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,

Plaintiff-Appellant,

v

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. 158069

Court of Appeals Docket No. 338990

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

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DEFENDANT-APPELLEE THE EATON COUNTY ROAD COMMISSION'S BRIEF ON APPEAL

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

DATED: August 28, 2020

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Counterstatement of Jurisdiction and Order Appealed From

Defendant-appellee the Eaton County Road Commission (the "Road Commission") doesn't dispute this Court's jurisdiction to hear this appeal by plaintiff-appellant Lynn Pearce, Personal Representative of the Estate of Brendon Pearce ("Pearce"), from the June 7, 2018 published opinion of the Court of Appeals.[1]

[1] See *Harston v County of Eaton*, 324 Mich App 549; 922 NW2d 391 (2018).

Counterstatement of Questions Presented

I.

Streng held that MCL 224.21(3)—not MCL 691.1404(1)—governs pre-suit notices of highway-defect claims against county road commissions. That's exactly what the plain language of MCL 691.1402(1) and MCL 224.21(3) provides. And, this Court repudiated the entirety of _Brown_ (which previously held that MCL 224.21(3) was unconstitutional) because of its deeply flawed constitutional analysis. Since _Streng_ gave effect to the Legislature's stated intent and wasn't contrary to any binding precedent, was it correctly decided?

The trial court answered: Yes.

The Court of Appeals did not specifically address this question.

Plaintiff-Appellant Pearce answers: Yes.

Defendant-Appellee Road Commission answers: Yes.

II.

In Michigan, judicial decisions generally apply retroactively unless they clearly established a new rule by overruling clear, uncontradicted, and settled case law. Here, _Streng_ didn't expressly overrule any prior judicial decisions. And, even if it did, the state of the law regarding which pre-suit notice provision governed highway-defect claims against county road commissions was unclear, contradictory, and unsettled. Did _Streng_ clearly establish a new rule of law?

The trial court answered: Yes.

The Court of Appeals answered: No.

Plaintiff-Appellant Pearce answers: Yes.

Defendant-Appellee Road Commission answers: No.

III.

When a judicial decision creates a new rule of law, Michigan courts analyze three factors to determine retroactivity: (1) the new rule's purpose; (2) reliance on the old rule; and (3) whether retroactivity affects the administration of justice. Here, those factors favor retroactivity because *Streng* gave meaning to the Legislature's intent, no one reasonably relied on the pre-*Streng* rule, and retroactivity won't affect how courts administer justice. Do the *Pohutski* factors favor applying *Streng* retroactively?

The trial court answered: No.

The Court of Appeals answered: Yes.

Plaintiff-Appellant Pearce answers: No.

Defendant-Appellee Road Commission answers: Yes.

IV.

***Streng* held that MCL 224.21(3) governs procedure for highway-defect claims against county road commissions. MCL 224.21(3) requires that plaintiffs give notice to the county clerk within 60 days of the accident. That didn't happen here. Is Pearce's claim barred because it failed to comply with MCL 224.21(3)'s notice provision?**

The trial court did not specifically address this question.

The Court of Appeals answered: Yes.

Plaintiff-Appellant Pearce answers: No.

Defendant-Appellee Road Commission answers: Yes.

Introduction

For more than 50 years, MCL 691.1402(1) has plainly stated that MCL 224.21(3) controls "procedure" for highway-defect claims against county road commissions. For even longer, MCL 224.21(3) has plainly stated that highway-defect plaintiffs can't sue a county road commission unless they give the road commission and the county clerk notice within 60 days of the accident. In *Streng*, the Court of Appeals gave effect to those statutes by holding that MCL 224.21's notice provision governs highway-defect claims against county road commissions. Here, Pearce (rightly) concedes that *Streng* was decided correctly. So the only issue is whether *Streng* applies retroactively.

In Michigan, judicial decisions apply retroactively unless they clearly established a new rule of law by making an unforeseeable ruling on a novel issue or overruling clear, uncontradicted, or settled case law. *Streng*'s holding—which embodied the longstanding plain language of MCL 224.21 and MCL 691.1402—wasn't unforeseeable. It also didn't expressly overrule any prior judicial decisions. Instead, *Streng* merely recognized that *Rowland's* overruling of *Brown*[2] wiped the slate clean and applied the plain language of the GTLA and MCL 224.21. And the pre-*Streng* state of the law about which notice provision governed highway-defect claims against county road commissions was, at most, unsettled, unclear, and contradicted. So, even if it overruled the remains of *Brown*'s dubious constitutional analysis (there was nothing to overrule), *Streng* didn't clearly establish a new rule of law. As a result, it applies retroactively, and the analysis ends there.

[2] *Brown v Manistee Co Rd Comm,* 452 Mich 354; 550 NW2d 215 (1996), rev'd by *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007).

Even if *Streng* did establish a new rule, the three-factor test from *Pohutski v City of Allen Park* (2002)[3] favors applying *Streng* retroactively because: (1) retroactivity supports its purpose of giving meaning to the plain language of MCL 224.21 and respecting the limits that the Legislature placed on highway-defect plaintiffs' ability to sue county road commissions; (2) there are no relevant reliance interests because highway-defect plaintiffs like Pearce don't decide whether to drive on county roads before *Streng* based on assumptions that MCL 691.1404(1) is the controlling notice provision and, even if they did, that sort of reliance was unreasonable based on the plain language of MCL 224.21 and the GTLA; and (3) applying *Streng* retroactively won't negatively affect the administration of justice.

In sum, *Streng* was correctly decided and its holding that MCL 224.21's notice provision governs highway-defect claims against county road commission applies retroactively to this case. But Pearce didn't comply with MCL 224.21 because she failed to serve notice on the county clerk within 60 days of the accident. So her claim against the Road Commission was barred by governmental immunity and subject to dismissal. So the Court of Appeals reached the right result for the right reasons. This Court should affirm that result.

Counterstatement of Facts

A. Pearce was in an accident on a county road. But, although she served the Road Commission, she didn't serve the county clerk as required by MCL 224.21.

In March 2015, co-defendant Melissa Musser was driving her minivan southbound on Mason Road near Kinsel Highway in Eaton County.[4] She had several passengers in the car, including Brendan Pearce (the decedent).[5] Allegedly, the accident happened when Musser drove

[3] *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002).
[4] Incident/Investigation Report (Appellant's App'x at 005a, 010a).
[5] Incident/Investigation Report (Appellant's App'x at 005a, 010a). Two of the other passengers in the car, Joseph Grinage and Ryan Harston, were originally plaintiffs in this action.

the minivan into a puddle, lost control, left the roadway, and crashed into a tree. Brendan Pearce (and Musser) died in the accident.

Musser was speeding when the accident happened.[6] Everyone in the vehicle except for Pearce—including Musser, who was driving—had been drinking alcohol that afternoon.[7] At least two of the passengers were drinking alcohol in the minivan while it was "going down the road."[8] And Musser was intoxicated when the accident occurred.[9] Furthermore, the minivan had bad tires—of the four tires, each was a different make and model, two were overinflated, one had low tread depth, and one was a "donut."[10]

Pearce alleges that Musser caused the accident by speeding, driving drunk, and otherwise acting negligently.[11] She also claims that the Road Commission caused the accident by failing to keep the road in a state of reasonable repair or free from defects that resulted in the puddle.[12]

Fifty-eight days after the crash, Pearce served the Road Commission—but not the Eaton County Clerk—with a pre-suit notice of intent to sue.[13]

B. After the trial court denied its first summary-disposition motion, the Road Commission appealed that ruling (unsuccessfully).

In March of 2016, the Road Commission moved to dismiss Brendon Pearce's claims against it, claiming that his pre-suit notice was deficient under MCL 691.1404—the statute then believed to govern these claims—because it failed to identify the "exact location" of the alleged

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[6] Pearce's First Amended Complaint at ¶9; Incident/Investigation Report (Appellant's App'x at 005a, 010a).
[7] Incident/Investigation Report (Appellant's App'x at 006a, 010a).
[8] *Id*.
[9] Case Supplemental Report (Appellant's App'x at 017a); Musser's Laboratory Reports (Appellant's App'x at 026a, 028a); Musser's Autopsy Report at 034a-035a).
[10] Vehicle Inspection Form (Appellant's App'x at 023a-025a).
[11] Pearce's First Amended Complaint at ¶9 (Appellee's App'x at 0004a).
[12] Pearce's First Amended Complaint at ¶16-18 (Appellee's App'x at 0006a).
[13] Pearce's Notice of Intent to Sue (Appellee's App'x at 0009a).

defect responsible for the underlying crash.[14] In response, Pearce argued that her notice substantially complied with MCL 691.1404, and that, in any event, the Road Commission had actual knowledge of the alleged defect.[15] Following oral argument, the trial court issued a written opinion denying the Road Commission's motion based on its finding that Pearce's notice complied with MCL 691.1404 because it adequately described the allege defect.[16]

Two days before the trial court denied the Road Commission's first dispositive motion, the Court of Appeals issued *Streng v Board of Mackinac County Road Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), in which it held that MCL 224.21—and not MCL 691.1404—governs pre-suit notices for highway-defect claims against county road commissions.

On appeal from the trial court's ruling, the Road Commission identified *Streng* as pertinent authority.[17] But, in its appellate brief, it argued that *Streng* was wrongly decided and that MCL 691.1404 governed its appeal.[18] In contrast, Pearce vigorously argued to the contrary and fully embraced *Streng*. That is, she cited MCL 224.21 and stated that the "issue in *Streng* is identical to the issue presented in this Appeal" and that "application of the notice requirements of MCL 224.21(3) to litigation involving county road commissions has been the law of the land since the GTLA was amended in 1970.[19]

In fact, Pearce believed so strongly that *Streng* governed her notice of intent that she also moved to summarily affirm the trial court's written opinion based on her assertion.[20] She asked the Court of Appeals for immediate consideration of her motion because *Streng* was "directly on

[14] Road Commission's 2016 Summary Disposition Motion (Appellee's App'x at 0012a).
[15] Pearce's 2016 Summary Disposition Response (Appellee's App'x at 0023a).
[16] 2016 Summary Disposition Denial Order at 5 (Appellee's App'x at 0040a).
[17] Road Commission's 2016 Docketing Statement (Appellee's App'x at 0043a).
[18] Road Commission's 2016 COA Brief on Appeal (Appellee's App'x at 0046a).
[19] Pearce's 2016 Brief on Appeal at 8, 11 (Appellee's App'x at 0078a and 0081a).
[20] Pearce's 2016 Motion to Affirm (Appellee's App'x at 0090a).

point and has precedential effect under the rule of *stare decisis*."[21] The Court of Appeals agreed and granted Pearce's Motion for Immediate Consideration and summarily affirmed the trial court's previous ruling.[22]

The Road Commission applied to this Court for leave to appeal that ruling, which was ultimately denied.[23] In her response to the Road Commission's application, Pearce reiterated her reliance on *Streng* and MCL 224.21(3): "Despite [the Road Commission's] argument to the contrary, application of the Notice Requirements of MCL 224.21(3) to litigation involving County Road Commissions has been the law of the land since the Governmental Tort Liability Act was amended in 1970. Consequently, the issue presented does not involve a legal principle of major significance to the state's jurisprudence."[24]

