

STATE OF MICHIGAN
IN THE SUPREME COURT

TIM EDWARD BRUGGER, II,

Supreme Ct. Docket No.158304

Plaintiff/Appellee,

Court of Appeals No.: 337394

vs.

Lower Court No.: 15-2403-NO B
Midland County Circuit Court

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

Defendant/Appellant.

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PLAINTIFF - APPELLEE'S ANSWER TO DEFENDANT-APPELLANT'S

APPLICATION FOR LEAVE TO APPEAL

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Exhibit No. 2 Midland County Road Commission's Answer to Plaintiff's First Amended Compliant, Affirmative Defenses, and Reliance of Jury Demand

STATEMENT OF JURISDICTION

Plaintiff-Appellee Tim Edward Brugger II does not contest the Statement of Jurisdiction contained in Defendant-Appellant's brief.

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE PLAINTIFF WAS REQUIRED TO GIVE NOTICE PURSUANT TO MCL 224.21.

PLAINTIFF-APPELLEE STATES:	NO.
DEFENDANT-APPELLANT STATES:	YES.
CIRCUIT COURT STATES:	NO.
THE COURT OF APPEALS STATES:	NO.

INTRODUCTION AND REASONS AGAINST GRANTING LEAVE TO APPEAL

The issue before this Court is whether or not Plaintiff gave the appropriate pre-suit notice to the Defendant pursuant to the Governmental Tort Liability Act MCL 691.1401 et seq. (GTLA). Plaintiffs, on August 15, 2013, gave their notice of injury and defect pursuant to MCL 691.1404, and as directed by this Court in *Rowland v. Washtenaw County Road Com'n*, 477 Mich 197; 731 NW2d 41 (2007) which expressly directs a plaintiff bringing a claim against a road commission to comply with the 120-day notice provision found in Sec. 1404.

Defendant's argument that it is entitled to Summary Disposition as to Plaintiff's Complaint is based on the recent Court of Appeals decision of *Streng v. Board of County Road Commissioners*, 315 Mich App 449; 890 NW2d 680 (2016). Defendant argues that the Court of Appeals has recently "confirmed" that the 60-day notice provision found in MCL 224.21, and not the 120-day notice provision provided for MCL 691.1404, is applicable to cases involving county road commissions. The Defendant did not initially contest the timeliness of Plaintiff's notice. Even though they argue that the Court of Appeals had "confirmed" the applicable notice provision in road commission cases, it was not raised as an affirmative defense. It was only raised after this Court denied leave in *Streng*.

In reality, the *Streng* Court did not "confirm" the applicable notice requirements, but instead resurrected a statutory provision that had been deemed unconstitutional and had not been applied in almost 50 years in claims involving county road commissions. More importantly, the decision is in direct contravention of decades of precedent from both this Court and the Court of Appeals regarding the

applicable notice provision for county road cases. (See Footnote 4 to the *Streng* opinion, which provides a partial list of the cases.)

Over twenty years ago, the 60-day notice provision of MCL 224.21 was stricken down by this Court as violative of the equal protection guarantee. *Brown v. Manistee County Road Commission*, 452 Mich, 354, 358; 550 NW2d 215 (1996).

In 1970 the GTLA was amended to include MCL 691.1404 and its 120-day notice provision. After the GTLA amendment, no reported decisions applied the 60-day notice provision to cases involving county road commissions. *Brown v. Manistee County Road Commission*, 204 Mich App 574, 579; 515 NW2d 121 (Neff, P. J, dissenting). Reversed on other grounds 452 Mich, 354 (1996).

This Court in *Brown*, noted that having two distinct notice provisions that covered identical causes of actions was suspect, and that there was no rational basis as to why there should be different notice provisions for accidents happening on county roads versus the roads of other governmental agencies. *Brown* 452 Mich at 363.

In addition to holding that the 120-day notice provision applied to county road commissions, this Court in *Brown* also held that a showing of “actual prejudice” was necessary in order to show that a notice filed after the 120-days was in effect defective under the statute. *Id. at 368*. The “actual prejudice” issue was revisited by this Court in *Rowland* in 2007.

This Court in *Rowland* overruled *Brown* to the extent that a requirement of “actual prejudice” was required to show that a late notice was defective. The Court concluded that the plain language of MCL 691.1404 required that the notice **must**

be served on the county road commission within 120-days of the injury. *Id.* at 200.

The equal protection issue that had been discussed in *Brown* between the 120-day and 60-day notice provisions was **never discussed** in *Rowland*.

