

**IN THE SUPREME COURT**

On Appeal from the Michigan Court of Appeals  
O’Connell, P.J., and K. F. Kelly and Riordan, JJ

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

Supreme Court Docket No. 158069

Plaintiff-Appellant,

Court of Appeals Docket No. 338990

v

THE EATON COUNTY ROAD COMMISSION,

Eaton County Circuit Court  
Case No. 16-29-NI

Defendant-Appellee,

and

LAWRENCE BENTON, Personal Representative of  
the ESTATE OF MELISSA SUE MUSSER,  
Deceased; and PATRICIA JANE MUSSER,

**DEFENDANT-APPELLEE EATON  
COUNTY ROAD COMMISSION’S  
ANSWER TO PLAINTIFF-APPELLANT  
LYNNE PEARCE’S APPLICATION  
FOR LEAVE TO APPEAL**

Defendants.

Joseph T. Collison, J.D. (P34210)  
COLLISON & COLLISON  
Attorneys for Plaintiff-Appellant Lynn Pearce  
5811 Colony Drive, North  
P.O. Box 6010  
Saginaw, MI 48608-6010  
(989) 799-3033  
[jtc@saginaw-law.com](mailto:jtc@saginaw-law.com)

Jon D. Vander Ploeg (P24727)  
D. Adam Tountas (P68579)  
SMITH HAUGHEY RICE & ROEGGE  
Attorneys for Defendant-Appellee Eaton County  
Road Commission  
100 Monroe Center NW  
Grand Rapids, MI 49503-2802  
(616) 774-8000  
[jvanderploeg@shrr.com](mailto:jvanderploeg@shrr.com)

Thomas S. Barger (P54968)  
GARAN LUCOW MILLER PC  
Attorneys for Defendants Estate of Melissa Sue  
Musser and Patricia Jane Musser  
504 S. Creyts Road, Suite A  
Lansing, MI 48917  
(517) 327-0300

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## INTRODUCTION

This case is one of two simultaneously pending in the Court of Appeals by plaintiffs claiming roadway defect injuries and road commission liability. In addition to this case, is Court of Appeals Docket No. 337394, *Tim Edward Brugger II v Bd of Co Rd Comm'rs for the Co of Midland, a/k/a Midland Co Rd Comm.* Both of these cases turn upon a question of statutory interpretation that was earlier decided in the case of *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017).

In both of these cases, the road commissions relied upon the statute requiring plaintiffs to give notice of their claims of highway defect and injury within 60 days after the accident. In the case of *Streng v Bd of Mackinac Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), the Court of Appeals held that the 60-day notice provision was still the law. For some time, plaintiffs, like these, had ignored that the 60-day provision believing that the Supreme Court had held they need only comply with a different 120-day provision. The 60-day notice provision is in MCL 224.21, and the 120-day notice provision is found in MCL 691.1404. There is no need here to plow through all of that, because the essential claim for this appeal is that the *Streng* court held the 60-day provision was still good law and applied.

For these cases, then, the question became whether *Streng*, as a rule of statutory interpretation, applied retroactively, or prospectively only and not to these plaintiffs.

That issue of retroactivity versus prospectivity in cases of statutory interpretation was decided late in 2016 by this Court in *W A Foote Mem Hosp v Mich Assigned Claims Plan*, pending now on application here, Supreme Court Docket No. 156622. The road commissions in this case and in the *Brugger* case argued that *W A Foote* decided the question of statutory interpretation and applicability (retroactive), as applied to this case and to *Brugger*. The Court of

Appeals agreed with the Road Commission in this case and held that the plaintiff's claims had to be dismissed for noncompliance with the 60-day notice provision.

The panel in *Brugger*, however, by a two-judge majority decision, held that *W A Foote* did not apply, and that the holding in *Streng* in favor of the 60-day notice provision would be prospective and not apply to the plaintiff in that case. (See Order Denying Reconsideration, **Exhibit 1**).

