

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.

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**DEFENDANT-APPELLANT MIDLAND COUNTY
BOARD OF ROAD COMMISSIONER'S BRIEF ON APPEAL**

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

DATED: August 3, 2020

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Table of Contents

Index of Authorities iii

Index of Appendices vii

Statement of Jurisdiction and Order Appealed From viii

Statement of Questions Presented x

Introduction 1

Statement of Facts 3

A. Brugger gets in an accident and doesn’t send a pre-suit notice to the Road Commission until 110 days after the accident 3

B. The trial court denied the Road Commission’s summary-disposition motion based on its conclusion that *Streng* was wrongly decided and only applied prospectively 3

C. The Road Commission appealed, arguing that *Streng* applies retroactively 4

D. The Court of Appeals affirmed the trial court’s ruling in a split, published opinion authored by Judge Douglas Shapiro over a dissent from Judge Colleen O’Brien 7

 1. The Court of Appeals Majority 7

 2. Judge Shapiro’s concurrence 9

 3. Judge O’Brien’s dissent 9

Standard of Review 13

Argument I 13

A. *Streng* gave effect to the plain language of MCL 691.1402(1) and MCL 224.21(3). For that reason alone, it was correctly decided 14

B. Even if the plain statutory language doesn’t conclusively establish that *Streng* was decided correctly (it does), principles of statutory construction confirm that the *Streng* court correctly held that the 60-day notice provision of MCL 224.21(3) governs claims against county road commissions 16

C. *Rowland* didn’t hold that MCL 691.1404(1) controlled over MCL 224.21(3). And it overruled *Hobbs* and *Brown* in their entirety, concluding that nothing could be saved from them “...because the [constitutional] analysis they employ is deeply flawed.” 20

Issue II – New Question30

A. General Principles of Michigan Retroactivity Law30

B. A judicial decision creates a new principle of law where it renders an unforeseeable ruling on an issue of first impression or overrules clear, uncontradicted, and settled case law33

C. This Court has recognized that the case law related to the highway exception at issue in *Brown, Rowland*, and *Streng* is confusing, contradictory, and virtually impenetrable36

D. *Streng* didn’t create a new rule for retroactivity purposes39

Issue III – *Pohutski’s* Three-factor test42

A. *Pohutski’s* Three-factor test42

 1. First Factor: Purpose of the New Rule42

 2. Second Factor: Reliance on the Old Rule43

 3. Third Factor: Effect on the Administration of Justice44

B. Case law applying *Pohutski’s* “three-factor” analysis in the GTLA context45

C. *Pohutski’s* three-factor test favors retroactive application of *Streng* to this case47

Conclusion & Relief Requested49

Index of Authorities

Cases

<i>Adams v Dept of Transportation</i> , 253 Mich App 431; 655 NW2d 625 (2002)	37
<i>Altobelli v Hartman</i> , 499 Mich 284; 884 NW2d 537 (2016)	13
<i>Atkins v Suburban Mobility Auth for Regional Transp</i> , 492 Mich 707; 822 NW2d 522 (2012)..	47
<i>Bezeau v Palace Sports & Entertainment, Inc.</i> , 487 Mich 455; 795 NW2d 797 (2010)	31, 35
<i>Brown v Manistee Co Rd Comm</i> , 452 Mich 354; 550 NW2d 215 (1996)	passim
<i>Brugger v Midland County Bd of Road Comm 'rs</i> , 324 Mich App 307; 920 NW2d 388 (2018).....	vi, 7, 12, 21
<i>Bukowski v City of Detroit</i> , 478 Mich 268; 732 NW2d 75 (2007)	14, 16, 20
<i>Buscaino v Rhodes</i> , 385 Mich 474; 189 NW2d 202 (1971)	32
<i>Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co</i> , 500 Mich 191; 895 NW2d 490 (2017)	41, 42, 43, 44, 48
<i>Crook v Patterson</i> , 42 Mich App 241; 201 NW2d 676 (1972)	7, 10
<i>Dearborn Twp Clerk v Jones</i> , 335 Mich 658; 57 NW2d 40 (1953)	17
<i>Devillers v Auto Club Ins Ass'n</i> , 473 Mich 562, 590 n 65; 702 NW2d 539 (2005)	7, 30, 31, 33, 35, 40
<i>Donohue v Russell</i> , 264 Mich 217; 249 NW 830 (1933)	31
<i>Employees Mut Ins Co v Morris</i> , 460 Mich 180; 596 NW2d 142 (1999)	33, 34, 36
<i>Galea v FCA US LLC</i> , 323 Mich App 360, 375; 917 NW2d 694 (2018).....	21
<i>Gebhardt v O'Rourke</i> , 444 Mich 535; 510 NW2d 900 (1994)	18, 19
<i>Gentzler v Constantine Village Clerk</i> , 320 Mich 394; 31 NW2d 668 (1948)	30, 31
<i>Gladych v New Family Homes, Inc</i> , 468 Mich 594; 664 NW2d 705 (2003)	30, 32, 35
<i>Gregg v State Hwy Dept</i> , 435 Mich 307; 458 NW2d 619 (1990)	46, 47
<i>Grimes v Mich Dept of Transp</i> , 475 Mich 72; 715 NW2d 275 (2006)	45, 46, 47, 48
<i>Grubauh v City of St Johns</i> , 384 Mich 165; 180 NW2d 778 (1970)	25

<i>Hegadorn v Dep't of Human Servs Dir</i> , 503 Mich 231; 931 NW2d 571 (2019)	14
<i>Hobbs v State Hwys Dept</i> , 398 Mich 90; 247 NW2d 754 (1976).....	passim
<i>Hyde v University of Michigan Bd of Regents</i> , 426 Mich 223; 393 NW2d 847 (1986)	30, 31
<i>Lesner v Liquid Disposal, Inc</i> , 466 Mich 95; 643 NW2d 553 (2002)	32
<i>Lincoln v General Motors Corp</i> , 461 Mich 483; 607 NW2d 73 (2000)	13, 31, 33, 34, 40
<i>Lindsey v Harper Hosp</i> , 455 Mich 56; 564 NW2d 861 (1997)	30, 31, 32, 33
<i>Madugula v Taub</i> , 496 Mich 685; 853 NW2d 75 (2014)	14
<i>McCahan v Brennan</i> , 492 Mich 730; 822 NW2d 747 (2012)	39
<i>McNeel v Farm Bureau Gen Ins Co of Mich</i> , 289 Mich App 76; 795 NW2d 205 (2010)	34, 43, 44, 45, 48, 49
<i>Monat v State Farm Ins Co</i> , 469 Mich 679; 677 NW2d 843 (2004)	34
<i>Moulter v Grand Rapids</i> , 155 Mich 165; 118 NW 919 (1908)	24, 27, 47
<i>Nawrocki v Macomb County Road Com'n</i> , 463 Mich 143; 615 NW2d 702 (2000)	36, 37, 41
<i>Nowell v Titan Ins Co</i> , 466 Mich 478; 648 NW2d 157 (2002)	17
<i>Paul v Wayne County Dept of Pub Serv</i> , 271 Mich App 617; 722 NW2d 922 (2006)	45, 46, 48
<i>People v Bruce</i> , 504 Mich 555; 939 NW2d 73 (2000)	13
<i>People v Doyle</i> , 451 Mich 93; 545 NW2d 627 (1996)	34, 35
<i>People v Hall</i> , 499 Mich 446; 884 NW2d 561 (2016).....	15
<i>People v Heflin</i> , 434 Mich 482; 456 NW2d 10 (1990).....	21
<i>People v Lewis</i> , 503 Mich 162; 926 NW2d 796 (2018)	14, 15
<i>People v Mazur</i> , 497 Mich 302; 872 NW2d 201 (2015)	17, 19
<i>People v McKinley</i> , 496 Mich 410; 852 NW2d 770 (2014)	17
<i>People v Meeks</i> , 293 Mich App 115; 808 NW2d 825 (2011).....	18
<i>People v Phillips</i> , 416 Mich 63; 330 NW2d 366 (1982)	34
<i>People v Pinkney</i> , 501 Mich 259; 912 NW2d 535 (2018).....	14, 16
<i>Pohutski v City of Allen Park</i> , 465 Mich 675; 641 NW2d 219 (2002).....	passim

RadLAX Gateway Hotel, LLC v Amalgamated Bank, 566 US 639; 132 S Ct 2065; 182 L Ed 2d 967 (2012)..... 18

Rowland v Washtenaw County Road Com'n, 477 Mich 197; 731 NW2d 41 (2007)..... passim

SBC Health Midwest, Inc v City of Kentwood, 500 Mich 65; 894 NW2d 5325 (2017)..... 17

Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich, 492 Mich 503; 821 NW2d 117 (2012) 30

Streng v Bd of Mackinac Co Road Comm'rs, 315 Mich App 449; 890 NW2d 680 (2016)..... passim

Suttles v Dep't of Trans, 457 Mich 635; 578 NW2d 295 (1998) 37

Tebo v Havlik, 418 Mich 350, 360; 343 NW2d 181 (1984) 31, 34

TOMRA of North America, Inc v Dept of Treasury, ___ Mich ___; ___ NW2d ___ (Docket Nos. 158333, 158335, June 16, 2020)..... 17, 18

Trbovich v Detroit, 378 Mich 79; 142 NW2d 696 (1966) 24

Trentadue v Buckler Lawn Sprinkler, 479 Mich 378; 738 NW2d 664 (2007) 30, 43, 45, 48, 49

W A Foote Mem Hosp v Mich Assigned Claims Plan, 504 Mich 985; 934 NW2d 44 (2019) 41, 42, 43, 45, 48

Wayne Co v Hathcock, 471 Mich 445; 684 NW 2d 765 (2004) 30, 35, 37, 44

Statutes

MCL 224.21 passim

MCL 500.3145(1) 35

MCL 600.215 viii

MCL 691.1401 7, 19

MCL 691.1402 passim

MCL 691.1404 passim

MCL 691.1407 43

MCR 2.116(C)(7) viii, 3, 13

MCR 7.202(6)(a)(v) viii
MCR 7.203(A)(1) viii
MCR 7.303(B)(1)..... viii
MCR 7.305(C)(2)(c) viii
MCR 7.305(H)(1)-(3) viii

Other Authorities

Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012) 17, 18
1 Mich Pl & Pr § 2:91 31

Index of Appendices

Volume	Appendix	Description	Page
A	1	Summary Disposition Order	0001a – 0003a
	2	Trial Court Register of Actions	0004a – 0010a
	3	Road Commission's Claim of Appeal	0011a – 0013a
	4	<i>Brugger v Midland County Bd of Road Comm'rs</i>	0014a – 0026a
	5	Reconsideration Denial Order	0027a – 0029a
	6	Grant Order	0030a – 0032a
	7	Brugger's First Amended Complaint	0033a – 0038a
	8	Brugger's Pre-Suit Notice of Intent to Sue	0039a – 0041a
	9	Brugger's Original Complaint	0042a – 0047a
	10	Road Commission's Motion for Summary Disposition	0048a – 0057a
	11	Brugger's Summary Disposition Response	0058a – 0081a
	12	Summary Disposition Hearing Transcript	0082a – 0117a

Statement of Jurisdiction and Order Appealed From

On February 27, 2017, Midland Circuit Court Judge Michael J. Beale entered an order denying defendant-appellant Midland County Board of Road Commissioners' motion for summary disposition based on governmental immunity under MCR 2.116(C)(7).¹ On March 13, 2017, the Road Commission timely claimed an appeal by right under MCR 7.203(A)(1) and MCR 7.202(6)(a)(v).² After briefing and oral argument, the Court of Appeals affirmed the trial court's ruling in a split, published opinion on May 15, 2018.³ Judge Douglas B. Shapiro authored the majority and concurring opinions, and Judge Colleen A. O'Brien authored a dissenting opinion.

Under MCL 600.215, MCR 7.303(B)(1), and MCR 7.305(H)(1)-(3), this Court has jurisdiction to grant leave to appeal or order other relief after a decision of the Court of Appeals. Under MCR 7.305(C)(2)(c), an application for leave to appeal to this Court is timely when it is filed within 42 days of a Court of Appeals order denying a timely filed motion for reconsideration. Here, the Road Commission timely filed its application for leave to appeal on August 23, 2018, 42 days after the Court of Appeals' denial of its motion for reconsideration on July 12, 2018.⁴

On April 24, 2020, this Court granted the Road Commission's Application for Leave to Appeal and directed the parties to address three issues: (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

¹ Summary Disposition Order (Appellant's App'x at 0002a). Although the face of the order indicates that it was signed on February 24, 2017, the trial court's register of actions shows that it entered the order on February 27, 2017. Trial Court Register of Actions (Appellant's App'x at 0005a).

² Road Commission's Claim of Appeal (Appellant's App'x at 0012a).

³ *Brugger v Midland County Bd of Road Comm'rs*, 324 Mich App 307; 920 NW2d 388 (2018) (Appellant's App'x at 0015a).

⁴ Reconsideration Denial Order (Appellant's App'x at 0028a).

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)...and if so”; (3) “whether *Streng* should be applied retroactively under the ‘three factor test’ set forth in *Pohutski*.”⁵

⁵ Grant Order (Appellant’s App’x at 0031a).