C. The trial court denied the Road Commission's second summary-disposition motion based on MCL 224.21 and *Streng*.

In light of the Court of Appeals' ruling that *Streng* applied and that MCL 224.21(3) controlled, the Road Commission filed a second summary-disposition motion based on *Streng* in March 2017.[25] Specifically, the Road Commission argued Pearce's notice failed to comply with MCL 224.21's requirement that a notice of intent to sue a county road commission must be served upon the county clerk as well as the road commission.[26]

In response, Pearce argued that: (1) failure to provide notice in compliance with MCL 224.21(3) was an affirmative defense that the Road Commission waived, and (2) even if she

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[21] Pearce's 2016 Motion for Immediate Consideration (Appellee's App'x at 0094a).
[22] *Estate of Brendan Pearce v Eaton County Road Comm'n*, unpublished order of the Court of Appeals, entered October 25, 2016 (Docket No. 333387) (Appellee's App'x at 0097a).
[23] 2016 Supreme Court Denial Order (Appellee's App'x at 0099a).
[24] Pearce's Answer to the Road Commission's Application for Leave to Appeal at v (Appellee's App'x at 0106a).
[25] Road Commission's 2017 Summary Disposition Motion (Appellee's App'x at 0127a).
[26] *Id.* at 5, 12-14 (Appellee's App'x at 0134a, 0141a – 0143a).

failed to comply with MCL 224.21(3), it didn't matter because the Road Commission had actual notice of the accident.[27]

After hearing oral argument in April 2017, the trial court asked for supplemental briefing about whether governmental immunity and defective statutory notices are affirmative defenses that must be pled in first responsive pleadings. In her brief, Pearce tried to split hairs between defective notice and defective service by arguing that even if defective notice under the GTLA isn't an affirmative defense, defective service—i.e., her failure to serve the county clerk—is and that the Road Commission had waived it.[28] She also asserted that *Streng* should only apply prospectively.[29]

In response, the Road Commission argued that Pearce's position is contrary to Michigan law because Michigan's appellate courts have repeatedly held that "the presence of any specific defect (including the failure to effectuate proper service) mandates the dismissal of a claimant's lawsuit" including in at least one case where the specific defect was the failure to serve a mandatory party.[30]

The trial court agreed that *Streng* governed the pre-suit notices at issue and that, under MCL 224.21(3) "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."[31] It also rejected Pearce's argument that defective notice under the GTLA isn't an affirmative defense but rather, a condition of government that doesn't need to be raised in the first responsive pleading.[32]

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[27] Pearce's 2017 Summary Disposition Response at 6-10 (Appellee's App'x at 0154a – 0158a).
[28] Pearce's Supplemental Summary Disposition Brief at 6-8 (Appellee's App'x at 0165a – 0167a).
[29] *Id.* at 8.
[30] Road Commission's Supplemental Summary Disposition Brief at 3-7 (Appellee's App'x at 0172a – 0175a).
[31] 2017 Summary Disposition Order at 4-5 (Appellee's App'x at 0181a – 0182a).
[32] *Id.* at 5-6 (Appellee's App'x at 0182a – 0183a).

However, the trial court ultimately denied the Road Commission's motion based on its conclusion that *Streng* created a new rule of law and applied prospectively under the three-factor test articulated in *Pohutski*.[33]

D. The Court of Appeals reversed the trial court's denial of summary disposition in a unanimous published opinion.

On appeal, the Road Commission argued that the trial court erred by holding that *Streng* only applied prospectively because "*Streng* did not announce a new rule of law; it merely clarified when the notice provisions in MCL 224.21 and MCL 691.1404 should be applied."[34] It explained that *Streng* "determined that the plain language of the GTLA expressly references MCL 224.21 as the proper authority governing highway-defect claims against county road commissions."[35] The Road Commission pointed out that, in reaching that holding, *Streng* did not overrule any precedential cases; rather, it merely recognized the failure of Michigan's appellate courts to give meaning to the plain language of MCL 691.1402(1) and MCL 224.21(3).[36] And, "[t]he fact that Michigan courts, for several years, overlooked the notice provision of MCL 224.21 does not make [*Streng*] a 'new rule' warranting prospective application" because *Streng* "merely 'restored…deference to the language of the operative statute.'"[37] The Road Commission also argued that, because *Streng* didn't create a new rule—and, thus, failed the *Pohutski* threshold question—the trial court erred by applying *Pohutksi's* three-factor test.[38]

In response, Pearce argued that "the administration of justice require[s] the prospective application of *Streng*."[39] Pearce's brief began by arguing that the Road Commission adopted

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[33] *Id.* at 6-7 (Appellee's App'x at 0183a – 0184a).
[34] Road Commission's 2017 Court of Appeals Brief on Appeal at 1.
[35] *Id.* at 13-14, citing MCL 691.1402(1).
[36] *Id.* at 15-16.
[37] *Id.* at 16, quoting *Rowland*, 477 Mich at 223 (cleaned up).
[38] *Id.* at 16-17.
[39] Pearce's 2017 Brief on Appeal at 10.

"two entirely inconsistent positions" regarding whether *Streng* controlled and that there's a distinction between defective "notice" and defective "service" under the GTLA.[40] She then went on to discuss *Rowland*. Although Pearce admitted that "the *Rowland* court did not address the conflict between the GTLA and the Highway Code," she contended that constituted binding precedent on that issue that *Streng* should have followed.[41] Indeed, Pearce contended that "the *Streng* decision is in direct conflict with [this] Court's higher authority and until [this] Court overturns almost five decades of precedent [Note: that's exactly what this Court did in *Rowland*], the notice requirements of the GTLA should apply to the present appeal."[42]

Pearce also argued that *Pohutski's* three-factor analysis favored applying *Streng* prospectively. In her view, the administration of justice favors prospective application because her case would be dismissed if *Streng* is applied retroactively, but prospective application wouldn't prejudice the Road Commission and "the law will simply remain as it was from 1970 to 2016."[43] In other words, Pearce argued that the Court of Appeals should apply *Streng* prospectively—and ignore the plain language of MCL 691.1402(1) and MCL 224.21(3)—based on the exact reasoning that this Court rejected in *Rowland*—i.e., that "there was absolutely no prejudice upon the Commission by Pearce's compliance with the established and unquestioned

[40] *Id.* at 10-12.
[41] *Id.* at 13-14.
[42] *Id.* at 15-16.
[43] *Id.* at 17-20. This is literally the exact opposite of the position that Pearce successfully asserted in her first appeal. Pearce's Answer to the Road Commission's Application for Leave to Appeal at v (Appellee's App'x at 0106a) ("[A]pplication of the notice requirements of MCL 224.21(3) to litigation involving county road commissions has been the law of the land since the GTLA was amended in 1970.").

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."[44]

In reply, the Road Commission contended that, by arguing that *Streng* doesn't control the outcome of this case, Pearce was taking a position that was diametrically opposed to the one that she had successfully asserted in the Road Commission's unsuccessful appeal of the trial court's 2016 summary-disposition order.[45] It also reiterated that *Streng* should be applied retroactively under this Court's retroactivity framework and the Court of Appeals' opinion in *W A Foote Memorial Hosp v Mich Assigned Claims Plan*.[46]

In May 2018, the Court of Appeals directed the parties to address whether *W A Foote* or its recent opinion in *Brugger v Midland County Bd of Road Commr's* controlled this case.[47] In her supplemental brief, Pearce argued that *Brugger*'s holding that *Streng* applies prospectively should control under the doctrine of stare decisis and this Court's retroactivity case law.[48] In her view, it would be unfair to hold her responsible for complying with the plain language of MCL 224.21 and MCL 691.1402 because Michigan's courts had overlooked it as well.[49]

In response, the Road Commission argued that *Brugger* doesn't control this case because its reasoning was fractured—it was a split opinion with a solo concurrence (by the majority author) and a dissent—and it ignored *W A Foote's* binding retroactivity analysis even though it was aware of the case.[50] It also argued that Pearce's argument was unpersuasive because she

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[44] *Id.* at 21. Along with her brief, Pearce filed a motion for summary affirmance, which the Court of Appeals denied. Order Denying Motion to Affirm (Appellee's App'x at 0186a).
[45] Road Commission's Court of Appeal Reply Brief at 1-2.
[46] *Id.* The Road Commission incorporated its response to Pearce's motion to affirm. Road Commission's Response to Motion to Affirm at 3-5 (Appellee's App'x at 0194a – 0196a).
[47] Court of Appeals' Supplemental Briefing Order (Appellee's App'x at 0198a).
[48] Pearce's Supplemental Brief at 9-14.
[49] *Id.* at 12-13.
[50] Road Commission's Supplemental Brief at 4-6.

failed to identify any case law that *Streng* overruled and, regardless, *stare decisis* should give way "to correction of decisions of the past that were clearly wrong."[51]

The Court of Appeals reversed the trial court's denial of summary disposition in a unanimous published opinion authored by Judge Peter D. O'Connell and joined by Judges Kirsten Frank Kelly and Michael J. Riordan, based on its holding that "*Streng* applies retroactively."[52]

The Court of Appeals began its analysis by noting that the GTLA expressly provides that MCL 224.21 governs the "procedure" for highway-defect claims against county road commissions, and that MCL 224.21 requires plaintiffs to give county road commissions and the relevant clerk notice of such claims within 60 days of the accident.[53] It also noted that *Streng* "held that MCL 224.21(3) governs claims brought against county road commissions."[54] And, although it recognized that *Brugger* had previously held that *Streng* applied prospectively, it declined to follow that opinion because it didn't cite or discuss *W A Foote*, which the *Brugger* court was bound to follow under MCR 7.215(J).[55]

Moving on to the retroactivity analysis, the Court of Appeals acknowledged that the general rule is that judicial decisions apply retroactively. It initially concluded that, in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012), this Court repudiated *Pohutski's* "threshold" and "three-factor" tests.[56] But the Court of Appeals then went on to apply the *Pohutski* analysis anyway.[57]

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[51] Road Commission's Supplemental Reply Brief at 1-2.
[52] *Harston v County of Eaton*, 324 Mich App 549, 552-553; 922 NW2d 391 (2018).
[53] *Id.* at 555, citing MCL 691.1402(1).
[54] *Id.* at 555.
[55] *Id.* at 555-556.
[56] *Id.* at 556-557.
[57] *Id.* at 556-557.

First, the Court of Appeals concluded that "Streng is retroactive under the threshold test."[58] It explained that, because "*Streng* followed [this] Court's decision in *Rowland*…and interpreted the text of MCL 224.21…*Streng* is not new law."[59] Indeed, the panel asserted "the issue in this case concerns statutory interpretation, not retroactivity" because "MCL 224.21(3) has always been the law and is currently the law" and that "[n]o changes have been made to this statute, so we are required to apply it as written."[60] The Court of Appeals also concluded that this Court's opinion in *Rowland* wasn't an obstacle to retroactive application of *Streng* because *Rowland* "discarded the entirety of the analysis in [*Brown*]…as deeply flawed."[61] Furthermore, the panel stressed that *Rowland* "did not mention MCL 224.21 or discuss the notice deadline," nor did it "approve or disapprove of the use of one notice provision over another."[62]

Second, the Court of Appeals concluded that "*Streng* is also retroactive under the three-factor test."[63] It explained that although "the trial court and plaintiffs championed widespread reliance on the 'old' rule and the unjust effect of applying *Streng* retroactively," *W A Foote* "decided that the proper, consistent interpretation of the statutory text outweighed these reliance concerns."[64] The Court of Appeals also stressed that applying *Streng* retroactively would further the purpose of the GTLA by "enforcing only those causes of action enacted by the Legislature."[65]

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[58] *Id.* at 558.
[59] *Id.* at 558.
[60] *Id.* at 558 n 7.
[61] *Id.* at 558 n 8.
[62] *Id.* at 558 n 8.
[63] *Id.* at 558.
[64] *Id.* at 558.
[65] *Id.* at 559.

