

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'S APPENDIX TO
DEFENDANT-APPELLANT'S BRIEF ON APPEAL

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

DEFENDANT-APPELLANT'S APPENDIX**TABLE OF CONTENTS**

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DATED: August 3, 2020

/s/ Jonathan B. Koch

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APPENDIX 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

TIM EDWARD BRUGGER, II

Plaintiff,

vs.

File No.: 15-2403-NO B

Hon.: Michael J. Beale (P44233)

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

A TRUE COPY



Defendants.

ANN MANARY

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**MIDLAND COUNTY CLERK &
CLERK OF THE 42nd CIRCUIT COURT**
**D. Adam Tountas (P68579)
Charles F. Behler (P10632)
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ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

At a session of said Court, held in the City
of Midland, Midland County, State of
Michigan, on the 21 day of February 2017.

**PRESENT: Honorable Michael J. Beale
Circuit Court Judge**

This matter having come before the Court upon the Motion of Defendant for
Summary Disposition pursuant to MCR 2.116(C)(7) and the Court having read the
parties briefs, heard oral argument and being further advised in the premises:

IT IS HEREBY ORDERED that the Motion for Summary Disposition is denied
for reasons stated by the Court on the record.

HON. MICHAEL J. BEALE
P44233



Honorable Michael J. Beale

Date: 2-24-17

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APPENDIX 2

ADR CASE REGISTER OF ACTIONS 03/08/17 PAGE
 15-002403-NO JUDGE BEALE FILE 02/25/15
 MIDLAND COUNTY JDF

P 001 BRUGGER, TIM, EDWARD, II

VS D 001 BOARD OF COUNTY ROAD COMM,,
 AKA-MIDLAND COUNTY ROAD COMM,,

5363 M-18
 COLEMAN MI 48618
 ATY:SOWLE,DONALD N.
 P-27010 989-772-5932

2334 N. MERIDIAN RD
 SANFORD MI 48657
 ATY:BEHLER, CHARLES
 P-10632 616-458-6245
 SERVICE/ANS 04/07/15 ANS

Actions, Judgments, Case Notes

Num	Date	Judge	Chg/Pty	Event Description/Comments	
1	02/25/15	BEALE		SUMMONS AND COMPLAINT RECEIPT# 00148205 AMT \$235.00	CLK TLB
2			P 001	COMPLAINT AND JURY DEMAND JURY DEMAND FILED RECEIPT# 00148205 AMT \$85.00	CLK TLB CLK TLB
3	03/12/15		D 001	RETURN OF SERVICE (PERSONAL)	CLK TLB CLK TLB
4	04/07/15			SET NEXT DATE FOR: 05/22/15 3:30 PM MOTION FOR SUMMARY DISPOSITION	CLK MS
5			D 001	DEF'S MOTION FOR SUMMARY ANSWER FILED ATTORNEY: P-10632 BEHLER BY ATTY CHARLES BEHLER/ AFFIRMATIVE DEFENSES/RELIANCE UPON JURY DEMAND/PROOF OF SERVICE	CLK CLK TLB CLK CLK CLK CLK CLK
6	04/20/15			MOTION FILED RECEIPT# 00149589 AMT \$20.00 DEF'S MOTION FOR PARTIAL SUM DISP	CLK TLB CLK CLK
7				BRIEF IN SUPPORT OF DEF'S MOTION FOR PARTIAL SUM DISP	CLK TLB CLK
8				NOTICE OF HEARING	CLK TLB
9				PROOF OF SERVICE FILED	CLK TLB
10	05/21/15			REMOVE NEXT EVENT: 05/22/15 3:30 PM MOTION FOR SUMMARY DISPOSITION	CLK MS
29				RESOLVED, PER DEF ATTY'S OFC ALTERNATIVE DISPUTE RESOLUTION ORDERED	CLK CLK MS CLK
12	05/26/15			STIP/ORDER GRANTING DEF'S MOT FOR PARTIAL SUM DISP	CLK TLB CLK
13				SCHEDULING AND CASE MANAGEMENT ORDER	CLK TLB CLK
14	06/03/15			PLTF'S FIRST AMENDED COMPLAINT	CLK TLB
15	06/11/15			MIDLAND COUNTY ROAD COMMISSION ANSWER TO PLTF'S FIRST AMENDED COMPLAINT AFFIRMATIVE DEFENSES AND RELIANCE UPON JURY DEMAND/ PROOF OF SERVICE	CLK TLB CLK CLK CLK
16				PROOF OF SERVICE FILED	CLK TLB
17	06/18/15		P 001	WITNESS LIST LAY AND EXPERT LIST/PROOF OF SERVICE	CLK TLB CLK CLK
18			P 001	EXHIBIT LIST	CLK TLB

ADR	CASE REGISTER OF ACTIONS	03/08/17	PAGE
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19 06/22/15	D 001 /PROOF OF SERVICE WITNESS LIST	CLK	TLB
20	D 001 LAY AND EXPERT LIST EXHIBIT LIST	CLK	TLB
21	PRELIMINARY LIST	CLK	TLB
22 06/25/15	PROOF OF SERVICE FILED	CLK	TLB
23	PROOF OF SERVICE FILED	CLK	TLB
24 06/29/15	PROOF OF SERVICE FILED	CLK	TLB
25 07/06/15	PROOF OF SERVICE FILED	CLK	TLB
26	PROOF OF SERVICE FILED	CLK	TLB
27 07/27/15	PROOF OF SERVICE FILED	CLK	TLB
28	PROOF OF SERVICE FILED	CLK	TLB
30 08/10/15	NOTICE OF TAKING DEP OF PLTF TIM EDWARD BRUGGER II/PROOF OF SERVICE	CLK	TLB
31	D 001 WITNESS LIST DEF MIDLAND CO ROAD COMMISSION SUPPLEMENTAL EXPERT LIST	CLK	TLB
11 08/13/15	DISCLOSURE/PROOF OF SERVICE NOTICE SENT FOR: 03/01/16 3:45 PM SETTLEMENT/TRIAL MANAGEMENT MEETING	CLK	NCH
32	REMOVE NEXT EVENT: 03/01/16 3:45 PM SETTLEMENT/TRIAL MANAGEMENT MEETING	CLK	MS
34	D 001 WITNESS LIST /SECOND SUPPLEMENTAL EXPERT DISCLOSURE/PROOF OF SERVICE	CLK	TLB
35 08/18/15	SET NEXT DATE FOR: 09/11/15 1:45 PM MOTION HEARING	CLK	MS
36 08/21/15	DEF'S MOTION TO COMPEL PROOF OF SERVICE FILED	CLK	TLB
37 09/08/15	PROOF OF SERVICE FILED	CLK	TLB
38 09/11/15	MOTION HEARING DEF'S MOTION TO COMPEL/DENIED	CRT	TLB
39 09/17/15	PROOF OF SERVICE FILED	CLK	TLB
40 10/09/15	SET NEXT DATE FOR: 11/06/15 1:45 PM MOTION HEARING	CLK	MS
41 10/13/15	DEF'S MOTION TO COMPEL ANSWER TO INTEROG 53 MOTION FILED	CLK	TLB
42	RECEIPT# 00154009 AMT \$20.00 DEF'S MOTION TO COMPEL AN ANSWER TO INTERROGATORY 53	CLK	TLB
43	DEF'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL AN ANSWER TO INTERROGATORY 53	CLK	TLB
44	NOTICE OF HEARING PROOF OF SERVICE FILED	CLK	TLB
45 10/30/15	PLTF'S RESPONSE TO DEF'S MOTION TO COMPEL AN ANSWER TO INTERROGATORY 53	CLK	TLB
46	PLTF'S RESPONSE TO DEF'S BRIEF IN SUPPORT OF ITS MOTION TO COMPEL AN ANSWER TO INTERROGATORY 53	CLK	TLB
47	NOTICE SENT FOR: 11/10/15 4:00 PM TELEPHONE CONFERENCE	CLK	MS

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ADR	CASE REGISTER OF ACTIONS	03/08/17	PAGE
15-002403-NO JUDGE BEALE	FILE 02/25/15		
48 11/06/15	RE: EXTENDING DISCOVERY DEADLINES; ONE ATTORNEY TO INITIATE CALL, THEN CALL COURT AT 989-832-6830. MOTION HEARING DEF MOTION TO COMPEL ANSWER TO INTERROG 53/COURT ORDERS SUPPLEMENTATION TO BE PROVIDED FOR DEP OF PLTF/COURT GRANTS EXTENSION OF PHONE CONF	CLK CLK CLK CLK CRT CRT CRT CRT CRT	TLB TLB TLB TLB TLB TLB TLB TLB TLB
49 11/09/15	PROOF OF SERVICE FILED	CLK	TLB
50 11/13/15	NOTICE OF PRESENTMENT	CLK	TLB
51	PROOF OF SERVICE FILED	CLK	TLB
33 11/16/15	NOTICE SENT FOR: 02/25/16 3:15 PM SETTLEMENT/TRIAL MANAGEMENT MEETING *RESET BY COURT FROM 3/1/16 AT 3:45 PM	CLK CLK CLK	MS MS MS
52	REMOVE NEXT EVENT: 02/25/16 3:15 PM SETTLEMENT/TRIAL MANAGEMENT MEETING	CLK	MS
53	NOTICE SENT FOR: 06/28/16 4:30 PM SETTLEMENT/TRIAL MANAGEMENT MEETING *ADJ FROM 2/25/16 AT 3:15 PM BY STIPULATION OF COUNSEL.	CLK CLK CLK CLK	MS MS MS MS
54 11/18/15	1ST AMENDED SCHEDULING AND CASE MANAGEMENT ORDER	CLK	TLB
55 11/20/15	ORDER RE: DEF'S MOTION TO COMPEL AN ANSWER TO INTERROGATORY 53	CLK	TLB
56 12/14/15	PROOF OF SERVICE FILED	CLK	TLB
57 12/18/15	DEFT LAY AND EXPERT WITNESS DISCLOSURE	CLK	TLB
58	DEFT DISCLOSURE OF EXHIBITS	CLK	TLB
59 12/21/15	DEFT'S SUPPLEMENTAL WITNESS DISCLOSURE	CLK	TLB
60 01/13/16	PROOF OF SERVICE FILED	CLK	TLB
61 01/19/16	PROOF OF SERVICE FILED	CLK	TLB
62 02/01/16	PROOF OF SERVICE FILED	CLK	TLB
63 02/03/16	DEF'S OBJECTION TO PLTF'S NOTICE OF TAKING DUCES TECUM DEP OF SAM SANMIGUEL	CLK	TLB
64	DEF'S OBJECTION TO PLTF'S NOTICE OF TAKING DUCES TECUM DEP OF BOB POMEROY	CLK	TLB
65	DEF'S OBJECTION TO PLTF'S NOTICE OF TAKING DUCES TECUM DEP OF DOUG HOBBS	CLK	TLB
66	PROOF OF SERVICE FILED	CLK	TLB
67 02/08/16	PROOF OF SERVICE FILED	CLK	TLB
68 02/11/16	PROOF OF SERVICE FILED	CLK	TLB
69 02/26/16	PROOF OF SERVICE FILED	CLK	TLB
70 03/07/16	PROOF OF SERVICE FILED	CLK	TLB
71 03/10/16	PROOF OF SERVICE FILED	CLK	TLB
72 03/14/16	PROOF OF SERVICE FILED	CLK	TLB
73 03/24/16	WITNESS LIST	CLK	TLB
	FIRST AMENDED LAY AND EXPERT LIST/PROOF OF SERVICE	CLK	TLB
74 03/28/16	PROOF OF SERVICE FILED	CLK	TLB

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ADR	CASE REGISTER OF ACTIONS	03/08/17	PAGE
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75	PROOF OF SERVICE FILED	CLK	TLB
76 03/30/16	PROOF OF SERVICE FILED	CLK	TLB
77 03/31/16	DEF'S OBJECTION TO PLTF'S NOTICE OF TAKING DUCES TECUM DEP OF RUSS INMAN	CLK	TLB
78	DEF'S OBJECTION TO PLTF'S NOTICE OF TAKING DUCES TECUM DEP OF ROB WOLLARD	CLK	TLB
79	DEF'S OBJECTION TO PLTF'S NOTICE OF TAKING DUCES TECUM DEP OF BRENDA GORDERT	CLK	TLB
80	PROOF OF SERVICE FILED	CLK	TLB
81	PROOF OF SERVICE FILED	CLK	TLB
82 04/01/16	PROOF OF SERVICE FILED	CLK	TLB
83 04/04/16	P 001 WITNESS LIST SECOND AMENDED LAY AND EXPERT LIST/PROOF OF SERVICE	CLK	TLB
84	PROOF OF SERVICE FILED	CLK	TLB
85	PROOF OF SERVICE FILED	CLK	TLB
86	PROOF OF SERVICE FILED	CLK	TLB
87 04/06/16	PROOF OF SERVICE FILED	CLK	TLB
88 04/12/16	RE: DEPOSITION OF TIM BECHTEL SET NEXT DATE FOR: 04/13/16 2:00 PM TELEPHONE CONFERENCE PHONE CONFERENCE REQUESTED BY COUNSEL; DEF'S ATTORNEY TO INITIATE CALL.	CLK	MS
89	PROOF OF SERVICE FILED NOTICE TO APPEAR FOR ADR HEARING	CLK	AMM
90 04/13/16	REMOVE NEXT EVENT: 06/28/16 4:30 PM SETTLEMENT/TRIAL MANAGEMENT MEETING Case Eval of 5/19 is removed at this time and may be reset after 7/12/16 phone conference	CLK	MS
91	NOTICE SENT FOR: 07/12/16 4:00 PM STATUS CONFERENCE *COUNSEL MAY APPEAR BY PHONE; PLTF'S ATTORNEY TO INITIATE CALL. *CASE EVAL IN MAY IS OFF AND STM OF 6/28 ALSO OFF.	CLK	MS
92 04/15/16	PROOF OF SERVICE FILED	CLK	TLB
93 04/18/16	PROOF OF SERVICE FILED	CLK	TLB
94 04/22/16	PROOF OF SERVICE FILED	CLK	TLB
95 05/02/16	PROOF OF SERVICE FILED	CLK	TLB
96 05/05/16	PROOF OF SERVICE FILED MAILED	CLK	LMG
97 05/19/16	PROOF OF SERVICE FILED	CLK	TLB
98 06/06/16	PROOF OF SERVICE FILED	CLK	TLB
99 06/09/16	NOTICE OF INDEPENDENT MEDICAL EXAMINATION OF PLTF TIM EDWARD BRUGGER, II WITH MANFRED GREIFFENSTEIN PHD	CLK	TLB
100 06/16/16	PROOF OF SERVICE FILED	CLK	TLB
101 06/29/16	PROOF OF SERVICE FILED	CLK	TLB
102 07/12/16	SET NEXT DATE FOR: 01/10/17 8:00 AM TRACKING DATE	CLK	MS

ADR CASE REGISTER OF ACTIONS 03/08/17 PAGE
15-002403-NO JUDGE BEALE FILE 02/25/15

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Case No.	Date	Description	Case No.	Date	Description	Case No.	Date	Description	Case No.	Date	Description	Case No.	Date	Description	Case No.	Date	Description	Case No.	Date	Description	Case No.	Date	Description	
		*Have attorneys contacted me for MOSD date? **set STC at same time as MOSD																						
		PROOF OF SERVICE FILED																						
103	07/18/16																							
104	09/26/16																							
105	11/16/16		D 001																					
		WITNESS LIST																						
		DEF MIDLAND CO ROAD COMM'S SECOND SUPPLEMENTAL LIST/PROOF OF SERVICE																						
106	12/01/16																							
		DEF'S OBJ TO PLTF'S NOTICE OF TAKING DISCOVERY ONLY DUCES TECUM DEP OF RANDALL COMMISSARIS																						
107																								
		DEF'S OBJ TO PLTF'S NOTICE OF TAKING DISCOVERY ONLY DUCES TECUM VIDEO CONFERENCE DEP OF DAVID THOM																						
108																								
		PROOF OF SERVICE FILED																						
109	12/20/16																							
		SET NEXT DATE FOR: 02/10/17 3:00 PM MOTION FOR SUMMARY DISPOSITION																						
		DEF'S MOTION FOR SUMMARY MOTION FILED																						
110	12/22/16																							
		RECEIPT# 00164443 AMT \$20.00																						
		DEF'S MOTION FOR SUM DISP																						
111																								
		BRIEF IN SUPPORT																						
112																								
		NOTICE OF HEARING																						
113																								
		PROOF OF SERVICE FILED																						
114	12/28/16																							
		REMOVE NEXT EVENT: 01/10/17 8:00 AM TRACKING DATE																						
115	02/03/17																							
		PLTF TIM BRUGGER'S RESPONSE TO DEF'S MOTION FOR SUM DISP																						
116																								
		PLTF TIM BRUGGER'S BRIEF IN SUPPORT OF RESPONSE TO DEF'S MOT FOR SUM DISP																						
117																								
		PROOF OF SERVICE FILED																						
118	02/10/17																							
		MOTION HEARING																						
		COURT MUST FOLLOW PRECEDENT W/SUPREME COURT AND COURT OF APPEALS/COURT FINDS SUM DISP /DENIED/FOR REASONS STATED ON RECORD/ATTY SOWLE TO PREPARE ORDER																						
119																								
		SUMMARY DISP EXHIBITS																						
120	02/17/17																							
		NOTICE OF PRESENTMENT																						
121																								
		PROOF OF SERVICE FILED																						
122	02/27/17																							
		ORDER DENYING DEF'S MOT FOR SUM DISP																						
		END OF SUMMARY																						

Date: 2-24-17

HON. MICHAEL J. BEALE
P44233

S
/Honorable Michael J. Beale

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APPENDIX 3

STATE OF MICHIGAN
IN THE COURT OF APPEALS

TIM EDWARD BRUGGER, II,
Plaintiff-Appellee,

Court of Appeals Docket No. _____

v

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

BOARD OF COUNTY ROAD COMMISSIONERS
FOR THE COUNTY OF MIDLAND, AKA
MIDLAND COUNTY ROAD COMMISSION, a
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Defendant-Appellant.

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CLAIM OF APPEAL

Defendant, Board of County Road Commissioners for the County of Midland, claims an appeal from the Order Denying Defendant's Motion for Summary Disposition entered on February 24, 2017, by the Honorable Michael J. Beale, Circuit Judge for the Midland County Circuit Court. (Exhibit 1) The February 24, 2017 Order is a final order pursuant to MCR 7.202(6)(a)(v), and is consequently appealable as of right to the Court of Appeals pursuant to and MCR 7.203(A)(1).

This Claim of Appeal is being filed within 21 days after the entry of the Court's February 24, 2017 Order and is therefore timely pursuant to MCR 7.204(A)(1)(a).

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Also attached hereto are the following:

- Midland County Circuit Court Case Register of Actions (**Exhibit 2**)
- Correspondence (dated 3/9/17) to court reporter Mary Beth Chetkovich requesting transcripts of the proceedings held before Judge Beale on 11-6-15 and 2-10-17 (**Exhibit 3**)

Bond on appeal is not required.

DATED: March 13, 2017

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SMITH HAUGHEY RICE & ROEGGE, A Professional Corporation

APPENDIX 4



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Appeal Granted by [Brugger v. Midland County Board of Road Commissioners](#), Mich., April 24, 2020

324 Mich.App. 307

Court of Appeals of Michigan.

Tim Edward BRUGGER II, Plaintiff-Appellee,

v.

MIDLAND COUNTY BOARD OF ROAD
COMMISSIONERS, Defendant-Appellant.

No. 337394

Submitted May 1, 2018, at Lansing.

Decided May 15, 2018, at 9:10 a.m.

