

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.

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

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

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DATED: August 28, 2020

/s/ Jonathan B. Koch

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APPENDIX 1

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

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

File No. 16-29-NI

Plaintiff,

HON. JOHN D. MAURER (P41845)

-vs-

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

Defendants.

PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE FOREGOING
INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE
ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD
HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED ON
THE PLEADINGS ON 5-18-16

BY: U.S. MAIL FAX _____
 HAND DELIVERED OVERNIGHT COURIER
 FEDERAL EXPRESS OTHER _____

SIGNATURE: Ann M. Morley

COLLISON & COLLISON
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FIRST AMENDED COMPLAINT

NOW COMES the Plaintiff, LYNN PEARCE, Personal Representative of the Estate of BRENDON PEARCE, Deceased, by and through her attorneys, COLLISON & COLLISON, and for her causes of action against the Defendants, The EATON COUNTY ROAD COMMISSION, LAWRENCE BENTON, Personal Representative of the Estate of MELISSA SUE MUSSER, Deceased and PATRICIA JANE MUSSER respectfully shows unto this Honorable Court as follows:

1. That Plaintiff, LYNN PEARCE, Personal Representative of the Estate of BRENDON PEARCE, Deceased, is a resident of the Village of Vermontville, County of Eaton, State of Michigan.
2. That Defendant, PATRICIA JANE MUSSER and Decedent, MELISSA SUE MUSSER, were at all times relevant hereto residents at 423 Elm Street, Village of Vermontville, County of Eaton, State of Michigan and whose Estate is pending in Eaton County Probate Court. The Personal Representative of the Estate of Melissa Sue Musser, is Lawrence J. Benton of 30700 Telegraph Road, Bingham Farms, Michigan.
3. That at all times hereinafter mentioned, The EATON COUNTY ROAD COMMISSION, was and still is established within Eaton County, Michigan and conducting business therein, with its corporate offices located at 1112 Reynolds Road, Charlotte, Michigan 48813.
4. That all the acts, transactions and occurrences arose in the County of Eaton, State of Michigan.
5. That the amount in controversy in this litigation exceeds the sum of Twenty-Five Thousand (\$25,000.00) Dollars, exclusive of costs, interest and attorney fees.

COUNT I

**NEGLIGENCE OF MELISSA SUE MUSSER AND
OWNER'S LIABILITY OF PATRICIA JANE MUSSER**

6. That Plaintiff hereby incorporates Paragraphs 1-5 of this Complaint, by reference thereto, as if fully reiterated word for word and paragraph by paragraph.
7. That on or about March 8, 2015, at approximately 6:00 p.m., Plaintiff's Decedent was a passenger in a certain motor vehicle bearing 2015 Michigan License Plate Number AFZ868, which motor vehicle was being driven in a careless, reckless, negligent and/or grossly negligent manner in a southbound direction along and upon North Mason Road, approximately 500 feet south of North Kinsel Road, in the County of Eaton, State of Michigan.
8. That on or about March 8, 2015, PATRICIA JANE MUSSER was the owner of the Oldsmobile motor vehicle being operated by Defendant, MELISSA SUE MUSSER, with Plaintiff's Decedent as a passenger.

9. That on or about March 8, 2015 at approximately 6:00 p.m., it was then and there the duty of Defendant, MELISSA SUE MUSSER, to drive said motor vehicle with due care and caution in accordance with the Statutes of the State of Michigan and the rules of the common law applicable to the operation of motor vehicles, but that notwithstanding said duties, Defendant did breach and violate same in one or more of the following particulars:

- (a) Driving said motor vehicle on the highway at a speed greater than would permit her to bring it to a stop within the assured clear distance ahead, contrary to the provisions of MCL 257.627;
- (b) Driving at an excessive and unlawful speed;
- (c) Failing to drive said motor vehicle on the highway at a careful and prudent speed, not greater than was reasonable and proper, having due regard to the traffic, surface and width of the highway and other conditions then and there existing as require by MCL 257.627;
- (d) Failing to keep proper or any lookout for roadway conditions which Defendant, MELISSA SUE MUSSER, knew or should have known would endanger the life and limb of other persons in the motor vehicle she was operating on North Mason Road;
- (e) Driving to the right of the fog line and failing to drive said motor vehicle upon the roadway as required by MCL 257.634;
- (f) Turning such motor vehicle from a direct line without first ascertaining that such movement could be made in safety and giving a signal as required by MCL 257.648;
- (g) In otherwise negligently failing to exert that degree of care, caution, diligence and prudence as would be demonstrated by a reasonably prudent person under the same or similar circumstances and in otherwise causing the fatal injuries and damages to Plaintiff's Decedent as hereinafter alleged;
- (h) In other manners as yet unknown to the Plaintiff but which will become known during the course of discovery;
- (i) In operating a motor vehicle while under the influence of intoxicating liquors and/or other medications and/or substances;
- (j) In operating a motor vehicle in a negligent, careless and reckless manner and without due care or circumspection and in violation of MCL 257.626.

10. That Defendant, PATRICIA JANE MUSSER, is vicariously liable for the negligent acts and/or omissions of the Defendant, MELISSA SUE MUSSER, by virtue of the terms of MCL 257.401.

11. That as a direct and proximate result of the negligent acts and/or omissions on the part of the Defendants herein, Plaintiff's Decedent sustained fatal injuries.

WHEREFORE, Plaintiff, LYNN PEARCE, Personal Representative of the Estate of Brendon Pearce, Deceased, prays that this Honorable Court award her damages against the Defendants, The Estate of MELISSA SUE MUSSER and PATRICIA JANE MUSSER, in whatever amount in excess of Twenty Five Thousand and 00/100 (\$25,000.00) Dollars to which she is found to be entitled to received, together with costs, interest and attorney fees.

COUNT II

BREACH OF STATUTORY DUTY BY THE EATON COUNTY ROAD COMMISSION

12. That Plaintiff hereby incorporates Paragraphs 1-11 of this Complaint, by reference thereto, as if fully reiterated word for word and paragraph by paragraph.

13. That at all times hereinafter mentioned and prior and subsequent thereto, Defendant, The EATON COUNTY ROAD COMMISSION, was and still is an entity duly organized and existing under the laws of the State of Michigan, MCL 224.1 *et seq.*, and carrying out governmental functions, in the county of Eaton, State of Michigan with jurisdiction over the traveled portion of the roadway known as North mason Road approximately 500 feet south of North Kinsel Road, in the County of Eaton, State of Michigan.

14. That it was then and there the duty of defendant, Eaton County Road Commission, to maintain the traveled portion of its highways, roads, intersections in a manner which is reasonably safe and fit for travel and to keep the same from being in a state of disrepair, including but not limited to dangerous potholes, improper crowning and improper drainage which caused accumulations of water on the roadway during rain, snow melt, ice melt and related runoffs, as required by the laws of the State of Michigan, more particularly, the governmental immunity exception contained within MCLS 691.1402, to wit:

MCLS § 691.1402 Sec. 2. (1) Each **governmental** agency having jurisdiction over a **highway** shall maintain the **highway** in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a **governmental** agency to keep a **highway** under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the **governmental** agency.

The liability, procedure, and remedy 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. Except as provided in section 2a, the duty of a **governmental** agency to repair and maintain **highways**, and the liability for that duty, extends only to the improved portion of the **highway** designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the **highway** designed for vehicular travel. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is

payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer.

15. That Defendant, The EATON COUNTY ROAD COMMISSION knew or should have known of the dangerous and defective condition of south bound North Mason Road approximately 500 feet south of Kinsel Road, as the condition was ongoing and reported by local residents.

16. That Defendant, The EATON COUNTY ROAD COMMISSION, by its agents and employees, failed to exercise reasonable and ordinary care and caution in the maintenance of the traveled portion of North Kinsel Road in the following manner, to-wit: failed to keep the highway, road and shoulder in a state of reasonable repair; failed to keep said highway, road free of pot holes and depressions which would cause dangerous accumulations of water and/or ice; failed to keep said highway, road free from obstruction, failed to provide a suitable means of traffic control or otherwise to provided sufficient warning to motorists lawfully upon said roads and as a direct and proximate result of the negligence of Defendant, The EATON COUNTY ROAD COMMISSION, the above described Defendant, MELISSA SUE MUSSER, was caused to lose control of the motor vehicle which she was operating, left the roadway, struck a tree and caused Plaintiff Decedent fatal injuries as hereinafter set forth in this Complaint.

17. That Defendant, The EATON COUNTY ROAD COMMISSION, by its agents and employees, was then and there guilty of one or more of the following omissions in violation of its statutory duties to Plaintiff's decedent:

(a) Failing to keep and maintain said highway, road, intersection free from obstruction, specifically, potholes and a lack of drainage which caused the accumulation of water and/or ice on the traveled portion of the roadway when Defendants, by its agents and employees, knew or in the exercise of reasonable care and diligence, should have known that said water and ice were on said highway, road and was not visible to operators of motor vehicles thereon;

(b) Failing to provide suitable means of traffic control when Defendant, by its agents and employees, knew or should have known of the dangerous condition of the intersection;

(c) Failing to maintain said highway, road, properly so as not to increase the hazard of the traveling public using said road and allowing said road to become a menace and a public nuisance;

(d) Failing to provide sufficient warning to motorists lawfully using said roadways and said intersection of the dangerous and unsafe condition.

18. As a direct and proximate result of the wrongful acts and misconduct of the Defendant, The EATON COUNTY ROAD COMMISSION, Plaintiff's Decedent, BRENDON PEARCE, suffered fatal injuries as indicated herein

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19. That Plaintiff, through her attorneys, had provided the required Notice to Defendant, The EATON COUNTY ROAD COMMISSION, as required by MCL 691.1404, et seq.

20. That there is no governmental immunity pursuant to MCL 691.1401, et seq., including but not limited to MCL 691.1402 and 691.1406.

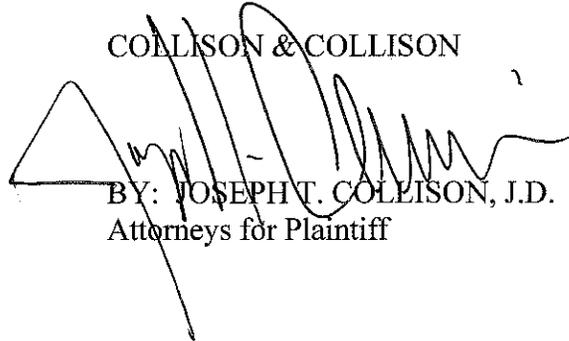
WHEREFORE, Plaintiff, LYNN PEARCE, Personal Representative of the Estate of BRENDON PEARCE, Deceased, respectfully prays for judgment against Defendant, The EATON COUNTY ROAD COMMISSION, a municipal corporation, for whatever amount in excess of Twenty Five Thousand and 00/100 (\$25,000.00) Dollars said Plaintiff is found to be entitled, plus interest, costs and attorney fees.

DEMAND FOR TRIAL BY JURY

NOW COMES the above-entitled Plaintiff, LYNN PEARCE, Personal Representative of the Estate of BRENDON PEARCE, Deceased, by and through her Attorneys, COLLISON & COLLISON, and hereby makes demand for Trial by Jury of all issues involved in this cause unless expressly waived.

Dated this 18th day of May, A.D., 2016.

COLLISON & COLLISON



BY: JOSEPH T. COLLISON, J.D.
Attorneys for Plaintiff

BUSINESS ADDRESS:
5811 Colony Drive, North
P.O. Box 6010
Saginaw, Michigan 48608-6010
(989) 799-3033

APPENDIX 2

NOTICE TO EATON COUNTY OF FATAL INJURIES DUE TO DEFECTIVE HIGHWAY

TO: BENJAMIN S. LYONS, Chairman
Eaton County Board of Road Commission
1112 Reynolds Road
Charlotte, Michigan 48813

PLEASE TAKE NOTICE that pursuant to MCLA 691.1404; MSA 3.996(104), the undersigned, LYNN M. PEARCE, 2948 N. Ionia Road, Vermontville, Michigan, hereby gives notice on behalf of the Estate of Brendon Lee Pearce, Deceased, to the Eaton County Road Commission, of fatal injuries sustained by decedent arising by virtue of a single vehicle accident occurring on March 8, 2015 due to the failure of the Eaton County Board of Road Commissioners to properly and adequately maintain in a reasonably safe and fit condition for public travel a certain roadway known as North Mason Road, near West Kinsel Highway, Kalamo Township, Eaton County, Michigan

DATE OF OCCURRENCE: March 8, 2015

TIME OF OCCURRENCE: Approximately 5:55 p.m.

PLACE OF OCCURRENCE: North Mason Road, approximately 500 feet South of the intersection with West Kinsel Highway, Kalamo Township, Eaton County, Michigan.

INJURIES SUSTAINED: As to Brendon Lee Pearce, severe injuries resulting in death.

NATURE OF DEFECT: Failure to maintain said roadway in a reasonably safe and fit condition for public travel; failure to properly sign and warn motorists of said roadway's water pooling condition; failure to take appropriate and adequate steps to eliminate the water pooling condition of its road; County should not have constructed or caused to be constructed such a road, which by its design, contour, inadequate drainage and unreasonable speed limits, made it unreasonably dangerous. The undersigned reserves the right to assert additional defects as same may become known.

WITNESSES: All witnesses are not known at this time, however, the police report lists the driver of the motor vehicle as Melissa Sue Musser, Deceased, and her passengers as follows:

- (1) Ryan Keith Harston, 109 N. State St., Nashville, Michigan 49073;
- (2) Joseph Lee Grinage, 704 Durkee St., Nashville, Michigan 49073;
- (3) John Eric Musser, 123 Sherman St., Vermontville, Michigan 49096;
- (4) Andrew Lee Musser, 9695 Brumm Rd., Nashville, Michigan 49073;
- (5) Brendon Lee Pearce, 2948 N. Ionia Rd., Vermontville, Michigan 49096.

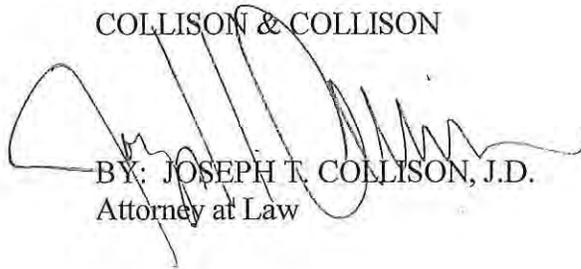
Also, Patricia Jane Musser, 423 Elm Street, Vermontville, Michigan 49096 is the owner of the vehicle and Eaton County Sheriff Deputy R. Buxton, Badge 19068, are known witnesses.

* * * * *

The Eaton County Road Commission is hereby placed on notice that the undersigned intends to hold it responsible for the fatal injury and damages sustained. If any further information is desired or deemed necessary, it may contact the attorneys who are: COLLISON & COLLISON, Attorneys at Law, 5811 Colony Drive, North, P.O. Box 6010, Saginaw, Michigan 48608-6010, telephone: (989) 799-3033.

Dated this 5th day of May, A.D., 2015.

COLLISON & COLLISON



BY: JOSEPH T. COLLISON, J.D.
Attorney at Law

BUSINESS ADDRESS:
5811 Colony Drive, North
P.O. Box 6010
Saginaw, Michigan 48608-6010
(989) 799-3033

APPENDIX 3

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

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

Plaintiff,

CASE NO. 16-29-NI

v

HON. JEFFREY L. SAUTER

THE EATON COUNTY ROAD COMMISSION;
LAWRENCE BENTON, Personal Representative of
the ESTATE OF MELISSA SUE MUSSER,
Deceased; and PATRICIA JANE MUSSER,

Defendants.

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D. Adam Tountas (P68579)
Charles J. Pike (P77929)
Rachael M. Roseman (P78917)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendant Eaton County Road
Commission
100 Monroe Center NW
Grand Rapids, MI 49503-2802
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**DEFENDANT EATON COUNTY ROAD COMMISSION'S
MOTION FOR SUMMARY DISPOSITION**

NOW COMES Defendant Eaton County Road Commission, by and through its attorneys, Smith Haughey Rice & Roegge, and hereby moves to dismiss Plaintiff's claims against it pursuant to MCR 2.116(C)(7). The authority supporting this motion is presented in the accompanying Brief.

DATED: March 28, 2016



D. Adam Tountas (P68579)
Charles J. Pike (P77929)
Rachael M. Roseman (P78917)
SMITH HAUGHEY RICE & ROEGGE
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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

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

Plaintiff,

CASE NO. 16-29-NI

v

HON. JEFFREY L. SAUTER

THE EATON COUNTY ROAD COMMISSION;
LAWRENCE BENTON, Personal Representative of
the ESTATE OF MELISSA SUE MUSSER,
Deceased; and PATRICIA JANE MUSSER,

Defendants.

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**DEFENDANT EATON COUNTY ROAD COMMISSION'S BRIEF IN SUPPORT OF ITS
MOTION FOR SUMMARY DISPOSITION**

I. INTRODUCTION

This case arises out of a motor vehicle accident in which Brendan Pearce suffered fatal injuries while riding as a passenger in a vehicle driven by Defendant Melissa Musser. The Plaintiff, acting as personal representative of Mr. Pearce, claims that the crash was caused by Ms. Musser's negligence and certain road conditions. (See generally **Exhibit 1**, Complaint). As a result, the Plaintiff is suing, among other parties, the Eaton County Road Commission ("Road Commission"). The claim against the Road

Commission is being made under the so-called “highway exception” to the Governmental Tort Liability Act (“GTLA”).

Previously, the Road Commission moved to dismiss a portion of the Plaintiff’s claims as failing to state valid theories of recovery. However, upon conferring with Plaintiff’s counsel, the Road Commission withdrew that Motion so as to allow Plaintiff to amend her Complaint. Plaintiff has yet to file her amended Complaint. Regardless of any amendments Plaintiff could possibly make to the Complaint, however, she has failed to comply with the notice of injury provision found under MCL 691.1404. This is because MCL 691.1404 sets forth, as a condition precedent to any recovery pursuant to the highway exception to governmental immunity, the requirement that, “[w]ithin 120 days from the time the injury occurred,” the plaintiff serve a notice on the governmental agency of the occurrence of the injury and the defect. The statute mandates that “the notice shall specify the exact location and nature of the defect, the injuries sustained, and the names and witnesses known at the time by the plaintiff.”

Notwithstanding the above, the Plaintiff’s notice to the Road Commission entirely failed to specify “the exact location and nature of the defect.” For these reasons, as detailed below, the Road Commission respectfully requests that this Court dismiss all of Plaintiff’s claims against the Road Commission pursuant to MCR 2.116(C)(7).

II. STATEMENT OF FACTS

On March 8, 2015, Brendan Pearce was one among a number of passengers in a vehicle driven by Defendant Melissa Musser (“Ms. Musser”). Ms. Musser lost control of the vehicle, which left the roadway and struck a tree. (**Exhibit 1**, Complaint, ¶ 16). Mr. Pearce suffered fatal injuries in the crash.

On May 5, 2015, Plaintiff Lynn Pearce, acting on behalf of the Estate of Brendan Pearce, mailed a document titled “Notice to Eaton County of Fatal Injuries Due to Defective Highway.” (**Exhibit 2**, May 5, 2015 Notice). With respect to the crash, that notice provided the following regarding the “place of occurrence”:

PLACE OF OCCURRENCE: North Mason Road, approximately 500 feet South of the intersection with West Kinsel Highway, Kalamo Township, Eaton County, Michigan.

(Exhibit 2, May 5, 2015 Notice).

However, the notice did not provide *any* information regarding the location of any alleged *defect*.

Plaintiff then proceeded to file her Complaint against the Eaton County Road Commission, among other parties, on January 4, 2016. Although she did not plead it discretely, the Plaintiff was seeking relief under the GTLA's highway exception to governmental immunity. Notwithstanding, her Complaint also included allegations of negligence and a claim under the GTLA's public-building exception.

On February 10, 2016, the Road Commission filed a Motion for Partial Summary Disposition, stating that the broad protections of governmental immunity insulate the Road Commission from any liability for negligence, and further still, that the facts as pled did not implicate the public-building exception of the GTLA. However, upon conferring with Plaintiff's counsel, the Road Commission agreed to adjourn the Motion, and to allow Plaintiff to amend her Complaint to remove any references to negligence on behalf of the Road Commission and proceed solely with her claims brought under the highway exception to governmental immunity.

Plaintiff has yet to file her amended Complaint. Regardless of any amendments the Plaintiff could possibly make to the Complaint, however, her failure to comply with the notice of injury provision set forth in MCL 691.1404 requires that this Court dismiss Plaintiff's claims in their entirety against the Road Commission.

III. LAW AND ARGUMENT

A. Standard of Review.

MCR 2.116(C)(7) allows summary disposition where a claim is barred because of immunity granted by law. A motion brought under that subrule may be supported by documentary evidence, but does not need to be where the issue can be resolved by the pleadings alone. *Maiden v Rozwood*, 461

Mich 109, 119; 597 NW2d 817 (1999). The contents of the complaint are accepted as true unless contradicted by documentary evidence submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, note 6; 526 NW2d 879 (1994). Additionally, if the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the Court to decide as a matter of law. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

B. Plaintiff Failed to Provide Any Information Regarding The Location Of The Alleged Defect Within Her Notice To The Road Commission. As Such, Plaintiff's Claims Under the Highway Exception to Governmental Immunity Should Be Dismissed.

Pursuant to the GTLA, MCL 691.1401 *et seq.*, governmental agencies are generally immune from tort liability. MCL 691.1407(1); *Rowland v Washtenaw Co Rd Comm*, 477 Mich. 197, 202; 731 NW2d 41 (2007). This grant of immunity is subject to six statutory exceptions, *Rowland*, 477 Mich at 203 n3, including the public highway exception, MCL 691.1402. Under the highway exception, a governmental agency can be liable for injuries arising from the agency's failure to maintain a highway in reasonable repair. MCL 691.1402(1). However, the exception is "narrowly drawn" and there must be strict compliance with the conditions and restrictions of the statute. *Scheurman v Dep't of Transp*, 434 Mich 619, 630; 456 NW2d 66 (1990). One such condition is the notice of injury provision found under MCL 691.1404. Under MCL 691.1404, as a condition precedent to any recovery pursuant to the highway exception, an injured party shall:

(1) As 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, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

MCL 691.1404(1) (emphasis added).

In this case, the Plaintiff's notice did not provide, or even purport to provide, *any* information regarding the location of the alleged *defect*. Instead, the notice only sets forth the approximate location of the "occurrence" – "North Mason Road, approximately 500 feet South of the intersection with West Kinsel Highway, Kalamo Township, Eaton County, Michigan" – which is consistent with the location of the *crash*, as indicated by both the UD-10 traffic crash report, (**Exhibit 3**, UD-10 Crash Report), and the notices of injury provided by other passengers in the crash.

For instance, Ryan Harston, another passenger in the crash, provided the following information in his notice of injury to the Road Commission, properly distinguishing between the location of "defective area" he alleged and the location of the crash itself:

LOCATION OF ACCIDENT AND DEFECT INCLUDING MEASUREMENTS:

N. Mason Road at this location is two lanes, one travelling north and the other travelling south. The speed limit in the area is 55 mph. The north and south lanes measure 10 feet wide from the centerline to the edge of the road.

The UD-10 Crash Report from the Eaton County Sheriff's Department indicates that the accident took place on N. Mason Road, 500 feet south of Kinsel Highway. Measuring from the Kinsel Highway and Mason Road street sign, there is 580 feet south to the point of impact at the tree along the west side of N. Mason Road.

Measuring from the Kinsel Highway/Mason Road street sign, south bound to the defective area at issue, along the southbound lane of North Mason Road, is 270 feet. The distance to the point of impact is 310 feet south.

The defective and hazardous area is marked with potholes and filler along the southbound lane of N. Mason Road and measures approximately 30 feet long. The defective area along southbound N. Mason Road is located between two homes which are positioned on the west side of the street; the addresses on either side of the defective pavement are 1969 N. Mason Road and 1915 N. Mason Road.

The latitude and longitude of the defective area along N. Mason Road is:
 Latitude: 42 degrees, 35 minutes, 44 seconds N
 Longitude: -85 degrees, 3 minutes, 15 seconds W

(**Exhibit 4**, Notice by Ryan Harston).

The Michigan Supreme Court held in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), that MCL 691.1404 is "straightforward, clear, unambiguous, and not constitutionally suspect and, accordingly, it must be enforced as written, no matter how much prejudice is

actually suffered by the defendant.” The statute explicitly states that Plaintiff must provide the “exact location” of the “defect” as “a condition to any recovery for injuries sustained by reason of any defective highway.” Here, unlike the notice provided by Ryan Harston, Plaintiff’s notice of injury in this case is completely silent as to the location of the alleged defect. As such, since Plaintiff’s notice of injury failed to provide *any* information regarding the location of the alleged defect, as explicitly required by the statute, plaintiff is barred from recovery.

C. **Even If Plaintiff’s Statement Regarding The “Place of Occurrence” Within The Notice of Injury Were Intended As Notice of The “Exact Location” of “The Defect”, The Notice Does Not Comply With The Notice Requirement Mandated By MCL 691.1404. For This Additional Reason, Plaintiff’s Claims Under the Highway Exception to Governmental Immunity Should Be Dismissed.**

MCL 691.1404 does not define the term “exact” as used within the statute’s requirement that notice be provided of the “exact location” of “the defect.” However, Michigan courts have addressed, in particular, the level of accuracy and specificity required by a notice in the context of a highway defect claim. In this regard, the Court of Appeals clarified in *Montford v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2011 (Docket No. 297074) (attached as **Exhibit 5**), “*the inclusion of the term “exact” before “location” negates the possibility that the Legislature intended erroneous, or even approximate, locations to suffice.*” (Emphasis added).

Indeed, Michigan courts have uniformly held that even slight errors in identifying the “exact location” of an alleged defect result in failure to comply with the notice statute. In *Smith v City of Warren*, 11 Mich App 449, 452–453; 161 NW2d 412 (1968), the plaintiff notified the governmental defendant that she had been injured as the result of an alleged defect in the roadway at “Thirteen Mile and Hoover, near the address of 11480 Thirteen Mile Road.” The *Smith* Court held that the plaintiff’s notice was not sufficient because it did not mention that the defect in question was actually on the south side of Thirteen Mile Road and approximately 40 yards away from the stated address. *Id.*

Similarly, in *Jakupovic v City of Hamtramck*, unpublished decision per curiam of the Court of Appeals, issued Dec. 7, 2010 (Docket No. 293715) (attached as **Exhibit 6**), *rev’d*, 489 Mich 939, 798 NW2d 12 (2011), the plaintiff mistakenly provided the address of the property *immediately next* to the

correct one in her § 1404 notice. In holding that notice was sufficient, the Court of Appeals reasoned that finding the notice defective would penalize her for a technical defect. *Id* (citing *Berribeau v City of Detroit*, 147 Mich 119, 125 (1907)). However, the Supreme Court reversed the decision of the Court of Appeals, holding that if a plaintiff gives an incorrect address in her notice, she fails to give the “exact location” of the defect as required by MCL 691.1404, which is fatal to her claim. *Jakupovic*, 489 Mich 939; 798 NW2d 12 (2011).

Again, in *Thurman v City of Pontiac*, 295 Mich App 381, 819 NW2d 90 (2012), plaintiff's notice stated that the alleged defect in the City's sidewalk was located at “35 Huron, Pontiac, Michigan.” Since plaintiff did not specify whether the alleged defect was located at 35 West Huron Street or 35 East Huron Street, the Court of Appeals held that plaintiff's notice to the City did not provide the “exact” location of the defect within the meaning of MCL 691.1404(1). *Id.* at 386-87. The Court thus concluded that the circuit court erred by denying the City's motion for summary disposition, and that the City was entitled to governmental immunity as a matter of law. *Id.*

In this case, Plaintiff's notice provided the following regarding the “place of occurrence”:

PLACE OF OCCURRENCE: North Mason Road, approximately 500 feet South of the intersection with West Kinsel Highway, Kalamo Township, Eaton County, Michigan.