Statement of Questions Presented

I.

***Streng* held that MCL 224.21(3)—not MCL 691.1404(1)—governs pre-suit notices of highway-defect claims against county road commissions. That’s exactly what the plain language of MCL 691.1402(1) and MCL 224.21(3) provides. Furthermore, this Court repudiated the entirety of the opinion that Brugger relies on, *Brown*, because of its deeply flawed constitutional analysis. So, *Streng* gave effect to the Legislature’s expressly stated intent and wasn’t contrary to any binding precedent. Was *Streng* correctly decided?**

The trial court answered: No.

The Court of Appeals Majority did not address this question.

Plaintiff-Appellee Brugger answers: No.

Defendant-Appellant Road Commission answers: Yes.

II.

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

The trial court answered: Yes.

The Court of Appeals Majority answered: Yes.

Plaintiff-Appellee Brugger answers: Yes.

Defendant-Appellant Road Commission answers: No.

III.

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

The trial court answered:	Yes.
The Court of Appeals Majority answered:	Yes.
Plaintiff-Appellee Brugger answers:	Yes.
Defendant-Appellant Road Commission answers:	No.

Introduction

In Michigan, statutes mean what they say. It's that simple. The GTLA says that MCL 224.21 governs procedure for highway-defect claims against county road commissions.⁶ In turn, MCL 224.21 says that highway-defect plaintiffs have 60 days to serve county road commissions (and the county clerk) with a pre-suit notice of intent. In *Streng*,⁷ the Court of Appeals gave effect to the plain language of those statutes by holding that MCL 224.21's 60-day notice provision governs highway-defect claims against county road commissions. So *Streng* was correctly decided.

Here, Brugger doesn't argue that *Streng* misinterpreted the relevant statutory language. Instead, he contends that *Streng* (and the Court of Appeals in this case) was bound to follow this Court's holding in *Brown* that MCL 224.21 is unconstitutional.⁸ But *Brown* is no longer good law. Rather, as *Streng* recognized, this Court repudiated *Brown* in its entirety in *Rowland*, where it held that "Nothing can be saved" from *Brown* because the constitutional analysis it employed was "deeply flawed."⁹ So *Streng* wasn't wrongly decided because it didn't follow *Brown*.

Streng also applies retroactively. In Michigan, judicial decisions apply retroactively unless they clearly established a new rule of law by overruling clear, uncontradicted, or settled case law. Here, *Streng* didn't expressly overrule any prior judicial decisions. Instead, it merely recognized *Rowland's* overruling of *Brown* and applied the plain language of the GTLA and MCL 224.21. Furthermore, the pre-*Streng* state of the law about which notice provision governed highway-defect claims against county road commissions was unsettled, unclear, and

⁶ MCL 691.1402(1).

⁷ *Streng v Bd of Mackinac Co Road Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016)

⁸ *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), rev'd by *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007).

⁹ *Rowland*, 477 Mich at 213-214.

contradicted. So, even if it overruled the remains of *Brown*'s dubious constitutional analysis (there was nothing to overrule), *Streng* didn't clearly establish a new rule of law. Thus, it applies retroactively under the general rule.

Even if *Streng* did establish a new rule, the three-factor test articulated in *Pohutski v City of Allen Park* (2002)¹⁰ favors applying *Streng* retroactively because: (1) retroactivity supports its purpose of giving meaning to the plain language of MCL 224.21 and respecting the limits that the Legislature placed on highway-defect plaintiffs' ability to sue county road commissions; (2) there are no reliance interests at work since highway-defect plaintiffs don't drive on county roads based on the assumption that they have 120-days to provide notice of a claim against a county road commission and, even if they did, any such reliance was unreasonable based on the plain language of MCL 224.21 and the GTLA; and (3) applying *Streng* retroactively won't negatively affect the administration of justice.

In sum, *Streng* was correctly decided and its holding that MCL 224.21's 60-day notice provision governs highway-defect claims against county road commission applies retroactively to this case. But Brugger didn't comply with MCL 224.21 because he waited 110 to serve his pre-suit notice on the Road Commission and, even then, failed to serve it on the county clerk. So his claim against the Road Commission was barred by governmental immunity. The Court of Appeals erred by ruling to the contrary. This Court should reverse that error.

¹⁰ *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002)

Statement of Facts

A. Brugger gets in an accident and doesn't send a pre-suit notice to the Road Commission until 110 days after the accident.

On April 27, 2013, Brugger was driving his motorcycle south on North Geneva Road in Midland County.¹¹ He claims that he struck a large pothole, lost control of his bike, and crashed into a ditch along the road.¹² Brugger maintains that he was injured in the crash.¹³ He served the Road Commission—but not the Midland County Clerk—with a pre-suit notice of intent to sue on August 15, 2013 – 110 days after the accident.¹⁴

B. The trial court denied the Road Commission's summary-disposition motion based on its conclusion that *Streng* was wrongly decided and only applied prospectively.

Brugger sued the Road commission in February 2015 and filed his first amended complaint four months later.¹⁵ During discovery, the Court of Appeals issued *Streng v Board of Mackinac County Road Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), which confirmed that the 60-day notice period in MCL 224.21—and not the 120-day notice period in MCL 691.1404—governed claims against county road commissions. Because Brugger waited 110 days to serve his pre-suit notice (and hadn't served the Midland County Clerk), the Road Commission moved for summary disposition of his claims under MCR 2.116(C)(7).¹⁶ Brugger opposed the motion.¹⁷

At the hearing, the trial court explained that, although *Streng* created an “interesting...exception,” it felt bound by *Rowland* to hold “that the GTLA is the notice

¹¹ Brugger's First Amended Complaint at ¶5 (Appellant's App'x at 0034a).

¹² *Id.* at ¶ 6-7 (Appellant's App'x at 0035a).

¹³ *Id.* at ¶ 17 (Appellant's App'x at 0036a).

¹⁴ Brugger's Pre-Suit Notice of Intent to Sue (Appellant's App'x at 0040a).

¹⁵ See Brugger's Original Complaint (Appellant's App'x at 0043a); See Brugger's First Amended Complaint (Appellant's App'x at 0034a)

¹⁶ The Road Commission's Motion for Summary Disposition (Appellant's App'x at 0049a).

¹⁷ Brugger's Summary Disposition Response (Appellant's App'x at 0059a).

provision for which road commission cases are subject to.”¹⁸ The trial court also opined that, while *Rowland* overruled two of the cases that had held that the GTLA controlled (*Brown*¹⁹ and *Hobbs*²⁰), “it was consistent as to what was the proper statutory provision in the Court’s perspective is that it was the application of that provision that was found to be inapplicable.”²¹ And, since it found that “the circumstances in this case are in compliance with the requirements of the GTLA,” the trial court denied the Road Commission’s Motion.²²

The trial court further concluded that, even if *Streng* was correctly decided, it didn’t apply to this case because it only applied prospectively.²³ In the trial court’s view, applying *Streng* retroactively would “result in manifest injustice to deny claims that had been in compliance” with the pre-*Streng* consensus that the GTLA’s 120-day notice provision governed highway-defect claims against county road commissions.²⁴ The trial court subsequently entered an order confirming its ruling.²⁵

C. The Road Commission appealed, arguing that *Streng* applies retroactively.

On appeal, the Road Commission argued that *Streng* merely “confirmed” what the GTLA and Highway Code plainly state: that “MCL 224.21 controls all highway-defect claims against a county road commission, including [Brugger’s]....”²⁶ It also argued that the trial court’s reliance on *Rowland* was misplaced because both the parties to that case (and this Court) took for granted

¹⁸ Summary Disposition Hearing Transcript at 31-33 (Appellant’s App’x at 0113a – 0115a).

¹⁹ *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), rev’d by *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007).

²⁰ *Hobbs v State Hwys Dept*, 398 Mich 90; 247 NW2d 754 (1976), rev’d by *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007).

²¹ Summary Disposition Hearing Transcript at 32 (Appellant’s App’x at 0114a).

²² *Id.* at 32-33 (Appellant’s App’x at 0114a – 0115a).

²³ *Id.*

²⁴ *Id.* at 32-33 (Appellant’s App’x at 0114a – 0115a).

²⁵ Summary Disposition Order (Appellant’s App’x at 0002a).

²⁶ Road Commission’s Brief on Appeal at 8-11.

that the GTLA controlled highway-defect claims—i.e., “*Rowland* pronounced nothing regarding the application of MCL 224.21 to claims against county road commissions.”²⁷ As a result, the trial court was required to follow *Streng* and apply MCL 224.21(3)’s 60-day notice provision.²⁸

The Road Commission also argued that the trial court erred by concluding that *Streng* applied prospectively.²⁹ Instead, it contended that *Streng* applies retroactively because that case merely “confirmed that the procedural requirements of MCL 224.21 should be followed in cases involving county road commissions” and, thus, “did not clearly establish a new rule of law.”³⁰ And the Road Commission argued that, under *Streng*, MCL 224.21 barred Brugger’s claim because he waited 110 days to file his notice (50 days after the 60-day notice period expired).³¹

In response, Brugger argued that *Streng* was wrongly decided and that the GTLA’s 120-day notice provision controlled.³² In Brugger’s view, *Rowland* definitively resolved the issue of whether MCL 224.21 or MCL 691.1404 governs highway-defect claims against county road commissions.³³ In Brugger’s view, *Rowland*’s failure to address MCL 224.21 leads to the “logical conclusion” that it “determined that MCL 691.1404 and not MCL 224.21 applied to road commissions.”³⁴ He also relied on *Brown* to argue that applying MCL 224.21’s 60-day notice provision to claims against county road commissions—as the Legislature intended—would violate his constitutional right to equal protection.³⁵ But Brugger never addressed the plain

²⁷ Road Commission’s Brief on Appeal at 11-12.

²⁸ Road Commission’s Brief on Appeal at 11-12.

²⁹ Road Commission’s Brief on Appeal at 12-14.

³⁰ Road Commission’s Brief on Appeal at 13-14.

³¹ Road Commission’s Brief on Appeal at 14.

³² Brugger’s Brief on Appeal at 7.

³³ *Id.* at 7-8.

³⁴ Brugger’s Brief on Appeal at 11.

³⁵ Brugger’s Brief on Appeal at 20-23.

language of MCL 691.1402(1) of the GTLA, which expressly provides that MCL 224.21 governs the “procedure” of highway-defect claims against county road commissions.³⁶

Brugger also argued that, even if *Streng* was correctly decided, it should only be applied prospectively.³⁷ In his view, *Streng* “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.”³⁸ Although Brugger acknowledged that *Streng* “perhaps interpret[ed] the statute consistent with its plain language,” he maintained that it still created a new principle of 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].”³⁹ Brugger further claimed that prospective application was warranted because “[t]here is no compelling reason that [*Streng*] needs to be given retroactive effect,” previous parties have relied on the 120-day notice provision, and it is unjust to punish plaintiffs who relied on the old consensus.⁴⁰

In reply, the Road Commission pointed out that, as *Streng* recognized, this Court’s opinion in *Rowland* “refuted the entirety of the rulings in *Hobbs* and *Brown II*” as “deeply flawed.”⁴¹ It also argued that, rather than creating a new rule of law, *Streng* merely recognized that the Legislature’s expressly stated intent that the 60-day notice provision govern highway-

³⁶ MCL 224.21(3).

³⁷ Brugger’s Brief on Appeal at 18

³⁸ Brugger’s Brief on Appeal at 18.

³⁹ Brugger’s Brief on Appeal at 18.

⁴⁰ Brugger’s Brief on Appeal at 19. Brugger also argued that, even if *Streng* applied and he was otherwise subject to the 60-day notice provision, he shouldn’t have to face the consequences of his failure to comply with it under the doctrine of equitable tolling. *Id.* at 13-17. However, that issue was not within the scope of this Court’s order granting leave to appeal and, thus, will not be addressed in this brief.

⁴¹ Road Commission’s Reply Brief at 1-2 (citations omitted).

defect claims against county road commissions “was the law, and it remained the law, and at most it had been overlooked by courts in the past.”⁴²

D. The Court of Appeals affirmed the trial court’s ruling in a split, published opinion authored by Judge Douglas Shapiro over a dissent from Judge Colleen O’Brien.

1. The Court of Appeals Majority.

The Court of Appeals’ majority opinion, authored by Judge Shapiro, held that *Streng* applied prospectively.⁴³ In the majority’s view “[t]he Legislature has enacted two inconsistent statutes governing pre-suit notice to road commissions,” and the prior case law that *Rowland* “implicitly overruled” had struck down the 60-day notice provision in MCL 224.21 as unconstitutional.⁴⁴ The majority also noted that “the last time that the viability of the pre-suit notice provisions in MCL 224.21(2) was directly addressed” was in *Crook v Patterson*, 42 Mich App 241; 201 NW2d 676 (1972) and that since then, Michigan’s appellate courts have “overlooked” MCL 224.21(3).⁴⁵ But the majority didn’t repudiate *Streng*. Instead, it held that *Streng* should be applied prospectively because it deviated “from what was understood to be the law for at least 40 years, and [Brugger’s] failure to comply with MCL 224.21(3) was the result of ‘the preexisting jumble of convoluted case law through which [he] was forced to navigate.’”⁴⁶

The majority’s analysis followed the the threshold-question/three-factor test articulated by *Pohutski*.⁴⁷ It concluded that “*Streng* effectively established a new rule of law departing from the longstanding application of MCL 691.1401 by Michigan courts” because “*Rowland* did not explicitly overrule binding precedent establishing the 120-day notice requirement of the GTLA,

⁴² *Id.*

⁴³ *Brugger v Midland County Bd of Road Comm’rs*, 324 Mich App 307; 920 NW2d 388 (2018).