The Road Commission in the *Brugger* case will be filing a timely Application for Leave to Appeal from that decision of the Court of Appeals. In the meanwhile, plaintiff Pearce in this case has filed this Application for Leave to Appeal from this panel's decision that *Streng* does have retroactive application as a rule of statutory interpretation, and that the plaintiff's claim is barred for noncompliance with the 60-day notice provision. The Road Commission contends that the Court of Appeals reached the right decision in this case. Hence, it opposes the plaintiff's Application for Leave to Appeal. The other Road Commission will shortly file its Application for Leave to Appeal in the *Brugger* case, for the reason that the other panel of the Court of Appeals reached the wrong decision, applying *Streng* prospectively only and not to that plaintiff.

In the meanwhile, the Court of Appeals' opinion in *W A Foote Mem Hosp, supra*, is not final. The plaintiff applied to this Court for leave, and this Court by Order dated May 25, 2018, considered the plaintiff's Application for Leave in that case and ordered that the parties would file supplemental briefs on issues that are directly at issue in these two road commission cases. The Clerk is to schedule the matter for oral argument on whether the Court should grant leave to appeal. That remains pending, and the parties have not yet completed their supplemental briefing.

The Eaton County Road Commission, the defendant in this case, contends that the Court of Appeals reached the right decision that *Streng* applies retroactively and that the plaintiff is barred from this action for having exceeded the statutory notice period. But, the Road Commission recognizes that the legal issue central to this decision is the one at issue in *W A Foote Mem Hosp*, and that this Court is considering whether or not to grant leave. Consequently, the Eaton County Road Commission suggests either of two solutions for this case and for the upcoming Application for Leave to Appeal in the *Brugger* case. The Court could hold these cases in abeyance, pending resolution of *W A Foote*. The other reasonable alternative would be for the Court to bring this case, and *Brugger*, when the Application is filed, within the current order for oral argument on the Application in *W A Foote*.

**COUNTER-STATEMENT OF APPELLATE JURISDICTION**

The Plaintiff's Statement of Appellate Jurisdiction is complete and correct so far as procedure and jurisdiction. The Road Commission admits that this case involves a legal issue of major significance to the State's jurisprudence, as evidenced by this Court's Order in the *WA Foote* case.

The Road Commission does disagree with the rest of the argument in the Plaintiff's Statement of Appellate Jurisdiction. The Road Commission contends that the Court of Appeals reached the right decision in this case and that it should not be overturned.

**COUNTER-STATEMENT OF QUESTIONS PRESENTED**

- I. WHETHER THE RESULT IN THIS CASE IS COMPELLED BY THE COURT OF APPEALS' DECISION IN *W A FOOTE MEM HOSP*, WHICH CONTROLS, AS FIRST PUBLISHED IN TIME, OVER THE LATER DECISION IN *BRUGGER*, SUCH THAT THE COURT OF APPEALS' DECISION IN *STRENG* APPLIES TO THIS CASE AND NOT PROSPECTIVELY ONLY.**

Plaintiff-Appellant Lynn Pearce answers "No."

Defendant-Appellee Eaton County Road Commission answers "Yes."

The Court of Appeals answered "Yes."

## COUNTER-STATEMENT OF FACTS

This case is inextricably tied to two others. They are *Brugger v Midland Co Bd of Rd Comm'rs*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (2018) (Docket No. 337394), and *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017). The legal principle at issue and central to all three cases is the same—whether a published and binding decision of the appellate court, holding that a statute was, and remains, the law, is the law that applies, although many plaintiffs and some courts had wrongly misconstrued it as no longer applicable. In these two road commission cases, the plaintiffs claim to have taken a cue from prior case law that their notice of the accident need only comply with MCL 691.1402 *et seq.*, which requires notice within 120 days. But according to *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2017), these plaintiffs claims were controlled by MCL 224.21(3), which required each of these plaintiffs to give notice within 60 days of an accident for suit against a road commission. In this case, the Circuit Court rejected Eaton County Road Commission's argument and held that the *Streng* decision should be given prospective application only, and not to these plaintiffs. The Circuit Court held that they need only to have complied with the 120-day notice provision in MCL 691.1402.