(**Exhibit 2**, May 5, 2015 Notice).

On its face, the notice's description of the “approximate” place of occurrence fails to provide the “exact” location of the defect that MCL 691.1404 explicitly requires. Additionally, as discussed above, the location described is *not* the location of the “defect” plaintiff alleges, but the location where the crash took place. (See **Exhibit 3**, UD-10 Crash Report; **Exhibit 4**, Notice by Ryan Harston). Rather, as Ryan Harston stated in his notice, the location described as the “place of occurrence” in Plaintiff's Notice, was the “point of impact” at the tree that the vehicle crash into. (**Exhibit 4**, Notice by Ryan Harston). The location of the alleged “defect” is described in Harston's notice as a separate location, identified through GPS coordinates. (**Exhibit 4**, Notice by Ryan Harston).

For these reasons, even if the described “place of occurrence” were intended by the Plaintiff to provide the requisite notice, the described location was both erroneous and approximate – thus failing to meet the requirements set forth in the statute. Plaintiff’s Notice of Injury simply does not meet the requirements of MCL 691.1404, namely, that the notice must provide the “exact location” of the “defect.” Plaintiff is not entitled to any recovery under the highway exception to governmental immunity. Thus, defendant respectfully requests that this Court dismiss Plaintiff’s claims in their entirety against the Road Commission as stated in Count II of her Complaint, pursuant to MCR 2.116(C)(7).

IV. CONCLUSION

For all of these reasons, the Road Commission respectfully requests this Honorable Court enter an Order granting summary disposition in its favor; dismissing all claims against the Road Commission; and providing any other relief deemed to be equitable and just.

DATED: March 28, 2016

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 Charles J. Pike (P77929)
 Rachael M. Roseman (P78917)
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APPENDIX 4

RECEIVED by MSC 8/28/2020 11:26:03 AM

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

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

Plaintiff,

File No. 16-29-NI

HON. JEFFREY SAUTER
(P29706)

-vs-

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

Defendants.

PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE FOREGOING
INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE
ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD
HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED ON
THE PLEADINGS ON 4-20-16

BY:
____ U.S. MAIL FAX _____
____ HAND DELIVERED OVERNIGHT COURIER
____ FEDERAL EXPRESS OTHER _____

SIGNATURE: *Ann M. Maney*

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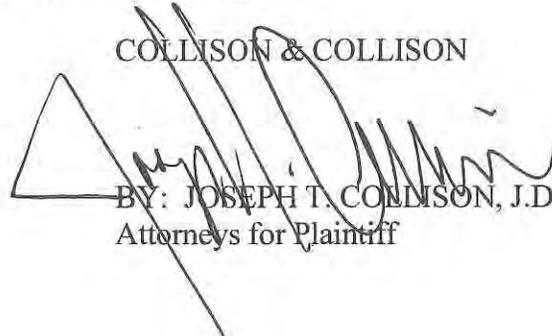
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**PLAINTIFF'S RESPONSE TO EATON COUNTY ROAD COMMISSION'S
MOTION FOR SUMMRY DISPOSITION**

NOW COMES the above named Plaintiff, LYNN PEARCE, Personal Representative of the Estate of BRENDON PEARCE, Deceased, by and through her attorneys, COLLISON & COLLISON, in answer to the Motion for Summary Disposition of EATON COUNTY ROAD COMMISSION, requesting that the Court deny such Motion for the reasons set forth within Plaintiff's accompanying brief.

Dated this 20th day of April, A.D., 2016.

COLLISON & COLLISON

A handwritten signature in black ink, appearing to read 'Joseph T. Collison', is written over the printed name and title. The signature is stylized and somewhat illegible.

BY: JOSEPH T. COLLISON, J.D.
Attorneys for Plaintiff

BUSINESS ADDRESS:
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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

LYNN PEARCE, Personal Representative of
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Plaintiff,

-vs-

THE EATON COUNTY ROAD COMMISSION,
LAWRENCE BENTON, Personal Representative of the
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PATRICIA JANE MUSSER,

Defendants.

File No. 16-29-NI

HON. JEFFREY SAUTER
(P29706)

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BY:
 U.S. MAIL FAX
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 FEDERAL EXPRESS OTHER

SIGNATURE: Ann M. Mowry

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**BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO MOTION
FOR SUMMARY DISPOSITION OF EATON COUNTY ROAD COMMISSION**

FACTUAL DEVELOPMENT

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

A vehicle which was owned by PATRICIA JANE MUSSER and which was being operated by MELISSA SUE MUSSER was southbound when the vehicle encountered a large water puddle which caused MELISSA SUE MUSSER to lose control and leave the roadway. The vehicle rolled over and struck a tree. Annexed hereto as Exhibit A is the Eaton County Office of the Sheriff Response to Plaintiff's FOIA Request. The Court will note, at page 14 of the Case Supplemental Report that

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

It was the opinion of Detective Rick Buxton that the pooled water on the road surface caused MELISSA SUE MUSSER to lose control of the vehicle. See Case Supplement Report at page 15.

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

BRENDON PEARCE, age 15, was a passenger in the vehicle. He sustained fatal injuries as the result of the accident. The present litigation involves a Wrongful Death claim by BRENDON's mother, LYNN PEARCE, as Personal Representative for automobile negligence

against MELISSA SUE MUSSER, owner liability against PATRICIA JANE MUSSER and liability under the defective highway exception to governmental immunity. See MCL 691.1402.

Plaintiff's Complaint was filed January 12, 2016 alleging that MELISSA MUSSER was negligent in the operation of the motor vehicle owned by PATRICIA JANE MUSSER and that the EATON COUNTY ROAD COMMISSION had failed to maintain the roadway in reasonable repair. Specifically, Plaintiff alleged in paragraph 15:

"15. That Defendant, EATON COUNTY ROAD COMMISSION, knew or should have known of the dangerous and defective condition of southbound North Mason Road approximately 500 feet south of Kinsel Road, as the condition was ongoing and reported by local residents."

The Road Commissions response was:

"Denied, that the relevant area of North Mason Road was dangerous and defective. Negligence or wrongdoing on the part of the Road Commission is expressly denied for the reason that the allegations regarding same are untrue." (Emphasis supplied)

As the Court can appreciate, the Road Commission, in its Answer, expressly acknowledged that it understood the "relevant area" alleged to have been defective on the date of the accident. In other words, this admission by the Road Commission obviates any argument that it did not have notice of the defect location.

Allegations of fact are admissible as admissions against interest. *Grand Trunk Western R. Co. v. Lovejoy*, 304 Mich. 35 (1942). Given the fact that Defendant has admitted it knew where the defect was located in its Answer, its Motion for Summary Disposition must be denied on this basis alone.

In further support for the proposition that Defendant was properly notified of the defect and its location, the Court should be advised that another occupant of the Musser vehicle, Ryan Harston, also initiated litigation against the Road Commission. See Eaton County Circuit Court

File No: 15-1226-NI. Harston's Complaint was filed October 8, 2015, three months before the present litigation. It is important for this Court to understand that the Harston and Pearce cases arise out of the same accident, involving identical facts.

As a predicate to suit, the injured person (or his estate) is required to provide the governmental agency controlling the defective highway with notice of the occurrence, the injury and the defect within 120 days from the time the accident occurred. See MCL 691.1404. The statutory notice was served by LYNN PEARCE on the EATON COUNTY ROAD COMMISSION on May 5, 2015. The minutes of the regular meeting of the Eaton County Board of Road Commissioners held on May 12, 2015 (one week after the statutory notice was mailed) acknowledges receipt of the notice and the fact that "there was discussion" at that time. See Exhibit C. Similarly, the statutory notice was filed on behalf of Harston on June 29, 2015. Notices were also provided on behalf of the Estate of MELISSA SUE MUSSER, Deceased and John Musser who was also a passenger in the vehicle. In fact, hundreds of pages of documentary evidence and nearly as many photographs were provided to the Road Commission within the statutory notice period by one or more of the parties identified above and remain part of the Road Commission's file. See Exhibit D.

Defendant's Motion, essentially, alleges that PEARCE'S notice was defective in that it was not sufficient to advise the EATON COUNTY ROAD COMMISSION of the nature and location of the defective condition. This is simply not true.

It appears that Defendant's argument simply is that Plaintiff's notice was not specific enough in the opinion of defense counsel to satisfy the statutory requirements. It is interesting to note, however, that the Road Commission does not claim that it did not have knowledge of the location of the defect nor that it did not understand the nature of the defect. Furthermore,

remedial actions were taken to obviate the defective condition almost immediately after the accident, thus suggesting that the Road Commission knew what the problem was, where the problem was and what it needed to do to correct the problem in order to protect the public from further injury long before any “notice” was required under the statute. Exhibit E.

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

The Court can appreciate, at this juncture, that the Road Commission had “exact notice” of the nature and location of the defect and that it was an ongoing problem approximately nine months prior to the fatal accident which forms the basis of this litigation.

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

Most importantly, Defendant was contacted on the day of the accident by Central Dispatch. The Road Commission was advised that there was a “bad accident – needs roads closed”. The call came in at 6:30 p.m. which was approximately 35 minutes after the accident occurred. In response to this notification, the Road Commission set 2 “Type II” barricades at the intersections of Mason and Kinsel as well as Mason and Valley. Most importantly, a “Type I” barricade was placed at the precise location of the pooled water on the southbound lane.¹ See Service Request and photograph marked collectively as Exhibit G.

¹ The “road closed” signs were retrieved by the Road Commission on March 9, 2015. See Exhibit H.

Obviously, the Road Commission had actual knowledge of the fact that water was pooling on North Mason Road for a minimum of nine months prior to the fatal accident which took the life of BRENDON PEARCE. Certainly, the Road Commission had actual knowledge of the nature and location of the defect within the statutory 120 period. In fact, it appears that the Road Commission had actual knowledge of the nature and location of the defect within 35 minutes of the accident occurrence.

Despite the foregoing, the Road Commission now claims that the notice provided by LYNN PEARCE, as Personal Representative of her deceased son was somehow insufficient to place the Road Commission on notice of the nature and extent of the defect. Obviously, this position is untenable.

For the reasons stated below, Defendant's Motion must be denied and Plaintiff must be awarded her costs and attorney fees.

STANDARD OF REVIEW

A movant can demonstrate that it is entitled to governmental immunity by either (1) showing that it has immunity based on the allegations in the pleadings, or (2) by demonstrating that it has immunity using supporting affidavits, deposition testimony, admissions, or other documentary evidence. *Yono v. Dep't of Transp (On Remand)*, 306 Mich.App 671, 679; 858 NW2d 128 (2014), lv gtd 497 Mich. 1040 (2015).

"In reviewing a motion for summary disposition under MCR 2.116(C)(7), a court considers the affidavits, pleadings, and other documentary evidence presented by the parties and accepts the plaintiff's well-pleaded allegations as true, except those contradicted by documentary evidence." *McLean v. Dearborn*, 302 Mich.App 68, 72-73; 836 NW2d 916 (2013).

When a motion is brought under MCR 2.116(C)(7) with supporting documentary evidence, the “challenge is similar to one under MCR 2.116(C)(10),” and “the movant may establish that, given the undisputed facts of the case, he or she is entitled to immunity as a matter of law, notwithstanding the plaintiff’s allegations.” *Yono (On Remand)*, 306 Mich.App at 679.

“[T]he relevant rules applicable to a motion under MCR 2.116(C)(10) apply equally to a factual challenge under MCR 2.116(C)(7).” *Id.* at 677 n 1. If a moving party properly supports its motion with documentary evidence that, “if left unrebutted, would show that there is no genuine issue of material fact that the movant has immunity, [then] the burden shifts to the nonmoving party to present evidence that establishes a question of fact as to whether the movant is entitled to immunity as a matter of law.” *Id.* at 679–680. “[A]ny documentation that is provided to the court ... must be admissible evidence,” *Plunkett v. Dep't of Transp*, 286 Mich.App 168, 180; 779 NW2d 263 (2009), and the documentary evidence is to be considered in a light most favorable to the nonmoving party, *Snead v. John Carlo, Inc*, 294 Mich.App 343, 354; 813 NW2d 294 (2011). “If the trial court determines that there is a question of fact as to whether the movant has immunity, the court must deny the motion.” *Yono (On Remand)*, 306 Mich.App at 680. “A question of fact exists when reasonable minds could differ as to the conclusions to be drawn from the evidence.” *Dextrom v. Wexford Co*, 287 Mich.App 406, 416; 789 NW2d 211 (2010). However, “[i]f no [material] facts are in dispute, or if reasonable minds could not differ regarding the legal effect of the facts, the question whether the claim is barred by governmental immunity is an issue of law.” *Willett v. Charter Twp of Waterford*, 271 Mich.App 38, 45; 718 NW2d 386 (2006) (quotation marks and citation omitted; second alteration in original).

LAW AND AUTHORITY

THE STATUTORY NOTICE REQUIREMENT

MCL 691.1404 provides in relevant part:

“(1) As 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. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the Claimant.***

THE PURPOSE OF THE STATUTORY NOTICE

The notice need not be provided in a particular form. It is sufficient if it is timely and contains the requisite information. *Burise v. City of Pontiac*, 282 Mich.App. 646 (2009).

Notice provisions permit the governmental agency to be apprised of possible litigation against it and to be able to investigate and gather evidence quickly to evaluate the claim. *Blohm v. Emmet County Bd. of County Road Com'rs* 223 Mich.App. 383 , appeal denied 586 (1997).

The principal purpose to be served by requiring notice of injury is to provide governmental agency with the opportunity to investigate the claim while the evidentiary trail is still fresh and to remedy the defect before other persons are injured. *Hussey v. City of Muskegon Heights* 36 Mich.App. 264 (1971) . Also see *Lawson v. City of Niles*, unpublished opinion per curiam of the Court of Appeals, issued January 8, 2009 (Docket No. 280797), p. 2, 2009 WL 50066 (Exhibit I).

However, the notice need only be understandable and sufficient to bring the important facts to the governmental entity's attention. *Brown v. City of Owosso*, 126 Mich 91 (1901). Thus, a liberal construction of the notice requirements is favored. *Meredith v. City of Melvindale*, 381 Mich. 572 (1969).

As noted above, the Road Commission does not claim that it did not have knowledge of the location of the defect nor that it did not understand the nature of the defect immediately after it occurred. Further, corrective measures were undertaken within days of the accident to prevent additionally accidents from occurring. Consequently, it is unclear what additional information Defendant claims it needs to be put on notice of something it was already aware of.

The court should also be advised that no discovery has yet been undertaken by the parties to this litigation. Perhaps the depositions of appropriate representatives of the Road Commission should be obtained before a ruling on the present motion to determine what more they could possibly require in order to “investigate the claim while the evidentiary trail is still fresh and to remedy the defect before other persons are injured.” At a minimum, it appears that Defendant's motion is premature.

SUFFICIENCY OF THE NOTICE

The requirement should not receive so strict a construction “as to make it difficult for the average citizen to draw a good notice...” *Kustasz v. Detroit*, 28 Mich. App. 312, 315 (1970), quoting *Meredith*, 381 Mich. at 579, quoting *Brown*, 126 Mich. at 94–95 “[A] notice should not be held ineffective when in ‘substantial compliance with the law...’” *Smith v. City of Warren*, 11 Mich. App. 449, 455 (1968), quoting *Ridgeway v. City of Escanaba*, 154 Mich. 68 (1908) (emphasis added). A plaintiff’s description of the nature of the defect may be deemed to substantially comply with the statute when “[c]oupled with the specific description of the location, time and nature of injuries...” *Jones v. Ypsilanti*, 26 Mich. App. 574, 584 (1970); see also *Barribeau v. Detroit*, 147 Mich. 119, 125, (1907) (“In determining the sufficiency of the notice ... the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the

place and the cause of the alleged injury.”). (Emphasis supplied). “Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.” *Jones*, 26 Mich. App. at 584, quoting *Smith*, 11 Mich. App. At 455.

The Supreme Court has held that this statutory notice provision is clear and unambiguous; thus, it must be enforced as written. *Rowland v. Washtenaw Co. Rd. Comm.*, 477 Mich. 197, 219 (2007). But notice “is sufficient if it is timely and contains the requisite information,” and notice does not need to be provided in a particular format. *Plunkett* at 176. The Court has held that substantial compliance with the statutory notice requirements is sufficient. *Id.* at 177, 779; see also *McLean v City of Dearborn*, 302 Mich App 68 (2013) at 75. And the information required by the statute “does not have to be contained within the plaintiff’s initial notice; it is sufficient if a notice is received by the governmental agency within the 120-day period that contains the required elements.” *Id.* At 74–75. (Emphasis supplied).

In *Rowland* the Supreme Court overruled a line of cases that held that, absent of showing of actual prejudice to the defendant-government, a plaintiff’s failure to comply with the highway exception notice provision was not fatal. *Id.* at 200. The *Rowland* plaintiff failed to provide the required notice within 120 days. *Id.* at 201. The *Rowland* Court found this error fatal to the plaintiff’s case, concluding that “MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written.” *Id.* at 219. *Rowland* did not discuss the “exact location” language at issue in this case, but it clearly dictates that MCL 691.1404 is to be enforced as written. *Rowland* did not discuss “substantial compliance” with the notice provision, but rather only removed any required showing of “actual prejudice”.

In *Plunkett*, the defendant argued that it was entitled to summary disposition because the plaintiff's notice was insufficient under MCL 691.1404 as it did not contain "a strictly accurate or correct identification of the alleged highway defect, and the alleged defect was not actionable under "uncontested standards for maintaining asphalt pavement." Id. at 174, 179. The Supreme Court concluded that a plaintiff need only substantially comply with the notice provision, insofar as a plaintiff should not be held to the standard of a hypertechnical and hyperdetailed recitation of the precise location of the defect. Id. at 177–179. Rather, the plaintiff must only provide a sufficiently accurate description of the nature and location of the defect that the reader is not left with any real doubt as to where and what the defect is.

In *McLean* Plaintiff, who was a pedestrian, broke her foot when she tripped and fell while stepping off a sidewalk onto a road. She brought a personal injury action against that City of Dearborn. Notice of the accident was provided to the city 5 days later. Approximately 2 months after the accident, a letter was authored by Plaintiff counsel which provided additional information regarding the location of the defect and Plaintiff's injuries.

Plaintiff filed a Complaint in the Circuit Court and Defendant filed its Motion for Summary Disposition, arguing that Plaintiff failed to provide adequate pre-suit notice of her claim pursuant to MCL 691.1404. Among other things, the City of Dearborn argued that Plaintiff had failed to provide the exact nature of the defect and the injury sustained.

The *McLean* Court held that the required information does not have to be contained within the Plaintiff's initial notice; it is sufficient if a notice is received by the governmental agency within the 120 day period which contains the required elements.

In the present case, the notice submitted by PEARCE clearly identifies the location as occurring on North Mason Road approximately 500 feet south of the intersection with W. Kinsel

Highway, Kalamo Township, Eaton County Michigan. The notice also clearly identifies the nature of the defect, i.e. that water was allowed to pool on the roadway which, when encountered by MELISSA MUSSER, caused her to leave the roadway. The notice specifically “reserves the right to assert additional defects as same may become known”.

Furthermore, the concluding paragraph of the notice specifically requests that “If any further information is desired or deemed necessary, [The Road Commission] may contact the attorneys who are: Collison & Collison, Attorney at Law, 5811 Colony Drive, North, P. O. Box 6010, Saginaw, Michigan 48608-6010, telephone: (989) 799-3033”. No such request was ever made by the Road Commission, presumably because all of the information required by defendant was already within its possession.

In addition to the notice provided by PEARCE, the Road Commission was also in possession of Harston’s notice which Defendant concedes within its Brief in Support of Motion for Summary Disposition is proper. The Road Commission also received notice from MELISSA SUE MUSSER and John Musser. Consequently the Defendant did have “a notice” within the statutory period. In fact, it had at least four “notices”. It is hard to imagine what additional information the Road Commission might require in that it was fully apprised of all relevant facts within the statutory period, regardless of whom provided such notice.

A remarkably similar situation occurred in *Plunkett*.

In that case Holly Plunkett lost control of her minivan as she traveling south on US-127 in Clare County. At the time of the accident it was raining and the road surface was wet. She apparently lost control due to the presence of an “unnatural accumulation of rain fall” which was allowed to pool or collect on the roadway. Likewise, in the present case, Plaintiff claims that

MELISSA SUE MUSSER lost control of her vehicle because of the unnatural collection of water on the roadway.

Much like the present case, the Department of Transportation raised a purely technical objection to Plaintiff's pre-suit notice. M-DOT alleged that the notice did not contain a "strictly accurate or correct identification of the alleged highway defect".

The *Plunkett* notice stated, in pertinent part:

"Please accept this letter as notice of intention to file a claim against the Michigan Department of Transportation on behalf of our clients in connection with an incident that occurred on May 19, 2005, at approximately 8:30 p.m. on Southbound US-127, at or near Bailey Road, Clare County, Michigan.

The claim arose when Holly Marie Plunkett struck standing/pooled water on the roadway's surface while driving, which then caused her vehicle to hydroplane out of control and strike a tree on the west side of the roadway. The standing/pooled water on the roadway was caused by excessive and uneven wear, and/or lack of drainage due to uneven and unreasonable wear, and/or failure to maintain the roadway in a reasonably safe manner. "(Emphasis supplied).

The above description of the location and nature of the defect was deemed sufficient to put the governmental authority on notice as to where the accident occurred. Plunkett's notice "reasonably apprised M-DOT of the nature of the defect".

As the *Plunkett* Court stated:

"[T]he requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice...." "[A] notice should not be held ineffective when in 'substantial compliance with the law....'" "A plaintiff's description of the nature of the defect may be deemed to substantially comply with the statute when "[c]oupled with the specific description of the location, time and nature of injuries...." "Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects." at page 269 (internal citations omitted) (Emphasis in the original).

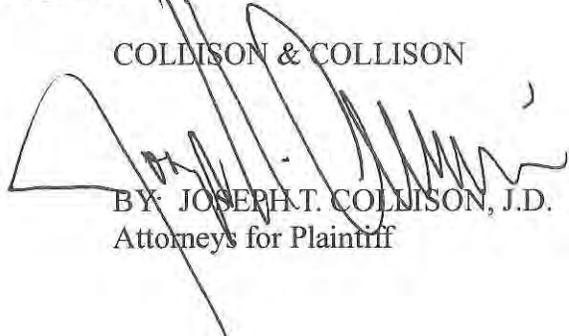
The notice provided by Plaintiff to Defendant in the present case, at a minimum, was "a sufficiently accurate description of the nature and location of the defect [such] that the [Road Commission was] not left with any real doubt as to where and what the defect is."

Finally, given the fact that no discovery has been conducted, Plaintiff believes that Defendant's motion is, at best, premature.

WHEREFORE, Plaintiff, LYNN PEARCE, Personal Representative of the Estate of BRENDON PEARCE, Deceased prays this Court deny Defendant, EATON COUNTY ROAD COMMISSION's Motion for Summary Disposition and enter Order thereon together with costs and attorney fees to be assessed.

Dated this 20th day of April, A.D., 2016.

COLLISON & COLLISON



BY: JOSEPH T. COLLISON, J.D.
Attorneys for Plaintiff

BUSINESS ADDRESS:
5811 Colony Drive, North
P.O. Box 6010
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APPENDIX 5

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

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

File No. 16-29-NI

HON. EDWARD J. GRANT (P14272)

Plaintiff,

-vs-

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

Defendants.

**COLLISON & COLLISON
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Attorneys for Plaintiff
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P.O. Box 6010
Saginaw, Michigan 48608-6010
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**GARAN LUCOW MILLER P.C.
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**SMITH HAUGHEY RICE & ROEGGE PC
BY: DEMETRIOS ADAM TOUNTAS (P68579)
Attorney for Defendant, Eaton County Road Commission
100 Monroe Center St NW
Grand Rapids, MI 49503-2802
Telephone: (616) 774-8000**

**ORDER DENYING THE EATON COUNTY ROAD COMMISSION'S
MOTION FOR SUMMARY DISPOSITION**

AT A SESSION OF SAID COURT, HELD AT THE COURTHOUSE,
IN THE CITY OF CHARLOTTE, COUNTY OF EATON, STATE OF MICHIGAN
ON THIS 26 DAY OF May, A.D., 2016

PRESENT: HONORABLE EDWARD J. GRANT, CIRCUIT JUDGE

John Maurer

UPON READING AND FILING of the EATON COUNTY ROAD
COMMISSION'S Motion for Summary Disposition and Plaintiff's Response thereto, the
Court having entertained Oral Argument, having reviewed the Legal Authority as cited,
and otherwise being fully advised in the premises.

NOW THEREFORE IT IS HEREBY ORDERED that Defendant's Motion be and
the same is hereby denied for the reasons set forth within this Court's May 5, 2016
Opinion and Findings.

John D. Maurer

Hon. **JOHN D. MAURER**
Circuit Judge

COUNTERSIGNED:

SI

DEPUTY CLERK

APPENDIX 6

Michigan Court of Appeals

DOCKETING STATEMENT

Case No.:	
Circuit:	16-29-NI
Court of Appeals:	333387

Please read before completing form.

- MCR 7.204(H) and 7.205(D)(3) require an **appellant** in a civil action to complete and file a docketing statement within 28 days after the claim of appeal is filed or the application for leave to appeal is granted. Failure to timely file this document may lead to dismissal of the appeal. An appellee may respond by filing a separate docketing statement.
- This document will be used to screen the appeal for suitability and eligibility for the settlement conference program, and will be used to help resolve jurisdictional and transcript issues. It is important that you complete this form accurately and legibly.
- The issues identified in the docketing statement do not limit appellant's presentation of the issues in appellant's brief. Omission of an issue in the docketing statement will not provide a basis for a motion to strike appellant's brief.

1. Case Name:

 Appellant
 Appellee
Lynn Pearce, as Personal Rep.

Name of first Plaintiff

Address:	
Telephone No:	

Attorney Name:	Joseph T. Collison	Bar No:	34210
Address:	5811 Colony Dr. Nort, P.O. Box 6010 Saginaw, MI 48608-6010		
Telephone No:	(989) 799-3033		

 Appellant
 Appellee
Eaton County Road Commission

Name of first Defendant

Address:	
Telephone No:	

Attorney Name:	Stephanie Hoffer	Bar No:	71536
Address:	100 Monroe Center NW Grand Rapids, MI 49503-2802		
Telephone No:	(616) 774-8000		

2. A bankruptcy or other proceeding has been filed which affects this Court's jurisdiction over this appeal.

Identify and explain.

3. There are pending or prior appeals in the Court of Appeals or Supreme Court which arose out of the same transaction, lower court case, or between the same parties.

Specify case name, lower court number, appellate court number(s), and citation, if available.

4. I am aware of the following pending appeals in the Court of Appeals or Supreme Court raising the same or closely related issues.

Specify case name, lower court number, appellate court number(s), and citation, if available.
Streng v Bd. of Mackinac Cnty. Rd. Comm'rs, Circuit Court No. 2013-007445-NI; COA Docket No. 323226 - publication citation pending; MSC 154034

5. Identify **all** the lower court hearings.

Type of proceeding (i.e. motion, trial, etc.)	Date(s) Occurred	Court Reporter
Motion for Summary Disposition	April 28, 2016	Angela L. Curtiss, CER 6183

6. **Nature of case:**

a. If the lower court case number provided on page 1 does not include a suffix, please specify the circuit court case code (i.e. NI, CK, etc): _____

b. Identify the procedural nature of the case being appealed.