For multiple reasons, therefore, the court held that "the trial court erred by ruling that Streng did not apply retroactively."[66] And, since "Pearce's notice was defective because she only served it on the Road Commission, not the county clerk," the Court of Appeals reversed the trial court and remanded for entry of summary disposition in the Road Commission's favor.[67]

E. This Court granted leave to appeal in *Pearce* and *Brugger*.

Subsequently, Pearce applied to this Court for leave to appeal the Court of Appeals decision, arguing that *Streng* should apply prospectively because it "change[d] 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" and that its "interpretation of the Governmental Immunity Act was novel and unprecedented in Michigan jurisprudence."[68] Pearce also asserted that *Streng* didn't involve statutory interpretation because it "did not attempt to analyze the language or terms of either [MCL 224.21 OR MCL 691.1404] but determined which statute applied to cases involving County Road Commissions."[69] And, even though she admitted that *Rowland* "did not address the conflict between the GTLA and the Highway Code," Pearce argued that it should control because it "specifically applied the provisions of the GTLA to claims involving county road commissions."[70]

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[66] *Id.* at 559. The Court of Appeals also rejected Pearce's assertion that the Road Commission was taking inconsistent positions from its prior appeal. *Id.* at 559 n 9.
[67] *Id.* at 559-560. In reaching its holding, the Court of Appeals affirmed the trial court's ruling "that the Road Commission was not required to plead defective notice under MCL 224.21 as an affirmative defense" because governmental immunity is a "characteristic of government" rather than an "affirmative defense." *Id.* at 559.
[68] *Pearce's* Application for Leave to Appeal at 16-17.
[69] *Id.* at 18.
[70] *Id.* at 16, 18.

Initially, this Court held Pearce's application in abeyance pending its decision in *W A Foote Memorial Hospital v Michigan Assigned Claims Plan* (Docket No. 156622).[71] And, after it decided *W A Foote*, this Court granted the application along with the Midland County Road Commission's application in *Brugger*, and consolidated the two cases.[72] The Court's grant order asked the parties to address three issues: (1) "whether [*Streng*] was correctly decided"; (2) "whether *Streng* clearly established a new principle of law and thereby satisfied the threshold question for retroactivity set forth in [*Pohutski*]"; and (3) "whether *Streng* should be applied retroactively under the 'three factor test' set forth in *Pohutski*."[73] Additionally, Justice Markman concurred in the grant order to encourage the parties to address the tension between the general rule that judicial decisions are given complete retrospective application and the "flexible approach" exception to that rule in which retroactivity is limited where "injustice might result."[74]

Standard of Review

"This Court reviews de novo a circuit court's decision on a motion for summary disposition brought under MCR 2.116(C)(7)."[75] MCR 2.116(C)(7) permits summary disposition where a claim is barred because of immunity granted by law. Additionally, "questions concerning the retroactivity of earlier judicial decisions are for this Court to decide de novo as matters of law."[76] Similarly, "[i]nterpretation and application of statutes are also questions of law that we review de novo."[77]

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[71] *Pearce* Abeyance Order (Appellee's App'x at 0200a).
[72] *Pearce* Grant Order (Appellee's App'x at 0202a).
[73] *Id.*
[74] *Id.* (Markman, J., concurring).
[75] *Altobelli v Hartman*, 499 Mich 284, 294-295; 884 NW2d 537 (2016).
[76] *Lincoln v General Motors Corp*, 461 Mich 483, 490; 607 NW2d 73 (2000).
[77] *People v Bruce*, 504 Mich 555, 562; 939 NW2d 188 (2019).

Argument I

Streng held that MCL 224.21(3)—not MCL 691.1404(1)—governs pre-suit notices of highway-defect claims against county road commissions. That's exactly what the plain language of MCL 691.1402(1) and MCL 224.21(3) provides. And, this Court repudiated the entirety of _Brown_ (which previously held that MCL 224.21(3) was unconstitutional) because of its deeply flawed constitutional analysis. So, because it gave effect to the Legislature's stated intent and wasn't contrary to any binding precedent, _Streng_ was correctly decided.

The first issue this Court asked the parties to address is whether *Streng* was correctly decided. *Streng* held that MCL 224.21 (rather than MCL 691.1404) governs the time limit for filing a pre-suit notice of intent to sue related to highway-defect claims against county road commissions based on an analysis of the language in MCL 224.21(3) and MCL 691.1402(1). To reach that holding, the Court of Appeals relied on well-established principles of statutory-interpretation—a "close reading of" the plain statutory language, the general-specific canon, and the *in pari materia* doctrine.[78] And there isn't any binding precedent to the contrary. As this Court recognized in *Rowland*, "[n]othing can be saved" from *Brown*—the opinion that held that MCL 224.21(3) was unconstitutional—because of its "deeply flawed" constitutional analysis. For multiple reasons, therefore, *Streng* reached the correct result because it correctly interpreted the plain language of the governing statutes. Indeed, Pearce doesn't dispute that the Court of Appeals correctly decided *Streng*. That is, she "agrees that *Streng* was correctly decided" because "[t]he language of MCL 224.21(3) and MCL 691.1404(1) is what it is."[79]

[78] *Streng*, 315 Mich App at 462.
[79] Pearce's Michigan Supreme Court Brief at 10. For some reason, Pearce never mentions MCL 691.1402(1).

A. *Streng* gave effect to the plain language of MCL 691.1402(1) and MCL 224.21(3). For that reason alone, it was correctly decided.

"When interpreting a statute, '[this Court's] goal is to give effect to the Legislature's intent, focusing first on the statute's plain language.'"[80] To do so, "this Court interprets every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage."[81] It also "examine[s] the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme."[82] "If the statute's language is clear and unambiguous, then judicial construction is inappropriate and the statute must be enforced as written."[83]

The two statutes at issue here are MCL 224.21 of the Highway Code and MCL 691.1402 of the GTLA. While most governmental-liability claims are governed by the procedures of the GTLA, MCL 691.1402(1) expressly provides that the "procedure" for highway-defect claims "as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21." In turn, MCL 224.21(3) provides that "a board of county road commissioners is not liable for damages to person or property sustained by a person upon a county road because of a defective county road, bridge, or culvert under the jurisdiction of the board of county road commissioners, unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners."

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[80] *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018), quoting *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (quotation marks and citations omitted); *Hegadorn v Dep't of Human Servs Dir*, 503 Mich 231, 245; 931 NW2d 571 (2019) (citations omitted) ("The principal goal of statutory interpretation is to give effect to the Legislature's intent, and the most reliable evidence of that intent is the plain language of the statute.").
[81] *Bukowski v City of Detroit*, 478 Mich 268, 273-274; 732 NW2d 75 (2007).
[82] *Pinkney*, 501 Mich at 268 (quotation marks and citations omitted).
[83] *People v Lewis*, 503 Mich 162, 165; 926 NW2d 796 (2018).

The language of MCL 691.1402(1) and MCL 224.21(3) plainly demonstrates that the Legislature intended that MCL 224.21 would be the statute that governs "procedure" in highway-defect claims against county road commissions, including the part requiring highway-defect plaintiffs to give notice to a county road commission (and the county clerk) of their intent to sue within 60 days of the accident. Nothing about the language of either statute is unclear, unambiguous, or in conflict.[84] Indeed, because MCL 691.1402(1) expressly references MCL 224.21 as the statute that governs procedure for claims against county road commissions, the statutes are harmonious on their face. So MCL 224.21(3) and MCL 691.1402(1) "must be enforced as written."[85]

That's exactly what *Streng* did. Based on "[a] close reading of the [statutory] language," the Court of Appeals recognized that "MCL 691.1402(1) expressly directs a person injured on a county road to proceed in accordance with MCL 224.21."[86] It also recognized that "[t]o follow the procedural requirements of the GTLA rather than those of MCL 224.21—particularly in light of the fact that the GTLA expressly points in the direction of the latter—would render the specific terms of MCL 224.21 nugatory, something we avoid, whenever possible."[87] Thus, although "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," the Court of Appeals concluded that "[n]othing in either the GTLA or the highway code indicate[s] that the Legislature intended that result."[88] So it held that the

[84] *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016) ("A statute is ambiguous if two provisions irreconcilably conflict or if the text is equally susceptible to more than one meaning.").
[85] *Lewis*, 503 Mich at 165.
[86] *Streng*, 315 Mich App at 462-463.
[87] *Streng*, 315 Mich App at 463.
[88] *Streng*, 315 Mich App at 463.

Legislature intended that "the procedures and remedies provided by MCL 224.21 are what apply to county road commissions.[89]

Had *Streng* reached the opposite conclusion, not only would the Court of Appeals have failed "to give effect to the Legislature's intent,"[90] it would also impermissibly render a large portion of MCL 691.1402(1) and MCL 224.21(3) "nugatory [and] surplusage."[91] It follows that, because it gave effect to (and harmonizes) the plain language of both of those statutes, *Streng* correctly held that highway-defect claims against county road commissions are subject to a 60-day notice period.[92]

B. Even if the plain statutory language doesn't conclusively establish that *Streng* was decided correctly (it does), principles of statutory construction confirm that the *Streng* court correctly held that the 60-day notice provision of MCL 224.21(3) governs claims against county road commissions.

Even if MCL 691.1402(1) didn't expressly reference MCL 224.21 and it's assumed that the GTLA and the Highway Code contained conflicting notice provisions, MCL 224.21 would still govern highway-defect claims against county road commissions under well-established principles of statutory construction.