The Court of Appeals in *Streng* determined that this Court, as well as all other prior decisions, must have been simply “**overlooking**” the applicability of MCL 224.21. *Streng* 315 Mich app at 463. Accordingly, they completed their own analysis and determined that MCL 224.21 was the applicable notice provision in cases involving county road commissions.

Obviously, Plaintiff disagrees with the findings of *Streng* given that it completely disregards the prior decisions of this Court. This Court in *Rowland* explicitly states that the 120-day notice provision MCL 691.1404 applies to cases involving road commissions. *Rowland* 477 Mich at 200. **Rowland has never been overruled.** Nor can it be argued the Court of Appeals decision in *Streng* overrules the holding in *Rowland* that the 120-day notice provision applies in county road commission cases.

Plaintiff also argued below, that even if the *Streng* decision was correct in its analysis, Plaintiff believed there were equitable and constitutional reasons why *Streng* should not apply to the Plaintiff in this case. The Court of Appeals below partially agreed and found that the *Streng* decision should only have prospective application.

Clearly there is confusion in the courts as to the applicable notice provisions. This Court in *Rowland* says one thing while the Court of Appeals in *Streng* now says

another. Plaintiff cannot be penalized for following the higher court's decision in *Rowland*, which explicitly applied the 120-day notice provision of 691.1404 to a county road commission case. The application of MCL 224.21 and its conflicting requirements, including among other things its 60-day notice period and service requirements, should be tolled as to Plaintiff because of the confusion caused by the courts regarding this issue. In the alternative, the *Streng* decision should be given prospective application only, given that it has essentially changed decades of authority and, in essence, sets forth new *law*.

Finally, the equal protection issues that were not addressed in either *Streng* or *Rowland* persist. Clearly having two distinct notice provisions that cover identical causes of actions is constitutionally suspect, and deserves analysis.

Defendant now argues that the Court of Appeals wrongly analyzed the issue of prospective application. Defendant contends that this matter is controlled by *WA Foote Mem Hospital v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017). Defendant did not raise this argument in its briefing, but only after the Court of Appeals had issued its decision. However, as argued below and held by the Court of Appeals in its Order denying Defendants motion for reconsideration, *Foote Memorial* is not controlling.

This Court should deny leave.

COUNTER STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

On April 27, 2013 Tim Brugger was operating his motorcycle southbound on North Geneva Road when he struck two potholes on the roadway and lost control and crashed his motorcycle sustaining serious injuries. His injuries included, but are not limited to, a closed head injury, two head lacerations, left frontal, temporal, and occipital skull fractures, left femur fracture requiring a rod and screws, and serious road rash. It was Plaintiff's allegation that the poor maintenance and repairs caused the condition of the potholes and loose gravel that directly caused Mr. Brugger to lose control of his motorcycle and crash.

Plaintiff served his pre-suit notice on the Defendant on August 15, 2013. Plaintiff filed his Complaint on February 9, 2015. He filed his first Amended Complaint on June 1, 2015. Defendant filed his Motion for Summary Disposition on or about December 20, 2016 challenging the timeliness of Plaintiff's Notice.

For purposes of the motion the factual allegations of Plaintiff's Complaint are not in dispute. Moreover, it was admitted that Plaintiff's notice of injury and defect was provided pursuant to MCL 691.1404 and provided to the members of the Road Commission within 110-days of the accident.

Nor did the Plaintiff dispute that he did not comply with MCL 224.21 (i.e. provide notice within 60-days and serve a copy of his notice of injury on the Midland County Clerk).

Oral argument was held on Defendant's motion on February 10, 2017.

At the hearing Plaintiff disputed the applicability of MCL 224.21 to his claim against the Midland County Road Commissioners. Plaintiffs argued that *Streng* was

wrongly decided and that MCL 691.1404 and its 120-day notice provision was the applicable notice period to his claim pursuant to *Rowland*. Plaintiff further argued that to the extent the Court of Appeals was required to follow *Streng*, it is distinguishable based on equitable and constitutional arguments that were not made in that case, and, hence never addressed by the *Streng* court.

The Trial Court in denying Defendants Motion for Summary Disposition found that this Court in *Rowland* has indicated that the 120-day notice provision of the GTLA is the applicable notice provision for cases involving road commissions. (Trial Court Transcript pp. 31-32).

The Trial Court also ruled that to the extent that *Streng* was correctly decided and was controlling authority, it should only be given prospective application to avoid manifest injustice. (Trial Transcript pp. 32-34).

The Court of Appeals, after oral argument, issued its published decision on May 15, 2018, affirming the Trial Court decision that *Streng* should only be applied to cases after May 2, 2016. (**Exhibit 1**). Judge Shapiro wrote separately indicating that in his opinion *Streng* was wrongly decided. Moreover, relying on *Apsey v Memorial Hosp*, 477 Mich 120,123: 730 NW2d 695 (2007), that the Plaintiff could satisfy the notice requirement by complying with either of the statutory notice provisions.