- arbitration
 bench trial
 post-judgment action
 declaratory judgment
 interlocutory matter
 jury trial
 summary disposition
 administrative proceeding (specify agency) _____
 other (i.e. default judgment) _____

7. Briefly describe the nature of the action and the result in the trial court. Conclusory statements such as “the judgment of the trial court is not supported by law” are unacceptable. Attach additional pages as needed.

This is an auto-negligence action. Brendon Pearce suffered fatal injuries in the accident, and his Estate filed suit against the driver's Estate, the vehicle owner, and the Eaton County Road Commission. The Road Commission filed a Motion for Summary Disposition arguing that Plaintiff failed to comply with the notice requirement set forth in MCL 691.1404, and therefore, failed to properly plead an exception to governmental immunity. The trial court denied the Motion, and the Road Commission timely filed this Appeal.

8. Briefly state the issues to be raised in this appeal. Attach additional pages as needed.

Did Plaintiff fail to properly plead an exception to governmental immunity where it did not serve Eaton County with a notice specifying the exact location and nature of the defect within 120 days from the time the injury occurred?

9. The amount and terms of the judgment appealed are:

10. Settlement negotiations. (Check all boxes that apply.)

- Settlement negotiations have been conducted or are scheduled.
 Settlement is unlikely.
 Other _____

Date: 07/11/2016
(mm/dd/yyyy)

Signature: /s/ Stephanie C. Hoffer (P71536)

APPENDIX 7

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

COA DOCKET NO. 333387

Plaintiff-Appellee,

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

v

THE EATON COUNTY ROAD COMMISSION,

Defendant-Appellant,

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

Defendants.

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(517) 327-0300

EATON COUNTY ROAD COMMISSION'S BRIEF ON APPEAL

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

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STATEMENT OF THE BASIS OF JURISDICTION

This Claim of Appeal arises out of the trial court's denial of Defendant-Appellant Eaton County Road Commission's Motion for Summary Disposition based on the defense of governmental immunity. The Order denying Defendant's Motion for Summary Disposition was entered on May 26, 2016, and was a "final order" pursuant to MCR 7.202(6)(a)(v). (**Exhibit 1**). Defendant-Appellant timely filed its Claim of Appeal on June 14, 2016, which is within 21 days of the entry of the Order, vesting this Court with jurisdiction. See MCR 7.203(A)(1); MCR 7.204(A)(1)(a).

INTRODUCTION AND STATEMENT OF QUESTIONS INVOLVED

The underlying litigation arises out of a single car crash in Eaton County. In addition to suing the driver and owner of the underlying vehicle, Plaintiff also sued the Eaton County Road Commission. Road commissions are governmental agencies that are generally immune from suit. There are several exceptions to immunity, including the "highway exception." The highway exception is a narrowly drawn immunity exception that allows suit when a governmental agency fails to maintain a highway in reasonable repair. Here, Plaintiff attempts to rely on the highway exception in his claim against the Road Commission, an entity which had no involvement in the underlying crash.

However, a plaintiff cannot rely on the highway exception unless he or she first strictly complies with the requisite notice period. The notice period is set forth in MCL 691.1404(1), which states:

As 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, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the ***exact location and nature of the defect***, the injury sustained and the names of the witnesses known at the time by the claimant. [Emphasis supplied.]

In this case, the Road Commission filed a Motion for Summary Disposition arguing that Plaintiff's Notice was defective because it only provided the approximate location of the accident and not the "exact location and nature of the defect" in the highway. Plaintiff's Notice set forth the following as the location of the "occurrence:"

North Mason Road, approximately 500 feet South of the intersection with West Kinsel Highway, Kalamo Township, Eaton County, Michigan.

Plaintiff's Notice is attached as **Exhibit 2**.

Based on the police report (**Exhibit 3**), it was apparent that Plaintiff described the location of the crash, and not the location of the defect. As such, the Road Commission filed a Motion for Summary Disposition arguing that Plaintiff failed to file a valid Notice, and therefore, the Road Commission remained immune from suit.

The trial court issued an "Opinion and Findings" on May 5, 2016 (**Exhibit 4**), in which it held that the Notice was "sufficient and substantially complie[d] with the statute requirements," and instructed Plaintiff to prepare an Order. After the Opinion issued, and only two days before the order was entered, a panel of this Court issued *Streng v Bd. Of Mackinac Cnty. Rd. Comm'rs*, __ Mich App __; 2016 Mich. App. LEXIS 1054 (Docket No. 323226) (**Exhibit 5**), holding that the applicable notice provision due to road commissions was not MCL 691.1404(1), but rather MCL 224.21(3), which only requires the notice to "set forth substantially" the location and nature of the defect, as opposed to "exactly" set forth. As *Streng* is published, if it applies retroactively, it would be binding on this case. But it should have prospective application only. Further, *Streng* was wrongly decided, and if *Streng* is deemed binding in this case, the Road Commission requests that this Panel acknowledge *Streng* was wrongly decided and declare a conflict.

Therefore, the issues presented for this Court to resolve can be succinctly stated as follows:

I. DID THE PANEL IN *STRENG v. BD. OF MACKINAC CNTY. RD. COMM'RS* WRONGLY DECIDE THAT MCL 224.21 APPLIED INSTEAD OF MCL 691.1404 BECAUSE THE CONTENTS OF THE NOTICE IS A SUBSTANTIVE REQUIREMENT NECESSARY TO ESTABLISH LIABILITY AND BINDING PRECEDENT DICTATES THAT CONFLICT REGARDING LIABILITY ARE RESOLVED IN FAVOR OF THE GOVERNMENT TORT LIABILITY ACT?

Plaintiff-Appellee has not answered this question, but presumably would answer: No.

Defendant-Appellant says: Yes.

The trial court did not reach this question.

II. SHOULD *STRENG v. BD. OF MACKINAC CNTY. RD. COMM'RS* APPLY TO THIS CASE WHEN PLAINTIFF DID NOT PRESERVE A CHALLENGE TO THE APPLICABILITY OF THE GTLA AND *STRENG* CHANGED ESTABLISHED LAW?

Plaintiff-Appellee has not answered this question, but presumably would answer: Yes.

Defendant-Appellant says: No.

The trial court did not reach this question.

III. DID PLAINTIFF FAIL TO COMPLY WITH MCL 691.1404(1), WHICH REQUIRES A PLAINTIFF TO PROVIDE THE "EXACT" LOCATION AND NATURE OF THE DEFECTIVE CONDITION, WHERE PLAINTIFF ONLY PROVIDED THE APPROXIMATE LOCATION OF THE ACCIDENT?

Plaintiff-Appellee says: No.

Defendant-Appellant says: Yes.

Trial Court says: No.

STATEMENT OF MATERIAL FACTS

On March 8, 2015, Brendan Pearce was one among a number of passengers in a vehicle driven by Defendant Melissa Musser (“Ms. Musser”). Ms. Musser lost control of the vehicle, which left the roadway and struck a tree. (**Exhibit 6**, Complaint, ¶ 16). Mr. Pearce suffered fatal injuries in the crash.

On May 5, 2015, Plaintiff Lynn Pearce, acting on behalf of the Estate of Brendan Pearce, mailed a document titled “Notice to Eaton County of Fatal Injuries Due to Defective Highway.” (**Exhibit 2**, May 5, 2015 Notice). With respect to the crash, that notice provided the following regarding the “place of occurrence”:

PLACE OF OCCURRENCE: North Mason Road, approximately 500 feet South of the intersection with West Kinsel Highway, Kalamo Township, Eaton County, Michigan. (**Exhibit 2**, May 5, 2015 Notice).

However, the notice did not provide *any* information regarding the location of any alleged *defect*.

Plaintiff then proceeded to file her Complaint against the Eaton County Road Commission, among other parties, on January 4, 2016. Although she did not plead it discretely, the Plaintiff was seeking relief under the GTLA’s highway exception to governmental immunity. Notwithstanding, her Complaint also included allegations of negligence and a claim under the GTLA’s public-building exception.

On February 10, 2016, the Road Commission filed a Motion for Partial Summary Disposition, stating that the broad protections of governmental immunity insulate the Road Commission from any liability for negligence, and further still, that the facts as pled did not implicate the public-building exception of the GTLA. However, before hearing, Plaintiff agreed to proceed solely with her claims brought under the highway exception to governmental immunity. The Road Commission subsequently withdrew its Motion for Partial Summary Disposition.

Thereafter, the Road Commission filed a new dispositive motion based upon the Plaintiff's failure to file a compliant statutory pre-suit notice. The Court denied that motion in an Order entered May 26, 2016. This appeal followed.

STANDARD OF REVIEW

Whether a governmental agency is immune from suit is an issue of law that this Court reviews de novo. See *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 202; 731 NW2d 41 (2007). The applicability of a statute is also a question of law that is reviewed de novo. *Id.*

MCR 2.116(C)(7) allows summary disposition where a claim is barred because of immunity granted by law. A motion brought under that subrule may be supported by documentary evidence, but does not need to be where the issue can be resolved by the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The contents of the complaint are accepted as true unless contradicted by documentary evidence submitted by the movant. *Patterson v Kleiman*, 447 Mich 429, 434, note 6; 526 NW2d 879 (1994). Additionally, if the facts are not in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the Court to decide as a matter of law. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

LAW AND ANALYSIS

On May 26, 2016, a panel of this Court issued *Streng v Bd. Of Mackinac Cnty. Rd. Comm'rs*, ___ Mich App ___, ___ NW2d ___ (2016) (COA Docket No. 323226) (**Exhibit 5**). *Streng* changed the legal landscape significantly, holding that the "exact" standard of MCL 691.1404 does not apply to notices provided to county road commissions, but rather a more relaxed standard applies. Thus, before addressing the sufficiency of Plaintiff's Notice, in order we must first determine the appropriate notice standard.

I. THE PANEL IN *STRENG v BD. OF MACKINAC CNTY. RD. COMM'RS* WRONGLY DECIDED THAT MCL 224.21 APPLIED INSTEAD OF MCL 691.1404 BECAUSE THE CONTENTS OF THE NOTICE IS A SUBSTANTIVE REQUIREMENT NECESSARY TO ESTABLISH LIABILITY AND BINDING PRECEDENT DICTATES THAT CONFLICT REGARDING LIABILITY ARE RESOLVED IN FAVOR OF THE GOVERNMENT TORT LIABILITY ACT.

In addition to different notice-waiting periods, MCL 224.21 has a relaxed content requirement.

Here is a comparison of the two statutes:

MCL 691.1404	MCL 224.21
<p>(1) As 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, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.</p> <p>(2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency....</p>	<p>(2) A county shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county’s jurisdiction, are under its care and control, and are open to public travel. The provisions of law respecting the liability of townships, cities, villages, and corporations for damages for injuries resulting from a failure in the performance of the same duty respecting roads under their control apply to counties adopting the county road system....</p> <p>(3) As action arising under subsection (2) shall be brought against the board of county road commissioners of the county and service shall be made upon the clerk and upon the chairperson of the board. The board shall be named in the process as the “board of county road commissioners of the county of...”. Any judgment obtained against the board of county road commissioners in the action shall be audited and paid from the county road fund as are other claims against the board of county road commissioners. However, a board of count road commissioners is not liable for damages to person or property sustained by a person upon a county road ... unless</p>

	<p>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. The notice shall set forth <i>substantially</i> the time when and place where the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident, and that the person receiving the injury intends to hold the county liable for damages. This section applies to all county roads whether they become county roads under this chapter or under Act No. 59 f the Public Acts of 1915, being sections 247.418 to 247.481 of the Michigan compiled laws.</p>
--	---

In *Ross v Consumers Power Co. (On Rehearing)*, the Court held that the goal of resolving conflicts between GTLA and other statutes is to “create a cohesive, uniform, and workable set of rules which will readily define the injured party’s rights and the governmental agency’s liability.” *Ross v Consumers Power Co (On Rehearing*, 420 Mich 567, 596; 363 NW2d 641 (1984). The panel in *Streng* recognized that “[h]aving two sets of rules that vary depending on the type of agency being sued is contrary to this goal of uniformity.” *Streng* at *14. The panel also properly noted that pursuant to the second sentence of MCL 224.21(2), the GTLA governs issues of liability. *Id.* (“The language of MCL 224.21(2), when read closely, dictates that only the GTLA’s provisions of law that deal with “liability” apply to counties and that under MCL 691.1402(1), procedural and remedial provisions should be those of MCL 224.21.”).

Despite recognizing the proper rules governing interpretation in the unique circumstance of conflicts between GTLA and other statutes, the panel in *Streng* failed to apply the proper rules. Rather, it relied on the general rule of statutory interpretation that the more specific statute governs.

That application is erroneous not only because *Ross* set forth a different standard of statutory interpretation in the circumstances, and applying the plain language of both statutes demonstrates that the content of the notice is related to *liability*, not procedure as interpreted by the panel in *Streng*. That is where the panel erred. Section 1402 *conditions liability* on a compliant notice. It is a substantive requirement, therefore, under *Ross*, the GTLA provision trumps.

Guidance in distinguishing matters of substance from matters of procedure can be found in *McDougall v Schanz*, 461 Mich 15; 597 NW2d 148 (1999). There, in the context of considering the validity of conflicting rules of evidence, the Michigan Supreme Court set forth the analysis for distinguishing between legislature rules of substance and rules of procedure. *Id.* The appropriate inquiry is whether there is a “clear legislative policy reflecting considerations other than the judicial dispatch of litigation.” *Id.* at 29. In other words, is the statute “a result of policy considerations over and beyond matters involving the orderly dispatch of judicial business?” *Id.* at 31.

The content of a compliant notice is *not* a matter of procedure. It is a declaration of policy by the legislature – a governmental agency’s potential liability is conditioned on the contents of the notice. Rather, the legislature is setting forth the circumstances under which a governmental agency will not have immunity.

Under the plain language of the statutes, the content of the notice relates to liability, and under the proper analysis the content requirements are not procedural. Therefore, to the extent the notice provisions conflict, the GTLA trumps pursuant to *Ross*, and “exact” notice is required. *Streng* was incorrectly decided because it did not include this analysis.

II. *STRENG v BD. OF MACKINAC CNTY. RD. COMM'RS* SHOULD NOT BE APPLIED TO THIS CASE BECAUSE PLAINTIFF DID NOT PRESERVE A CHALLENGE TO THE APPLICABILITY OF THE GTLA AND *STRENG* CHANGED ESTABLISHED LAW.

Streng changed the legal landscape regarding the notice due to road commissions. This case was pending at the time *Streng* was issued. Newly decided cases only apply to pending cases where a challenge has been raised and preserved. *Devillers v Auto Club Ins. Ass'n*, 473 Mich 562, 586; 702 N.W.2d 539 (2005). And where there has been a change in the law. *Id.* Because *Streng* changed the law, although published, it does not apply retroactively. It also does not apply in this pending case because Plaintiff never challenged the applicability of the GTLA.

III. PLAINTIFF FAILED TO COMPLY WITH MCL 691.1404(1), WHICH REQUIRES A PLAINTIFF TO PROVIDE THE “EXACT” LOCATION AND NATURE OF THE DEFECTIVE CONDITION, WHERE PLAINTIFF ONLY PROVIDED THE APPROXIMATE LOCATION OF THE ACCIDENT.

Applying the correct standard, Plaintiff’s notice here failed to comply with the statute. Substantial compliance is insufficient. A condition precedent to recovery requires the notice to contain and *exact* statement of the location of the defect, not the accident.

A. Plaintiff Failed to Provide *Any* Information Regarding The Location Of The Alleged *Defect* Within Her Notice To The Road Commission, But Rather, Provided the Approximate Location of the Accident.

Under the highway exception, a governmental agency can be liable for injuries arising from the agency's failure to maintain a highway in reasonable repair. MCL 691.1402(1). However, the exception is “narrowly drawn” and there must be strict compliance with the conditions and restrictions of the statute. *Scheurman v Dep't of Transp*, 434 Mich 619, 630; 456 NW2d 66 (1990). One such condition is the notice of injury provision found under MCL 691.1404. Under MCL 691.1404, as a condition precedent to any recovery pursuant to the highway exception, an injured party shall:

(1) As 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, except as otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the **exact location and nature of the defect**, the injury sustained and the names of the witnesses known at the time by the claimant.

MCL 691.1404(1) (emphasis added).

In this case, the Plaintiff's notice did not provide, or even purport to provide, **any** information regarding the location of the alleged **defect**. Instead, the notice only sets forth the approximate location of the "occurrence" – "North Mason Road, approximately 500 feet South of the intersection with West Kinsel Highway, Kalamo Township, Eaton County, Michigan" – which is consistent with the location of the **crash**, as indicated by both the UD-10 traffic crash report, (**Exhibit 7**, UD-10 Crash Report), and the notices of injury provided by other passengers in the crash.

For instance, Ryan Harston, another passenger in the crash, provided the following information in his notice of injury to the Road Commission, properly distinguishing between the location of "defective area" he alleged and the location of the crash itself:

LOCATION OF ACCIDENT AND DEFECT INCLUDING MEASUREMENTS:

N. Mason Road at this location is two lanes, one travelling north and the other travelling south. The speed limit in the area is 55 mph. The north and south lanes measure 10 feet wide from the centerline to the edge of the road.

The UD-10 Crash Report from the Eaton County Sheriff's Department indicates that the accident took place on N. Mason Road, 500 feet south of Kinsel Highway. Measuring from the Kinsel Highway and Mason Road street sign, there is 580 feet south to the point of impact at the tree along the west side of N. Mason Road.

Measuring from the Kinsel Highway/Mason Road street sign, south bound to the defective area at issue, along the southbound lane of North Mason Road, is 270 feet. The distance to the point of impact is 310 feet south.

The defective and hazardous area is marked with potholes and filler along the southbound lane of N. Mason Road and measures approximately 30 feet long. The defective area along southbound N. Mason Road is located between two homes which are positioned on the west side of the street; the addresses on either side of the defective pavement are 1969 N. Mason Road and 1915 N. Mason Road.

The latitude and longitude of the defective area along N. Mason Road is:

Latitude: 42 degrees, 35 minutes, 44 seconds N

Longitude: -85 degrees, 3 minutes, 15 seconds W

(**Exhibit 8**, Notice by Ryan Harston).¹

The Michigan Supreme Court held in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 219; 731 NW2d 41 (2007), that MCL 691.1404 is “straightforward, clear, unambiguous, and not constitutionally suspect and, accordingly, it must be enforced as written, no matter how much prejudice is actually suffered by the defendant.” The statute explicitly states that Plaintiff must provide the “exact location” of the “defect” as “a condition to any recovery for injuries sustained by reason of any defective highway.” Here, unlike the notice provided by Ryan Harston, Plaintiff’s notice of injury in this case is completely silent as to the location of the alleged defect. As such, since Plaintiff’s notice of injury failed to provide *any* information regarding the location of the alleged defect, as explicitly required by the statute, plaintiff is barred from recovery.

B. Even If Plaintiff’s Statement Regarding The “Place of Occurrence” Within The Notice of Injury Were Intended As Notice of The “Exact Location” of “The Defect,” The Notice Does Not Comply With The Notice Requirement Mandated By MCL 691.1404 because the “exact” location is not specified.

MCL 691.1404 does not define the term “exact” as used within the statute’s requirement that notice be provided of the “exact location” of “the defect.” However, Michigan courts have addressed, in particular, the level of accuracy and specificity required by a notice in the context of a highway defect claim. In this regard, the Court of Appeals clarified in *Montford v City of Detroit*, unpublished opinion per curiam of the Court of Appeals, issued June 28, 2011 (Docket No. 297074) (attached as **Exhibit 9**), “*the inclusion of the term “exact” before “location” negates the possibility that the Legislature intended erroneous, or even approximate, locations to suffice.*” (Emphasis added).

Indeed, Michigan courts have uniformly held that even slight errors in identifying the “exact location” of an alleged defect result in failure to comply with the notice statute.² In *Smith v City of*

¹ Note that the Harston notice was provided long after the Pearce notice.

Warren, 11 Mich App 449, 452–453; 161 NW2d 412 (1968), the plaintiff notified the governmental defendant that she had been injured as the result of an alleged defect in the roadway at “Thirteen Mile and Hoover, near the address of 11480 Thirteen Mile Road.” The *Smith* Court held that the plaintiff’s notice was not sufficient because it did not mention that the defect in question was actually on the south side of Thirteen Mile Road and approximately 40 yards away from the stated address. *Id.*

Similarly, in *Jakupovic v City of Hamtramck*, unpublished decision per curiam of the Court of Appeals, issued Dec. 7, 2010 (Docket No. 293715) (attached as **Exhibit 10**), *rev’d*, 489 Mich 939, 798 NW2d 12 (2011), the plaintiff mistakenly provided the address of the property *immediately next* to the correct one in her § 1404 notice. In holding that notice was sufficient, the Court of Appeals reasoned that finding the notice defective would penalize her for a technical defect. *Id.* (citing *Berribeau v City of Detroit*, 147 Mich 119, 125 (1907)). However, the Supreme Court reversed the decision of the Court of Appeals, holding that if a plaintiff gives an incorrect address in her notice, she fails to give the “exact location” of the defect as required by MCL 691.1404, which is fatal to her claim. *Jakupovic*, 489 Mich 939; 798 NW2d 12 (2011).

Again, in *Thurman v City of Pontiac*, 295 Mich App 381; 819 NW2d 90 (2012), plaintiff’s notice stated that the alleged defect in the City’s sidewalk was located at “35 Huron, Pontiac, Michigan.” Since plaintiff did not specify whether the alleged defect was located at 35 West Huron Street or 35 East Huron Street, the Court of Appeals held that plaintiff’s notice to the City did not provide the “exact” location of the defect within the meaning of MCL 691.1404(1). *Id.* at 386-87.

² In the trial court, Plaintiff relied heavily on *Plunkett v Dep’t of Transp*, 286 Mich App 168; 779 NW2d 263 (2009) for the proposition that only “substantial compliance” was required. However, *Plunkett* did not consider the “exact location” requirement, but rather the nature of the defect. *Plunkett* cannot be extended to the location requirement because where the legislature has specified that the “exact” location must be provided, the judiciary cannot lessen that standard.

The Court thus concluded that the circuit court erred by denying the City's motion for summary disposition, and that the City was entitled to governmental immunity as a matter of law. *Id.*

In this case, Plaintiff's notice provided the following regarding the "place of occurrence:"

PLACE OF OCCURRENCE: North Mason Road, approximately 500 feet South of the intersection with West Kinsel Highway, Kalamo Township, Eaton County, Michigan. (**Exhibit 2**, May 5, 2015 Notice).

On its face, the notice's description of the "approximate" place of occurrence fails to provide the "exact" location of the defect that MCL 691.1404 explicitly requires. Additionally, as discussed above, the location described is *not* the location of the "defect" plaintiff alleges, but the location where the crash took place. (See **Exhibit 7**, UD-10 Crash Report; **Exhibit 8**, Notice by Ryan Harston). Rather, as Ryan Harston stated in his notice, the location described as the "place of occurrence" in Plaintiff's Notice, was the "point of impact" at the tree that the vehicle crash into. (**Exhibit 8**, Notice by Ryan Harston). The location of the alleged "defect" is described in Harston's notice as a separate location, identified through GPS coordinates. (**Exhibit 8**, Notice by Ryan Harston).

For these reasons, even if the described "place of occurrence" were intended by the Plaintiff to provide the requisite notice, the described location was both erroneous and approximate – thus failing to meet the requirements set forth in the statute. Plaintiff's Notice of Injury simply does not meet the requirements of MCL 691.1404, namely, that the notice must provide the "exact location" of the "defect." Plaintiff is not entitled to any recovery under the highway exception to governmental immunity. Thus, defendant respectfully requests that this Court dismiss Plaintiff's claims in their entirety against the Road Commission as stated in Count II of her Complaint, pursuant to MCR 2.116(C)(7).

RELIEF REQUESTED

Defendant Eaton County Road Commission respectfully requests this Court REVERSE the trial court's Order Denying the Eaton County Road Commission's Motion for Summary Disposition. Defendant respectfully requests any additional relief deemed necessary, including but not limited to, costs incurred in prosecuting this appeal.

DATED: August 9, 2016

/s/ Stephanie C. Hoffer
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APPENDIX 8

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

COURT OF APPEALS
DOCKET NO. 333387

Plaintiff/Appellee,

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

-vs-

THE EATON COUNTY ROAD COMMISSION,

Defendant/Appellant

and

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

Defendants.

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**BRIEF OF PLAINTIFF/APPELLEE LYNN PEARCE, PERSONAL
REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED**

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

Plaintiff/Appellee accepts the jurisdictional statement of Defendant/Appellant Eaton County Road Commission.

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COUNTER STATEMENT OF QUESTIONS INVOLVED

I. IS AN INDIVIDUAL CLAIMING INJURY OR LOSS DUE TO A DEFECTIVE COUNTY ROAD ONLY REQUIRED TO PROVIDE NOTICE WHICH “SET[S] FORTH SUBSTANTIALLY THE TIME WHEN AND PLACE WHERE THE INJURY TOOK PLACE, THE MANNER IN WHICH IT OCCURRED, THE KNOWN EXTENT OF THE INJURY, THE NAMES OF ANY WITNESSES TO THE ACCIDENT AND THAT THE PERSON RECEIVING THE INJURY INTENDS TO HOLD THE COUNTY LIABLE FOR DAMAGES.”?

Plaintiff/Appellee contends the answer to this question is “yes”.

Defendant/Appellant contends the answer to this question is “no”.

The Trial Court was not requested by Defendant/Appellant to answer this question.

II. DID PLAINTIFF/APPELLEE’S NOTICE TO EATON COUNTY OF FATAL INJURIES DUE TO DEFECTIVE HIGHWAY MEET THE SUBSTANTIAL COMPLIANCE STANDARD ESTABLISHED IN *PLUNKETT V DEPARTMENT OF TRANSPORTATION*, 286 MICH APP 168; 779 N.W. 2d 263 (2009)?

Plaintiff/Appellee contends the answer to this question is “yes”.

Defendant/Appellant contends the answer to this question is “no”.

The Trial Court ruled in favor of Plaintiff/Appellee by answering this question “yes”.

STATEMENT OF FACTS

A. NATURE OF THE ACTION

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

A vehicle which was owned by Patricia Jane Musser and which was being operated by Melissa Sue Musser was southbound when the vehicle encountered water which had collected on the pavement and which caused Melissa Sue Musser to lose control and leave the roadway. The vehicle rolled over and struck a tree. Annexed to Plaintiff’s Response Brief to the Road

Commission's Motion for Summary Disposition as Exhibit A is the Eaton County Office of the Sheriff 's Response to Plaintiff's FOIA Request. The Court will note, at page 14 of the Case Supplemental Report, that:

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

It was the opinion of Detective Rick Buxton that the pooled water on the road surface caused Melissa Sue Musser to lose control of the vehicle. See Case Supplement Report at page 15.

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

Brendon Pearce, age 15, was a passenger in the vehicle. He sustained fatal injuries as the result of the accident. The present litigation involves a Wrongful Death claim by Brendon's mother, Lynn Pearce, as Personal Representative for automobile negligence against Melissa Sue Musser, owner liability against Patricia Jane Musser and liability under the defective highway exception to governmental immunity as against the Eaton County Road Commission. See MCL 691.1402.