⁴⁴ *Id.* at 313-315, 315 n 3.

⁴⁵ *Id.* at 315-316.

⁴⁶ *Id.* at 315, quoting *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 590 n 65; 702 NW2d 539 (2005).

⁴⁷ *Id.* at 316-317.

as the governing provision in actions against county road commission defendants, and no case has been decided based upon MCL 224.21(3) for at least 46 years.”⁴⁸

Next, the majority turned to *Pohutski*'s three-factor test. First, it found that *Streng*'s purpose—“correct[ing] an apparent error in interpreting a provision of the GTLA”—was “served by prospective application as well as by retroactive application.”⁴⁹ Second, the majority concluded that the “extensive history of reliance on the 120-day GTLA notice provision, rather than MCL 224.21(3), in cases concerning county road commission defendants” weighs in “favor of prospective application.”⁵⁰ Third, it found that “prospective application would minimize the effect of this sudden departure from established precedent on the administration of justice.”⁵¹

The majority also stressed that it blamed the “confusion” over whether the Highway Code or the GTLA notice provision controlled claims against county road commissions on “the Legislature and the Judiciary.”⁵² It explained that, in its view, “[t]he Legislature adopted two different sets of conflicting requirements as to the timing and the content of the pre-suit notice” and “for decades the Judiciary has decided many pre-suit notice cases based upon the requirements of the GTLA, with no reference to MCL 224.21(3).”⁵³ In light of these “procedural circumstances,” the majority concluded that the prospective application was warranted.⁵⁴ So it held “that *Streng* applies only to actions arising” after it was issued and “affirm[ed] the trial court’s denial of [the Road Commission’s] motion for summary disposition.”⁵⁵

⁴⁸ *Id.* at 316.

⁴⁹ *Id.* at 316.

⁵⁰ *Id.* at 316.

⁵¹ *Id.* at 316.

⁵² *Id.* at 316-317.

⁵³ *Id.* at 317.

⁵⁴ *Id.* at 317-318.

⁵⁵ *Id.* at 318.

2. Judge Shapiro's concurrence.

In addition to writing the majority opinion, Judge Shapiro also wrote a solo concurrence “to set forth [his] view that *Streng* was wrongly decided, and that compliance with either of the two notice-of-claim statutes suffices to preserve the claim.”⁵⁶ In his view, *Streng* “somewhat arbitrar[i]ly” concluded “that it had to choose one statute over the other and elevated MCL 224.21(3)...over MCL 6[91].1404.”⁵⁷ But he contended that “such a choice need not be made.”⁵⁸ Instead, in Judge Shapiro's view, “compliance with the pre-suit notice requirements of *either* MCL 600.1404 *or* MCL 224.21 is sufficient to proceed to suit” and, as a result, “*Streng* was wrongly decided.”⁵⁹ Judge Shapiro did not address the plain language of MCL 691.1402.

3. Judge O'Brien's dissent.

Writing in dissent, Judge O'Brien concluded that summary disposition was warranted because *Streng* doesn't “warrant divergence from [the] general rule” of complete retroactivity.⁶⁰ In her view, *Streng* didn't create a new rule of law.⁶¹ Rather, it merely recognized the fact that this Court's opinion in *Rowland* “corrected th[e] long line of cases”—including *Hobbs*, and *Brown*—“that impermissibly grafted an ‘actual prejudice’ requirement into statutory notice requirements to avoid governmental immunity.”⁶² Judge O'Brien also noted that *Rowland* “cite[d] a number of purposes for notice provisions, thereby expelling the long-held notion that the only purpose of a notice requirement in governmental immunity cases was to prevent

⁵⁶ *Id.* at 318 (Shapiro, J., concurring).

⁵⁷ *Id.* at 318-319 (Shapiro, J., concurring).

⁵⁸ *Id.* at 319-320 (Shapiro, J., concurring).

⁵⁹ *Id.* at 321 (Shapiro, J., concurring).

⁶⁰ *Id.* at 322 (O'Brien, J., dissenting).

⁶¹ *Id.* at 328 (O'Brien, J., dissenting).

⁶² *Id.* at 325 (O'Brien, J., dissenting).

prejudice”—it undermined the entire basis of the dead-and-gone constitutional arguments that Judge Shapiro (and Brugger) seek to resurrect.⁶³

Judge O’Brien also recognized that *Rowland* rendered “*Crook’s* holding that MCL 224.21 violated equal protection...no longer good law.”⁶⁴ She also noted that *Rowland* had the same destructive effect on *Brown’s* holding that MCL 224.21 wasn’t rationally related to the (at the time) sole permissible purpose of notice statutes—prejudice prevention.⁶⁵ In other words, by “reject[ing] the idea that the sole purpose of a notice statute was to prevent prejudice,” *Rowland* “rejected the reasoning in *Brown* that MCL 224.21 was unconstitutional.”⁶⁶

Since *Hobbs*, *Brown*, and *Crook* were no longer good law after *Rowland*, Judge O’Brien contended that, when *Streng* was decided, “the notice requirements of MCL 224.21 were no longer unconstitutional.”⁶⁷ Thus, it was writing on a blank canvas when it addressed “the question of whether the notice requirements in either MCL 224.21 or the GTLA applied to injuries due to a highway defect on county roads.”⁶⁸

As a result, Judge O’Brien concluded that *Streng* didn’t create a new law (and, thus, failed the threshold question prong of the *Pohutski* test) because “*Streng* did not overrule any caselaw, nor did it introduce a novel interpretation of a statute”—it merely “resolved a dispute between two conflicting statutes.”⁶⁹ That is, because *Brown* was no longer good law, “*Streng* did not clearly establish a new principle of law in 2016”; rather, “the only new principles of law

⁶³ *Id.* at 326 (O’Brien, J., dissenting).

⁶⁴ *Id.*

⁶⁵ *Id.* at 326-327 (O’Brien, J., dissenting).

⁶⁶ *Id.* at 326 (O’Brien, J., dissenting).

⁶⁷ *Id.* at 327 (O’Brien, J., dissenting).

⁶⁸ *Id.*

⁶⁹ *Id.* at 328.

were established by *Rowland* in 2007, and *Streng* simply resolved the ensuing conflict between [MCL 224.21 and MCL 691.1404] in the post-*Rowland* legal landscape.”⁷⁰

Because “*Rowland*—not *Streng*—upended over 30 years of caselaw governing notice requirements,” Judge O’Brien concluded that *Streng* “did not, itself ‘overrule’ any caselaw.”⁷¹ But she stressed that, even if it did, *Streng* didn’t create a new rule of law because, after *Rowland*, “the caselaw governing the applicable notice requirements at the time that *Streng* was decided was not ‘clear and uncontradicted....’”⁷² Judge O’Brien also rejected Brugger’s argument that *Rowland* had definitively decided the issue whether the GTLA or the Highway Code notice provision governed claims against the Road Commission by applying the 120-day notice provision. As she explained, *Rowland* doesn’t help Brugger “because MCL 224.21 ‘was not discussed by the Supreme Court and implicit conclusions are not binding precedent.’”⁷³

Judge O’Brien went on to opine that, even if *Streng* somehow created a new rule of law, *Pohutski*’s three-factor test still favored retroactivity. First, she noted that the purpose of *Streng*—“to resolve a conflict between two conflicting statutes” where “the Legislature intended for the 60-day notice requirement in MCL 224.21 to control”—“is not served by applying the notice requirements of the GTLA” in contravention of the Legislature’s intent.⁷⁴ Second, she rejected the majority’s focus on “the entire history of reliance on the GTLA notice provision”; rather, she asserted that “the proper inquiry is the extent of reliance on the GTLA notice provision following *Rowland*.”⁷⁵ And, since there are no binding cases “decided after *Rowland*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 329 n 7.

⁷⁴ *Id.* at 329.

⁷⁵ *Id.* at 330.

that allowed a claim noticed after 60 days of the injury but before 120 days to proceed,” Judge O’Brien concluded that “there does not appear to be extensive reliance on the 120-day GTLA notice provision” during “the relevant post-*Rowland* timeframe.”⁷⁶ So she concluded that the first two factors favored retroactivity.⁷⁷ And, although Judge O’Brien found that the third-factor favored *Brugger* because he had “attempted to comply with what he believed was the proper statute,” she also recognized that, “[a]t the very least, when plaintiff was injured, there was a question of whether the notice requirements in MCL 224.21 or the GTLA applied to his claims.”⁷⁸ As a result, Judge O’Brien would have applied *Streng* retroactively.⁷⁹

Subsequently, the Road Commission moved for reconsideration, which the Court of Appeals denied.⁸⁰ The Road Commission then applied to this Court for leave appeal, which was granted in April 2020.⁸¹ The Court’s grant order asked the parties to address three issues: (1) “whether [*Streng*] was correctly decided”; (2) “whether *Streng* clearly established a new principle of law and thereby satisfied the threshold question for retroactivity set forth in [*Pohutski*]”; and (3) “whether *Streng* should be applied retroactively under the ‘three factor test’ set forth in *Pohutski*.”⁸² Additionally, Justice Markman concurred in the grant order to encourage the parties to address the tension between the general rule that judicial decisions are given complete retrospective application and the “flexible approach” exception to that rule in which retroactivity is limited where “injustice might result.”⁸³

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 330-331.

⁷⁹ *Id.* at 331.

⁸⁰ Reconsideration Denial Order (Appellant’s App’x at 0028a).

⁸¹ Grant Order.

⁸² *Id.*

⁸³ *Id.* (Markman, J., concurring).

Standard of Review

“This Court reviews de novo a circuit court's decision on a motion for summary disposition brought under MCR 2.116(C)(7).”⁸⁴ MCR 2.116(C)(7) permits summary disposition where a claim is barred because of immunity granted by law. Additionally, “questions concerning the retroactivity of earlier judicial decisions are for this Court to decide de novo as matters of law.”⁸⁵ Similarly, “[i]nterpretation and application of statutes are also questions of law that we review de novo.”⁸⁶

Argument I

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

Streng held that MCL 224.21 (rather than MCL 691.1404) governs the time limit for filing a pre-suit notice of intent to sue related to highway-defect claims against county road commissions based on an analysis of the language in MCL 224.21(3) and MCL 691.1402(1). To reach that holding, the Court of Appeals relied on well-established principles of statutory-interpretation—a “close reading of” the plain statutory language, the general-specific canon, and the *in pari materia* doctrine.⁸⁷ In his application, Brugger doesn’t address the plain-language statutory basis for *Streng*’s holding or engage with the principles of statutory interpretation it employed. Instead, he contends that the *Streng* court was compelled to ignore the plain statutory

⁸⁴ *Altobelli v Hartman*, 499 Mich 284, 294-295; 884 NW2d 537 (2016).

⁸⁵ *Lincoln v General Motors Corp*, 461 Mich 483, 490; 607 NW2d 73 (2000).

⁸⁶ *People v Bruce*, 504 Mich 555, 562; 939 NW2d 188 (2019).

⁸⁷ *Streng*, 315 Mich App at 462.

language and follow this Court’s opinion in *Brown*. As shown below, Brugger is wrong—as this Court recognized in *Rowland*, “[n]othing can be saved” from *Brown* because of its “deeply flawed” constitutional analysis. Regardless, *Streng* reached the correct result because it correctly interpreted the plain language of the governing statutes.

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

“When interpreting a statute, ‘[this Court’s] goal is to give effect to the Legislature’s intent, focusing first on the statute’s plain language.’”⁸⁸ To do so, “this Court interprets every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage.”⁸⁹ This Court “examine[s] the statute as a whole, reading individual words and phrases in the context of the entire legislative scheme.”⁹⁰ “If the statute’s language is clear and unambiguous, then judicial construction is inappropriate and the statute must be enforced as written.”⁹¹

The two statutes at issue here are MCL 224.21 of the Highway Code and MCL 691.1402 of the GTLA. While most governmental-liability claims are governed by the procedures of the GTLA, MCL 691.1402(1) expressly provides that the “procedure” for highway-defect claims “as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21.” In turn, MCL 224.21(3) provides that “a board of county road commissioners is not liable for damages to person or property sustained

⁸⁸ *People v Pinkney*, 501 Mich 259, 268; 912 NW2d 535 (2018), quoting *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (quotation marks and citations omitted); *Hegadorn v Dep’t of Human Servs Dir*, 503 Mich 231, 245; 931 NW2d 571 (2019) (citations omitted) (“The principal goal of statutory interpretation is to give effect to the Legislature’s intent, and the most reliable evidence of that intent is the plain language of the statute.”).

