IN THE SUPREME COURT

APPEAL FROM THE 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,

Plaintiff/Appellant,

SUPREME COURT
DOCKET NO. 158069

-vs-

COURT OF APPEALS
DOCKET NO. 338990

THE EATON COUNTY ROAD COMMISSION,

EATON COUNTY CIRCUIT
COURT FILE NO. 16-000029-NI

Defendant/Appellee

and

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

Defendants.

_____/

TIM EDWARD BRUGGER, II,

Plaintiff/Appellee,

SUPREME COURT
DOCKET NO. 158304

COURT OF APPEALS
DOCKET NO. 337394

-vs-

MIDLAND COUNTY BOARD OF ROAD COMMISSIONERS,

MIDLAND COUNTY CIRCUIT
COURT FILE NO. 15-002403-NO

Defendant/Appellant.

_____/

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PLAINTIFF/APPELLANT BRIEF ON APPEAL

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

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Case Law **Page(s)**

Statutes

Court Rules

STATEMENT OF QUESTIONS PRESENTED

I. WAS *STRENG v BOARD OF MACKINAC COUNTY ROAD COMMISSIONERS*, 315 MICH APP 449 (2016) LV DEN, 500 MICH 919 (2016) CORRECTLY DECIDED?

The Trial Court answered this question "yes".

Defendant/Appellee, THE EATON COUNTY ROAD COMMISSION, although initially adopting a contrary position, (that the present action was governed by the Governmental Tort Liability Act) now answers this question "yes".

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II. DID *STRENG* CLEARLY ESTABLISH A NEW PRINCIPLE OF LAW AND THEREBY SATISFY THE THRESHOLD QUESTION FOR RETROACTIVITY SET FORTH IN *POHUTSKI V CITY OF ALLEN PARK*, 465 MICH 675, 696 (2002)?

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III. SHOULD *STRENG* BE APPLIED PROSPECTIVELY UNDER THE "THREE-FACTOR TEST" SET FORTH IN POHUTSKI?

The Trial Court answered this question "yes".

Defendant/Appellee, THE EATON COUNTY ROAD COMMISSION, although initially adopting a contrary position, ("*** because *Streng* changed the law, it does not apply retroactively ***") now answers this question "no".

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STATEMENT OF FACTS AND PROCEDURAL HISTORY
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. Annexed as Exhibit A[1], is the Sheriff Department's Case Supplemental Report. The Court will note at page 14, that:

> "There was a large water puddle north of the driveway at 1915 Mason Road. The puddle covered approximately three quarters of the southbound lane.***"

It was the opinion of Detective Rick Buxton that the pooled water on the road surface caused MELISSA SUE MUSSER to lose control of the vehicle. See Case Supplement Report at page 15, Appellant's Appendix p 17a.

Annexed as Exhibit B[2] are two photographs depicting the pooled water, the specific accident location and the general condition of the roadway at that location. These photographs clearly demonstrate the physical characteristics of the water which was allowed to accumulate on North Mason Road immediately prior to this fatal accident. These photographs were taken the day of the accident and are part of the ROAD COMMISSION's investigative file.

BRENDON PEARCE, age 15, was a passenger in the vehicle. He sustained fatal injuries as the result of the accident. The present litigation involves a Wrongful Death claim by BRENDON'S

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[1] Appellant's Appendix at pp 1a – 47a.
[2] Appellant's Appendix at pp 48a – 49a.

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. See MCL 691.1402.

The ROAD COMMISSION no longer claims 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 the statute. See Exhibit C, Appellant's Appendix at pp 50a – 53 a.

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." See Exhibit D, Appellant's Appendix at p 54a.

Mr. Osborn re-contacted 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. See Exhibit E, Appellant's Appendix at p 55a.

Most importantly, Defendant was contacted <u>on the day of the accident</u> 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.[3] See Service Request and photograph marked collectively as Exhibit F, Appellant's Appendix at pp 56a – 57a.

Obviously, 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 there is no question that the ROAD COMMISSION had actual knowledge of the nature and location of the defect within 35 minutes of the accident occurrence.

Although originally claiming that the notice by PEARCE was insufficient, and after losing that argument and appeal, the ROAD COMMISSION now takes the position that service of the notice was insufficient.

PROCEDURAL HISTORY

This Appeal, by leave granted, 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. The case involved consolidated Appeals by the EATON COUNTY ROAD COMMISSION although the current proceedings pertain to Court of Appeals Docket No: 338990, only. *Pearce v Eaton County Road Commission*, 324 Mich App 549; 922 N.W. 2d 391 (2018).