B. CHARACTER OF PROCEEDINGS

Plaintiff's Complaint was filed January 12, 2016 alleging that Melissa Musser was negligent in the operation of the motor vehicle owned by Patricia Jane Musser and that the Eaton

County Road Commission had failed to maintain the roadway in reasonable repair. Specifically, Plaintiff alleged in paragraph 15:

“15. That Defendant, EATON COUNTY ROAD COMMISSION, knew or should have known of the dangerous and defective condition of southbound North Mason Road approximately 500 feet south of Kinsel Road, as the condition was ongoing and reported by local residents.”

The Road Commission’s response was:

“Denied, that the relevant area of North Mason Road was dangerous and defective. Negligence or wrongdoing on the part of the Road Commission is expressly denied for the reason that the allegations regarding same are untrue.” (Emphasis supplied)

Plaintiff’s Amended Complaint was filed May 18, 2016. Count II dealt specifically with the breach of the Statutory Duty by the road commission. Paragraph 13 specifically alleges:

“***the EATON COUNTY ROAD COMMISSION, was and still is an entity duly organized and existing under the laws of the State of Michigan, MCL 224.1 et seq,***.

The road commission admitted that its activities were governed by the Highway Code as referenced above.

Paragraph 14 specifically incorporates the notice provisions of MCL 224.21 by reference thereto.

In pertinent part, paragraph 14 of the Amended Complaint alleges:

“***the liability, procedure and remedy 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***”.(emphasis supplied)

The response of the road commission to paragraph 14 of the Amended Complaint was, essentially:

“***by way of further response, the Road Commission asserts that MCL 691.1402 speaks for itself.***”

Subsection (3) of MCL 224.21 requires that the Notice of Injury and Defect “set forth substantially the time when and place where the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident and that the person receiving the injury intends to hold the county liable for damages.”

There is no contention in the present Appeal that the Notice of Defect and Injury of Plaintiff/Appellee failed to meet the statutory requirements under the Highway Code (MCL 224.21[3]). To the contrary, Defendant/Appellant simply claims that the heightened notice requirement under the Governmental Tort Liability Act (MCL 691.1401 *et seq.*) applies to County Road Commissions, a point never conceded by Appellee. In fact, Defendant/Appellant’s Motion for Summary Disposition, argued in the Trial Court on April 28, 2016, involved a single issue i.e. whether Plaintiff/Appellee’s Notice was sufficient under MCL 691.1404. Plaintiff/Appellee argued that she had met the heightened statutory notice requirements of the GTLA and the Trial Court so agreed by virtue of its Order Denying Defendant/Appellant’s Motion for Summary Disposition entered on May 26, 2016. Defendant/Appellant then filed the present Appeal.

C. SUBSTANCE OF PROOF

It is interesting to note, that the road commission does not claim that it did not have knowledge of the exact location of the defect nor that it did not understand the nature of the defect. Furthermore, remedial actions were taken to obviate the defective condition almost immediately after the accident, thus confirming that the road commission knew what the problem was, where the problem was and what it needed to do to correct the problem in order to protect the public from further injury long before any “notice” was required under the statute. See Response Brief Exhibit E.

Specifically, the road commission was advised by homeowner, Jared Osborn, on June 25, 2014 that “his property just north of 1915 (North Mason Road) has standing water in the road whenever it rains, it comes gushing off Kinsel and pools on southbound side. Road is lower than sides and there is no ditch.” See Response Brief Exhibit F. Also see Defendant/Appellant’s Answer to Request for Admission 13.

The Court can appreciate, at this juncture, that the road commission had “exact notice” of the nature and location of the defect and that it was an ongoing problem approximately nine months prior to the fatal accident which forms the basis of this litigation.

Mr. Osborn recontacted the road commission on March 12, 2015 (four days after the fatality) again requesting that something be done about the water on the road and requested that a representative of the Eaton County Road Commission call him with an explanation as to why the defective condition continued to exist. The problem was corrected that same day. Response Brief Exhibit E. Also see Defendant/Appellant’s Answer to Request for Admission 14.

Most importantly, Defendant was contacted on the day of the accident by Central Dispatch. The Road Commission was advised that there was a “bad accident – needs roads closed”. The call came in at 6:30 p.m. which was approximately 35 minutes after the accident occurred. In response to this notification, the Road Commission set 2 “Type II” barricades at the intersections of Mason and Kinsel as well as Mason and Valley. Most importantly, a “Type I” barricade was placed at the precise location of the pooled water on the southbound lane.¹ See Service Request and photograph marked collectively as Response Brief Exhibit G. Also see Defendant/Appellant’s Answers to Request for Admissions 16-18.

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

¹ The “road closed” signs were retrieved by the Road Commission on March 9, 2015. See Response Brief Exhibit H.

Brendon Pearce. In fact, it appears that the Road Commission had actual knowledge of the nature and location of the defect within 35 minutes of the accident occurrence.

Despite the foregoing, the Road Commission claims that the notice provided by Lynn Pearce, as Personal Representative of her deceased son was somehow insufficient to place the Road Commission on notice of the nature and extent of the defect. Obviously, this position is untenable.

D. IMPORTANT INSTRUMENTS AND EVENTS

As indicated above, this litigation arises by virtue of an automobile accident occurring March 8, 2015. Brendon Pearce sustained fatal injuries as the result of the accident and a Wrongful Death Action was initiated within the Eaton County Circuit Court on January 4, 2016. Prior thereto Plaintiff/Appellee satisfied the statutory requirement of providing notice to Eaton County of the fact that Brendon Peace died as a result of a defective road. See Notice to Eaton County of Fatal Injuries due to Defective Highway dated May 5, 2015. (Exhibit 2 of Appellant's Brief on Appeal).

Ultimately, Plaintiff/Appellee, with the stipulation of Defendant/Appellant, filed her Amended Complaint which specifically referenced MCL 224.21. See paragraphs 13-14 of the Amended Complaint.

The Road Commission then filed its Motion for Summary Disposition on March 30, 2016. Essentially, Appellant argued that Appellee had failed to comply with the Notice Requirements of MCL 691.1404. The Trial Court denied Defendant/Appellant's Motion and an Order was entered May 26, 2016. The Trial Court specifically found that "prompt and proper notice was given by the Plaintiff to the Eaton County Road Commission; the location and alleged defect in the road were adequately given and were sufficient to bring the defect to the road commission's attention. Plaintiff's notice is sufficient and substantially complies with the statute requirements."

(Exhibit 4 of Defendant/Appellant's Brief on Appeal). The Road Commission then filed its Appeal on June 14, 2016.

E. THE RULING AND ORDER OF THE TRIAL COURT

As noted above, the Trial Court determined that Plaintiff's notice satisfied the requirements of MCL 691.1404 in that the notice included an adequate description of the condition of the road as well as the cause of the accident and location of the defect. Furthermore, the Court adopted the substantial compliance analysis of *Plunkett v Department of Transportation*, 286 Mich App 168; 779 N.W. 2d 263 (2009).

Obviously, if Plaintiff's notice met the requirements under the GTLA, it would also meet the notice requirements of MCL 224.21(3) which is the notice requirement under the Highway Code.

The Court denied Defendant/Appellant's Motion and an Order to such effect was entered within the Eaton County Circuit Court on May 26, 2016. (Exhibit 1 of Defendant/Appellant's Brief on Appeal).

STANDARD OF REVIEW

A Circuit Court decision regarding a Motion for Summary Disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW.2d 817 (1999). When a claim is barred by governmental immunity, summary disposition is appropriate under MCR 2.116(C)(7). *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW.2d 897 (1998). Under MCR 2.116(C)(7) the moving party has the option of supporting its motion with affidavits, depositions, admissions or other documentary evidence provided that the "substance or content" of the supporting proofs is admissible as evidence. *Maiden, supra*, at 119. In reviewing a motion under MCR 2.116(C)(7), the court accepts the factual contents of the Complaint as true unless contradicted

by the movant's documentation. *Id.* When the material facts are not in dispute, the reviewing court may decide whether a Plaintiff's claim is barred by immunity as a matter of law. *Robinson v Detroit*, 462 Mich 439, 445; 613 NW.2d 307 (2000).

ARGUMENT

I. IS AN INDIVIDUAL CLAIMING INJURY OR LOSS DUE A DEFECTIVE COUNTY ROAD ONLY REQUIRED TO PROVIDE NOTICE WHICH "SET[S] FORTH SUBSTANTIALLY THE TIME WHEN AND PLACE WHERE THE INJURY TOOK PLACE, THE MANNER IN WHICH IT OCCURRED, THE KNOWN EXTENT OF THE INJURY, THE NAMES OF ANY WITNESSES TO THE ACCIDENT AND THAT THE PERSON RECEIVING THE INJURY INTENDS TO HOLD THE COUNTY LIABLE FOR DAMAGES."?

Plaintiff/Appellee contends the answer to this question is "yes".

Defendant/Appellant contends the answer to this question is "no".

The Trial Court was not requested by Defendant/Appellant to answer this question.

This Court issued its Opinion in *Streng v Board of Mackinac County Road Commission* for publication on May 24, 2016. (____ Mich App ____ (2016); 2016 WL 2992564, Docket No: 323226). The issue in *Streng* is identical to the issue presented within this Appeal i.e. which notice provision governs the facts and resolution of the notice issues in this case, MCL 691.1404 under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq* or MCL 224.21 under the Highway Code, MCL 220.1 *et seq.*?

In *Streng*, the Road Commission argued, among other things, that Plaintiff/Appellee's Notice of Intent failed to identify the exact location of the accident, as required by the notice provision of MCL 691.1404(1). As in the present case, the *Streng* court noted that the Road Commission did have actual notice of the precise location of the accident. In fact, it appears that

the Road Commission had actual notice of the location of the defect well before the Notice of Intent was sent, much like in this appeal.

Alternatively, Plaintiff/Appellee responded by arguing that her notice complied with MCL 224.21(3) which requires that the notice only “set forth substantially the time when and place where the injury took place”. The Trial Court held that Plaintiff/Appellee’s notice would satisfy either statute because the location was “sufficiently stated with the additional circumstances surrounding the event’s developments.” Further, Defendant/Appellant’s argument that the notice was not sufficient despite it having actual notice of the exact location was “form over substance” that the Trial Court found was without merit.

In the present Appeal the Trial Court held that Plaintiff/Appellee’s notice satisfied the GTLA notice requirements. By implication, the Court would have ruled that the notice also satisfied the requirements under the Highway Code. The Court was not requested by the Road Commission to decide this issue (i.e. which notice provision controlled), but only whether Plaintiff/Appellee’s notice satisfied the heightened requirements of MCL 691.1404.

The *Streng* court clearly held that MCL 224.21 is the specific statute in regard to claims of liability against County Road Commissioners for accidents that occur on county roads. *Streng* also noted that, despite multiple legislative amendments to the GTLA and the Highway Code, the notice provisions of MCL 224.21 remain in effect and have not been substantively changed. (Slip Opinion page 7).

In reconciling the notice requirements of the GTLA versus the notice requirements under the Highway Code, the *Streng* court held:

“To 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. *Robinson*, 486 Mich at 21.”²

In fact, the court went on to hold:

“In sum, courts appear to have been overlooking the time limit, substantive requirements and service procedures applicable to notice under MCL 224.21(3) when the responsible party is a County Road Commission. Nothing in either the GTLA or the Highway Code indicate that the Legislature intended that result. Despite the precedent of applying the GTLA to the exclusion of MCL 224.21, the procedures and remedies provided by MCL 224.21 are what apply to County Road Commissions and if the Legislature wants the laws to be more uniform, it has the power to make the changes necessary.” (Slip Opinion page 7).

Streng was decided while the current litigation was pending in the Trial Court. *Streng* was released for publication and is binding precedent. See MCR 7.215(C)(2).

Defendant/Appellant argues that this issue was not preserved in the Trial Court. Plaintiff/Appellee, obviously, disagrees. Generally, the Court of Appeals will decline to consider issues which have not been preserved for Appellant review. However, the Court will depart from this general rule where, as here, consideration of the claim is necessary to a proper determination of the case and where a question of law may be decided without reference to material facts in dispute. See *Trail Clinic, P.C. v Bloch*, 114 Mich App 700, 711-712; 319 N.W.2d 638 (1982) *lv. den* 417 Mich 959(1985), *Harris v Pennsylvania Erection and Construction et al*, 143 Mich App 790; 372 N.W.2d 663(1985) and *Kennedy Liquor and Deli Shoppe, Inc. d/b/a Big Daddy's Liquor and Party Store v Liquor Control Commission, et al*, (_____ Mich App _____ (2016); 2016 Mich App. WL 187.

Further, Appellate Courts may overlook preservation requirements where the failure to consider the issue would result in manifest injustice. *Herald Company, Inc. v Kalamazoo*, 229 Mich App 376, 390; 589 N.W. 2d, 295 (1998), if consideration of the issue is necessary to proper

² *Robinson v City of Lansing*, 486 Mich 1; 782 N.W. 2d 171 (2010).

determination of the case, *Providence Hospital v Labor Fund*, 162 Mich App 191, 195; 412 N.W. 2d 690 (1987), or if the issue involves a question of law and the facts necessary for its resolution have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 N.W. 2d 456 (1998). Also see *Steward v Panek, et al*, 251 Mich App 546; 652 N.W. 2d 232 (2002).

As in *Streng*, the issue in this case is whether the notice requirements of the GTLA or whether the notice provisions of the Highway Code are applicable. Despite Defendant/Appellant'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 GTLA was amended in 1970. Clearly, the Highway Code provisions apply and Plaintiff/Appellee's notice is sufficient under both statutes.

II. DID PLAINTIFF/APPELLEE'S NOTICE TO EATON COUNTY OF FATAL INJURIES DUE TO DEFECTIVE HIGHWAY MEET THE SUBSTANTIAL COMPLIANCE STANDARD ESTABLISHED IN *PLUNKETT V DEPARTMENT OF TRANSPORTATION*, 286 MICH APP 168; 779 N.W. 2d 263 (2009)?

Plaintiff/Appellee contends the answer to this question is "yes".

Defendant/Appellant contends the answer to this question is "no".

The Trial Court ruled in favor of Plaintiff/Appellee by answering this question "yes".

MCL 691.1404 provides in relevant part:

"(1) As 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. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the Claimant.***"

THE PURPOSE OF THE STATUTORY NOTICE

The notice need not be provided in a particular form. It is sufficient if it is timely and contains the requisite information. *Burise v. City of Pontiac*, 282 Mich.App. 646; 766 N.W. 2d 311 (2009).

Notice provisions permit the governmental agency to be apprised of possible litigation against it and to be able to investigate and gather evidence quickly to evaluate the claim. *Blohm v. Emmet County Bd. of County Road Com'rs* 223 Mich.App. 383, *lv den* 458 Mich 869 (1998); 565 N. W. 2d 924 (1997).

The principal purpose to be served by requiring notice of injury is to provide the governmental agency with the opportunity to investigate the claim while the evidentiary trail is still fresh and to remedy the defect before other persons are injured. *Hussey v. City of Muskegon Heights* 36 Mich.App. 264; 193 N.W. 2d 421 (1971). Also see *Lawson v. City of Niles*, unpublished per curiam opinion of the Court of Appeals, issued January 8, 2009 Docket No. 280797. (Response Brief) (Exhibit I).

However, the notice need only be understandable and sufficient to bring the important facts to the governmental entity's attention. *Brown v. City of Owosso*, 126 Mich 91; 85 N.W. 2d 256 (1901). Thus, a liberal construction of the notice requirements is favored. *Meredith v. City of Melvindale*, 381 Mich. 572; 165 N.W. 2d 7 (1969).

As noted above, the Road Commission does not claim that it did not have knowledge of the location of the defect nor that it did not understand the nature of the defect immediately after it occurred. Further, corrective measures were undertaken within days of the accident to prevent additional accidents from occurring. Consequently, it is unclear what additional information Defendant claims it needs to be put on notice of something it was already aware of.

SUFFICIENCY OF THE NOTICE

The requirement should not receive so strict a construction “as to make it difficult for the average citizen to draw a good notice....” *Kustasz v. Detroit*, 28 Mich. App. 312, 315; 184 N.W. 2d 328 (1970), quoting *Meredith*, 381 Mich. at 579, quoting *Brown*, 126 Mich. at 94–95 “[A] notice should not be held ineffective when in ‘substantial compliance with the law....’” *Smith v. City of Warren*, 11 Mich. App. 449, 455; 161 N.W. 2d 412 (1968), quoting *Ridgeway v. City of Escanaba*, 154 Mich. 68; 117 N.W. 550 (1908). A plaintiff’s description of the nature of the defect may be deemed to substantially comply with the statute when “[c]oupled with the specific description of the location, time and nature of injuries....” *Jones v. Ypsilanti*, 26 Mich. App. 574, 584; 182 N.W. 2d 795 (1970); see also *Barribeau v. Detroit*, 147 Mich. 119, 125; 110 N.W. 512 (1907) (“In determining the sufficiency of the notice ... the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury.”). (Emphasis supplied). “Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.” *Jones*, 26 Mich. App. at 584; quoting *Smith*, 11 Mich. App. At 455.

The Supreme Court has held that this statutory notice provision is clear and unambiguous; thus, it must be enforced as written. *Rowland v. Washtenaw Co. Rd. Comm.*, 477 Mich. 197, 219; 731 N.W. 2d 41 (2007). But notice “is sufficient if it is timely and contains the requisite information,” and notice does not need to be provided in a particular format. *Plunkett* at 176. The Court has held that substantial compliance with the statutory notice requirements is sufficient. *Id.* at 177, 779; see also *McLean v City of Dearborn*, 302 Mich App 68; 863 N.W. 2d 916 (2013) at 75. And the information required by the statute “does not have to be contained within the

plaintiff's initial notice; it is sufficient if a notice is received by the governmental agency within the 120-day period that contains the required elements.” Id. At 74–75. (Emphasis supplied).

In *Rowland* the Supreme Court overruled a line of cases that held that, absent of showing of actual prejudice to the defendant-government, a plaintiff's failure to comply with the highway exception notice provision was not fatal. Id. at 200. The *Rowland* plaintiff failed to provide the required notice within 120 days. Id. at 201. The *Rowland* Court found this error fatal to the plaintiff's case, concluding that “MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written.” Id. at 219. *Rowland* did not discuss the “exact location” language at issue in this case. *Rowland* did not discuss “substantial compliance” with the notice provision, but rather only removed any required showing of “actual prejudice”.

In *Plunkett*, the defendant argued that it was entitled to summary disposition because the plaintiff's notice was insufficient under MCL 691.1404 as it did not contain a strictly accurate or correct identification of the alleged highway defect, and the alleged defect was not actionable under “uncontested standards for maintaining asphalt pavement.” Id. at 174, 179. The Court concluded that a plaintiff need only substantially comply with the notice provision, insofar as a plaintiff should not be held to the standard of a hypertechnical and hyperdetailed recitation of the precise location of the defect. Id. at 177–179. Rather, the plaintiff must only provide a sufficiently accurate description of the nature and location of the defect that the reader is not left with any real doubt as to where and what the defect is.

In *McLean* Plaintiff, who was a pedestrian, broke her foot when she tripped and fell while stepping off a sidewalk onto a road. She brought a personal injury action against that City of Dearborn. Notice of the accident was provided to the city 5 days later. Approximately 2 months

after the accident, a letter was authored by Plaintiff counsel which provided additional information regarding the location of the defect and Plaintiff's injuries.

Plaintiff filed a Complaint in the Circuit Court and Defendant filed its Motion for Summary Disposition, arguing that Plaintiff failed to provide adequate pre-suit notice of her claim pursuant to MCL 691.1404. Among other things, the City of Dearborn argued that Plaintiff had failed to provide the exact nature of the defect and the injury sustained.

The *McLean* Court held that the required information does not have to be contained within the Plaintiff's initial notice; it is sufficient if a notice is received by the governmental agency within the 120 day period which contains the required elements.

In the present case, the notice submitted by Pearce clearly identifies the location as occurring on North Mason Road approximately 500 feet south of the intersection with W. Kinsel Highway, Kalamo Township, Eaton County Michigan. The notice also clearly identifies the nature of the defect, i.e. that water was allowed to pool on the roadway which, when encountered by Melissa Musser, caused her to leave the roadway. The notice specifically "reserves the right to assert additional defects as same may become known".

Furthermore, the concluding paragraph of the notice specifically requests that "If any further information is desired or deemed necessary, [The Road Commission] may contact the attorneys who are: Collison & Collison, Attorney at Law, 5811 Colony Drive, North, P. O. Box 6010, Saginaw, Michigan 48608-6010, telephone: (989) 799-3033". No such request was ever made by the Road Commission, presumably because all of the information required by defendant was already within its possession.

In addition to the notice provided by Pearce, the Road Commission was also in possession of Harston's notice which Defendant concedes within its Brief in Support of Motion

for Summary Disposition is proper. The Road Commission also received notice from Melissa Sue Musser and John Musser. Consequently the Defendant did have “a notice” within the statutory period. In fact, it had at least four “notices”. It is hard to imagine what additional information the Road Commission might require in that it was fully apprised of all relevant facts within the statutory period, regardless of whom provided such notice.

A remarkably similar situation occurred in *Plunkett*.

In that case Holly Plunkett lost control of her minivan as she traveling south on US-127 in Clare County. At the time of the accident it was raining and the road surface was wet. She apparently lost control due to the presence of an “unnatural accumulation of rain fall” which was allowed to pool or collect on the roadway. Likewise, in the present case, Plaintiff claims that Melissa Sue Musser lost control of her vehicle because of the unnatural collection of water on the roadway.

Much like the present case, the Department of Transportation raised a purely technical objection to Plaintiff’s pre-suit notice. M-DOT alleged that the notice did not contain a “strictly accurate or correct identification of the alleged highway defect”.

The *Plunkett* notice stated, in pertinent part:

“Please accept this letter as notice of intention to file a claim against the Michigan Department of Transportation on behalf of our clients in connection with an incident that occurred on May 19, 2005, at approximately 8:30 p.m. on Southbound US–127, at or near Bailey Road, Clare County, Michigan.”

The claim arose when Holly Marie Plunkett struck standing/pooled water on the roadway's surface while driving, which then caused her vehicle to hydroplane out of control and strike a tree on the west side of the roadway. The standing/pooled water on the roadway was caused by excessive and uneven wear, and/or lack of drainage due to uneven and unreasonable wear, and/or failure to maintain the roadway in a reasonably safe manner. “(Emphasis supplied). (*Plunkett* at page 175).

The above description of the location and nature of the defect was deemed sufficient to put the governmental authority on notice as to where the accident occurred. Plunkett's notice also "reasonably apprised M-DOT of the nature of the defect".

As the *Plunkett* Court stated:

"[T]he requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice...." "[A] notice should not be held ineffective when in 'substantial compliance with the law....'" "A plaintiff's description of the nature of the defect may be deemed to substantially comply with the statute when "[c]oupled with the specific description of the location, time and nature of injuries...." "Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.'" (*Plunkett* at pages 176-177 (internal citations omitted) (Emphasis in the original).

The notice provided by Plaintiff to Defendant in the present case, at a minimum, was "a sufficiently accurate description of the nature and location of the defect [such] that the [Road Commission was] not left with any real doubt as to where and what the defect is."

The Eaton County Circuit Court agreed with the position of Plaintiff/Appellee by ruling:

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

Consequently, the Panel can appreciate that Plaintiff's notice complied not only with the notice provisions of the Highway Code but the notice provisions of the GTLA as well. For all of the reasons stated above, the decision of the Trial Court must be affirmed.

REQUEST FOR RELIEF

WHEREFORE Plaintiff/Appellee LYNN PEARCE, Personal Representative of the Estate of Brendon Pearce, Deceased, prays this Court affirm the Order of the Trial Court denying Defendant/Appellant's Motion for Summary Disposition.

Dated this 6th day of October, A.D., 2016.

COLLISON & COLLISON

/s/ Joseph T. Collison

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

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APPENDIX 9

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

COURT OF APPEALS
DOCKET NO. 333387

Plaintiff/Appellee,

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

-vs-

THE EATON COUNTY ROAD COMMISSION,

Defendant/Appellant

and

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

Defendants.

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Telephone: (517) 327-0300

COLLISON & COLLISON 5811 COLONY DRIVE NORTH PO BOX 6010 SAGINAW MI 48608-6010 TELEPHONE 989.799.3033

MOTION TO AFFIRM

NOW COMES the above named Plaintiff/Appellee, pursuant to MCR 7.211(C)(3) and hereby moves this Court to dispense with Oral Argument and to affirm denial of Defendant/Appellant's Motion for Summary Disposition, further stating as follows:

1. That Lynn Pearce, Personal Representative of the Estate of Brendon Pearce, Deceased, is the Plaintiff/Appellee in the above entitled matter as is more fully reflected by Docket No: 333387.
2. That this Appeal arises by virtue of the denial of Defendant/Appellant's Motion for Summary Disposition premised on its entitlement to governmental immunity for the reason that Plaintiff/Appellee's Notice of Injury and Defect did not comply with the requirements of MCL 691.1404.
3. That the Trial Court found that the notice met the substantial compliance standard set forth in *Plunkett v Department of Transportation*, 286 Mich App 168; 779 N.W. 2d 263 (2009).
4. That this Court issued its Opinion in *Streng v Board of Mackinac County Road Commission* for publication on May 24, 2016. (_____ Mich App _____, 2016; 2016 WL 2992564, Docket No. 323226.)
5. That the issue in *Streng* is identical to the issue presented within this Appeal i.e. which notice provision governs the facts and resolution of the notice issues in this case, MCL 691.1404 under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq* or MCL 224.21 under the Highway Code, MCL 220.1 *et seq*.
6. That the *Streng* Court held that MCL 224.21 is the specific statute in regard to claims of liability against County Road Commission for accidents that occur on County roads.
7. That MCL 224.21(3) requires only that an individual claiming injury or loss due to a defective County road provide notice which sets forth substantially the time when and place where the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident and that the person receiving the injury intends to hold the County liable for damages.
8. That the Trial Court found that the notice of Plaintiff/Appellee met the heightened notice requirement under the GTLA which requires that the injured person serve a notice on the governmental agency of the occurrence of the injury and defect and that the notice specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the Claimant.

- 9. That the notice requirements of MCL 691.1404 do not apply to the present Appeal.
- 10. That the notice provision of MCL 224.21 do apply and that, under either statute, the notice of Plaintiff/Appellee is sufficient.
- 11. That *Streng* is directly on point, is a published decision and has precedential effect under the rule of *stare decisis*. MCR 7.215(C)(2).
- 12. That the present Appeal is factually and legally untenable and Oral Argument is unnecessary to resolve this matter.

For the reasons stated above, Lynn Pearce, Personal Representative of the Estate of Brendon Pearce, Deceased requests this Court grant this Motion to Affirm the Order of the Trial Court denying Defendant/Appellant's Motion for Summary Disposition.

Dated this 6th day of October, A.D., 2016.

COLLISON & COLLISON

/s/ Joseph T. Collison

BY: JOSEPH T. COLLISON, J.D.
Attorneys for Plaintiff/Appellee

BUSINESS ADDRESS:
5811 Colony Drive, North
P.O. Box 6010
Saginaw, Michigan 48608-6010
Telephone: 989-799-3033

APPENDIX 10

STATE OF MICHIGAN
IN THE COURT OF APPEALS

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

COURT OF APPEALS
DOCKET NO. 333387

Plaintiff/Appellee,

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

-vs-

THE EATON COUNTY ROAD COMMISSION,

Defendant/Appellant

and

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

Defendants.