⁸⁹ *Bukowski v City of Detroit*, 478 Mich 268, 273-274; 732 NW2d 75 (2007).

⁹⁰ *Pinkney*, 501 Mich at 268 (quotation marks and citations omitted).

⁹¹ *People v Lewis*, 503 Mich 162, 165; 926 NW2d 796 (2018).

by a person upon a county road because of a defective county road, bridge, or culvert under the jurisdiction of the board of county road commissioners, unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners.”

The language of MCL 691.1402(1) and MCL 224.21(3) plainly demonstrates that the Legislature intended that MCL 224.21 would be the statute that governs “procedure” in highway-defect claims against county road commissions, including the part giving a highway-defect plaintiff 60 days to serve a county road commission (and the county clerk) with a pre-suit notice of intent to sue. Nothing about the language of either statute is unclear, unambiguous, or in conflict.⁹² Indeed, because MCL 691.1402(1) expressly references MCL 224.21 as the statute that governs procedure for claims against county road commissions, the statutes are harmonious on their face. So MCL 224.21(3) and MCL 691.1402(1) “must be enforced as written.”⁹³

That’s exactly what *Streng* did. Based on “[a] close reading of the [statutory] language,” the Court of Appeals recognized that “MCL 691.1402(1) expressly directs a person injured on a county road to proceed in accordance with MCL 224.21.”⁹⁴ As a result, the Court of Appeals recognized that “[t]o follow the procedural requirements of the GTLA rather than those of MCL 224.21—particularly in light of the fact that the GTLA expressly points in the direction of the latter—would render the specific terms of MCL 224.21 nugatory, something we avoid, whenever possible.”⁹⁵ Thus, although “appellate courts appear to have overlooked the time limit,

⁹² *People v Hall*, 499 Mich 446, 454; 884 NW2d 561 (2016) (“A statute is ambiguous if two provisions irreconcilably conflict or if the text is equally susceptible to more than one meaning.”).

⁹³ *Lewis*, 503 Mich at 165.

⁹⁴ *Streng*, 315 Mich App at 462-463.

⁹⁵ *Streng*, 315 Mich App at 463.

substantive requirements, and service procedures required by MCL 224.21(3) when the responsible body is a county road commission,” the Court of Appeals concluded that “[n]othing in either the GTLA or the highway code indicate[s] that the Legislature intended that result.”⁹⁶ Thus, it held that the Legislature intended that “the procedures and remedies provided by MCL 224.21 are what apply to county road commissions.”⁹⁷

Had *Streng* reached the opposite conclusion—as Brugger suggests it was mandated to do—not only would the Court of Appeals have failed “to give effect to the Legislature’s intent,”⁹⁸ it would also impermissibly render a large portion of MCL 691.1402(1) and MCL 224.21(3) “nugatory [and] surplusage.”⁹⁹ It follows that, because it gave effect to (and harmonizes) the plain language of both of those statutes, *Streng* correctly held that highway-defect claims against county road commissions are subject to a 60-day notice period.¹⁰⁰

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

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

⁹⁶ *Streng*, 315 Mich App at 463.

⁹⁷ *Streng*, 315 Mich App at 463.

⁹⁸ *Pinkney*, 501 Mich at 268 (citations omitted).

⁹⁹ *Bukowski*, 478 Mich at 273-274.

¹⁰⁰ As noted above, the primary goal of statutory interpretation is to give effect to the Legislature’s intent as expressed in the plain language of statutes. *Pinkney*, 501 Mich at 268. So the extent any of this Court’s prior case law established a rule that is contrary to the plain language of MCL 224.21(3) or MCL 691.1402(1), it should be expressly overruled.

As this Court recently recognized, “[w]hen a potential conflict...surfaces within a statute, ‘it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them.’”¹⁰¹ In doing so, “[this Court] must always read the text as a whole, ‘in view of its structure and of the physical and logical relation of its many parts.’”¹⁰² That’s because “[c]ontext is a primary determinant of meaning,’ and for an interpretation that seeks the ordinary meaning of the statute, it is the narrower context drawn from neighboring provisions within a statute that is most appropriate to consider.”¹⁰³

As the *Streng* court recognized, two principles of statutory construction—the *in pari materia* and the general-specific canon—resolve any apparent conflict over whether MCL 224.21 or MCL 691.1404 governs the period for providing county road commissions with notice of highway-defect claims.¹⁰⁴ First, “[u]nder the [*in pari materia*] doctrine, statutes that relate to the same subject or that share a common purpose should, if possible, be read together to create a harmonious body of law.”¹⁰⁵ That is, “statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and ... courts will regard all statutes upon the same general subject matter as part of 1 system.”¹⁰⁶ Second, “where a statute contains a general

¹⁰¹ *TOMRA of North America, Inc v Dept of Treasury*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 158333, 158335, June 16, 2020), quoting *Nowell v Titan Ins Co*, 466 Mich 478, 483; 648 NW2d 157 (2002) (Slip Op at 13-14).

¹⁰² *TOMRA*, ___ Mich at ___, quoting Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p. 167 (Slip Op at 14).

¹⁰³ *TOMRA*, ___ Mich at ___, quoting *Reading Law*, p. 167 (Slip Op at 14).

¹⁰⁴ *Streng*, 315 Mich App at 462.

¹⁰⁵ *People v Mazur*, 497 Mich 302, 313, 872 NW2d 201 (2015); *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 73 n26; 894 NW2d 5325 (2017), quoting *Reading Law*, p. 252 (“*In pari materia* (or the related-statutes canon) provides that ‘laws dealing with the same subject ... should if possible be interpreted harmoniously.’”).

¹⁰⁶ *People v McKinley*, 496 Mich 410, 421 n 11; 852 NW2d 770 (2014), quoting *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662, 57 NW2d 40 (1953).

provision and a specific provision, the specific provision controls.”¹⁰⁷ This principle is known as the “general/specific canon.”¹⁰⁸ As this Court has recognized, it “is tailor-made for cases...in which statutory provisions would otherwise conflict.”¹⁰⁹ In such cases, this Court “dissipates” any conflict by interpreting “the specific provision ... as an exception to the general one.”¹¹⁰

The two notice provisions at issue are contained in MCL 691.1404(1) and MCL 224.21(3). MCL 691.1404(1) provides that “[a]s a condition to any recovery for injuries sustained by reason of any defective highway, the injured person, within 120 days from the time the injury occurred...shall serve a notice on the governmental agency of the occurrence of the injury and the defect.” In turn, MCL 224.21(3) provides that “a board of county road commissioners is not liable for damages to person or property sustained by a person upon a county road because of a [highway defect] under the jurisdiction of the board of county road commissioners, unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners.”

MCL 691.1404(1) and MCL 224.21(3) both relate to the same purpose (procedure for highway-defect claims) and share a common purpose (ensuring that the government entities responsible for maintaining the roads receive adequate notice of roadway defects and potential

¹⁰⁷ *Gebhardt v O'Rourke*, 444 Mich 535, 542–543, 510 NW2d 900 (1994); *People v Meeks*, 293 Mich App 115, 118; 808 NW2d 825 (2011) (“But the canons of statutory construction recognize the principle that when a specific statutory provision differs from a related general one, the specific one controls.”); *Reading Law*, p. 183 (“If there is a conflict between a general provision and a specific provision, the specific provision prevails ...”).

¹⁰⁸ *RadLAX Gateway Hotel, LLC v Amalgamated Bank*, 566 US 639, 645, 132 S Ct 2065, 182 L Ed 2d 967 (2012) (“The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission.”).

¹⁰⁹ *TOMRA*, ___ Mich at ___ (Slip Op at 14-15)

¹¹⁰ *TOMRA*, ___ Mich at ___, quoting *RadLax Gateway Hotel*, 566 US at 645 (Slip Op at 14-15).

lawsuits). So, to the extent they somehow conflict, MCL 691.1401(1) and MCL 224.21(3) are *in pari materia* and must “be read together to create a harmonious body of law.”¹¹¹

When MCL 691.1404(1) and MCL 224.21(3) are read together, it’s clear that MCL 691.1404(1) is the more general provision and MCL 224.21(3) is the more specific provision. MCL 691.1404 imposes a pre-suit notice requirement as a prerequisite to “any recovery for injuries sustained by reason of *any* defective highway” maintained by any “governmental agency” of any sort.¹¹² In contrast, MCL 224.21(1) is far more precise. It only imposes a notice requirement on plaintiffs bringing highway-defect claims against a specific government entity—“a board of county road commissioners”—for a specific subset of injuries—those “sustained...upon a county road because of a [highway defect] under the jurisdiction of the board of county road commissioners.”¹¹³

So, under the general/specific canon, in a situation where both statutes could theoretically apply—i.e., a highway-defect claim against a county road commission, MCL 224.21(3)’s 60-day notice period should be interpreted as an exception that “controls” over the general 120-day notice period in MCL 691.1404(1).¹¹⁴ And that’s exactly what *Streng* held: “While the GTLA is a statute of general governmental immunity, MCL 224.21 is the specific statute that applies to claims of liability against county road commissioners for accidents that occur on county roads.”¹¹⁵

In sum, regardless whether the GTLA and MCL 224.21(3) are harmonious or in conflict, well-established principles of statutory interpretation and construction lead to the inexorable

¹¹¹ *Mazur*, 497 Mich at 313.

¹¹² MCL 691.1404(1).

¹¹³ MCL 224.21(3).

¹¹⁴ See *Gebhardt*, 444 Mich at 542–543.

¹¹⁵ *Streng*, 315 Mich at 463.

conclusion that MCL 224.21(3) governs the filing of pre-suit notices related to highway-defect claims against county road commissions. Since that’s exactly what the Court of Appeals held in *Streng*, that decision was correctly decided.

C. *Rowland* didn’t hold that MCL 691.1404(1) controlled over MCL 224.21(3). And it overruled *Hobbs* and *Brown* in their entirety, concluding that nothing could be saved from them “...because the [constitutional] analysis they employ is deeply flawed.”

As noted above, Brugger doesn’t argue that *Streng* incorrectly interpreted the plain language of MCL 224.21(3) or MCL 691.1402(1). Instead, he contends that *Streng* “resurrected a statutory provision that had been deemed unconstitutional...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.”¹¹⁶ In Brugger’s view, *Streng* was wrongly decided because it “completely disregarded” this Court’s opinions in *Rowland* and *Brown*, regardless of the plain meaning of the relevant statutory language.¹¹⁷ His argument depends on two assumptions: (1) that *Rowland*’s application of MCL 691.1404’s 120-day notice provision established binding precedent that that statute controls over MCL 224.21(3), and (2) that *Rowland* didn’t overrule *Brown* in its entirety. But those assumptions are incorrect—and, thus, Brugger’s argument fails—for several reasons.

First, as a threshold matter, Brugger’s argument is inconsistent with the plain language of MCL 691.1402 and MCL 224.21(3). As noted above, his suggested interpretation would render large portions of both of those statutes nugatory. That’s not how this Court interprets statutes.¹¹⁸ So his argument fails for that reason alone.

¹¹⁶ Brugger’s Answer to the Road Commission’s Application for Leave to Appeal at 1-2.

¹¹⁷ *Id.* at 3.

¹¹⁸ See *Bukowski*, 478 Mich at 273-274.

Second, Brugger’s assertion that *Rowland*’s application of the 120-day notice provision of MCL 691.1404 rather than the 60-day provision of MCL 224.21 constituted binding precedent that *Streng* was required to follow lacks merit. As *Streng* recognized, “[t]he *Rowland* Court made no mention of MCL 224.21, nor did it discuss the reasoning in *Brown* ... regarding the notice period.... *Rowland* expressed neither approval nor disapproval regarding that choice but simply focused on the lack of statutory language in MCL 691.1404 allowing exceptions to the time limit.¹¹⁹ As noted below, this was because neither of the parties in *Streng* raised the issue of whether MCL 691.1404(1) or MCL 224.21(3). So, as Judge O’Brien recognized in her dissenting opinion in this case, “the *Rowland* decision provides no help to plaintiff because MCL 224.21 ‘was not discussed by the Supreme Court and implicit conclusions are not binding precedent.’”¹²⁰

Third, Brugger is wrong that *Rowland* didn’t overrule *Brown* in its entirety. As the Court of Appeals recognized in *Streng*, this Court “repudiated the entirety of the rulings in *Hobbs* and *Brown*,” and stated that “[n]othing can be saved” from those opinions “because the analysis they employed is deeply flawed.”¹²¹ Brugger acknowledges that *Rowland* overruled *Brown* but tries to sidestep that reality by claiming that something can be saved from *Brown*.¹²² Specifically, he contends that *Rowland* only overruled *Brown*’s holding that notice provisions are only

¹¹⁹ *Streng*, 315 Mich App at 459-460.

¹²⁰ *Brugger*, 324 Mich at 329 n7 (O’Brien, J., dissenting), quoting *Galea v FCA US LLC*, 323 Mich App 360, 375, 917 NW2d 694 (2018); see also *People v Heflin*, 434 Mich 482, 498 n 13, 456 NW2d 10 (1990) (“[J]ust as obiter dictum does not constitute binding precedent, we reject the dissent’s contention that ‘implicit conclusions’ do so.”).