On appeal to the Court of Appeals in this case, the panel has held by published decision that the *Streng* decision is not limited to prospective application only, but that it has retroactive application since the statute it construed was, and remains, the law. Thus, these plaintiffs gave notice of claim too late, and the claim here by Pearce was dismissed.

The Court in *Brugger, supra*, decided otherwise in a published decision. The panel in this case, however, ordered supplemental briefing by the parties on the question of whether the result was controlled by *W A Foote Mem Hosp, supra*. Attached hereto is the Road Commission's supplemental brief. (**Exhibit 2**). The panel in this case determined that the

outcome was controlled by the Court's decision in *W A Foote*. In other words, according to the rule of law in *W A Foote*, the *Streng* decision had retroactive application and applies to these plaintiffs.

*W A Foote* has come to this Court on Application for Leave to Appeal. The Court entered an Order on May 25, 2018 (copy attached hereto as **Exhibit 3**), that the parties address the retroactive versus prospective application question. The Court has ordered submission of that Application for Leave to oral argument, and the parties in *W A Foote* have not completed their supplemental briefing.

The correctness of the decision of the Court of Appeals in this case may well turn upon this Court's decision in *W A Foote*. If this Court upholds the Court of Appeals' decision in *W A Foote*, then it is likely that the decision of the Court of Appeals in this case should be upheld. The Eaton County Road Commission contends here that the Court of Appeals reached the correct decision in this case, and that *W A Foote* states the proper resolution of the legal issue involved and should be affirmed on appeal.

### **ARGUMENT**

Defendant, Eaton County Road Commission, contends that the Court of Appeals reached the right result and decision in this case, and that it must not be overturned on appeal. For its argument, the Road Commission attaches and incorporates by reference its supplemental brief to the Court of Appeals in this case. (**Exhibit 2**).

The Road Commission recognizes that the decision in this case likely turns upon this Court's resolution of the appeal in *W A Foote, supra*. The parties in that case have been ordered to provide supplemental briefing on the particular legal question involved there and here, whether a decision giving newfound interpretation to, and application of, an existing statute,

perhaps contrary to past interpretation or practice, should be given retroactive application to the parties in this lawsuit, or prospective application only to later litigants.

Moreover, *W A Foote*, and these two different road commission cases, are all coming to this Court at roughly the same time and on the same issue. The Eaton County Road Commission recognizes that the result in this case may well turn upon this Court's decision in the *W A Foote* case. Consequently, the Eaton County Road Commission asks that this Court hold the plaintiff's Application in this case in abeyance until *W A Foote* is decided. As an alternative, this Court may wish to have the Eaton County Road Commission weigh in along with the Court's consideration of *W A Foote*. In any event, this plaintiff's Application for Leave to Appeal ought not be granted unless and until the *W A Foote* case is decided.

### **RELIEF REQUESTED**

For all of the foregoing reasons and authorities, Defendant-Appellee Eaton County Road Commission respectfully requests that this Court either:

1. Hold the Plaintiff's Application for Leave to Appeal in abeyance until after the conclusion of its deliberations and a decision in the *W A Foote* case; or
2. Order that these parties be joined in consideration of the legal issues currently submitted by Order of this Court in the *W A Foote* case; or
3. Such other relief as this Court deems appropriate.

DATED: August 9, 2018

/s/ Jon D. Vander Ploeg  
 Jon D. Vander Ploeg (P24727)  
 D. Adam Tountas (P68579)  
 SMITH HAUGHEY RICE & ROEGGE  
 Attorneys for Defendant-Appellee Eaton County  
 Road Commission  
 100 Monroe Center NW  
 Grand Rapids, MI 49503-2802  
 (616) 774-8000  
[jvanderploeg@shrr.com](mailto:jvanderploeg@shrr.com)