As this Court recently recognized, "[w]hen a potential conflict…surfaces within a statute, 'it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them.'"[93] In doing so, "[this Court] must always read the text as a whole, 'in

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[89] *Streng*, 315 Mich App at 463.
[90] *Pinkney*, 501 Mich at 268 (citations omitted).
[91] *Bukowski*, 478 Mich at 273-274.
[92] As noted above, the primary goal of statutory interpretation is to give effect to the Legislature's intent as expressed in the plain language of statutes. *Pinkney*, 501 Mich at 268. So the extent any of this Court's prior case law established a rule that is contrary to the plain language of MCL 224.21(3) or MCL 691.1402(1), it should be expressly overruled.
[93] *TOMRA of North America, Inc v Dept of Treasury*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 158333, 158335, June 16, 2020), quoting *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002) (Slip Op at 13-14).

view of its structure and of the physical and logical relation of its many parts.'"[94] That's because "'[c]ontext is a primary determinant of meaning,' and for an interpretation that seeks the ordinary meaning of the statute, it is the narrower context drawn from neighboring provisions within a statute that is most appropriate to consider."[95]

In *Streng*, the Court of Appeals relied on two principles of statutory construction—the *in pari materia* and the general-specific canon—to resolve any apparent conflict over whether MCL 224.21 or MCL 691.1404 governs the period for providing county road commissions with notice of highway-defect claims.[96] First, "[u]nder the [*in pari materia*] doctrine, statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law."[97] That is, "statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and ... courts will regard all statutes upon the same general subject matter as part of 1 system."[98] Second, "where a statute contains a general provision and a specific provision, the specific provision controls."[99] This principle is known as the "general/specific canon."[100] It "is tailor-made for cases…in which statutory provisions would

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[94] *TOMRA*, ___ Mich at ___, quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 167 (Slip Op at 14).
[95] *TOMRA*, ___ Mich at ___, quoting *Reading Law*, p. 167 (Slip Op at 14).
[96] *Streng*, 315 Mich App at 462.
[97] *People v Mazur*, 497 Mich 302, 313, 872 NW2d 201 (2015); *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 73 n26; 894 NW2d 5325 (2017), quoting *Reading Law*, p. 252 ("*In pari materia* (or the related-statutes canon) provides that 'laws dealing with the same subject ... should if possible be interpreted harmoniously.'").
[98] *People v McKinley*, 496 Mich 410, 421 n 11; 852 NW2d 770 (2014), quoting *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662, 57 NW2d 40 (1953).
[99] *Gebhardt v O'Rourke*, 444 Mich 535, 542–543, 510 NW2d 900 (1994); *People v Meeks*, 293 Mich App 115, 118; 808 NW2d 825 (2011) ("But the canons of statutory construction recognize the principle that when a specific statutory provision differs from a related general one, the specific one controls."); *Reading Law*, p. 183 ("If there is a conflict between a general provision and a specific provision, the specific provision prevails ....").
[100] *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 645, 132 S Ct 2065, 182 L Ed 2d 967 (2012) ("The general/specific canon is perhaps most frequently applied to statutes in

otherwise conflict."[101] In such cases, this Court "dissipates" any conflict by interpreting "the specific provision ... as an exception to the general one."[102]

The two notice provisions at issue are contained in MCL 691.1404(1) and MCL 224.21(3). MCL 691.1404(1) provides that "[a]s a condition to any recovery for injuries sustained by reason of any 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." In turn, MCL 224.21(3) provides that "a board of county road commissioners is not liable for damages to person or property sustained by a person upon a county road because of a [highway defect] under the jurisdiction of the board of county road commissioners, unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners."

MCL 691.1404(1) and MCL 224.21(3) both relate to the same purpose (procedure for highway-defect claims) and share a common purpose (ensuring that the government entities responsible for maintaining the roads receive adequate notice of roadway defects and potential lawsuits). So, to the extent they somehow conflict, MCL 691.1401(1) and MCL 224.21(3) are *in pari materia* and must "be read together to create a harmonious body of law."[103]

When MCL 691.1404(1) and MCL 224.21(3) are read together, it's clear that MCL 691.1404(1) is the more general provision and MCL 224.21(3) is the more specific provision. MCL 691.1404 imposes a pre-suit notice requirement as a prerequisite to "any recovery for

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which a general permission or prohibition is contradicted by a specific prohibition or permission.").

[101] *TOMRA*, ___ Mich at ___ (Slip Op at 14-15).

[102] *TOMRA*, ___ Mich at ___, quoting *RadLax Gateway Hotel*, 566 US at 645 (Slip Op at 14-15).

[103] *Mazur*, 497 Mich at 313.

injuries sustained by reason of *any* defective highway" maintained by any "governmental agency" of any sort.[104] In contrast, MCL 224.21(3) only imposes a notice requirement on plaintiffs bringing highway-defect claims against a specific government entity—"a board of county road commissioners"—for a specific subset of injuries—those "sustained…upon a county road because of a [highway defect] under the jurisdiction of the board of county road commissioners."[105] So, under the general/specific canon, in a situation where both statutes could theoretically apply—i.e., a highway-defect claim against a county road commission, MCL 224.21(3)'s 60-day notice period should be interpreted as an exception that "controls" over the general 120-day notice period in MCL 691.1404(1).[106] And that's exactly what *Streng* held: "While the GTLA is a statute of general governmental immunity, MCL 224.21 is the specific statute that applies to claims of liability against county road commissioners for accidents that occur on county roads."[107]

In sum, regardless whether the GTLA and MCL 224.21(3) are harmonious or in conflict, well-established principles of statutory interpretation and construction lead to the conclusion that MCL 224.21(3) governs the filing of pre-suit notices related to highway-defect claims against county road commissions. Since that's exactly what the Court of Appeals held in *Streng*, that decision was correctly decided.

Argument II

In Michigan, judicial decisions generally apply retroactively unless they clearly established a new rule by overruling clear, uncontradicted, and settled case law. Here, *Streng* didn't expressly overrule any prior judicial decisions. And, even if it did, the state of the law governing which pre-suit notice provision governed highway-defect claims against county road

[104] MCL 691.1404(1).
[105] MCL 224.21(3).
[106] See *Gebhardt*, 444 Mich at 542–543.
[107] *Streng*, 315 Mich at 463.

commissions was unclear, contradictory, and unsettled. So *Streng* didn't clearly establish a new rule of law.

A. General Principles of Michigan Retroactivity Law

Michigan's "general rule" of retroactivity "is that judicial decisions are to be given full retroactive effect."[108] And, as this Court has held many times, prospective application is an "extreme measure" that is only warranted in "exigent circumstances."[109]

Historically, the only exception to the general rule of retroactivity recognized by this Court applied "where constitutional or 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."[110] But, over the last few

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[108] *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997); *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) ("[T]he general rule is that judicial decisions are to be given complete retroactive effect."); *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 536; 821 NW2d 117 (2012) 536, quoting *Gentzler v Constantine Village Clerk,* 320 Mich 394, 398, 31 NW2d 668 (1948) ("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.").

[109] *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 400; 738 NW2d 664 (2007) (holding that the general rule is that judicial decisions apply retroactively unless "exigent circumstances" justify the "extreme measure" of prospective-only application); *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 586; 702 NW2d 539 (2005) (citations omitted) ("This case presents no 'exigent circumstances' of the sort warranting the 'extreme measure' of prospective-only application."); *Devillers v Auto Club Ins Ass'n,* 473 Mich 562, 586; 702 NW2d 539 (2005), quoting *Wayne Co. v Hathcock,* 471 Mich 445, 484 n 98; 684 NW2d 765 (2004) ("Prospective application is a departure from this usual rule and is appropriate only in 'exigent circumstances.'"); *Gladych v New Family Homes, Inc*, 468 Mich 594, 606 n 6; 664 NW2d 705 (2003) (Referring to "prospective application" as an "extreme measure").

[110] *Gentzler*, 320 Mich at 398 (citations omitted)); *Donohue v Russell*, 264 Mich 217, 219; 249 NW 830 (1933) ("The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision, except in so far as the construction last given would impair the obligations of contracts entered into or injuriously affect vested rights acquired in reliance on the earlier decision" (citation omitted)).

decades, this Court has "adopted a more flexible approach" that "give[s] holdings limited retroactive or prospective effect" where "injustice might result from full retroactivity."[111]

The goal of the so-called flexible approach is "to accomplish the 'maximum of justice' under varied circumstances."[112] But, while it has employed such apparently expansive language, this Court has repeatedly demonstrated that flexibility (and, thus, prospective application) isn't unlimited and hasn't overwhelmed the general rule—i.e., the general rule still has teeth. For example, the Court has held that prospective application (and, thus, flexibility) is limited to situations where the it overrules "clear and uncontradicted" or "settled" case law.[113] *S*imilarly, the Court has clarified that, although prospective application may be warranted if the Court

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[111] *Lindsey*, 455 Mich at 68; *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002) ("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."); *Bezeau v Palace Sports & Entertainment, Inc.*, 487 Mich 455, 462; 795 NW2d 797 (2010) ("However, there are exceptions to [the general] rule. This Court should adopt a more flexible approach if injustice would result from full retroactivity."); *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984) ("Although it has often been stated that the general rule is one of complete retroactivity, this Court has adopted a flexible approach."); 1 Mich Pl & Pr § 2:91 (2d ed) ("In general, the state Supreme Court's decisions are given full retroactive effect; however, there are exceptions to this rule and a more flexible approach is adopted if injustice would result from full retroactivity.").

[112] *Lindsey*, 455 Mich at 68.

[113] *Devillers, 473 Mich at* 587 (citations and quotation marks omitted, emphasis in original) ("[P]rospective-only application of our decisions is generally limited to decisions which overrule *clear and uncontradicted* case law."); *Pohutski*, 465 Mich at 696 ("[A] holding that overrules settled precedent may properly be limited to prospective application."); *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) (Stating that, although "[w]e often have limited the application of decisions which have overruled prior law or reconstrued statutes," prospective application "has generally been limited to decisions which overrule clear and uncontradicted case law"); *Lincoln*, 461 Mich at 491 (In determining whether to apply judicial decision, "the first question is whether [the decision] overruled clear and contradicted prior case law." "[T]hat leads to the question whether [the overruled case law] constituted a clear and uncontradicted ruling on the subject of [the current] proceedings….").

"decides an issue of first impression," it does not apply where the new ruling "was not clearly foreshadowed."[114]

And, aside from full retroactivity or prospective application, the flexible approach enables courts to give a judicial decision that overrules a prior decision "limited retroactive application"—i.e., it only applies to the case at issue and pending cases "in which [the] specific issue has been raised and preserved."[115] Consistent with the flexible approach, this Court has limited the retroactivity of decisions that have overruled settled precedent on several occasions.[116]

However, the "flexible" approach doesn't always result in prospective application even where retroactive application would cause some unfairness. For example, in *Lindsey v Harper Hospital*, this Court gave retroactive effect to a prior decision holding that the Revised Probate Code's statute of limitations saving provision runs from the appointment of a temporary personal representative.[117] It explained that, while "plaintiff's claim may seem unfairly barred by our holding, it cannot be denied that all statutes of limitation set arbitrary time limits for legal claims" and "serve to protect defendants from stale claims"—a purpose that "must be balanced with the purpose of exceptions to statutes of limitation."[118]

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[114] *Lindsey*, 455 Mich at 68-69 (citations omitted).
[115] *Gladych v New Family Homes, Inc*, 468 Mich 594, 607; 664 NW2d 705 (2003).
[116] *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 108-109; 643 NW2d 553 (2002) (giving limited retroactive application to Court's holding overruling the formula for calculating worker's compensation benefits for surviving partial dependents articulated in a prior opinion in "recognition of the effect of changing settled law"); *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003) (Giving limited retroactive application to the Court's holding that employee was required to serve employer with a copy of the summons and complaint in order to toll the limitations period, overruling *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971)).
[117] *Lindsey*, 455 Mich at 69.
[118] *Lindsey*, 455 Mich at 69.

This Court articulated the framework for determining whether a judicial decision applies retroactively in *Pohutski v City of Allen Park* (2002).[119] It identified "three factors to be weighed in determining when a decision should not have retroactive application": "(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."[120] Additionally, in the civil context, this Court "recognized an additional threshold question whether the decision clearly established a new principle of law."[121]

B. A judicial decision creates a new principle of law where it renders an unforeseeable ruling on an issue of first impression or overrules clear, uncontradicted, and settled case law.