Defendant then filed a motion for reconsideration. The Court of Appeals denied the motion by Order on July 12, 2018. (**Exhibit 2**).

Defendant has now sought leave to this Court on August 23, 2018.

STANDARD OF REVIEW

The question of whether a governmental agency is immune from suit is an issue of law that is reviewed de novo.

Defendant filed their Motion for Summary Disposition pursuant to MCR 2.116(C)(7), which provides that summary disposition may be granted where a claim is barred because of immunity granted by law. Unlike a motion under subsection (C)(10), a movant under MCR 2.116 (C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the Complaint are accepted as true unless contradicted by documentation submitted by the movement. *Patterson v. Kleiman*, 447 Mich 429, 434 fn 6; 526 NW2d 879 (1994).

In this case, Defendants are admittedly not contesting the contents of Plaintiff's First Amended Complaint. Instead they challenge the sufficiency of Plaintiff's pre-suit notice.

ARGUMENT

I. The *Streng* decision was wrongly decided.

Michigan courts have consistently and reliably applied the notice provision found in MCL 691.1401(1) and not MCL 224.21 to cases involving county road commissions. (See Footnote 4 to the *Streng* opinion, which provides a partial list of the cases).

Specifically, in *Brown*, this Court held that the notice provision found in MCL 691.1404(1) applied to a case against Manistee County Road Commission after the plaintiff lost control of his motorcycle near a pothole. This Court in *Brown* examined the two different notice provisions, primarily with reference to the fact that the notice under MCL 224.21 provided that notice should be given within 60-days of the occurrence, whereas notice under MCL 691.1404 must be provided within 120-days of the occurrence. This Court found no rational basis to support a 60-day notice requirement for claims against county road commissions, where a 120-day notice requirement applied to all other claims against other governmental entities with jurisdiction over highways. Thus, this Court declared MCL 224.21 unconstitutional and affirmatively held that the 120-day notice provision applied in action for personal injuries against a county road commission. *Brown* 452 Mich at 356. However, the *Brown* court also found that if the road commission did not suffer “actual prejudice”, the plaintiff’s claim was not barred by failure to give notice within the requisite 120-day time period. *Id.* at 366.

Subsequently, in *Rowland*, this Court once again applied the MCL 691.1404 notice provision to an action against the Washtenaw County Road Commission after the plaintiff allegedly tripped on uneven pavement while crossing the street. Contrary to the pronouncements of the Court of Appeals in *Streng*, this Court overruled *Brown* only to the extent that *Brown* considered whether there was prejudice in determining the applicability of the notice period. Specifically, the Court stated:

MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must

be enforced as written. As this Court stated in *Robertson v. DaimlerChrysler Corp.*, 465 Mich 732 (2002), “The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written.” **Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days** and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and the nature of the defect, the injury sustained, and the names of the witnesses known at the time of by the claimant, no matter how much prejudice is *actually suffered*. Conversely, the notice provision is not satisfied if notice is served **more than 120 days** after the accident *even if there is no prejudice*. *Rowland* 477 Mich at 219. (Emphasis added).

The portion of *Brown* finding MCL 224.21 to be unconstitutional was never overturned or even addressed by this Court or the Legislature. *Rowland* only considered whether the “actual prejudice” “analysis” espoused in *Brown* was correctly decided; it did not discuss the portion of *Brown* finding that MCL 224.21 was unconstitutional as a violation of equal protection. *Rowland* 477 Mich at 210.

To support its conclusion that *Brown* was overruled in its entirety, the court in *Streng* focused on the language in *Rowland* that stated, “Nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed”. *Streng* 315 Mich App at 459 citing *Rowland* 477 Mich at 214. Importantly, *Hobbs v. Michigan State Highway Dept.*, 398 Mich. 90; 247 NW2d 754 (1976) case was not a county road commission case and only dealt with the “actual prejudice” issue. There was no discussion of equal protection violations relative to the two notice provisions. It was solely within this context that this Court in *Rowland* stated, “Nothing can be saved”. Therefore, there is no basis to conclude that *Brown’s*

constitutional examination of the 60-day notice provision in MCL 224.21 has been overruled.

Interestingly enough, even the dissent in *Brown* from Justice Riley agreed that the 120-day notice provision applied to road commission cases rather than the 60-day notice provision stating:

[I] agree with the majority's conclusion that plaintiff must comply with the 120-day notice requirement... *Brown* 452 Mich at 369.