Synopsis

Background: Motorcyclist injured when he lost control of his motorcycle and crashed, allegedly due to large potholes and uneven pavement, brought action against county board of road commissioners. The Circuit Court, Midland County, No. 15-002403-NO, [Michael J. Beale](#), J., denied board's motion for summary disposition. Board appealed.

[Holding:] The Court of Appeals, [Shapiro](#), P.J., held that *Streng v. Bd. of Mackinac Rd. Comm'rs*, 315 Mich. App. 449, 890 N.W.2d 680, which held that a 60-day, rather than a 120-day, notice period controlled the timing and content of presuit notice directed to a road commission, applied prospectively only.

Affirmed.

[Shapiro](#), P.J., concurred and filed opinion.[O'Brien](#), J., dissented and filed opinion.

West Headnotes (3)

[1] Courts In general; retroactive or prospective operationDecision in *Streng v. Bd. of Mackinac Rd. Comm'rs*, 315 Mich. App. 449, 890 N.W.2d 680,

which held that a 60-day, rather than a 120-day, notice period controlled the timing and content of presuit notice directed to a road commission, applied only to actions arising on or after May 2, 2016, and thus a 60-day, rather than a 120-day, notice period applied to motorcyclist's action against county board of road commissioners over injuries suffered in a crash that was allegedly caused by large potholes and uneven pavement, where *Streng* was issued after motorcyclist had given presuit notice and filed suit prior to that date. *Mich. Comp. Laws Ann.* §§ 224.21(3), 691.1404.

2 Cases that cite this headnote

[2] Courts In general; retroactive or prospective operation

There are three factors to be weighed in determining whether retroactive application of a judicial decision is appropriate: (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.

[3] Costs Nature and Grounds of Right

The role of the government in creating confusion concerning a legal standard weighs strongly against sanctioning a party for acting in good faith based upon the apparent law.

1 Cases that cite this headnote

****389** Midland Circuit Court, LC No. 15-002403-NO, [Michael J. Beale](#), J.

Attorneys and Law Firms

Gray, Sowle & Iacco, PC (by [Donald N. Sowle](#) and [Patrick A. Richards](#)) for plaintiff.

Smith Haughey Rice & Roegge (by [Jon D. Vander Ploeg](#) and [D. Adam Tountas](#)) for defendant.

Before: [Shapiro](#), P.J., and M. J. Kelly and [O'Brien](#), JJ.

Opinion

Shapiro, P.J.

***310** Defendant, the Midland County Board of Road Commissioners, appeals the trial court's denial ***311** of its motion for summary disposition. Because plaintiff's presuit notice complied with the applicable statute, we affirm.

I. FACTS

Plaintiff, Tim E. Brugger II, was injured on April 27, 2013, when he lost control of his motorcycle and crashed. He filed suit against defendant, asserting that the crash was the result of large potholes and uneven pavement on a road maintained by the Midland County Road Commission. Governmental immunity does not shield a road commission from liability when it fails to maintain the road in a condition “reasonably safe and convenient for public travel.” [MCL 691.1402\(1\)](#).

On August 15, 2013, 110 days after the crash, plaintiff served defendant with presuit notice in accordance with ****390** [MCL 691.1404](#) of the governmental tort liability act (GTLA), [MCL 691.1401 et seq.](#) After suit was filed, the case progressed in typical fashion until this Court issued the decision in [Streng v. Bd. of Mackinac Co. Rd. Comm'rs](#), 315 Mich. App. 449, 890 N.W.2d 680 (2016). In [Streng, id.](#) at 462-463, 890 N.W.2d 680, the Court concluded that [MCL 224.21\(3\)](#) (a provision of the county road act), rather than [MCL 691.1404](#), controlled the timing and content of a presuit notice directed to a road commission. Following that decision, defendant, relying on [Streng](#), moved for summary disposition, arguing that plaintiff's presuit notice—filed within the 120 days as set forth in the GTLA—was ineffective because it was not filed within the 60-day limit set forth in the county road act.

The trial court denied the motion, concluding that [Streng](#) should be given prospective application because, for decades, parties and the courts had understood ***312** that the GTLA notice provision controlled. The trial court set forth its opinion from the bench, stating:

From the Court's perspective, I find that the Supreme Court in [Rowland](#) ^[1] specifically indicated that the GTLA is the notice provision for which road commission cases are subject to being followed and it had done that consistent

with a fairly significant long line of cases, two of which they overruled.

However, 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 and, therefore, stricken by the Supreme Court in [Rowland](#).

So, therefore, the Court finds that the circumstances in this case are in compliance with the requirements of the GTLA. And, therefore, that it is—summary disposition on that basis is denied.

However, I will also indicate if the analysis is, in fact, inaccurate and [Streng](#) was correctly decided, ... I will find that based upon the criteria that was announced in [Bahutski](#) ^[2] [sic] as well as the other case that was cited in [Rowland](#) that it is, in fact, to be applied prospectively, because there had been no indication that the differentiation was appropriate to provide notice to claimants that were coming forward.

And that it would—it would, in fact, result in manifest injustice to deny claims that had been in compliance with the agreed—with what had been agreed upon as the proper notice provision, but there was a change, from the Court's perspective, a change in the application of that interpretation by the Court of Appeals decision and that occurred after the notice had already been provided in this case.

***313** And, therefore, the Court's ... opinion [is that] it does not prevent the application of the GTLA provision of 691.1404.

Defendant appeals the trial court's ruling, arguing that plaintiff's failure to file a notice consistent with the requirements of the county road act mandates dismissal.

The question before us, therefore, is whether the decision in [Streng](#) should apply to all pending cases or only to those cases that arose after it was issued.

II. ANALYSIS

[1] This case presents a highly unusual circumstance. The Legislature has enacted ****391** two inconsistent statutes governing presuit notice to road commissions. The GTLA

requires that notice be provided within 120 days of the injury. [MCL 691.1404\(1\)](#). In contrast, the county road act allows for a 60-day period. [MCL 224.21\(3\)](#). The statutes also vary somewhat regarding the required content of the notice.

In 1970, the Michigan Supreme Court held that the 60-day notice provision in [MCL 224.21\(3\)](#) violated due process as applied to an incapacitated individual. *Grubaugh v. City of St. Johns*, 384 Mich. 165, 176, 180 N.W.2d 778 (1970), abrogated by *Rowland v. Washtenaw Co. Rd. Comm.*, 477 Mich. 197, 731 N.W.2d 41 (2007). *Grubaugh* did not extend its conclusion to all claimants however, noting that was a question for another day. *Id.* at 176-177. In 1972, in *Reich v. State Hwy. Dep't*, 386 Mich. 617, 623-624, 194 N.W.2d 700 (1972), abrogated by *Rowland*, 477 Mich. 197, 731 N.W.2d 41 (2007), the Supreme Court held that then-extant 60-day notice provision in [MCL 691.1404](#) was unconstitutional on its face because it violated the Equal Protection Clause by requiring governmental tortfeasors to be given notice when none was required ***314** for private tortfeasors.³ *Reich* did not address [MCL 224.31](#), but shortly after it was decided, we concluded in *Crook v. Patterson*, 42 Mich. App. 241, 242, 201 N.W.2d 676 (1972), that the rationale in *Reich* applied to that statute as well, and this Court struck down the [MCL 224.21\(3\)](#) notice requirement as unconstitutional. *Crook* was not appealed, and we can find no reported case thereafter in which a court evaluated a claimant's notice of claim under [MCL 224.21\(3\)](#) until the decision in *Streng*.⁴

Thus, *Crook*—decided 46 years ago—was the last time that the viability of the presuit notice provision in ***315** [MCL 224.21\(3\)](#) was directly addressed. And since the *Crook* decision, our courts have routinely applied the 120-day notice requirement of the GTLA when a defendant is a county road commission without any discussion of [MCL 224.21\(3\)](#). See *Streng*, 315 Mich. App. at 460 n. 4, 890 N.W.2d 680 (listing published and unpublished cases applying the GTLA notice provision in actions against county road commissions). As was stated ****392** in *Streng*, 315 Mich. App. at 463, 890 N.W.2d 680, “appellate courts appear to have overlooked the time limit, substantive requirements, and service procedures required by [MCL 224.21\(3\)](#) when the responsible body is a county road commission.”

Plaintiff asks that we reject *Streng* and request a conflict panel under [MCR 7.215\(J\)\(2\)](#) and (3). We need not do so however because we can decide this case on other grounds. We conclude that *Streng* should be applied prospectively as it is at variance from what was understood to be the law

for at least 40 years, and plaintiff's failure to comply with [MCL 224.21\(3\)](#) was the result of “the preexisting jumble of convoluted case law through which the plaintiff was forced to navigate.” *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562, 590 n. 65, 702 N.W.2d 539 (2005).

[2] The rules governing retroactivity are found in *Pohutski v. City of Allen Park*, 465 Mich. 675, 695-696, 641 N.W.2d 219 (2002). In *Pohutski*, the Michigan Supreme Court acknowledged the general rule that judicial decisions are given full retroactive effect. *Id.* at 695, 641 N.W.2d 219. However, “a more flexible approach is warranted when injustice might result from full retroactivity.” *Id.* at 696, 641 N.W.2d 219. Such injustice may result where a holding overrules settled precedent. *Id.* There are three factors to be weighed in determining whether retroactive application is appropriate:

***316** (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. In the civil context, ... this Court ... recognized an additional threshold question whether the decision clearly established a new principle of law. [*Pohutski*, 465 Mich. at 696, 641 N.W.2d 219 (citation omitted).]

We conclude that *Streng* should be given prospective-only application and that therefore, the 120-day notice provision of [MCL 691.1404\(1\)](#) is applicable to this case. Because our Supreme Court in *Rowland* did not explicitly overrule binding precedent that established the 120-day notice requirement of the GTLA as the governing provision in actions against county road commission defendants, and no case has been decided on the basis of [MCL 224.21\(3\)](#) for at least 46 years, we conclude that *Streng* effectively established a new rule of law departing from the longstanding application of [MCL 691.1404\(1\)](#) by Michigan courts. See *Streng*, 315 Mich. App. at 463, 890 N.W.2d 680; *Bezeau v. Palace Sports & Entertainment, Inc.*, 487 Mich. 455, 463, 795 N.W.2d 797 (2010) (opinion by WEAVER, J.).

Turning to the three-part test, we first consider the purpose of the *Streng* holding, which was to correct an apparent

error in interpreting a provision of the GTLA. As noted in *Pohutski*, 465 Mich. at 697, 641 N.W.2d 219, this purpose is served by prospective application. Second, as previously discussed, there has been an extensive history of reliance on the 120-day GTLA notice provision, rather than MCL 224.21(3), in cases concerning county road commission defendants. The universal reliance on this decades-long history also weighs in favor of prospective application. Moreover, prospective application would minimize the effect of this sudden departure from established precedent on the administration of justice.

[3] Also relevant is the fact that the confusion concerning the law was not created by plaintiff but, rather, by *317 the Legislature and the Judiciary. The Legislature adopted two conflicting sets of requirements regarding the timing and content of the presuit notice. And for decades, the Judiciary has decided many presuit notice cases based on the requirements of the **393 GTLA, with no reference to MCL 224.21(3). The role of the government in creating confusion concerning a legal standard weighs strongly against sanctioning a party for acting in good faith on the basis of the apparent law. For instance, in *Bryant v. Oakpointe Villa Nursing Ctr. Inc.*, 471 Mich. 411, 417, 684 N.W.2d 864 (2004), the plaintiff filed an action against the defendant healthcare provider sounding in ordinary negligence. The defendant argued that two of the plaintiff's claims sounded in medical malpractice and that those claims should therefore be dismissed because, although the action had been filed during the three-year limitations period for negligence cases, it had not been filed within the two-year limitations period for medical malpractice. *Id.* at 418, 684 N.W.2d 864. The Supreme Court concluded that the two counts in question sounded in medical malpractice and that “under ordinary circumstances [those counts] would be time-barred.” *Id.* at 432, 684 N.W.2d 864. Nevertheless, it did not dismiss them because “[t]he equities of [the] case ... compel a different result.” *Id.* The Court went on to state:

The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is one that has troubled the bench and bar in Michigan, even in the wake of our opinion in *Dorris*.⁵ Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the

legal nature of her claim, rather than a negligent failure to preserve her rights. Accordingly, for this case and others *318 now pending that involve similar procedural circumstances, we conclude that plaintiff's medical malpractice claims may proceed to trial along with plaintiff's ordinary negligence claim. MCR 7.316(A)(7). [*Bryant*, 471 Mich. at 432, 684 N.W.2d 864.]

There can be no doubt that the “procedural circumstances” in the instant case are, as they were in *Bryant*, the result of “understandable confusion” resulting from conflicting actions by the Legislature and the Judiciary. Accordingly, like the Supreme Court in *Bryant*, we conclude that “plaintiff's ... claims may proceed to trial....” *Id.* As discussed, for decades the Judiciary applied the 120-day notice provision of MCL 691.1404(1) in actions against county road commission defendants. See *Streng*, 315 Mich. App. at 460 n. 4, 890 N.W.2d 680. Plaintiff filed his presuit notice on August 15, 2013, more than two years and nine months before *Streng* was decided.

Because we conclude that *Streng* applies only to actions arising on or after May 2, 2016, we affirm the trial court's denial of defendant's motion for summary disposition. As the prevailing party, plaintiff may tax costs under MCR 7.219.

M.J. Kelly, J., concurred with Shapiro, P.J.

Shapiro, P.J. (concurring).

As I stated in the majority opinion, *Streng v. Bd. of Mackinac Co. Rd. Comm'rs*, 315 Mich. App. 449, 890 N.W.2d 680 (2016), should not be applied retroactively. I write separately to set forth my view that *Streng* was wrongly decided and that compliance with either of the two notice-of-claim statutes suffices to preserve the claim.

Streng presented a highly unusual circumstance in that there were two statutes that set forth *inconsistent* requirements for a notice of claim against a county *319 road commission. The Court in *Streng* concluded **394 that it had to choose one statute over the other, and it elevated MCL 224.21(3), the provision within the county road act, MCL 224.1 et seq., over MCL 600.1404, the provision within the governmental tort

liability act, [MCL 691.1401 et seq.](#) *Streng*, 315 Mich. App. at 362-363, 890 N.W.2d 680. The Court's conclusion rested upon the principle of statutory interpretation that between a general and specific statute the more specific statute controls. It could, of course, have reached the opposite conclusion by following the interpretive principle that a later-adopted statute controls over an earlier-adopted conflicting statute.¹ Choosing between the statutes is therefore, a somewhat arbitrary process.²

Streng, however, did not consider *Apsey v. Mem. Hosp.*, 477 Mich. 120, 123, 730 N.W.2d 695 (2007), which held that such a choice need not be made.³ *Apsey* was the last time Michigan was faced with the issue of two conflicting statutes governing the same procedural requirements. The unfortunate history of that case and the Supreme Court's ultimate resolution of it provide much guidance. *Apsey* involved a medical malpractice *320 case brought in 2001. The plaintiff filed an affidavit of merit, as required by [MCL 600.2912d\(1\)](#), signed by a qualified out-of-state physician. *Id.* at 124, 730 N.W.2d 695. It was undisputed that the document was properly notarized and effective in Michigan under the relevant provision—[MCL 565.262](#)—of the Uniform Recognition of Acknowledgements Act, [MCL 565.261 et seq.](#) However, the defendant argued that the affidavit was not effective in Michigan because it did not satisfy [MCL 600.2102\(4\)](#). *Id.* at 125, 730 N.W.2d 695. That statute required that for an out-of-state affidavit to be effective in Michigan, it must be accompanied by a certification carrying the seal of the county clerk where the document was signed, confirming that the signing notary was in fact a notary.

Until *Apsey* was decided in 2007, courts had not relied on or even cited [MCL 600.2102\(4\)](#) during the 23 years that the courts had been reviewing the adequacy of notices of claim.⁴ Instead, the bench and bar had, since the adoption of the affidavit-of-merit requirement, consistently relied on and enforced the [MCL 565.262](#) notary requirements. Following the *Apsey* decision, medical malpractice defendants all over the state moved to dismiss pending cases because the affidavit of merit lacked **395 certification of the notary's qualifications from the local court. Many of these cases were subject to dismissal with prejudice because the period of limitations had run, and in *Scarsella v. Pollak*, 461 Mich. 547, 549-550, 607 N.W.2d 711 (2000), the Supreme Court had previously held that when an *321 affidavit of merit was shown to be defective, the filing of the complaint did not toll the statutory limitations period.

Ultimately, however, the Supreme Court in *Apsey* rejected the idea that one of the two conflicting statutes had to prevail over the other. Instead, it concluded that in passing two statutes designating proper procedure, the Legislature had provided “alternative method[s]” to accomplish the task. *Apsey*, 477 Mich. at 134, 730 N.W.2d 695. In other words, rather than viewing the two statutes as “conflicting” with one being “right” and the other being “wrong,” the Court concluded that compliance with *either* of the statutes was sufficient. *Id.* at 124, 730 N.W.2d 695.

As Justice YOUNG stated in his concurrence:

This is a case in which the majority and the dissent offer two compelling but competing constructions of [two statutes], and, in my view, neither construction is unprincipled. Both sides invoke legitimate, well-established canons of statutory construction to justify their respective positions. In short, this is a rare instance where our conventional rules of statutory interpretation do not yield an unequivocal answer regarding how to reconcile the provisions of the two statutes that appear to conflict. [*Id.* at 138-139, 730 N.W.2d 695 (YOUNG, J., concurring).]

After inviting the Legislature to “dispel much of the confusion generated” by the two statutes, Justice YOUNG concluded that “until that time, I favor a resolution that is least unsettling and disruptive to the rule of law in Michigan”; for that reason, he concurred in the reversal of the Court of Appeals. *Id.* at 141, 730 N.W.2d 695.

Apsey unmistakably leads to the conclusion that compliance with the presuit notice requirements of *either* [MCL 691.1404\(1\)](#) or [MCL 224.21\(3\)](#) is sufficient to proceed to suit. I believe that *Streng* was wrongly decided and should have adopted that view.

O'Brien, J. (dissenting).

*322 “[T]he general rule is that judicial decisions are to be given complete retroactive effect.” *Hyde v. Univ. of Mich. Bd. of Regents*, 426 Mich. 223, 240, 393 N.W.2d 847 (1986). Because I believe that *Streng v. Bd of Mackinac Co. Rd. Comm.'rs*, 315 Mich. App. 449, 463, 890 N.W.2d 680 (2016), does not warrant divergence from this general rule, I respectfully dissent.

In addressing this issue, it is necessary to understand the events that led up to the *Streng* decision. The following summary, although lengthy, is crucial for understanding the effects of *Streng* on our jurisprudence and the reasons why it should be given retrospective application.

Our Supreme Court in *Rowland v. Washtenaw Co. Rd. Comm.*, 477 Mich. 197, 206-209, 731 N.W.2d 41 (2007)—the case that, as will be explained, created the issue that *Streng* resolved—summarized this history as follows:

As of 1969 ... 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. In 1970, however, there was an abrupt departure from these holdings in the Court's decision in *Grubaugh v. City of St. Johns*, 384 Mich. 165, 180 N.W.2d 778 (1970).¹ In *Grubaugh* the Court discerned **396 an unconstitutional due process deprivation if plaintiffs suing governmental defendants had different rules than plaintiffs suing private litigants....