¹²¹ *Streng*, 315 Mich App at 459-460; see also *Brugger*, 324 Mich at 329 n 6 (O’Brien, J., dissenting) (“To the extent *Rowland* did not explicitly overrule *Brown*’s holding that MCL 224.21 was unconstitutional, *Rowland* clearly rejected *Brown*’s reasoning with regard to that issue by explaining that there were numerous reasons, besides preventing prejudice, to find a rational basis for a notice requirement.”).

¹²² Brugger’s Answer to the Road Commission’s Application for Leave to Appeal at 8-10.

enforceable upon a showing of actual prejudice and left intact *Brown*'s holding that the 60-day notice provision of MCL 224.21(3) violated constitutional guarantees of equal protection and the 120-day provision of MCL 691.1404(1) didn't.¹²³ That is, in Brugger's view, "there is no basis to conclude that *Brown*'s constitutional examination of the 60-day notice provision in MCL 224.21 has been overruled."¹²⁴ But, as a review of both *Brown* and *Rowland* reveals, that simply isn't true. Rather, *Rowland* demolished the entirety of *Brown*, including its equal protection ruling. So *Streng* wasn't bound to follow it.

A full review of *Brown* reveals that its equal-protection and prejudice holdings—which Brugger seeks to separate and distinguish—were inextricably connected. In *Brown*, the road commission defendant urged dismissal under MCL 224.21 because the plaintiff had not given notice within 60 days.¹²⁵ This Court held that the constitutionality of the statute required that it have a rational purpose.¹²⁶ It held that the 60-day notice period for road commission claims, differing as it did from the 120-day notice period for other governmental units, needed a rational purpose as well.¹²⁷

The defendant in *Brown* argued that one of the purposes of the notice provision "is to enable the county to remedy any road defects and prevent future injury."¹²⁸ But the *Brown* court rejected that assertion, stating that "[t]he only purpose that this Court has been able to posit for a notice requirement is to prevent prejudice to the government agency."¹²⁹ It also rejected the defendant's assertion "that a [county] road commission requires a shorter notice period merely

¹²³ Brugger's Answer to the Road Commission's Application for Leave to Appeal at 9-10.

¹²⁴ *Id.* at 9-10.

¹²⁵ *Brown*, 452 Mich at 357.

¹²⁶ *Brown*, 452 Mich at 361-363.

¹²⁷ *Brown*, 452 Mich at 362-363.

¹²⁸ *Brown*, 452 Mich at 362.

¹²⁹ *Brown*, 452 Mich at 362.

because it is responsible for rural roads” because, in the *Brown* court’s view, “[t]his fact bears no relationship to the stated purpose of the notice provision.”¹³⁰ And, because the only purpose the *Brown* court could imagine for the 60-day notice provision of MCL 224.21—prevention of prejudice to the government—was the same purpose served by the GTLA’s 120-day notice provision, it held that “we are unable to perceive a rational basis for the county road commission statute to mandate notice of a claim within 60 days.”¹³¹

As a result, the Court held that “the distinct sixty-day notice provision required for claims against a county road commission is unconstitutional” because it denied equal protection to plaintiffs suing county road commissions.¹³² However, the *Brown* court went on to uphold the 120-day notice provision as “reasonable,” stating “[w]e do not believe that a 120-day notice provision is unreasonably short.”¹³³ It also upheld earlier case law—*Hobbs v State Hwys Dept*¹³⁴—that engrafted the showing of prejudice requirement on to enforcement of the notice provision.¹³⁵

It follows that *Brown*’s conclusion that it was irrational (and, thus, unconstitutional) for the Legislature to subject plaintiffs suing road commissions to a different notice provision than plaintiffs bringing claims against other governmental entities was inextricably intertwined with its reliance on the principle that notice provisions are only valid to prevent actual prejudice to the governmental entity being sued (and have no other conceivable purpose).

In *Rowland*, this Court revisited the question it faced in *Brown*—whether a showing of actual prejudice was required to obtain dismissal for lack of timely notice.¹³⁶ There, because the

¹³⁰ *Brown*, 452 Mich at 363.

¹³¹ *Brown*, 452 Mich at 363.

¹³² *Brown*, 452 Mich at 363-364.

¹³³ *Brown*, 452 Mich at 364.

¹³⁴ *Hobbs v State Hwys Dept*, 398 Mich 90; 247 NW2d 754 (1976).

¹³⁵ *Brown*, 452 Mich at 365-368.

¹³⁶ *Rowland*, 477 Mich at 200.

plaintiff failed to give notice within 120 days, the parties never addressed the 60-day provision in MCL 224.21. Instead, because the plaintiff had served her notice 140 days after her accident, the defendants only raised the 120-day notice provision as a defense.¹³⁷

This Court began its analysis by recognizing that “[f]rom its earliest years, this Court, evidently detecting no constitutional impediments, if indeed any were even urged, enforced governmental immunity mandatory notice provisions according to their plain language.”¹³⁸ For example, it noted that this Court had previously held that “the right to recover for injuries arising from [highway defects] was purely statutory and that it was discretionary with the Legislature whether it would confer upon injured persons a right of action” and that “any rights given to sue the government could be subject to limitations the Legislature chose.”¹³⁹ This Court recognized that “[t]he implicit theory” underlying those principles “was that such notice provisions were economic or social legislation and that, because the Legislature had a rational basis for notice requirements – the most obvious being facilitating meaningful investigations **and allowing quick repair so as to preclude other accidents.**”¹⁴⁰ It also noted that this Court had previously recognized that “for [Michigan’s judiciary] to not accede to the Legislature’s authority in this fashion would be to unconstitutionally usurp the legislative authority.”¹⁴¹

As a result, the *Rowland* Court explained that, before 1970, “the enforceability of notice requirements and the particular notice requirements in governmental immunity cases was well settled and had been enforced for almost a century.”¹⁴² In 1970, however, “there was an abrupt

¹³⁷ *Rowland*, 477 Mich at 201-202.

¹³⁸ See *Rowland*, 477 Mich at 205.

¹³⁹ *Rowland*, 477 Mich at 205, citing *Moulter v Grand Rapids*, 155 Mich 165; 118 NW 919 (1908).

¹⁴⁰ *Id.* (emphasis added).

¹⁴¹ *Id.* at 205-206, citing *Trbovich v Detroit*, 378 Mich 79; 142 NW2d 696 (1966).

¹⁴² *Id.* at 206.

departure from these holdings in *Grubauh v City of St Johns*, 384 Mich 165; 180 NW2d 778 (1970),” in which “the Court discerned an unconstitutional due process deprivation if plaintiffs suing governmental defendants had different rules than plaintiffs suing private litigants.”¹⁴³ *Grubauh* began a line of cases holding that if a statutory notice provision “served a permissible purpose, such as to prevent prejudice, it passed constitutional muster,” but “if it served some other purpose (the Court could not even imagine any other) then the notice required by the statute became an unconstitutional legislative requirement.”¹⁴⁴ That line of cases culminated in *Hobbs*—which held that the notice requirement in a highway-defect claim violates constitutional guarantees of equal protection unless the government agency can show actual prejudice “[b]ecause actual prejudice...is the only legitimate purpose we can posit for this notice provision”¹⁴⁵—and *Brown*, which “reassessed the propriety of the *Hobbs* decision and declined to overrule it on the basis of stare decisis and legislative acquiescence.”¹⁴⁶

In tackling the question of whether the constitution required that a showing of prejudice be engrafted onto the notice provision, *Rowland* examined the full underpinnings of the *Hobbs* and *Brown* decisions.¹⁴⁷ It recognized that *Brown*’s reasoning that the only rational basis for notice requirements—to prevent prejudice to investigation of the claim—was the basis for the *Brown* Court’s two constitutional conclusions that the notice statute was unconstitutional if it did not require a showing of prejudice as a precondition for its application, and it was constitutionally unfair to provide two different notice periods depending on type of the governmental unit responsible for the road in question.

¹⁴³ *Id.* at 206.

¹⁴⁴ *Id.* at 207-208.

¹⁴⁵ *Id.* at 208-209, quoting *Hobbs*, 398 Mich at 96.

¹⁴⁶ *Id.* at 209.

¹⁴⁷ *Rowland*, 477 Mich at 210-214.

In *Brown*, the Court had lightly brushed aside the question where there is a rational basis for legislative distinction between road commissions and other governmental authorities, with road commissions having a shorter time, 60 days as opposed to 120 days for other governmental units. This Court took that stilted reasoning to task: “The simple fact is that *Hobbs* and *Brown* were wrong because they were built on an argument that governmental immunity statutes are unconstitutional or sometimes unconstitutional if the government was not prejudiced.”¹⁴⁸ It concluded that the reasoning that forms the foundation of *Hobbs*’ and *Brown*’s constitutional conclusions “has no claim to being defensible constitutional theory and is not rescued by musings to the effect that the justices ‘look askance’ at devices such as notice requirements...or the pronouncement that other reasons that could supply a rational basis were not to be considered because in the Court’s eyes the ‘only legitimate purpose’ of the notice provisions was to protect from ‘actual prejudice.’”¹⁴⁹

The *Rowland* Court pointed to other legitimate purposes for a notice requirement, including allowing time to create reserves, reducing the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed.¹⁵⁰ These were possible reasons, in addition to allow for fresh investigation, that the Legislature may have had in mind as purposes for the notice provisions. And, since, “it is [a court’s] duty in rational basis cases to find constitutionality if any state of facts known of which could be reasonably be assumed affords support for the statute,” the Court concluded that “there is unquestionably now,

¹⁴⁸ *Rowland*, 477 Mich at 210 (emphasis added).

¹⁴⁹ *Rowland*, 477 Mich at 210, quoting *Hobbs*, 398 Mich at 96 (citations and quotation marks omitted, emphasis added).

¹⁵⁰ *Rowland*, 477 Mich at 212.

and there was [*Hobbs* and *Brown* were decided], a ‘rational basis’ for finding... a rational for this statute and the distinction it draws.”¹⁵¹

In reaching that conclusion, the Court stressed that it was “common sense” that if the Legislature isn’t required to provide a highway-defect exception to governmental immunity “it surely has authority to allow such suits only upon compliance with rational notice limits.”¹⁵² In other words, because creating exceptions to governmental immunity is entirely optional, the Legislature “could attach to the right conferred [by the exception] any limitations it chose.”¹⁵³

Accordingly, the *Rowland* Court held that MCL 691.1404’s “notice provision passes constitutional muster.”¹⁵⁴ So it “reject[ed] the hybrid constitutionality of the court...*Hobbs*, and *Brown* engrafted onto our law.”¹⁵⁵ Thus, the *Rowland* Court questioned the entirety of Court’s constitutional analysis in *Hobbs* and *Brown* and rejected not just parts of it, but all of it. That is, this Court held that “Nothing can be saved” from those cases “because the analysis they employ is deeply flawed.”¹⁵⁶

Rowland didn’t directly address whether the 60-day notice provision of MCL 224.21(3) had a rational basis because the parties didn’t raise the issue. But it did have something to say about equal-protection principles in the context of distinguishing between claims for governmental negligence from those for a private party’s negligence. Specifically, the *Rowland* Court recognized that “[w]ith economic or social legislation” like a governmental liability notice statute “there can be distinctions between classes of persons if there is a rational basis to do

¹⁵¹ *Rowland*, 477 Mich at 212 (citations and question marks omitted).

¹⁵² *Rowland*, 477 Mich at 212.

¹⁵³ *Rowland*, 477 Mich at 212, quoting *Moulter*, 155 Mich at 168-169.

¹⁵⁴ *Rowland*, 477 Mich at 213.

¹⁵⁵ *Rowland*, 477 Mich at 213.

¹⁵⁶ *Rowland*, 477 Mich at 213-214 (emphasis added).

so.”¹⁵⁷ Indeed, such “legislation invariably involves line drawing and social line drawing does not violate equal protection guarantees when it has a ‘rational basis,’ i.e., as long as it is rationally related to a legitimate governmental purpose.”¹⁵⁸ In *Rowland*, this Court concluded that the “rational basis” for the 120-day notice provision of MCL 691.1404 “is clear,” noting that, while there are many justifications for such a statute, “the already cited justification, that the road be promptly repaired to prevent further injury, will suffice.”¹⁵⁹

From all of this, it’s clear that in *Rowland* this Court rejected the totality of the constitutional analysis and reasoning that formed the basis for its prior decisions in *Hobbs* and *Brown*. That is, *Rowland* didn’t reject *Brown* and *Hobbs* just because they imposed a requirement that notice statutes be interpreted to require a showing of prejudice from late notice; rather, *Rowland* rejected the entirety of the constitutional analysis in those cases, including the analysis that resulted in *Brown*’s holding that the 60-day notice requirement of MCL 224.21 for claims against county road commissions violated equal protection. And the reasoning employed by the *Rowland* Court to reject *Brown*’s stilted analysis of the potential rational legislative purposes of notice provisions applies with equal force to *Brown*’s analysis of the issue whether having different notice provisions for claims against county road commissions violates equal protection. It follows, then, that *Rowland*’s repudiation of the entirety of *Brown*’s reasoning swept aside the earlier case’s equal protection analysis rejecting the shorter notice period for road commission claims. Once again, this Court said it best: “Nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed.”¹⁶⁰

¹⁵⁷ *Rowland*, 477 Mich at 207.

