

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Shapiro, PJ, and M. J. Kelly and O'Brien, JJ

TIM EDWARD BRUGGER, II,

Supreme Court Docket No. _____

Plaintiff-Appellee,

Court of Appeals Docket No. 337394

v

BOARD OF COUNTY ROAD COMMISSIONERS
FOR THE COUNTY OF MIDLAND, AKA
MIDLAND COUNTY ROAD COMMISSION, a
governmental agency,

Midland County Circuit Court
Case No. 15-2403-NO B

Defendant-Appellant.

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**APPLICATION FOR LEAVE TO APPEAL ON BEHALF
OF DEFENDANT MICHIGAN COUNTY ROAD
COMMISSIONERS FOR THE COUNTY OF MIDLAND**

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STATEMENT OF APPELLATE JURISDICTION

This Court has jurisdiction over this Application for Leave to Appeal under MCR 7.303(B)(1). The Application is timely because it is filed within 42 days after the Court of Appeals' July 12, 2018 Order (**Exhibit 1**) denying Defendant's timely-filed Motion for Reconsideration. MCR 7.305(C)(2)(b).

JUDGMENT AND ORDER APPEALED AND RELIEF SOUGHT

The Court of Appeals issued its published Opinion in this case on May 15, 2018 (**Exhibit 2**). The Midland County Road Commission filed a timely Motion for Reconsideration on June 5, 2018, which the Court of Appeals denied by Order dated July 12, 2018. (**Exhibit 1**). The Road Commission here seeks leave to appeal the Court of Appeals' published Opinion and Order dated May 15, 2018, and also its published July 12, 2018 Opinion and Order denying the Road Commission's Motion for Reconsideration.

The plaintiff, Tim Brugger, was injured and in an automobile accident. He brought a claim against the Midland County Road Commission, giving his notice to the Road Commission more than 60 days after the accident but within 120 days. Plaintiffs, like Brugger, had often done as Brugger did over a number of years. Plaintiffs had for some time ignored the 60-day provision in MCL 224.21, believing that they needed only to comply with the 120 day notice provision in MCL 691.1404. However, in 2016, the Court of Appeals held in a published decision in *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), that claims such as his against county road commissions must comply with the 60-day notice period in MCL 224.21. The Road Commission moved for summary disposition in this case on that basis. Resolution of the motion depended upon whether *Streng* applies retroactively or prospectively only (and not to the litigants in this case). The trial court held that *Streng*

applies only prospectively, and that this case could proceed, because the plaintiff complied with the 120-day notice provision in MCL 691.1404.

On appeal, the Court of Appeals held that the Circuit Court's decision (see **Exhibit 3**) was correct, and that the case could proceed. The Road Commission contended that the applicability of *Streng*, whether it was retroactive or prospective only, was controlled by the published decision of the Court of Appeals in *W A Foote Mem Hosp v Michigan Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017). *W A Foote* had held, in a published decision, that a statutory interpretation like this one has retroactive application. This panel of the Court of Appeals ignored the *W A Foote* decision in its first decision. In denying the Road Commission's Motion for Reconsideration, the Court held that the *W A Foote* case was inapplicable to this one.

In the meanwhile, between the time of the first decision of the Court of Appeals in this case and its Order denying reconsideration, another panel of the Court of Appeals in *Harston v Eaton Co Rd Comm*, ___ Mich App ___; ___ NW2d ___ (2018) (COA Docket No. 338981, held that *Streng, supra*, is retroactive and results in denial of the plaintiff's claim. The Court published that decision, saying that its result was compelled by *W A Foote*, which predated the conflicting decision of the other panel in this case.

The Road Commission contends that the decision of the Court of Appeals in *Harston, supra*, is correct, and that its decision in this case is incorrect, in error, and must be reversed. Hence, the Road Commission brings this appeal.

STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER, BY VIRTUE OF THE *STRENG* COURT OF APPEALS DECISION, PLAINTIFF WAS REQUIRED TO GIVE NOTICE OF HIS ACCIDENT WITHIN 60 DAYS IN ACCORDANCE WITH MCL 224.21.**

Plaintiff says, “No.”

Defendant Midland County Rd Comm says, “Yes.”

The Circuit Court said, “No.”

The Court of Appeals said, “No.”

- II. WHETHER THE APPLICABILITY OF *STRENG* IS RETROACTIVE IN ACCORDANCE WITH *W A FOOTE MEM HOSP V MICH ASSIGNED CLAIMS PLAN*.**

Plaintiff says, “No.”

Defendant Midland County Rd Comm says, “Yes.”

The Circuit Court did not answer this question

The Court of Appeals said, “_____.”

INTRODUCTION AND REASONS FOR GRANTING THE APPLICATION

This case should be seen as a companion with two others currently pending before this Court on Application for Leave to Appeal. The first is *W A Foote Mem Hosp, supra* (Supreme Court Docket No. 156622), and the second is *Harston v Eaton Co Rd Comm, supra* (Supreme Court Docket No. 158069). In *W A Foote*, the Court of Appeals held that judicial decisions of statutory interpretation must apply retroactively because retroactivity is the vehicle by which the “law” remains “the law.” The principle of law from *W A Foote*, applied to this case and to *Harston*, means that *Streng* applies retroactively in both cases. Hence, both plaintiffs should have given their notices to the Road Commissions within 60 days after their accidents. Neither did so. Applying *Streng* retroactively, as required by *W A Foote*, means that both plaintiffs failed to comply, and their claims must be dismissed.