Two years later, in *Reich v. State Hwy. Dep't*, 386 Mich. 617, 194 N.W.2d 700 (1972),² the Court took *Grubaugh* one step further and held that an earlier version of MCL 691.1404, which included a 60-day notice provision, was unconstitutional, but this time because it violated equal *323 protection guarantees. The analysis again was that the constitution forbids treating those injured by governmental negligence differently from those injured by a private party's negligence. Leaving aside the unusual switch from one section of the constitution to another to justify an adjudication of unconstitutionality, this claim is simply incorrect. Private and public tortfeasors can be treated differently in the fashion they have been treated here by the Legislature. It does not offend the constitution to do so because with economic or social regulation legislation, such as this statute, there can be distinctions made between classes of persons if there is a rational basis to do so. As we explained in *Phillips v. Mirac, Inc.*, 470 Mich. 415, 431-433, 685 N.W.2d 174 (2004), legislation invariably

involves line drawing and social legislation involving 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. The existence of a rational basis here is clear, as we will discuss more fully, but even the already cited justification, that the road be repaired promptly to prevent further injury, will suffice.

Considering the same point, Justice BRENNAN in his dissent in *Reich* pithily pointed out the problems with the majority's analysis:

The legislature has declared governmental immunity from tort liability. The legislature has provided specific exceptions to that standard. The legislature has imposed specific conditions upon the exceptional instances of governmental liability. The legislature has the power to make these laws. This Court far exceeds its proper function when it declares this enactment unfair and unenforceable. [*Reich*, 386 Mich. at 626, 194 N.W.2d 700 (BRENNAN, J., dissenting).]

The next year, in *Carver v. McKernan*, 390 Mich. 96, 211 N.W.2d 24 (1973),³ the Court retreated from *Grubaugh* and *Reich* and, in a novel ruling, held that application of *324 the six-month notice provision in the Motor Vehicle Accident Claims Act (MVACA), MCL 257.1118, was constitutional, and that the provision was thus enforceable, only where the failure to give notice resulted in prejudice to the party receiving the notice, in that case the Motor Vehicle Accident Claims Fund (MVACF). The reasoning was that while some notice provisions may be constitutionally permitted some may not be, depending on the purpose the notice serves. Thus, if notice 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. Thus, the Court concluded that in order to save the statute from being held unconstitutional, it had to allow notice to **397 be given after six months and still be effective unless the governmental agency, there the MVACF, could show prejudice. Whatever a court may do to save a statute from being held to be unconstitutional, it surely cannot engraft an amendment to the statute, as was done in *Carver*. See, e.g., *North Ottawa Community Hosp. v. Kieft*, 457 Mich. 394, 408 n. 14, 578 N.W.2d 267 (1998). Notwithstanding these problems, they went unnoticed and the rule now was “only upon a showing of prejudice by

failure to give such notice, may the claim against the fund be dismissed.” *Carver*, 390 Mich. at 100, 211 N.W.2d 24.

Returning to the *Carver* approach in 1976, this Court in [*Hobbs v. Dep't of State Hwys.*, 398 Mich. 90, 96, 247 N.W.2d 754 (1976)]⁴ held regarding the notice requirement in the defective highway exception to governmental immunity:

The rationale of *Carver* is equally applicable to cases brought under the governmental liability act. Because actual prejudice to the state due to lack of notice within 120 days is the only legitimate purpose we can posit for this notice provision, absent a showing of such prejudice the notice provision contained in [MCL 691.1404] is not a bar to claims filed pursuant to [MCL 691.1402].

*325 Finally, in 1996, in [*Brown v. Manistee Co. Rd. Comm.*, 452 Mich. 354, 550 N.W.2d 215 (1996)],⁵ this Court reassessed the propriety of the *Hobbs* decision and declined to overrule it on the basis of stare decisis and legislative acquiescence. [Some alterations in original.]

Relevant to the current appeal, this Court in *Crook v. Patterson*, 42 Mich. App. 241, 242, 201 N.W.2d 676 (1972), held—in a half-page decision that relied exclusively on *Reich*—that MCL 224.21 violated the Equal Protection Clause and was, therefore, unconstitutional and void. In 1996, the Michigan Supreme Court in *Brown* also held that MCL 224.21 was unconstitutional on equal-protection grounds, but the Court noted that the issue was “not the same equal protection issue raised in *Reich*,” *Brown*, 452 Mich. at 361 n. 12, 550 N.W.2d 215 and that “[t]his Court is no longer persuaded that notice requirements are unconstitutional per se.” *id.* Instead, the *Brown* Court held that MCL 224.21 violated Equal Protection Clause because the 60-day notice provision had no rational basis to “[t]he only purpose ... for a notice requirement,” which was “to prevent prejudice to the government....” *Id.* at 362-364, 550 N.W.2d 215.

In 2007, the Michigan Supreme Court in *Rowland* corrected this long line of cases that impermissibly engrafted an “actual prejudice” requirement into statutory notice requirements to avoid governmental immunity. In our Supreme Court’s words:

The simple fact is that *Hobbs* and *Brown* were wrong because they were built on an argument that governmental immunity notice

statutes are unconstitutional or at least sometimes unconstitutional if the government was not prejudiced. This reasoning has no claim to being defensible constitutional theory and is not rescued by *326 musings to the effect that the justices “ ‘look askance’ ” at devices such as notice requirements, *Hobbs*, 398 Mich. at 96 [247 N.W.2d 754], quoting *Carver*, 390 Mich. at 99 [211 N.W.2d 24], or the pronouncement that other reasons that could supply a rational **398 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.” *Hobbs*, 398 Mich. at 96 [247 N.W.2d 754]. [*Rowland*, 477 Mich. at 210, 731 N.W.2d 41.]

The *Rowland* Court went on to cite a number of purposes for notice provisions, thereby rejecting the long-held notion that the only purpose of a notice requirement in governmental immunity cases was to prevent prejudice. The *Rowland* Court concluded that “[t]he notice provision passes constitutional muster” and rejected “the hybrid constitutionality of the sort *Carver*, *Hobbs*, and *Brown* engrafted onto our law.” *Id.* at 213, 731 N.W.2d 41.

After *Rowland* abrogated *Reich*, *Crook*’s holding that MCL 224.21 violated equal protection was no longer good law. But even before *Rowland*, it is debatable whether *Crook* was good law; *Brown* decided that MCL 224.21 was unconstitutional but expressly rejected reliance on *Reich*—upon which *Crook* was exclusively decided—because our Supreme Court was “no longer persuaded” by those reasons. *Brown*, 452 Mich. at 361 n. 12, 550 N.W.2d 215. In contrast to *Crook*, *Brown* held that MCL 224.21 violated equal protection because it was not rationally related to “[t]he only purpose” of a notice statute: “to prevent prejudice to the governmental agency.” *Id.* at 362, 550 N.W.2d 215. *Rowland* expressly overruled *Brown* and its “reading an ‘actual prejudice’ requirement into” notice statutes. *Rowland*, 477 Mich. at 213, 731 N.W.2d 41. *Rowland* also rejected the idea that the sole purpose of a notice statute was to prevent prejudice. See *id.* at 211-213, 731 N.W.2d 41. In so doing, it rejected the reasoning in *Brown* that MCL

224.21 was unconstitutional. See *Brown*, 452 Mich. at 362, 550 N.W.2d 215.

*327 It was in this context that this Court, in 2016, addressed *Streng*. As explained, after *Rowland* was decided, the notice requirements in MCL 224.21 were no longer unconstitutional. This created the question of whether the notice requirements in either MCL 224.21(3) or the GTLA applied to injuries caused by a highway defect on county roads. No published opinion addressed this issue until *Streng*, which held that the notice requirements in MCL 224.21(3) controlled. *Streng*, 315 Mich. App. at 463, 890 N.W.2d 680.

The question now before us is whether *Streng* should be given retroactive effect. The Michigan Supreme Court in *Pohutski v. City of Allen Park*, 465 Mich. 675, 696, 641 N.W.2d 219 (2002), provided guidance for a court faced with a decision of this type:

This Court adopted from *Linkletter v. Walker*, 381 U.S. 618, 85 S.Ct. 1731[,] 14 L.Ed.2d 601 (1965), three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *People v. Hampton*, 384 Mich. 669, 674, 187 N.W.2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil v. Huson*, 404 U.S. 97, 106-107, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), recognized an additional threshold question whether the decision clearly established a new principle of law. *Riley v. Northland Geriatric Center (After Remand)*, 431 Mich. 632, 645-646, 433 N.W.2d 787 (1988) (GRIFFIN, J.).

Guiding this analysis are the principles that prospective-only application is an “extreme measure,” *Wayne Co. v. Hathcock*, 471 Mich. 445, 484 n. 98, 684 N.W.2d 765 (2004), and that decisions are generally **399 given retrospective application, *Hyde*, 426 Mich. at 240, 393 N.W.2d 847.

*328 Initially, I question the majority's conclusion that *Streng* established new law. *Streng* did not overrule any caselaw, nor did it introduce a novel interpretation of a statute. Instead, it resolved a dispute between two conflicting statutes. The majority is correct that this dispute had lain dormant since this Court's decision in *Crook* in 1972. However, as stated, *Brown*, in 1996, rejected the basis for the *Crook* decision. More pointedly, *Rowland*, in 2007, overruled *Brown* and abrogated *Reich*—on which *Crook* exclusively relied—making the holdings of both *Crook* and *Brown* no longer binding on the interpretation of MCL 224.21.⁶ Accordingly, *Streng* did not clearly establish a new principle of law in 2016; the only new principles of law were established by *Rowland* in 2007, and *Streng* simply resolved the ensuing conflict between two statutes—MCL 224.21 and the GTLA notice provision—in the post-*Rowland* legal landscape.

Further, as observed in *Devillers v. Auto Club Ins. Ass'n*, 473 Mich. 562, 587, 702 N.W.2d 539 (2005), “prospective-only application of our decisions is generally limited to decisions which overrule clear and uncontradicted case law.” (Quotation marks and citation omitted.) As explained, *Rowland*—not *Streng*—upended over 30 years of caselaw governing notice requirements. *Streng* merely interpreted the pertinent statutes post-*Rowland* and did not, itself, “overrule” any caselaw. Moreover, as a result of *Rowland*, the caselaw governing the applicable notice requirements at the time that *Streng* was decided was not “clear and uncontradicted”; by abrogating the reasoning employed *329 by the relevant cases, *Rowland*, at the very least, “contradicted” the applicable caselaw.⁷

Even assuming that this Court's resolution of the highly unusual situation faced in *Streng* created new law, I believe that the next two factors weigh in favor of retroactivity. The purpose of the *Streng* holding was to resolve a conflict between two statutes. The *Streng* Court decided that of those two statutes, the Legislature intended for the 60-day notice requirement in MCL 224.21 to control. This purpose is not served by applying the notice requirements of the GTLA—the statute that the *Streng* Court held that the Legislature did **400 not intend to apply—to control.⁸

*330 With respect to the next factor, I do not believe that it is proper to look back at the entire history of reliance on the GTLA notice provision as the majority does. As discussed, *Rowland* abrogated precedent establishing that MCL 224.21 was unconstitutional, which in turn created the

question of whether the notice provisions of MCL 224.21 or the GTLA applied in cases such as the one before us. *Rowland* was decided in 2007, and I believe that the proper inquiry is the extent of reliance on the GTLA notice provision following *Rowland*. Orders by the Supreme Court following *Rowland* did not apply MCL 224.21, see *Mauer v. Topping*, 480 Mich. 912, 739 N.W.2d 625 (2007); *Ells v. Eaton Co. Rd. Comm.*, 480 Mich. 902, 903, 739 N.W.2d 87 (2007); *Leech v. Kramer*, 479 Mich. 858, 735 N.W.2d 272 (2007), but none of those orders addressed whether MCL 224.21 was applicable. Instead, each case dismissed the respective plaintiff's claim for failure to file notice within the 120-day notice period required by the GTLA. Therefore, none of these cases established that a case filed after 60 days but before 120 days of the injury satisfied the applicable notice requirement; the claims would have failed under either the GTLA or MCL 224.21. The majority has not cited a single binding case decided after *Rowland* that allowed a claim noticed after 60 days of the injury but before 120 days to proceed. Therefore, in the relevant post-*Rowland* time frame, there does not appear to be extensive reliance on the 120-day GTLA notice provision.

The last factor, however, weighs in favor of plaintiff. Plaintiff attempted to comply with what he believed was the proper statute and filed notice within 120 days of his injury. However, plaintiff was injured six years after *Rowland* was released. At that time, MCL 224.21 was again constitutional and, as later decided by *Streng*, applied to claims such as plaintiff's. At the very least, when plaintiff was injured, there was a question *331 whether the notice requirements in MCL 224.21 or the GTLA applied to his claims. Ultimately, in light of the other factors—and guided by the principles that retrospective application is the general rule and prospective-only application is an extreme measure—I would hold that retrospective application is appropriate in this case.

Lastly, the majority contends that “[t]he role of the government in creating confusion concerning a legal standard weighs strongly against sanctioning a party for acting in good faith based upon the apparent law.” In support of this assertion, the majority cites *Bryant v. Oakpointe Villa Nursing Ctr., Inc.*, 471 Mich. 411, 684 N.W.2d 864 (2004). Put simply, *Bryant* is inapplicable to this case; it does not address whether a case should apply retroactively, and as will be explained, *Bryant* neither supports nor contradicts the majority's argument.

At issue in *Bryant* was whether the plaintiff's claims sounded in medical malpractice or ordinary negligence. *Id.* at 414, 684 N.W.2d 864. That determination was significant because if the plaintiff's claims sounded in medical malpractice, then the claims were filed after the period of limitations had run. *Id.* at 418-419, 684 N.W.2d 864. Our Supreme Court, after significant analysis, concluded that two of the plaintiff's four claims sounded in medical malpractice, and then it addressed “whether **401 [the] plaintiff's medical malpractice claims [were] time-barred.” *Id.* at 432, 684 N.W.2d 864. Our Supreme Court stated that normally the plaintiff's medical malpractice claims would be time-barred, but the “equities” in the case compelled “a different result.” *Id.* The *Bryant* Court explained as follows:

The distinction between actions sounding in medical malpractice and those sounding in ordinary negligence is *332 one that has troubled the bench and bar in Michigan.... Plaintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights. [*Id.*]

Had the plaintiff proceeded under the correct understanding of her legal claims, her first complaint would have been filed within the medical-malpractice statutory period of limitations, see *id.* at 418-419, 684 N.W.2d 864, and the Supreme Court ultimately allowed her claims to go forward, *id.* at 432, 684 N.W.2d 864.

Contrary to the majority's reading of *Bryant*, the “understandable confusion” identified in that case had nothing to do with the Legislature or the Judiciary. Rather, *Bryant* simply recognized that it is difficult to distinguish a medical malpractice claim from an ordinary negligence claim and, therefore, that the plaintiff's confusion with classifying her claims was understandable. Indeed, the general difficulty of determining whether a claim sounds in medical malpractice or ordinary negligence was on full display in *Bryant*: the first judge at trial decided that the plaintiff's claims sounded in ordinary negligence; after the first judge recused herself, the second judge decided that the plaintiff's claims sounded in medical malpractice; on appeal,

two judges on a panel of this Court held that the plaintiff's claims sounded in ordinary negligence, while a dissenting judge believed that the plaintiff's claims sounded in medical malpractice; then, at our Supreme Court, five justices held that two of the plaintiff's four claims sounded in medical malpractice, while two justices dissented and would have held that all of the plaintiff's claims sounded in ordinary negligence. *Bryant* did not ascribe this difficulty—and the resulting “understandable confusion”—to either the courts or the Legislature. Therefore, *Bryant*'s holding *333 simply does not support the majority's contention that the role of the government in creating confusion weighs in favor of prospective-only application.

Because *Bryant* does not support the majority's contention that “the role of the government in creating confusion” supports prospective application, and because the majority does not otherwise support this assertion, I question whether the “role of the government in creating confusion” is a valid consideration for prospective-only application. If it were, it would “strongly” weigh in favor of prospectively applying virtually all cases that deal with the interpretation of an ambiguous statute. When the Legislature enacts an ambiguous statute, it creates confusion in the statute's interpretation, which is ultimately resolved by the courts. Under the majority's reasoning, if a party attempted to comply with an ambiguous statute in good faith but ultimately failed to do so, the well-intentioned-plaintiff's actions would “strongly” weigh in favor of prospective application of the court's interpretation of the ambiguous statute. Therefore, I do not believe that “[t]he role of government in creating confusion concerning a legal standard” has any application to whether a decision should apply retrospectively.

Turning to the concurring opinion, I disagree that *Streng* rested exclusively “upon **402 the principle of statutory interpretation that between a general and specific statute the more specific statute controls.” Rather, *Streng* also interpreted MCL 224.21 and the GTLA *in pari materia*. Specifically, *Streng* cited language from MCL 224.21(2) that provides that liability is governed by the GTLA and language from the GTLA that provides that the “liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in ... MCL 224.21.” *334 *Streng*, 315 Mich. App. at 463, 890 N.W.2d 680, quoting MCL 691.1402(1). *Streng* concluded that “[a] close reading of the language of MCL 224.21(2) dictates that only those GTLA provisions of law that deal with ‘liability’ apply to counties, while under MCL 691.1402(1), procedural and

remedial provisions for counties should be those of MCL 224.21.” *Id.* at 462-463, 890 N.W.2d 680. Accordingly, *Streng* concluded that the procedural notice requirements in MCL 224.21 controlled.

I also disagree with the concurring opinion's conclusion that *Streng* “could, of course, have reached the opposite conclusion by following the interpretive principle that a later-adopted statute controls over an earlier-adopted conflicting statute.” The current version of MCL 691.1402 became effective March 13, 2012, see 2012 PA 50, which is after MCL 691.1404 became effective. MCL 691.1402(1) contains the language on which *Streng* relied to conclude that the “procedural and remedial provisions for counties should be those of MCL 224.21” rather than those of the GTLA. *Streng*, 315 Mich. App. at 463, 890 N.W.2d 680. Therefore, if the later-adopted statute controlled, the GTLA's notice requirements were subject to MCL 224.21 for “county roads under the jurisdiction of a county road commission....” MCL 691.1402(1).

Further, the concurring opinion misapplies the holding of *Apsey v. Mem. Hosp.*, 477 Mich. 120, 730 N.W.2d 695 (2007). At issue in *Apsey* were two statutes that provided conflicting requirements for notarizing an affidavit of merit in medical malpractice cases. However, one of the statutes at issue provided that it was “an additional method of proving notarial acts.” MCL 565.268. The Supreme Court explained that this

sentence of MCL 565.268 indicates that the [Uniform Recognition of Acknowledgements Act (URAA), *335 MCL 569.261 et seq.] is an additional or alternative method of proving notarial acts. As an “additional” method, the URAA does not replace the prior method. Instead, it is intended to stand as a coequal with it. Because the two methods are alternative and coequal, the URAA does not diminish or invalidate “the recognition accorded to notarial acts by other laws of this state.” MCL 565.268. Simply, MCL 600.2102(4) is not invalidated by the URAA. It remains an additional method of attestation of out-of-state affidavits. Because the two methods exist as alternatives, a party may use either to validate an affidavit. [*Apsey*, 477 Mich. at 130, 730 N.W.2d 695.]

Clearly, the *Apsey* Court did not conclude “that in passing two statutes designating proper procedure, the Legislature had provided ‘alternative method[s]’ to accomplish the task,” as the concurring opinion in this case asserts. (Alteration in original.) Rather, the *Apsey* Court relied on language from MCL 565.268, which explicitly stated that it was “an

alternative method,” to conclude that the Legislature intended to provide an alternative method.

