

- “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 and 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.” *Williams*, at page 266 (opinion of Justice Edward in which Justices Talbot Smith, T.M. Kavanagh and Souris concurred).
- “This court has overruled prior precedent in the past. In each such incident, 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.

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 of that law.” *Placek* at page 665.

- “When the decision to overrule precedent is finally made, the Court is satisfied that the importance of the result reached outweighs any unfairness to those negatively affected by the decision. Applying the rule prospectively with the exception of that case and cases pending on Appeal in which the issue was raised and preserved is an attempt to limit any such unfairness.” *Murray v Beyer Memorial Hospital*, 409 Mich 217, 222- 223; 293 N.W. 2d 341 (1980)
- “Even where statutory construction has been involved, this court has limited the retroactivity of a decision when justice so required.” *Tebo* at page 361.
- “Finally, the general rule is that judicial decisions are to be given complete retroactive effect. We have often limited the application of decisions which have overruled prior law or reconstrued statutes \*\*\* Complete prospective application has generally been limited to decisions which overrule clear and uncontradicted case law.” *Hyde* at page 40
- “\*\*\*resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy.” *Riley* at page 644
- “\*\*\*where injustice might result from full retroactivity, this Court has adopted a more flexible approach giving holdings limited retroactive or prospective effect. This flexibility is intended to accomplish the “maximum of justice” under varied circumstances.” *Lindsey* at page 68
- “Prospective application may be appropriate where the holding overrules settled precedent. *Bezeau* at page 462

The *Spectrum* Court could have adopted a blanket rule of retroactivity in the context of judicial decisions of statutory interpretation. It did not. It could have “actually repudiated” rather than “effectively repudiated” *Pohutski*. It did not. Consequently, the *Footte* Court’s extrapolation of this Court’s interpretation of a No-Fault Code provision was incorrect; the flexible approach in *Pohutski* survives; and the *PEARCE* Court erred in its reliance on *Footte* to the exclusion of *Brugger* when ruling in favor of Appellant.

#### STATEMENT OF MATERIAL FACTS

This litigation arises by virtue of a single vehicle accident occurring March 8, 2015 on North Mason Road, 500 feet south of its intersection with Kinsel Road. The accident site is physically located within Kalamo Township, Eaton County, Michigan.

A vehicle which was owned by PATRICIA JANE MUSSER and which was being operated by MELISSA SUE MUSSER was southbound when the vehicle encountered water which had collected on the pavement and which caused MELISSA SUE MUSSER to lose control and leave the roadway. The vehicle rolled over and struck a tree.

It was the opinion of Detective Rick Buxton that pooled water on the road surface caused MELISSA SUE MUSSER to lose control of the vehicle.

BRENDON PEARCE, age 15, was a passenger in the MUSSER vehicle. He sustained fatal injuries as a result of the accident. The present litigation involves a Wrongful Death claim by Brendon’s mother, LYNN PEARCE, AS PERSONAL REPRESENTATIVE for automobile negligence against MELISSA SUE MUSSER, owner liability against PATRICIA JANE MUSSER and liability under the defective highway exception to governmental immunity as against THE EATON COUNTY ROAD COMMISSION.

Again, the ROAD COMMISSION does not claim that it did not have knowledge of the exact location of the defect nor that it did not understand the nature of the defect. Furthermore, remedial actions were taken to obviate the defective condition almost immediately after the accident, thus confirming that the ROAD COMMISSION knew what the problem was, where the problem was and what it needed to do to correct the problem in order to protect the public from further injury long before any “notice” was required under either statute.

Specifically, the ROAD COMMISSION was advised by homeowner, Jared Osborn, on June 25, 2014 that “his property just north of 1915 (North Mason Road) has standing water in the road whenever it rains, it comes gushing off Kinsel and pools on southbound side. Road is lower than sides and there is no ditch.”

Mr. Osborn recontacted the ROAD COMMISSION on March 12, 2015 (four days after the fatality) again requesting that something be done about the water on the road and requested that a representative of the ROAD COMMISSION call him with an explanation as to why the defective condition continued to exist. The problem was corrected that same day.

Most importantly, Defendant was contacted on the day of the accident by Central Dispatch. The Road Commission was advised that there was a “bad accident – needs roads closed”. The call came in at 6:30 p.m. which was approximately 35 minutes after the accident occurred. In response to this notification, the ROAD COMMISSION set two “Type II” barricades at the intersections of Mason and Kinsel as well as Mason and Valley. Most importantly, a “Type I” barricade was placed at the precise location of the pooled water on the southbound lane.

The ROAD COMMISSION had actual knowledge of the fact that water was pooling on North Mason Road for a minimum of nine months prior to the fatal accident which took the life

of BRENDON PEARCE. In fact, it appears that the ROAD COMMISSION had actual knowledge of the nature and location of the defect within 35 minutes of the accident.

### STATEMENT OF PROCEEDINGS

- Plaintiff's Complaint was filed January 12, 2016 alleging that MELISSA MUSSER was negligent in the operation of the motor vehicle owned by PATRICIA JANE MUSSER and that THE EATON COUNTY ROAD COMMISSION had failed to maintain the roadway in reasonable repair.
- The ROAD COMMISSION filed its Answer and Affirmative Defenses on February 2, 2016, affirmatively averring that Plaintiff failed to comply with the mandatory notice provisions set forth in MCL 691.1404. (There was no issue raised by the ROAD COMMISSION regarding service of notice at that time.)
- Defendant's First Motion for Summary Disposition based on defective notice under the GTLA was argued in the Trial Court on April 28, 2016. (There was no issue raised by the ROAD COMMISSION regarding service of notice at that time.)
- The Trial Court issued its Order denying Defendant's Motion for Summary Disposition on May 26, 2016, specifically holding that Plaintiff's notice was proper under the GTLA.
- Plaintiff's first Amended Complaint was filed May 23, 2016.
- The ROAD COMMISSION's Answer to Plaintiff's First Amended Complaint was filed June 1, 2016. Again, the ROAD COMMISSION affirmatively averred that Plaintiff failed to comply with the mandatory notice provisions set forth in MCL 691.1404. (There was no issue raised by the ROAD COMMISSION regarding service of notice at that time.)
- HARSTON's Complaint was filed October 8, 2015.
- The ROAD COMMISSION asserted an identical affirmative defenses in its Answer dated November 30, 2015.
- HARSTON's First Amended Complaint was filed December 11, 2015.
- Again, the ROAD COMMISSION filed its Answer with an identical affirmative defenses on December 28, 2015.
- GRINAGE filed his Complaint on June 27, 2016.
- For the first time the ROAD COMMISSION asserted the affirmative defense of allegedly defective notice under the Highway Code in its Answer of July 26, 2016.