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 her mother, PATRICIA JANE

[3] The "road closed" signs were retrieved by the Road Commission on March 9, 2015. See Exhibit G, Appellant's Appendix at p 58a.

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 sufficiently specific 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.

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 the 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 Appellee to raise this issue in its first four Answers and its failure to raise or brief 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 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. [4]

The ROAD COMMISION 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 under either 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 H, Appellant's Appendix at pp 59a – 66a)

[4] *Streng* was decided on May 24, 2016, almost five months after the Pearce Complaint was filed.

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 v. Midland County Board of Road Commissioners* 324 Mich. App 307; 920 N.W. 2d 307 [2018]) and despite 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* should be retroactive and that it was bound by the Court of Appeals decision in *W.A. Foote Memorial Hospital v Michigan Assigned Claims Plan Facility*, 321 Mich. App 159, 909 N.W. 2d 38 (2018) which it understood called for complete retroactive application of decisions interpreting a statute.

The *Foote* Court believed that *Spectrum Health v Farm Bureau Mutual Insurance Company of Michigan*, 492 Mich 503, 821 NW2d 117 (2012) "effectively repudiated" this Court's prior decision in *Pohutski v City of Allen Park*, 465 Mich 675, 641 NW2d 219 (2002) which provides for a flexible approach to the issue of retroactive verses prospective application of a decision where injustice might result from full retroactivity.

In actuality, the *Spectrum Health* Court did not "effectively repudiate" *Pohutski* nor did *Spectrum Health* establish a rule of absolute retroactivity in the context of judicial decisions of statutory interpretation.

Appellant filed her Application for Leave to Appeal on June 27, 2018. By Order of December 4, 2018, the Application for Leave to Appeal was held in abeyance pending the decision of this Court in *Foote*.

Foote was decided on October 25, 2019. That part of the judgment by the Court of Appeals stating that the application of the "threshold question" and "three-factor test" set forth in *Pohutski* in the context of judicial decisions of statutory interpretation was "effectively repudiated" by this court's decision in *Spectrum Health* was VACATED. See 504 Mich. 985; 934 N.W. 2d 44 (2020). Thereafter, the Application was again considered by this Court and was GRANTED. See April 24, 2020 Order. Consequently, jurisdiction is vested in this Court by virtue of MCR 7.305(H)(3).

ARGUMENT

I. WAS *STRENG v BOARD OF MACKINAC COUNTY ROAD COMMISSIONERS*, 315 MICH APP 449 (2016) LV DEN, 500 MICH 919 (2016) CORRECTLY DECIDED?

The Trial Court answered this question "yes".

Defendant/Appellee, THE EATON COUNTY ROAD COMMISSION, although initially adopting a contrary position, (that the present action was governed by the Governmental Tort Liability Act) now answers this question "yes".

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Plaintiff/Appellant LYNN PEARCE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED, agrees that *Streng* was correctly decided, that it clearly established a new principle of law and that it should apply on a prospective basis.

The issue in *Streng* is identical to the question presented within this Appeal i.e. which provision controls the notice requirements in this case, MCL 691.1404 under the Governmental Tort Liability Act or MCL 224.21 under the Highway Code? As a preliminary matter, the *Streng* court acknowledged its obligation to "resolve the conflict as to which notice provision governs this case ***". *Streng*, 315 Mich App at 455.

Streng recognized that no precedential case had substantively considered the potential conflicts between the Highway Code and GTLA since *Brown II*.[5] In fact, the Court observed:

> "Instead, 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". *Id.* at page 460.

Streng's footnote 4 identifies two unpublished Court of Appeals decisions and six published decisions decided in both the Supreme Court and the Court of Appeals which applied MCL 691.1404 to road defect cases involving county road commissions in addition to *Brown II* and *Rowland v. Washtenaw Co. Rd. Comm*, 477 Mich. 197; 731 N.W. 2d 41 (2007) .[6] *Id.* at 461.

After a very thorough analysis of both statutes and the case law accumulated over almost 50 years the *Streng* Court concluded:

> "In sum, appellate courts appear to have overlooked the time limit, substantive requirements, and service procedures required by MCL 224.21(3) when the responsible body is a county road commission. Nothing in either the GTLA or the highway code indicate the Legislature intended that result. Despite the precedent of applying the GTLA to the exclusion of MCL 224.21, the procedures and remedies provided by MCL 224.21 are what to apply to county road commissions ****"
> *Id.* at 463.