¹⁵⁸ *Rowland*, 477 Mich at 207.

¹⁵⁹ *Rowland*, 477 Mich at 207.

¹⁶⁰ *Rowland*, 477 Mich at 214.

Furthermore, despite what *Brown* had to say about lack of reason for the distinction, there are several distinctions between road commissions and other governmental units making the different lengths of notice “rational.” Road Commissions have different management structures and manpower from the other types of government entities and different budgetary restraints. In other words, they have different levels of resources available to employ for investigation of claims. They also have jurisdictions with more miles of lightly traveled rural roads than the state, cities, villages, and townships. County road commissions also have different maintenances schedules (i.e., they maintain their roads more frequently). Thus, if there’s an issue with one of their roadways, county road commissions need to know sooner than the State because, odds are, the road will be fixed more quickly and the details of the defect lost forever. As a result, there are numerous rational reasons that justify a shorter notice period to enable road commissions to facilitate investigation and early repair to avoid injury to other motorists.

In sum, in reversing *Hobbs* and *Brown*, *Rowland* demolished those decisions in their entirety, brick by brick. The reasoning employed by *Rowland* demonstrates that the 60-day notice provision in MCL 224.21(3) has a rational basis and, thus, passes constitutional scrutiny. So, it must be applied as intended and adopted by the Legislature. Since that is what *Streng* did, it was correctly decided.

Issue II – New Question

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

A. General Principles of Michigan Retroactivity Law

Michigan's "general rule" of retroactivity "is that judicial decisions are to be given full retroactive effect."¹⁶¹ And, as this Court has held many times, prospective application is an "extreme measure" that is only warranted in "exigent circumstances."¹⁶²

Historically, the only exception to the general rule of retroactivity recognized by this Court applied "where constitutional or statute law has received a given construction by the courts of last resort and contracts have been made and rights acquired under and in accordance with such construction, such contracts may not be invalidated, nor vested rights acquired under them

¹⁶¹ *Lindsey v Harper Hosp*, 455 Mich 56, 68; 564 NW2d 861 (1997); *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) ("[T]he general rule is that judicial decisions are to be given complete retroactive effect."); *Spectrum Health Hosp v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503, 536; 821 NW2d 117 (2012) 536, quoting *Gentzler v Constantine Village Clerk*, 320 Mich 394, 398, 31 NW2d 668 (1948) ("The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.").

¹⁶² *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 400; 738 NW2d 664 (2007) (holding that the general rule is that judicial decisions apply retroactively unless "exigent circumstances" justify the "extreme measure" of prospective-only application); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005) (citations omitted) ("This case presents no 'exigent circumstances' of the sort warranting the 'extreme measure' of prospective-only application."); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 586; 702 NW2d 539 (2005), quoting *Wayne Co. v Hathcock*, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004) ("Prospective application is a departure from this usual rule and is appropriate only in 'exigent circumstances.'"); *Gladych v New Family Homes, Inc*, 468 Mich 594, 606 n 6; 664 NW2d 705 (2003) (Referring to "prospective application" as an "extreme measure").

impaired, by a change of construction made by a subsequent decision.”¹⁶³ But, over the last couple of decades, this Court has “adopted a more flexible approach” that “give[s] holdings limited retroactive or prospective effect” where “injustice might result from full retroactivity.”¹⁶⁴

The goal of the so-called flexible approach is “to accomplish the ‘maximum of justice’ under varied circumstances.”¹⁶⁵ But, while it has employed such apparently expansive language, this Court has repeatedly demonstrated that flexibility (and, thus, prospective application) is not unlimited and has not overwhelmed the general rule. For example, the Court has held that prospective application (and, thus, flexibility) is limited to situations where the it overrules “clear and uncontradicted” or “settled” case law.¹⁶⁶ Similarly, the Court has clarified that, although

¹⁶³ *Gentzler*, 320 Mich at 398 (citations omitted); *Donohue v Russell*, 264 Mich 217, 219; 249 NW 830 (1933) (“The effect of overruling a decision and refusing to abide by the precedent there laid down is retrospective and makes the law at the time of the overruled decision as it is declared to be in the last decision, except in so far as the construction last given would impair the obligations of contracts entered into or injuriously affect vested rights acquired in reliance on the earlier decision” (citation omitted)).

¹⁶⁴ *Lindsey*, 455 Mich at 68; *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002) (“Although the general rule is that judicial decisions are given full retroactive effect...a more flexible approach is warranted where injustice might result from full retroactivity.”); *Bezeau v Palace Sports & Entertainment, Inc.*, 487 Mich 455, 462; 795 NW2d 797 (2010) (“However, there are exceptions to [the general] rule. This Court should adopt a more flexible approach if injustice would result from full retroactivity.”); *Tebo v Havlik*, 418 Mich 350, 360; 343 NW2d 181 (1984) (“Although it has often been stated that the general rule is one of complete retroactivity, this Court has adopted a flexible approach.”); 1 Mich Pl & Pr § 2:91 (2d ed) (“In general, the state Supreme Court's decisions are given full retroactive effect; however, there are exceptions to this rule and a more flexible approach is adopted if injustice would result from full retroactivity.”).

¹⁶⁵ *Lindsey*, 455 Mich at 68.

¹⁶⁶ *Devillers*, 473 Mich at 587 (citations and quotation marks omitted, emphasis in original) (“[P]rospective-only application of our decisions is generally limited to decisions which overrule *clear and uncontradicted* case law.”); *Pohutski*, 465 Mich at 696 (“[A] holding that overrules settled precedent may properly be limited to prospective application.”); *Hyde v University of Michigan Bd of Regents*, 426 Mich 223, 240; 393 NW2d 847 (1986) (Stating that, although “[w]e often have limited the application of decisions which have overruled prior law or reconstrued statutes,” prospective application “has generally been limited to decisions which overrule clear and uncontradicted case law”); *Lincoln*, 461 Mich at 491 (In determining whether to apply judicial decision, “the first question is whether [the decision] overruled clear and

prospective application may be warranted if the Court “decides an issue of first impression,” it does not apply where the new ruling “was not clearly foreshadowed.”¹⁶⁷

And, aside from full retroactivity or prospective application, the flexible approach enables courts to give a judicial decision that overrules a prior decision “limited retroactive application”—i.e., it only applies to the case at issue and pending cases “in which [the] specific issue has been raised and preserved.”¹⁶⁸ Consistent with the flexible approach, this Court has limited the retroactivity of decisions that have overruled settled precedent on several occasions.¹⁶⁹

However, the “flexible” approach doesn’t always result in prospective application even where retroactive application would cause some unfairness. For example, in *Lindsey v Harper Hospital*, this Court gave retroactive effect to a prior decision holding that the Revised Probate Code’s statute of limitations saving provision runs from the appointment of a temporary personal representative.¹⁷⁰ It explained that, while “plaintiff’s claim may seem unfairly barred by our holding, it cannot be denied that all statutes of limitation set arbitrary time limits for legal

contradicted prior case law.” “[T]hat leads to the question whether [the overruled case law] constituted a clear and uncontradicted ruling on the subject of [the current] proceedings....”).

¹⁶⁷ *Lindsey*, 455 Mich at 68-69 (citations omitted).

¹⁶⁸ *Gladych v New Family Homes, Inc*, 468 Mich 594, 607; 664 NW2d 705 (2003).

¹⁶⁹ *Lesner v Liquid Disposal, Inc*, 466 Mich 95, 108-109; 643 NW2d 553 (2002) (giving limited retroactive application to Court’s holding overruling the formula for calculating worker’s compensation benefits for surviving partial dependents articulated in a prior opinion in “recognition of the effect of changing settled law”); *Gladych v New Family Homes, Inc*, 468 Mich 594; 664 NW2d 705 (2003) (Giving limited retroactive application to the Court’s holding that employee was required to serve employer with a copy of the summons and complaint in order to toll the limitations period, overruling *Buscaino v Rhodes*, 385 Mich 474; 189 NW2d 202 (1971)).

¹⁷⁰ *Lindsey*, 455 Mich at 69.

claims” and “serve to protect defendants from stale claims”—a purpose that “must be balanced with the purpose of exceptions to statutes of limitation.”¹⁷¹

This Court articulated the framework for determining whether a judicial decision applies retroactively in *Pohutski v City of Allen Park* (2002).¹⁷² It identified “three factors to be weighed in determining when a decision should not have retroactive application”: “(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice.”¹⁷³ Additionally, in the civil context, this Court “recognized an additional threshold question whether the decision clearly established a new principle of law.”¹⁷⁴

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

As noted above, the “threshold” rule of the *Pohutski* framework is whether “the decision clearly established a new principle of law.”¹⁷⁵ Thus, if the decision at-issue didn’t create a new rule, it applies retroactively and further analysis (i.e., application of the three-factor test) is unnecessary.¹⁷⁶ That’s exactly the case with *Streng*.

It’s axiomatic that a judicial decision only creates a new rule of law when it overrules “clear and uncontradicted” or “settled” case law,¹⁷⁷ or when it decides an issue of first

¹⁷¹ *Lindsey*, 455 Mich at 69.

¹⁷² *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002)

¹⁷³ *Pohutski*, 465 Mich at 696.

¹⁷⁴ *Id.* at 696.

¹⁷⁵ *Id.* at 696.

¹⁷⁶ *Employees Mut Ins Co v Morris*, 460 Mich 180, 190; 596 NW2d 142 (1999) (“If the decision [overruling a prior decision] does not announce a new principle of law, then full retroactivity is favored.”)

¹⁷⁷ *Devillers*, 473 Mich at 587 (citations and quotation marks omitted, emphasis in original) (“[P]rospective-only application of our decisions is generally limited to decisions which overrule *clear and uncontradicted* case law.”); *Pohutski*, 465 Mich at 696 (“[A] holding that overrules settled precedent may properly be limited to prospective application.”); *Lincoln*, 461

impression “where the result would have been unforeseeable to the parties.”¹⁷⁸ In other words, a decision only creates a new rule when its holding was “unexpected,” “unforeseeable,” or “indefensible,” under the then-existing law.¹⁷⁹ Thus, as the Court of Appeals has recognized, an opinion from this Court that clarifies “a previously ambiguous state of law” doesn’t create a new rule because the case law it overruled was not “clear and uncontradicted.”¹⁸⁰

This Court has also made clear that a decision doesn’t create a new law if the opinion it overrules was based on statutory interpretation that contradicted the plain language of the statute

Mich at 491 (In determining whether to apply judicial decision, “the first question is whether [the decision] overruled clear and contradicted prior case law.” “[T]hat leads to the question whether [the overruled case law] constituted a clear and uncontradicted ruling on the subject of [the current] proceedings...”); *Lincoln*, 461 Mich at 491-492 (Finding that a judicial decision did not establish a new principle of law because the case law it expressly overruled was not “a clear and uncontradicted holding with regard to the issues resolved [by the decision]”); See *Tebo*, 418 Mich at 363 (finding that it would be “unjust” to applied the overruling decision retroactively “[i]n light of the unquestioned status of [the case law it overruled] at the time [it] was decided...”).

¹⁷⁸ *Employees Mut Ins Co v Morris*, 460 Mich 180, 190; 596 NW2d 142 (1999) (recognizing that a judicial decision establishes a new principle of law “either by overruling clear past precedent on which the parties have relied or by deciding an issue of first impression where the result would have been unforeseeable to the parties”); *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982) (“A rule of law is new for purposes of resolving the question of its retroactive application ... either when an established precedent is overruled or when an issue of first impression is decided which was not adumbrated by any earlier appellate decision.”); *Monat v State Farm Ins Co*, 469 Mich 679, 694; 677 NW2d 843 (2004) (giving “full retroactive effect” to the Court’s holding that mutuality isn’t required to assert collateral estoppel defensively; the Court explained that its decision was not a sweeping change to the law because there was no previous decision that specifically addressed the issue).

¹⁷⁹ *People v Doyle*, 451 Mich 93, 108; 545 NW2d 627 (1996) (finding that prior decision was not a new rule because it was not “unexpected,” “unforeseeable,” or “indefensible,” under the law existing at time and, thus, did not present the “special circumstances” that would require prospective application); *Employees Mut Ins Co v Morris*, 460 Mich at 195 (“Only if this Court’s decision can be said to be “unexpected” or “indefensible” in light of the law in place at the time of the acts in question would there be a question about whether to afford the decision complete retroactivity.”).