This Court in *Rowland* cited with approval Justice Riley's dissent from *Brown* without raising any question as to her conclusion that the 120-day notice provision should be applied in road commission cases. *Rowland* 477 Mich at 210.

The Court of Appeals in *Streng* took the position that *Rowland's* "silence" with regard to the equal protection argument in *Brown* as an indication that this Court had somehow overruled *Brown's* holding that MCL 224.21 was unconstitutional. *Streng* 315 Mich App at 463. As the Court stated in *Streng*:

In sum, Courts appeared to have **overlooked the time limit, substantive requirements, and service procedures applicable to notice under MCL 224.221(3)** when the responsible body is a county road commission. *Id.* (emphasis added)

Rowland, however, was not silent with regard to the applicability of 691.1404 as to county road commissions. This Court in essence reaffirmed the equal protection holding of *Brown* stating:

We conclude that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect **must be served on the governmental agency within 120 days** of the injury. *Rowland* 477 Mich at 200.

As defined by the GTLA, “governmental agency” means this state or a political subdivision. MCL 691.1401(a). “Political subdivision” means a municipal corporation, county, **county road commission**, school district, community college district, port district, metropolitan district, or transportation authority or combination of two or more of these when acting jointly. MCL 691.1401(e). *Rowland* obviously was a county road commission case and this Court specifically said that the 120-day notice provision must be met, not the 60-day notice provision.

The fact that *Rowland* did not revisit the viability of the notice provision in MCL 224.21 only leads to one logical conclusion. Simply put, this Court determined that MCL 691.1404 and not MCL 224.21 applied to road commissions. *Rowland* 477 Mich at 200.

It seems unlikely that this Court would overturn precedent without a thoroughly reasoned rationale. Moreover, to infer that this Court would so casually overrule constitutional precedent with equal protection implications without even so much as a discussion defies logic. Instead, arguably, the exact opposite seems more likely. In other words, this Court had no need to discuss the portion of *Brown’s* ruling that it did not intend to overturn.

The Court of Appeals in *Streng* has ignored the plain language in *Rowland* and ruled that this Court overruled the equal protection argument in *Brown*. Obviously, the Court of Appeals cannot overrule this Court.

The Court of Appeals and all other lower courts are bound to follow the decisions of this Court, regardless of whether they are well reasoned or whether the Court of Appeals believes that the decisions to be correct, unless and until they are

modified or overruled by the Supreme Court. *People v. Metamora Water Service, Inc.*, 276 Mich App 376; 741 NW2d 61 (2007). As this Court explained in *Boyd v. W.G. Wade Shows*, 443 Mich 515, 532; 505 NW2d 544 (1993) overruled on other grounds *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28; 732 NW2d 56 (2007):

As the Court of Appeals repeatedly noted, it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower Courts are bound by that authority, [citations omitted].

Accordingly, Plaintiff would argue regardless of *Streng*, this Court must follow the clear language in *Rowland* and find the Plaintiff has complied with the applicable statutory notice requirement MCL 691.1404.¹

II. If the Streng decision was correctly decided it should only be given prospective application.

Both the Trial Court and the Court of Appeals discussed the equities involved in this matter and found that the *Streng* decision, if applicable, should only have prospective application. Plaintiff in response to Defendant's motion raised not only prospective application but also argued in favor of equitable tolling. Both equitable

¹ Defendant pointed out that this Court has denied the Defendant in *Streng's* application for leave. Plaintiff would remind this Court that the denial for an application for leave to appeal is ordinarily an act of judicial discretion. Judicially, a court's refusal to hear a discretionary appeal means nothing other than the court would not hear the case. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case as the bar has been told many times. *United States v. Carver*, 260 US 482, 490, 43 S.Ct. 181, 67 L.Ed. 361 (1923). Michigan has followed a similar rule that a denial of leave to appeal is not an endorsement of the legal issues within the opinion of the Court of Appeals. See *Malooly v. York Heating & Ventilating Corporation*, 270 Mich 240; 258 NW 622 (1935).

tolling and prospective application are valid reasons to deny Defendants motion and accordingly both are discussed below.

A. Equitable Tolling.

The long recognized remedy of judicial tolling has been applied in a variety of circumstances. See example, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95, 111 S. Ct. 453, 112 L.Ed. 2d 435 (1990). This Court has recognized the doctrine of equitable tolling in cases where the courts themselves have created confusion and the litigants have relied on their detriment to the preexisting jumble of convoluted case law. See e.g. *Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 471 Mich 411; 731 NW2d 29 (2004).