The *Streng* Court was specifically asked to and in fact did reconcile two conflicting statutory provisions. *Streng* recognized that its decision was a departure from the longstanding practice by

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[5] *Brown v Manistee County Road Commission*, 452 Mich 354; 550 N.W. 2d 215 (1996).

[6] Footnote 4 of *Streng* identified the following unpublished and published decisions as including "*Whitmore v Charlevoix Co Rd Comm*, unpublished opinion per curium of the Court of Appeals, issued October 7, 2010 (Docket Nos. 289672 and 291421), p 3 rev'd in part on other grounds 490 Mich 964, 965 (2011) (the defendant did not challenge the timeliness of the notice); *Ellis v Eaton Co Rd Comm*, unpublished opinion per curium of the Court of Appeals, issued February 7, 2006 (Docket No. 264635), p 3 rev'd 480 Mich 902, 903 (2007) (the defendant's manager was at the scene of the crash the same day, but plaintiff's total failure to provide notice as required by MCL 691.1404 required reversal under Rowland).

Reported cases discussing the duty imposed on counties as arising under MCL 691.1402 included*: Hanson v Mecosta Co Rd Comm'rs*, 465 Mich 492; 638 N.W. 2d 396 (202); *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143; 615 N. W. 2d 702 (2000); *Sebring v City of Berkley*, 247 Mich App 666; 637 N.W. 2d 552 (2001) (Oakland County Road Commission was codefendant); *Taylor v Lenawee Co Bd of Co Rd Comm'rs*, 216 Mich App 435; 549 N. WW. 2d 80 (1996); *Reese v Wayne Co*, 193 Mich App 215; 483 N.W. 2d 671 (1992); *Zyskowski v Habelmann (On Remand)*, 169 Mich App 98; 425 N. W. 2d 711 (1988)"

litigants and the courts (trial and appellate) in applying the GTLA rather than the highway code in cases involving county road commissions.

The language of MCL 224.221(3) and MCL 691.1404(1) is what it is. *Streng* did not attempt to interpret the language of either of these statutes but simply determined which notice provision applied to cases involving county road commissions. Consequently, PEARCE agrees that *Streng* was correctly decided, that it clearly established a new principle of law and that it should apply on a prospective basis.

ARGUMENT

II. DID *STRENG* CLEARLY ESTABLISH A NEW PRINCIPLE OF LAW AND THEREBY SATISFY THE THRESHOLD QUESTION FOR RETROACTIVITY SET FORTH IN *POHUTSKI V CITY OF ALLEN PARK*, 465 MICH 675, 696 (2002)?

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In general, this Court's decisions are given full retroactive effect. *Pohutski*, at 465 Mich 695. However, there are exceptions to this rule. This Court should adopt a more flexible approach if injustice would result from full retroactivity. *Id.* at 696. Prospective application may be appropriate where the holding overrules settled precedent. *Id.* As stated in *Pohutski* at 696:

> "This Court adopted from *Linkletter v Walker,* 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed. 2d 601 (1965), three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *People v*

> *Hampton*, 384 Mich 669, 674, 187 N.W. 2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil v Huson*, 404 U.S. 97, 106-107, 92 S.Ct. 349, 30 L.Ed. 2d 296 (1971), recognized an additional threshold question whether the decision clearly established a new principle of law." *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 645, 433 N.W. 2d 787 (1988) (GRIFFIN, J.) *Id.*

Consequently, the first issue to be decided is whether *Streng* "clearly established a new principle of law." Effectively, a new principle of law can be established even where a Court interprets a statute consistently with its plain language if it affects how the statute would be applied to litigants in a way that was inconsistent with how the statute had been applied. See *Bezeau v Palace Sports and Entertainment, Inc.*, 487 Mich 455, 463; 795 N.W. 2d 797 (2010).

The ROAD COMMISSION's initial reaction to *Streng* was something quite different from its current position in that, until its second appeal, 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 (Docket No. 154885), the ROAD COMMISION argued:

> "***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 argued:

> "***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 that the notice provisions of the Highway Code apply for purposes of this Appeal. These inconsistent arguments by the ROAD COMMISSION reinforce the notion that Michigan Courts and litigants have, for 50 years, consistently and constantly applied the requirements of the GTLA to defective road claims against county road commissions. This longstanding practice was particularly troublesome to the *Streng* court.