- The ROAD COMMISSION filed its first Appeal regarding the Trial Court's May 5, 2016 Opinion and Findings denying its Motion for Summary Disposition on June 14, 2016. (There was no issue raised by the ROAD COMMISSION regarding service of notice at that time).
- The Court of Appeals granted Plaintiff's Motion to Affirm and Motion for Immediate Consideration on October 6, 2016.
- The ROAD COMMISSION's Application for Leave to Appeal was filed with the Michigan Supreme Court on December 6, 2016. (There was no issue raised by the ROAD COMMISSION regarding service of notice at that time.)
- Application for Leave to Appeal was denied by the Michigan Supreme Court on June 27, 2017.
- The ROAD COMMISSION's Second Motion for Summary Disposition based upon allegedly defective service of notice under the Highway Code was filed on March 10, 2017.
- Argument on Defendant's Second Motion for Summary Disposition occurred April 28, 2017.
- Defendant's Second Motion for Summary Disposition was denied by virtue of the Trial Court's Order of June 6, 2017.
- The ROAD COMMISSION filed its second Appeal of Right to this Honorable Court on June 27, 2017.
- PEARCE filed her brief on December 21, 2017. The parties were then ordered by virtue of the Court of Appeals own Motion to brief whether *Foote* or *Brugger* controlled the Appeal. Supplemental Briefs were filed by the parties in accordance with the Court of Appeals' May 21, 2018 Order.
- The Appeal was submitted on Case Call on June 5, 2018.
- On June 7, 2018 the Court of Appeals issued its Opinion and Order reversing the Trial Court's denial of the ROAD COMMISSIONS' Second Motion for Summary Disposition and remanded for proceedings consistent with its Opinion.
- Plaintiff/Appellant now files her Application for Leave to Appeal pursuant to MCR 7.303(B)(1).

**QUESTION PRESENTED FOR REVIEW**

- I. **DID THE COURT OF APPEALS ERR IN RULING THAT THE PRESENT APPEAL IS CONTROLLED BY *W.A. FOOTE MEMORIAL HOSPITAL v MICHIGAN ASSIGNED CLAIMS PLAN*, 321 MICH APP 159; 909 N.W. 2D 38 (2017) RATHER THAN *BRUGGER v MIDLAND COUNTY BOARD OF ROAD COMMISSIONERS*, \_\_\_\_\_ MICH APP \_\_\_\_\_; \_\_\_\_\_ N.W. 2D \_\_\_\_\_; 2018 WL 222848 (2018) FOR PURPOSES OF THE PROSPECTIVE OR RETOACTIVE APPLICATION OF *STRENG v BOARD OF MACKINAC COUNTY ROAD COMMISSIONERS*, 315 MICH APP 499; 890 N.W. 2d 680 (2016)?**

The Trial Court was not asked this specific question but ruled that *Streng* applied prospectively. .

Defendant/Appellee, THE EATON COUNTY ROAD COMMISSION answers “no”.

Plaintiff/Appellant LYNN PEARCE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED, contends the answer to this question should be “yes”.

**STANDARD OF REVIEW**

A Circuit Court decision regarding a Motion for Summary Disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW.2d 817 (1999). When a claim is barred by governmental immunity, summary disposition is appropriate under MCR 2.116(C)(7). *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW.2d 897 (1998). Under MCR 2.116(C)(7) the moving party has the option of supporting its motion with affidavits, depositions, admissions or other documentary evidence provided that the “substance or content” of the supporting proofs is admissible as evidence. *Maiden, supra*, at 119. In reviewing a motion under MCR 2.116(C)(7), the court accepts the factual contents of the Complaint as true unless contradicted by the movant’s documentation. *Id.* When the material facts are not in dispute, the reviewing court may

decide whether a Plaintiff's claim is barred by immunity as a matter of law. *Robinson v Detroit*, 462 Mich 439, 445; 613 NW.2d 307 (2000).

### ARGUMENT

The current position assumed by the ROAD COMMISSION is interesting to say the least, in that, up to now, it continuously asserted that *Streng* was wrongfully decided and that the notice provisions of the GTLA should apply in this litigation. In fact, in its Brief in Support of its Application for Leave to Appeal to the Michigan Supreme Court, the ROAD COMMISSION argues:

“\*\*\*When *Streng* was decided, this case was pending. Newly decided cases only apply to pending cases where a challenge has been raised and preserved.\*\*\*Plaintiff never challenged the applicability of the GTLA, so *Streng* should not apply here.

Moreover an Appellate Court's decision is not given retroactive effect when it changes established law \*\*\* until *Streng* \*\*\* notices to County Road Commissions for injuries sustained by reason of a defective highway were regularly governed by MCL 691.1401(1) \*\*\* because *Streng* changed the law, it does not apply retroactively.\*\*\*” (Citations omitted) (Brief pages 12-13).

The ROAD COMMISSION'S Reply Brief to Plaintiff's Answer to the Application for Leave to Appeal likewise argues:

“\*\*\*The Road Commission argued that even if *Streng* was correctly decided, it would not apply retroactively to this case. \*\*\* Before *Streng* was issued there was a long line of case law holding that the notice requirement was to be strictly interpreted \*\*\* *Streng* was an outlier and effectively changed the law.\*\*\*” (Citations omitted) (Reply Brief pages 2-3).

Further, footnote 5 of the Reply Brief noted the *Streng* Court's recognition of the “precedent of applying the GTLA to the exclusion of MCL 224.21” and that the notice provision of MCL 691.1401 had been “regularly applied” by Michigan Courts “in cases involving the highway exception to governmental immunity and county road commissions”.

In other words, the ROAD COMMISSION has adopted two entirely inconsistent positions i.e. that the notice provisions of the GTLA apply with respect to its argument during its first Appeal and, at least for the moment, that the notice provisions of the Highway Code apply for purposes of this Appeal.

Again, it is important for this Court to understand that the ROAD COMMISSION does not contend that PEARCE's notice was defective under the Highway Code. To the contrary, the ROAD COMMISSION takes the position that service of the notice failed to comply with the requirements of MCL 224.21 in that there was no separate service on "the clerk" by PEARCE.

This becomes important due to the fact that the GTLA does not require service of the notice on "the clerk". Consequently, if *Streng* is applied prospectively, PEARCE has satisfied all of the notice requirements under the GTLA and her case can proceed. The next issue is whether the Court of Appeals in *Streng* "effectively repudiated" this Court's decision in *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 N.W. 2d 41 (2007) which held that the GTLA applies to claims against county road commissions.

In *Rowland*, a pedestrian sued the county road commission alleging she sustained personal injuries in a fall as a result of a defective condition on a highway. The Plaintiff filed the statutorily required notice under MCL 691.1404(1) but did not serve it within the 120 day time requirement of the Governmental Tort Liability Act (GTLA).

The issue was whether the road commission was required to demonstrate actual prejudice by late service of the notice and the Michigan Supreme Court determined that it did not. *Rowland* overruled prior case law which did require the road commission to demonstrate actual prejudice.

The *Rowland* decision is important in that it specifically applied the provisions of the GTLA to claims involving county road commissions. MCL 691.1404 requires that notice of a defect in a highway be served within 120 days from the time the injury occurred. Subsection (2) requires “that the notice be served on any individual, either personally or by certified mail return receipt requested, who may lawfully be served with civil process \*\*\*”.