In *Bryant* this Court addressed the difference between actions sounding in ordinary negligence and those sounding in medical malpractice. The court concluded that some of the plaintiff's claims sounded of malpractice and would have been barred by the malpractice limitations. *Id.* at 432. Nonetheless, the court allowed the plaintiff's malpractice claims to proceed with the negligence claims stating that:

The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan...[p]laintiff's failure to comply with the applicable statute of limitations is the product of an **understandable confusion** about the legal nature of her claim, rather than a negligent failure to preserve her rights. *Id.* at 432. (emphasis added)

As set forth above, that is exactly what has occurred here. The Court of Appeals in *Streng* has essentially disregarded nearly 50 years of legal precedent. In

addition, they have taken the unusual step of determining that the notice provision of MCL 224.21 that was found unconstitutional by this Court was applicable because other courts, including this Court, had simply overlooked the notice provision and its applicability to county road commission cases.

Plaintiff would argue that the conflicting decisions of *Rowland and Streng* are perfect examples of judicial confusion. *Rowland* specifically stated that a plaintiff in a county road commission case “must” comply with the 120-day notice provision. *Streng* has now flipped *Rowland* on its head and says it doesn’t mean what it says. If a litigant cannot rely on the express language of this Court, but rather must try to anticipate what issues the court may have “overlooked” the judicial system is going to be impossible for litigants to navigate. This Court in *Rowland* quite clearly stated that the 120-day notice provision applies to county road commission cases. If the Court of Appeals holding in *Streng* is applied to this case it will be in essence as if they have overruled this Court.²

This approach was specifically rejected in a prior unpublished Court of Appeals decision in which some of the same arguments raised in *Streng* were addressed. In the prior case the Court of Appeals applied the 120-day notice provision to the county drain commission despite the plaintiff’s argument to the contrary. *Ficke v. Lenawee County Drain Commissioner*, unpublished opinion Court of Appeals issued May 3rd, 2011 (docket number 296076 attached as **Exhibit 3.**)

In that case, the plaintiff brought a claim pursuant to the highway exception to governmental immunity, MCL 691.1402 against the Lenawee County Board of

² The Defendant in this case even seems to acknowledge a “level of confusion” regarding this issue in its original brief. (Def. Brief in Support at p. 5.)

County Road Commissioners after he fell from a tractor. He alleged that his fall was caused by a depression in the highway. *Ficke* at 1. The road commission moved for summary disposition on the basis of plaintiff's failure to comply with MCL 691.1404, which is a precondition to any claim under the highway exception. Plaintiff contended, in response, that MCL 691.1404 did not apply to the highway exception claim brought against the county road commission, but rather that the notice provision of MCL 224.21 applied. Plaintiff argued that because MCL 224.21 was declared unconstitutional by this Court in *Brown*, there was no statutory notice provision requirement applicable to highway claims against county road commissions. *Ficke* at 2.

The Court of Appeals rejected the plaintiff's argument. In doing so, it discussed this Court's *Brown* decision at length. The *Ficke* panel of the Court of Appeals also examined *Rowland*, citing it as an example of this Court explicitly requiring strict compliance with MCL 691.1404 as a precondition to any claim for injuries against the county road commission arising from the alleged defective highway. *Ficke* at 4-5. Ultimately, the *Ficke* panel offered the following well reasoned rejection of the plaintiff's argument based on *Rowland* and *Brown*:

The *Rowland* Court did not expressively consider or address its holding in *Brown* that the 60-day notice provision set forth in MCL 224.21 is unconstitutional, and thus, that the 120-day provision applies to actions against county road commissions. However, it applied the 120-day notice provision to the Plaintiff's claim against the Washtenaw County Road Commission. And, following *Rowland* our Supreme Court has likewise applied the 120-day notice provision when peremptorily reversing this Court's decision on the basis of Plaintiff's failure to provide timely notice to Defendant County Road Commissions under MCL 691.1401, in *Mauer v. Topping*,

480 Mich. 912 (2007) and *Leech v. Cramer*, 479 Mich. 858 (2007). We therefore conclude that both *Brown* and *Rowland* require that the 120-day notice provision set forth in MCL 691.1404(1) be applied to actions against county road commissions. *Id* at 5.

The court in *Ficke*, after finding that this Court had unequivocally held that the 120-day notice provision applied to county road commissions, found that they were bound to follow this Court's decisions until they were modified or overruled by the this Court. *Ficke* at 5.