Streng noted several other inconsistencies between the GTLA and the Highway Code "that have not been addressed by precedent" in addition to the notice requirements. *Id.* at 461. 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 effectively changed the rules by which all Courts and counsel had abided for half a century by holding that the Highway Code as opposed to the GTLA applied to defective road claims

against county road commission defendants. This interpretation of the Governmental Immunity Act was novel and unprecedented in Michigan jurisprudence.

Streng was followed by *Brugger* which also recognized the "highly unusual circumstances" that 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, content, and service 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 *Brugger* Court determined that *Streng* represented an effective change in the law and, as such, should only be applied on a prospective basis. *Brugger*, 324 Mich App at 314. This was the position taken by PEARCE at the time of argument in the Court of Appeals.

In analyzing road commission cases from 1970 forward, the *Brugger* court concluded:

> "***we can find no reported case thereafter (referencing *Crook v Patterson*, 42 Mich App 241, 242; N.W. 2d 676 [1972]) in which a court evaluated a claimant's notice of claim under MCL 224.21(3) until the decision in *Streng*." *Id.* at 315.

Consequently, it had been almost 50 years since the last time the viability of the pre-suit notice provision in MCL 224.21(3) was directly addressed. The *Brugger* court went on to note:

> "***our courts have routinely applied the 120-day requirement of the GTLA when a defendant is a county road commission without any discussion of MCL 224.21(3)". *Id*. at 316.

It is important to keep in mind that *Streng* was not so much a situation of statutory <u>construction</u> as it was a situation of statutory <u>application</u>.

The *Brugger* court concluded that *Streng* clearly established a new rule of law by departing from the longstanding application of MCL 691.1404(1) to the exclusion of MCL 224.21(3) by Michigan courts, thereby satisfying the threshold question for retroactivity set forth in *Pohutski*.

Appellant is mindful that not every case overruling prior precedent should be applied prospectively. Sometimes limited retroactive application is appropriate. See *Gladych v. New Family Homes, Inc.*, 468 Mich.594, 606; 664 N.W. 2d 705 (2003). Sometimes, complete retroactive application is appropriate. See *County of Wayne v Hathcock*, 471 Mich 445; 684 N.W. 2d 765 (2004). The common thread with each situation is the effect on the administration of justice and whether litigants, in reliance on established precedence, would be left without a remedy.

Gladych dealt with a situation where "unambiguous language" of a statute (MCL 600.5856) conflicted with this Court's prior interpretation of that statute (*Buscanio v Rhodes*, 385 Mich 474; 189 N.W. 2d 202 [1971]). After considering the effect of overruling its prior decision, this Court recognized that "practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretation set forth in *Buscaino*". *Gladych*, 468 Mich at 606.

Ultimately, because of the extensive reliance on the erroneous interpretation of the statute by the *Buscaino* court, the determination was made to give limited retroactive application by applying its ruling only to those cases in which that specific issue had been raised and preserved[7]. In all other cases the decision was given prospective application.[8] *Id.* at 607.

Hathcock dealt with the condemnation of private property for the construction of a project which was then to be transferred to private entities. Among the issues to be briefed for the *Hathcock* Court was "whether a decision overruling *Poletown Neighborhood Council v. Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) should apply retroactively or prospectively only, taking into consideration the reasoning of *Pohutski* ***." See 471 Mich.at 455.

Additionally, Justice Cavanagh, in his partial concurrence, recognized that the factors enumerated in *Pohutski* "must be considered when determining whether a decision should have

[7]The Road Commission never raised this issue for appeal until after *Streng* was decided.

[8] Justice Weaver would have given the decision prospective application only "in fairness to the Plaintiff in the present case." *Id.* at 607.

retroactive application." *Id.* at 505. Justice Cavanagh further noted that the Supreme Court had adopted a thoughtful approach to retroactivity to minimize chaos and maximize justice (referring to *Tebo v Havlik*, 418 Mich 350, 360, 361, 363; 343 N.W. 2d 181 [1984]). *Id.* at 505.

Consequently, *Hathcock* in fact embraced rather than repudiated *Pohutski*.

The *Hathcock* Court based its decision on retroactive application verses prospective application on the fact that "first, this case presents none of the exigent circumstances[9] that warranted the 'extreme measure' of prospective application in *Pohutski v City of Allen Park, Gladych v. New Family Homes, Inc.*, 468 Mich.594, 606 n. 6; 664 N.W. 2d 705 (2003)". *Id.* at 484 n. 98.