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SMITH HAUGHEY RICE & ROEGGE PC
BY: STEPHANIE HOFFER (P71536)
D. ADAM TOUNTAS (P68579)
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GARAN LUCOW MILLER P.C.
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Attorney for Defendants, Estate of Melissa
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Lansing, Michigan 48917-8267
Telephone: (517) 327-0300

MOTION FOR IMMEDIATE CONSIDERATION

NOW COMES the above named Plaintiff/Appellee, LYNN PEARCE, Personal Representative of the Estate of Brendon Pearce, Deceased, pursuant to MCR 7.211(C)(6) and hereby moves this Court for immediate consideration for the reason that this Court's decision in *Streng v Board of Mackinac County Road Commission*, (____ Mich App ____ (2016); 2016 WL 2992564, Docket No: 323226) is directly on point and has precedential effect under the rule of *stare decisis*. MCR 7.215(C)(2).

Immediate consideration of Plaintiff/Appellee's Motion to Affirm will promote judicial economy, save judicial resources and avoid unnecessary time, effort and expense.

WHEREFORE Plaintiff/Appellee LYNN PEARCE, Personal Representative of the Estate of Brendon Pearce, Deceased, prays this Court grant her Motion for Immediate Consideration.

Dated this 6th day of October, A.D., 2016.

COLLISON & COLLISON

/s/ Joseph T. Collison

BY: JOSEPH T. COLLISON, J.D.
Attorneys for Plaintiff/Appellee

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APPENDIX 11

Court of Appeals, State of Michigan

ORDER

Estate of Brendon Pearce v Eaton County Road Commission

Michael J. Kelly
Presiding Judge

Docket No. 333387

Peter D. O'Connell

LC No. 16-000029-NI

Amy Ronayne Krause
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The Court orders that the motion to affirm pursuant to MCR 7.211(C)(3) is GRANTED for the reason that the question to be reviewed is so unsubstantial as to need no argument or formal submission.

Presiding Judge

M. J. Kelly, J., would deny the motion to affirm.

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SMITH, HAUGHEY, RICE & ROEGGE

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on



OCT 25 2016

Date

Jerome W. Zimmer Jr.
Chief Clerk

APPENDIX 12

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Order

**Michigan Supreme Court
Lansing, Michigan**

June 27, 2017

Stephen J. Markman,
Chief Justice

154885

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

LYNN MARIE PEARCE, Personal Representative
of the Estate of BRENDON PEARCE, Deceased,
Plaintiff-Appellee,

v

SC: 154885
COA: 333387
Eaton CC: 16-000029-NI

EATON COUNTY ROAD COMMISSION,
Defendant-Appellant,
and

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

_____/

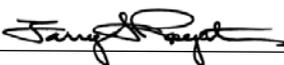
On order of the Court, the application for leave to appeal the October 25, 2016 order of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.



t0619

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 27, 2017



Clerk

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.

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

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

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DATED: August 28, 2020

/s/ Jonathan B. Koch

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APPENDIX 13

STATE OF MICHIGAN

IN THE SUPREME COURT

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

Plaintiff/Appellee,

-vs-

THE EATON COUNTY ROAD COMMISSION,

Defendant/Appellant

and

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

Defendants.

SUPREME COURT
DOCKET NO. 154885

COURT OF APPEALS
DOCKET NO. 333387

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

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**ANSWER TO DEFENDANT/APPELLANT EATON COUNTY ROAD COMMISSION'S
APPLICATION FOR LEAVE TO APPEAL**

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE BASIS OF JURISDICTION

MCR 7.303(B)(1) allows discretionary review of a decision by the Court of Appeals.

MCR 7.305 provides that an unsuccessful Appellant in the Court of Appeals may apply for Leave to Appeal to this Court. However, MCR 7.305(B) requires that the applicant demonstrate that:

“*** (3) the issue involves a legal principle of major significance to the state's jurisprudence; *** (5) in an appeal of a decision of the Court of Appeals, (a) the decision is clearly erroneous and will cause material injustice, or (b) the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals***”.

Despite Defendant/Appellant'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 nor does the Court of Appeals' Order conflict with a Supreme Court decision or another decision of the Court of Appeals but, rather, is guided by the Court of Appeals' decision in *Streng v Board of Mackinac County Road Commissioners*, ___ Mich App ___ (2016); 2016 WL 2992564, (COA Docket No. 323226); Application for Leave Denied 12/21/2016 (MSC Docket No. 154034).

COUNTER STATEMENT OF QUESTIONS INVOLVED

I. DID THE COURT OF APPEALS PROPERLY ORDER IMMEDIATE CONSIDERATION OF PLAINTIFF/APPELLEE’S MOTION TO AFFIRM BY CONCLUDING THAT THE QUESTION APPEALED BY DEFENDANT/APPELLANT WAS SO UNSUBSTANTIAL AS TO NEED NO ARGUMENT OR FORMAL SUBMISSION AS PROVIDED IN MCR 7.211(C)(3)?

Plaintiff/Appellee contends the answer to this question is “yes”.

Defendant/Appellant contends the answer to this question is “no”.

The Court of Appeals ruled in favor of Plaintiff/Appellee by answering this question “yes”.

II. DID PLAINTIFF/APPELLEE’S NOTICE TO EATON COUNTY OF FATAL INJURIES DUE TO DEFECTIVE HIGHWAY MEET THE SUBSTANTIAL COMPLIANCE STANDARD ESTABLISHED IN *PLUNKETT V DEPARTMENT OF TRANSPORTATION*, 286 MICH APP 168; 779 N.W. 2d 263 (2009)?

Plaintiff/Appellee contends the answer to this question is “yes”.

Defendant/Appellant contends the answer to this question is “no”.

The Court of Appeals implicitly ruled in favor of Plaintiff/Appellee by granting Plaintiff/Appellee’s Motion for Immediate Consideration of Defendant/Appellant’s Motion to Affirm and ruling that the question presented on Appeal was so unsubstantial as to need no argument or formal submission.

COUNTER STATEMENT OF FACTS

A. THE NATURE OF THE ACTION

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

A vehicle which was owned by Patricia Jane Musser and which was being operated by Melissa Sue Musser was southbound when the vehicle encountered water which had collected on the pavement and which caused Melissa Sue Musser to lose control and leave the roadway. The vehicle rolled over and struck a tree. Annexed to Plaintiff's Response Brief to the Road

Commission's Motion for Summary Disposition as Exhibit A is the Eaton County Office of the Sheriff 's Response to Plaintiff's FOIA Request. The Court will note, at page 14 of the Case Supplemental Report, that:

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

It was the opinion of Detective Rick Buxton that the pooled water on the road surface caused Melissa Sue Musser to lose control of the vehicle. See Case Supplement Report at page 15.

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

Brendon Pearce, age 15, was a passenger in the vehicle. He sustained fatal injuries as the result of the accident. The present litigation involves a Wrongful Death claim by Brendon's mother, Lynn Pearce, as Personal Representative for automobile negligence against Melissa Sue Musser, owner liability against Patricia Jane Musser and liability under the defective highway exception to governmental immunity as against the Eaton County Road Commission. See MCL 691.1402.

B. THE CHARACTER OF PLEADINGS AND PROCEEDINGS

Plaintiff's Complaint was filed January 12, 2016 alleging that Melissa Musser was negligent in the operation of the motor vehicle owned by Patricia Jane Musser and that the Eaton

County Road Commission had failed to maintain the roadway in reasonable repair. Specifically, Plaintiff alleged in paragraph 15:

“15. That Defendant, EATON COUNTY ROAD COMMISSION, knew or should have known of the dangerous and defective condition of southbound North Mason Road approximately 500 feet south of Kinsel Road, as the condition was ongoing and reported by local residents.”

The Road Commission’s response was:

“Denied, that the relevant area of North Mason Road was dangerous and defective. Negligence or wrongdoing on the part of the Road Commission is expressly denied for the reason that the allegations regarding same are untrue.” (Emphasis supplied)

Plaintiff’s Amended Complaint was filed May 18, 2016. Count II dealt specifically with the breach of the Statutory Duty by the road commission. Paragraph 13 specifically alleges:

“***the EATON COUNTY ROAD COMMISSION, was and still is an entity duly organized and existing under the laws of the State of Michigan, MCL 224.1 et seq,***.

The road commission admitted that its activities were governed by the Highway Code as referenced above.

Paragraph 14 specifically incorporates the notice provisions of MCL 224.21 by reference thereto.

In pertinent part, paragraph 14 of the Amended Complaint alleges:

“***the liability, procedure and remedy 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***”.(emphasis supplied)

The response of the road commission to paragraph 14 of the Amended Complaint was, essentially:

“***by way of further response, the Road Commission asserts that MCL 691.1402 speaks for itself.***”

Subsection (3) of MCL 224.21 requires that the Notice of Injury and Defect “set forth substantially the time when and place where the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident and that the person receiving the injury intends to hold the county liable for damages.”

There is no contention in the present Appeal that the Notice of Defect and Injury of Plaintiff/Appellee failed to meet the statutory requirements under the Highway Code (MCL 224.21[3]). To the contrary, Defendant/Appellant simply claims that the heightened notice requirement under the Governmental Tort Liability Act (MCL 691.1401 *et seq.*) applies to County Road Commissions, a point never conceded by Appellee. In fact, Defendant/Appellant’s Motion for Summary Disposition, argued in the Trial Court on April 28, 2016, involved a single issue i.e. whether Plaintiff/Appellee’s Notice was sufficient under MCL 691.1404. Plaintiff/Appellee argued that she had met the heightened statutory notice requirements of the GTLA and the Trial Court so agreed by virtue of its Order Denying Defendant/Appellant’s Motion for Summary Disposition entered on May 26, 2016. Defendant/Appellant then filed its Appeal of Right to the Michigan Court of Appeals on June 14, 2016. Plaintiff/Appellee, in turn, filed her Motion for Immediate Consideration, Motion to Affirm and Brief on Appeal on October 6, 2016.

The Court of Appeals issued its Order granting Plaintiff/Appellee’s Motion for Immediate Consideration and granting Plaintiff/Appellee’s Motion to Affirm on October 25, 2016 for the reason that the question to be reviewed “is so unsubstantial as to need no argument or formal submission.”. MCR 7.211(C)(3). Defendant/Appellant then filed the present Application for Leave to Appeal on December 6, 2016.

C. **THE SUBSTANCE OF PROOF**

It is interesting to note, that the road commission does not claim that it did not have knowledge of the exact location of the defect nor that it did not understand the nature of the defect. Furthermore, remedial actions were taken to obviate the defective condition almost immediately after the accident, thus confirming that the road commission knew what the problem was, where the problem was and what it needed to do to correct the problem in order to protect the public from further injury long before any “notice” was required under the statute. See Response Brief Exhibit E.

Specifically, the road commission was advised by homeowner, Jared Osborn, on June 25, 2014 that “his property just north of 1915 (North Mason Road) has standing water in the road whenever it rains, it comes gushing off Kinsel and pools on southbound side. Road is lower than sides and there is no ditch.” See Response Brief Exhibit F. Also see Defendant/Appellant’s Answer to Request for Admission 13.

The Court can appreciate, at this juncture, that the road commission had “exact notice” of the nature and location of the defect and that it was an ongoing problem approximately nine months prior to the fatal accident which forms the basis of this litigation.

Mr. Osborn recontacted the road commission on March 12, 2015 (four days after the fatality) again requesting that something be done about the water on the road and requested that a representative of the Eaton County Road Commission call him with an explanation as to why the defective condition continued to exist. The problem was corrected that same day. Response Brief Exhibit E. Also see Defendant/Appellant’s Answer to Request for Admission 14.

Most importantly, Defendant was contacted on the day of the accident by Central Dispatch. The Road Commission was advised that there was a “bad accident – needs roads closed”. The call

came in at 6:30 p.m. which was approximately 35 minutes after the accident occurred. In response to this notification, the Road Commission set two "Type II" barricades at the intersections of Mason and Kinsel as well as Mason and Valley. Most importantly, a "Type I" barricade was placed at the precise location of the pooled water on the southbound lane.¹ See Service Request and photograph marked collectively as Response Brief Exhibit G. Also see Defendant/Appellant's Answers to Request for Admissions 16-18.

Obviously, the Road Commission had actual knowledge of the fact that water was pooling on North Mason Road for a minimum of nine months prior to the fatal accident which took the life of Brendon Pearce. In fact, it appears that the Road Commission had actual knowledge of the nature and location of the defect within 35 minutes of the accident occurrence.

Despite the foregoing, the Road Commission claims that the notice provided by Lynn Pearce, as Personal Representative of her deceased son was somehow insufficient to place the Road Commission on notice of the nature and extent of the defect. Obviously, this position is untenable.

D. DATES OF IMPORTANT INSTRUMENTS AND EVENTS

As indicated above, this litigation arises by virtue of an automobile accident occurring March 8, 2015. Brendon Pearce sustained fatal injuries as the result of the accident and a Wrongful Death Action was initiated within the Eaton County Circuit Court on January 4, 2016. Prior thereto Plaintiff/Appellee satisfied the statutory requirement of providing notice to Eaton County of the fact that Brendon Peace died as a result of a defective road. See Notice to Eaton County of Fatal Injuries due to Defective Highway dated May 5, 2015. (Exhibit E of Defendant/Appellant's Application for Leave to Appeal).

¹ The "road closed" signs were retrieved by the Road Commission on March 9, 2015. See Response Brief Exhibit H.

Ultimately, Plaintiff/Appellee, with the stipulation of Defendant/Appellant, filed her Amended Complaint which specifically referenced MCL 224.21. See paragraphs 13-14 of the Amended Complaint.

The Road Commission then filed its Motion for Summary Disposition on March 30, 2016. Essentially, Appellant argued that Appellee had failed to comply with the Notice Requirements of MCL 691.1404. The Trial Court denied Defendant/Appellant's Motion and an Order was entered May 26, 2016. The Trial Court specifically found that "prompt and proper notice was given by the Plaintiff to the Eaton County Road Commission; the location and alleged defect in the road were adequately given and were sufficient to bring the defect to the road commission's attention. Plaintiff's notice is sufficient and substantially complies with the statute requirements." (Exhibit B of Defendant/Appellant's Application for Leave to Appeal). The Road Commission then filed its Appeal to the Court of Appeals on June 14, 2016.

E. THE RULING AND ORDER OF THE TRIAL COURT

As noted above, the Trial Court determined that Plaintiff's notice satisfied the requirements of MCL 691.1404 in that the notice included an adequate description of the condition of the road as well as the cause of the accident and location of the defect. Furthermore, the Court adopted the substantial compliance analysis of *Plunkett v Department of Transportation*, 286 Mich App 168; 779 N.W. 2d 263 (2009).

Obviously, if Plaintiff's notice met the requirements under the GTLA, it would also meet the notice requirements of MCL 224.21(3) which is the notice requirement under the Highway Code.

The Trial Court denied Defendant/Appellant's Motion and an Order to such effect was entered within the Eaton County Circuit Court on May 26, 2016. (Exhibit F of Defendant/Appellant's Application for Leave to Appeal).

F: THE RULING AND ORDER OF THE COURT OF APPEALS

Plaintiff/Appellee's Response Brief, Motion to Affirm and Motion for Immediate Consideration were filed with the Court of Appeals on October 6, 2016. The Court then issued its Order on October 25, 2016 which granted both the Motion for Immediate Consideration and Plaintiff/Appellee's Motion to Affirm, specifically finding that the "question to be reviewed is so unsubstantial as to need no argument or formal submission." (Exhibit A of Defendant/Appellant's Application for Leave to Appeal).

STANDARD OF REVIEW

A Circuit Court decision regarding a Motion for Summary Disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW.2d 817 (1999). When a claim is barred by governmental immunity, summary disposition is appropriate under MCR 2.116(C)(7). *Glancy v City of Roseville*, 457 Mich 580, 583; 577 NW.2d 897 (1998). Under MCR 2.116(C)(7) the moving party has the option of supporting its motion with affidavits, depositions, admissions or other documentary evidence provided that the "substance or content" of the supporting proofs is admissible as evidence. *Maiden, supra*, at 119. In reviewing a motion under MCR 2.116(C)(7), the court accepts the factual contents of the Complaint as true unless contradicted by the movant's documentation. *Id.* When the material facts are not in dispute, the reviewing court may decide whether a Plaintiff's claim is barred by immunity as a matter of law. *Robinson v Detroit*, 462 Mich 439, 445; 613 NW.2d 307 (2000).

ARGUMENT

- I. DID THE COURT OF APPEALS PROPERLY ORDER IMMEDIATE CONSIDERATION OF PLAINTIFF/APPELLEE'S MOTION TO AFFIRM BY CONCLUDING THAT THE QUESTION APPEALED BY DEFENDANT/APPELLANT WAS SO UNSUBSTANTIAL AS TO NEED NO ARGUMENT OR FORMAL SUBMISSION AS PROVIDED IN MCR 7.211(C)(3)?**

Plaintiff/Appellee contends the answer to this question is "yes".

Defendant/Appellant contends the answer to this question is "no".

The Court of Appeals ruled in favor of Plaintiff/Appellee by answering this question "yes".

This Court, on December 21, 2016, denied Application for Leave to Appeal of the Court of Appeals' decision in *Streng v Board of Mackinac County Road Commission* (___ Mich App ___ (2016); 2016 WL 2992564, Docket No: 323226; Application for Leave Denied 12/21/2016 (MSC Docket No. 154034). The issue in *Streng* is identical to the issue presented within this Appeal i.e. which notice provision governs the facts and resolution of the notice issues in this case, MCL 691.1404 under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq* or MCL 224.21 under the Highway Code, MCL 220.1 *et seq.*?

In *Streng*, the Road Commission argued, among other things, that Plaintiff/Appellee's Notice of Intent failed to identify the exact location of the accident, as required by the notice provision of MCL 691.1404(1). As in the present case, the *Streng* court noted that the Road Commission did have actual notice of the precise location of the accident. In fact, it appears that the Road Commission had actual notice of the location of the defect well before the Notice of Intent was sent, much like in this appeal.

Alternatively, Plaintiff/Appellee responded by arguing that her notice complied with MCL 224.21(3) which requires that the notice only "set forth substantially the time when and

place where the injury took place”. The Trial Court held that Plaintiff/Appellee’s notice would satisfy either statute because the location was “sufficiently stated with the additional circumstances surrounding the event’s developments.” Further, Defendant/Appellant’s argument that the notice was not sufficient despite it having actual notice of the exact location was “form over substance” that the Trial Court found was without merit.

In the present Appeal the Trial Court held that Plaintiff/Appellee’s notice satisfied the GTLA notice requirements. By implication, the Court would have ruled that the notice also satisfied the requirements under the Highway Code. The Court was not requested by the Road Commission to decide this issue (i.e. which notice provision controlled), but only whether Plaintiff/Appellee’s notice satisfied the heightened requirements of MCL 691.1404.

The *Streng* court clearly held that MCL 224.21 is the specific statute in regard to claims of liability against County Road Commissioners for accidents that occur on county roads. *Streng* also noted that, despite multiple legislative amendments to the GTLA and the Highway Code, the notice provisions of MCL 224.21 remain in effect and have not been substantively changed. (Slip Opinion page 7).

In reconciling the notice requirements of the GTLA versus the notice requirements under the Highway Code, the *Streng* court held:

“To 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. *Robinson*, 486 Mich at 21.”²

In fact, the court went on to hold:

“In sum, courts appear to have been overlooking the time limit, substantive requirements and service procedures applicable to notice under MCL 224.21(3) when the responsible party is a

² *Robinson v City of Lansing*, 486 Mich 1; 782 N.W. 2d 171 (2010).

County Road Commission. Nothing in either the GTLA or the Highway Code indicate that the Legislature intended that result. Despite the precedent of applying the GTLA to the exclusion of MCL 224.21, the procedures and remedies provided by MCL 224.21 are what apply to County Road Commissions and if the Legislature wants the laws to be more uniform, it has the power to make the changes necessary.” (Slip Opinion page 7).

Streng was decided while the current litigation was pending in the Trial Court. *Streng* was released for publication and is binding precedent. See MCR 7.215(C)(2).

Defendant/Appellant argues that this issue was not preserved in the Trial Court. Plaintiff/Appellee, obviously, disagrees. Generally, the Court of Appeals will decline to consider issues which have not been preserved for Appellant review. However, the Court will depart from this general rule where, as here, consideration of the claim is necessary to a proper determination of the case and where a question of law may be decided without reference to material facts in dispute. See *Trail Clinic, P.C. v Bloch*, 114 Mich App 700, 711-712; 319 N.W.2d 638 (1982) *lv den* 417 Mich 959(1985), *Harris v Pennsylvania Erection and Construction et al*, 143 Mich App 790; 372 N.W.2d 663(1985) and *Kennedy Liquor and Deli Shoppe, Inc. d/b/a Big Daddy's Liquor and Party Store v Liquor Control Commission, et al*, (___ Mich App ___ (2016); 2016 Mich App. WL 187

Further, Appellate Courts may overlook preservation requirements where the failure to consider the issue would result in manifest injustice *Herald Company, Inc. v Kalamazoo*, 229 Mich App 376, 390; 589 N.W. 2D, 295 (1998); if consideration of the issue is necessary to proper determination of the case. *Providence Hospital v Labor Fund*, 162 Mich App 191, 195; 412 N.W. 2D 690 (1987); or if the issue involves a question of law and the facts necessary for its resolution have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 N.W. 2d 456 (1998). Also see *Steward v Panek, et al*, 251 Mich App 546; 652 N.W. 2D 232 (2002).

Obviously the Court of Appeals was not persuaded by Defendant/Appellant's preservation argument in that both the Motion for Immediate Consideration and Motion to Affirm were granted.

Similarly, the Road Commission's claim that it was deprived of "the opportunity to have this case formally submitted to a panel and addressed with the benefit of oral arguments" is unfounded.

Not only does MCR 7.211(C)(3) contemplate submission of appeals without argument, MCR 7.214(E) does as well if the panel concludes that the dispositive issues have been recently authoritatively decided and that the briefs and record adequately present the facts and legal arguments such that the court's deliberations would not be significantly aided by oral argument. *Streng* was decided six months before the Court of Appeals rejected the present appeal. Finally, MCR 7.214(E)(1)(c) provides for submission without argument if "the appeal is without merit."

As in *Streng*, the issue in this case is whether the notice requirements of the GTLA or whether the notice provisions of the Highway Code are applicable. Despite Defendant/Appellant'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 GTLA was amended in 1970. Clearly, the Highway Code provisions apply and Plaintiff/Appellee's notice is sufficient under both statutes.

II. DID PLAINTIFF/APPELLEE'S NOTICE TO EATON COUNTY OF FATAL INJURIES DUE TO DEFECTIVE HIGHWAY MEET THE SUBSTANTIAL COMPLIANCE STANDARD ESTABLISHED IN *PLUNKETT V DEPARTMENT OF TRANSPORTATION*, 286 MICH APP 168; 779 N.W. 2d 263 (2009)?

Plaintiff/Appellee contends the answer to this question is "yes".

Defendant/Appellant contends the answer to this question is "no".

The Court of Appeals implicitly ruled in favor of Plaintiff/Appellee by granting Plaintiff/Appellee's Motion for Immediate Consideration of Defendant/Appellant's Motion to Affirm and ruling that the question presented on Appeal was so unsubstantial as to need no argument or formal submission.

MCL 691.1404 provides in relevant part:

“(1) As 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. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the Claimant.***”

THE PURPOSE OF THE STATUTORY NOTICE

The notice need not be provided in a particular form. It is sufficient if it is timely and contains the requisite information. *Burise v. City of Pontiac*, 282 Mich.App. 646; 766 N.W. 2d 311 (2009).

Notice provisions permit the governmental agency to be apprised of possible litigation against it and to be able to investigate and gather evidence quickly to evaluate the claim. *Blohm v. Emmet County Bd. of County Road Com'rs* 223 Mich.App. 383, *lv den* 458 Mich 869 (1998); 565 N. W. 2d 924 (1997).

The principal purpose to be served by requiring notice of injury is to provide the governmental agency with the opportunity to investigate the claim while the evidentiary trail is still fresh and to remedy the defect before other persons are injured. *Hussey v. City of Muskegon Heights* 36 Mich.App. 264; 193 N.W. 2d 421 (1971). Also see *Lawson v. City of Niles*, unpublished per curiam opinion of the Court of Appeals, issued January 8, 2009 Docket No. 280797. (Response Brief Exhibit I).

However, the notice need only be understandable and sufficient to bring the important facts to the governmental entity's attention. *Brown v. City of Owosso*, 126 Mich 91; 85

N.W. 2d 256 (1901). Thus, a liberal construction of the notice requirements is favored. *Meredith v. City of Melvindale*, 381 Mich. 572; 165 N.W. 2d 7 (1969).

As noted above, the Road Commission does not claim that it did not have knowledge of the location of the defect nor that it did not understand the nature of the defect immediately after it occurred. Further, corrective measures were undertaken within days of the accident to prevent additional accidents from occurring. Consequently, it is unclear what additional information Defendant claims it needed to be put on notice of something it was already aware of.

SUFFICIENCY OF THE NOTICE

The requirement should not receive so strict a construction “as to make it difficult for the average citizen to draw a good notice....” *Kustasz v. Detroit*, 28 Mich. App. 312, 315; 184 N.W. 2d 328 (1970), quoting *Meredith*, 381 Mich. at 579, quoting *Brown*, 126 Mich. at 94–95 “[A] notice should not be held ineffective when in ‘substantial compliance with the law....’” *Smith v. City of Warren*, 11 Mich. App. 449, 455; 161 N.W. 2d 412 (1968), quoting *Ridgeway v. City of Escanaba*, 154 Mich. 68; 117 N.W. 550 (1908). A plaintiff’s description of the nature of the defect may be deemed to substantially comply with the statute when “[c]oupled with the specific description of the location, time and nature of injuries....” *Jones v. Ypsilanti*, 26 Mich. App. 574, 584; 182 N.W. 2d 795 (1970); see also *Barribeau v. Detroit*, 147 Mich. 119, 125; 110 N.W. 512 (1907) (“In determining the sufficiency of the notice ... the whole notice and all of the facts stated therein may be used and be considered to determine whether it reasonably apprises the officer upon whom it is required to be served of the place and the cause of the alleged injury.”). (Emphasis supplied). “Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.” *Jones*, 26 Mich. App. at 584; quoting *Smith*, 11 Mich. App. At 455.

This Court has held that this statutory notice provision is clear and unambiguous; thus, it must be enforced as written. *Rowland v. Washtenaw Co. Rd. Comm.*, 477 Mich. 197, 219; 731 N.W. 2d 41 (2007). But notice “is sufficient if it is timely and contains the requisite information,” and notice does not need to be provided in a particular format. *Plunkett* at 176. The Court of Appeals has held that substantial compliance with the statutory notice requirements is sufficient. *Id.* at 177, 779; see also *McLean v City of Dearborn*, 302 Mich App 68; 863 N.W. 2d 916 (2013) at 75. And the information required by the statute “does not have to be contained within the plaintiff’s initial notice; it is sufficient if a notice is received by the governmental agency within the 120–day period that contains the required elements.” *Id.* At 74–75. (Emphasis supplied).

In *Rowland* the Supreme Court overruled a line of cases that held that, absent of showing of actual prejudice to the defendant-government, a plaintiff’s failure to comply with the highway exception notice provision was not fatal. *Id.* at 200. The *Rowland* plaintiff failed to provide the required notice within 120 days. *Id.* at 201. The *Rowland* Court found this error fatal to the plaintiff’s case, concluding that “MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written.” *Id.* at 219. *Rowland* did not discuss the “exact location” language at issue in this case. *Rowland* did not discuss “substantial compliance” with the notice provision, but rather only removed any required showing of “actual prejudice”.