As noted above, the "threshold" rule of the *Pohutski* framework is whether "the decision clearly established a new principle of law."[122] Thus, if the decision at-issue didn't create a new rule, it applies retroactively and further analysis (i.e., application of the three-factor test) is unnecessary.[123] That's exactly the case with *Streng*.

It's axiomatic that a judicial decision only creates a new rule of law when it overrules "clear and uncontradicted" or "settled" case law,[124] or when it decides an issue of first

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[119] *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002).
[120] *Pohutski*, 465 Mich at 696.
[121] *Id.* at 696.
[122] *Id.* at 696.
[123] *Employees Mut Ins Co v Morris*, 460 Mich 180, 190; 596 NW2d 142 (1999) ("If the decision [overruling a prior decision] does not announce a new principle of law, then full retroactivity is favored.").
[124] *Devillers, 473 Mich at* 587 (citations and quotation marks omitted, emphasis in original) ("[P]rospective-only application of our decisions is generally limited to decisions which overrule *clear and uncontradicted* case law."); *Pohutski*, 465 Mich at 696 ("[A] holding that overrules settled precedent may properly be limited to prospective application."); *Lincoln*, 461 Mich at 491 (In determining whether to apply judicial decision, "the first question is whether [the decision] overruled clear and contradicted prior case law." "[T]hat leads to the question whether [the overruled case law] constituted a clear and uncontradicted ruling on the subject of [the current] proceedings…."); *Lincoln*, 461 Mich at 491-492 (Finding that a judicial decision did not establish a new principle of law because the case law it expressly overruled was not "a clear and

impression "where the result would have been unforeseeable to the parties."[125] In other words, a decision only creates a new rule when its holding was "unexpected," "unforeseeable," or "indefensible," under the then-existing law.[126] Thus, as the Court of Appeals has recognized, an opinion from this Court that clarifies "a previously ambiguous state of law" doesn't create a new rule because the case law it overruled was not "clear and uncontradicted."[127]

This Court has also made clear that a decision doesn't create a new law if the opinion it overrules was based on statutory interpretation that contradicted the plain language of the statute at issue.[128] The basis for that principle is two-fold: (1) a decision giving effect to the plain

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uncontradicted holding with regard to the issues resolved [by the decision]"); See *Tebo*, 418 Mich at 363 (finding that it would be "unjust" to applied the overruling decision retroactively "[i]n light of the unquestioned status of [the case law it overruled] at the time [it] was decided…").

[125] *Employees Mut Ins Co v Morris*, 460 Mich 180, 190; 596 NW2d 142 (1999) (recognizing that a judicial decision establishes a new principle of law "either by overruling clear past precedent on which the parties have relied or by deciding an issue of first impression where the result would have been unforeseeable to the parties"); *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982) ("A rule of law is new for purposes of resolving the question of its retroactive application ... either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision."); *Monat v State Farm Ins Co*, 469 Mich 679, 694; 677 NW2d 843 (2004) (giving "full retroactive effect" to the Court's holding that mutuality isn't required to assert collateral estoppel defensively; the Court explained that its decision was not a sweeping change to the law because there was no previous decision that specifically addressed the issue).

[126] *People v Doyle*, 451 Mich 93, 108; 545 NW2d 627 (1996) (finding that prior decision was not a new rule because it was not "unexpected," "unforeseeable," or "indefensible," under the law existing at time and, thus, did not present the "special circumstances" that would require prospective application); *Employees Mut Ins Co v Morris*, 460 Mich at 195 ("Only if this Court's decision can be said to be "unexpected" or "indefensible" in light of the law in place at the time of the acts in question would there be a question about whether to afford the decision complete retroactivity.").

[127] *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 95; 795 NW2d 205 (2010) (finding that a Supreme Court opinion was "a clarification of a previously ambiguous state of law" rather than a new rule because the case law it overruled was not "clear and uncontradicted" in light of a prior Supreme Court opinion).

[128] *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586, 702 NW2d 539 (2005) (citation omitted) (retroactively overruling a 19-year-old legal precedent determined to be inconsistent with plain statutory language); *Wayne Co v Hathcock*, 471 Mich 445, 484 n 98, 684 NW2d 765

language of a statute cannot be unexpected; and (2) a rule of law that is directly contrary to plain and unambiguous statutory language is not "clear and uncontradicted."[129]

In *Devillers* (2005), for example, this Court gave retroactive effect to its overruling of a prior decision that "engrafted onto the text of [MCL 500.3145(1)] a tolling clause that has absolutely no basis in the text of the statute."[130] The Court explained that, because the prior decision was completely unsupported (and inconsistent) with the plain statutory language, a decision overruling it "is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority…."*[131]*

Similarly, in *Wayne County v Hathcock* (2004), this Court overruled its prior opinion in *Poletown* (an eminent domain case) as unconstitutional.[132] But, even though *Poletown* had been on the books for 23 years, the Court concluded that there was no reason to depart from the general rule of retroactivity.[133] The Court explained that, although "it is a certainty that state and local government actors have acted in reliance on [*Poletown's*] broad, but erroneous, interpretation,….[o]ur decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution

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(2004) (retroactively overruling a 23-year-old legal precedent determined to be inconsistent with proper constitutional interpretation), *Gladych v New Family Homes, Inc.*, 468 Mich 594, 605, 664 NW2d 705 (2003) (retroactively overruling a 32-year-old legal precedent determined to be inconsistent with plain statutory language). Cf. *Bezeau v Palace Sports & Entertainment, Inc.*, 487 Mich 455, 463; 795 NW2d 797 (2010) (a prior opinion "established a new rule of law" where it "established a new interpretation of [the relevant statutory language] that broke from the longstanding interpretation of the statute.").

[129] *Doyle*, 451 Mich at 113 (stating that the Court's holding that its decision overruling a prior opinion applied retroactivity "is grounded in the belief that it is perfectly clear that anyone reading the habitual offender act and the Motor Vehicle Code easily could have concluded that the [overruled] decision was contrary to their plain meanings.")

[130] *Devillers, 473 Mich at 587.*

[131] *Id.*

[132] *Wayne County v Hathcock*, 471 Mich 445, 448; 684 NW2d 765 (2004).

[133] *Id.*

since it took effect in 1963."[134] The Court also stressed that its "decision simply applies fundamental constitutional principles and enforces the 'public use' requirement as that phrase was used at the time our 1963 Constitution was ratified."[135] As a result, it applied its opinion overruling *Poletown* retroactively.[136]

Likewise, in *Employees Mut Ins Co v Morris*, the Court concluded that a prior opinion (*Profit*) applied retroactively because it "was not an unforeseeable decision that had the effect of changing the law."[137] The Court explained that the opinion that *Profit* overruled "misinterpreted the law as it existed at the time" in a way that "was in direct conflict with the statute, the legislative intent, and two prior decisions of this Court."[138]

C. This Court has repeatedly recognized that the case law related to the highway exception at issue in *Brown*, *Rowland*, and *Streng* is confusing, contradictory, and virtually impenetrable.

With respect to the threshold "new rule" analysis, Michigan's appellate courts have repeatedly recognized that the case law related to the GTLA lacks clarity and consistency. For example, in *Nawrocki v Macomb County Road Com'n*, this Court referred to the case law regarding "the interpretation and application of the highway exception" to the GTLA as "an exhausting line of *confusing and contradictory* decisions."[139] In the Court's view, these "conflicting decisions" have "created a rule of law that is virtually impenetrable, even to the most experienced judges and legal practitioners."[140] Similarly, in *Suttles v Dep't of Trans,* another highway-exception case, this Court "acknowledge[d] that the notion of governmental

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[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Employees Mut Ins Co v Morris*, 460 Mich at 197.
[138] *Id.*
[139] *Nawrocki v Macomb County Road Com'n*, 463 Mich 143, 149; 615 NW2d 702 (2000) (emphasis added).
[140] *Id.* at 149-150.

immunity, its interpretation, and its practical application have been difficult at times, stemming in part from the decisions of this Court and from *the confusing nature of the statute itself*."[141]

The Court of Appeals has also acknowledged this reality. In an opinion holding that *Nawrocki* applied retroactively, the lower court concluded that "the Supreme Court did not overrule clear and uncontradicted case law, thereby establishing a new principle of law. Rather, the Supreme Court articulated the proper interpretation of the statutory highway exception to governmental immunity, a statute that was misinterpreted…."[142]

This Court's decision in *Rowland* and its progeny are also instructive with respect to the retroactivity analysis in this case. In *Rowland*, this Court overruled two prior opinions (*Brown* and *Hobbs*) which collectively held that that MCL 224.21(3) was unconstitutional and that failure to comply with the GTLA's notice provision didn't bar a claim filed under the highway exception unless the lack of notice actually prejudiced the governmental agency.[143] Although it didn't specifically mention MCL 224.21(3), the *Rowland* Court rejected the entirety of Court's constitutional analysis in *Hobbs* and *Brown*, and held that "[n]othing can be saved" from those cases "because the analysis they employ is deeply flawed."[144] It also concluded that notice-provisions must be enforced as written as long as they have a "rational" basis, such as allowing time for governmental entities to create reserves, reducing the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed.[145] After reaching its holding, this Court addressed whether its decision applied retroactively.[146]

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[141] *Suttles v Dep't of Trans,* 457 Mich 635, 642–643, 578 NW2d 295 (1998) (emphasis added).
[142] *Adams v Dept of Transportation*, 253 Mich App 431, 440; 655 NW2d 625 (2002).
[143] *Rowland v Washtenaw County Road Com'n*, 477 Mich 197, 200, 220; 731 NW2d 41 (2007).
[144] *Rowland,* 477 Mich at 213-214 (emphasis added).
[145] *Id.* at 212-214.
[146] *Id.* at 220.

Applying the *Pohutski* framework and relying on *Hathcock*, this Court concluded that its decision didn't create a new rule of law and gave it full retroactive effect.[147] The Court explained that, because "*Hobbs* and *Brown* adopted the 'actual prejudice' requirement…despite the clear lack of that requirement in the statute itself," a decision overruling those decisions "will return our law to that which existed before *Hobbs* and which was mandated by MCL 691.1404(1)."[148] Thus, in the Court's view, "there exist no exigent circumstances that would warrant the 'extreme measure' of prospective application."[149] In reaching that conclusion, this Court stressed that "our decision here is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority—enforcing the language of MCL 691.1404(1)."[150] It also noted that "overruling precedent that usurped legislative power restores legitimacy to the law."[151]

Finally, the Court stated that it was "mindful of the fact that the public fisc is at risk in [highway exception] cases."[152] Because "a central purpose of governmental immunity is to prevent a drain on the state's resources by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity," the Court concluded that "[t]he decision to expand the class of those entitled to seek recovery against the government should be in the hands of the Legislature."[153] It also stressed that it "does not have the authority to waive the government's immunity from suit, and tax dollars should only be at risk when a plaintiff satisfies

[147] *Id.* at 220, 223.
[148] *Id.* at 220-222.
[149] *Id.* at 221.
[150] *Id.* at 222 (citations omitted).
[151] *Id.* at 222.
[152] *Id.* at 222-223.
[153] *Id.* at 223, 223 n 18.

all the prerequisites, including a notice provision, set by the Legislature for one of the exceptions to governmental immunity."[154]

Five years later, this Court reaffirmed *Rowland's* holding in *McCahan v Brennan*.[155] There, this Court "reiterate[d] 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."[156] It also "clarif[ied] that *Rowland* applies to all such statutory notice or filing provisions, including the one at issue in this case."[157] As a result, the Court "reaffirm[ed] that when the Legislature conditions the ability to pursue a claim against the state on a plaintiff's having provided specific statutory notice, the courts may not engraft an 'actual prejudice' component onto the statute before enforcing the legislative prohibition."[158] Stated differently, the crux of *Rowland* was that "[c]ourts may not engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements."[159]

D. Streng didn't create a new rule for retroactivity purposes.

Applying this Court's well-established retroactivity analysis, it's clear that *Streng* didn't create a new rule of law and, thus, applies retroactively to Pearce's case. In reaching its holding that the highway code notice provision, MCL 224.21, rather than the GTLA's notice provision, governs the notice requirements for highway-defect claims against county road commissions, *Streng* didn't expressly overrule any prior judicial decisions.[160] Instead, it recognized that

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[154] *Id.* at 223.
[155] *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012).
[156] *Id.* at 733.
[157] *Id.* at 733.
[158] *Id.* at 738.
[159] *Id.* at 746-747.
[160] *Streng*, 315 Mich App at 687-688.