Further, the *Hathcock* Court questioned the appropriateness of rendering prospective only opinions but recognized that prospective application is appropriate in cases such as this where the decision "overrule[s] clear and uncontradicted case law." *Id.* citing *Hyde v University of Michigan Board of Regents*, 426 Mich 223, 240; 393 N.W. 2d 847 (1986).

However, as footnote 98 concludes:

> "Because *Poletown* was a radical departure from our eminent domain jurisprudence, it is hardly the 'clear and uncontradicted case law' contemplated by *Hyde*."

The *Hathcock* Court determined that *Poletown* itself was such a profound deviance from fundamental constitutional principles and over a century of this Court's eminent domain jurisprudence leading up to the 1963 constitution that "we must overrule *Poletown* in order to vindicate our constitution, protect the peoples' property rights and preserve the legitimacy of the Judicial Branch as the expositor-not creator-of fundamental law." *Id.* at 483.

[9]Footnote 6 of *Gladych* essentially defines "exigent circumstances" as involving situations where litigants, in reliance on flawed statutory interpretation, would be denied relief by a correction in interpretation of the same statute. *Id.* at 606.

Hathcock returned the law regarding eminent domain to that which existed before *Poletown* because of constitutional concerns. No such urgency exists in the present appeal. *Pohutski* and *Gladych* on the other hand merely corrected an error in the interpretation of statutory law.

Unlike *Poletown*, the 50 year history of the application of the GTLA to road defect cases involving county road commissions was the rule, rather than the exception.

Both *Pohutski* and *Hathcock* are easily reconcilable. *Pohutski* clearly established a new principle of law. *Hathcock* did not.

The analysis of *Streng* by the *Brugger* Court is not only well reasoned but legally and factually supported by half a century of precedent. Consequently, the predicate for application of *Streng* on a prospective basis has been established.

III. SHOULD *STRENG* BE APPLIED PROSPECTIVELY UNDER THE "THREE FACTOR-TEST" SET FORTH IN POHUTSKI?

The Trial Court answered this question "yes".

Defendant/Appellee, THE EATON COUNTY ROAD COMMISSION although initially adopting a contrary position ("*** because *Streng* changed the law, it does not apply retroactively now answers this question "no".

The Court of Appeals answered this question "no".

Plaintiff/Appellant LYNN PEARCE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED, agrees that *Streng* was correctly decided, that it clearly established a new principle of law and that it should apply on a prospective basis.

Because *Streng* changed decades of precedent, it should only be applied prospectively. It is axiomatic that "where statutory construction has been involved, this Court has limited the retroactivity of a decision when justice so required." *Gusler v Fairview Tubular Products*, 412 Mich 270; 315; 315 N.W. 2d 388 (1981); *Franges v General Motors Corp*, 404 Mich 590; 274 N.W. 2d 392 (1979).

As this Court also noted in *Placek v Sterling Heights*, 405 Mich 638,665; 275 N.W. 2d 511 (1979), quoting *Williams v Detroit*, 364 Mich 231, 250; 111 N.W. 2d 1 (1961):

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

In addition, this Court has recognized situations where the administration of justice calls for prospective application of its 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*, 364 Mich at 266 (opinion of Justice Edward in which Justices Talbot Smith, T.M. Kavanagh and Souris concurred).

- 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 v City of Sterling Heights*, 405 Mich 638, 665; 275 N.W. 2d 511 (1979).

- "Even where statutory construction has been involved, this court has limited the retroactivity of a decision when justice so required." *Tebo v Havlik*, 418 Mich 350, 361; 343 N.W. 2d 181 (1984).

- "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*, 426 Mich at 40.

- "***resolution of the retrospective-prospective issue ultimately turns on considerations of fairness and public policy." *Riley v Northland Geriatric Center*, 431 Mich 632, 644; 433 N.W. 2d 787 (1988).

- "***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 v Harper Hospital*, 455 Mich 56, 68; 564 N.W. 2d 861 (1997).

- "Prospective application may be appropriate where the holding overrules settled precedent. *Bezeau*, 487 Mich at 462.