In contrast to *Apsey*, there is no language in either [MCL 224.21](#) or the GTLA providing that the statute is “an additional method” of providing notice for purposes ****403** of governmental immunity. Without some indication that the Legislature intended for these statutes to be alternative methods for providing notice, *Apsey* simply has no bearing on whether *Streng* was wrongly decided. See *Mich. Ed. Ass'n v. Secretary of State (On Rehearing)*, 489 Mich. 194, 218, 801 N.W.2d 35 (2011) (“[N]othing may be read into a statute that

is not within the manifest intent of the Legislature as derived from the act itself.”) (quotation marks and citation omitted).⁹

***336** Ultimately, however, any disagreement I have with the concurring opinion will be resolved another day. With regard to the issue before us, because I would apply *Streng* retrospectively, I respectfully dissent from the majority opinion.

All Citations

324 Mich.App. 307, 920 N.W.2d 388

Footnotes

- 1 [Rowland v. Washtenaw Co. Rd. Comm.](#), 477 Mich. 197, 731 N.W.2d 41 (2007).
- 2 Apparently, the trial court was referring to [Pohutski v. City of Allen Park](#), 465 Mich. 675, 641 N.W.2d 219 (2002).
- 3 The constitutionality of the GTLA notice provision was again addressed in [Hobbs v. Dept. of State Hwys.](#), 398 Mich. 90, 247 N.W.2d 754 (1976). By the time that case was heard, the Legislature had amended [MCL 691.1404](#) so as to provide for a 120-day notice period, see [MCL 691.1404\(1\)](#), as amended by 1970 PA 155, and the Supreme Court in [Carver v. McKernan](#), 390 Mich. 96, 100, 211 N.W.2d 24 (1973), had upheld a 120-day notice provision in a different statute. In [Hobbs](#), 398 Mich. at 96, 247 N.W.2d 754, the Supreme Court overruled [Reich's](#) absolute bar on notice provisions and held that the 120-day notice provision in [MCL 691.1404\(1\)](#) was constitutional when the government could show prejudice. In 1996, the Supreme Court decided [Brown v. Manistee Co. Rd. Comm.](#), 452 Mich. 354, 550 N.W.2d 215 (1996), reiterating that the 120-day notice provision in the GTLA was constitutional if prejudice could be shown but that the 60-day notice provision in [MCL 224.21](#) was unconstitutional. *Id.*, at 363-364, 550 N.W.2d 215. Finally, in [Rowland](#), 477 Mich. at 200-201, 731 N.W.2d 41 (2007), the Supreme Court overruled [Hobbs](#) and [Brown](#) and held that the 120-day notice provision in the GTLA was constitutional and that no prejudice need be shown by the government when a claimant failed to satisfy that provision.
- 4 [Rowland](#), while overruling [Brown](#) and abrogating [Reich](#), addressed only the GTLA notice-provision holding and made no mention of [MCL 224.21\(3\)](#) or [Crook](#). It considered only whether the plaintiff had complied with the 120-day notice provision of the GTLA. With [Reich](#) abrogated, the [Crook](#) holding striking down [MCL 224.21\(3\)](#) was without support and was implicitly overruled. However, it was not explicitly overruled, which may explain why until [Streng](#), the notice requirement in [MCL 224.21\(3\)](#) remained dormant, if not dead, in the eyes of bench and bar.
- 5 [Dorris v. Detroit Osteopathic Hosp. Corp.](#), 460 Mich. 26, 594 N.W.2d 455 (1999).
- 1 “Statutes enacted by the Legislature on a later date take precedence over those enacted on an earlier date.” [Baumgartner v. Perry Pub. Sch.](#), 309 Mich. App. 507, 521, 872 N.W.2d 837 (2015).
- 2 The dissent does not dispute that [MCL 691.1404](#) was adopted after [MCL 224.21](#). Nevertheless, the dissent argues that because [MCL 691.1402](#) was amended in 2012, see 2012 PA 50, it should be considered the later-adopted provision. However, the 2012 amendment of [MCL 691.1401](#) addressed matters wholly unrelated to notice to road commissions. The relevant provision in [MCL 691.1402\(1\)](#), i.e., the sentence referring to [MCL 224.21](#), was part of the *original* version of the GTLA enacted in 1964, see 1964 PA 170, and has never been amended. The relevant provision reads exactly as it did when [Crook](#) was decided in 1972. The 2012 amendments of [MCL 691.1402](#) are not relevant to the relationship of [MCL 691.1404](#) and [MCL 224.21](#).
- 3 The [Streng](#) Court should not be faulted for not noting the significance of [Apsey](#) because neither party cited it in their briefs.
- 4 It appears that the last time any version of [MCL 600.2102\(4\)](#) had been relied on to dismiss a case—see 1915 CL 12502—was in [In re Alston's Estate](#), 229 Mich. 478, 201 N.W. 460 (1924). In [Wallace v. Wallace](#), 23 Mich. App. 741, 747, 179 N.W.2d 699 (1970), the Court agreed that the relevant affidavit did not satisfy [MCL 600.2102](#) but concluded that such an error could be corrected nunc pro tunc and was not dispositive of the case.
- 1 Abrogated by [Rowland](#), 477 Mich 197, 731 N.W.2d 41.
- 2 Abrogated by [Rowland](#), 477 Mich 197, 731 N.W.2d 41.

- 3 Abrogated by *Rowland*, 477 Mich 197, 731 N.W.2d 41.
- 4 Overruled by *Rowland*, 477 Mich 197, 731 N.W.2d 41.
- 5 Overruled by *Rowland*, 477 Mich. 197, 731 N.W.2d 41.
- 6 To the extent that *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.
- 7 Plaintiff's strongest argument that *Streng* created new law is that the *Rowland* Court applied the 120-day notice provision from the GTLA rather than the 60-day notice provision from MCL 224.21. See *Rowland*, 477 Mich. at 219, 731 N.W.2d 41. Perhaps this was because, under either standard, the plaintiff's claim in *Rowland* was barred because she had served notice 140 days after her injury. *Id.* at 201, 731 N.W.2d 41. But regardless of the Supreme Court's reasoning, as recognized in *Streng*,
- [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. [*Streng*, 315 Mich. App. at 459-460, 890 N.W.2d 680.]
- Therefore, 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." *Galea v. FCA U.S. LLC*, 323 Mich. App. 360, 375, 917 N.W.2d 694 (2018); see also *People v. Heflin*, 434 Mich. 482, 499 n. 13, 456 N.W.2d 10 (1990) ("[J]ust as obiter dictum does not constitute binding precedent, we reject the dissent's contention that 'implicit conclusions' do so.").
- 8 The majority states that the purpose of *Streng* "was to correct an apparent error in interpreting a provision of the GTLA." I do not believe that *Streng* resolved any error in the interpretation of the GTLA because, both before and after *Streng*, the notice provision of the GTLA has been interpreted to be a 120-day notice requirement.
- 9 Also notable, the concurring opinion of Justice YOUNG in *Apsey*, which the concurring opinion in this case cites, was a concurrence in result only. Five justices agreed with the majority, and one wrote a dissenting opinion. It is unclear why the concurring opinion in this case takes the position that the reasoning of one justice, which was not adopted by a single other justice, "unmistakably leads to" any conclusion grounded in the jurisprudence of this state.

APPENDIX 5

Court of Appeals, State of Michigan

For Publication

ORDER

Tim Edward Brugger II v Midland County Board of Road
Commissioners

Douglas B. Shapiro
Presiding Judge

Docket No. 337394

Michael J. Kelly

LC No. 15-002403-NO

Colleen A. O'Brien
Judges

The motion for reconsideration is DENIED for the reasons set forth below.

Defendant argues that we should follow the decision in *Harston v Eaton County Road Commission*, ___ Mich App ___; ___ NW2d ___ (2018) (docket #338981), which held that *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016) was retroactive. However, *Harston* was decided after our published decision in this case. As the first published Court of Appeals case to decide the issue of *Streng's* retroactivity, our decision controls. The *Harston* panel failed to adhere to MCR 7.215(j) which provides:

Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court or a special panel of the Court of Appeals as provided in this rule. [Emphasis added.]

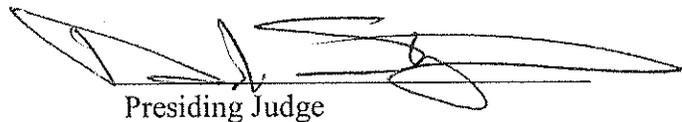
Because *Harston* was decided after this case, we need not consider it. However, we do so in hopes of providing clarification to the bench and bar. *Harston* concluded that *all* judicial rulings involving the reinterpretation of a statute are to be applied retroactively. *Harston* based this conclusion on its reading of *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), oral argument gtd on the application 911 NW2d 470 (2018).¹

¹ *Foote Memorial* was not mentioned in the briefing in this case even though it was decided before defendant's brief was filed. Further, prior to argument, defendant did not file a supplemental brief to advise us that it believed that *Foote Memorial* was relevant, let alone controlling, precedent by which this case must be decided. We also take judicial notice of the fact that *Foote Memorial* was similarly not cited in the initial briefing to the *Harston* panel. It was briefed in *Harston* only when the panel *sua sponte* directed the parties to file supplemental briefs addressing it. Thus, it would appear that defendants did not, until invited to by the *Harston* panel, conclude that *Foote Memorial* was worth briefing, let alone dispositive of the case before us.

The holding in *W A Foote Mem Hosp* was that the decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), is to be given retroactive application. Our opinion does not contradict that holding. The *Harston* panel cited *Foote Memorial* for the principal, previously articulated in *Spectrum Health v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012), that “a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation.” In *Foote Memorial*, we were considering whether or not *Covenant*, a decision of a court of supreme jurisdiction overruling a former decision, should be given retroactive application. Similarly, in *Spectrum Health*, the Supreme Court was considering its own previous decision, i.e. a decision of the court of supreme jurisdiction. We are unaware of any case, and none was cited in *Harston*, that holds that this rule applies to decisions of this Court or any other intermediate Court of Appeal. *Streng* was a decision of this Court, not of the Supreme Court. Given the clear demarcation of this principle of retroactivity to decisions of the Supreme Court, it is difficult to understand why the *Harston* court concluded that *Foote Memorial* “controls this case in all respects.” Neither the holding of *Foote Memorial*, i.e. that the Supreme Court’s decision in *Covenant* was retroactive, nor its analysis, i.e. that decisions of “the court of supreme jurisdiction” should be given retroactive application are controlling here.

The “first-out” rule set forth in MCR 7.215(C)(2) was adopted due to the confusion created by conflicting decisions by different panels of this Court. Unfortunately, the *Harston* decision has resulted in exactly the type of confusion the rule was intended to avoid. That confusion is unwarranted. Our published opinion in this case was the first Court of Appeals’ decision addressing the retroactivity of *Streng* and so is precedentially binding pursuant to MCR 7.215(C)(2). *Harston* was the second case addressing the issue and is not precedentially binding.

The clerk is directed to provide a copy of this order to the Supreme Court Reporter of Decisions for publication in the Michigan Appeals Reports.



Presiding Judge

O’Brien, J., would grant the motion for reconsideration.



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

JUL 12 2018

Date



Chief Clerk

APPENDIX 6

Order

Michigan Supreme Court
Lansing, Michigan

April 24, 2020

Bridget M. McCormack,
Chief Justice

158304

David F. Viviano,
Chief Justice Pro Tem

TIM EDWARD BRUGGER, II,
Plaintiff-Appellee,

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

v

SC: 158304
COA: 337394
Midland CC: 15-002403-NO

MIDLAND COUNTY BOARD OF ROAD
COMMISSIONERS,
Defendant-Appellant.

By order of December 4, 2018, the application for leave to appeal the May 15, 2018 judgment of the Court of Appeals was held in abeyance pending the decision in *WA Foote Mem Hosp v Mich Assigned Claims Plan* (Docket No. 156622). On order of the Court, the case having been decided on October 25, 2019, 504 Mich 985 (2019), the application is again considered, and it is GRANTED. The parties shall address: (1) whether *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), lv den 500 Mich 919 (2016), was correctly decided, and if so (2) whether *Streng* “clearly established a new principle of law” and thereby satisfied the threshold question for retroactivity set forth in *Pohutski v City of Allen Park*, 465 Mich 675, 696 (2002), compare *Pohutski*, 465 Mich at 696-697 (citations omitted) (“Although this opinion gives effect to the intent of the Legislature that may be reasonably be inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in [*Hadfield v Oakland Co Drain Comm'r*, 430 Mich 139 (1988) and [*Li v Feldt (After Remand)*, 434 Mich 585 (1990)].”) with *Wayne Co v Hathcock*, 471 Mich 445, 484 (2004) (“Our decision today [overruling *Poletown Neighborhood Council v Detroit*, 410 Mich 616 (1981)] does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which has been mandated by our Constitution since it took effect in 1963.”). See also *Chevron Oil v Huson*, 404 US 97, 106 (1971) (citations omitted) (holding that a decision establishes a new principle of law, such that it may be applied retroactively, if it “overrul[es] clear past precedent on which litigants may have relied . . .”); and if so (3) whether *Streng* should be applied retroactively under the “three factor test” set forth in *Pohutski*.

We further ORDER that this case be argued and submitted to the Court together with the case of *Estate of Brendon Pearce v Eaton County Road Commission*, Docket No. 158069, at such future session of the Court as both cases are ready for submission. The

total time allowed for oral argument shall be 60 minutes: 30 minutes for appellants and 30 minutes for appellees, to be divided at their discretion. MCR 7.314(B)(1).

The Negligence Law Section of the State Bar of Michigan, Michigan Association of Counties, and Michigan Municipal League are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae. Motions for permission to file briefs amicus curiae and briefs amicus curiae regarding these cases should be filed in *Estate of Brendon Pearce v Eaton County Road Commission*, Docket No. 158069, only and served on the parties in both cases.

MARKMAN J. (*concurring*).

I concur with our orders granting leave to appeal in this case and in *Estate of Brendon Pearce v Eaton Co Rd Comm*, Docket No. 158069. I write separately only to encourage the parties and any amici, when addressing the issue of the retroactivity of *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449 (2016), lv den 500 Mich 919 (2016), to address the relevance of the tension identified in *Pohutski v City of Allen Park*, 465 Mich 675 (2002), between “the general rule . . . that judicial decisions are given full retroactive effect” and the exception to that rule of “a more flexible approach . . . where injustice might result from full retroactivity [of a corrected interpretation of the law],” *id.* at 695-696, as well as what consideration should be given to any asserted “injustice” that might result to the prevailing party in cases in which the new rule is applied prospectively only.



a0421

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

April 24, 2020

Clerk

APPENDIX 7

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

TIM EDWARD BRUGGER, II

Plaintiff,

File No.: 15- 2403-NO-B

vs.

Hon.: Michael J. Beale (P44223)

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

Defendants.

Donald N. Sowle (P27010)
Attorney for Plaintiff
GRAY, SOWLE & IACCO, P.C.
1985 Ashland Drive, Ste. A
Mt. Pleasant, MI 48858
Telephone: (989) 772-5932
Facsimile: (989) 773-0538

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CIRCUIT COURT
I hereby certify that
this document is
a true and correct copy
of the original on file
with this office.
MIDLAND COUNTY CLERK &
CLERK OF THE 42nd CIRCUIT COURT
By: Deputy County Clerk

PLAINTIFF'S FIRST AMENDED COMPLAINT

NOW COMES the Plaintiff, Tim Edward Brugger, II, by his attorneys, GRAY, SOWLE & IACCO, P.C. and for his First Amended Complaint against the Defendants states the following:

1. Plaintiff is a resident of the County of Midland, Michigan.
2. Defendant, Board of County Road Commissioners for the County of Midland aka Midland County Road Commission (hereinafter referred to as "Defendant Road Commission") is a governmental agency within the meaning of MCL 691.1401 et. seq. that regularly conducts business in Midland County.
3. The cause of action arose in the County of Midland, State of Michigan.
4. That the amount in controversy exceeds the sum of \$25,000.00 and is otherwise within the jurisdiction of this Court.
5. On or about April 27, 2013, Plaintiff Tim Brugger was operating a 2011 Harley Davidson motorcycle south bound on N. Geneva Rd. near the intersection of W. Saginaw Rd.

6. On said date, Plaintiff, Tim Brugger encountered a large area of N. Geneva Road, which was full of potholes and uneven pavement.

7. At approximately 9:00 p.m. at the above-mentioned date and place, Plaintiff's motorcycle struck large potholes in the travel portion of the road causing him to lose control of his motorcycle, causing the motorcycle to crash, leave the roadway and come to a stop in a ditch adjacent to the roadway.

8. At all times mentioned herein, Tim Brugger was acting in a reasonably prudent manner.

9. That at all times mentioned herein, N. Geneva Rd. near W. Saginaw Rd., is a county road, under the jurisdiction of and controlled, constructed and maintained by the Defendant Road Commission which has a duty to maintain said road in a safe and suitable condition for travel by the public.

10. At all times mentioned herein, Defendant Road Commission had a statutory duty and responsibility to maintain the highway in reasonable repair so that it was reasonably safe and convenient for public travel. MCL 691.1402.

11. The Defendant Road Commission breached that statutory duty by failing to maintain N. Geneva Rd. in reasonable repair and allowed N. Geneva rd. to deteriorate to the point that is was no longer safe and convenient for the general public and Tim Brugger specifically, to travel upon N. Geneva Rd.

12. The Defendant Road Commission's failure to maintain N. Geneva Road in reasonable repair so that it was safe and convenient for the public and Tim Brugger to travel upon N. Geneva Rd. proximately caused Tim Brugger's motorcycle crash and the injuries suffered by Tim Brugger as a result of the crash.

13. On April 27, 2013, and for a period of time prior to that date sufficient to give Defendant Road Commission notice, N. Geneva Rd. was in an unsafe and defective condition.

14. That Defendant Road Commission knew or in the exercise of reasonable diligence should have known of the existence of the defects in N. Geneva Rd. and had a reasonable time to repair the road before April 27, 2013.

15. Defendant's statutory violations include the following acts and omissions among others:

- a. Failure to use reasonable care to make the road reasonably safe for the reasonably foreseeable purposes;

- b. Failure to maintain the road in a reasonably safe condition by paving over or filling in potholes which were allowed to exist for an unreasonable period of time causing the road not to be reasonably safe and convenient for vehicular travel;
- c. Failure to maintain N. Geneva Rd. in reasonable repair so it was reasonably safe and convenient for public travel.
- d. Failure to warn the public adequately of the hazardous condition of N. Geneva Rd. at and near the area where this incident occurred; and,
- e. Other statutory violations as may become known through discovery.

16. That by virtue of the Public Highway Exception to Governmental Immunity, MCL 691.1402, the defense of Governmental Immunity is of no force and effect.

17. As a direct and proximate result of Defendant Road Commission's above mentioned statutory violations and failure to maintain N. Geneva Rd. in reasonable repair, Plaintiff sustained serious and permanent injuries, among others:

- a. Traumatic brain injury;
- b. Subarachnoid hemorrhage following injuries with loss of consciousness;
- c. Spleen laceration;
- d. Acute posthemorrhagic anemia;
- e. Lung contusion;
- f. Right wrist fracture;
- g. Left femur fracture requiring multiple surgeries;
- h. Phalanx fracture;
- i. Intracerebral hemorrhage;
- j. Renal contusion;
- k. Displaced spinous process fractures T3-T7;
- l. Basilar and occipital skull fracture;
- m. Multiple lacerations;
- n. Loss of hearing;
- o. Permanent and serious disfigurement;
- p. Impairment of cognitive functions; and
- q. Other injuries which are noted in voluminous medical records.