In the present situation there is no question, whatsoever, that Plaintiff/Appellee PEARCE complied with the notice provisions of the GTLA both in substance and in timeliness. The Trial Court so ruled, the Court of Appeals affirmed and this Court denied Leave to Appeal.

*Streng*, on the other hand held that the provisions of the Highway Code (MCL 224.21 *et seq*) govern personal injury claims arising by virtue of defective county roads. The Court noted several conflicts between the GTLA and the Highway Code. MCL 224.21(3) requires notice be served “in writing upon the clerk and upon the chairperson of the Board of County Road Commissioners” within 60 days. There is no requirement under the GTLA for service “in writing upon the clerk.” See MCL 691.1404(1). The Highway Code requires that the notice “set forth substantially the time when and place where the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident and that the person receiving the injury intends to hold the county liable for damages.” See MCL 224.21(3). The GTLA requires its notice to “specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.”

*Streng*, attempted to “change the rules” by which all Courts and counsel had abided for 50 years by holding that the Highway Code as opposed to the GTLA applied to road commission

defendants. This interpretation of the Governmental Immunity Act was novel and unprecedented in Michigan jurisprudence.<sup>1</sup>

In fact at footnote 4 the *Streng* Court identified two unpublished decisions (including one against THE EATON COUNTY ROAD COMMISSION) and six published decisions (including two Supreme Court decisions) which discuss the duties imposed on counties as arising under MCL 691.1402.

This Court has had the opportunity to interpret the GTLA many times over the past 50 years and in each and every instance, this Court has held that MCL 691.1404 applies to defective highway claims involving county road commissions. See *Rowland, supra, Appel v State Dep't of Highways*, 398 Mich 110; 247 N.W. 2d 762 (1976) and *Beasley v State*, 483 Mich 1025; 765 N.W. 2d 608 (2009). These latter cases supplement the list of the other eight cases cited in the *Streng* decision.

*Streng* was followed by *Brugger* which recognized the “highly unusual circumstances” which existed given the two, inconsistent statutes governing pre-suit notice to road commissions. Because the legislature adopted two, different sets of conflicting requirements as to the timing and content of the pre-suit notice, and because of the fact that, for decades, the judiciary had decided pre-suit notice cases based upon the requirements of the GTLA with no reference to MCL 224.21(3) the Court of Appeals determined that *Streng* represented an effective change in the law and, as such, should only be applied on a prospective basis. This was the position taken by *Pearce* at the time of argument in the Court of Appeals.<sup>2</sup>

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<sup>1</sup> *Streng*, itself, did not indicate whether it applied prospectively or retroactively.

<sup>2</sup> The Midland County Road Commission filed its Motion for Reconsideration on June 5, 2018 along with its supplemental authority in *Brugger*.

Arguably, in order for *Foote* to be controlling as the *PEARCE* Court believed, *Streng* would have to be limited to a simple “plain language” analysis. This was not the situation present in *Streng*, however.

The language of MCL 224.221(3) and MCL 691.1404(1) is what it is. *Streng* did not attempt to analyze the language or terms of either of these statutes but determined which statute applied to cases involving County Road Commissions. *Foote* specifically limited its holding to cases involving purely statutory interpretation. See footnote 15.

It is obvious that the decision in *Streng* involved more than a “plain language” analysis. The *Streng* Court was specifically asked to and in fact did reconcile two conflicting statutory provisions, thus changing the statutory interpretation which had been in place for almost 50 years.

It is also important to note that the *Rowland* court did not address the conflict between the GTLA and the Highway Code but apparently accepted the proposition that the GTLA governed *Rowland’s* claims. Additionally, the *Streng* court noted that there had been no precedential decision which substantively considered the conflicts between the two statutes. In fact, the *Streng* Court stated:

“It appears that the sixty-day notice provision [MCL 224.21] has not been applied in any reported cases involving County Road Commissions since MCL 691.1404...was amended in 1970.” *Streng* at page 460

The *Streng* Court went on to state:

“\*\*\*both the Supreme Court and this Court have regularly applied the GTLA without consulting MCL 224.21 in cases involving the highway exception to governmental immunity and County Road Commissions”.

Consequently, *Foote* and *Streng* are distinguishable. The *Foote* rule of complete retroactivity does not apply and *Brugger* controls.

Additionally, the Court's reasoning in *Pohutski* is directly applicable to the instant case. First, in *Pohutski*, as in the instant case, a previous statutory interpretation of the GTLA was at issue. Like the instant case, in *Pohutski*, the appellate court overruled a previously unquestioned precedential interpretation of that provision. The prior interpretation had existed for about 14 years before *Pohutski* was decided.

Where in *Pohutski* the issue was whether a common law defense was available under MCL 691.1407 in the instant matter the issue is which notice provision is proper. Both issues require the same legal analysis in determining whether or not the new rule is to be retroactively applied. It is worth again pointing out that, in the present appeal, it is not the Michigan Supreme Court that has explicitly overruled *Rowland* and its progeny, but rather the Court of Appeals.

The three-part test for retroactivity was satisfied in *Pohutski*, and is satisfied in the instant matter for the exact same reasons. In *Pohutski*, the Court held that the purpose of their new holding was "to correct an error" in the Court's previous interpretation of the governmental immunity act. *Id.* at 697. The ROAD COMMISSION argues that *Streng* made the same kind of interpretative correction, thus changing the established rule. Therefore, the purpose of the rule in *Pohutski* and the instant matter are the same, and the first prong of the test is fulfilled in both.

Additionally, according to *Pohutski*, the second prong is satisfied in the instant matter as well. The *Pohutski* Court held that the second element of reliance was met because there had been "extensive reliance on *Hadfield's*<sup>3</sup> interpretation of § 7 of the Governmental Tort Liability Act." Prior to *Streng*, there was unquestioned reliance on the MCL 691.1404 notice provisions.

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<sup>3</sup> *Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139; 422 N.W. 2d 205 (1988).

Again, as stated by the *Streng* Court itself: “the sixty-day notice provision [of MCL 224.21] has not been applied in any reported cases involving county road commissions since MCL 691.1404... was amended in 1970.” *Streng, supra* at 460. Therefore, the second part of the test for limiting retroactivity is clearly met as well.

Finally, and most importantly, the *Pohutski* Court found that “prospective application minimizes the effect of this decision on the administration of justice.” *Pohutski*, at page 699. The Court went even further to state that “if we applied our holding in this case retroactively, the plaintiffs in cases currently pending would not be afforded relief under *Hadfield* or 2001 PA 222. Rather, they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing.” Like the plaintiffs in *Pohutski*, PEARCE and other plaintiffs would be denied relief because of an unfortunate circumstance of timing should *Streng* be applied retroactively. This would surely be adverse to the administration of justice and thus the third and final prong is satisfied.

The circumstances in *Pohutski* are analogous to the circumstances before this Court in the instant matter. Because the three-prong test is met, the notice requirements required by *Streng*, if controlling, should not be applied retroactively to this case and the Trial Court’s denial of Defendant’s Second Motion for Summary Disposition must be affirmed.