The Midland County Road Commission contends that this case should be decided in accordance with *W A Foote*, and that the Court of Appeals has erred by choosing to do otherwise. The Eaton County Road Commission has opposed the Application for Leave to Appeal by the plaintiff in *Harston*, because that panel of the Court of Appeals chose to follow *W A Foote*. That is the correct result.

In *W A Foote*, this Court has issued an Order to submit the case to oral argument on whether to grant the Application for Leave to Appeal. That Order was issued by the Court on May 25, 2018, and a copy is attached hereto as **Exhibit 4**.

The holdings in these two road commission cases, this one and *Harston*, are dependent upon this Court’s decision in *W A Foote Mem Hosp*. Hence, the Midland County Road Commission asks that this case follow along the course of the appeal in *W A Foote*. If the Court of Appeals’ decision in *W A Foote* is upheld, and it should be, then this Court must consider whether this Road Commission case is to be decided in accordance with it. Here the Court of

Appeals held that the holding of *W A Foote* would be inapplicable in this case. That holding by the Court is patently in error.

The grounds for granting this Application are found in MCR 7.305(B)(2) and (3). The decision of the Court of Appeals panel in this case conflicts with *W A Foote, supra*, and with the decision of the other panel in *Harston v Eaton Co Rd Comm, supra*. The Midland County Road Commission asserts here that the Court of Appeals reached the right decision and result in *Harston*. The Court should grant this Application and reverse the decision of the Court of Appeals in this case. The Road Commission incorporates, by reference, its Motion for Reconsideration filed in the Court of Appeals in this case. A copy is attached hereto as **Exhibit 5**.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The material proceedings of facts for this Application for Leave to Appeal may well be gleaned from the foregoing sections. Nonetheless, they are these in succinct summary.

Plaintiff contends that he was injured in an automobile accident caused by a roadway defect. He made his claim against the Midland County Road Commission. He provided notice of his claim to the Road Commission longer than 60 days after the accident, but sooner than 120 days after the accident. The Circuit Court denied the Road Commission's Motion for Summary Disposition. The Road Commission contends that plaintiff needed to comply with the 60-day provision in MCL 224.21. Plaintiff believed that compliance with the 120-day provision in MCL 691.1404 was sufficient.

In *Streng, supra*, the Court of Appeals held that plaintiffs like Mr. Brugger misapprehended the law when they ignored the 60-day provision, complying instead with the 120-day provision. Hence, if *Streng* governs this case, the trial court should have granted the Road Commission's Motion for Summary Disposition.

The Road Commission contends that the legal principle at issue in this case is controlled by the published Court of Appeals' decision in *W A Foote, supra*. The holding of *W A Foote* requires that the statutory interpretation and application of the law in *Streng* must apply to this case as well. This panel of the Court of Appeals has disagreed and has concluded that the plaintiff's case may proceed, though he did not comply with the 60-day provision. Hence, the Road Commission brings this appeal.

In a like case against the Eaton County Road Commission, *Harston v Eaton Co Rd Comm, supra*, another panel of the Court of Appeals has held that *Streng* does apply retroactively and that it does apply to the litigants in that case. That panel of the Court of Appeals held that the plaintiff's claim was properly dismissed for noncompliance with the 60-

day provision. That plaintiff has filed an Application for Leave to Appeal in this Court. It remains pending, and the Midland County Road Commission has filed its reply in opposition.

Also, *WA Foote* is currently pending on Application for Leave to Appeal in this Court. There, the Court has ordered the parties to file supplemental briefs, and the Court will hear oral argument on whether to grant the Application. Hence, the legal principle of paramount importance for these two road commission cases is pending before this Court, per that Order, in *WA Foote*.

The Midland County Road Commission in this case, and the Eaton County Road Commission in the *Harston* case, contend that *WA Foote* is rightly decided and that retroactive application of the 60-day notice provision is compelled in both of these cases by application of the legal principle announced in *WA Foote*. The Court should grant this Application for Leave to Appeal so that it may follow the course of events along with this Court's consideration of *WA Foote* and of *Harston*.

ARGUMENT

For its argument that the Court should grant leave to appeal in this case, the Midland County Road Commission adopts, by reference, the Eaton County Road Commission's Reply to the Plaintiff's Application for Leave to Appeal in the Eaton County Road Commission case, Supreme Court Docket No. 158069. A copy of that response is attached hereto as **Exhibit 6**.

The Midland County Road Commission contends that the Court of Appeals decision in *WA Foote* was rightly decided. The Road Commission contends, as well, that the legal principle of statutory interpretation, as stated by the Court in *WA Foote*, controls the resolution of this case. The holding of *WA Foote* compels the conclusion that *Streng*'s enforcement of the 60-day notice provision applies retroactively and to this case, just as it applied to the litigants in *Streng*. Consequently, the decision of the Court of Appeals must be reversed.

RELIEF REQUESTED

For all of the foregoing reasons and authorities, defendant Midland County Road Commission respectfully requests that this Court grant leave to appeal, and that, upon leave granted, it reverse the decisions of the Court of Appeals and the Circuit Court and hold that the plaintiff's case must be dismissed, and that the defendant be awarded its costs and fees herein.

DATED: August 23, 2018

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