Rowland "repudiated the entirety of the rulings" in the line of cases holding that MCL 224.21 wasn't enforceable and applied the plain language of the GTLA and Highway Code.[161] The *Streng* court also noted that, other than case law overruled by *Rowland*, "no precedential case has substantively considered the potential conflicts between the highway code and the GTLA."[162]

As a result, *Streng* didn't create a new rule because it didn't overrule anything. It also didn't create a new rule because it's holding was neither "unforeseeable" nor "indefensible" based on the plain language of MCL 224.21(3) combined with MCL 691.1402(1)'s unambiguous statement that the "procedure" governing highway-defect claims against county road commissions "shall be as provided in ... MCL 224.21." And, since *Streng* didn't create a new rule, it applies retroactively.

Here, Pearce argues that *Streng* created a new rule because it "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" and that its "interpretation of the Governmental Immunity Act was novel and unprecedented in Michigan Jurisprudence."[163] There are several problems with Pearce's argument.

First, the rule that MCL 224.21(3) governs highway defect claims against county road commissions isn't "new" in any sense of the word. Indeed, that's exactly what the language of MCL 691.1402(1) and MCL 224.21(3) have plainly stated is the law of the land for more than 50 years. Indeed, Pearce correctly (and repeatedly) acknowledged this reality during the Road Commission's prior appeal:

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[161] *Streng*, 315 Mich App at 459-460.
[162] *Streng*, 315 Mich App at 460.
[163] Pearce's Michigan Supreme Court Brief at 12-13.

- "[A]pplication of the notice requirements of MCL 224.21(3) to litigation involving county road commissions has been the law of the land since the GTLA was amended in 1970.[164]

- "[A]pplication of the Notice Requirements of MCL 224.21(3) to litigation involving County Road Commissions has been the law of the land since the Governmental Tort Liability Act was amended in 1970."[165]

Second, despite Pearce's current claim that "Michigan Courts and litigants have, for 50 years, consistently and constantly applied the requirements of the GTLA to defective road claims against road commissions,"[166] when *Streng* was decided there wasn't any binding precedent holding that MCL 224.21(3) didn't apply to highway-defect claims against county road commissions or was somehow subservient to MCL 691.1404(1).

While this Court had previously held that MCL 224.21(3) was unconstitutional in *Hobbs* and *Brown*, [167] it overruled those opinions in *Rowland*. While *Rowland* didn't expressly mention MCL 224.21, it "reject[ed] the hybrid constitutionality" that "*Hobbs*, and *Brown* engrafted onto our law" and held that notice provisions can be enforced absent actual prejudice to a government entity.[168] Thus, in reaching its holding, the *Rowland* Court rejected the entirety of the constitutional analysis in *Hobbs* and *Brown*, including the portion that formed the basis for their holding regarding MCL 224.21(3). Specifically, this Court held that "[n]othing can be saved" from *Hobbs* and *Brown* "because the analysis they employ is deeply flawed."[169] In other words,

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[164] Pearce's 2016 Brief on Appeal at 8, 11 (Appellee's App'x at 0078a and 0081a).
[165] Pearce's Answer to the Road Commission's Application for Leave to Appeal at v (Appellee's App'x at 0106a).
[166] *Id.* at 12.
[167] *Hobbs v State Hwys Dept*, 398 Mich 90; 247 NW2d 754 (1976) , rev'd by *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007); *Brown v Manistee Co Rd Comm,* 452 Mich 354; 550 NW2d 215 (1996), rev'd by *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007).
[168] *Rowland*, 477 Mich at 213.
[169] *Rowland,* 477 Mich at 213-214 (emphasis added).

as the Court of Appeals recognized in *Streng*, *Rowland* "repudiated the entirety of the rulings in *Hobbs* and *Brown*."[170]

And, while *Rowland* had applied the 120-day notice provision of MCL 691.1404 to a claim against a county-road commission, that application didn't constitute binding precedent on the issue whether MCL 224.21(3) controlled that *Streng* was required to follow. In *Rowland*, because the plaintiff had served her notice 140 days after her accident, the defendants only raised the 120-day notice provision as a defense.[171] And neither of the parties in *Rowland* raised the issue of whether MCL 691.1404(1) or MCL 224.21(3) controlled claims against county road commissions.

Thus, as *Streng* recognized, "[t]he *Rowland* Court made no mention of MCL 224.21, nor did it discuss the reasoning in *Brown* ... regarding the notice period.... *Rowland* expressed neither approval nor disapproval regarding that choice but simply focused on the lack of statutory language in MCL 691.1404 allowing exceptions to the time limit.[172] In other words, as Judge O'Brien recognized in her dissenting opinion in *Brugger*, "the *Rowland* decision provides no help to plaintiff because MCL 224.21 'was not discussed by the Supreme Court and implicit conclusions are not binding precedent.'"[173] It follows that, *Rowland's* application of

[170] *Streng*, 315 Mich App at 459-460; see also *Brugger*, 324 Mich at 329 n 6 (O'Brien, J., dissenting) ("To the extent *Rowland* did not explicitly overrule *Brown's* holding that MCL 224.21 was unconstitutional, *Rowland* clearly rejected *Brown's* reasoning with regard to that issue by explaining that there were numerous reasons, besides preventing prejudice, to find a rational basis for a notice requirement.").
[171] *Rowland*, 477 Mich at 201-202.
[172] *Streng*, 315 Mich App at 459-460.
[173] *Brugger*, 324 Mich at 329 n7 (O'Brien, J., dissenting), quoting *Galea v FCA US LLC*, 323 Mich App 360, 375, 917 NW2d 694 (2018).

MCL 691.1404(1) is at most *obiter dictum* on the issue whether the GTLA or MCL 224.21(3) provides the relevant notice period.[174]

Third, even if *Streng* somehow overruled something from *Brown* or *Rowland* (it didn't), it still wouldn't create a new rule. As this Court has held time and again, a judicial decision only creates a new rule if it overrules settled, clear, and uncontradicted case law or decides an issue of first impression "where the result would have been unforeseeable to the parties."[175] *Streng* doesn't fall into either of those categories. To the extent *Streng* ruled on an issue of first impression, it's holding wasn't unforeseeable because it accords with the plain language of MCL 224.21(3) and MCL 691.1402(1). And, as noted above, *Streng* didn't overrule the previously binding precedent that held that MCL 224.21(3) was unenforceable because it was unconstitutional—this Court's opinion in *Brown*—because it was previously overruled in its entirety in *Rowland*.

But, to the extent something from *Brown*'s constitutional analysis somehow survived *Rowland* (it didn't), the pre-*Streng* state of the law about which notice provision governed procedure for highway-defect claims against county road commissions was a mess of partially overruled cases and non-binding dicta. In other words, it was—at best—unsettled, unclear, and

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[174] *People v Heflin*, 434 Mich 482, 498 n 13, 456 NW2d 10 (1990) ("[J]ust as obiter dictum does not constitute binding precedent, we reject the dissent's contention that 'implicit conclusions' do so.").

[175] *Devillers, 473 Mich at* 587 (citations and quotation marks omitted, emphasis in original) ("[P]rospective-only application of our decisions is generally limited to decisions which overrule *clear and uncontradicted* case law."); *Pohutski*, 465 Mich at 696 ("[A] holding that overrules settled precedent may properly be limited to prospective application."); *Lincoln*, 461 Mich at 491-492 (Finding that a judicial decision did not establish a new principle of law because the case law it expressly overruled was not "a clear and uncontradicted holding with regard to the issues resolved [by the decision]"); *Morris*, 460 Mich at 190 (recognizing that a judicial decision establishes a new principle of law "either by overruling clear past precedent on which the parties have relied or by deciding an issue of first impression where the result would have been unforeseeable to the parties").

contradicted. So, even if Pearce is correct that *Streng* is inconsistent with the decades-long failure to give meaning to MCL 691.1402(1) and MCL 224.21(3) (she's not), that doesn't mean it created a new rule. This is especially true considering this Court's recognition that the line of "confusing and contradictory" decisions regarding the GTLA and the highway-defect exception has created "a rule of law that is virtually impenetrable."[176] So, even if it's assumed that *Streng* overruled something (it didn't), whatever was overruled wasn't settled, clear, or uncontradicted. It follows that, no matter what, *Streng* didn't create a new rule for retroactivity purposes.

This Court's recent decision in *W A Foote Mem Hosp v Michigan Assigned Claims Plan* (2019)—in which it affirmed the Court of Appeals' holding that *Covenant Med Ctr v State Farm Mut Auto Ins* (2017)[177] applied retroactively[178]— supports the conclusion that *Streng* didn't create a new rule for retroactivity purposes. There, this Court held that because "*Covenant* did not clearly establish a new principle of law," it "does not satisfy *Pohutski*'s threshold question, and…therefore applies retroactively."[179] Like *Streng*, *Covenant* gave effect to the plain language of an unambiguous, but previously misinterpreted statutory scheme (Michigan's no-fault act). Unlike *Streng*, *Covenant* had a broad, sweeping impact on Michiganders across the state (it extinguished hundreds of no-fault provider claims in one fell swoop). But, even though no-fault providers, attorneys, and the lower courts had been relying on the pre-*Covenant* misinterpretation of the no-fault act for over twenty years, this Court held that *Covenant* didn't create a new rule of

[176] See *Nawrocki*, 463 Mich at 149-150.
[177] *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW 2d 490 (2017).
[178] *W A Foote Mem Hosp v Michigan Assigned Claims Plan*, 504 Mich 985; 934 NW2d 44 (2019).
[179] *W A Foote*, 504 Mich at 985.

law.[180] And, if *Covenant's* upending of decades of settled expectations didn't create a new rule, then *Streng* didn't either.

In sum, *Streng* didn't create a new rule. So it "does not satisfy *Pohutski*'s threshold question, and…therefore applies retroactively."[181] For that reason alone, this Court should reverse the Court of Appeals' holding that *Streng* only applies prospectively.

