

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 Ct. Docket No.158304

Plaintiff/Appellee,

Court of Appeals No.: 337394

vs.

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
Governmental agency,

Defendant/Appellant.

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PLAINTIFF - APPELLEE BRUGGER'S BRIEF ON APPEAL (Corrected)

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

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

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. WHETHER *STRENG* WAS CORRECTLY DECIDED?

PLAINTIFF-APPELLEE STATES: NO.
DEFENDANT-APPELLANT STATES: YES.
CIRCUIT COURT STATES: NO.
THE COURT OF APPEALS STATES: DID NOT ADDRESS.

II. WHETHER *STRENG*, IF CORRECTLY DECIDED, CLEARLY ESTABLISHED A NEW PRINCIPLE OF LAW SATISFYING THE THRESHOLD QUESTION FOUND IN *POHUTSKI*?

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

III. WHETHER *STRENG* SHOULD BE APPLIED RETROACTIVELY UNDER *POHUTSKI'S* "THREE FACTOR TEST"?

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

INTRODUCTION

The issue before this Court is whether or not Plaintiff gave the appropriate pre-suit notice to the Defendant pursuant to the Governmental Tort Liability Act MCL 691.1401 et seq. (GTLA). Plaintiffs, on August 15, 2013, gave their notice of injury and defect pursuant to MCL 691.1404(1), and as directed by this Court in *Rowland v. Washtenaw County Road Com'n*, 477 Mich 197; 731 NW2d 41 (2007) which expressly directs a plaintiff bringing a claim against a road commission to comply with the 120-day notice provision found in Sec. 1404(1).

Defendant's argument that it is entitled to Summary Disposition as to Plaintiff's Complaint is based on the recent Court of Appeals decision of *Streng v. Board of County Road Commissioners*, 315 Mich App 449; 890 NW2d 680 (2016). Defendant argued in the lower courts that the Court of Appeals had recently "confirmed" that the 60-day notice provision found in MCL 224.21(3), and not the 120-day notice provision provided for MCL 691.1404(1), is applicable to cases involving county road commissions. The Defendant, however, did not initially contest the timeliness of Plaintiff's notice. Even though they argue that the Court of Appeals had "confirmed" the applicable notice provision in road commission cases, it was never raised as a defense. It was only raised after this Court denied leave in *Streng*.

In reality, the *Streng* Court did not "confirm" the applicable notice requirements, but instead established a new principle of law when it resurrected a statutory provision that had been deemed unconstitutional and had not even been applied in almost 50 years. The decision is in direct contravention of decades of precedent from both this Court and the Court of Appeals regarding the applicable

notice provision for county road cases. (See, *Rowland*; *Whitmore v Charlevoix County Road Commission* 490 Mich 964; 806 NW2d 307 (2011); *Ells v. Eaton County Road Commission*, 480 Mich 902; 739 NW2d 87 (2007); *Mauer v. Topping and Board of County Road Commissioners of Manistee County*, 480 Mich 912; 739 NW2d 625 (2007); *Leech v. Kramer*, 479 Mich 858; 735 NW 2d 272 (2007); See also, Streng, 315 Mich App at 460 n4. (Listing additional published and unpublished cases in which the GTLA was applied in cases involving county road commissions.).

Over twenty years ago, the 60-day notice provision of MCL 224.21(3) was stricken down by this Court as violative of the equal protection guarantee. *Brown v. Manistee County Road Commission*, 452 Mich, 354, 358; 550 NW2d 215 (1996).

The GTLA had been amended in 1970 to include MCL 691.1404(1) 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; 516 NW2d 121 (Neff, P. J., dissenting). Reversed on other grounds 452 Mich, 354 (1996).

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

In addition to holding that the 120-day notice provision applied to county road commissions, this Court in *Brown* also held that a showing of “actual prejudice” was

necessary in order to show that a notice filed after the 120-days was in effect defective under the statute. *Id. at 368.*

This Court in *Rowland* overruled *Brown* to the extent that a requirement of “actual prejudice” was required to show that a late notice was defective. The Court concluded that the plain language of MCL 691.1404(1) required that the notice **must be served on the county road commission within 120-days of the injury.** *Id. at 200.* (Emphasis added).