¹⁸⁰ *McNeel v Farm Bureau Gen Ins Co of Mich*, 289 Mich App 76, 95; 795 NW2d 205 (2010) (finding that a Supreme Court opinion was “a clarification of a previously ambiguous state of law” rather than a new rule because the case law it overruled was not “clear and uncontradicted” in light of a prior Supreme Court opinion).

at issue.¹⁸¹ The basis for that principle is two-fold: (1) a decision giving effect to the plain language of a statute cannot be unexpected; and (2) a rule of law that is directly contrary to plain and unambiguous statutory language is not “clear and uncontradicted.”¹⁸²

In *Devillers* (2005), for example, this Court gave retroactive effect to its overruling of a prior decision that “engrafted onto the text of [MCL 500.3145(1)] a tolling clause that has absolutely no basis in the text of the statute.”¹⁸³ The Court explained that, because the prior decision was completely unsupported (and inconsistent) with the plain statutory language, a decision overruling it “is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority....”¹⁸⁴

Similarly, in *Wayne County v Hathcock* (2004), this Court overruled its prior opinion in *Poletown* (an eminent domain case) as unconstitutional.¹⁸⁵ But, even though *Poletown* had been on the books for 23 years, the Court concluded that there was no reason to depart from the general rule of retroactivity.¹⁸⁶ The Court explained that, although “it is a certainty that state and

¹⁸¹ *Devillers v Auto Club Ins Ass’n*, 473 Mich 562, 586, 702 NW2d 539 (2005) (citation omitted) (retroactively overruling a 19-year-old legal precedent determined to be inconsistent with plain statutory language); *Wayne Co v Hathcock*, 471 Mich 445, 484 n 98, 684 NW2d 765 (2004) (retroactively overruling a 23-year-old legal precedent determined to be inconsistent with proper constitutional interpretation), *Gladych v New Family Homes, Inc.*, 468 Mich 594, 605, 664 NW2d 705 (2003) (retroactively overruling a 32-year-old legal precedent determined to be inconsistent with plain statutory language). Cf. *Bezeau v Palace Sports & Entertainment, Inc.*, 487 Mich 455, 463; 795 NW2d 797 (2010) (a prior opinion “established a new rule of law” where it “established a new interpretation of [the relevant statutory language] that broke from the longstanding interpretation of the statute.”).

¹⁸² *Doyle*, 451 Mich at 113 (stating that the Court’s holding that its decision overruling a prior opinion applied retroactivity “is grounded in the belief that it is perfectly clear that anyone reading the habitual offender act and the Motor Vehicle Code easily could have concluded that the [overruled] decision was contrary to their plain meanings.”)

¹⁸³ *Devillers*, 473 Mich at 587.

¹⁸⁴ *Id.*

¹⁸⁵ *Wayne County v Hathcock*, 471 Mich 445, 448; 684 NW2d 765 (2004)

¹⁸⁶ *Id.*

local government actors have acted in reliance on [*Poletown's*] broad, but erroneous, interpretation,....[o]ur decision today does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963.”¹⁸⁷ The Court also stressed that its “decision simply applies fundamental constitutional principles and enforces the ‘public use’ requirement as that phrase was used at the time our 1963 Constitution was ratified.”¹⁸⁸ As a result, it applied its opinion overruling *Poletown* retroactively.¹⁸⁹

Likewise, in *Employees Mut Ins Co v Morris*, the Court concluded that a prior opinion (*Profit*) applied retroactively because it “was not an unforeseeable decision that had the effect of changing the law.”¹⁹⁰ The Court explained that the opinion that *Profit* overruled “misinterpreted the law as it existed at the time” in a way that “was in direct conflict with the statute, the legislative intent, and two prior decisions of this Court.”¹⁹¹

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

With respect to the threshold “new rule” analysis, Michigan’s appellate courts have repeatedly recognized that the case law related to the GTLA lacks clarity and consistency. For example, in *Nawrocki v Macomb County Road Com’n*, this Court referred to the case law regarding “the interpretation and application of the highway exception” to the GTLA as “an exhausting line of *confusing and contradictory* decisions.”¹⁹² In the Court’s view, these

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Employees Mut Ins Co v Morris*, 460 Mich at 197.

¹⁹¹ *Id.*

¹⁹² *Nawrocki v Macomb County Road Com’n*, 463 Mich 143, 149; 615 NW2d 702 (2000) (emphasis added).

“conflicting decisions” have “created a rule of law that is virtually impenetrable, even to the most experienced judges and legal practitioners.”¹⁹³ Similarly, in *Suttles v Dep't of Trans*, another highway-exception case, the Supreme Court “acknowledge[d] that the notion of governmental immunity, its interpretation, and its practical application have been difficult at times, stemming in part from the decisions of this Court and from *the confusing nature of the statute itself*.”¹⁹⁴

The Court of Appeals has acknowledged this reality. In an opinion holding that *Nawrocki* applied retroactively, the lower court concluded that “the Supreme Court did not overrule clear and uncontradicted case law, thereby establishing a new principle of law. Rather, the Supreme Court articulated the proper interpretation of the statutory highway exception to governmental immunity, a statute that was misinterpreted....”¹⁹⁵

This Court’s decision in *Rowland* and its progeny are also instructive with respect to the retroactivity analysis in this case. As noted above, *Rowland* overruled two prior opinions (*Brown* and *Hobbs*) which collectively held that, absent actual prejudice to the governmental agency, failure to comply with the GTLA’s notice provision didn’t bar a claim filed under the highway exception.¹⁹⁶ After reaching its holding, this Court addressed whether its decision applied retroactively.¹⁹⁷

Applying the *Pohutski* framework and relying on *Hathcock*, this Court concluded that its decision didn’t create a new rule of law and gave it full retroactive effect.¹⁹⁸ The Court explained

¹⁹³ *Id.* at 149-150.

¹⁹⁴ *Suttles v Dep't of Trans*, 457 Mich 635, 642–643, 578 NW2d 295 (1998) (emphasis added).

¹⁹⁵ *Adams v Dept of Transportation*, 253 Mich App 431, 440; 655 NW2d 625 (2002).

¹⁹⁶ *Rowland v Washtenaw County Road Com'n*, 477 Mich 197, 200, 220; 731 NW2d 41 (2007)

¹⁹⁷ *Id.* at 220.

¹⁹⁸ *Id.* at 220, 223.

that, because “*Hobbs* and *Brown* adopted the ‘actual prejudice’ requirement...despite the clear lack of that requirement in the statute itself,” a decision overruling those decisions “will return our law to that which existed before *Hobbs* and which was mandated by MCL 691.1404(1).”¹⁹⁹ Thus, in the Court’s view, “there exist no exigent circumstances that would warrant the ‘extreme measure’ of prospective application.”²⁰⁰ In reaching that conclusion, this Court stressed that “our decision here is not a declaration of a new rule, but a return to an earlier rule and a vindication of controlling legal authority—enforcing the language of MCL 691.1404(1).”²⁰¹ It also noted that “overruling precedent that usurped legislative power restores legitimacy to the law.”²⁰²

Finally, the Court stated that it was “mindful of the fact that the public fisc is at risk in [highway exception] cases.”²⁰³ Because “a central purpose of governmental immunity is to prevent a drain on the state's resources by avoiding even the expense of having to contest on the merits any claim barred by governmental immunity,” the Court concluded that “[t]he decision to expand the class of those entitled to seek recovery against the government should be in the hands of the Legislature.”²⁰⁴ It also stressed that it “does not have the authority to waive the government's immunity from suit, and tax dollars should only be at risk when a plaintiff satisfies all the prerequisites, including a notice provision, set by the Legislature for one of the exceptions to governmental immunity.”²⁰⁵

¹⁹⁹ *Id.* at 220-222.

²⁰⁰ *Id.* at 221.

²⁰¹ *Id.* at 222 (citations omitted).

²⁰² *Id.* at 222.

²⁰³ *Id.* at 222-223.

²⁰⁴ *Id.* at 223, 223 n 18.

²⁰⁵ *Id.* at 223.

Five years later, this Court reaffirmed *Rowland*'s holding in *McCahan v Brennan*.²⁰⁶ There, this Court “reiterate[d] the core holding of *Rowland* that such statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate.”²⁰⁷ It also “clarif[ied] that *Rowland* applies to all such statutory notice or filing provisions, including the one at issue in this case.”²⁰⁸ As a result, the Court “reaffirm[ed] that when the Legislature conditions the ability to pursue a claim against the state on a plaintiff's having provided specific statutory notice, the courts may not engraft an ‘actual prejudice’ component onto the statute before enforcing the legislative prohibition.”²⁰⁹ Stated differently, the crux of *Rowland* was that “[c]ourts may not engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements.”²¹⁰

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

Applying this Court's well-established retroactivity analysis, it's clear that *Streng*²¹¹ didn't create a new rule of law and, thus, applies retroactively to Brugger's case. As noted above, *Streng* held that the highway code notice provision, MCL 224.21, rather than the GTLA's notice provision, applies to highway-exception claims against county road commissions.²¹² But, in reaching that ruling, *Streng* didn't expressly overrule any prior judicial decisions. Instead, it recognized that *Rowland* “repudiated the entirety of the rulings” in the line of cases holding that MCL 224.21 wasn't enforceable and applied the plain language of the GTLA and Highway

²⁰⁶ *McCahan v Brennan*, 492 Mich 730; 822 NW2d 747 (2012).

²⁰⁷ *Id.* at 733.

²⁰⁸ *Id.* at 733.

²⁰⁹ *Id.* at 738.

²¹⁰ *Id.* at 746-747.

²¹¹ *Streng v Board of Mackinac County Road Com'rs*, 315 Mich 449; 890 NW2d 680 (2016).

²¹² *Streng*, 315 Mich App at 687-688.

Code.²¹³ The *Streng* court also noted that, other than case law overruled by *Rowland*, “no precedential case has substantively considered the potential conflicts between the highway code and the GTLA.”²¹⁴ As a result, under this Court’s retroactivity case law, *Streng* didn’t create a new rule because it didn’t overrule anything. It applies retroactively for that reason alone.

Streng also didn’t create a new rule because it’s holding was neither “unforeseeable” nor “indefensible” based on the plain language of MCL 224.21(3) combined with MCL 691.1402(1)’s unambiguous statement that the “procedure” governing highway-defect claims against county road commissions “shall be as provided in ... MCL 224.21.”

Brugger will likely argue that, by applying the plain language of MCL 224.21(3) and MCL 691.1402(1), *Streng* implicitly overruled the portion of the pre-*Rowland* case law that survived that decision. As a threshold matter, that argument fails because as shown above, *Rowland* repudiated the entirety of the *Brown* and the other case law it overruled (including *Brown*’s dubious equal-protection analysis).

Even if *Rowland* didn’t overrule *Brown* in its entirety, *Streng* still didn’t create a new rule. As the wealth of case law cited above demonstrates, a judicial decision only creates a new rule if it overrules settled, clear, and uncontradicted case law.²¹⁵ But, to the extent something from *Brown*’s constitutional analysis survived *Rowland*, the pre-*Streng* state of the law about what notice provision controlled highway-defect claims against county road commissions was—

²¹³ *Streng*, 315 Mich App at 459-460.

²¹⁴ *Streng*, 315 Mich App at 460.

²¹⁵ *Devillers*, 473 Mich at 587 (citations and quotation marks omitted, emphasis in original) (“[P]rospective-only application of our decisions is generally limited to decisions which overrule *clear and uncontradicted* case law.”); *Pohutski*, 465 Mich at 696 (“[A] holding that overrules settled precedent may properly be limited to prospective application.”); *Lincoln*, 461 Mich at 491-492 (Finding that a judicial decision did not establish a new principle of law because the case law it expressly overruled was not “a clear and uncontradicted holding with regard to the issues resolved [by the decision]”)

at best—unsettled, unclear, and contradicted. Indeed, Brugger admits this—in his view, there is “clearly...confusion in the courts as to the applicable notice provisions.”²¹⁶ This is especially true considering this Court’s recognition that the line of “confusing and contradictory” decisions regarding the GTLA and the highway-defect exception has created “a rule of law that is virtually impenetrable.”²¹⁷ So, even if it’s assumed that *Streng* overruled something (it didn’t), whatever was overruled wasn’t settled, clear, or uncontradicted. It follows that, no matter what, *Streng* didn’t create a new rule for retroactivity purposes.

This Court’s recent decision in *W A Foote Mem Hosp v Michigan Assigned Claims Plan* (2019)—in which it affirmed the Court of Appeals’ holding that *Covenant Med Ctr v State Farm Mut Auto Ins* (2017)²¹⁸ applied retroactively²¹⁹— supports the conclusion that *Streng* didn’t create a new rule for retroactivity purposes. There, this Court held that because “*Covenant* did not clearly establish a new principle of law,” it “does not satisfy *Pohutski*’s threshold question, and...therefore applies retroactively.”²²⁰ Like *Streng*, *Covenant* gave effect to the plain language of an unambiguous, but previously misinterpreted statutory scheme (Michigan’s no-fault act). Unlike *Streng*, *Covenant* had a broad, sweeping impact on Michiganders across the state (it extinguished hundreds of no-fault provider claims in one fell swoop). But, even though no-fault providers, attorneys, and the lower courts had been relying on the pre-*Covenant* misinterpretation of the no-fault act for over twenty years, this Court held that *Covenant* didn’t create a new rule of

²¹⁶ Brugger’s Answer to the Road Commission’s Application for Leave to Appeal at 3.

²¹⁷ See *Nawrocki*, 463 Mich at 149-150.

²¹⁸ *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW 2d 490 (2017).