Argument III

When a judicial decision creates a new rule of law, Michigan courts analyze three factors to determine retroactivity: (1) the new rule's purpose; (2) reliance on the old rule; and (3) whether retroactivity affects the administration of justice. Here, those factors favor retroactivity because *Streng* gave meaning to the Legislature's intent, no one reasonably relied on the pre-*Streng* rule, and retroactivity won't affect how courts administer justice. So the *Pohutski* factors favor applying *Streng* retroactively.

A. *Pohutski's* three-factor test

As noted above, this Court articulated the framework for determining whether a judicial decision applies retroactivity in *Pohutski v City of Allen Park* (2002).[182] There, the Court identified "three factors to be weighed in determining when a decision should not have retroactive application": "(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."[183]

1. First Factor: Purpose of the New Rule.

In *Pohutski*, this Court applied the three-factor test and concluded that prospective application of its ruling was appropriate.[184] Regarding the first factor, the Court opined that the

[180] *W A Foote*, 504 Mich at 985.
[181] *W A Foote*, 504 Mich at 985.
[182] *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002).
[183] *Pohutski*, 465 Mich at 696.
[184] *Pohutski*, 465 Mich at 697-698.

purpose of its decision was "to correct an error in the interpretation of [MCL 691.1407]" and that prospective application furthered that purpose.[185]

Since *Pohutski*, several decisions by Michigan's appellate courts have reached the opposite conclusion. In *Trentadue*, for example, this Court held that "prospective-only application is inappropriate" where "the very purpose of our holding is to respect limits the Legislature has placed" on a plaintiff's ability to bring or maintain a suit.[186] Similarly, in *McNeel*, the Court of Appeals found that retroactivity is favored if the purpose of a new rule of law is to "give meaning to the statutory language" and to "clarif[y] an ambiguous state of the law."[187] And, in the part of *W A Foote* that this Court affirmed, the Court of Appeals concluded that the purpose of *Covenant*—to "conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law"[188]—favored retroactivity in order to ensure consistency in the law.[189]

2. Second Factor: Reliance on the Old Rule.

The second factor favors prospective application where there has been "extensive reliance" on the overruled decisions by the courts and where "decisions have undoubtedly been predicated upon this Court's longstanding interpretation…."[190] But, the mere fact that there was some form of reliance on the old rule doesn't mean that this factor favors prospective application.

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[185] *Pohutski*, 465 Mich at 697.
[186] *Trentadue*, 479 Mich at 401.
[187] *McNeel*, 289 Mich App at 96-97 (finding that, if the Supreme Court's prior opinion was a new rule, the three-factor test weighed in favor of retroactive application where: (1) the purpose of the new rule was to "clarify[y] an ambiguous state of the law" and "give meaning to the statutory language").
[188] *Covenant*, 500 Mich at 201, 895 NW2d 490.
[189] *W A Foote*, 321 Mich App at 193-194.
[190] *Pohutski*, 465 Mich at 697.

In *McNeel*, the Court of Appeals found that, even though there had been significant reliance on the overruled decision, the second *Pohutski* factor favored retroactive application because, in light of "the ambiguous state of the law, it [was] unclear how reasonable the reliance on [the old rule] was, given that it contradicted the Supreme Court's precedent."[191]

Similarly, in *W A Foote*, the Court of Appeals held that "the mere fact that insurers and healthcare providers may have acted in reliance on the caselaw that *Covenant* overturned is not dispositive of the question of retroactivity."[192] The panel explained that, although "every retroactive application of a judicial decision has at least the potential to upset some litigants' expectations concerning their pending suits," it concluded that it was "less than clear that the state of the law that was overturned by *Covenant* was so clear and uncontradicted as to predominate in favor of only prospective application."[193]

3. Third Factor: Effect on the Administration of Justice.

The third factor—the effect of retroactivity on the administration of justice—is the least definitive. For example, *Pohutski* found that "prospective application minimizes the effect of this decision on the administration of justice."[194] But, aside from noting that under the specific circumstances at issue retroactive application of its decision would create "a distinct class of litigants denied relief because of an unfortunate circumstances of timing," it didn't clarify how future courts should analyze this factor.[195]

In contrast, in *Trentadue*, this Court found that the third *Pohutski* factor favored retroactive application of its holding that courts can't use extrastatutory discovery rules.[196] It

[191] *McNeel*, 289 Mich App at 96-97.
[192] *W A Foote*, 321 Mich App at 194.
[193] *Id.* (citations and quotation marks omitted).
[194] *Pohutski*, 465 Mich at 697-698.
[195] *Id.*
[196] *Trentadue*, 479 Mich at 400-401.

explained that "the administration of justice is not significantly affected because the rights and interests of plaintiffs and defendants are opposed in these matters; although plaintiffs may be denied relief for stale claims, defendants and the judiciary are relieved from having to defend and decide cases based on deteriorated evidence."[197] In other words, the administration of justice factor isn't concerned with whether retroactive application of a new rule benefits (or impairs) a certain group of plaintiffs or defendants, but rather, whether it affects the ability of courts to administer justice.

Consistent with *Trentadue*, the Court of Appeals has found that the third factor weighs in favor of retroactive application if the decision at issue only applies to a "limited number of cases."[198] It has also held that retroactive application of "judicial decisions applying statutory law as enacted by our Legislature" supports the administration of justice by "demanding consistency in the law" rather than "allow[ing] the law to ebb and flow at the whim of the judiciary."[199]

B. Case law applying *Pohutski's* "three-factor" analysis in the GTLA context.

Michigan's appellate courts have issued several decisions related to the GTLA that are relevant to whether the three-factor *Pohutski* analysis favors retroactive application of *Streng*. For example, in *Paul v Wayne County Dept of Pub Serv*, the Court of Appeals held that this Court's opinion in *Grimes v Mich Dept of Transp*—a case holding that a highway shoulder isn't designed for vehicular travel—applied retroactively.[200] After finding that *Grimes* created a new

[197] *Trentadue*, 479 Mich at 401.
[198] *McNeel*, 289 Mich App at 96-97 (finding that, if the Supreme Court's prior opinion was a new rule, the third *Pohutski* factor weighed in favor of retroactive application because retroactive application would have only a small effect on the administration of justice "[g]iven the limited number of cases to which this issue applies.").
[199] *W A Foote*, 321 Mich App at 195.
[200] *Paul v Wayne County Dept of Pub Serv*, 271 Mich App 617, 624; 722 NW2d 922 (2006).

rule because it overruled a prior Supreme Court opinion (*Gregg*), the panel found that the first *Pohutski* factor weighed in favor of retroactive application because "the purpose of the new rule is simply to bring case law in line with the explicit language of the statute and preclude liability under the highway exception to governmental immunity" in accordance with the Legislature's stated intent.[201]

With respect to the second *Pohutski* factor, the *Paul* court found that, although "plaintiff relied on *Gregg* in bringing this lawsuit…that reliance is not relevant."[202] In the Court of Appeals' view, "the relevant question [was] whether plaintiff relied on *Gregg* while operating his motorcycle." But, since the plaintiff "[c]learly…did not drive onto the shoulder because he believed *Gregg* somehow entitled him to do so…[he] cannot claim that he acted in reliance on *Gregg,* or that this reliance resulted in the motorcycle accident and his injuries."[203] Accordingly, the panel found that the second *Pohutski* factor favored retroactivity.[204]

And, although this Court's opinion in *Grimes*—the case that *Paul* held applied retroactively—involved *stare decisis* rather than retroactivity, it contains several points related to the second *Pohutski* factor.[205] In *Grimes*, this Court applied the *stare decisis* analysis to overrule its prior opinion in *Gregg v State Hwy Dept*.[206] In reaching that holding, the found "no reliance interests at work that support the continuation of *Gregg's* erroneous interpretation of the highway exception."[207] The Court explained that "Motorists traverse shoulders because of the exigencies of highway travel. They do not traverse shoulders because our case law might permit

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[201] *Paul v Wayne County Dept of Pub Serv*, 271 Mich App 617, 622-623; 722 NW2d 922 (2006).
[202] *Paul*, 271 Mich App at 623.
[203] *Id.*
[204] *Id.*
[205] *Grimes v Mich Dept of Transp*, 475 Mich 72, 87 n 49; 715 NW2d 275 (2006).
[206] See *Gregg v State Hwy Dept*, 435 Mich 307; 458 NW2d 619 (1990).
[207] *Grimes*, 475 Mich at 87 n 49.

them to recover against the governmental agency in the event of an accident."[208] Thus, it concluded that *Gregg*—a case holding that a highway shoulder is designed for vehicular travel—"is not the sort of case that fosters a reliance interest or shapes future individual conduct."[209]

Finally, it's well-established that, because governmental liability is voluntary, the Legislature can impose whatever conditions or limitations on that liability that it wants to, regardless whether they're reasonable or not.[210]

C. *Pohutski's* three-factor test favors retroactive application of *Streng* to this case.

Because *Streng* didn't create a new rule, the analysis ends there and there's no need for this Court to analyze whether the three factors mentioned in *Pohutski*. But, even if *Streng* somehow created a new rule (it didn't), *Pohutski's* three-factor test favors applying it retroactively to Pearce's case.

With respect to the first factor, the purpose of *Streng* was to give meaning to the Legislature's stated intent, clarify an ambiguity in the state of the law, conform highway-defect case law to the text of MCL 224.21(3) and MCL 691.1402(1), and to respect the limits that the

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[208] *Id.*
[209] *Id.*
[210] See, e.g., *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 714; 822 NW2d 522 (2012) ("[B]ecause the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed."); *Moulter v City of Grand Rapids*, 155 Mich 165, 168-169; 118 NW2d 919 (1908) ("The right to recover for injuries arising from want of repair of sidewalks, etc., is a purely statutory one in this state. It being optional with the Legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred any limitations it chose. Whether the limitations imposed are reasonable or unreasonable in such cases are questions for the Legislature, and not for the courts."); *Atkins*, 492 Mich at 714-715 ("Statutory notice provisions are a common means by which the government regulates the conditions under which a person may sue governmental entities. It is well established that 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.").

Legislature placed on a plaintiff's ability to sue a county road commission for a highway defect. Under *Trentadue*, *McNeel*, and *W A Foote*, this factor favors applying *Streng* retroactively.[211]

Regarding the second factor (reliance on the old rule), there are two reasons why it favors retroactivity. First, based on *Paul*, *Grimes*, and *W A Foote*, although highway-defect plaintiffs (and defendants) may have previously relied on the pre-*Rowland*, pre-*Streng* case law to file notices that complied with MCL 691.1404(1) but not MCL 224.21(3), that isn't the sort of reliance that matters.[212] That is, future highway-defect plaintiffs didn't drive on county roads (or take any other actions) in reliance on the rule that they have to provide notice of a claim to the county road commission but not the county clerk (and have a longer period to do so). Thus, while Pearce argues that "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," that reliance was irrelevant to the retroactivity analysis.[213] Second, even if it was unquestioned, any post-*Rowland*, pre-*Streng* reliance on MCL 691.1404(1) instead of MCL 224.21(3) was necessarily unreasonable because of both *Rowland's* total overruling of *Brown* and the plain language of MCL 691.1402(1) which mandates that the highway code governs procedure for claims against county road commissions.[214]

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[211] *Trentadue*, 479 Mich at 401 (holding that "prospective-only application is inappropriate" where "the very purpose of our holding is to respect limits the Legislature has placed" on a plaintiff's ability to bring or maintain a suit); *McNeel*, 289 Mich App at 96-97 (concluding that retroactivity is favored if the purpose of a new rule of law is to "give meaning to the statutory language" and to "clarif[y] an ambiguous state of the law."); *W A Foote*, 321 Mich App at 193-194, quoting *Covenant*, 500 Mich at 201 (finding that the stated purpose of *Covenant*—to "conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law" favored retroactivity in order to ensure consistency in the law).