As noted above, the *Ficke* court was not alone. No case until *Streng* applied the 60-day notice provision to cases involving the county road commission for over four decades. It is a fair statement to say that the issue was settled and established law that the 120-day notice provision applied to cases involving county road commissions. In fact, the case law is so well settled that even the county road commission defendant in *Streng* argued for the application of the 120-day notice provision. The Defendant in this case never specifically raised any objection to the timeliness or the manner of service of Defendant's notice of injury and defect. No affirmative defense alleged that the Plaintiff had failed to timely provide notice under MCL 224.21 or that the notice was not served on the County Clerk. (**Exhibit 4**). It is clear that this Defendant believed that the 120-day notice provision of MCL 691.1404 was applicable.

There was never a dispute that Plaintiff's notice was beyond the 60 days or that it was not served on the County Clerk. If the Defendant believed that the 60-day notice was applicable, they could have brought this motion after the Complaint was

filed rather than conduct months of discovery when there was no dispute that the notice was provided beyond the 60 days and not served on the County Clerk.

It is Plaintiff's position that if such well learned appellate judges, and attorneys who routinely represent county road commissions could be mistaken as to the applicability of MCL 691.1404, then the Plaintiff should not be penalized for a similar confusion about its application. Just as this Court in *Bryant* tolled the statute of limitations, based on what Justice Markman called an "understandable confusion" of the law, this Court would be well within its discretion to extend the time allowed to provide notice pursuant to MCL 224.21 or in the alternative find that Plaintiff's current notice was timely and properly served.

To be clear, Plaintiff believes that the law was settled by this Court in *Brown* and *Rowland*. However, to the extent the *Streng* court is correct then this Court's opinion in *Rowland* created a significant amount of confusion as to the applicable notice provision by expressly stating that the 120-day notice provision "must" be followed in county road commission cases.

B. Prospective Application

Although the general rule is that judicial decisions are given full retroactive effect *Hyde v. University of Michigan Board of Regents*, 426 Mich 223; 313 NW2d 847 (1986), a more flexible approach has been deemed warranted where injustice might result from full retroactivity. *Lindsey v. Harper Hospital*, 455 Mich 56; 564 NW2d 861 (1997). For example, a holding that overrules settled precedent may properly be limited to prospective application. *Id.*

Michigan courts have adopted a three factored test when deciding whether or not a decision should have retroactive application. Those factors are 1. The purpose to be served by the new rule, 2. The extent of reliance on the old rule, and 3. The effective retroactivity on the administration of justice. *People v. Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971). The three part test was adopted by this Court in *Pohutski v. City of Allen Park*, 465 Mich 675, 696-697; 641 NW2d 219 (2002).

In this type of analysis there is always the threshold question of whether a new law is being created. Essentially, the *Streng* court has created a new rule of law by breaking with longstanding precedent and holding that the MCL 224.21 notice provision is now applicable to county road commission cases. The *Streng* court, while perhaps interpreting the statute consistent with its plain language, created new law because it changed how it would be applied in road commission cases, inconsistent with how it had been applied previously by the appellate courts including this Court, a court of last resort. See *Bezeau v Palace Sports & Entertainment, Inc.* 487 Mich 455; 795 NW2d 797.

Under the first part of the *Pohutski* test presumably the purpose of the rule is to correct an error in interpretation of the governmental immunity statute that has been “overlooked” by the courts and litigants for decades. Prospective application would not interfere with the purpose of the *Streng* case. There is no compelling reason that decision needs to be given retroactive effect. Second, there has been a nearly 50-year reliance on the prior application of the 120-day notice provision to cases involving county road commissions. All of the published decisions that have

considered the issue have found that since *Brown's* ruling that the 60-day notice provision was unconstitutional, have applied the 120-day notice to road commission cases. *Streng* 315 Mich App at 460. In fact, to Plaintiff's knowledge all county road commissions, prior to *Streng*, have agreed that the 120-day notice provision applies to them and have not challenged the *Brown* decision. Prospective application would acknowledge the reliance by all parties involved in these types of cases. As for the third prong of the test, if the decision is applied retroactively, countless cases which have relied on this Court's own clear and unambiguous language that the 120-day notice provision applies will be dismissed, and it would amount to a gross miscarriage of justice for litigants who have operated under undisputed decades of legal authority regarding the applicable notice provision.

Defendants in its Motion for Reconsideration, for the first time, formally argued that the issue of prospective application was controlled by *Foote Memorial, supra*. Defendant argues that *Foote Memorial* is controlling precedent with respect to the issue of retroactive versus prospective application.³ *Foote Memorial* held that judicial decisions regarding statutory interpretation apply retroactively, and that the 3-part test performed in *Pohutski* was repudiated by *Spectrum Health Hospital v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012).