18. As a direct and proximate result of Defendant Road Commission's above mentioned statutory violations, Plaintiff has suffered the following damages including but not limited to:

- a. Pain and suffering in the past, present, and on into the future;
- b. Multiple surgeries in the past and he will undergo many surgeries in the future;
- c. A disability in the past and future which has and will prevent him from performing many of his normal activities and which has and will prevent her from enjoying the normal amenities of life;
- d. The expenditure of money for medical, hospital, prescriptions and rehabilitation services which may come due in the past as well as into the future;
- e. A loss of earnings in the past and a loss of earnings and earning capacity on into the future;
- f. Fright and shock in the past, present and into the future;
- g. Mental anguish in the past, present and into the future;
- h. Permanent scarring;
- i. Permanent loss of hearing;
- j. Embarrassment in the past, present and into the future;
- k. Closed head injury and sequelae; and
- l. All other relevant damages allowed by law which become apparent through discovery and trial.

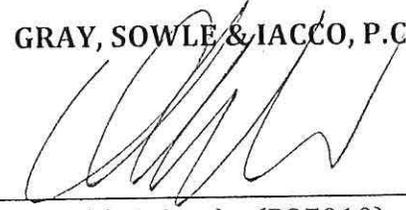
WHEREFORE, the Plaintiff requests that a jury trial be granted and that the jury determine the amount of damages suffered by the Plaintiff as of the date of trial and that the Court enter a judgment in favor of the Plaintiff and against the Defendant for whatever amount the Plaintiff is found to be entitled, together with interest thereon, attorney fees and costs of suit.

Dated: June 1, 2015

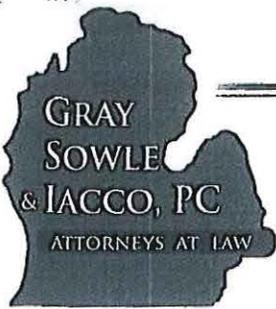
Respectfully submitted,

GRAY, SOWLE & IACCO, P.C.

BY: _____


Donald N. Sowle (P27010)
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APPENDIX 8



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DONALD N. SOWLE
dsowle@gsilaw.com

PATRICK A. RICHARDS
prichards@gsilaw.com

August 15, 2013

NOTICE OF INJURY AND DEFECT PURSUANT TO MCL 691.1404

Janice Leatherman Sagle, Chairman
Donald Terwillegar, Vice Chairman
Deepak Gupta, Manager
Eugene R. Smith, Member
Midland County Board of Road Commissioners/
Midland County Road Commission
2334 N. Meridian Rd.
Sanford, MI 48657



Re: Tim Edward Brugger, II
Our File No: 13-044
Date of Loss: 4-27-13
Location:

Potholes located 494 feet south of the remonumentation marker in the intersection of Geneva and W. Fike Rd. and extends to 506 feet south of same. The potholes are slightly west of the centerline in the southbound lane of travel in Midland County, Michigan. (A copy of the traffic crash report bearing complaint #: 13-002951 authored by the Midland County Sheriff's Department is attached. Also attached is an aerial photo of the location of the potholes and showing the dimensions.)

RECEIVED

SEP 30 2013

This Notice is written pursuant to MCLA 691.1404:

1. On April 27, 2103, Tim Edward Brugger, II was operating a motorcycle southbound on N. Geneva Rd. approximately 494 feet south of the remonumentation marker in the intersection of Geneva and W. Fike Rd. and slightly west of the centerline, he struck potholes and loose gravel on the roadway, lost control and crashed the motorcycle sustaining serious injuries.
2. At all times mentioned herein, N. Geneva Rd. is a trunk line within the the jurisdiction of the Midland County Board of Road Commissioners in Midland County and further was under its care and control and open to the public for travel.
3. The incident in which serious injuries occurred to Tim Edward Brugger, II was caused by the negligence of the Midland County Board of Road Commissioners in Midland County in failing to perform and/or negligently performing reasonable maintenance and repair of the roadway to alleviate dangerous road surface conditions, loose gravel and to fill in potholes.

Notice of Injury and Defect

August 15, 2013

Page Two.

4. That as a direct and proximate result of said defects, potholes and loose gravel in the roadway at said location, the motorcycle operated by Tim Edward Brugger, II went out of control, and crashed causing serious injuries to Tim Edward Brugger which include but are not limited to closed head injury, two head lacerations, left frontal, temporal and occipital skull fractures, left femur fracture requiring rod and screws and serious road rash.

5. Witnesses to the accident known at this time include:

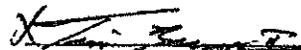
- A. Timothy Edward Brugger, II
1240 E. Maple Rd., Clare, MI 48617
- B. Scott Lawrence Rydman
4432 W. Fike Rd., Coleman, MI 48618
- C. See police report attached.

6. The poor maintenance and repairs caused the condition, potholes and loose gravel that directly affected the vehicular traffic on the improved portion of this roadway so that travel was not reasonably safe.

7. The Midland Board of County Road Commissioners and the Midland County Road Commission had actual and/or constructive notice of the defects, potholes and loose gravel as referenced above more than 30 days prior to the date of the incident causing injuries to Tim Edward Brugger, II.

If you need additional information, please feel free to contact our office.

Date: 8/15/13

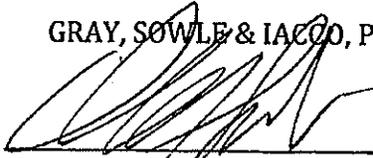


Tim Edward Brugger, II

Date: 8/15/13

Respectfully submitted,

GRAY, SOWLE & IACCO, P.C.

By: 

Donald N. Sowle (P27010)
Attorney for Plaintiff
4985 Ashland Drive, Suite A
Mt. Pleasant, MI 48858
(989) 772-5932

DNS/be
Enclosures

APPENDIX 9

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

TIM EDWARD BRUGGER, II

Plaintiff,

vs.

File No.: 15-2403 -NO B
Honorable: HON: MICHAEL J. BEALE
P44233

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

Defendants.

Donald N. Sowle (P27010)
Attorney for Plaintiff
GRAY, SOWLE & IACCO, P.C.
1985 Ashland Drive, Ste. A
Mt. Pleasant, MI 48858
Telephone: (989) 772-5932
Facsimile: (989) 773-0538

A TRUE COPY
Ann Manary
ANN MANARY
MIDLAND COUNTY CLERK &
CLERK OF THE 42nd CIRCUIT COURT

COMPLAINT AND JURY DEMAND

There is no other pending or resolved civil action arising out of the transaction or occurrence alleged in the complaint.

NOW COMES the Plaintiff, Tim Edward Brugger, II, by his attorneys, GRAY, SOWLE & IACCO, P.C. and complains against the Defendant as follows:

1. Plaintiff is a resident of the County of Midland, Michigan.
2. Defendant, Board of County Road Commissioners for the County of Midland aka Midland County Road Commission (hereinafter referred to as "Defendant Road Commission") is a governmental agency within the meaning of MCL 691.1401 et. seq. that regularly conducts business in Midland County.
3. The cause of action arose in the County of Midland, State of Michigan.

4. That the amount in controversy exceeds the sum of \$25,000.00 and is otherwise within the jurisdiction of this Court.

5. On or about April 27, 2013, Plaintiff Tim Brugger was operating a 2011 Harley Davidson motorcycle south bound on N. Geneva Rd. near the intersection of W. Saginaw Rd.

6. On said date, Plaintiff, Tim Brugger encountered a large area of N. Geneva Road which was full of potholes and uneven pavement.

7. At approximately 9:00 p.m. at the above-mentioned date and place, Plaintiff's motorcycle struck large potholes in the travel portion of the road causing him to lose control of his motorcycle, causing the motorcycle to crash, leave the roadway and come to a stop in a ditch adjacent to the roadway.

8. At all times mentioned herein, Tim Brugger was acting in a reasonably prudent manner.

9. That at all times mentioned herein, N. Geneva Rd. near W. Saginaw Rd., is a county road, under the jurisdiction of and controlled, constructed and maintained by the Defendant Road Commission which has a duty to maintain said road in a safe and suitable condition for travel by the public.

10. At all times mentioned herein, Defendant Road Commission had a statutory duty and responsibility to maintain the highway in reasonable repair so that it was reasonably safe and convenient for public travel. MCL 691.1402.

11. The Defendant Road Commission breached that statutory duty by failing to maintain N. Geneva Rd. in reasonable repair and allowed N. Geneva rd. to deteriorate to the point that is was no longer safe and convenient for the general public and Tim Brugger specifically, to travel upon N. Geneva Rd.

12. The Defendant Road Commission's failure to maintain N. Geneva Road in reasonable repair so that it was safe and convenient for the public and Tim Brugger to travel upon N. Geneva Rd. proximately caused Tim Brugger's motorcycle crash and the injuries suffered by Tim Brugger as a result of the crash.

13. On April 27, 2013, and for a period of time prior to that date sufficient to give Defendant Road Commission notice, N. Geneva Rd. was in an unsafe and defective condition.

14. That Defendant Road Commission knew or in the exercise of reasonable diligence should have known of the existence of the defects in N. Geneva Rd. and had a reasonable time to repair the road before April 27, 2013.

15. Defendant's negligence and statutory violations include the following acts and omissions among others:

- a. Failure to use reasonable care to make the road reasonably safe for the reasonably foreseeable purposes;
- b. Failure to maintain the road in a reasonably safe condition by paving over or filling in potholes which were allowed to exist for an unreasonable period of time causing the road not to be reasonably safe and convenient for vehicular travel;
- c. Failure to maintain N. Geneva Rd. in reasonable repair so it was reasonably safe and convenient for public travel.
- d. Failure to warn the public adequately of the hazardous condition of N. Geneva Rd. at and near the area where this incident occurred; and,
- e. Other acts of negligence as may become known through discovery.

16. That by virtue of the Public Highway Exception to Governmental Immunity, MCL 691.1402, the defense of Governmental Immunity is of no force and effect.

17. As a direct and proximate result of Defendant Road Commission's above mentioned acts of negligence and/or gross negligence and statutory violations and failure to maintain N. Geneva Rd. in reasonable repair, Plaintiff sustained serious and permanent injuries, among others:

- a. Traumatic brain injury;
- b. Subarachnoid hemorrhage following injuries with loss of consciousness;
- c. Spleen laceration;
- d. Acute posthemorrhagic anemia;
- e. Lung contusion;
- f. Right wrist fracture;
- g. Left femur fracture requiring multiple surgeries;
- h. Phalanx fracture;
- i. Intracerebral hemorrhage;
- j. Renal contusion;
- k. Displaced spinous process fractures T3-T7;

- l. Basilar and occipital skull fracture;
- m. Multiple lacerations;
- n. Loss of hearing;
- o. Permanent and serious disfigurement;
- p. Impairment of cognitive functions; and
- q. Other injuries which are noted in voluminous medical records.

18. As a direct and proximate result of Defendant Road Commission's above mentioned acts of negligence and/or gross negligence, Plaintiff has suffered the following damages including but not limited to:

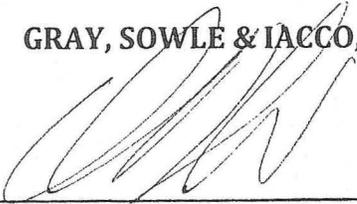
- a. Pain and suffering in the past, present, and on into the future;
- b. Multiple surgeries in the past and he will undergo many surgeries in the future;
- c. A disability in the past and future which has and will prevent him from performing many of his normal activities and which has and will prevent her from enjoying the normal amenities of life;
- d. The expenditure of money for medical, hospital, prescriptions and rehabilitation services which may come due in the past as well as into the future;
- e. A loss of earnings in the past and a loss of earnings and earning capacity on into the future;
- f. Fright and shock in the past, present and into the future;
- g. Mental anguish in the past, present and into the future;
- h. Permanent scarring;
- i. Permanent loss of hearing;
- j. Embarrassment in the past, present and into the future;
- k. Closed head injury and sequelae; and
- l. All other relevant damages allowed by law which become apparent through discovery and trial.

WHEREFORE, the Plaintiff requests that a jury trial be granted and that the jury determine the amount of damages suffered by the Plaintiff as of the date of trial and that the Court enter a judgment in favor of the Plaintiff and against the Defendant for whatever amount the Plaintiff is found to be entitled, together with interest thereon, attorney fees and costs of suit.

Dated: 2/19/15

Respectfully submitted,

GRAY, SOWLE & IACCO, P.C.

BY: 

Donald N. Sowle (P27010)
Attorney for Plaintiff
1985 Ashland Drive, Ste. A
Mt. Pleasant, MI 48858
Telephone: (989) 772-5932
Facsimile: (989) 773-0538

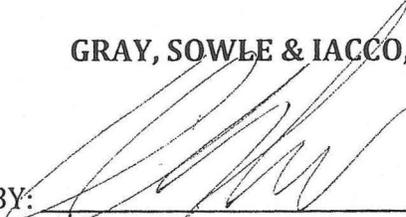
JURY DEMAND

Plaintiff hereby demands trial by jury.

Dated: 2/19/15

Respectfully submitted,

GRAY, SOWLE & IACCO, P.C.

BY: 

Donald N. Sowle (P27010)
Attorney for Plaintiff
1985 Ashland Drive, Ste. A
Mt. Pleasant, MI 48858
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Facsimile: (989) 773-0538

APPENDIX 10

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

TIM EDWARD BRUGGER, II,

Plaintiff,

CASE NO. 15-2403-NO B

v

HON. MICHAEL J. BEALE

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

Defendant.

Donald N. Sowle (P27010)
GRAY SOWLE & IACCO, PC
Attorney for Plaintiff
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D. Adam Tountas (P68579)
Charles J. Pike (P77929)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendant Midland County Road
Commission
100 Monroe Center NW
Grand Rapids, MI 49503-2802
(616) 774-8000

DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

NOW COMES Defendant, the Midland County Road Commission ("Road Commission"), by and through its attorneys, Smith Haughey Rice & Roegge, and states for its motion for summary disposition as follows:

1. In April of 2013, Tim Edward Brugger, II ("Mr. Brugger") crashed his motorcycle in Warren Township.
2. In order to recover for his injuries Mr. Brugger is suing the Road Commission.

3. Mr. Brugger's theory of liability is that a roadway defect, as opposed to some other factor, was responsible for his crash.

4. In order to sustain his claims, Mr. Brugger was obligated to serve a statutorily-compliant pre-suit notice. He did not do so.

5. Therefore, Mr. Brugger's lawsuit must be dismissed.

WHEREFORE, the Road Commission respectfully requests that this Honorable Court enter an Order dismissing Mr. Brugger's lawsuit, with prejudice; and providing any other relief deemed to be equitable and just.

RESPECTFULLY SUBMITTED,

DATED: December 20, 2016

D. Adam Tountas (P68579)
Charles J. Pike (P77929)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendant Midland County Road
Commission
100 Monroe Center NW
Grand Rapids, MI 49503-2802
(616) 774-8000

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

TIM EDWARD BRUGGER, II,
Plaintiff,

CASE NO. 15-2403-NO B

v

HON. MICHAEL J. BEALE

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

Defendant.

Donald N. Sowle (P27010)
GRAY SOWLE & IACCO, PC
Attorney for Plaintiff
1985 Ashland Drive, Suite A
Mt. Pleasant, MI 48858
(989) 772-5932

D. Adam Tountas (P68579)
Charles J. Pike (P77929)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendant Midland County Road
Commission
100 Monroe Center NW
Grand Rapids, MI 49503-2802
(616) 774-8000

**BRIEF IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY DISPOSITION**

I. INTRODUCTION

In April of 2013, Tim Edward Brugger II ("Mr. Brugger") crashed his motorcycle on North Geneva Road in Warren Township. In order to recover for his injuries, Mr. Brugger is suing the Midland County Road Commission ("Road Commission").

Mr. Brugger's theory of liability is that a roadway defect, as opposed to some other factor, was responsible for the crash. In order to sustain his claims, Mr. Brugger was obligated to serve a statutorily-compliant pre-suit notice. He did not do so. Therefore, this lawsuit must be dismissed.

II. FACTUAL BACKGROUND

On April 27, 2013, Mr. Brugger spent the evening hours at a friend's party in Warren Township; around 9:00 p.m., he decided to leave the gathering. Shortly thereafter; Mr. Brugger hopped on his motorcycle, left his friend's driveway, and headed southbound on North Geneva Road. (**Exhibit A**, First Amended Complaint, ¶ 5).¹

As Mr. Brugger rode towards the intersection of North Geneva and West Saginaw, he encountered a section of roadway that was "full of potholes and uneven pavement." (**Exhibit A**, ¶ 6). He "struck those potholes, lost control of his motorcycle, and crashed on the roadway." (**Exhibit A**, ¶ 7). Mr. Brugger sustained a host of significant injuries as a result of the crash. (**Exhibit A**, ¶17).

On August 15, 2013, 110 days after crashing his motorcycle, Mr. Brugger served the Road Commission with a pre-suit notice of intent to sue. The notice was entitled "Notice of Injury and Defect Pursuant to MCL 691.1404." (**Exhibit B**, Pre-Suit Notice).

Mr. Brugger mailed his notice to the Road Commission's board members and Managing Director. (**Exhibit B**). It identified the location of his crash; described the nature of his alleged injuries; identified potential witnesses to his crash; and blamed the Road Commission for the same. (**Exhibit B**).

Mr. Brugger did not serve a copy of his pre-suit notice on the Midland County Clerk.

III. STANDARD OF REVIEW

MCR 2.116(C)(7) permits summary disposition where a claim is barred because of immunity granted by law. A motion brought under that subrule may be supported by documentary evidence. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). However, unlike a motion brought under

¹ This Motion seeks the dismissal of Mr. Brugger's lawsuit on the basis of statutory governmental immunity under MCR 2.116(C)(7). Thus, for the purposes of this motion only, the Road Commission does not contest the allegations in Mr. Brugger's First Amended Complaint, which govern this lawsuit. However, in citing paragraphs from that pleading, the Road Commission does not intend to admit or in any way concede the accuracy of the same within the context of the larger litigation. Rather, the Road Commission is entitled to summary disposition because, even if the factual allegations in Mr. Brugger's First Amended Complaint are true, this lawsuit must be dismissed because of his failure to file a statutorily-compliant pre-suit notice.

subrule (C)(10), a movant under (C)(7) is not required to file supportive material, and the opposing party need not reply with any supportive material. *Id.*

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

As indicated above, for the purpose of this motion only, the Road Commission is not disputing the contents of Mr. Brugger's first amended complaint. This is because, given the relevant pre-suit notice requirements, even if those contents are deemed admitted, this lawsuit must be dismissed.

IV. LAW AND ARGUMENT

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

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

Mr. Brugger's lawsuit relies upon the GTLA's so-called "highway exception," which is codified at MCL 691.1402(1). The relevant portion of that statute provides as follows:

Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21.

In order to bring a claim under the highway exception, however, a plaintiff is required to comply with one of two pre-suit notice requirements. The first of those requirements, which applies to highway defect claims brought against the State, is contained within MCL 691.1404(1). The second notice provision, which applies to claims brought against a county road commission, says this:

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

* * *

However, a board of county road commissioners is not liable for damages to a person or property sustained by a person upon a county road because of a defective county road ... unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners. MCL 224.21(3).

These various notice requirements are mandatory, and a plaintiff's failure to comply with them requires the dismissal of his or her lawsuit. *McLean v City of Dearborn*, 302 Mich App 68, 74; 836 NW2d 916 (2013) (holding that the failure to provide adequate notice under the highway defect provision of the GTLA is fatal to a plaintiff's claim against a governmental agency); and *Rowland v Washtenaw County Road Commission*, 477 Mich 197, 200 – 201; 731 NW2d 41 (2007) (same holding). Under those circumstances, dismissal is mandatory "no matter how much prejudice is actually suffered" by the plaintiff submitting the defective notice. *Rowland, supra* at 219; see also *McCahan v Brennan*, 492 Mich

730, 746 – 747; 822 NW2d 747 (2012) (holding that a court may not “engraft an actual prejudice requirement or otherwise reduce the obligation to comply fully with statutory notice requirements” mandated by our state legislature).