#### REQUEST FOR RELIEF

All of the factors of the limited retroactivity test are satisfied and analogous Michigan Supreme Court cases have limited retroactivity in almost the exact, same situations. It would be contradictory to the interests of justice to allow the *Streng* notice requirements to be retroactively applied when *Streng* itself acknowledges that the notice provision has never been applied before it was decided. Furthermore, there was absolutely no prejudice upon the COMMISSION by

PEARCE'S compliance with the established and unquestioned GTLA notice provisions and there is no reason why the circumstances in the instant matter do not present a clear situation where limited retroactivity is warranted. PEARCE respectfully asks this Court to affirm the Trial Court's denial of the ROAD COMMISSION'S Motion for Summary Disposition and allow her to have her case decided on its merits.

Dated this 11<sup>th</sup> day of July, A.D., 2018.

COLLISON & COLLISON

*/s/ Joseph T. Collison*

JOSEPH T. COLLISON, J.D.  
Attorneys for Plaintiff/Appellant

**INDEX OF EXHIBITS**

- EXHIBIT A** Opinion and Order issued June 7, 2018 in the case of ESTATE OF BRENDON PEARCE by LYNN PEARCE, Personal Representative vs. EATON COUNTY ROAD COMMISSION, et. al.
- EXHIBIT B** Opinion and Order of the Trial Court dated June 6, 2017
- EXHIBIT C** Opinion and Findings of the Trial Court dated May 5, 2016

# EXHIBIT A

STATE OF MICHIGAN  
COURT OF APPEALS

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RYAN HARSTON,

Plaintiff,

and

JOSEPH GRINAGE,

Intervening Plaintiff-Appellee,

v

COUNTY OF EATON,

Defendant,

and

EATON COUNTY ROAD COMMISSION,

Defendant-Appellant,

and

ESTATE OF MELISSA SUE MUSSER, by  
LAWRENCE BENTON, Personal Representative,  
and PATRICIA JANE MUSSER,

Defendants-Appellees.

FOR PUBLICATION  
June 7, 2018  
9:10 a.m.

No. 338981  
Eaton Circuit Court  
LC No. 15-001226-NI

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ESTATE OF BRENDON PEARCE, by LYNN  
PEARCE, Personal Representative,

Plaintiff-Appellee,

v

EATON COUNTY ROAD COMMISSION,

No. 338990  
Eaton Circuit Court  
LC No. 16-000029-NI

Defendant-Appellant,

and

ESTATE OF MELISSA SUE MUSSER, by  
LAWRENCE BENTON, Personal Representative,  
and PATRICIA JANE MUSSER,

Defendants-Appellees.

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Before: O'CONNELL, P.J., and K. F. KELLY and RIORDAN, JJ.

O'CONNELL, P. J.

These consolidated cases<sup>1</sup> arise out of a fatal car crash. Defendant Eaton County Road Commission appeals as of right the trial court's order denying the Road Commission's motion for summary disposition brought under MCR 2.116(C)(7) (immunity granted by law). The parties dispute the retroactivity of *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), holding that the notice provision at MCL 224.21(3) in the highway code, MCL 220.1 *et seq.*, rather than the notice provision at MCL 691.1404(1) in the governmental tort liability act (GTLA), MCL 691.1401 *et seq.*, governs a claim brought against a county road commission. We hold that *Streng* applies retroactively. We reverse the trial court's order ruling otherwise, although we affirm the trial court's ruling that the Road Commission was not required to assert defective notice as an affirmative defense, and we remand these cases for further proceedings consistent with this opinion.

### I. BACKGROUND

On March 8, 2015, Melissa Musser, whose estate is a defendant, was driving a minivan owned by defendant Patricia Musser. Plaintiff Joseph Grinage and Brendon Pearce, whose estate is a plaintiff, were passengers in the car. Melissa lost control of the minivan when she came to standing water in the roadway. The minivan went off the road, rolled over, and came to rest on its roof against a tree. Everyone except Pearce had been drinking, and the minivan was traveling about 20 miles over the speed limit. Pearce died at the scene of the crash. Melissa died at the hospital. Grinage was seriously injured.

On May 5, 2015, Lynn Pearce, the personal representative of the estate of Brendon Pearce, served a "Notice to Eaton County of Fatal Injuries due to Defective Highway" on the

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<sup>1</sup> *Harston v Eaton Co*, unpublished order of the Court of Appeals, entered October 20, 2017 (Docket Nos. 338981 and 338990). In addition, by the parties' stipulation, we previously dismissed Ryan Harston as a plaintiff. *Harston v Eaton Co*, unpublished order of the Court of Appeals, entered May 25, 2018 (Docket No. 338981).

Road Commission. Grinage served a “Notice of Intent to File a Claim” on the Road Commission on July 2, 2015.

Grinage and Pearce each filed a complaint, alleging that the Musser defendants were negligent and that the Road Commission breached its statutory duty under MCL 691.1402 to maintain the roads. In Pearce’s case, the Road Commission first filed a motion for summary disposition under MCR 2.116(C)(7), arguing that Pearce’s notice was inadequate. The trial court disagreed and denied the motion. The Road Commission appealed the trial court’s decision. Pearce then filed a motion to affirm on appeal, arguing that her notice was sufficient under *Streng* and MCL 224.21(3)’s provision that the notice should state “substantially” the details of the injury. This Court granted Pearce’s motion to affirm.<sup>2</sup> The Road Commission sought leave to appeal in the Supreme Court, which denied leave to appeal.<sup>3</sup>

After this Court granted Pearce’s motion to affirm, the Road Commission returned to the trial court and filed a motion for summary disposition in the consolidated cases, arguing that all three plaintiffs’ notices were insufficient under MCL 224.21(3). The parties disputed whether *Streng* applied retroactively and whether MCL 224.21(3), as applied in *Streng*, or MCL 691.1404(1), the GTLA notice provision, governed plaintiffs’ notices. Two of the plaintiffs further argued that the Road Commission waived its challenge to plaintiffs’ notices because it did not assert defective notice under MCL 224.21 as an affirmative defense.

The trial court denied the Road Commission’s motion. The trial court rejected Pearce’s argument that the Road Commission was required to assert insufficient notice as an affirmative defense because inadequate notice was a component of governmental immunity, which is not an affirmative defense. Nonetheless, the trial court concluded that *Streng* did not apply retroactively because it announced a new rule, reliance on the old rule was widespread, and retroactive application of *Streng* would adversely affect the administration of justice.

## II. DISCUSSION

This Court reviews a trial court’s ruling on a motion for summary disposition de novo. *Stevenson v Detroit*, 264 Mich App 37, 40; 689 NW2d 239 (2004). This Court also reviews the legal question of retroactivity de novo. *Johnson v White*, 261 Mich App 332, 336; 682 NW2d 505 (2004). Summary disposition is proper if a party has “immunity granted by law[.]” MCR 2.116(C)(7). When reviewing a motion for summary disposition under subrule (C)(7), this Court reviews documentary evidence and accepts the plaintiffs’ well-pleaded allegations as true unless documentation contradicts those allegations. *Stevenson*, 264 Mich App at 40.