In *Plunkett*, the defendant argued that it was entitled to summary disposition because the plaintiff’s notice was insufficient under MCL 691.1404 as it did not contain a strictly accurate or correct identification of the alleged highway defect, and the alleged defect was not actionable under “uncontested standards for maintaining asphalt pavement.” *Id.* at 174, 179. The Court concluded that a plaintiff need only substantially comply with the notice provision, insofar as a

plaintiff should not be held to the standard of a hypertechnical and hyperdetailed recitation of the precise location of the defect. *Id.* at 177–179. Rather, the plaintiff must only provide a sufficiently accurate description of the nature and location of the defect that the reader is not left with any real doubt as to where and what the defect is.

In *McLean* Plaintiff, who was a pedestrian, broke her foot when she tripped and fell while stepping off a sidewalk onto a road. She brought a personal injury action against that City of Dearborn. Notice of the accident was provided to the city 5 days later. Approximately 2 months after the accident, a letter was authored by Plaintiff counsel which provided additional information regarding the location of the defect and Plaintiff's injuries.

Plaintiff filed a Complaint in the Circuit Court and Defendant filed its Motion for Summary Disposition, arguing that Plaintiff failed to provide adequate pre-suit notice of her claim pursuant to MCL 691.1404. Among other things, the City of Dearborn argued that Plaintiff had failed to provide the exact nature of the defect and the injury sustained.

The *McLean* Court held that the required information does not have to be contained within the Plaintiff's initial notice; it is sufficient if a notice is received by the governmental agency within the 120 day period which contains the required elements.

In the present case, the notice submitted by Pearce clearly identifies the location as occurring on North Mason Road approximately 500 feet south of the intersection with W. Kinsel Highway, Kalamo Township, Eaton County Michigan. The notice also clearly identifies the nature of the defect, i.e. that water was allowed to pool on the roadway which, when encountered by Melissa Musser, caused her to leave the roadway. The notice specifically "reserves the right to assert additional defects as same may become known".

Furthermore, the concluding paragraph of the notice specifically requests that “If any further information is desired or deemed necessary, [The Road Commission] may contact the attorneys who are: Collison & Collison, Attorney at Law, 5811 Colony Drive, North, P. O. Box 6010, Saginaw, Michigan 48608-6010, telephone: (989) 799-3033”. No such request was ever made by the Road Commission, presumably because all of the information required by defendant was already within its possession.

In addition to the notice provided by Pearce, the Road Commission was also in possession of Harston’s notice which Defendant concedes within its Brief in Support of Motion for Summary Disposition is proper. The Road Commission also received notice from Melissa Sue Musser and John Musser. Consequently the Defendant did have “a notice” within the statutory period. In fact, it had at least four “notices”. It is hard to imagine what additional information the Road Commission might require in that it was fully apprised of all relevant facts within the statutory period, regardless of whom provided such notice.

A remarkably similar situation occurred in *Plunkett*.

In that case Holly Plunkett lost control of her minivan as she traveling south on US-127 in Clare County. At the time of the accident it was raining and the road surface was wet. She apparently lost control due to the presence of an “unnatural accumulation of rain fall” which was allowed to pool or collect on the roadway. Likewise, in the present case, Plaintiff claims that Melissa Sue Musser lost control of her vehicle because of the unnatural collection of water on the roadway.

Much like the present case, the Department of Transportation raised a purely technical objection to Plaintiff’s pre-suit notice. M-DOT alleged that the notice did not contain a “strictly accurate or correct identification of the alleged highway defect”.

The *Plunkett* notice stated, in pertinent part:

“Please accept this letter as notice of intention to file a claim against the Michigan Department of Transportation on behalf of our clients in connection with an incident that occurred on May 19, 2005, at approximately 8:30 p.m. on Southbound US-127, at or near Bailey Road, Clare County, Michigan.”

The claim arose when Holly Marie Plunkett struck standing/pooled water on the roadway's surface while driving, which then caused her vehicle to hydroplane out of control and strike a tree on the west side of the roadway. The standing/pooled water on the roadway was caused by excessive and uneven wear, and/or lack of drainage due to uneven and unreasonable wear, and/or failure to maintain the roadway in a reasonably safe manner. “(Emphasis supplied). (*Plunkett* at page 175).”

The above description of the location and nature of the defect was deemed sufficient to put the governmental authority on notice as to where the accident occurred. Plunkett’s notice also “reasonably apprised M-DOT of the nature of the defect”.

As the *Plunkett* Court stated:

“[T]he requirement should not receive so strict a construction as to make it difficult for the average citizen to draw a good notice....” “[A] notice should not be held ineffective when in ‘*substantial compliance* with the law....’” “A plaintiff’s description of the nature of the defect may be deemed to substantially comply with the statute when “[c]oupled with the specific description of the location, time and nature of injuries....” “‘Some degree of ambiguity in an aspect of a particular notice may be remedied by the clarity of other aspects.’” (*Plunkett* at pages 176-177 (internal citations omitted) Emphasis in the original).

The notice provided by Plaintiff to Defendant in the present case, at a minimum, was “a sufficiently accurate description of the nature and location of the defect [such] that the [Road Commission was] not left with any real doubt as to where and what the defect is.”

The Eaton County Circuit Court agreed with the position of Plaintiff/Appellee by ruling:

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

Consequently, this Court can appreciate that Plaintiff's notice complied not only with the notice provisions of the Highway Code but the notice provisions of the GTLA as well. For all of the reasons stated above Defendant/Appellant's Application for Leave to Appeal must be denied.

REQUEST FOR RELIEF

WHEREFORE Plaintiff/Appellee LYNN PEARCE, Personal Representative of the Estate of Brendon Pearce, Deceased, prays this Court deny Defendant/Appellant's Application for Leave to Appeal.

Dated this 27th day of December, A.D., 2016.

COLLISON & COLLISON

/s/ Joseph T. Collison

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

APPENDIX 14

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

JOSEPH GRINAGE,

Plaintiff,

CASE NO. 15-1226-NI

v

HON. JOHN D. MAURER

ESTATE OF MELISSA SUE MUSSER, PATRICIA
JANE MUSSER, and THE EATON COUNTY
ROAD COMMISSION

Defendants.

AND

RYAN HARSTON,

Plaintiff,

CASE NO. 15-1226-NI

v

HON. JOHN D. MAURER

THE EATON COUNTY ROAD COMMISSION,
and the ESTATE OF MELISSA SUE MUSSER and
PATRICIA JANE MUSSER,

Defendants.

AND

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

Plaintiff,

CASE NO. 16-29-NI

v

HON. JOHN D. MAURER

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

Defendants.

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DEFENDANT EATON COUNTY ROAD COMMISSION'S
MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant, the Eaton County Road Commission ("Road Commission"), by and thought its attorneys, Smith Haughey Rice & Roegge, and states for its Motion for Summary Disposition as follows:

1. On March 8, 2015, Melissa Musser took several friends and family members for a ride in her mother's minivan.

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2. At one point, the vehicle was headed southbound on Mason Road. Musser was legally intoxicated; driving at least 20 miles over the speed limit; and riding on bad tires.

3. Musser lost control of the minivan, left the roadway, and struck a tree. She and Brendon Pearce were killed in the crash. The other occupants were injured.

4. A handful of the minivan's occupants (and Brendon Pearce's Estate) are suing Musser; her mother, who owned the minivan; and the Road Commission. The claims against the Road Commission assert that a highway defect (specifically, a large puddle) was responsible for the underlying crash.

5. However, in order to successfully plead a claim of that kind, these Plaintiffs were required to file compliant pre-suit notices. They did not do so.

6. As a result, the Road Commission hereby moves for summary disposition of the claims made against it; for the reasons that follow, that motion should be granted.

WHEREFORE, the Road Commission respectfully requests that this Honorable Court enter an Order dismissing the claims of Pearce, Grinage, and Harston, with prejudice; and providing any other relief deemed to be equitable and just.

DATED: March 10, 2017



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SMITH HAUGHEY RICE & ROEGGE, A Professional Corporation

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

JOSEPH GRINAGE,

Plaintiff,

CASE NO. 15-1226-NI

v

HON. JOHN D. MAURER

ESTATE OF MELISSA SUE MUSSER, PATRICIA
JANE MUSSER, and THE EATON COUNTY
ROAD COMMISSION

Defendants.

AND

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THE EATON COUNTY ROAD COMMISSION,
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Defendants.

AND

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

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HON. JOHN D. MAURER

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**DEFENDANT EATON COUNTY ROAD COMMISSION'S
 BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION**

I. INTRODUCTION

This lawsuit stems from a drunken joyride gone bad. On March 8, 2015, Melissa Musser took several friends and family members for a ride in her mother's minivan. At one point, the vehicle was headed southbound on Mason Road. Musser was legally intoxicated; driving at least 20 miles over the speed limit; and riding on bad tires. She lost control of the minivan, left the roadway, and struck a tree. Musser and Brendon Pearce were killed in the crash. The other occupants were injured. A handful of

those occupants (and Brendon Pearce's Estate) are suing Musser; her mother, who owned the minivan; and the Road Commission.

The claims against the Road Commission assert that a highway defect – specifically, a large puddle – was responsible for the underlying crash. In order to successfully plead a claim of that kind, however, these Plaintiffs were required to file compliant pre-suit notices. They did not do so. As a result, the Road Commission hereby moves for summary disposition of the claims made against it. For the reasons that follow, the Road Commission's motion should be granted.

II. BACKGROUND

A. The underlying accident.

On March 8, 2015, Musser (31 years old) decided to take a drive with a few of her friends and family members. She sent Joseph Grinage (22 years old) a Facebook message asking him if he wanted to “go for a ride.” (**Exhibit A**, Incident Report, p. 8). He was with Brendon Pearce (15 years old) and Ryan Harston (19 years old) at the time. (*Id.*) Grinage arranged to have Musser pick them up at the Old Kellogg Alternative Education Building in Nashville. (*Id.*) She showed up in her mother's 2002 Oldsmobile minivan. Andrew Musser (30 years old) and John Musser (56 years old) were already inside the vehicle. (*Id.*)

Everyone other than Pearce had been drinking alcohol that afternoon. (*Id.*) This included Musser, who was driving.¹ (*Id.*) According to Grinage, at least two people, John and Andrew Musser, were drinking alcohol in the minivan while it was “going down the road.”² (*Id.*) As their ages reflect, two of the vehicle's other occupants, Brendon Pearce and Ryan Harston, were not legally able to drink at the time. (**Exhibit A**, p. 1).

¹ As part of her autopsy, two separate blood draws were taken of Musser. One of those draws reflected a BAC of .083; the other of .092. (**Exhibit B**, Autopsy Report, pp. 1, 3). Under either analysis, she was driving while legally intoxicated.

² Photographs taken by the Eaton County Sheriff's Department support this contention, as several open and partially full beer cans were observed at the accident site. (**Exhibit C**, photographs).

Around 6 o'clock that evening, Musser's minivan was travelling southbound on Mason Road near Kinsel Highway. (**Exhibit A**, p. 1). It is unclear where the vehicle was headed. These Plaintiffs allege that, while on Mason Road, the minivan came into contact with a large puddle; hydroplaned; left the roadway; and crashed into a tree. Detective Richard Buxton, a well-credentialed accident reconstructionist who investigated this crash on behalf of the Eaton County Sheriff's department, isn't so sure. During his deposition, Detective Buxton testified that it's entirely possible Musser didn't encounter the puddle prior to the crash. (**Exhibit D**, Detective Buxton's deposition, p. 56, line 24 – p. 57, line 2). That is to say, the accident may have been caused by Musser attempting to evade the puddle and overcorrecting with the steering wheel. (*Id.*, p. 57, lines 3 – 11).

Detective Buxton is sure, however, that Musser was driving well in excess of the speed limit. Based upon survey data and measurements taken at the crash site, he concluded that her minivan was traveling somewhere between 70 and 74 miles per hour at the time of impact. (**Exhibit D**, p. 41, lines 17 – 20); see also **Exhibit A**, pg. 14). This cruising speed was almost 20 miles over the posted speed limit. (**Exhibit D**, p. 43, lines 13 – 15). And, when one takes into account the requirements of the basic speed law, Musser could have been driving more than 20 miles over the actual speed limit, which depends, in part, on roadway conditions. (*Id.*, p. 43, lines 16 – 20).

Additionally, at the time of the crash, Musser's minivan was outfitted with four ineffective tires. A vehicle inspection worksheet completed by Detective Buxton describes those tires. (**Exhibit E**). Each was made by a different manufacturer, and was of a different model. (*Id.*) This impacted the minivan's ability to handle, corner, and operate smoothly. (**Exhibit D**, p. 49, lines 14 – 19). Two of the tires were overinflated, and one had an almost unlawfully low tread depth. (**Exhibit D**, p. 49, lines 23 – p. 50, lines 6; and p. 51, lines 6 – 12). Further still, one of the minivan's tires was a "donut." (**Exhibit D**, p. 47, lines 4 – 12). Donut tires are not intended to be ridden on perpetually; they have a mileage limitation. (*Id.*, p.

52, lines 6 – 10). According to Detective Buxton, they also have a lower top speed than normal tires. (*Id.*, p. 52, lines 11 – 16). This means that, if one is riding on a donut tire in excess of its recommended speed, the vehicle is going to be more difficult to operate. (*Id.*, p. 52, lines 17 – 21).

To make a long story short, Detective Buxton does not believe that the underlying crash was caused by the puddle. His deposition testimony on this point could not have been any more clear:

Q: Detective, are you of the opinion that this puddle did not cause the crash?

Mr. Miller: Objection to the form of the question.

Q: (By Mr. Tountas). Go ahead.

A: Yes.

Q: Why is that?

A: I believe speed and intoxication caused the crash. (**Exhibit D**, p. 61, lines 12 – 19).

B. The pre-suit notices.

After the crash, each of these Plaintiffs served a pre-suit notice of intent to sue upon the Road Commission. However, for reasons discussed more fully below, none of those notices were valid. The two salient factors governing this validity analysis are (1) the number of days after the underlying crash that each of the notices was served; and (2) whether the Eaton County Clerk was also served with a copy of the pre-suit notice. The result of this two-phase analysis is as follows:

- **Brendon Pearce** – the notice was served 58 days after the underlying crash; it was not served upon the County Clerk (**Exhibit F**);
- **Joseph Grinage** – the notice was served 116 days after the underlying crash; it was served upon the County Clerk (**Exhibit G**);
- **Ryan Harston** – was served 113 days after the underlying crash; it was not served upon the County Clerk (**Exhibit H**).

C. The Road Commission's first dispositive motion.

One year ago, the Road Commission moved to dismiss Brendon Pearce's claims against it.³ (**Exhibit I**, the Road Commission's Motion for Summary Disposition). The motion contended that Pearce's pre-suit notice was insufficient. More specifically, the Road Commission argued that, under MCL 691.1404, which was the statute then believed to govern these claims, Pearce's notice failed to identify the "exact location" of the alleged defect responsible for the underlying crash. (**Exhibit I**, pp. 4 – 7). 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. (**Exhibit J**, Pearce's Response to the Road Commission's Motion for Summary Disposition, pp. 4 – 6; 9 – 11).

After oral argument, this Court issued a written opinion analyzing the Road Commission's motion. (**Exhibit K**, Opinion and Findings, May 5, 2016). The opinion found that Pearce's notice complied with MCL 691.1404 because it adequately described the alleged defect. (**Exhibit K**, p. 5). Three weeks later, this Court entered a formal Order denying the Road Commission's motion for summary disposition. (**Exhibit L**, May 26, 2016 Order). The Road Commission timely appealed this Court's ruling.

D. The Road Commission's appeal and *Streng*.

Two days before this Court entered its Order denying the Road Commission's dispositive motion, the Michigan Court of Appeals issued *Streng v Board of Mackinac County Road Commissioners*, 315 Mich App 449; ___ NW2d ___ (2016). *Streng* dealt with the claims of a plaintiff who was injured on a county highway when she lost control of her motorcycle and crashed. In that case, the defendant challenged the sufficiency of the plaintiff's pre-suit notice under MCL 691.1404, arguing that the same failed to identify the specific location of the alleged defect. *Streng*, 1-2.

³ Brendon Pearce's claims are actually being brought by his mother, Lynn Pearce, who is the Personal Representative of his Estate. For that reason, from this point forward in the Road Commission's brief, any use of the moniker "Pearce" references Lynn Pearce.

The Michigan Court of Appeals rejected the defendant's arguments, holding, somewhat unexpectedly, that MCL 691.1404 does not govern pre-suit notices being issued in relation to a county road commission. Rather, the Court held that a provision of the county road law, MCL 224.21, applied to those claims. (*Streng*, pp. 2 – 6). The upshot of the Court's ruling in this regard was that the plaintiff's notice was sufficient because, under MCL 224.21, an injured party is only required to "set forth substantially the ... place where the injury took place." (*Streng* at 3).

In its docketing statement, the Road Commission identified *Streng* as pertaining to the issues raised in its appeal. However, throughout its appellate briefing, the Road Commission argued that *Streng* was wrongly decided, and that MCL 691.1404 governed its appeal. Pearce vigorously argued otherwise. In fact, she fully embraced *Streng*, and made it the focal point of every appellate submission.

For instance, within the first three pages of her appellate brief, Pearce cited MCL 224.21, the notice provision relied upon in *Streng*. (**Exhibit M**, p. 3). Then, she stated this:

This Court issued its Opinion in *Streng v Board of Mackinac County Road Commission* for publication on May 24, 2016. (____ Mich App ____, 2016); (2016 WL 2992564, Docket No. 323226). The issue in *Streng* is identical to the issue presented in this Appeal i.e. which notice provision governs the facts and resolution of the notice issues in this case, MCL 691.1404 under the Governmental Tort Liability Act (GTLA), MCL 691.1401 et seq or MCL 224.21 under the Highway Code, MCL 220.1 et seq.?

* * *

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 GTLA was amended in 1970. (**Exhibit M**, pp. 8 and 11).

Additionally, when she filed her appellate brief, Pearce separately moved the Court of Appeals to summarily affirm this Court's written opinion. The exclusive basis being offered for her motion to affirm, wherein Pearce sought to circumvent the Road Commission's right to oral argument, was that *Streng* governed this dispute. Pearce said this about *Streng* governing her claims:

4. That this Court issued its Opinion in *Streng v Board of Mackinac County Road Commission* for publication on May 24, 2016. (____ Mich App ____, 2016; 2016 WL 2992564, Docket No. 323226).
5. That the issue in *Streng* is identical to the issue presented in this Appeal i.e. which notice provision governs the facts and resolution of the notice issues in this case, MCL 691.1404 under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq* or MCL 224.21 under the Highway Code, MCL 220.1 *et seq*.
6. That the *Streng* Court held that MCL 224.21 is the specific statute in regard to claims of liability against County Road Commission for accidents that occur on County roads.

* * *

9. That the notice requirements of MCL 691.1404 do not apply to the present Appeal.
10. That the notice provision of MCL 224.21 do not apply and that, under either statute, the notice of Plaintiff/Appellee is sufficient.
11. That *Streng* is directly on point, is a published decision and has precedential effect under the rule of *stare decisis*. MCR 7.215(C)(2).
12. That the present Appeal is factually and legally untenable and Oral Argument is unnecessary to resolve this matter.

(**Exhibit N**, Pearce's Motion to Affirm).

Finally, at the same time, Pearce also filed a Motion for Immediate Consideration. (**Exhibit O**, Pearce's Motion for Immediate Consideration). In that motion, she asked the Court of Appeals to immediately consider her motion to affirm because *Streng* was "directly on point and has precedential effect under the rule of *stare decisis*." (*Id.*) The Court of Appeals agreed and, in a written order, granted Pearce's motion for immediate consideration, and affirmed this Court's previous ruling. (**Exhibit P**, Court of Appeals Order dated October 25, 2016).

After the Court of Appeals summarily affirmed this Court's ruling, the Road Commission filed an Application for Leave to Appeal with the Michigan Supreme Court. Pearce responded to that Application, which remains pending. (**Exhibit Q**, Pearce's Answer to the Road Commission's Application for Leave to Appeal). Her feelings about *Streng* have not waned:

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 nor does the Court of Appeals' Order conflict with a Supreme Court decision or another decision of the Court of Appeals but, rather, is guided by the Court of Appeals' decision in *Streng v Board of Mackinac County Road Commissioners*, _____ Mich App _____ (2016); 2016 WL 2992564, (COA Docket No. 323226); Application for Leave Denied 12/21/2016 (MSC Docket No. 154034). (**Exhibit Q**, p. v).

Pearce's enthusiasm for *Streng* and MCL 224.21 is, in part, understandable, given the latter's much less stringent notice requirements. However, that enthusiasm is also foolish because other aspects of *Streng* mandate the dismissal of Pearce's claims against the Road Commission. In fact, the application of *Streng* invalidates every pre-suit notice served in connection with this lawsuit. As a result, the Road Commission hereby moves for the dismissal of every claim pending against it. For the reasons that follow, the motion should be granted.

III. STANDARD OF REVIEW

MCR 2.116(C)(7) permits summary disposition where a claim is barred because of immunity granted by law. A motion brought under that subrule may be supported by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, unlike a motion brought under subrule (C)(10), a movant under (C)(7) is not required to file supportive material, and the opposing party need not reply with any supportive material. *Id.*

The contents of the complaint are accepted as true unless contradicted by the movant's documentary evidence. *Patterson v Kleiman*, 447 Mich 429, 434, note 6; 526 NW2d 879 (1994). Additionally, if the facts are not in dispute, and reasonable minds could not differ concerning the legal effect of those facts, whether a claim is barred by immunity is a question for the court to decide as a matter of law. *Diehl v Danuloff*, 242 Mich App 120, 123; 618 NW2d 83 (2000).

IV. LAW AND ARGUMENT

A. The GTLA's So-Called "Highway Exception," and its Notice Requirements.

Under the Governmental Tort Liability Act ("GTLA"), MCL 691.1401 et seq., a governmental agency is immune from tort liability when engaged in a governmental function. "Immunity from tort liability, as provided by MCL 691.1407, is expressed in the broadest possible language – it extends immunity to all governmental agencies for *all tort liability* whenever they are engaged in the exercise or discharge or a governmental function." *Nawrocki v Macomb County Road Commission*, 463 Mich 143, 156; 615 NW2d 702 (2000) (citations omitted) (emphasis in original). There are six statutory exceptions to this broad grant of governmental immunity. However, those exceptions are narrowly drawn. *Haliw v City of Sterling Heights*, 464 Mich 297, 303; 627 NW2d 581 (2000); and *Nawrocki*, at 157 ("Although governmental agencies may be under many duties, with regard to services they provide to the public, only those enumerated within the statutorily-created exceptions are legally compensable if breached.")

The claims against the Road Commission in this lawsuit rely upon the GTLA's so-called "highway exception," which is codified at MCL 691.1402(1). The relevant portion of that statute provides as follows:

Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy 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 order to bring a claim under the highway exception, however, a plaintiff is required to comply with one of two pre-suit notice requirements. The first of those requirements, which applies to highway

defect claims brought against the State, is contained within MCL 691.1404(1). The second notice provision, which applies to claims brought against a county road commission says this:

An action [advancing a highway defect claim against a county road commission] shall be brought against the board of county road commissioners of the county and service shall be made upon the clerk and upon the chairperson of the board.

* * *

However, a board of county road commissioners is not liable for damages to a person or property sustained by a person upon a county road because of a defective county road ... 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 224.21(3).

These notice requirements are mandatory, and a plaintiff's failure to comply with them requires the dismissal of his or her lawsuit. *McLean v City of Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013) (holding that the 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; 731 NW2d 41 (2007) (same holding). Under those circumstances, dismissal is mandatory "no matter how much prejudice is actually suffered" by the plaintiff submitting the defective notice. *Rowland, supra* at 219; see also *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).

In summary, a valid highway exception claim requires a statutorily compliant pre-suit notice. And, where a plaintiff has failed to serve one, his or her case must be dismissed.

B. *Streng* Confirmed the Highway Exception's Notice Requirements.

In *Streng v Board of Mackinac County Road Commissioners*, 315 Mich App 449; ____ NW2d ____ (2016) (Docket No. 323226) (**Exhibit R**), the Michigan Court of Appeals confirmed the highway

exception's notice requirements. The defendant in that lawsuit made several challenges to the plaintiff's pre-suit notice. While resolving the validity of those challenges, the Court made several pronouncements, many of which are dispositive here.

As an initial matter, the Court confirmed that, based upon the plain language of the GTLA, all highway exception claims being brought against a county road commission are governed by the notice requirements found in MCL 224.21, a statute that is expressly referenced in the portion of the GTLA creating the highway exception. *Streng* at 16 – 17. See also MCL 691.1402(1) (“The liability, procedure, and remedy 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.”).

The *Streng* Court thereafter provided that, based upon the mandates of MCL 224.21, in order to sustain a valid highway defect claim against a county road commission, a plaintiff must: (1) serve a pre-suit notice within 60 days of his or her alleged injury; and (2) the pre-suit notice must be served upon, among other parties, the relevant county's clerk. *Streng* 17 – 21.

In short, then, under the GTLA (and *Streng*), MCL 224.21 controls all highway exception claims being brought against a County Road Commission. That includes the claims being made by Pearce, Harston, and Grinage. And, when applied to those claims, MCL 224.21 mandates dismissal of the same. Before delving into that topic, however, it is worth revisiting two important legal doctrines: law of the case; and judicial estoppel.

C. *Streng* governs all aspects of Pearce's lawsuit under the law of the case and judicial estoppel doctrines.

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. *Ashker Ex Rel Estate of Ashker v Ford Motor Company*, 245 Mich App 9, 13; 627 NW2d 1 (2001). The doctrine applies to those questions that were necessary to the appellate court's determination. *City of Kalamazoo v Department of Corrections*,

229 Mich App 132, 135; 580 NW2d 475 (1998). Its primary purpose is to maintain consistency and avoid reconsideration of matters once decided during the course of a single, and continuing, lawsuit. *Bennett v Bennett*, 197 Mich App 497, 499 – 500; 496 NW2d 353 (1992).

Moreover, the law of the case doctrine applies without regard to the correctness of the prior determination; therefore, the fact that a prior appellate decision was erroneous is not sufficient, in itself, to justify ignoring the doctrine's application. *Booker v Detroit*, 251 Mich App 167, 182; 650 NW2d 680 (2002); see also *Bennett*, *supra*, at 500; *Driver v Hanley* (after remand), 226 Mich App 558, 565; 575 NW2d 31 (1997); and *Reeves v Cincinnati, Inc.* (after remand), 208 Mich App 556, 560; 528 NW2d 787 (1995) (“[T]he doctrine of law of the case is a bright-line rule to be applied virtually without exception.”).

Judicial estoppel is a closely related doctrine that prevents a party from prevailing in one phase of the case on an argument, and then relying on a contradictory argument to prevail in another phase. *Spohn v Vandyke Public Schools*, 296 Mich App 470, 479; 822 NW2d 239 (2012). The doctrine is “utilized in order to preserve ‘the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship.’” *Spohn* at 479 – 480, quoting *Browning v Levy*, 283 F3d 761, 775 (CA 6, 2002). Michigan has adopted the “prior success” model of judicial estoppel, which has as its focus “the danger of inconsistent rulings.” *Paschke v Retool Industries*, 445 Mich 502, 510; 519 NW2d 441 (1984). 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.” *Paschke* at 509. “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.” *Paschke* at 510. The prior success model does not mean, however, that the party against whom the judicial estoppel is invoked must have actually prevailed on the merits. *Spohn, supra*, at 480.