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

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

In *Streng v Board of Mackinac County Road Commissioners*, ____ Mich App ____; ____ NW2d ____ (2016) (Docket No. 323226) (**Exhibit C**), the Michigan Court of Appeals recently confirmed the highway exception’s notice requirements. In that case, which also involved a county road commission, several challenges were made with respect to the plaintiff’s pre-suit notice. While resolving those challenges, the Court made several pronouncements, many of which are dispositive, here.

As an initial matter, the Court confirmed that, based upon the plain language of the GTLA, all highway exception claims being brought against a county road commission are governed by the notice requirements found in MCL 224.21, a statute that is expressly referenced in the portion of the GTLA creating the highway exception. *Streng* at 16 – 17. See also MCL 691.1402(1) (“The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283 MCL 224.21.”).

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

While issuing its opinion, the Court also noted that, over the past several decades, a level of confusion has arisen regarding which notice provision applies to highway exception claims being brought against a county road commission. More specifically, it found that certain Courts have been

inappropriately applying the notice requirement found in MCL 691.1404, which pertains to claims against the State. However, the *Streng* Court concluded that this confusion did not constitute a valid reason to ignore the governing statute's plain meaning:

The language of MCL 224.21(2), when read closely, dictates that only the GTLA's provisions of law that deal with "liability" apply to counties and that under MCL 691.1402(1), procedural and remedial provisions should be those of MCL 224.21. The GTLA expressly directs that a person injured on a county road to proceed in accordance with MCL 224.21. While the GTLA is a statute of general governmental immunity, MCL 224.21 is the specific statute in regards to claims of liability against county road commissioners for accidents that occur on county roads. Despite multiple legislative amendments to the GTLA and the highway code, the notice provisions of MCL 224.21 remain in effect and have not been substantively changed. To follow the procedural requirements of the GTLA rather than those of MCL 224.21 – particularly in light of the fact that the GTLA expressly points in the direction of the latter – would render the specific terms of MCL 224.21 nugatory, something we avoid, whenever possible. *Streng* at 15 – 16, internal citations and quotations omitted.

In short, then, under the GTLA (and *Streng*), MCL 224.21 controls all highway exception claims being brought against a county road commission. This includes the claims being made in this lawsuit.

C. Mr. Brugger's pre-suit notice does not comply with MCL 224.21 and, therefore, this lawsuit must be dismissed.

Under MCL 224.21, no suit can be brought unless, as a pre-condition to the same, the Plaintiff "serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the Board of County Road Commissioners." MCL 224.21(3). Mr. Brugger's notice failed to comply with both of these requirements.

First, Mr. Brugger's pre-suit notice was late. The underlying crash occurred on April 27, 2013. Yet, his notice was not served until August 15, 2013, which is 110 days later. (**Exhibit B**).

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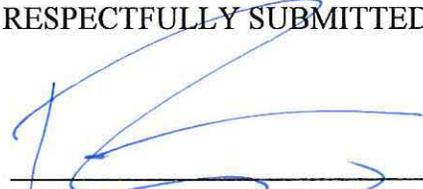
Second, as the face of Mr. Brugger's notice reflects, it was served upon each member of the Road Commission, as well as that entity's Managing Director. It was not, however, served upon the Midland County Clerk. (**Exhibit B**).

In light of the above, Mr. Brugger's notice did not comply with MCL 224.21 and, as a result, this lawsuit must be dismissed.

V. CONCLUSION

The Road Commission respectfully requests that this Honorable Court enter an Order dismissing Mr. Brugger's lawsuit, with prejudice; and providing any other relief deemed to be equitable and just.

RESPECTFULLY SUBMITTED,



DATED: December 20, 2016

D. Adam Tountas (P68579)
Charles J. Pike (P77929)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendant Midland County Road
Commission
100 Monroe Center NW
Grand Rapids, MI 49503-2802
(616) 774-8000

SMITH HAUGHEY RICE & ROEGGE, A Professional Corporation

APPENDIX 11

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

TIM EDWARD BRUGGER, II

Plaintiff,

File No.: 15-2403-NO B

Hon.: Michael J. Beale (P44233)

vs.

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

Defendants.

Donald N. Sowle (P27010)
Attorney for Plaintiff
GRAY, SOWLE & IACCO, P.C.
1985 Ashland Drive, Ste. A
Mt. Pleasant, MI 48858
Telephone: (989) 772-5932
Facsimile: (989) 773-0538

D. Adam Tountas (P68579)
Charles F. Behler (P10632)
Charles J. Pike (P77929)
SMITH HAUGHEY RICE & ROEGGE
Attorneys for Defendant Midland
County Road Commission
100 Monroe Center NW
Grand Rapids, MI 49503-2802
Telephone: (616) 774-8000
Facsimile: (616) 774-2461

PLAINTIFF TIM BRUGGER'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Plaintiff, Tim Edward Brugger, II, by and through his attorneys, Gray, Sowle & Iacco, P.C. provide the following response to Defendant's Motion for Summary Disposition:

1. Plaintiff admits that he crashed his motorcycle in April 2013.
2. Plaintiff admits that he is suing the road commission.
3. Plaintiff admits that his theory of liability is that a roadway defect was responsible for his crash.

4. Plaintiff admits that a statutory pre-suit notice must be served. Plaintiff denies that he failed to file a notice that was compliant with the applicable law in Michigan as expressly provided for in *Rowland v. Washtenaw Co Rd Com'n*, 477 Mich. 197 (2007).
5. This lawsuit should not be dismissed for the grounds set forth in Plaintiff's supportive brief.

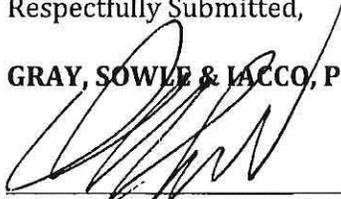
WHEREFORE, Tim Edward Brugger, II respectfully requests this Honorable Court to enter an Order denying Defendant's Motion for Summary Disposition.

DATE: February 3, 2017

Respectfully Submitted,

GRAY, SOWLE & IACCO, P.C.

By:


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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

TIM EDWARD BRUGGER, II

Plaintiff,

File No.: 15-2403-NO B

Hon.: Michael J. Beale (P44233)

vs.

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

Defendants.

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**PLAINTIFF TIM BRUGGER'S BRIEF IN SUPPORT OF HIS RESPONSE TO DEFENDANT'S
MOTION FOR SUMMARY DISPOSITION**

INTRODUCTION

The issue in this motion is whether or not Plaintiff gave the appropriate pre-suit notice to the Defendant pursuant to the Governmental Tort Liability Act MCL 691.1401 et seq. (GTLA) Plaintiffs, on August 15, 2013, gave their notice of injury and defect pursuant to MCL 691.1404, and as directed by Michigan Supreme Court in *Rowland v. Washtenaw County Rad Com'n*, 477 Mich. 197 (2007) which expressly directs a Plaintiff to comply with

the 120-day notice provision found in Sec. 1404. Defendant in this case has never contested Plaintiff's notice until now.

Defendant's argument that it is entitled to Summary Disposition as to Plaintiff's Complaint is based on the recent Court of Appeals decision of *Streng v. Board of County Road Commissioners*, 315 Mich. App. 449 (2016) (Docket Number 323226) 2016WL2992564. Defendant argues that the Court of Appeals has recently "confirmed" that the 60-day notice provision found in MCL 224.21, and not the 120-day notice provision provided for MCL 691.1404, is applicable to cases involving county road commissions.

In reality, the *Streng* Court did not "confirm" the applicable notice requirements, but instead resurrected a statutory provision that had been deemed unconstitutional and had not been applied in almost 50 years in claims involving county road commissions. More importantly, the decision is in direct contravention of decades of precedent from both the Supreme Court and the Court of Appeals regarding the applicable notice provision for county road cases. (See Footnote 4 to the *Streng* opinion, which provides a partial list of the cases.)

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

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

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

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

The Supreme Court in *Rowland* overruled *Brown* to the extent that a requirement of "actual prejudice" was required to show that a late notice was defective. The Supreme Court concluded that the plain language of MCL 691.1404 required that the notice **must be served on the county road commission within 120-days of the injury**. *Id. at 200*.

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

The Court of Appeals in *Streng* determined that the Supreme Court, as well as all other prior decisions, must have been simply "**overlooking**" the applicability of MCL 224.21. *Streng* at Slip op. 7. Accordingly, they completed their own analysis and determined that MCL 224.21 was the applicable notice provision in cases involving county road commissions.

Obviously, Plaintiff disagrees with the findings of *Streng* noting that it completely disregards the prior decisions of the Supreme Court. The Supreme Court in *Rowland* explicitly states that the 120-day notice provision MCL 691.1404 applies to cases involving

road commissions. *Rowland* at 200. **Rowland has never been overruled.** Nor can it be argued the Court of Appeals decision in *Streng* overrules the holding in *Rowland* that the 120-day notice provision applies in county road commission cases. This Court is obligated to follow the decision in *Rowland* and deny Defendant's motion.

Even, assuming that this Court is bound to follow the *Streng* decision, Plaintiff believes there are equitable and constitutional reasons why *Streng* should not apply to the Plaintiff in this case.

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

Finally, this Court should once again revisit the equal protection issues that were not addressed in *Streng*. Clearly having to distinct notice provisions that cover identical causes of actions is constitutionally suspect, and deserves analysis.

BACKGROUND

On April 27, 2013 Tim Brugger was operating his motorcycle southbound on North Geneva Road when he struck two potholes on the roadway and lost control and crashed his

motorcycle sustaining serious injuries. His injuries included, but are not limited to, a closed head injury, two head lacerations, left frontal, temporal and occipital skull fractures, left femur fracture requiring rod and screws, and serious road rash. It was Plaintiff's allegation that the poor maintenance and repairs caused the condition of the potholes and loose gravel that directly caused Mr. Brugger to lose control of his motorcycle and crash.

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

Plaintiff does not dispute that he did not comply with MCL 224.21 (i.e. provide notice within 60-days and serve a copy of his notice of injury on the Midland County Clerk). What Plaintiff does dispute is the applicability of MCL 224.21 to his claim against the Midland County Road Commissioners. It is Plaintiff's position that *Streng* was wrongly decided and that MCL 691.1404 was the applicable notice period to his claim and not MCL 224.21. Plaintiff would argue that this Court must follow *Rowland* and its holding that the 120-day notice provision applies to Plaintiff's claim and deny Defendants motion. Further, to the extent this Court is required to follow *Streng*, Plaintiff would argue that his case is distinguishable based on equitable and constitutional arguments that were not made in *Streng*, and, hence never addressed by the *Streng* court.

STANDARD OF REVIEW

Defendants have filed their Motion for Summary Disposition pursuant to MCR 2.116(c)(7), which provides that summary disposition may be granted where a claim is

barred because of immunity granted by law. Unlike a motion under subsection (c)(10), a movant under MCR 2.116 (c)(7) is not required to file supportive material, and the opposing party need not reply with supportive material. The contents of the Complaint are accepted as true unless contradicted by documentation submitted by the movement. *Patterson v. Kleiman*, 447 Mich. 429, 434 fn 6 (1994).

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

LEGAL ANALYSIS

I. Prior to *Streng v. Board of Mackinac County Road Commissioners*, Michigan Courts have consistently applied the notice provision found in MCL 691.1404(1) to cases involving county road commissions.

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

Specifically, in *Brown*, the Supreme Court held that the notice provision found in MCL 691.1404(1) applied to a case against Manistee County Road Commission after the plaintiff lost control of his motorcycle near a pothole. The court in *Brown* examined the two different notice provisions, primarily with reference to the fact that the notice under MCL 224.21 provided that notice should be given within 60-days of the occurrence, whereas notice under MCL 691.1404 must be provided within 120-days of the occurrence. The Supreme Court found no rational basis to support a 60-day notice requirement for claims against county road commissions, where a 120-day notice requirement applied to all other claims against other governmental entities with jurisdiction over highways. Thus,

the Supreme Court declared MCL 224.21 unconstitutional and affirmatively held that the 120-day notice provision applied in action for personal injuries against a county road commission. *Brown* at 356. However, the *Brown* court also found that if the road commission did not suffer "actual prejudice", the plaintiff's claim was not barred by failure to give notice within the requisite 120-day time period. *Id.* at 366.

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

MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. As this Court stated in *Robertson v. DaimlerChrysler Corp.*, 465 Mich 732 (2002), "The Legislature is presumed to have intended the meaning it has plainly expressed, and if the expressed language is clear, judicial construction is not permitted and the statute must be enforced as written." **Thus, the statute requires notice to be given as directed, and notice is adequate if it is served within 120 days** and otherwise complies with the requirements of the statute, i.e., it specifies the exact location and the nature of the defect, the injury sustained, and the names of the witnesses known at the time of by the claimant, no matter how much prejudice is *actually suffered*. Conversely, the notice provision is not satisfied if notice is served **more than 120 days** after the accident *even if there is no prejudice*. *Rowland* et 219. (Emphasis added).

Contrary to the Court of Appeals' conclusion in *Streng*, the portion of *Brown* finding MCL 224.21 to be unconstitutional was never overturned or addressed by the Supreme Court or the Legislature. *Rowland* only considered whether the "actual prejudice"

"analysis" espoused in *Brown* was correctly decided; it did not discuss the portion of *Brown* finding that MCL 224.21 was unconstitutional as a violation of equal protection. *Id.* at 210.

To support its conclusion that *Brown* was overruled in its entirety, the court in *Streng* focused on the language in *Rowland* that stated, "Nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed". *Streng* at Slip op. 5 citing *Rowland* 477 Mich. at 214. Importantly, *Hobbs v. Michigan State Highway Dept.*, 398 Mich. 90 (1976) case was not a county road commission case and only dealt with the "actual prejudice" issue. There was no discussion of equal protection violations relative to the two notice provisions. It was solely within this context that the Supreme Court in *Rowland* stated, "Nothing can be saved". Therefore, there is no basis to conclude that *Brown's* constitutional examination of the 60-day notice provision in MCL 224.21 has been overruled.

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

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

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

The Court of Appeals in *Streng* took the position that *Rowland's* "silence" with regard to the equal protection argument in *Brown* as an indication that the Supreme Court had somehow overruled *Brown's* holding that MCL 224.21 was unconstitutional. *Streng* Slip op. at 7. As the Court stated in *Streng*:

In sum, Courts appeared to have been **overlooking the time limit, substantive requirements, and service procedures applicable to notice under MCL 224.221(3)** when the responsible body is a county road commission. *Id* at 7. (emphasis added)

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

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

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

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

Furthermore, it seems unlikely that the Supreme Court would overturn precedent without a discussion and a thoroughly reasoned rationale. To infer that the Supreme Court just casually overruled a constitutional equal protection argument in *Brown* without any discussion defies logic. Instead, arguably, the exact opposite seems more likely. In other

words, the Supreme Court had no need to discuss the portion of *Brown's* ruling that it did not intend to overturn.

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

The Court of Appeals and all other lower courts are bound to follow the decisions of the Supreme Court, regardless of whether they are well reasoned or whether the Court of Appeals believes that the decisions to be correct, unless and until they are modified or overruled by the Supreme Court. *People v. Metamora Water Service, Inc.*, 276 Mich. App. 376 (2007). As the Supreme Court explained in *Boyd v. W.G. Wade Shows*, 443 Mich. 515, 532 (1993) overruled on other grounds *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28 (2007):

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

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

¹ Defendant will likely point out that the Supreme Court has recently denied the Defendant in *Streng's* application for leave. Plaintiff would remind this Court that the denial for an application for leave to appeal is ordinarily an act of judicial discretion. Judicially, a court's refusal to hear a discretionary appeal means nothing other than the court would not hear the case. The denial of a writ of certiorari imports no expression of opinion upon the merits of the case as the bar has been told many times. *United States v. Carver*, 260 US 482, 490, 43 S.Ct. 181, 67 lawyers edition L.E.D. 361 (1923). Michigan has followed a similar rule stating that a denial of leave to appeal "means that the Supreme Court expresses no

II. The Court of Appeals decision in *Streng* should not be applicable to the facts and circumstances of the current case for equitable reasons.

A. Equitable Tolling.

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

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

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

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

present view with respect to the legal questions dealt within the opinion of the Court of Appeals." *Frishett v. State Farm Mut. Automobile Ins. Co.*, 378 Mich. 733 (1966).

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

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

This approach was specifically rejected in a prior unpublished Court of Appeals decision in which some of the same arguments raised in *Streng* were addressed. In the prior case the Court of Appeals applied the 120-day notice provision to the county drain commission despite the plaintiff's argument to the contrary. *Ficke v. Lenawee County Drain Commissioner*, unpublished opinion Court of Appeals issued May 3rd, 2011 (docket number 296076 attached as **Exhibit 1**.)

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

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

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

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

The *Rowland* Court did not expressively consider or address its holding in *Brown* that the 60-day notice provision set forth in MCL 224.21 is unconstitutional, and thus, that the 120-day provision applies to actions against county road commissions. However, it applied the 120-day notice provision to the Plaintiff's claim against the Washtenaw County Road Commission. And, following *Rowland* our Supreme Court has likewise applied the 120-day notice provision when peremptorily reversing this Court's decision on the basis of Plaintiff's failure to provide timely notice to Defendant County Road Commissions under MCL 691.1401, in *Mauer v. Topping*, 480 Mich. 912 (2007) and *Leech v. Cramer*, 479 Mich. 858 (2007). We therefore conclude that both *Brown* and *Rowland* require that the 120-day

notice provision set forth in MCL 691.1404(1) be applied to actions against county road commissions. *Id* at 5.

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

As noted above, the *Ficke* court was not alone. No case until *Streng* applied the 60-day notice provision to cases involving the county road commission for over four decades. It is a fair statement to say that the issue was settled and established law that the 120-day notice provision applied to cases involving county road commissions. In fact, the case law is so well settled that even the county road commission defendant in *Streng* argued for the application of the 120-day notice provision. The Defendant in this case never specifically raised any objection to the timeliness or the manner of service of Defendant's notice of injury and defect. No affirmative defense alleged that the Plaintiff had failed to timely provide notice under MCL 224.21 or that the notice was not served on the County Clerk. (**Exhibit 2**). It is clear that this Defendant believed that the 120-day notice provision of MCL 691.1404 was applicable.

There was never a dispute that Plaintiff's notice was beyond the 60 days or that it was not served on the County Clerk. If the Defendant believed that the 60-day notice was applicable, they could have brought this motion after the complaint was filed rather than conduct months of discovery when there was no dispute that the notice was provided beyond the 60 days and not served on the County Clerk.

It is Plaintiff's position that if such well learned appellate judges, and attorneys who routinely represent county road commissions could be mistaken as to the applicability of

MCL 691.1404, then the Plaintiff should not be penalized for a similar confusion about its application. Just as the Supreme Court in *Bryant* tolled the statute of limitations, based on what Justice Markman called an “understandable confusion” of the law, this Court would be well within its discretion to extend the time allowed to provide notice pursuant to MCL 224.21 or in the alternative find that Plaintiff’s current notice was timely and properly served.

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

B. Prospective Application

Although the general rule is that judicial decisions are given full retroactive effect *Hyde v. University of Michigan Board of Regents*, 426 Mich. 223 (1986). A more flexible approach has been deemed warranted where injustice might result from full retroactivity. *Lindsey v. Harper Hospital*, 455 Mich. 56 (1997). For example, a holding that overrules settled precedent may properly be limited to prospective application. *Id.* Michigan courts have adopted a three factored test when deciding whether or not a decision should have retroactive application. Those factors are 1. The purpose to be served by the new rule, 2. The extent of reliance on the old rule, and 3. The effective retroactivity on the administration of justice. *People v. Hampton*, 384 Mich. 669, 674 (1971). The three part

test was more recently adopted by the Michigan Supreme Court in *Pohutski v. City of Allen Park*, 465 Mich. 675, 696-697 (2002).