Governmental agencies are generally immune from liability when they are performing a government function, unless provided otherwise by statute. MCL 691.1407(1); *Streng*, 315 Mich

<sup>2</sup> *Estate of Brendon Pearce v Eaton Co Rd Comm*, unpublished order of the Court of Appeals, entered October 25, 2016 (Docket No. 333387).

<sup>3</sup> *Pearce v Eaton Co Rd Comm*, 500 Mich 1021 (2017).

App at 455. The GTLA provides that the “liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in . . . MCL 224.21.” MCL 691.1402(1). MCL 224.21(3) contains a notice provision requiring potential plaintiffs to give notice to the clerk and the chairperson of the board of county road commissioners within 60 days of the injury. MCL 224.21(3). For all other highway defect claims, the GTLA’s 120-day notice provision at MCL 691.1404(1) governs. In 2016, this Court held that MCL 224.21(3) governs claims brought against county road commissions. *Streng*, 315 Mich App at 462-463.

In May 2018, a panel of this Court concluded that *Streng* applies prospectively only. *Brugger v Midland Co Bd of Rd Commr’s*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2018) (Docket No. 337394). That decision, however, does not cite or discuss *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), issued in August 2017, soon after the trial court’s order in this case.<sup>4</sup> In *W A Foote Mem Hosp*, 321 Mich App 159, a panel of this Court addressed the retroactivity of a judicial interpretation of a statute. “A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.” MCR 7.215(J). Because *W A Foote* was published before *Brugger* and controls the issue in this case, we are required to follow *W A Foote*.<sup>5</sup>

*W A Foote Mem Hosp*, 321 Mich App at 182-183, followed the retroactivity test announced in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 536; 821 NW2d 117 (2012):

“ ‘The 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. [*Spectrum Health*, 492 Mich at 536, quoting *Gentzler v Constantine Village Clerk*, 320 Mich 394, 398; 31 NW2d 668 (1948).]

The *Foote* Court noted that this rule only pertains to the retroactivity of decisions interpreting a statute, *id.* at 190 n 15, and concluded that the *Spectrum Health* test, the Supreme Court’s most

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<sup>4</sup> At oral arguments in the present case, counsel for appellant stated that he had informed the *Brugger* panel that *W A Foote* controlled the outcome of the *Brugger* case.

<sup>5</sup> Even if we were not required to follow *W A Foote*, we would agree with Judge O’Brien’s excellent dissent in *Brugger*.

recent resolution of a retroactivity question, overrides the “threshold” test and the “three part” test.<sup>6</sup> *Id.* at 191. The threshold test asks whether the decision announces a new rule of law. *Id.* at 177. If so, the three-part test considers “(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.” *Id.* at 193 (citation and quotation marks omitted).

*W A Foote Mem Hosp*, 321 Mich App at 189-195, applied the *Spectrum Health* test, the threshold test, and the three-part test to conclude that a recent Supreme Court decision overruling prior precedent applied retroactively. Because the interpretation of statutory text was not new law, retroactivity was proper under the *Spectrum Health* test and the threshold test. *Id.* at 189-192. In addition, the exception in the *Spectrum Health* test did not apply because the plaintiff’s claim was based on the absence of a contract and the plaintiff’s claim did not arise from a Supreme Court case. *Id.* at 191 n 17. Finally, applying the three-factor test, the Court concluded that the purpose of the “new” rule was to conform caselaw to the terms of the statute, noted that parties had extensively relied on prior caselaw, but decided that promoting consistency in the law served the administration of justice. *Id.* at 193-195.

*W A Foote Mem Hosp* controls this case in all respects. First, *Streng* followed the Supreme Court’s decision in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), and interpreted the text of MCL 224.21, so *Streng* is not new law.<sup>7</sup> For the same reason, *Streng* is retroactive under the threshold test. In addition, plaintiffs’ claims do not meet the exception in the *Spectrum Health* retroactivity test. The parties’ dispute in this case does not arise out of a contract, and plaintiffs’ claims do not find support in *Rowland*.<sup>8</sup>

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<sup>6</sup> In response to plaintiffs’ reliance on *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002), and *Tebo v Havlik*, 418 Mich 350; 343 NW2d 181 (1984), *W A Foote Mem Hosp*, 321 Mich App at 186 n 14, 195 n 19, noted that the Supreme Court effectively repudiated *Pohutski* and undermined *Tebo* in *Spectrum Health*. In addition, the Supreme Court has repeatedly demonstrated that interpreting the straightforward statutory text merits overruling prior precedent and applying its interpretation retroactively. See *Rowland*, 477 Mich at 220-222 (applying its decision retroactively to restore the law to what was mandated by the statutory text); *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 587; 702 NW2d 539 (2005) (same); see also *Wayne Co v Hathcock*, 471 Mich 445, 483-484; 684 NW2d 765 (2004) (applying its decision retroactively to give effect to a constitutional provision).

<sup>7</sup> Even 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.

<sup>8</sup> *Streng* addressed this concern by noting that *Rowland* discarded the entirety of the analysis in *Brown v Manistee Co Rd Comm*, 452 Mich 354, 361-364; 550 NW2d 215 (1996), overruled by *Rowland*, 477 Mich 197, as “ ‘deeply flawed[,]’ ” *Rowland* did not mention MCL 224.21 or discuss the notice deadline, and *Rowland* did not approve or disapprove of the use of one notice provision over another. *Streng*, 315 Mich App at 459-460.

*Streng* is also retroactive using the three-part test. The trial court and plaintiffs championed widespread reliance on the “old” rule and the unjust effect of applying *Streng* retroactively. *W A Foote Mem Hosp*, 321 Mich App at 195, decided that the proper, consistent interpretation of the statutory text outweighed these reliance concerns. Further, the cause of action in this case can defeat governmental immunity, which is especially significant for enforcing only those causes of actions enacted by the Legislature, as noted in the context of no-fault benefits in *W A Foote Mem Hosp*, 321 Mich App at 192. Accordingly, the trial court erred by ruling that *Streng* did not apply retroactively.<sup>9</sup>

Applying *Streng* and MCL 224.21(3), plaintiffs’ notices were noncompliant. MCL 224.21(3) requires service of the notice of defect on the Road Commission and the County Clerk within 60 days of the accident. MCL 224.21(3); *Streng*, 315 Mich App at 466-467. It is not clear if Grinage served his notice on the County Clerk. Even if he did, his notice was deficient because he, too, served it more than sixty days after the accident. Pearce’s notice was defective because she only served it on the Road Commission, not the County Clerk, even though the notice was timely. Therefore, the trial court erred by measuring plaintiffs’ notices against MCL 691.1404(1) and finding them sufficient.