Under the law of the case doctrine, *Streng* controls all aspects of Pearce's lawsuit. First, as each of her appellate submissions made clear, Pearce asked the Court of Appeals to find that *Streng* (and MCL 224.21) governed her claims. The Court did so—most notably, by granting her motion to affirm. Second, even if, as the Road Commission previously argued, *Streng* was wrongly decided, the result is unaffected. Again, the law of the case doctrine requires that a lower court follow an appellate ruling in the same proceeding without regard to the ruling's correctness.

Further still, Pearce is bound by *Streng* for the remainder of these proceedings under the doctrine of judicial estoppel. Pearce repeatedly argued that *Streng* governed her claims against the Road Commission. *Streng* was, in fact, the entire basis being offered in support of Pearce's motion to affirm, which was granted by the Court of Appeals. And, under the prior success model of judicial estoppel, Pearce's victory on her motion to affirm prevents her from now arguing that *Streng* does not govern her claims.

D. Pearce's pre-suit notice does not comply with MCL 224.21 and, therefore, her claims against the Road Commission must be dismissed.

Under MCL 224.21, no suit can be brought unless, as a pre-condition to the same, the Plaintiff "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 224.21(3).

Pearce's pre-suit notice failed to comply with the latter of these conditions. As the face of her notice reflects, it was only served upon the Road Commission. (**Exhibit F**). It was not served upon the Eaton County Clerk. Therefore, Pearce's claims are subject to mandatory dismissal.

E. Grinage's and Harston's pre-suit notices also failed to comply with MCL 224.21 and, therefore, their claims against the Road Commission must be dismissed.

Grinage served the Eaton County Clerk, but his notice was untimely. Again, MCL 224.21(3) gave him 60 days after the crash to serve his notice. However, Grinage's notice was served 116 days after the crash.

Harston's notice was defective for two reasons: (1) it was served 113 days after the underlying crash and, for that reason, was untimely; and (2) Harston failed to serve the Eaton County Clerk.

In light of the above, Grinage's and Harston's notices also failed to comply with MCL 224.21, and their claims against the Road Commission must be dismissed.

V. CONCLUSION

For all of these reasons, the Road Commission respectfully requests that this Honorable Court enter an Order dismissing the claims of Pearce, Grinage, and Harston, with prejudice; and providing any other relief deemed to be equitable and just.

DATED: March 10, 2017



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APPENDIX 15

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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

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

Plaintiff,

File No. 16-29-NI

HON. JOHN D. MAURER (P41845)

-vs-

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

Defendants.

PROOF OF SERVICE	
THE UNDERSIGNED CERTIFIES THAT THE FOREGOING INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED ON THE PLEADINGS ON <u>4-17-17</u>	
BY:	
<input checked="" type="checkbox"/> U.S. MAIL	FAX
<input type="checkbox"/> HAND DELIVERED	<input type="checkbox"/> OVERNIGHT COURIER
<input type="checkbox"/> FEDERAL EXPRESS	<input type="checkbox"/> OTHER
SIGNATURE:	<i>Ann M. Maurer</i>

AND

RYAN HARSTON,

Plaintiff,

File No. 15-1226-NI

HON. JOHN D. MAURER (P41845)

-vs-

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

Defendants.

AND

JOSEPH GRINAGE,

Plaintiff,

File No. 15-1226-NI

HON. JOHN D. MAURER (P41845)

-vs-

Estate of MELISSA SUE MUSSER, PATRICIA
JANE MUSSER and THE EATON COUNTY ROAD
COMMISSION,

Defendants.

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**PLAINTIFF, LYNN PEARCE, PERSONAL REPRESENTATIVE OF THE ESTATE
OF BRENDON PEARCE, DECEASED'S REPSONSE TO DEFEDANT, EATON
COUNTY ROAD COMMISSIONS'S MOTION FOR SUMMARY DISPOSITION**

1. Plaintiff admits that the casualty complained of occurred on March 8, 2015 and that MELISSA MUSSER, Deceased, was the operator of a motor vehicle owned by her mother, PATRICIA JANE MUSSER, when she lost control after encountering a large puddle of standing water which was allowed to accumulate on the roadway due to a highway defect.
2. Plaintiff admits only that the incident occurred on Mason Road and that MELISSA MUSSER was operating the vehicle which she was driving in a southerly direction. Plaintiff avers lack of knowledge sufficient to form a belief with respect to the remaining allegations contained therein, neither admitting nor denying same, leaving Defendant to its strict proofs in support thereof.
3. Plaintiff admits only that MELISSA MUSSER lost control of the vehicle in which she was driving due to a large puddle of water which was allowed to accumulate on the roadway due to the defective condition of the roadway. Plaintiff incorporates her First Amended Complaint by reference thereto as the best evidence of the claims being asserted by the PEARCE Estate within this litigation.

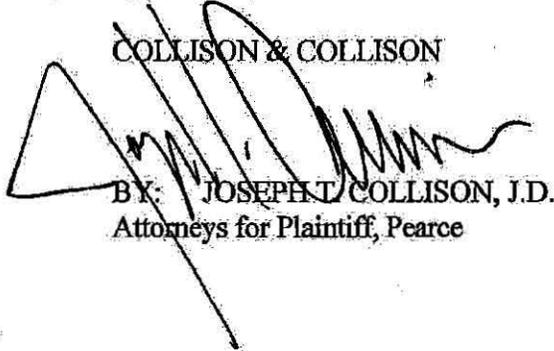
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- 4. Plaintiff admits only that she has initiated litigation within this Honorable Court against MELISSA SUE MUSSER for negligence in the operation of the motor vehicle that she was driving. PATRICIA JANE MUSSER as owner of the motor vehicle driven by her daughter and against the EATON COUNTY ROAD COMMISSION under the defective highway exception to the Governmental Tort Liability Act. Plaintiff incorporates her First Amended Complaint by reference thereto as the best evidence of the claims asserted against the respective parties herein.
- 5. Denied for the reason that said allegations are untrue. Plaintiff affirmatively avers that any alleged defect in notice was waived by Defendant by not asserting such defense within Defendant's first responsive pleading or Answer to Plaintiff's First Amended Complaint as required by MCR 2.111(F)(2).
- 6. Plaintiff denies that Defendant ROAD COMMISSION is entitled to the relief requested.

WHEREFORE Plaintiff, LYNN PEARCE, Personal Representative of the Estate of BRENDON PEARCE, Deceased, prays this Court deny the Motion for Summary Disposition filed by Defendant, EATON COUNTY ROAD COMMISSION, and enter Order thereon together with costs and attorney fees to be assessed.

Dated this 17th day of April, A.D., 2017.

COLLISON & COLLISON



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SIGNATURE:	<i>Ann M. Mandy</i>

AND

RYAN HARSTON,

Plaintiff,

File No. 15-1226-NI

HON. JOHN D. MAURER (P41845)

-vs-

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

Defendants.

AND

JOSEPH GRINAGE,

Plaintiff,

File No. 15-1226-NI

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Estate of MELISSA SUE MUSSER, PATRICIA
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**BRIEF OF PLAINTIFF, LYNN PEARCE, PERSONAL REPRESENTATIVE OF
THE ESTATE OF BENDON PEARCE, DECEASED IN SUPPORT OF RESPONSE TO
THE MOTION FOR SUMMARY DISPOSITION OF DEFENDANT, EATON
COUNTY ROAD COMMISSION**

FACTUAL DEVELOPMENT

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

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

Exhibit A is the Eaton County Office of the Sheriff's Response to Plaintiff's FOIA Request. The Court will note, at page 14 of the Case Supplemental Report, that:

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

It was the opinion of Detective Rick Buxton that the pooled water on the road surface caused Melissa Sue Musser to lose control of the vehicle. See Case Supplement Report at page 15.

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

It is interesting to note that the Road Commission does not claim that it did not have knowledge of the location of the defect nor that it did not understand the nature of the defect. Furthermore, remedial actions were taken to obviate the defective condition almost immediately after the accident, thus suggesting that the Road Commission knew what the problem was, where the problem was and what it needed to do to correct the problem in order to protect the public from further injury.

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

The Court can appreciate, at this juncture, that the Road Commission had "exact notice" of the nature and location of the defect and that it was an ongoing problem approximately nine months prior to the fatal accident which forms the basis of this litigation.

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

Most importantly, Defendant was contacted on the day of the accident by Central Dispatch. The Road Commission was advised that there was a "bad accident – needs roads closed". The call came in at 6:30 p.m. which was approximately 35 minutes after the accident occurred. In response to this notification, the Road Commission set 2 "Type II" barricades at the intersections of Mason and Kinsel as well as Mason and Valley. Most importantly, a "Type I" barricade was placed at the precise location of the pooled water on the southbound lane.¹ See Service Request and photograph marked collectively as Exhibit E.

Despite the foregoing, the Road Commission now claims that the notice provided by LYNN PEARCE, as Personal Representative of her deceased son was somehow insufficient to place the Road Commission on notice of the nature and extent of the defect. Obviously, this position is untenable.

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

Plaintiff's Complaint was filed January 11, 2016 alleging that MELISSA MUSSER was negligent in the operation of the motor vehicle owned by PATRICIA JANE MUSSER and that

¹ The "road closed" signs were retrieved by the Road Commission on March 9, 2015. See Exhibit F.

the EATON COUNTY ROAD COMMISSION had failed to maintain the roadway in reasonable repair.

The ROAD COMMISSION filed its Answer and Affirmative Defenses February 2, 2016, 14 months ago. Affirmative Defense #5 specifically alleges:

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

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

Defendant's Motion for Summary Disposition, argued in the Trial Court on April 28, 2016, involved a single issue i.e. whether Plaintiff's Notice was sufficient under the GTLA. Plaintiff argued that she had met the heightened statutory notice requirements of the GTLA and the Trial Court so agreed by virtue of its Order Denying Defendant's Motion for Summary Disposition which was entered on May 26, 2016.

Although a Stipulation and Order to Allow Plaintiff's First Amended Complaint was entered April 4, 2016, the Amended Complaint was not actually filed until May 23, 2016. The ROAD COMMISSION'S Answer to Plaintiff's First Amended Complaint and Affirmative Defenses were filed June 1, 2016, 10 months ago. Again, Affirmative Defense #5 states:

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

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

This additional affirmative defense, which serves as the basis for the ROAD COMMISSION'S Motion for Summary Disposition, was raised as part of its fifth answer on July 26, 2016, more than 6 months after the Pearce litigation was initiated.

The Court should be reminded that allegedly defective notice under the Highway Code has never been pled as a defense in the PEARCE claim. Consequently, to the extent the ROAD COMMISSION claims a defense that has never been pled as the basis for a dispositive motion, the motion must be denied.

In any event, following denial of the ROAD COMMISSION'S Motion for Summary Disposition, Defendant then filed its Appeal of Right to the Michigan Court of Appeals on June 14, 2016. The allegedly defective notice under the Highway Code was not raised at that time either. Plaintiff, in turn, filed her Motion for Immediate Consideration, Motion to Affirm and Brief on Appeal on October 6, 2016.

The Court of Appeals issued its Order granting Plaintiff's Motion for Immediate Consideration and granting Plaintiff's Motion to Affirm on October 25, 2016 for the reason that the question to be reviewed "is so unsubstantial as to need no argument or formal submission." MCR 7.211(C)(3). Defendant then filed an Application for Leave to Appeal to the Michigan Supreme Court on December 6, 2016. Defendant again failed to assert the allegedly defective notice under the Highway Code in its application. The application remains pending.

LAW AND AUTHORITY

The Court of Appeals issued its Opinion in *Streng v Board of Mackinac County Road Commission* for publication on May 24, 2016. [315 Mich App 449 (2016)]. The issue in *Streng* was which provision governs the facts and resolution of the notice issues in cases involving County Road Commissions, MCL 691.1404 under the Governmental Tort Liability Act (GTLA), MCL 691.1401 *et seq* or MCL 224.21 under the Highway Code, MCL 220.1 *et seq*?

In essence, the Court of Appeals ruled that the Highway Code was the applicable statute.

MCL 224.21. Subsection (3) provides:

“(3) An action arising under subsection shall be brought against the board of county road commissioners of the county and service shall be made upon the clerk and upon the chairperson of the board. ***”

The ROAD COMMISSION now claims that notice was improper under the above statute because the “clerk” was not served with the statutory notice, although it concedes the chairperson was and that it had actual notice of the accident within an hour of its occurrence.

MCR 2.111(F)(2) requires that all Affirmative Defenses, such as an allegedly defective notice, be pled in a party’s first responsive pleading. In fact, the Court Rule states:

“(2) *Defenses Must Be Pleaded; Exceptions.* A party against whom a cause of action has been asserted by Complaint, Cross Claim, Counter Claim, or Third Party Claim must assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading or by motion as provided by this rule is waived ***. (Emphasis supplied)

Furthermore, MCR 2.111(F)(3) requires that a party must state the facts constituting an Affirmative Defense within its first responsive pleading.

The ROAD COMMISSION has done neither. It has never raised the Affirmative Defense of allegedly defective notice under the Highway Code in the PEARCE claim nor has it stated the factual basis for any allegedly defective notice, either under the Governmental Tort Liability Act nor the Highway Code, despite the fact that the PEARCE litigation was filed more 15 months ago.

Defenses generally fall into one of two categories i.e. denial of the matter asserted or avoidance which concedes that the matter asserted is true but that the claim must fail for purely technical reasons. The latter are affirmative defenses.

By way of illustration, MCR 2.111(F)(3)(a) lists a number of affirmative defenses which are not exhaustive such as contributory negligence; the existence of an agreement to arbitrate;

assumption of risk; payment; release; satisfaction; discharge; license; fraud; duress; estoppel; statute of frauds; statute of limitation; immunity granted by law; want or failure of consideration; or that an instrument or transaction is void, voidable or cannot be recovered on by reason of statute or nondelivery.

MCR 2.111(F)(3)(b) further defines an Affirmative Defense as one that seeks to avoid the legal effect of or defeat the claim of the opposing party such as, in the present case, allegedly defective notice.

There is no question that the basis of the ROAD COMMISSION'S Motion for Summary Disposition is the allegedly defective notice under the Highway Code. As such, Defendant was required to assert the matter within its first responsive pleading. It did not do so nor did it assert this defense against Defendant PEARCE when responding to the First Amended Complaint. Further, this Affirmative Defense has never been asserted against the claims advanced by LYNN PEARCE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED, either in the trial court, the Court of Appeals or the Supreme Court.

Defendant has not asserted the Affirmative Defense against HARSTON, either in the original Complaint or the First Amended Complaint. As stated above, it appears that the only time this Affirmative Defense was raised was in response to the Complaint filed on behalf of JOSPEH GRINAGE on July 26, 2016.

It is important for this Court to understand that the ROAD COMMISSION, obviously, was aware that the Affirmative Defense existed. Why it chose not to assert the Affirmative Defense against PEARCE and HARSTON and only against GRINAGE is a matter of some speculation. However, the point of the matter remains that the ROAD COMMISSION has been aware of this defense for at least 9 months and has still failed to assert it against PEARCE and HARSTON.

Again, the failure to plead an Affirmative Defense as required by the Court Rule constitutes a waiver of that Affirmative Defense. See *Campbell v St. John Hospital*, 434 Mich 608 (1990). The primary function of a pleading in Michigan is to give notice of nature of the claim or defense sufficient to permit the opposite party to take a responsive position. See, 2 Martin, Dean and Webster, *Michigan Court Rules Practice*, p 192.

Because the ROAD COMMISSION did not properly plead the allegedly defective notice nor it did it factually support any allegedly defective notice claim, the defense is waived. Also see *Grand Blanc Landfill, Inc. v Swanson Environmental, Inc.*, 200 Mich App 642 (1993); *Rowry v University of Michigan*, 441 Mich 1 (1992); *Butler v Detroit Automobile Inter-Insurance Exchange*, 121 Mich App 727 (1982) and *Furstenberg Brothers v Carrollton Township*, 61 Mich App 230 (1975).

Apparently, the ROAD COMMISSION concedes that LYNN PEARCE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED, timely filed her notice (page 5 of the ROAD COMMISSION'S Brief in Support of Motion for Summary Disposition). The ROAD COMMISSION claims only that the "clerk" was not served with a copy of the notice as required under the Highway Code.

That may or may not be true but is not the subject of this response. There is no need for this Court to determine the sufficiency of notice, given the fact that it is an Affirmative Defense which has been waived. Had the ROAD COMMISSION intended to rely on the defective notice defense, one would think that it would have been raised in the Affirmative Defenses filed in response to PEARCE's original Complaint, PEARCE's First Amended Complaint, in either one of its appeals, HARSTON's original Complaint, and/or HARSTON's First Amended Complaint.

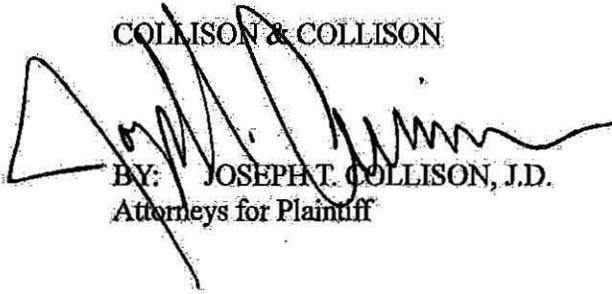
One also wonders why, when the ROAD COMMISSION did raise this defense in July, 2016 against the GRINAGE claim, it has still failed to plead the defense against PEARCE or HARSTON.

An Affirmative Defense which has never been pled cannot be the basis of a Motion for Summary Disposition. Accordingly, the ROAD COMMISSION'S Motion for Summary Disposition must be denied.

WHEREFORE Plaintiff, LYNN PEARCE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED, prays this Court deny the Motion of the EATON COUNTY ROAD COMMISSION for summary disposition and enter Order thereon together with costs and attorney fees to be assessed.

Dated this 17th day of April, A.D., 2017.

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APPENDIX 16

RECEIVED by MSC 8/28/2020 11:26:03 AM

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

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

Plaintiff,

File No. 16-29-NI

HON. JOHN D. MAURER (P41845)

-vs-

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

Defendants.

PROOF OF SERVICE

THE UNDERSIGNED CERTIFIES THAT THE FOREGOING INSTRUMENT WAS SERVED UPON ALL PARTIES TO THE ABOVE CAUSE TO EACH OF THE ATTORNEYS OF RECORD HEREIN AT THEIR RESPECTIVE ADDRESSES DISCLOSED ON THE PLEADINGS ON 5-23-17

BY:
 U.S. MAIL FAX _____
 HAND DELIVERED OVERNIGHT COURIER _____
 FEDERAL EXPRESS OTHER _____

SIGNATURE: Ann M. Manry

AND

RYAN HARSTON,

Plaintiff,

File No. 15-1226-NI

HON. JOHN D. MAURER (P41845)

-vs-

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

Defendants.

AND

JOSEPH GRINAGE,

Plaintiff,

File No. 15-1226-NI

HON. JOHN D. MAURER (P41845)

-vs-

Estate of MELISSA SUE MUSSER, PATRICIA
JANE MUSSER and THE EATON COUNTY ROAD
COMMISSION,

Defendants.

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**SUPPLEMENTAL RESPONSE OF PLAINTIFF, LYNN PEARCE, PERSONAL
REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED TO THE
SECOND MOTION FOR SUMMARY DISPOSITION OF DEFENDANT, EATON
COUNTY ROAD COMMISSION**

PROCEDURAL DEVELOPMENT

The Court will recall that the ROAD COMMISSION's Second Motion for Summary Disposition was Orally Argued on April 28, 2017. At the beginning of his presentation, counsel for the ROAD COMMISSION presented the Court and opposing counsel with the case of *Fairley v Department of Corrections*, 497 Mich 290 (2015). It is the position of defense counsel that *Fairley* is controlling authority which, essentially, holds that neither governmental immunity nor defective statutory notice are affirmative defenses which are required to be pled in Defendant's first responsive pleadings. The merit of that argument will be discussed in greater detail below. However, the Court should recall that it allowed Plaintiffs 30 days to response to

the ROAD COMMISSION's argument, given the unfair surprise which occurred at the time of the summary disposition motion.

CONTEXTUAL DEVELOPMENT

The evolution of these consolidated claims is set forth in some detail in PEARCE's Response Brief beginning at page 4. With respect to PEARCE, her Complaint was filed January 11, 2016, alleging, among other things, that the ROAD COMMISSION had failed to maintain the roadway in responsible repair. The ROAD COMMISSION filed its Answer and Affirmative Defenses on February 2, 2016. Affirmative Defense #5 specifically alleges:

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

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

Defendant's first Motion for Summary Disposition, argued in the Trial Court on April 28, 2016, involved a single issue i.e. whether Plaintiff's Notice was sufficient under the GTLA. Plaintiff argued that she had met the heightened statutory notice requirements of the GTLA and the Trial Court so agreed by virtue of its Opinion and Findings dated May 6, 2016. The Trial Court specifically found that “prompt and proper notice was given by the Plaintiff to the EATON COUNTY ROAD COMMISSION, the location and alleged defect in the road were adequately given and were sufficient to bring the defect to the ROAD COMMISSION's attention. Plaintiff's notice is sufficient and substantially complies with the statute requirements”. The Order Denying Defendant's Motion for Summary Disposition was entered on May 26, 2016. The ROAD COMMISSION then filed its Appeal on June 14, 2016 to the Michigan Court of Appeals. Plaintiff, in turn, filed her Motion for Immediate Consideration, Motion to Affirm and Brief on Appeal all on October 6, 2016.

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

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

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

This additional affirmative defense, which serves as the basis for the ROAD COMMISSION'S Second Motion for Summary Disposition, was first raised as part of its fifth answer on July 26, 2016.

Again, the only issue raised, argued and decided at the time of the original Summary Disposition hearing was whether or not PEARCE's notice satisfied the requirements of the GTLA.

The Court of Appeals issued its Order granting Plaintiff's Motion for Immediate Consideration and granting Plaintiff's Motion to Affirm on October 25, 2016 for the reason that the question to be reviewed “is so unsubstantial as to need no argument or formal submission.”. MCR 7.211(C)(3). Defendant then filed an Application for Leave to Appeal to the Michigan Supreme Court on December 6, 2016. The application remains pending.

The foregoing is important in that the ROAD COMMISSION argues that the “law of the case” is *Streng v Board of Mackinac County Road Commission*, 315 Mich App 449 (2016)

which, essentially, held that the notice provisions of the Highway Code (MCL 224.21) applied to litigation against a county road commission for accidents occurring on county roads.

The argument by the ROAD COMMISSION is interesting, to say the least, in that it has and continues to assert that *Streng* was wrongfully decided and that the notice provisions of the GTLA should apply in this litigation. In fact, in its Brief in Support of its Application for Leave to Appeal the Michigan Supreme Court, the ROAD COMMISSION argues:

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

An Appellant Court’s decision is not given retroactive effect when it changes established law *** until *Streng* *** notices to County Road Commissions for injuries sustained by reason of a defective highway were regularly governed by MCL 691.1401(1) *** because *Streng* changed the law, it does not apply retroactively.***” (Citations omitted)

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

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

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

In other words, the ROAD COMMISSION has adopted two entirely inconsistent positions i.e. that the notice provisions of the GTLA apply with respect to its argument in the appellate courts and, at least for the moment, that the notice provisions of the Highway Code apply for purposes of its second Motion for Summary Disposition in the Trial Court.

The foregoing is important in that this Court (through Judge Edward Grant) has determined that PEARCE did comply with the GTLA. That decision was affirmed on appeal and, in all likelihood, will be affirmed by the Michigan Supreme Court in its denial of Defendant's Application for Leave to Appeal.

It is also important for this Court to understand that the ROAD COMMISSION does not contend that PEARCE's notice was defective under the Highway Code. To the contrary, the ROAD COMMISSION takes the position that service of the notice failed to comply with the requirements of MCL 224.21. That may or may not be true. However, the notice provisions of the Highway Code have never been asserted as an Affirmative Defense against the claims of PEARCE.

ARGUMENT

With respect to PEARCE, the ROAD COMMISSION claims that service of Plaintiff's Notice of Injury and Defect was improper in that the County Clerk was not separately served with that document.

The ROAD COMMISSION states that defective notice is not an Affirmative Defense which is required to be pleaded based upon the decision in *Fairley, supra*. However, the ROAD COMMISSION has not and *Fairley* does not discuss the assertion of defective service of an otherwise proper notice in the context of Affirmative Defenses.

Fairley, dealt with an automobile accident involving a motor vehicle owned by the Michigan Department of Corrections and operated by a MDOC employee. The injured party filed a notice of injury and intent to hold the MDOC liable in the Court of Claims. The notice was not signed by Fairley but her attorney did sign the notice on her behalf.

The companion case of *Stone v Michigan State Police*, also dealt with the motor vehicle exception to governmental immunity. Defendant claimed that Stone's notice was defective in that it was not verified before an officer authorized to administer oaths.

In both cases, the basis for summary disposition was defective notice. There is no such claim which has been asserted with respect to the claims of PEARCE. To the contrary, Defendant ROAD COMMISSION claims that service of the notice did not comply with the requirements of MCL 224.21.

It has always been the rule in Michigan that Defendants must “apprise the Plaintiff of the nature of the defense relied upon, so that he might be prepared to meet, and to avoid surprise on the trial.” *Rosenbury v Angell*, 6 Mich 508 (1859). MCR 2.111(F) provides that a Defendant waives any Affirmative Defense not set forth in the Defendants’ first responsive pleading. *Electrolines, Inc. v Prudential Assurance Co., LTD.*, 260 Mich App 144 (2003).

Furthermore, MCR 2.111(F)(3) requires that the party “must state the facts constituting” any Affirmative Defense so raised. *Hanon v Barber*, 99 Mich App 851 (1980). A statement of an Affirmative Defense must contain facts setting forth why and how the party asserting it believes the Affirmative Defense is applicable. *Tyra v Organ Procurement Agency of Michigan*, 302 Mich App 208 (2013).

Plaintiff concedes based solely on the language in *Fairley* that governmental immunity is not an Affirmative Defense which is required to be pled in Defendant’s first responsive pleadings. In fact, governmental immunity is specifically contemplated as the basis for a dispositive motion under MCR 2.116.

Plaintiff further concedes that *Fairley* holds:

“***we conclude that defective notice need not be pleaded as an affirmative defense because defendants are presumed to be entitled to governmental immunity***”. (Emphasis supplied)

However, nowhere in the *Fairley* opinion is the issue of defective service addressed which, of course, is the claim of the ROAD COMMISSION with respect to PEARCE. Plaintiff relies upon her Brief in Support of Response to Motion for Summary Disposition of the EATON

COUNTY ROAD COMMISSION with respect to the issue of waiver of Affirmative Defenses which have not been properly pled or factually supported.

Finally, this entire discussion is moot in the event that this Court determines that *Streng* is to be applied on a prospective basis. In that event, the notice requirements of the GTLA will apply rather than the notice provisions of the Highway Code. This Court has already ruled and the Court of Appeals has affirmed that Plaintiff did, in fact, meet the notice requirements of the GTLA. Further, the ROAD COMMISSION has not raised Defective notice under the GTLA against the remaining Plaintiffs.

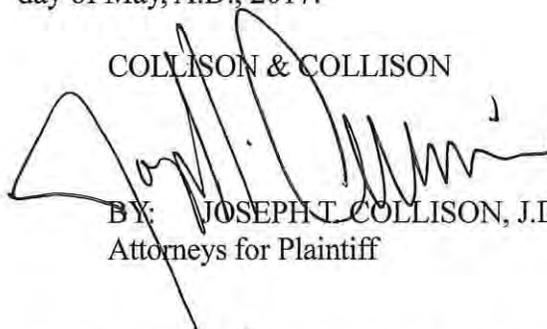
In other words, should this Court determine that *Streng* does not apply retroactively, then this case can proceed in that all Plaintiffs have met the statutory notice requirements of MCL 691.1404.