Essentially, the *Streng* court has created a new rule of law by holding that the MCL 224.21 notice provision is now applicable to county road commission cases. Under the first part of the test presumably the purpose of the rule is to correct an error in interpretation of the governmental immunity statute that has been "overlooked" by the courts and litigants for decades. Prospective application would not interfere with the purpose of the *Streng* case. There is no compelling reason that decision needs to be given retroactive effect. Second, there has been a nearly 50-year reliance on the prior application of the 120-day notice provision to cases involving county road commissions. All of the published decisions that have considered the issue have found that since *Brown's* ruling that the 60-day notice provision was unconstitutional have applied the 120-day to road commission cases. *Streng* Slip op. at 5. In fact, to Plaintiff's knowledge all county road commissions, prior to *Streng*, have agreed that the 120-day notice provision applies to them and have not challenged the *Brown* decision. Prospective application would acknowledge the reliance by all parties involved in these types of cases. As for the third prong of the test, if the decision is applied retroactively, countless cases which have relied on the Supreme Court's own clear and unambiguous language that the 120-day notice provision applies will be dismissed, and it would amount to a gross miscarriage of justice for litigants who have operated under undisputed decades of legal authority regarding the applicable notice provision.

This Court has the equitable authority to find that *Streng* should be given only prospective application and not applied in to the facts and circumstances of Mr. Brugger's case.

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

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

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

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

While MCL 224.21 limited itself to cases involving county road commissions. MCL 691.1404 has a much broader application. Nothing in section 1404 limits application to county road cases. Specifically, Section 1404 expressly applies to "**any** recovery for injuries sustained by reason of **any** defective highway" MCL 691.1404(1)(emphasis added). As the Supreme Court in *Brown* noted "it is clear that MCL 691. 1404 and MCL 224.21 govern identical causes of action for defective road and highway maintenance". *Brown* at 361.

Having two equally applicable but fundamentally different notice provisions for no apparent rational basis is fundamentally and constitutionally unfair.

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

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

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

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

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

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

As a condition to any recovery for injuries sustained by reason of any defective highway, the injured person within 120 days from the time the injury occurred, except as provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect.

The first criteria in determining the intent of the legislature is the specific language of the statute. *House Speaker v. State Administrative*

Board, 441 Mich. 547, 567 (1993). Words in a statute are to be accorded their plain and ordinary meaning, MCL 8.3a. I believe that the words emphasize in the above quoted portion of the statute served to override the 60-day notice provision regarding boards of county road commissioners in MCL 224.21.

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

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

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

Plaintiff would again argue that the 60-day notice provision violates his constitutional rights. In essence, there is no rational reason that the notice provision should be different for cases involving county road commissions versus other governmental agencies. Moreover, the statutes are vague and ambiguous, given that they contain conflicting requirements and arguably both could be found applicable to county road cases.

Presumably, that is why the Supreme Court in *Brown* over 20 years ago found that the notice provision in MCL 224.21 was unconstitutional. Arguably, that

decision was never overturned as set forth above. However, to the extent that the *Streng* court is correct that *Brown's* finding as to the constitutionality of MCL 224.21 has been overturned in *Rowland*, then this Court is obligated to consider the equal protection arguments of this Plaintiff.

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

CONCLUSION

The Michigan Supreme Court in *Rowland* set forth that the appropriate notice to a county road commission pursuant to the GTLA is 120 days pursuant to MCL 691.1404. The courts of Michigan followed that ruling, the county road commissions followed that ruling, and Plaintiff followed that ruling when he gave notice to the Midland County Road Commission of the highway defects. This Court must also follow *Rowland* and deny Defendant's motion.

Plaintiffs would argue that in the first instance, the Supreme Court's *Rowland* decision stands as the law today and cannot be overruled by *Streng*. Plaintiffs believe that *Streng* was wrongly decided and in direct contradiction of the law and should not be applied in this case.

Notwithstanding the *Streng* decision, the Court can exercise its equitable powers. This Court has within its power the ability to prevent a grave injustice. In the interest of justice it should find that the application MCL 224.21 and its time limit and service

requirements are tolled given the understandable confusion created by the prior decisions of the Michigan courts including the Michigan Supreme Court and Plaintiff's reliance thereon. Also the Court may use its equitable power to find that the *Streng* decision be given prospective application only because it states a new law goes against 50 years of precedent.

Finally, the Court should revisit the equal protection arguments that were first raised in the *Brown* decision and hold that there is no rational basis for having two separate and distinct statutory notice provisions in the GTLA. There is no rational basis for treating those who are injured on county roads versus those who are injured on roads of other governmental agencies differently. By finding the section MCL 224.21 violates Plaintiff's equal protection rights under the Michigan U.S. Constitution the Court would clarify that the 120-day notice as set forth in the *Rowland* decision is the law in the State of Michigan.

For these reasons this motion for Summary Disposition should be denied and the Court should grant whatever other relief it finds appropriate.

Dated: February 3, 2017

Respectfully submitted,

GRAY, SOWLE & IACCO, P.C.

BY: 

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APPENDIX 12

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COPY

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF MIDLAND

TIM EDWARD BRUGGER, II,
Plaintiff,

vs

Case Number
15-002403-NO

BOARD OF COUNTY ROAD COMMISSION,
Defendant.

_____ /

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE MICHAEL J. BEALE, CIRCUIT JUDGE

Midland, Michigan - Friday, February 10, 2017

APPEARANCES:

For the Plaintiff: DONALD N. SOWLE, (P27010),
Attorney at Law
1985 Ashland Drive Ste A
Mt. Pleasant, Michigan 48858

For the Defendant: ADAM TOUNTAS, (P68579),
Attorney at Law
100 Monroe Center St. NW
Grand Rapids, Michigan 49503

Recorded by: Michelle Speltz
CEO 8672

Transcribed by: Mary E. Chetkovich
CSR 3044, RPR, CER

INDEX

WITNESSES: None

EXHIBITS: NONE

1 Midland, Michigan

2 Friday, February 10th, 2017 - 3:16 p.m.

3 ---***---

4 THE COURT: All right. The Court calls the
5 case of Brugger versus -- it says Midland County Board
6 of Road Commissioners.

7 MR. SOWLE: Yes.

8 THE COURT: File number 15-2403.

9 Counsel's appearances, please.

10 MR. SOWLE: Donald Sowle on behalf of
11 Plaintiff, P27010.

12 MR. TOUNTAS: Adam Tountas, your Honor, on
13 behalf of the defense, P68579.

14 THE COURT: All right.

15 Mr. Tountas, this is your motion, so you may
16 proceed, sir.

17 MR. TOUNTAS: Thank you, your Honor.

18 Many years ago when I started practicing law,
19 I got the best piece of advice I could have from a
20 mentor.

21 He says, kid, this is not like it appears on
22 TV. You don't need to be piss and vinegar. You don't
23 need to woo anybody. You need to get up and do your
24 level best to advise the Court on the law so that it can
25 make the best possible decision.

1 That has truly, your Honor, informed me in my
2 law practice, all eleven and half years of it. And
3 that's really the approach I'm going to double down on
4 today.

5 And the reason is because there has been a lot
6 of confusion in the law. And I think starting at the
7 beginning and being as earnest as possible, we'll put
8 this Court in the best possible place to make a
9 decision.

10 Now, that being said, I think that when the
11 Court does consider the law in that earnest best possible
12 light, my client does prevail on its motion.

13 But, nonetheless, I'll start at the beginning
14 and that is with the Governmental Tort Liability Act.

15 Before the GTLA -- and I'll call it that for
16 short -- was enacted, the County Road Law governed
17 procedural liability for defect claims against a county
18 road commission.

19 The Governmental Tort Liability Act came
20 along, and that's 691.1401. And there are several
21 sections of it.

22 And what that law did was essentially grab and
23 explain governmental immunity and all the different --
24 at that point there were four or five statutory
25 exceptions to it; now there are six -- it enumerated

1 those and it talked about the procedure for finding --
2 abrogating governmental immunity and finding liability.
3 And it had a highway defect provision in it.

4 Now, that highway defect provision also
5 referenced the County Road Law and basically said this,
6 your Honor. When you're dealing with highway defect
7 claims again the State, the Township, any other
8 municipal corporation, you're using 1404. When you're
9 dealing with a county road commission, you looking at
10 the County Road Law. And that sets forth the procedure.

11 And when you went to the County Road Law, it
12 had a different notice provision both in terms of date
13 and the substantive requirement that had to be there to
14 describe the defect.

15 And it shook out like this, your Honor.

16 Under the County Road Law, an injured person
17 had sixty days to file a Notice of Intent with the road
18 commission and the county clerk. Their notice had to
19 substantially indicate where the defect was and describe
20 the nature of it and give witnesses.

21 Under the Governmental Tort Liability Act, you
22 had 120 days. And there was what we refer to as a
23 heightened notice requirement; meaning, that you had to
24 really be specific.

25 In this case, Mr. Sowle following that statute

1 had GPS coordinates he used to identify the location.
2 It was incredible. The location of the pothole. Pin
3 point.

4 So along comes a case called Brown in 1996.
5 Brown is a case very similar to our own. It involves a
6 motorcyclist who either hits a pothole or comes into
7 contact with some (inaudible; away from microphone)
8 seeking to avoid a pothole, drops the motorcycle, and is
9 severely injured.

10 No notice is filed in that case. And 60 days
11 after the accident, the road commission patches the
12 pothole.

13 They don't know about the accident. It's kind
14 of like in this case. We're not talking about the
15 merits of this case, but the same thing happened here.
16 And, you know, without knowledge of the accident, the
17 pothole is patched in between the day of the injury and
18 filing the suit.

19 And so in that Brown case which was handled
20 by my firm. We've been representing road commissions
21 for a million years. And I talked to the attorney who
22 handled it this morning.

23 It gets in front of the court and that say,
24 look, you got to dismiss the case, so on and so forth.

25 The Court says, well, hold on a second in

1 Brown. Supreme Court. There's really this due process
2 issue. You can't treat certain municipal corporations
3 under different notice statute that prejudices the
4 rights of injured people. You can't have sixty days and
5 120. And so we don't like that. 120 it is. 120 from
6 here on after for every highway defect claim.

7 Now, parenthetically, the Court was wrong when
8 it did that, because the case law says that governmental
9 immunity is, you know, sovereign immunity. And the
10 sovereign gets to define the terms and conditions under
11 which you can bring a claim.

12 And so if the State legislature says -- and
13 I'm obviously being a little flippant -- you have to
14 wear a red hat when you file your complaint, it's really
15 up to them. Courts defer to the legislature in
16 determining what those notice provisions are.

17 And absent bold unconstitutionality, they
18 really can't be revisited.

19 So we disagree with Brown in that instance,
20 but they also said this.

21 It's 120 days. And really, folks, what's the
22 purpose of a notice provision? To make sure the
23 defendant isn't prejudiced.

24 So they weren't prejudiced in this case. And
25 so we're actually going to graph now onto the law an

1 actual prejudice requirement.

2 When I'm speaking with John Vander Ploeg who
3 handled that case on appeal, he said, yes, I had a heart
4 attack when I opened up that opinion, because I did not
5 foresee notice, had to explain that to the client, et
6 cetera, et cetera, et cetera, the no prejudice piece.

7 So then we go to 2006, ten years later, our
8 firm again representing and Rowland (ph) gets another
9 bite at the apple.

10 That's a case where there was a highway defect
11 claim. Notice is filed 140 days after. And the
12 argument is, look, we're prejudiced. Right. We're
13 prejudiced.

14 And the Supreme Court, as only Justice Taylor
15 could, excoriates the previous opinion. Says, you know,
16 you basically usurped legislative prerogative in Brown.
17 And what you actually did was decide that you had to
18 have this actual prejudice showing. And Brown is
19 terrible and so we're overruling that.

20 And there is this quote they use out of it.

21 And, your Honor, I'm -- in the Rowland
22 decision, which is 477 Mich 197. And I'm on 214. And
23 the Supreme Court says this, quote, nothing can be saved
24 from Hobbs and Brown, because the analysis they employ
25 is deeply flawed.

1 And because the Court gets away with the
2 actual prejudice requirement and the notice in Rowland
3 was 140 days, the Court dismisses the claim and the
4 Washtenaw County Road Commission prevails.

5 Now, fast forward to last May 2016. The
6 Michigan Court of Appeals issues the Streng (ph) opinion
7 which candidly caught many of us who represent road
8 commissions off guard. They say -- and this is a
9 published opinion. They say, hey look. Brown
10 overturned. Brown says for the first time ever in our
11 State's jurisprudence it's not the County Road Law, it's
12 1404, which is the GTLA, 691.1404, and actual prejudice.

13 Well, guess what happened in Rowland?

14 The Supreme Court says Brown is gone. Nothing
15 can be saved. That takes us back to status quo
16 (inaudible). And it's the County Road Law that governs
17 these things.

18 THE COURT: Well, what about the paragraph
19 that says MCL 691.1404, which I believe is the GTLA.

20 MR. TOUNTAS: Correct, your Honor.

21 THE COURT: Is straightforward, clear,
22 unambiguous, and not constitutionally suspect.
23 Accordingly, we conclude it must be enforced as written.

24 Now, I understand that's where the Court of
25 Appeals takes it on that aspect. But, thus the statute

1 requires notice to be given as directed and notice is
2 adequate if it is served within 120 days and otherwise
3 complies with the requirements of the statute.

4 It specifies the exact -- but it indicates
5 that that is sufficient notice; does it not?

6 MR. TOUNTAS: Are you reading out of Streng or
7 Rowland, your Honor? And I apologize.

8 THE COURT: Rowland.

9 MR. TOUNTAS: Yes, okay.

10 Well, that's interesting. I think that when
11 you look the cases -- and I was going to get to this --
12 but we'll go to it now.

13 When you look at the four cases that address
14 whether it's the County Road Law versus 1404 in between
15 Rowland and Streng, they don't say -- they don't grapple
16 with County Road Law versus GTLA.

17 They do apply. And this is true. They do
18 apply 1404, but it's not an issue that's raised under --
19 it's not an issue that's raised, number one. And it's
20 not a substantive analysis of one section of the notice
21 provision versus the other.

22 And so the position we're taking, your Honor,
23 is that that's -- that's really an acquiescence or a
24 silence on the part of the Supreme Court.

25 They don't double down and actually say, no,

1 it's 1404 as opposed to this.

2 You know, the litigants in those cases may not
3 have raised that as an issue. And I totally understand,
4 because I don't know that I would have raised it as an
5 issue pre-Streng.

6 But that's not necessarily the same thing,
7 your Honor, as considering that issue and coming down
8 firmly on the side of 1404 for certain enumerated
9 reasons.

10 And I understand that explanation may not be
11 the greatest one in the world, but it's the only one
12 candidly I think you can come to.

13 THE COURT: Well, would you agree with me then
14 that the status of the law prior to the Streng
15 opinion -- which is S-t-r -- S-t-r-e-n-g or something
16 like that.

17 MR. TOUNTAS: It is.

18 THE COURT: Had been accepted that it was MCL
19 691.1404 that sets it necessary parameters upon which
20 you file notice.

21 And that, in fact, based upon that and based
22 upon the Supreme Court precedent, the Plaintiff did that
23 and acted in accordance with that?

24 MR. TOUNTAS: Your Honor, I think the answer
25 to that is no.

1 THE COURT: Why is that not right?

2 MR. TOUNTAS: Sure.

3 Because I think that the Streng opinion
4 actually gets the implication of Rowland overturning
5 Brown correctly.

6 Now, I will firmly put myself in the can of
7 people that had it wrong and was reading the tea leaves
8 in the other direction.

9 And I understand that that's probably a
10 skeptical position to your Honor right now.

11 But I --

12 THE COURT: But don't you find it kind of
13 ironic that the Court of Appeals finds that the language
14 is clear and unambiguous and that in every other Court
15 that interpreted had a different interpretation prior to
16 that?

17 MR. TOUNTAS: I will, you know, my --

18 THE COURT: Including the Supreme Court which
19 is their boss?

20 MR. TOUNTAS: Your Honor, my (inaudible)
21 obligation to not be rude to members of the Court of
22 Appeals, because I'm an officer.

23 I will say I was surprised.

24 THE COURT: Okay.

25 MR. TOUNTAS: Yes. I was surprised.

1 THE COURT: I'll accept that.

2 MR. TOUNTAS: Yeah.

3 But, you know, candidly, I still think that
4 the thrust of Streng got it right, which is when you
5 overturn an opinion, it really only dealt with the
6 actual prejudice requirement in Rowland. And they
7 didn't deal with 60 days versus 120 days in Rowland.

8 It isn't proper to interpret that silence as a
9 stamp of approval on that part of the analysis.

10 And this gets back to the conversation I had
11 today. And I understand this is not evidence. This is
12 just being offered for illustrative purposes only with
13 John Vander Ploeg who handled both Rowland and brown.

14 I said, Clug -- that's what we call him at the
15 office -- help me understand why you didn't push the
16 issue of County Road Law versus GTLA in Rowland.

17 And he said, well, because the notice was
18 filed 140 days after and we didn't need to. It failed
19 under either one and so we just left it.

20 That made me feel great headed into the
21 hearing, but I understand that there was some confusion
22 on the Supreme Court's part, because here they
23 overturned Brown and didn't explicitly say, other than
24 saying -- and this is fair, your Honor -- nothing can be
25 saved from that opinion. Presumably, they met

1 everything in the opinion's analytic framework which
2 means the County Road Law Versus 1404 coming down on the
3 side of 1404.

4 But I think the point is Streng actually gets
5 this right. And a bunch of people were confused and
6 were interpreting the Supreme Court's silent as tacit
7 approval.

8 And I did pull, your Honor, and I'll read the
9 citations into the record just because I think it's
10 helpful.

11 The four cases where the Supreme Court --

12 THE COURT: Wait a second.

13 MR. TOUNTAS: Yeah.

14 THE COURT: Going back to your language that
15 you said that nothing can be saved from Hobbs and Brown,
16 but does it not go on to say because the analysis they
17 employed is deeply flawed.

18 MR. TOUNTAS: Correct.

19 THE COURT: But did they not later on reaffirm
20 that the proper notice provision is 120 days which is
21 exactly the same thing they had done in Hobbs and Brown?

22 MR. TOUNTAS: I understand that, your Honor.

23 THE COURT: So maybe everything wasn't flawed.
24 Maybe it was flawed as to the analysis of the
25 constitutionality aspect of it and whether due process

1 does or does not require the obligation for prejudice to
2 be shown.

3 MR. TOUNTAS: It could be, your Honor.

4 THE COURT: Okay.

5 MR. TOUNTAS: That is an absolutely acceptable
6 interpretation of that opinion.

7 THE COURT: Okay.

8 MR. TOUNTAS: What -- where we would come from
9 in light of that is the only way, however, to go with
10 that interpretation -- and I thought Mr. Sowle did a
11 great job setting it forth in his brief, and I told him
12 so -- would be to do harm to Streng.

13 And if Streng were unpublished, then I think
14 you could probably do that and not do any damage to our
15 State's jurisprudence.

16 But Streng is published. It has to be
17 contented with at some point. And when you look at that
18 case, you know, Streng went to the Supreme Court.

19 Another former law partner of mine out on his
20 own represented the Road Commission in that case. He
21 left the fold and lost in Streng and went to the Court
22 of Appeals and lost there too. And now we had this
23 opinion. And it went to the Supreme Court and they said
24 we're not going to hear it.

