

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. 158304

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.

SUPPLEMENTAL AUTHORITY

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This case is pending on Application for Leave to Appeal by the Defendant-Appellant, Midland County Road Commission. The Application is currently held in abeyance by this Court by Order dated December 4, 2018. The Court has withheld decision on the Application pending its resolution of *W A Foote Memorial Hosp v Michigan Assigned Claims Plan*, Docket No. 156622. **(Exhibit A)** The Court has now decided *W A Foote*, and the Road Commission points to it here as supplemental authority for the Court's resolution of this case.

The question for this appeal is whether the case should be dismissed on the basis of *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016). The Court of Appeals held in favor of the plaintiff that *Streng* did not have retroactive application, because it announced a new rule of law by requiring plaintiff to have complied with a statutory notice provision that, though on the books, was apparently not enforced by the courts for a number of years. The Road Commission contends that, applying the rationale employed by this Court in *W A Foote*, the *Streng* decision should have retroactive application. Just as the case of *Covenant Med Ctr, Inc v State Farm Mut Ins Co*, 500 Mich 191 (2017), did not meet the threshold question for application of the *Pohutski* framework, because it did not clearly establish a new principle of law; *Streng* does not meet that threshold either. Thus, the three-factor test in *Pohutski v City of Allen Park*, 465 Mich 675 (2002), does not come into play to even potentially block retroactive application of *Streng*. *Streng* applies, and the plaintiff's claim should have been dismissed. This Court, based upon its decision in *W A Foote*, should reverse the decision of the Court of Appeals.

DATED: November 4, 2019

/S/ JON D. VANDER PLOEG

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EXHIBIT A

Order

October 25, 2019

156622

W A FOOTE MEMORIAL HOSPITAL,
d/b/a ALLEGIANCE HEALTH,
Plaintiff-Appellant,

v

MICHIGAN ASSIGNED CLAIMS PLAN
and MICHIGAN AUTOMOBILE INSURANCE
PLACEMENT FACILITY,
Defendants-Appellees,

and

JOHN DOE INSURANCE COMPANY,
Defendant.

Michigan Supreme Court
Lansing, Michigan

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

SC: 156622
COA: 333360
Kent CC: 15-008218-NF

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On October 2, 2019, the Court heard oral argument on the application for leave to appeal the August 31, 2017 judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.305(H)(1). In lieu of granting leave to appeal, we AFFIRM the holding of the Court of Appeals that this Court's decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191 (2017), applies retroactively. Nonetheless, we VACATE that part of the judgment of the Court of Appeals stating that this Court's decision in *Spectrum Health Hosps v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503 (2012), "effectively repudiated" the application of the "threshold question" and "three-factor test" set forth in *Pohutski v City of Allen Park*, 465 Mich 675 (2002), in the context of judicial decisions of statutory interpretation. In concluding that the Court was not setting forth a new law, the Court in *Spectrum Health* engaged in an analysis that is consistent with the analysis required by *Pohutski*'s threshold question. *Spectrum Health* did not purport to repudiate *Pohutski*'s framework, and the Court of Appeals erred by concluding to the contrary. Applying *Pohutski* to the instant case, because this Court's decision in *Covenant* did not clearly establish a new principle of law, *Covenant* does not satisfy *Pohutski*'s threshold question, and the *Covenant* decision therefore applies retroactively.



a1015

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.

October 25, 2019

Clerk