²¹⁹ *W A Foote Mem Hosp v Michigan Assigned Claims Plan*, 504 Mich 985; 934 NW2d 44 (2019).

²²⁰ *W A Foote*, 504 Mich at 985.

law.²²¹ And, if *Covenant's* upending of decades of settled expectations didn't create a new rule, then *Streng* didn't either.

In sum, *Streng* didn't create a new rule. So it “does not satisfy *Pohutski's* threshold question, and...therefore applies retroactively.”²²² For that reason alone, this Court should reverse the Court of Appeals' holding that *Streng* only applies prospectively.

Issue III – *Pohutski's* Three-factor test

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

A. *Pohutski's* three-factor test

As noted above, this Court articulated the framework for determining whether a judicial decision applies retroactivity in *Pohutski v City of Allen Park* (2002).²²³ There, the Court identified “three factors to be weighed in determining when a decision should not have retroactive application”: “(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice.”²²⁴

1. First Factor: Purpose of the New Rule.

In *Pohutski*, this Court applied the three-factor test and concluded that prospective application of its ruling was appropriate.²²⁵ Regarding the first factor, the Court opined that the

²²¹ *W A Foote*, 504 Mich at 985.

²²² *W A Foote*, 504 Mich at 985.

²²³ *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002)

²²⁴ *Pohutski*, 465 Mich at 696.

²²⁵ *Pohutski*, 465 Mich at 697-698.

purpose of its decision was “to correct an error in the interpretation of [MCL 691.1407]” and that prospective application furthered that purpose.²²⁶

Since *Pohutski*, several decisions by Michigan’s appellate courts have reached the opposite conclusion. In *Trentadue*, for example, this Court held that “prospective-only application is inappropriate” where “the very purpose of our holding is to respect limits the Legislature has placed” on a plaintiff’s ability to bring or maintain a suit.²²⁷ Similarly, in *McNeel*, the Court of Appeals found that retroactivity is favored if the purpose of a new rule of law is to “give meaning to the statutory language” and to “clarif[y] an ambiguous state of the law.”²²⁸ And, in the part of *W A Foote* that this Court affirmed, the Court of Appeals concluded that the purpose of *Covenant*—to “conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law”²²⁹—favored retroactivity in order to ensure consistency in the law.²³⁰

2. Second Factor: Reliance on the Old Rule.

The second factor favors prospective application where there has been “extensive reliance” on the overruled decisions by the courts and where “decisions have undoubtedly been predicated upon this Court’s longstanding interpretation....”²³¹ But, the mere fact that there was reliance on the old rule doesn’t mean that this factor favors prospective application.

²²⁶ *Pohutski*, 465 Mich at 697.

²²⁷ *Trentadue*, 479 Mich at 401.

²²⁸ *McNeel*, 289 Mich App at 96-97 (finding that, if the Supreme Court’s prior opinion was a new rule, the three-factor test weighed in favor of retroactive application where: (1) the purpose of the new rule was to “clarify[y] an ambiguous state of the law” and “give meaning to the statutory language”)

²²⁹ *Covenant*, 500 Mich at 201, 895 NW2d 490.

²³⁰ *W A Foote*, 321 Mich App at 193-194.

²³¹ *Pohutski*, 465 Mich at 697.

In *McNeel*, the Court of Appeals found that, even though there had been significant reliance on the overruled decision, the second *Pohutski* factor favored retroactive application because, in light of “the ambiguous state of the law, it [was] unclear how reasonable the reliance on [the old rule] was, given that it contradicted the Supreme Court's precedent.”²³²

Similarly, in *W A Foote*, the Court of Appeals held that “the mere fact that insurers and healthcare providers may have acted in reliance on the caselaw that *Covenant* overturned is not dispositive of the question of retroactivity.”²³³ The panel explained that, although “every retroactive application of a judicial decision has at least the potential to upset some litigants’ expectations concerning their pending suits,” it concluded that it was “less than clear that the state of the law that was overturned by *Covenant* was so clear and uncontradicted as to predominate in favor of only prospective application.”²³⁴

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

The third factor—the effect of retroactivity on the administration of justice—is the least definitive. For example, *Pohutski* found that “prospective application minimizes the effect of this decision on the administration of justice.”²³⁵ But, aside from noting that under the specific circumstances at issue retroactive application of it decision would create “a distinct class of litigants denied relief because of an unfortunate circumstances of timing,” it didn’t clarify how future courts should analyze this factor.²³⁶

²³² *McNeel*, 289 Mich App at 96-97.

²³³ *W A Foote*, 321 Mich App at 194.

²³⁴ *Id.* (citations and quotation marks omitted).

²³⁵ *Pohutski*, 465 Mich at 697-698.

²³⁶ *Id.*

In contrast, in *Trentadue*, this Court found that the third *Pohutski* factor favored retroactive application of its holding that courts can't use extrastatutory discovery rules.²³⁷ It explained that “the administration of justice is not significantly affected because the rights and interests of plaintiffs and defendants are opposed in these matters; although plaintiffs may be denied relief for stale claims, defendants and the judiciary are relieved from having to defend and decide cases based on deteriorated evidence.”²³⁸ In other words, the administration of justice factor isn't concerned with whether retroactive application of a new rule benefits (or impairs) a certain group of plaintiffs or defendants, but rather, whether it affects the ability of courts to administer justice.

Consistent with *Trentadue*, the Court of Appeals has found that the third factor weighs in favor of retroactive application if the decision at issue only applies to a “limited number of cases.”²³⁹ It has also held that retroactive application of “judicial decisions applying statutory law as enacted by our Legislature” supports the administration of justice by “demanding consistency in the law” rather than “allow[ing] the law to ebb and flow at the whim of the judiciary.”²⁴⁰

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

Michigan's appellate courts have issued several decisions related to the GTLA that are relevant to whether the three-factor *Pohutski* analysis favors retroactive application of *Streng*. For example, in *Paul v Wayne County Dept of Pub Serv*, the Court of Appeals held that this

²³⁷ *Trentadue*, 479 Mich at 400-401.

²³⁸ *Trentadue*, 479 Mich at 401.

²³⁹ *McNeel*, 289 Mich App at 96-97 (finding that, if the Supreme Court's prior opinion was a new rule, the third *Pohutski* factor weighed in favor of retroactive application because retroactive application would have only a small effect on the administration of justice “[g]iven the limited number of cases to which this issue applies.”).

²⁴⁰ *W A Foote*, 321 Mich App at 195.

Court’s opinion in *Grimes v Mich Dept of Transp*—a case holding that a highway shoulder isn’t designed for vehicular travel—applied retroactively.²⁴¹ After finding that *Grimes* created a new rule because it overruled a prior Supreme Court opinion (*Gregg*), the panel found that the first *Pohutski* factor weighed in favor of retroactive application because “the purpose of the new rule is simply to bring case law in line with the explicit language of the statute and preclude liability under the highway exception to governmental immunity” in accordance with the Legislature’s stated intent.²⁴²

With respect to the second *Pohutski* factor, the *Paul* court found that, although “plaintiff relied on *Gregg* in bringing this lawsuit...that reliance is not relevant.”²⁴³ In the Court of Appeals’ view, “the relevant question [was] whether plaintiff relied on *Gregg* while operating his motorcycle.” But, since the plaintiff “[c]learly...did not drive onto the shoulder because he believed *Gregg* somehow entitled him to do so...[he] cannot claim that he acted in reliance on *Gregg*, or that this reliance resulted in the motorcycle accident and his injuries.”²⁴⁴ Accordingly, the panel found that the second *Pohutski* factor favored retroactivity.²⁴⁵

And, although this Court’s opinion in *Grimes*—the case that *Paul* held applied retroactively—involved *stare decisis* rather than retroactivity, it contains several points related to the second *Pohutski* factor.²⁴⁶ In *Grimes*, this Court applied the *stare decisis* analysis to overrule its prior opinion in *Gregg v State Hwy Dept*.²⁴⁷ In reaching that holding, the found “no reliance interests at work that support the continuation of *Gregg*’s erroneous interpretation of the

²⁴¹ *Paul v Wayne County Dept of Pub Serv*, 271 Mich App 617, 624; 722 NW2d 922 (2006).

²⁴² *Paul v Wayne County Dept of Pub Serv*, 271 Mich App 617, 622-623; 722 NW2d 922 (2006).

²⁴³ *Paul*, 271 Mich App at 623.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Grimes v Mich Dept of Transp*, 475 Mich 72, 87 n 49; 715 NW2d 275 (2006).

²⁴⁷ See *Gregg v State Hwy Dept*, 435 Mich 307; 458 NW2d 619 (1990).

highway exception.”²⁴⁸ The Court explained that “Motorists traverse shoulders because of the exigencies of highway travel. They do not traverse shoulders because our case law might permit them to recover against the governmental agency in the event of an accident.”²⁴⁹ Thus, it concluded that *Gregg*—a case holding that a highway shoulder is designed for vehicular travel—“is not the sort of case that fosters a reliance interest or shapes future individual conduct.”²⁵⁰

Finally, it’s well-established that, because governmental liability is voluntary, the Legislature can impose whatever conditions or limitations on that liability that it wants to, regardless whether they’re reasonable or not.²⁵¹

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

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

²⁴⁸ *Grimes*, 475 Mich at 87 n 49.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ See, e.g., *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 714; 822 NW2d 522 (2012) (“[B]ecause the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed.”); *Moulter v City of Grand Rapids*, 155 Mich 165, 168-169; 118 NW2d 919 (1908) (“The right to recover for injuries arising from want of repair of sidewalks, etc., is a purely statutory one in this state. It being optional with the Legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred any limitations it chose. Whether the limitations imposed are reasonable or unreasonable in such cases are questions for the Legislature, and not for the courts.”); *Atkins*, 492 Mich at 714-715 (“Statutory notice provisions are a common means by which the government regulates the conditions under which a person may sue governmental entities. It is well established that statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate.”).

With respect to the first factor, the purpose of *Streng* was to give meaning to the Legislature’s stated intent, clarify an ambiguity in the state of the law, conform highway-defect case law to the text of MCL 224.21(3) and MCL 691.1402(1), and to respect the limits that the Legislature placed on a plaintiff’s ability to sue a county road commission for a highway defect. Under *Trentadue*, *McNeel*, and *W A Foote*, this factor favors applying *Streng* retroactively.²⁵²

Regarding the second factor (reliance on the old rule), there are two reasons why it favors retroactivity. First, based on *Paul*, *Grimes*, and *W A Foote*, although highway-defect plaintiffs (and defendants) may have previously relied on the pre-*Rowland*, pre-*Streng* case law to file notices within the 120-day period, that isn’t the sort of reliance that matters. That is, future highway-defect plaintiffs don’t drive on county roads (or take any other actions) in reliance on the rule that they have 120-days to provide notice of a claim against a county road commission. Second, any post-*Rowland*, pre-*Streng* reliance on the 120-day notice period was necessarily unreasonable because of both *Rowland*’s total overruling of *Brown* and the plain language of MCL 691.1402(1) which mandates that the highway code governs procedure for claims against county road commissions.

The last factor, effect on the administration of justice, also favors retroactivity. First, retroactivity wouldn’t affect the administration of justice given the “limited number of cases” to

²⁵² *Trentadue*, 479 Mich at 401 (holding that “prospective-only application is inappropriate” where “the very purpose of our holding is to respect limits the Legislature has placed” on a plaintiff’s ability to bring or maintain a suit); *McNeel*, 289 Mich App at 96-97 (concluding that retroactivity is favored if the purpose of a new rule of law is to “give meaning to the statutory language” and to “clarif[y] an ambiguous state of the law.”); *W A Foote*, 321 Mich App at 193-194, quoting *Covenant*, 500 Mich at 201 (finding that the stated purpose of *Covenant*—to “conform our caselaw to the text of the applicable statutes to ensure that those to whom the law applies may look to those statutes for a clear understanding of the law” favored retroactivity in order to ensure consistency in the law).

which *Streng* applies.²⁵³ Second, applying *Streng*'s common-sense, plain-language holding retroactively furthers the administration of justice by ensuring consistency in the law as the Legislature enacted it. And third, because the Legislature has full discretion to impose whatever limits on governmental liability it chooses, applying *Streng* retroactively furthers the administration of justice by giving effect to the limits that the Legislature has placed on liability against county road commissions (i.e., the 60-day notice provision contained in MCL 224.21(3)). For multiple reasons, therefore, applying *Streng* retroactively wouldn't negatively interfere with the administration of justice. And, even if those reasons didn't exist, the third *Pohutski* factor would at most be a wash because "the interests of plaintiffs and defendants are opposed in these matters; although plaintiffs may be denied relief for stale claims, defendants and the judiciary are relieved from having to defend and decide cases based on deteriorated evidence."²⁵⁴

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

Conclusion & Relief Requested

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

²⁵³ See *McNeel*, 289 Mich App at 96-97.

²⁵⁴ *Trentadue*, 479 Mich at 401.

Michigan law. The Court of Appeals majority erred by ruling to the contrary. And this Court should reverse that error.

DATED: August 3, 2020

/s/ Jonathan B. Koch

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