25 Now, as Mr. Sowle points out, that's not a

1 substantive point of law, the fact that they won't hear
2 it.

3 But it does mean --

4 THE COURT: We are in flux. We are in serious
5 flux right now.

6 MR. TOUNTAS: We are in some kind of flux.

7 Unless you agree with what I'm saying from the
8 podium, which is Streng actually got it right and the
9 Supreme Court's acquiescence for however many years is
10 just that. It's acquiescence. It's not substantively a
11 ruling on the law.

12 And again, I mean, it's not evidence with the
13 one illustrative point I would go to is my law partner
14 who handled Rowland saying we didn't raise 120 versus
15 60, because we were at 140 and we didn't need to.

16 THE COURT: What about the finding that that,
17 in fact, does significantly alter the status of the law
18 as it relates to the notice provision. And, therefore,
19 there is -- I don't think -- was there an indication of
20 the retroactivity in Streng? There was. I think I
21 remember that now.

22 MR. TOUNTAS: In Mr. Sowle's brief, correct.

23 And that is -- that is exactly the second and
24 final point I was going to come to. So thank you for
25 getting there.

1 I think, in fact, if you look at Rowland, you
2 get the touchstone as to what the Courts needs to
3 consider on retroactivity. And I'm on -- I'm in the
4 Rowland, 477 Mich 197.

5 THE COURT: Are you talking about Bahutski
6 (ph) and all that?

7 MR. TOUNTAS: Yes.

8 THE COURT: Yeah.

9 MR. TOUNTAS: Bahutski, et cetera.

10 I'm trying to find the page.

11 THE COURT: So would you not agree that I
12 think Bahutski is more of an indication of a similarity
13 of the circumstances here where it had been fairly well
14 settled law with the trespass nuisance exception to
15 governmental liability.

16 And they found because of that and there is
17 reliance based on the substantial amount of years that
18 they, in fact, will only apply it prospectively?

19 MR. TOUNTAS: Your Honor, I wouldn't agree
20 with that. I wouldn't agree with that for this reason.

21 It is clear to me that when you read Streng,
22 they don't think they're creating new law.

23 I can sit here at this podium and tell you I
24 was surprised, but I don't get to make that call because
25 I don't wear a black a robe and --

1 THE COURT: That would be my call; right?

2 MR. TOUNTAS: That's exactly right.

3 And so really I think when you look at Streng,
4 they don't think they were creating new law. And when
5 you go into Rowland -- and they did this in Rowland,
6 because they're overturning Brown and they're saying,
7 look, we're overturning it and it's got full retroactive
8 application.

9 And it's because when you are not creating new
10 law in here, we're doing away with the precedent that
11 was poorly reasoned, we don't like; but it's also true
12 that when you're actually not creating the new law, it's
13 predictable. And predictability being the important
14 aspect of --

15 THE COURT: So when (inaudible) though is that
16 under the analysis of Rowland, they didn't change the
17 notice provision which was 120 days. They just
18 eliminated the possibility of if didn't comply with
19 that, you had it out that they found was not, in fact,
20 crafted into the statutory provision. Whereas in
21 Streng, they are, in fact, modifying what the Supreme
22 Court previously indicated was the number of days of
23 notice that was required, which would I think indicate a
24 possible change in the law.

25 Would you not agree with that?

1 MR. TOUNTAS: Your Honor, I would not. And I
2 think that point actually gets to the fundamental
3 difference between where I am and Mr. Sowle is on this.

4 THE COURT: All right.

5 MR. TOUNTAS: Our position on this is that
6 because when they abrogated or overruled Brown, they
7 said nothing could be saved.

8 Their mere silence in the four cases in
9 between (inaudible) and Streng is not the same thing as
10 saying ever having to really consider 60 versus 120.

11 And I'll be really candid with you. That only
12 became clear to me after talking to my partner today who
13 said, well, we didn't raise it because we were 140.

14 I think you've indicated a perfectly
15 reasonable reading of the legal history. I think we've
16 also indicated a perfectly reasonable reading.

17 And honestly, your Honor, I understand this is
18 a sticky wicket. I don't envy this Court's position.
19 The only thing I would say -- and I commented this to
20 Mr. Sowle before the hearing. Whatever this Court
21 rules, the issue will go up on appeal.

22 THE COURT: Yeah.

23 MR. TOUNTAS: Because it will be a final order
24 one way or the other.

25 And maybe the fairest justice of all is giving

1 the Court of Appeals and Supreme Court another chance to
2 tell us what we all misunderstand.

3 THE COURT: Well, I appreciate that, counsel.
4 I really do.

5 Thank you very much.

6 MR. TOUNTAS: So I appreciate that, your
7 Honor. Thank you.

8 THE COURT: Mr. Sowle?

9 MR. SOWLE: Thank you.

10 I've been practicing 40 years, and I've never
11 seen anything like this, your Honor.

12 When you look at it, even --

13 THE COURT: (Inaudible) to let you know,
14 counsel. I was actually on the appeal in Bahutski.

15 MR. SOWLE: Okay.

16 THE COURT: So I have seen something very
17 similar to this. I won't tell you what side I was on
18 until after I make my decision.

19 MR. SOWLE: Out here in the (inaudible) we
20 have to read what the courts say to determine what to
21 tell our clients and how to act.

22 In this case, I think even the Streng Court
23 notes nobody ever ruled for 40 years that MCL 224.21 of
24 the County Road applied.

25 In fact, I think after Brown found the

1 situation unconstitutional in the Supreme Court that it
2 was a violation of equal protection, you went all the
3 way up to the Rowland decision.

4 Rowland is a Washtenaw County Road Commission
5 case. The Supreme Court ruled unequivocally that in
6 that case the appropriate statute to look at was
7 691.1404 of the GTLA.

8 They specifically held -- contrary to what
9 counsel says, I don't think anybody raised 60 days,
10 because nobody thought 60 days was the rule.

11 I think everybody had acquiesced that it's
12 120.

13 So in terms of the Court looking at it, they
14 specific look at 691.1404. You were 140 days. You
15 should have been 120. You're out of here.

16 And I think the Court quoted it. They say we
17 conclude the plain language of this statute should be
18 enforced as written.

19 They also put the entire body of 1404 in their
20 opinion. And that includes the service on the
21 governmental agency not the county clerk. Very specific
22 exact location of the problem.

23 That was the problem in the Streng case.
24 Somebody screwed up on the notice and had to scramble.
25 Said, hey, let's go 60. I think that's how we ended up

1 where we are.

2 But the point being in Rowland, the Supreme
3 Court is the supreme law of the land as far as I know.
4 And even in Rowland in discussing the earlier section
5 about how the Court of Appeals was handling it, the
6 Judge says on page 202 -- and they were talking about
7 why the defendant had urged the panel to disregard Hobbs
8 and Brown's construction of 1404 on the basis that they
9 were wrongly decided.

10 And so Cliff Taylor says the Court of Appeals,
11 however, noted it was duty bound to follow this Court's
12 construction of MCL 691.1404 and that the decisions were
13 binding unless the Supreme Court overruled them.

14 By denying the need to appeal in Streng, the
15 Supreme has left Rowland untouched. It unequivocally
16 says in a road commission case, the appropriate statute
17 is 1404 and 120 days is the notice.

18 So I think Streng cannot wag the tail -- not
19 wag the dog.

20 They may do a great job of scholarship, but I
21 think they -- they're disrespectful to the Court of
22 Appeals -- or the Supreme Court.

23 In one part of Streng at page -- well, around
24 210, 211, they say both in Brown and Hobbs, the
25 defendant was a State department. They applied the

1 GTLA's notice period. And Rowland expressed neither
2 approval or disapproval regarding the choice, but simply
3 focused on 691.1404's lack of statutory language
4 allowing exceptions to time limit.

5 I think that they're missing the point that
6 not only did the Supreme Court grab onto 1404 at the
7 appropriate statute in a road commission case, but that
8 that creates precedent that this Streng court has to
9 obey.

10 They don't ever say -- they don't ever explain
11 what the Rowland case was. They kind of do a little
12 dance around the constitutionality issue with the
13 overruling of Hobbs and Brown.

14 And I tried to lay out most of what I've said
15 in my brief. And in that sense, our basic position is
16 that Rowland is still good law. Not overruled.
17 Specifically says in a road commission case you get 120
18 days. Notice on the governmental agency just as we did.

19 And if you look at the justices on that case,
20 Justice Taylor, Corrigan, Young, and Markman, they've
21 never been shy about giving their explanation of why
22 they do something.

23 So what we point out in the brief, they only
24 attacked the actual prejudice issue of Hobbs and Brown.
25 They never address the equal protection issue.

1 And I think contrary to saying they implied --
2 straightened it out, I think they left it alone. I
3 think they thought it was 120 because that other thing
4 was declared unconstitutional.

5 They never discussed it. These are five
6 Supreme Court justices plus the two dissents. Everybody
7 agrees it's 120 days.

8 So while I think we can -- the quote I cite in
9 the brief, you did not like a Supreme Court decision;
10 but that is the law of the land until they overrule it.
11 And I think what Streng has done is tried to usurp that
12 power from the Court.

13 The other -- just the long-standing issue of
14 40 years we've always found that it's 120 day issue.
15 Nobody ever brought the 224 statute out before. And so
16 I think just the stare decisis of that, the precedent
17 setting should be acknowledged by the Court.

18 Counsel mentioned that denial to leave means
19 that the Supreme Court expresses no present view with
20 the legal questions. So I don't think we read anything
21 into what they did by not taking it.

22 They may not like the facts. They might want
23 to wait for a different case. Perhaps this one.

24 I think I've beat that Rowland is the supreme
25 law of the land, but I'll move onto my confusion.

1 If there is a problem here who is granted the
2 confusion, it would be the Supreme Court. But my basic
3 argument is they're as clear as a bell. But for many
4 years -- if you look at all the Court of Appeals
5 decisions following Rowland, everybody agreed it's 120
6 days for a road commission.

7 I cited the unpublished case of Fick. And
8 that was the Lenawee County Road Commission case, and I
9 cited it because there was no other good law to bring to
10 the Court.

11 But what they did there, the same issue was
12 the defendant was trying to say because 224.21, the
13 county road had been declared unconstitutional, that he
14 didn't have to comply with 1404.

15 And then the Fick court specifically said, you
16 know, we know that in Rowland, the Supreme Court was
17 silent on the equal protection argument of Brown.

18 But you know what? We are bound to follow
19 their decision. And they say it's 120 days under 1404.

20 The Streng Court took it upon themselves to go
21 beyond what the Fick Court said that we are bound by the
22 Supreme Court. And they kind of slide over here and
23 make their own law.

24 But I don't think that can be held over to the
25 Supreme Court as long as Rowland is not overturned.

1 Again, you have to give some credit to
2 Justices Corrigan, Taylor, and Markman, Kelly, and
3 Cavanagh.

4 If you could say that there was a well-settled
5 area of law after 40 years, I think this has to be one
6 of the most complete settlements of law such that the
7 road commissions never raised this argument. They
8 believed it was 120 days under 1404.

9 In Streng, the Road Commission from Mackinaw
10 County argued it was 120 days. And somehow it got
11 flipped on its head.

12 But it's odd that I'm agreeing with my
13 compatriot as to what the law is.

14 And the other thing in this case, and I think
15 it's because you believe I did the correct notice, there
16 was -- we filed the complaint. There was no motion for
17 summary disposition saying, oh, you should have sent it
18 to the county clerk; and, oh, you should have done it 60
19 days.

20 Because they believed it was correct. In
21 fact, I think Adam said that that was one of the best
22 notices he had ever seen, my GPS coordinates. And he
23 used it to show other people how it should be done.

24 And the reason we did that was because if you
25 looked at the case law where they were attacking people

1 is not the 120 days. They were going after, you didn't
2 get it right where it should be. So I'm confronted with
3 a county road with 50 potholes. And if I say it's that
4 one there, he's going to say, no, it's not one there, or
5 you didn't give me good notice.

6 So we went out and found the two potholes.
7 The police found, had an accident reconstruction expert
8 do a GPS coordinate and gave them that kind of a notice.

9 So I think it's instructive that road
10 commissions for years and years never made motions based
11 on this, because they thought the law was settled.

12 I get into the judicial argument of confusion.
13 If learned judges, Appellate Courts, Supreme Court, and
14 attorneys representing county road commissions all
15 followed Rowland and believed it was 120 days and those
16 procedural service requirements, I don't think the
17 Plaintiff should be punished in this case.

18 And I think Justice Markman talked in Bryant
19 (ph) the question of ordinary negligence versus med mal.
20 That there was understandable confusion of the law. And
21 they -- there they tolled the statute of limitation to
22 let a plaintiff continue a case, because the Court had
23 created the confusion.

24 I think that's -- if there is confusion, it's
25 created by the courts.

1 And I talk about the Court's equitable power,
2 that you could find that our notice was timely or
3 properly served. Or if -- because of the Court's
4 causing the confusion, my client shouldn't be made to
5 pay for this.

6 And I think what's interesting in the Supreme
7 Court case, they use the words the 120 day notice
8 provision must be followed. They're telling us exactly
9 what we should do, and that's what we did in this case.

10 Our next argument was perspective application.
11 I'm sure the Court's aware of the three prong test. I
12 don't want to belabor it, but we're just thinking that
13 Streng changes four decades of law.

14 And if that isn't a new rule, I don't know
15 what is. I know they sometimes say, oh, we're going
16 back to the original rule. But that begs the question
17 that for years all the courts and litigants relied on
18 120 day notice under 1404.

19 So the second prong is extended reliance.
20 We've had four decades of reliance on it. And
21 perspective application would at least protect the
22 parties like my client who in good faith followed the
23 law, and now we're being trying to get thrown out of
24 court.

25 If that third prong, if it is retroactive,

1 then many other causes besides ours may be thrown out.
2 And we believe that's a miscarriage of justice. And the
3 Court can use equitable power to do it.

4 My last argument was equal protection. I
5 agree that we aren't quite sure what happened in
6 Rowland, but they didn't expressly overrule the legal
7 protection argument.

8 And I think for my client, that same equal
9 protection argument applies. You've got two different
10 statues with the same addressed need of having safe
11 roads.

12 So there's no rational basis for having two
13 different notices with two different service of notice
14 issues and those other different things.

15 I go through in my brief. I don't want to
16 belabor the Court, because I know you're very well
17 prepared.

18 But if you look at the reasonings of the Court
19 in Brown, I think they apply here too for my client,
20 that this is a violation of his equal protection rights
21 under the 14th and -- Amendment of the United States and
22 also the Article One, Section Two of the Michigan
23 Constitution.

24 We believe that the Court has the power to
25 declare this unconstitutional.

1 And I don't have anything further unless the
2 Court has questions.

3 THE COURT: No questions.

4 MR. SOWLE: Thank you. For all those reasons,
5 I think the motion should be denied.

6 THE COURT: Mr. Tountas?

7 MR. TOUNTAS: I don't have anything else to
8 say, your Honor, other than I don't know that I actually
9 made my request for relief.

10 We would ask that the motion be granted.

11 MR. SOWLE: Your Honor?

12 THE COURT: Yes.

13 MR. SOWLE: Mr. Tountas does a nice job, but
14 he didn't attach my photographs to his affidavit as an
15 exhibit.

16 I would like to approach the bench and at
17 least make this part of the record if it goes up.

18 MR. TOUNTAS: I have no objection to that,
19 your Honor.

20 THE COURT: Okay.

21 MR. SOWLE: This would be attached to his
22 exhibit which --

23 THE COURT: All righty.

24 Do you want that as part of the court file
25 then?

1 MR. SOWLE: Yes, sir.

2 THE COURT: All right. I will approve it as
3 part of the court file.

4 All righty. Well, I have to say it was
5 interesting digesting this material and trying to figure
6 out what was the correct way to proceed.

7 Counsel got to sit through some of my earlier
8 things that were not quite as interesting, but entertain
9 go would be more along the lines of what's going on.
10 But this was a real brain teaser.

11 But this is the way I see things as it comes
12 down here.

13 This court is a trial court level. And,
14 therefore, I am bound to follow precedent of both the
15 Supreme Court and the Court of Appeals.

16 And there are occasions when sometimes they're
17 not completely in sync with each other and we have to
18 make a determination how we're going to proceed.

19 But as Mr. Sowle indicated, it is the Supreme
20 Court as the authority and as the binding precedent to
21 the extent there is any inconsistencies with the Court
22 of Appeals decision, published or non-published.

23 But the Court of Appeals case in Streng does
24 raise an interesting, if they've created an exception
25 underlying that.

1 From the Court's perspective, I find that the
2 Supreme Court in Rowland specifically indicated that the
3 GTLA is the notice provision for which road commission
4 cases are subject to being followed and it had done that
5 consistent with a fairly significant long line of cases,
6 two of which they overruled.

7 However, it was consistent as to what was the
8 proper statutory provision in the Court's perspective is
9 that it was the application of that provision that was
10 found to be inapplicable and, therefore, stricken by the
11 Supreme Court in Rowland.

12 So, therefore, the Court finds that the
13 circumstances in this case are in compliance with the
14 requirements of the GTLA. And, therefore, that it is --
15 summary disposition on that basis is denied.

16 However, I will also indicate if the analysis
17 is, in fact, inaccurate and Streng was correctly
18 decided, that if the governmental entity is the State of
19 Michigan or road commission and, therefore, the highway
20 provision of the 60 day notice and the different --
21 differententia -- differentiation of who is to be
22 provided that notice is the applicable one in this
23 situation, I will find that based upon the criteria that
24 was announced in Bahutski as well as the other case that
25 was cited in Rowland that it is, in fact, to be applied

1 prospectively, because there had been no indication that
2 the differentiation was appropriate to provide notice to
3 claimants that were coming forward.

4 And that it would -- it would, in fact, result
5 in manifest injustice to deny claims that had been in
6 compliance with the agreed -- with what had been agreed
7 upon as the proper notice provision, but there was a
8 change, from the Court's perspective, a change in the
9 application of that interpretation by the Court of
10 Appeals decision and that occurred after the notice had
11 already been provided in this case.

12 And, therefore, the Court's of the opinion it
13 does not prevent the application of the GTLA provision
14 of 691.1404.

15 Mr. Sowle, are you going to prepare an order
16 to that effect, sir?

17 MR. SOWLE: I think so.

18 THE COURT: I think you can just say for the
19 reasons stated on the record and we would be adequate.

20 MR. SOWLE: All right. If I can clarify,
21 you're denying summary disposition.

22 THE COURT: Yes.

23 MR. SOWLE: Also if the --

24 THE COURT: Just say deny summary disposition
25 for the reasons stated on the record. And I think that

1 would be adequate.

2 MR. SOWLE: Okay. Do you want me to put
3 something about that if Streng is correct, it's
4 prospective?

5 THE COURT: Nope.

6 MR. SOWLE: Okay.

7 THE COURT: No. It's denied under both
8 reasons. And the analysis is on the record so that
9 Mr. Tountas files his application for -- or actually,
10 it's a final order. So he files his request for review
11 by the Court of Appeals, they can review the transcript
12 and decide if they find I'm right or wrong.

13 MR. SOWLE: All right. I'll just say denied
14 for reasons stated on the record.

15 THE COURT: I think would be adequate.

16 MR. SOWLE: Thank you.

17 THE COURT: Do you agree with that, counsel?

18 MR. TOUNTAS: I do, your Honor. Thank you.

19 THE COURT: Okay. Have a good weekend,
20 gentlemen. I enjoyed your issue.

21 MR. SOWLE: Thank you, your Honor.

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23 (Proceedings Concluded)

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