Finally, the trial court determined that the Road Commission was not required to plead defective notice under MCL 224.21 as an affirmative defense. We agree. Governmental immunity is not an affirmative defense. *Kendricks v Rehfield*, 270 Mich App 679, 681; 716 NW2d 623 (2006). Rather, it is a characteristic of government, and a plaintiff must plead in avoidance of governmental immunity. *Mack v Detroit*, 467 Mich 186, 203; 649 NW2d 47 (2002).

The notice provision is an integral component of defeating governmental immunity. Interpreting the effect of a notice provision at MCL 600.6431, the Supreme Court held that this provision “establishes conditions precedent for avoiding the governmental immunity conferred by the GTLA, which expressly incorporates MCL 600.6431.” *Fairley v Dep’t of Corrections*, 497 Mich 290, 297; 871 NW2d 129 (2015). Similarly, MCL 691.1402(1) in the GTLA refers to MCL 224.21 for claims brought against county road commissions, and this section includes the notice provision at MCL 224.21(3). Therefore, MCL 224.21(3)’s notice requirements, including the deadline and service requirements, are a component of pleading a claim in avoidance of governmental immunity. Accordingly, the burden was on plaintiffs to meet the requirements for bringing a claim against the Road Commission. The trial court correctly rejected the argument that the Road Commission waived its challenge to the sufficiency of plaintiffs’ notices by failing to plead defective notice as an affirmative defense.

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<sup>9</sup> Pearce maintains that the Road Commission has taken inconsistent positions on the applicability of *Streng*. Pearce is correct that the Road Commission strenuously objected to *Streng* as wrongly decided in Pearce’s prior appeal, but Pearce invoked *Streng* to argue that her notice was substantially compliant. When this Court granted Pearce’s motion to affirm, the Road Commission reasonably understood *Streng* to be controlling. Therefore, we are not concerned by the Road Commission’s apparent about-face.

### III. CONCLUSION

We reverse the trial court's denial of the Road Commission's motion for summary disposition. We hold that *Streng* applies retroactively and that plaintiffs' notices were deficient under MCL 224.21(3). We affirm the trial court's ruling that the Road Commission was not required to plead defective notice as an affirmative defense. Accordingly, we direct the trial court to grant the Road Commission's motion for summary disposition.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell  
/s/ Kirsten Frank Kelly  
/s/ Michael J. Riordan

# **EXHIBIT B**

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

**Joseph Grinage,**

Plaintiff

v

File No. 15-1226-NI

**Estate of Melissa Sue Musser,  
Patricia Jane Musser, and  
The Eaton County Road Commission,**

and

File No. 16-29-NI

Defendants,

Honorable John D. Maurer

AND

**Ryan Harston,**

Plaintiff

v

**The Eaton County Road Commission, and  
The Estate of Melissa Sue Musser, and  
Patricia Jane Musser**

Defendants,

AND

**Lynn Pearce, Personal Representative of the  
Estate of Brendon Pearce, Deceased,**

Plaintiff

v

**Lawrence Benton, Personal Representative  
of the Estate of Melissa Sue Musser, Deceased,  
Patricia Jane Musser, and The Eaton  
County Road Commission**

Defendants,

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Jeffrey D. Malin (P36212)  
Matthew G. Gauthier (P76043)

D. Adam Tountas (P68579)  
Charles J. Pike (P77929)

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Road Commission

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Attorneys for Defendants Estate of Melissa  
Sue Musser and Patricia Jane Musser

Joseph T. Collison (P34210)  
COLLISON & COLLISON  
Attorneys for Plaintiff Pearce

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ORDER

City of Charlotte, County of Eaton, State of  
Michigan, on the 6<sup>th</sup> day of June, 2017.

HONORABLE JOHN D. MAURER, Circuit Judge

WHEREAS, Defendant Eaton County Road Commission filed a motion for summary disposition pursuant to MCR 2.116(C)(7), and

WHEREAS, the parties all appeared for oral arguments on April 28, 2017, at which time the Court allowed for additional briefing,

NOW THEREFORE; the Court, having read the extensive briefs, heard oral arguments, reviewed the follow-up briefs, and reviewed the relevant authority, finds as follows.

FACTS

On March 8, 2015, a minivan driven by Melissa Musser left the roadway and struck a tree. The car was owned by Melissa's mother, Patricia Musser. Both Melissa Musser and Brendon Pearce, a passenger in the vehicle, were killed. There were several other passengers in the vehicle, among them Joseph Grinage and Ryan Harston, who were injured but survived the accident. Plaintiffs Grinage, Harston, and Pearce's estate are suing the Eaton County Road Commission claiming a highway

defect was responsible for the crash. Defendant Eaton County Road Commission responds that Melissa Musser was legally intoxicated and driving at least 20 miles over the speed limit on bad tires in the rain, and also that pre-suit notice was insufficient and they should not be responsible.

Each Plaintiff is required to serve pre-suit notice of intent to sue, the details of which form the instant issue. Defendant Road Commission argues that the notice must be served on the County Clerk and the Chairperson of the County Road Commission within 60 days after the accident. Plaintiff Pearce served notice 58 days after the accident, but did not serve the County Clerk. Plaintiff Grinage served notice 116 days after the accident. Plaintiff Harston served notice 113 days after the crash, but did not serve the County Clerk. Plaintiff Ryan Harston responds that notice must be served within 120 days after the accident, and also that he served the proper parties. Harston and Pearce also argue that Defendant Road Commission did not properly plead the affirmative defense of improper notice.

This matter appeared before this Court on May 8, 2016, apparently for a hearing on Eaton County Road Commission's motion for summary disposition based on insufficient notice to the county. This motion was only for File No. 16-29-NI regarding Brendon Pearce's claims, and dealt with properly describing the alleged defect. This Court, Judge Grant on SCAO assignment, denied the motion because it found the notice to be sufficient. That decision was appealed, affirmed by the Court of Appeals, and an application for leave to appeal is, at the time of writing, pending before the Supreme Court. An apparent change in law has created the issues forming the basis of the instant motion.

#### STANDARD OF REVIEW

Summary disposition pursuant to MCR 2.116(C)(7) does not test the merits of

the claim, but rather certain defenses that may eliminate the need for trial: release, payment, prior judgment [res judicata], immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, or “infancy or other disability of the moving party.” The grounds listed in (C)(7) must be raised in a party’s first responsive pleading unless stated in a motion filed prior to the first responsive pleading. When reviewing a (C)(7) motion, “the court must accept all well-pled allegations of the nonmoving party as true.” *DMI Design & Mfg, Inc v Adac Plastics, Inc*, 165 Mich App 205, 209 (1987).

In determining whether a plaintiff’s claim is barred because of immunity granted by law, the reviewing court will accept the allegations stated in the plaintiff’s complaint as true unless contradicted by documentary evidence. *Maiden v. Rozwood*, 461 Mich. 109, 119 (1999). Moreover,

The reviewing court must view the pleadings and supporting evidence in the light most favorable to the nonmoving party to determine whether the undisputed facts show that the moving party has immunity. If there is no factual dispute, whether a plaintiff’s claim is barred under the applicable statute of limitations is a matter of law for the court to determine.