³ Defendant also provided a supplemental authority of this Court's decision on June 7, 2018, *Harston, et al v Eaton Co Rd Comm, et al* and *Estate of Brendan Pearce v Eaton Co Rd Comm, et al*, Court of Appeals Docket Nos. 338981 and 338990. That opinion adopts the Defendant's argument and with a somewhat circular logic argues that it is not bound by this case's decision because of *WA Foote*. Essentially allowing it to make an end run around this case's published opinion and MCR 7.215(J).

As the Court of Appeals noted *Foote Memorial* is distinguishable from the issues in the present case and thus is inapplicable.

The Court of Appeals in its Order denying reconsideration noted that *Foote Memorial* addressed the issue of retroactivity of a court of supreme jurisdiction overruling a former decision. The Court of Appeals found that rule inapplicable to cases involving opinions of the Court of Appeals.

This is not this Court overruling prior precedent. It is the Court of Appeals interpreting this Court's decision and changing the well understood holding of that case. To argue that *Rowland* expressed no preference for which notice provision applied ignores the explicit language of the decision. Plaintiff should, at a minimum, have the right to rely on the explicit language of this Court when it comes to matters of procedure.

Moreover, in order for *Foote Memorial* to even be controlling it would have to be conclusive that *Streng* was a case merely of statutory interpretation. *Streng* however, was not. In reality, it was a question of statutory application.

There is really no dispute as to the language of either MCL 224.221(3) or MCL 691.1404(1). *Streng* did not really have to analyze the meanings of any of the terms of either of those statutes, but rather which statutory provision applied in County road cases in light of the decision of this Court in *Rowland v. Washtenaw County Road Comm'n*, 477 Mich 197; 731 NW2d 41 (2007).

The analysis in this current case is more of a composite issue versus a statutory interpretation. This court in *WA Foote* specifically limited its holding to cases involving purely statutory interpretation. *Foote Memorial* see footnote 15.

Not only did *Streng* analyze the statutes involved, but it interpreted this Court's decision to reach its conclusion. For these significant distinguishable reasons alone *Foote Memorial* is not controlling.

In addition, *Foote Memorial* noted that *Spectrum* recognized an ongoing exception to the principal of retroactivity. This Court noted in *Spectrum* that when

a:

“statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them impaired, by a change of construction made by a subsequent decision.”
Id at p. 536

This Court in *Spectrum* took that quote from their decision in *Gentzler v. Constantine Village Clerk*, 320 Mich 394, 398; 31 NW2d 668 (1948). *Gentzler* relied in part on this Court's earlier opinion in *Donahue v. Russell*, 264 Mich 217; 249 NW 830 (1933). *Donahue* described the retrospective analysis as follows:

The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision, except and so far as the construction last given would impair the obligations of contracts entered into or injuriously affect vested rights acquired in reliance on the earlier decisions. Id. at 399.

Accordingly, the *Spectrum* decision recognized two distinct situations in which prospectivity is still applied. The first being situations where the decision will adversely affect contractual rights and the second in situations that would affect

vested rights. While this case does not involve a contract, it certainly involves the Plaintiff's vested rights as it relates to his constitutional right to not have laws violate his equal protection and due process rights. Mr. Brugger should have the right to be protected from the procedural rules being changed in the middle of the game. It also violates the vested right that Mr. Brugger obtained to not have his equal protection rights violated by two conflicting notice provisions that arbitrarily set two different sets of requirements for the same situation.

Finally, this case differs from *WA Foote* in that it is one that has resulted because of judicial confusion. Confusion created not by Plaintiff, but perhaps by an oversight by this Court. No such confusion existed in *WA Foote*, rather it was a change in the interpretation of a statute and whether it created a cause of action. This case involves only matters of procedure and not substance. It is as previously argued more analogous to *Bryant v. Oakpointe*. *Foote Memorial* and *Spectrum* did not involve statutory time limits and judicial created confusion about which was applicable. As such this matter is further distinguishable and thus not controlled by those decisions.

III. MCL 224.21 violates the Plaintiff's constitutional right to equal protection under the laws of the State of Michigan and the United States.

If the *Streng* court is correct that this Court in *Rowland* not only reversed the actual prejudiced finding, but also overruled the equal protection argument regarding the notice provision of MCL 224.21, then it did so without any discussion of the issues. It goes without saying that the county defendant in *Streng* would not enjoy the same constitutional rights as an individual such as the Plaintiff in this case.

Unlike the governmental defendant in *Streng*, Mr. Brugger's constitutional rights are clearly implicated given the conflicting notice provisions. Accordingly, it is appropriate for this Court to consider and address the equal protection rights of Mr. Brugger.