[212] *Paul*, 271 Mich App at 623; *Grimes*, 475 Mich at 87 n 49; *W A Foote*, 321 Mich App at 194.

[213] Pearce's Michigan Supreme Court Brief at 19.

[214] See *McNeel*, 289 Mich App at 96-97.

The last factor, effect on the administration of justice, also favors retroactivity. First, retroactivity wouldn't affect the administration of justice given the "limited number of cases" to which *Streng* applies.[215] Second, applying *Streng's* common-sense, plain-language holding retroactively furthers the administration of justice by ensuring consistency in the law as the Legislature enacted it. And third, because the Legislature has full discretion to impose whatever limits on governmental liability it chooses, applying *Streng* retroactively furthers the administration of justice by giving effect to the limits that the Legislature has placed on liability against county road commissions (i.e., the 60-day notice provision contained in MCL 224.21(3)). And, even if those reasons didn't exist, the third *Pohutski* factor would at most be a wash because "the interests of plaintiffs and defendants are opposed in these matters; although plaintiffs may be denied relief for stale claims, defendants and the judiciary are relieved from having to defend and decide cases based on deteriorated evidence."[216] For multiple reasons, therefore, and despite Pearce's assertions to the contrary, applying *Streng* retroactively wouldn't negatively interfere with the administration of justice.

In sum, each one of the three *Pohutski* factors weighs in favor of applying *Streng* retroactively. So, there are no "exigent circumstances" that justify the "extreme measure" of applying *Streng* prospectively.[217]

Argument IV

Streng held that MCL 224.21(3) governs procedure for highway-defect claims against county road commissions. MCL 224.21(3) requires that plaintiffs give notice to the county clerk within 60 days of the accident. That didn't happen here. So Pearce's claim is barred because it failed to comply with MCL 224.21(3)'s notice provision.

[215] See *McNeel*, 289 Mich App at 96-97.
[216] *Trentadue*, 479 Mich at 401.
[217] See *Devillers,* 473 Mich at 586.

A. Pearce failed to comply with MCL 224.21(3)'s notice requirements. So her claim is barred by governmental immunity and is subject to dismissal.

For all the reasons stated above, *Streng* was correctly decided and it applies retroactively to Pearce's case. *Streng* held that highway-defect claims against county road commissions are subject to the notice requirement contained in MCL 224.21(3). In turn, MCL 224.21(3) requires that, before they can sue a county road commission, highway-defect plaintiffs like Pearce must service written notice of their intent to sue on the county clerk and chair of the board of county road commissioners within 60 days of the accident. Here, although she served the road commission chair, Pearce failed to give the Eaton County clerk notice within 60 days of the accident. So, as the Court of Appeals held, Pearce's claim is barred by governmental immunity and subject to dismissal.[218] That should end this analysis. But, in addition to the issues identified in this Court's order, Pearce raises a variety of additional arguments which are all meritless.

B. Even if the Road Commission knew about the alleged defect before the 60-day notice period expired, that doesn't excuse Pearce's failure to serve the Eaton County Clerk.

In her brief, Pearce repeatedly asserts that her claim shouldn't be dismissed because "the ROAD COMMISSION had *actual knowledge* of the defect" that allegedly caused her injuries.[219] That is, Pearce contends that she shouldn't be penalized for failing to comply with MCL 224.21(3) because 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."[220]

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[218] *McLean v City of Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013) (failure to provide adequate notice under the highway defect provision of the GTLA is fatal to a plaintiff's claim against a governmental agency); and *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 200 – 201, 213-214 (same).
[219] Pearce's Supreme Court Brief at 20.
[220] Pearce's Supreme Court Brief at 2-3.

Leaving aside that the Road Commission's knowledge of the alleged defect has nothing to do with whether the Eaton County Clerk received the notice required by MCL 224.21(3), this argument is nothing more than an attempt to resurrect the "actual prejudice" requirement from *Brown* and *Hobbs*. But, as noted above, this Court overruled those opinions in *Rowland*.[221] Further, *Rowland* held that, where a highway-defect plaintiff fails to satisfy a statutory notice provision, when dismissal is mandatory "*even if there is no prejudice.*"[222] Accordingly, this argument lacks merit and must be rejected.

C. Neither the GTLA nor the Highway Code distinguish between notice and service for purposes of complying with MCL 224.21(3).

In her brief, Pearce tries to argue that she didn't violate MCL 224.21(3) by splitting hairs between notice and service. Specifically, she claims that the Road Commission "did not claim that the *notice* was not sufficient under…the Highway Code" but rather, "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."[223] She also downplays her failure to serve the Eaton County Clerk in violation of MCL 224.21(3) as a "technical defect in service."[224]

This argument has no basis in Michigan law. It's well-established that, where a claimant fails to properly serve a statutorily-compliant notice, his or her claims are barred by governmental immunity and must be dismissed.[225] And Michigan law does not differentiate (or

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[221] *Rowland*, 477 Mich App at 200, 213-214; *McCahan v Brennan*, 492 Mich 730, 746 – 747; 822 NW2d 747 (2012) (holding that a court may not "engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements" mandated by our state legislature).
[222] *Rowland*, 477 Mich at 219.
[223] Pearce's Supreme Court Brief at 6.
[224] Pearce's Supreme Court Brief at 20.
[225] *Rowland*, 477 Mich at 219 (a notice is defective if it isn't served in compliance with the statutory requirements); *McLean v City of Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013).

prioritize) amongst the many ways that a notice can be defective. Indeed, this Court has specifically held that failure to serve an appropriate party with a pre-suit notice makes the notice defective.[226]

In *Braun v Wayne County*, the plaintiff and her husband sued Wayne County for injuries allegedly sustained because of a defect—and uncovered catch basin—in a county road. The defendant moved to dismiss "on the ground that plaintiffs had not complied with the requirements of 1 Comp Laws 1929 § 3996…by serving a notice in writing upon the county clerk or deputy county clerk within 60 days of the accident."[227] After the trial court dismissed their claims, the plaintiffs appealed, arguing that they had they had effectively complied with the Highway Code by initially presenting her claim to the road commission, whose clerk was, by law at that time, the Wayne County Clerk.[228] This Court disagreed:

> The statutory requirement that notice be served upon the county clerk is not satisfied when such notice is served upon the County Board of Road Commissioners, even though the county clerk is its clerk…. This statutory requirement is mandatory, and the notice should have been served upon the county clerk or deputy county clerk.[229]

Braun disposes of Pearce's notice/service distinction. Here, just like there, Pearce failed to serve the county clerk with a copy of her pre-suit notice. And, just like in *Braun*, that failure to comply with a mandatory requirement of the Highway Code's notice provision renders the notice defective. So dismissal is warranted.

D. The Road Commission isn't judicially estopped from arguing that *Streng* was correctly decided and controls this action.

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[226] *Braun v Wayne County*, 303 Mich 454, 459-460; 6 NW2d 744 (1942).
[227] *Id.* at 456-457.
[228] *Id.* at 459.
[229] *Braun* at 459 – 460.

Pearce also tries to score points by pointing out that the Road Commission's position in this appeal—that *Streng* was correctly decided and applies retroactively—is inconsistent with its position in its earlier appeal.[230] This is irrelevant for two reasons.

First, regardless who argued what in the Road Commission's first appeal, the plain language of MCL 224.21 and MCL 691.1402 speaks for itself and "application of the notice requirements of MCL 224.21(3) to litigation involving county road commissions has been the law of the land since the GTLA was amended in 1970.[231]

Second, Pearce's inconsistency argument—an implicit attempt to raise the judicial estoppel doctrine—lacks merit. Michigan has adopted the "prior success" model of judicial estoppel.[232] Under the prior success model, "[a] party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding."[233] "The mere assertion of inconsistent positions is not sufficient to invoke estoppel; rather, there must be some indication that the Court in the earlier proceeding accepted that party's position as true."[234] In its first appeal, the Road Commission argued that *Streng* didn't control this case. But it didn't do so successfully—the trial court denied its motion, the Court of Appeals granted Pearce's motion to affirm, and this Court denied the Road Commission's application. So the Road Commission isn't judicially estopped from reevaluating

[230] Pearce's Supreme Court Brief at 11-12.
[231] (Pearce's Brief on Appeal, pp. 8 and 11, attached as Exhibit M to Defendant's Motion for Summary Disposition, filed 3/10/2016).
[232] *Paschke v Retool Industries*, 445 Mich 502, 510; 519 NW2d 441 (1984).
[233] *Paschke* at 509.
[234] *Paschke* at 510.

the issue and asserting that the plain language of MCL 224.21(3) and MCL 691.1402(1) unequivocally demonstrate that *Streng* was correctly decided (and applies retroactively).[235]

E. *Streng* correctly interpreted and applied the language of MCL 224.21(3) and MCL 691.1402(1).

In her brief, Pearce argues that "[i]t is important to keep in mind that *Streng* was not so much a situation of statutory *construction* as it was a situation of statutory *application*."[236] As a threshold matter, it's not clear why this distinction matters or what authority it's based on. Indeed, Pearce's failure to explain or support this statement means she's abandoned the issue.[237] Regardless, as the Court of Appeals repeatedly made clear in its opinion, *Streng* involved both statutory interpretation—i.e., a "close reading of the language" of MCL 224.21(3) and MCL 691.1402(1)—and statutory construction—i.e., application of the general/specific canon and the *in pari materia* doctrine.

Conclusion & Relief Requested

For the reasons stated above, the answers to the questions that this Court asked the parties to brief are: (1) *Streng* was correctly decided; (2) *Pohutski's* threshold question isn't satisfied because *Streng* didn't clearly create a new rule of law; and (3) even if *Streng* created a new rule of law, prospective application isn't warranted under *Pohutski's* three-factor test. It follows that

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[235] Indeed, if anyone should be judicially estopped from their current position, it's Pearce. In the Road Commission's prior appeal, the Court of Appeals granted Pearce's motion for summary affirmance based on her arguments the *Streng* was directly on point and had precedential effect. Yet, despite having successfully asserted that *Streng* and MCL 224.21 govern this case, Pearce has now taken the diametrically opposed position.

[236] Pearce's Supreme Court Brief at 13.

[237] *People v McGraw*, 484 Mich 120, 131 n 36, 771 NW2d 655 (2009) ("Failure to brief an issue on appeal constitutes abandonment."); *Schellenberg v Rochester Michigan Lodge No 2225, of Benev and Protective Order of Elks of USA*, 228 Mich App 20, 49; 577 NW2d 163 (1998) ("Where a party fails to cite any supporting legal authority for its position, the issue is effectively abandoned."); *Berger v Berger*, 277 Mich App 700, 712; 747 NW2d 336 (2008) ("A party abandons a claim when it fails to make a meaningful argument in support of its position.").

Streng should be applied retrospectively under well-established principles of Michigan law. Here, the Court of Appeals reached the right result for the right reasons. So this Court should affirm.

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/s/ Jonathan B. Koch

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