However, if the parties present evidence that establishes a question of fact concerning whether the defendant is entitled to immunity as a matter of law, summary disposition is inappropriate.

*Kincaid v Cardwell*, 300 Mich App 513, 522–23 (2013) (citations omitted).

#### ANALYSIS

At issue in the instant motion is whether to apply the 120 day notice provision of the Government Tort Liability Act, MCL 691.1404, or the 60 day notice provision of the Highway Code, MCL 224.21; if it is the latter, whether defective notice must be raised as an affirmative defense; and, in short, whether to give *Streng v Board of Mackinac County Road Commissioners*, 315 Mich App 449 (2016), retroactive effect.

The first issue may be addressed succinctly. *Streng* is explicit that MCL 224.21 governs notice of intent to sue for injuries sustained on highways: service must be made within 60 days of the injury, in writing, on both the county clerk and the chairperson of

the board of county road commissioners. Plaintiff Harston argues that there is a conflict as the Supreme Court has stated that the 120 day window of the GTLA governs. This position is incorrect. Plaintiff relies on *Rowland v Washtenaw Rd Commn*, 477 Mich 197 (1972), where the Supreme Court did rule on a case applying the 120 day notice period. However, *Rowland* addressed the constitutionality of statutory notice provisions for governmental defendants—in general—in a case that happened to apply the 120 day notice provision of the GTLA; it does not stand for the position that the notice provision of the GTLA is to be applied rather than notice provision of the Highway Code. This is clear from the text of *Rowland*, and also evident in *Streng's* discussion of the history of these provisions, *Rowland*, and note that no precedential case has applied the 60 day notice provision since 1970. *Streng*, at 460.

While under *Streng* the Highway Code is the applicable provision, it may not apply to this case. Plaintiffs argue that Defendant Road Commission has waived this defense by its failure to raise it affirmatively. This argument must also fail. Plaintiff relies on MCR 2.111(F)(3) and MCR 2.116(D)(2) for the position that the affirmative defense of immunity granted by law must be raised in a party's first responsive pleading. However,

It is well established that governmental immunity is not an affirmative defense, but is instead a characteristic of government. “[I]t is the responsibility of the party seeking to impose liability on a governmental agency to demonstrate that its case falls within one of the exceptions [to governmental immunity].” Furthermore . . . “[W]hen the Legislature specifically qualifies the ability to bring a claim against the state or its subdivisions on a plaintiff's meeting certain notice requirements that the plaintiff fails to meet, no saving construction—such as requiring a defendant to prove actual prejudice—is allowed.”

*Fairley v Dep't of Corr*, 497 Mich 290, 298, reconsideration den sub nom. *Stone v Michigan State Police*, 498 Mich 864 (2015) (citations omitted); See also *McCann v State Dept of Mental Health*, 398 Mich 65, 77 n 1(1976); *Galli v Kirkeby*, 398 Mich 527,

542 n 5 (1976). Plaintiffs have not argued that Defendant Road Commission is not protected by governmental immunity. Therefore, Plaintiffs' argument that Defendant failed to raise the affirmative defense of defective notice fails because it is not an affirmative defense, but a condition of government that may be raised at any time.

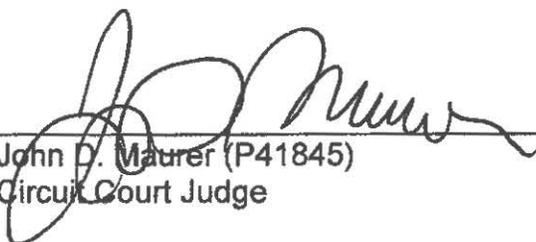
Plaintiff Pearce concedes this point, but argues that the issue is one of improper notice rather than defective service as discussed in *Fairley*. This misunderstands the issue. Notice and service are not two distinct facets of this claim; the notice is defective under the Highway Code *because* of the improper service.

The only remaining issue, then, is the retrospective effect of *Streng*. If *Streng* is given retrospective effect, for the reasons stated above, Defendant Road Commission would be entitled to summary disposition. "Although the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity. For example, a holding that overrules settled precedent may properly be limited to prospective application." *Pohutski v City of Allen Park*, 465 Mich 675, 695–96 (2002) (citations omitted). A three factor test is applied to determine if a decision should not have retroactive effect. "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." *Id.*

Defendant argues that *Streng* does not announce a new rule or new interpretation of a rule. This cannot be accepted. *Streng* itself acknowledges that "both the Supreme Court and [the Court of Appeals] have regularly applied the GTLA without consulting MCL 224.21 in cases involving the highway exception to governmental immunity and county road commissions" and cites authority noting that "the 60 day notice provision has not been applied in any reported cases involving county road commissions since . . . 1970." *Streng*, at 460. While the purpose to be served by the

new rule is to give full effect to both the GTLA and the Highway Code, this is not outweighed by the extent of reliance on the old rule. Further, the only effect of retroactive application would be to bar an entire class of litigants from bringing suit against county road commissioners. Plaintiffs in this case followed the well-established rule of law at the time their suits were filed, and it would be detrimental to the administration of justice to bar their claims now based on a change in the interpretation of this law. As such, this Court finds that it would be improper to give *Streng* retroactive effect. Thus, under the law prior to *Streng*, the Plaintiffs filed proper notice and Defendant's motion for summary disposition must be denied.

It is so ordered.



John D. Maurer (P41845)  
Circuit Court Judge

**PROOF OF MAILING**

Angela L. Curtiss swears on the 6<sup>th</sup> day of June, 2017 that she served a copy of  
the foregoing Order upon Jeffrey D. Malin, D. Adam Tountas, Leonard E. Miller, Thomas  
S. Barger and Joseph T. Collison via first class mail, postage fully prepaid.

Angie Curtiss  
Angela L. Curtiss

Grinage v Estate of Melissa Musser, et al; File No. 15-1226-NI  
and  
Harston v Eaton County Road Commission, et al; File No. 16-29-FH

# EXHIBIT C

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

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**LYNN PEARCE, Personal Representative of  
the Estate of BRENDON PEARCE, Deceased,**

Plaintiff,

File No. 16-29-NI

v

**THE EATON COUNTY ROAD COMMISSION,  
LAWRENCE BENTON, Personal Representative  
of the Estate of MELISSA SUE MUSSER,  
Deceased and PATRICIA JANE MUSSER,**

Honorable Jeffrey L. Sauter  
by Honorable Edward J. Grant  
(on SCAO assignment)

Defendants.

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OPINION AND FINDINGS

At a session of Court, held in the City of  
Charlotte, County of Eaton, State of Michigan,  
on the 5th day of May, 2016.

Present: HONORABLE EDWARD J. GRANT, Circuit Judge

On March 8, 2015, Melissa Musser was driving a vehicle on N. Mason Road. Brendon Pearce was a passenger in Ms. Musser's car. It is alleged that the car hydroplaned and crashed into a tree, and as a result thereof, both Ms. Musser and Mr. Pearce died. Lynn Pearce, as Personal Representative of the Estate of Brendon Pearce, Deceased sued Melissa Musser's Estate alleging that Melissa Musser drove negligently; Patricia Musser was also sued, as she was the owner of the car in question. The plaintiff also sued the Eaton County Road Commission alleging that the Road Commission kept the road in a dangerous and defective condition despite having a duty to keep the county

roads safe from disrepair and that its failure to do so caused Ms. Musser to lose control of her car and crash into a tree, killing Mr. Pearce.