Having two separate notice provisions with conflicting provisions that have different requirements as to: the substance of the notice, the timing of the notice, and service violates Plaintiff's equal protection guarantees under the 14th amendment of the U.S. Constitution and Article 1 sec. 2 of the Michigan Constitution. Those guarantees are violated where the legislative classification is arbitrary and not rationally related to the object of the legislation. *Bissell v. Kommareddi*, 202 Mich App 578, 580; 509 NW2d 542 (1993).

While MCL 224.21 limited itself to cases involving county road commissions. MCL 691.1404 has a much broader application. Nothing in section 1404 limits application to county road cases. Specifically, Section 1404 expressly applies to “**any** recovery for injuries sustained by reason of **any** defective highway” MCL 691.1404(1)(emphasis added). As this Court in *Brown* noted “it is clear that MCL

691.1404 and MCL 224.21 govern identical causes of action for defective road and highway maintenance”. *Brown* 452 Mich at 361. Having two equally applicable but fundamentally different notice provisions for no apparent rational basis is fundamentally and constitutionally unfair.

Application of MCL 691.1404 over MCL 224.21 is the more reasonable approach given that the GTLA is the more recent statute and was part of a statutory scheme whose purpose was to provide a more uniform approach.

The title of the GTLA provides in its legislative intent in part that it is an act **“to make uniform the liability of municipal corporations, political subdivisions and the State, its agencies and departments, officers, employees, and volunteers thereof.”**

Moreover, courts have found that the provisions of the GTLA apply broadly and uniformly to all governmental agencies. *Ross v. Consumers Power Co.*, 420 Mich 567, 591; 363 NW2d 641 (1984), *Nawrocki v. Macomb County Road Commission*, 463 Mich 143, 158; 615 NW2d 702 (2000). The GTLA is intended to occupy the entire field with regard to governmental immunity. *Id.*

Again, the GTLA is the more recent legislative pronouncement on governmental immunity. MCL 224.21 was enacted as part of Act No. 283 of the public acts of 1909; the GTLA was enacted in 1964. In addition, the GTLA notice provision found in MCL 691.1404 was amended in 1970.

As Judge Neff’s dissent in the Court of Appeal’s opinion in *Brown* stated:

In my view, the broad language of MCL 691.1404(1) preempts application of the 60-day notice provision in MCL 224.21 (citations omitted) MCL 691.1404(1) provides in pertinent part:

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 provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect.

The first criteria in determining the intent of the legislature is the specific language of the statute. *House Speaker v. State Administrative Board*, 441 Mich. 547, 567 (1993). Words in a statute are to be accorded their plain and ordinary meaning. MCL 8.3a. I believe that the words emphasize in the above quoted portion of the statute served to override the 60-day notice provision regarding boards of county road commissioners in MCL 224.21.

Further, the sixty-day notice provision has not been applied in any reported cases involving county road commissions since MCL 691.1404 was amended in 1970. Until that provision was amended by 1970 P.A. 155, it also contained a 60-day notice provision. The amendment changed it to 120 days. **There is no apparent reason for changing the notice provision regarding governmental agencies other than the county road commissions, but not that of the road commissions.**

Even if I agree that the legislature intended that there be a shorter notice period for county road commissions than for other governmental agencies, I would hold that such legislative scheme violates equal protection guarantees. *Brown*, 204 Mich App at 578-579. (Emphasis added).

This Court in *Brown*, essentially adopting Judge Neff's position, found that there was no rational basis for having two separate notice periods. No rational basis for having the shorter 60-day notice period applied to county road commission cases and thus found that the entirety of MCL 224.21 statute unconstitutional. *Brown*, 452 Mich at 363-364.

Plaintiff would again argue that the 60-day notice provision violates his constitutional rights. In essence, there is no rational reason that the notice provision should be different for cases involving county road

commissions versus other governmental agencies. Moreover, the statutes are vague and ambiguous, given that they contain conflicting requirements and arguably both could be found applicable to county road cases.

Presumably, that is why this Court in *Brown* over 20 years ago found that the notice provision in MCL 224.21 was unconstitutional. Arguably, that decision was never overturned as set forth above. However, to the extent that the *Streng* court is correct that *Brown's* finding as to the constitutionality of MCL 224.21 has been overturned in *Rowland*, then this Court is obligated to consider the equal protection arguments of this Plaintiff.

Plaintiff is not arguing that a notice provision by itself is unconstitutional. That issue has long been resolved. It is Plaintiff's position that the existence of two notice provisions, which overlap and have vastly different requirements is a violation of equal protection.

RELIEF REQUESTED

For the reasons stated above leave should not be granted.

Dated: 9/20/2018

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