This precise issue, i.e. whether or not *Streng* applies prospectively or retroactively is part of the ROAD COMMISSION's appeal pending in the Michigan Supreme Court. Consequently, it appears that the ROAD COMMISSION's Second Motion for Summary Disposition is premature. A disposition by the Supreme Court will, in all likelihood, obviate what is certain to be an appeal from this Court's decision.

WHEREFORE Plaintiff, LYNN PEARCE, PERSONAL REPRESENTATIVE OF THE ESTATE OF BRENDON PEARCE, DECEASED, prays this Court deny the Motion for Summary Disposition of Defendant, EATON COUNTY ROAD COMMISSION and enter Order thereon together with costs and attorney fees to be assessed.

Dated this 23rd day of May, A.D., 2017.

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APPENDIX 17

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

JOSEPH GRINAGE,

Plaintiff,

CASE NO. 15-1226-NI

v

HON. JOHN D. MAURER

ESTATE OF MELISSA SUE MUSSER, PATRICIA
JANE MUSSER, and THE EATON COUNTY
ROAD COMMISSION

Defendants.

AND

RYAN HARSTON,

Plaintiff,

CASE NO. 15-1226-NI

v

HON. JOHN D. MAURER

THE EATON COUNTY ROAD COMMISSION,
and the ESTATE OF MELISSA SUE MUSSER and
PATRICIA JANE MUSSER,

Defendants.

AND

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

Plaintiff,

CASE NO. 16-29-NI

v

HON. JOHN D. MAURER

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

Defendants.

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**THE ROAD COMMISSION'S REPLY TO THE ESTATE OF BRENDON PEARCE'S
 SUPPLEMENTAL RESPONSE BRIEF IN OPPOSITION TO THE ROAD COMMISSION'S
 SECOND MOTION FOR SUMMARY DISPOSITION**

I. INTRODUCTION

This Court recently heard the Road Commission's second motion for summary disposition. At the time of the hearing, Lynn Pearce, who is the Personal Representative of her son's Estate, offered one argument in opposition to the dismissal of her claims: that the Road Commission failed to plead her defective pre-suit notice as an affirmative defense.

As part of its presentation, the Road Commission provided this Court (and every other litigant) with a copy of *Fairley v Department of Corrections*, 497 Mich 290; 871 NW2d 129 (2015), a Michigan Supreme Court case that establishes, within the context of governmental immunity, a defendant need not plead a plaintiff's defective pre-suit notice as an affirmative defense. At oral argument, Pearce's counsel, evidently not having fully researched the applicability of his client's sole defense, claimed "unfair surprise," and requested an additional 30 days to address, in writing, *Fairley's* applicability to this lawsuit. This Court graciously agreed.

Pearce's supplemental response is now on file with this Court. It is a Master Class in distraction. The first 5 – ½ pages are spent rehashing this lawsuit's procedural posture; the Road Commission's appellate arguments (which are non-binding because it lost); and otherwise avoiding *Fairley's* applicability. It is not until the last three pages of the brief that Pearce admits what should have been obvious at the hearing – under *Fairley*, the Road Commission was not required to plead her defective pre-suit notice as an affirmative defense.

Not to be denied, however, in Pearce's latest submission, her counsel proposes a new argument: that, when it comes to governmental immunity, there is a difference between a defective notice, and defective "service" of an otherwise proper notice. Unfortunately for Pearce, Michigan law does not differentiate along the lines suggested by her counsel. As a result, and because *Fairley* controls the issue at hand, Pearce's claims must be dismissed.

What follows is a discussion of the law pertaining to pre-suit notices, all of which directly supports the Road Commission's request for relief.

II. LAW AND ARGUMENT

The Governmental Tort Liability Act ("GTLA"), MCL 691.1401 et. seq., broadly shields and grants to governmental agencies immunity from tort liability when they are engaged in the exercise or discharge of a governmental function. MCL 691.1407(1); *Duffy v Department of Natural Resources*, 490

Mich 198, 204; 805 NW2d 399 (2011); *Grimes v Department of Transportation*, 475 Mich 72, 76 – 77; 715 NW2d 275 (2006). A governmental agency can be held liable under the GTLA only if a case falls into one of the enumerated statutory exceptions. *Grimes*, 475 Mich at 77; see also *Stanton v Battle Creek*, 466 Mich 611, 614 – 615; 647 NW2d 508 (2002). This case involves what is colloquially referred to as the “highway exception,” a provision codified at MCL 691.1402.

The Legislature has further qualified a claimant’s ability to sue a governmental agency under the highway exception by requiring that he or she submit, as a pre-condition to suit being filed, a statutorily-compliant notice. See MCL 691.1404. Under the GTLA, claims being brought against a county road commission must comply with a separate, equally mandatory, notice provision. See MCL 224.21(3). Where a claimant fails to properly serve a statutorily-compliant notice, his or her claims must be dismissed. *McLean v City of Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013).

Both of the statutory provisions identified above contain several, explicit requirements that dictate the appropriate form of a pre-suit notice; the timeframe within which it must be served; and the persons upon whom it must be served. The failure to comply with any one of those statutory requirements renders a pre-suit notice defective, and requires the dismissal of a claimant’s lawsuit. See *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 204; 731 NW2d 41 (2007) (holding that a statutorily-compliant pre-suit notice is a condition to recover for injuries sustained because of a defective highway). More importantly, Michigan law does not differentiate (or prioritize) amongst the many ways that a notice can be defective. This sampling of cases, which covers several decades of our State’s jurisprudence, plainly illustrates that point:

- *Braun v Wayne County*, 303 Mich 454; 6 NW2d 744 (1942) (dismissed because of the failure to serve an appropriate party with the pre-suit notice);
- *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007) (dismissed because the pre-suit notice was untimely);

- *Woods v City of Saginaw*, unpublished opinion per curium of the Court of Appeals, issued June 30, 2009 (Docket No. 283781) (**Exhibit A**) (dismissed because of the failure to serve a pre-suit notice);
- *Carroll v City of Flint*, unpublished opinion per curium of the Court of Appeals, issued February 10, 2011 (Docket No. 296134) (**Exhibit B**) (dismissed because of, among other things, the failure to serve the pre-suit notice on an appropriate party);
- *Jones v City of Pontiac*, unpublished opinion per curium of the Court of Appeals, issued June 26, 2012 (Docket No. 304155) (**Exhibit C**) (dismissed because, among other things, the pre-suit notice was served on the wrong party); and,
- *Watts v City of Flint*, unpublished opinion per curium of the Court of Appeals, issued January 17, 2013 (Docket No. 307686); lv den 494 Mich 857 (2013). (**Exhibit D**) (dismissed because service of the pre-suit notice was effectuated by first class mail, as opposed to certified mail).

As these authorities establish, a notice can be defective for any one of several reasons. Furthermore, the presence of any specific defect (including the failure to effectuate proper service) mandates the dismissal of a claimant's lawsuit. Nowhere is this point established more conclusively than in *Braun, supra*, a case dealing with, among other things, the specific defect (failure to serve a mandatory party) and statutory language at issue in this lawsuit.

In *Braun*, the plaintiff fell into an uncovered catch basin on a highway under the jurisdiction of Wayne County. She presented notice of her claims against Wayne County to its road commission within four days of the accident. Under an administrative regime that has since been abandoned, those claims were referred to the Wayne County Board of Auditors for consideration. The plaintiff's claims were subsequently denied, and she filed suit under a precursor to MCL 224.21, the same provision of the Highway Code at issue in this case. Before filing suit, however, the plaintiff failed to serve a pre-suit notice of her claims on the Wayne County Clerk. The defendant moved to dismiss the plaintiff's lawsuit

based upon her failure to properly serve the pre-suit notice. The trial court granted the defendant's motion.

On appeal, the *Braun* plaintiff argued that, by initially presenting her claim to the road commission, whose clerk was, at that time, the Wayne County Clerk, she had effectively complied with the Highway Code. The Supreme 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. *Braun* at 459 – 460.

Braun is dispositive. In that case, the plaintiff failed to serve the county clerk with a copy of her pre-suit notice. Furthermore, in *Braun*, the Supreme Court found that the plaintiff's failure was a defect warranting the dismissal of her claims. Here, Pearce failed to serve the Eaton County Clerk with her pre-suit notice and, as such, the same was defective.¹ Contrary to the position taken by Pearce's counsel, Michigan law does not differentiate between defects relating to content and those relating to the manner of service. A defective notice is just that – a defective notice. And, under Michigan law, a defective notice requires the dismissal of a claimant's lawsuit.

¹ Pearce's counsel has been disappointingly coy with this issue, having represented, in two separate briefs, that service of his client's pre-suit notice upon the Eaton County Clerk "may or may not have happened." Setting aside his obligations to this tribunal (and the other litigants involved in this case) under MCR 2.114(D), one can assume that, if Pearce had actually served the Eaton County Clerk with a copy of her pre-suit notice, evidence of that fact would have surfaced by this point of the litigation. In any event, the issue is now moot. Under MCR 2.116(G)(3) and (6), Pearce was required to submit evidence establishing service upon the Clerk in response to the Road Commission's second dispositive motion. Her failure to do so entitles the Road Commission to summary disposition on that issue. See *SSC Associates Limited Partnership v General Retirement System of City of Detroit*, 192 Mich App 360, 364; 480 NW2d 275 (1991) (holding that, while opposing a dispositive motion, a party must establish the existence of a disputed fact through admissible evidence); see also *Stanton v Dachille*, 186 Mich App 247, 262; 463 NW2d 479 (1990) ("Where the opposing party fails to produce affidavits or evidence establishing a material issue of fact, summary disposition is properly granted.").

III. CONCLUSION

Pearce's latest argument runs contrary to Michigan law and should be rejected by this Court. She failed to serve the Eaton County Clerk with her pre-suit notice, and that failure renders her notice defective. Under Michigan law, defective notices require the dismissal of a claimant's lawsuit. Finally, according to the plain language of *Fairley*, the Road Commission was not obligated to plead Pearce's defective notice as an affirmative defense. For all these reasons, Pearce's claims against the Road Commission must be dismissed, with prejudice.

DATED: June 2, 2017



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APPENDIX 18

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

Joseph Grinage,

Plaintiff

v

File No. 15-1226-NI

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

and

File No. 16-29-NI

Defendants,

Honorable John D. Maurer

AND

Ryan Harston,

Plaintiff

v

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

Defendants,

AND

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

Plaintiff

v

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

Defendants,

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

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

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Attorneys for Plaintiff Pearce

ORDER

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

HONORABLE JOHN D. MAURER, Circuit Judge

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

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

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

FACTS

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

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

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

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

STANDARD OF REVIEW

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

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

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

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

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

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

ANALYSIS

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

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

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

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

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

Fairley v Dep't of Corr, 497 Mich 290, 298, reconsideration den sub nom. *Stone v*

Michigan State Police, 498 Mich 864 (2015) (citations omitted); See also *McCann v*

State Dept of Mental Health, 398 Mich 65, 77 n 1(1976); *Galli v Kirkeby*, 398 Mich 527,

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

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

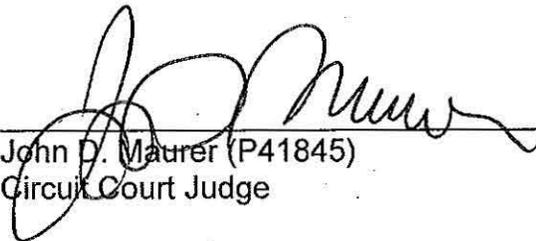
The only remaining issue, then, is the retrospective effect of *Streng*. If *Streng* is given retrospective effect, for the reasons stated above, Defendant Road Commission would be entitled to summary disposition. "Although the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity. For example, a holding that overrules settled precedent may properly be limited to prospective application." *Pohutski v City of Allen Park*, 465 Mich 675, 695–96 (2002) (citations omitted). A three factor test is applied to determine if a decision should not have retroactive effect. "Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice." *Id.*

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

new rule is to give full effect to both the GTLA and the Highway Code, this is not outweighed by the extent of reliance on the old rule. Further, the only effect of retroactive application would be to bar an entire class of litigants from bringing suit

against county road commissioners. Plaintiffs in this case followed the well-established rule of law at the time their suits were filed, and it would be detrimental to the administration of justice to bar their claims now based on a change in the interpretation of this law. As such, this Court finds that it would be improper to give *Streng* retroactive effect. Thus, under the law prior to *Streng*, the Plaintiffs filed proper notice and Defendant's motion for summary disposition must be denied.

It is so ordered.



John D. Maurer (P41845)
Circuit Court Judge

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APPENDIX 19

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Court of Appeals, State of Michigan

ORDER

Estate of Brendon Pearce v Eaton County Road Commission

Docket No. 338990

LC No. 16-000029-NI

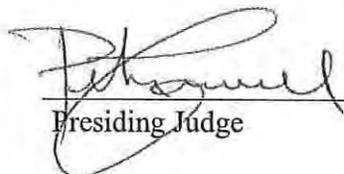
Peter D. O'Connell
Presiding Judge

Patrick M. Meter

Stephen L. Borrello
Judges

The Court orders that the motion for immediate consideration is GRANTED.

The Court orders that the motion to affirm pursuant to MCR 7.211(C)(3) is DENIED for failure to persuade the Court that it is manifest that the questions to be reviewed are so unsubstantial as to need no argument or formal submission or were not properly raised.



Presiding Judge

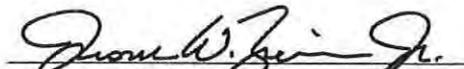
MAR -5 2018



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAR 02 2018

Date



Chief Clerk

APPENDIX 20

STATE OF MICHIGAN
IN THE COURT OF APPEALS

JOSEPH GRINAGE,
Plaintiff-Appellee,

Court of Appeals Docket No. 338981,
Consolidated with Docket No. 338990

v

THE EATON COUNTY ROAD COMMISSION,
Defendant-Appellant,

Eaton County Circuit Court
Case No. 15-1226-NI

-and-

ESTATE OF MELISSA SUE MUSSER and
PATRICIA JANE MUSSER,

Defendants-Appellees.

**DEFENDANT-APPELLANT'S RESPONSE
TO PLAINTIFF PEARCE'S MOTION TO
AFFIRM IN DOCKET NO. 338990**

AND

RYAN HARSTON,
Plaintiff-Appellee,

v

THE EATON COUNTY ROAD COMMISSION,
Defendant-Appellant,

-and-

ESTATE OF MELISSA SUE MUSSER and
PATRICIA JANE MUSSER,

Defendants-Appellees.

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

Court of Appeals Docket No. 338990,
Consolidated with Docket No. 338981

Plaintiff-Appellee,

v

THE EATON COUNTY ROAD COMMISSION,
Defendant-Appellant,

Eaton County Circuit Court
Case No. 16-000029-NI

-and-

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

Defendants-Appellees.

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**DEFENDANT-APPELLANT'S RESPONSE TO PLAINTIFF PEARCE'S
MOTION TO AFFIRM IN DOCKET NO. 338990**

NOW COMES Defendant-Appellant, Eaton County Road Commission, by and through its attorneys Smith Haughey Rice & Roegge, and in Response to Plaintiff-Appellee's Motion to Affirm, states as follows:

I. INTRODUCTION

This case involves an appeal as of right following the trial court's denial of a motion for summary disposition based on governmental immunity. The parties' dispute centers around this Court's holding in *Streng v Bd of Mackinac County Road Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), and, particularly, whether that judicial decision should be afforded retroactive or prospective effect. In a prior appeal, this Court agreed with the Plaintiff's position that *Streng* governed this dispute. See Exhibits M through Q to Defendant's Motion for Summary Disposition, filed 3/10/2016; *Estate of Brendan Pearce v Eaton County Road Comm'n*, unpublished order of the Court of Appeals, entered October 25, 2016 (Docket No. 333387).

Following that first appeal, the Road Commission filed a Second Motion for Summary Disposition in reliance on *Streng*, arguing that each of the Plaintiffs' notices failed to comply with MCL 224.21's notice provision. The trial court denied this Motion, finding that *Streng* should be applied prospectively only. The Road Commission appealed, and Plaintiff has responded with this Motion to Affirm, filed concurrently with a Motion for Immediate Consideration. For the reasons discussed herein, Plaintiff cannot show that the question raised by the Road Commission is "so unsubstantial as to need no argument or formal submission." MCR 7.211(C)(3). To the contrary, the Road Commission's position is supported by established legal principles and well-founded in law. Accordingly, this Court should DENY Plaintiff's

Motion to Affirm and allow the Road Commission time to submit a proper Reply Brief, pursuant to the Michigan Court Rules, for the benefit of this Court.

II. LAW AND ARGUMENT

Motions to Affirm are governed by MCR 7.211(C)(3), which provides as follows:

(3) *Motion to Affirm.* After the appellant's brief has been filed, an appellee may file a motion to affirm the order or judgment appealed from on the ground that

- (a) it is manifest that the **questions sought to be reviewed are so unsubstantial** as to need no argument or formal submission; or
- (b) the questions sought to be reviewed were not timely or properly raised.

See also IOP 7.211(C)(3) ("A motion to affirm requires that the issues on appeal be *so manifestly insubstantial that the plenary appeal process need not occur*, or that the issues were not timely or properly raised.") (emphasis added). Further, this Court's IOPs state "a motion to affirm will have the most practical impact if brought immediately after the appellant's brief has been filed and well before the appeal has been placed upon the Court's session calendar." IOP 7.211(C)(3).

In her motion, Plaintiff makes no specific claim that the issues raised by Defendant are "so unsubstantial as to need no argument or formal submission." MCR 7.211(C)(3). Rather, she simply posits that case law supports the trial court's order, and, thus, that it should be affirmed. In particular, Plaintiff argues it would be contrary to the administration of justice for *Streng* to be retroactively applied. (Plaintiff's Motion to Affirm, p. 4). Plaintiff's argument is chiefly based on a three-factor test announced by the Michigan Supreme Court in *Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002).

Michigan case law, however, supports the Road Commission's argument on appeal that *Streng* should be retroactively applied. In *Streng*, this Court held that the notice requirements in MCL 224.21 applied to claims against county road commissions, analyzing the plain language of MCL 224.21 and MCL 691.1402 of the Governmental Tort Liability Act ("GTLA") to reach its conclusion. Thus, *Streng* represents a judicial decision of statutory interpretation, as opposed to a decision that overrules clear and uncontradicted case law.

This Court's recent decision in *W.A. Foote Memorial Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; ___ NW2d ___ (2017), is directly on point. There, the Court determined that the Michigan Supreme Court's decision in *Covenant Med Ctr, Inc v State Farm Mut Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), should be applied retroactively. *W.A. Foote Memorial Hosp*, 321 Mich App at ___; slip op at 20. The parties made strikingly similar arguments to those made by the parties in this appeal. For instance, the plaintiff cited the three-factor test in *Pohutski*, claiming "it would be unfair to apply *Covenant* retroactively because plaintiff and others have relied on a long line of pre-*Covenant* decisions" that recognized a previous interpretation of Michigan no-fault law. *Id.* at ___; slip op at 9. Conversely, the defendant in *W.A. Foote Memorial Hosp* argued that "*Covenant* did not establish a new principle of law, but instead corrected judicial misinterpretations of statutory law to return the law to what it always had been" *Id.* at ___; slip op at 10.

This Court agreed with the defendant, reasoning as follows:

[N]otwithstanding the understandable reliance of plaintiff and others on prior decisions of this Court, those decisions did not represent "the law." Rather, "the law" in this instance is the pronouncement of the Legislature in the statutory text of MCL 500.3112. Absent legislative revision, that law is immutable and unmalleable; its meaning does not ebb and flow with the waves of judicial preferences. . . . We recognize that the application of this principle can sometimes lead to seemingly unfair results.

However, any unfairness ultimately derives not from the application of the law itself, but rather from the judiciary's determination to stray from the law. And our first obligation must be to maintain the rule of law.

Id. at ___; slip op at 13-14. Put simply, “judicial decisions of statutory interpretation must apply retroactively because retroactivity is the vehicle by which ‘the law’ remains ‘the law.’” *Id.* at ___; slip op at 16 (emphasis added). “[I]ntervening judicial decisions that may have misinterpreted existing statutory law simply are not, and never were, ‘the law.’” *Id.* at ___; slip op at 17, citing *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012). Accordingly, in *W.A. Foote Memorial Hosp*, this Court determined it need not reach the *Pohutski* three-factor test cited by the plaintiff because application thereof had been repudiated in the context of judicial decisions of statutory interpretation. *Id.*

The instant case is analogous. The Court’s decision in *Streng* involved a question of statutory interpretation with respect to MCL 691.1402 and MCL 224.21. Plaintiff emphasizes several judicial decisions pre-*Streng* that applied MCL 691.1402’s notice provisions despite the plain language of MCL 224.21. Per *W.A. Foote Memorial Hosp*, these intervening judicial decisions “are not, and never were, ‘the law.’” *Id.* Rather, “the law” is the pronouncement by the Legislature in the statutory text of MCL 224.21 as applied to county road commissions. See *id.* at ___; slip op at 13-14. Because *Streng* is a judicial decision of statutory interpretation, it should be retroactively applied.¹

Accordingly, contrary to Plaintiff’s Motion to Affirm, the questions sought to be reviewed by the Road Commission are of substantial merit and should be formally submitted to a

¹ In fact, this Court has applied *Streng* retroactively. In *Vincent v Calhoun County Road Comm’n*, unpublished opinion per curiam of the Court of Appeals, issued August 9, 2016 (Docket No. 327518) (**Exhibit A**), this Court cited *Streng* in its determination that the plaintiff failed to comply with MCL 224.21’s notice provisions to his claim against the Calhoun County Road Department and, thus, could not maintain suit.

panel of this Court for review. The Road Commission should further be afforded the opportunity to properly rebut Plaintiff's Brief on Appeal in a Reply Brief under the Court Rules. See MCR 7.212(G).

III. RELIEF REQUESTED

WHEREFORE, Defendant respectfully requests that this Court DENY Plaintiff's Motion to Affirm.

DATED: February 26, 2018

/S/ JON D. VANDER PLOEG

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APPENDIX 21

Court of Appeals, State of Michigan

ORDER

Ryan Harston v County of Eaton
Estate of Brendon Pearce v Eaton County Road Commission

Docket Nos. 338981; 338990

LC No. 15-001226-NI; 16-000029-NI

Peter D. O'Connell
Presiding Judge

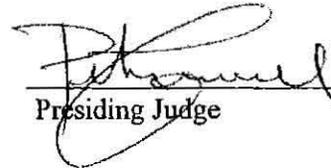
Kirsten Frank Kelly

Michael J. Riordan
Judges

On August 31, 2017, this Court issued *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), applying the retroactivity test announced in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 536; 821 NW2d 117 (2012), to hold that the Supreme Court's decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 470 (2017), applied retroactively.

On May 16, 2018, this Court issued *Brugger v Midland Co Bd of Rd Commr's*, ___ Mich App ___; ___ NW2d ___ (2018) (Docket No. 337394), applying the retroactivity rules in *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002), to hold that *Streng v Bd of Mackinac Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016); slip op at 4-5, only applies prospectively.

On the Court's own motion, we direct the parties to brief whether *W A Foote Mem Hosp* or *Brugger* controls this case. Appellant and appellees must file their principal briefs on this issue within seven days of the Clerk's certification of this order, and appellant may file a reply brief no later than seven days after the filing of appellees' briefs.



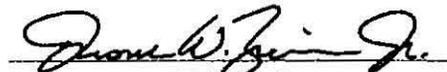
 Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY 21 2018

Date



 Chief Clerk

APPENDIX 22

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Order

Michigan Supreme Court
Lansing, Michigan

December 4, 2018

Stephen J. Markman,
Chief Justice

158069

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

LYNN PEARCE, Personal Representative of the
Estate of BRENDON PEARCE, Deceased,
Plaintiff-Appellant,

v

SC: 158069
COA: 338990
Eaton CC: 16-000029-NI

EATON COUNTY ROAD COMMISSION,
Defendant-Appellee,

and

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

On order of the Court, the application for leave to appeal the June 7, 2018 judgment of the Court of Appeals is considered and, it appearing to this Court that the case of *W A Foote Memorial Hospital v Michigan Assigned Claims Plan* (Docket No. 156622) is pending on appeal before this Court and that the decision in that case may resolve an issue raised in the present application for leave to appeal, we ORDER that the application be held in ABEYANCE pending the decision in that case.

DEC - 3 2018



I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 4, 2018

Clerk

APPENDIX 23

Order

Michigan Supreme Court
Lansing, Michigan

April 24, 2020

Bridget M. McCormack,
Chief Justice

158069

David F. Viviano,
Chief Justice Pro Tem

LYNN PEARCE, Personal Representative of the
Estate of BRENDON PEARCE, Deceased,
Plaintiff-Appellant,

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

v

SC: 158069
COA: 338990
Eaton CC: 16-000029-NI

EATON COUNTY ROAD COMMISSION,
Defendant-Appellee,

and

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

By order of December 4, 2018, the application for leave to appeal the June 7, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *W A Foote Mem Hosp v Mich Assigned Claims Plan* (Docket No. 156622). On order of the Court, the case having been decided on October 25, 2019, 504 Mich 985 (2019), the application is again considered, and it is GRANTED. The parties shall address: (1) whether *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), lv den 500 Mich 919 (2016), was correctly decided, and if so (2) whether *Streng* “clearly established a new principle of law” and thereby satisfied the threshold question for retroactivity set forth in *Pohutski v City of Allen Park*, 465 Mich 675, 696 (2002), compare *Pohutski*, 465 Mich at 696-697 (citations omitted) (“Although this opinion gives effect to the intent of the Legislature that may be reasonably be inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in [*Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139 (1988) and [*Li v Feldt (After Remand)*, 434 Mich 585 (1990)].”) with *Wayne Co v Hathcock*, 471 Mich 445, 484 (2004) (“Our decision today [overruling *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981)] does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963.”). See also *Chevron Oil v Huson*, 404 US 97, 106 (1971) (citations omitted) (holding that a decision establishes a new principle of law, such that it may be applied

retroactively, if it “overrul[es] clear past precedent on which litigants may have relied . . .”); and if so (3) whether *Streng* should be applied retroactively under the “three factor test” set forth in *Pohutski*.

We further ORDER that this case be argued and submitted to the Court together with the case of *Brugger v Midland Co Bd of Road Commissioners*, Docket No. 158304, at such future session of the Court as both cases are ready for submission.

The total time allowed for oral argument shall be 60 minutes: 30 minutes for appellants and 30 minutes for appellees, to be divided at their discretion. MCR 7.314(B)(1).

The Negligence Law Section of the State Bar of Michigan, Michigan Association of Counties, and Michigan Municipal League are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Estate of Brendon Pearce v Eaton County Road Commission*, Docket No. 158069, only and served on the parties in both cases.

MARKMAN J. (*concurring*).

I concur with our orders granting leave to appeal in this case and in *Brugger v Midland Co Bd of Rd Comm’rs*, Docket No. 158304. I write separately only to encourage the parties and any amici, when addressing the issue of the retroactivity of *Streng v Bd of Mackinac Co Rd Comm’rs*, 315 Mich App 449 (2016), lv den 500 Mich 919 (2016), to address the relevance of the tension identified in *Pohutski v City of Allen Park*, 465 Mich 675 (2002), between “the general rule . . . that judicial decisions are given full retroactive effect” and the exception to that rule of “a more flexible approach . . . where injustice might result from full retroactivity [of a corrected interpretation of the law],” *id.* at 695-696, as well as what consideration should be given to any asserted “injustice” that might result to the prevailing party in cases in which the new rule is applied prospectively only.



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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 24, 2020

Clerk