As the *Brugger* court noted:

> "Turning to the three-part test, we first consider the purpose of the *Streng* holding, which was to correct an apparent error in interpreting a provision of the GTLA. As noted in *Pohutski*, 465 Mich at 697, 641 N.W. 2d 219, this purpose is served by prospective application. Second, as previously discussed, there has been an extensive history of reliance on the 120-day GTLA notice provision, rather than MCL 224.21(3), in cases concerning county road commission defendants. The universal reliance on this decades-long history also weighs in favor of prospective application. Moreover, prospective application would minimize the effect of this sudden departure from established precedent on the administration of justice.
>
> Also relevant is the fact that the confusion concerning the law was not created by plaintiff but, rather, by the Legislature and the Judiciary. The Legislature adopted two conflicting sets of requirements regarding the timing and content of the presuit notice. And for decades, the Judiciary has decided many presuit notice cases based on the requirements of the GTLA, with no reference to MCL 224.21(3). The role of the government in creating confusion concerning a legal standard weighs strongly against sanctioning a party for acting in good faith on the basis of the apparent law. ***". *Brugger,* 324 Mich App at 317-318.

Similarly, "reliance interests" are to be weighed in order to avoid undue hardship when the determination is made to overrule precedent.

In fact, this point was recognized in *Robinson v Detroit*, 462 Mich 439; 613 N. W. 2d 307 (2000) by its admonishment to consider "whether the previous decision has become so imbedded, so accepted, so fundamental, to everyone's expectations that to change it would produce not just readjustments, but practical real-world dislocations." *Id.* at 466

The three-part test for prospective application was satisfied in *Pohutski* and is satisfied in *Streng* for the same reasons. In *Pohutski*, the Court held that the purpose of their holding was "to correct an error" in the Court's previous interpretation of the governmental immunity act. *Id.* at 697. *Streng* made a similar kind of correction, thus changing the established understanding of pre-suit notice procedures in road defect cases involving county road commissions.

The statutory misinterpretation had existed for about 14 years before *Pohutski* was decided. In *Streng* the misapplication of the GTLA to county road commission cases had existed for almost half a century. Therefore, the purpose of the rule in *Pohutski* and *Streng* (to clarify the meaning and application of the GTLA) is the same and the first prong of the test is fulfilled in both.

Additionally, the second prong was satisfied in *Streng* as well. The *Pohutski* Court held that the element of reliance was met because there had been "extensive reliance on *Hadfield's* interpretation of § 7 of the governmental tort liability act ***" *Id.* at 697. Like the prior reliance on *Hadfield* in *Pohutski*, prior to *Streng*, there was unquestioned reliance by courts and litigants on the MCL 691.1404 notice provisions in highway defect cases involving county road commissions. 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." *Id.* 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." *Id.* at 697. This 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." *Id.* at 698-699.

Consequently the *Pohutski* Court determined that prospective application would minimize the change in interpretation on the administration of justice and best serve the interests of all concerned, thus avoiding an unjustified negative impact.[10]

[10] See also *Weems v Chrysler Corp*,448 Mich. 679;533 N.W. 2d 287 (1995).

The Wrongful Death claim of the ESTATE OF BRENDON PEARCE, DECEASED, accrued on March 8, 2015, approximately 14 ½ months before the decision in *Streng* was issued. Further, the ROAD COMMISSION received PEARCE'S pre-suit notice on May 5, 2015, more than a year before *Streng* was decided. Finally, Plaintiff's Complaint was filed January 11, 2016, approximately 4 ½ months prior to *Streng*.[11] To deny PEARCE her ability to pursue her claim would severely affect the administration of justice as the result would be dismissal of her case without ever reaching the merits. That result would be particularly adverse to the administration of justice because the ROAD COMMISSION had actual knowledge of the defect nine months prior to the fatal accident which took the life of BRENDON PEARCE regardless of any technical defect in service which might exist post-*Streng*. Further, the chairperson of the ROAD COMMISSION had actual service as did "the clerk" from one or more of the parties involved in these consolidated cases.

Even more fundamental to the analysis of fairness and the effect on the administration of justice is the fact that there is absolutely no injustice to the ROAD COMMISSION in that it would still have the ability to prevail at trial should *Streng* be applied prospectively. PEARCE would be deprived of that opportunity if retroactive application were ordered however.

CONCLUSION AND RELIEF REQUESTED

The circumstances in *Pohutski* are analogous to the circumstances in *Streng*. Because the threshold question and the three-prong test are met, the notice requirements of *Streng* should not be applied retroactively to this case, the PEARCE Court of Appeals decision must be reversed and the Trial Court's denial of Defendant's Second Motion for Summary Disposition must be affirmed.

[11] The pre-suit notice in *Brugger* was filed more than two years and nine months before *Streng* was decided.

Respectfully submitted this 31st day of July, A.D., 2020.

COLLISON & COLLISON

/s/ Joseph T. Collison
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