On May 3, 2015, the plaintiff gave Eaton County notice of the accident occurring and addressing said notification to the Eaton County Board of Road Commission, stating that the accident occurred "approximately 5:55 p.m." and that it occurred on "North Mason Road, approximately 500 feet South of the intersection with West Kinsel Highway, Kalamo Township, Eaton County, Michigan". The notice stated that the defect involved a "water pooling condition" with "inadequate drainage". The notice also listed known witnesses and stated that Brendon Pearce was fatally injured in the crash. The State of Michigan Traffic Crash Report (Exhibit 3 of Defendant's Motion for Summary Disposition) states that the crash's location occurred on "N Mason Rd, 500 feet S of Kinsel Hwy" and this was what the plaintiff used in giving her notice. The defendant, Eaton County Road Commission (hereinafter Road Commission), filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7), claiming that plaintiff's notice is insufficient because MCL 691.1404(1) provides that a notice "shall specify the exact location and nature of the defect" involved. The plaintiff has filed a response and brief in answer thereto. The Court has now had the opportunity to read and review the excellent briefs submitted by the parties in addition to which the Court has also had the advantage of having heard oral argument by each of the parties; each has made an excellent presentation on behalf of their respective clients.

The Court is well aware that a Motion for Summary Disposition brought pursuant to MCR 2.116(C)(7) allows for summary disposition when there has been "release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds . . . or assignment or other disposition of the claim" before suit has been filed. All filed affidavits,

pleadings, depositions, admissions and documentary evidence are to be considered with the motion being granted "only if no factual development could provide a basis for recovery" but only so long as they would be admissible at trial. MCR 2.116(G)(5). All well-pleaded allegations are regarded as true and construed in a light most favorable to the nonmovant. *Patterson v Kleiman*, 447 Mich 429, 433 (1994). One of the statutory exceptions to governmental immunity is the public highway exception found at MCL 691.1402, which provides that any governmental agency with jurisdiction over a highway "shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel". MCL 691.1404 provides that if a person is alleging injuries from a defective highway, the "injured person, within 120 days from the time the injury occurred . . . shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant".

Defendant's Motion for Summary Disposition alleges that plaintiff's notice was defective in that it was not sufficient to advise the Eaton County Road Commission of the nature and location of the defective condition and thus not in compliance with the exception to government immunity and the motion must therefore be granted. Plaintiff contends that the statute has been complied with and Defendant's Motion for Summary Disposition must be denied.

Plaintiff contends that the notice given was in accordance with the statutory requirement and further that the Road Commission does not claim that it did not have knowledge of the location of the defect nor that it did not understand the nature of the defect and that remedial actions were taken almost immediately after the accident to

obviate the defective condition. The Road Commission had been previously advised by homeowner Jared Osborn on June 25, 2014, that "his property just north of 1915 (North Mason Road) has standing water in the road whenever it rains, it comes gushing off Kinsel and pools on southbound side. Road is lower than sides and there is no ditch". Exhibit F. Mr. Osborn recontacted the Road Commission on March 12, 2015, just four days after the accident in question, requesting that something be done about the water on the road and requested that a representative of the Eaton County Road Commission call him with an explanation as to why the defective condition continued to exist. The problem was corrected that same day. Exhibit E. Additionally, the Road Commission was contacted on the day of the accident by Central Dispatch of an accident and need to close a road whereupon a "Type I" barricade was placed at the precise location of the pooled water on the southbound lane. Exhibit G. Each party cites case law in their brief and the Court has had the opportunity to review the cases.

Defendant cited the case of *McCahan v Brennan*, 492 Mich 730 (2012), in which the Court stated at page 732:

"The Court of Appeals correctly determined that when the Legislature conditions the ability to pursue a claim against the State on a plaintiff's having filed specific statutory notice, the courts may not engraft an "actual prejudice" component onto the statute as a precondition to enforcing the legislative prohibition. We reiterate the core holding of *Rowland* that such statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate. We further clarify that *Rowland* applies to all such statutory notice or filing provisions, including the one at issue in this case."

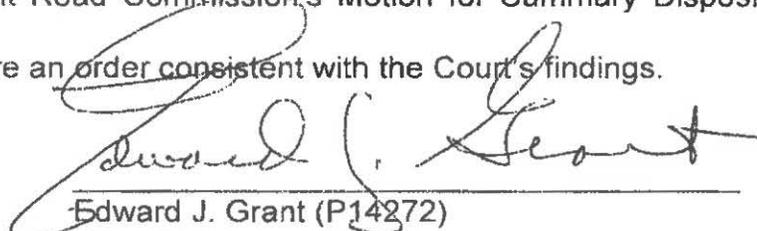
In this case, the plaintiff did not file a verified notice of intent to file a claim with the Clerk of the Court of Claims within six months after the accident as required by statute, but instead had sent a letter providing the necessary information to the university's legal office within the time period required. The case before this Court is quite different than whether a certain specified time period was complied with.

The case of *Plunkett v Department of Transportation*, 286 Mich App 168 (2009), also involved whether the plaintiff's notice included an adequate description of the condition of the road and cause of the accident. The Court found at page 177:

"However, when notice is required of an average citizen for the benefit of a government entity, it need only be understandable and sufficient to bring the important facts to the governmental entity's attention. Thus, a liberal construction of the notice requirements is favored to avoid penalizing an inexperienced layman for some technical defect. The principal purposes to be served by requiring notice are simply (1) to provide the governmental agency with an opportunity to investigate the claim while it is still fresh, and (2) to remedy the defect before other persons are injured."

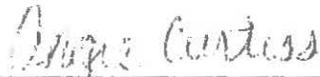
This Court is satisfied and finds that prompt and proper notice was given by the plaintiff to the Eaton County Road Commission; the location and alleged defect in the road were adequately given and were sufficient to bring the defect to the Road Commission's attention. Plaintiff's notice is sufficient and substantially complies with the statute requirements.

Wherefore, Defendant Road Commission's Motion for Summary Disposition is DENIED. Plaintiff will prepare an order consistent with the Court's findings.

  
 Edward J. Grant (P14272)  
 Circuit Judge on SCAO Assignment

**PROOF OF MAILING**

Angela L. Curtiss swears on the 6<sup>th</sup> day of May, 2016 that she served a copy of the foregoing Opinion and Findings upon Joseph T. Collison, Thomas S. Barger and Demetrios Adam Tountas via first class mail, postage fully prepaid.

  
\_\_\_\_\_  
Angela L. Curtiss

A courtesy copy was also provided to Jeffrey Malin via first class mail.

Pearce v Eaton County Road Commission, et al  
File No. 16-29-NI