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

The Court of Appeals in *Streng* determined that this Court, as well as all other prior decisions, must have been simply “overlooking” the applicability of MCL 224.21(3). *Streng*, 315 Mich App at 463. Accordingly, they completed their own statutory analysis and determined that MCL 224.21 was the applicable notice provision in cases involving county road commissions.

The Court in *Streng* disregarded the fact that this Court in *Rowland* explicitly applied the 120-day notice provision found in MCL 691.1404. *Rowland*, 477 Mich at 200. *Rowland* has never been overruled. Nor can it be argued the Court of Appeals decision in *Streng* overrules the holding in *Rowland* that the 120-day notice provision applies in county road commission cases.

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

agreed in part and found that the *Streng* decision should not be applied retroactively and should only have prospective application.

What was once a clear and undisputed issue has now been jumbled. This Court in *Rowland* and its progeny directs 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(1) to a county road commission case. Equity requires that the holding in *Streng*, if allowed to stand, only be applied prospectively.

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

COUNTER STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

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

Plaintiff served his pre-suit notice on the Defendant on August 15, 2013. (Defendant Appellant's Appendix #8). Plaintiff filed his Complaint on February 9, 2015. (Defendant Appellant's Appendix #9). He filed his first Amended Complaint on June 1, 2015. (Defendant Appellant's Appendix #7). Defendant filed its Motion for Summary Disposition on or about December 20, 2016 challenging the timeliness of Plaintiff's Notice. (Defendant Appellant's Appendix #10).

For purposes of the motion the factual allegations of Plaintiff's Complaint are not in dispute. Moreover, it was admitted that Plaintiff's notice of injury and defect was sufficient pursuant to MCL 691.1404(1) and provided to the members of the Road Commission within 110-days of the accident.

Plaintiff did not and does not dispute that he did not comply with certain requirements of MCL 224.21(3) (i.e. provide notice within 60-days and serve a copy of his notice of injury on the Midland County Clerk).

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

At the hearing Plaintiff disputed the applicability of MCL 224.21 to his claim against the Midland County Road Commissioners. Plaintiffs argued that *Streng* was wrongly decided and that MCL 691.1404(1) and its 120-day notice provision was the applicable notice period to his claim pursuant to *Rowland*. Plaintiff further argued that to the extent the Court of Appeals was required to follow *Streng*, it is distinguishable based on equitable and constitutional arguments that were not made in that case, and, hence never addressed by the *Streng* court. (Defendant Appellant's Appendix #12)

The Trial Court in denying Defendants Motion for Summary Disposition found that this Court in *Rowland* has indicated that the 120-day notice provision of the GTLA is the applicable notice provision for cases involving road commissions. (Trial Court Transcript pp. 31-32, Defendant Appellant's Appendix #12).

The Trial Court also ruled that to the extent that *Streng* was correctly decided and was controlling authority, it should only be given prospective application to avoid manifest injustice. (Trial Transcript pp. 32-34 Defendant Appellant's Appendix 12).

The Court of Appeals, after oral argument, issued its published decision on May 15, 2018, affirming the Trial Court decision that *Streng* should only be applied to cases after May 2, 2016. *Brugger v. Midland County Board of Commissioners*, 324 Mich App 307, 319; 920 NW2d 388 (2018). The majority reached its conclusion relying on the three factor test for prospective application enunciated in *Pohutski v. City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002). Judge Shapiro also wrote separately indicating that in his opinion *Streng* was wrongly decided, and that, relying on *Apsey v Memorial Hosp*, 477 Mich 120,123; 730 NW2d 695 (2007), the Plaintiff could satisfy

the notice requirement by complying with either of the statutory notice provisions. *Brugger* 324 Mich App at 321 (Shapiro P.J. Concurring). Judge O'Brien, who was on the panel of *Streng*, dissented arguing that the *Streng* case was correctly decided and should be applied retrospectively. *Brugger* 324 Mich App at 322-336(O'Brien J. dissenting).

STANDARD OF REVIEW

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

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

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

ARGUMENT

I. The *Streng* Decision Was Wrongly Decided.

As noted above the Michigan legislature enacted two, arguably, conflicting notice provisions for defective road cases. However, for nearly 50 years Michigan courts have consistently and reliably applied the notice provision found in MCL 691.1404(1) and not MCL 224.21(3) to cases involving county road commissions *Brugger*, 324 Mich App at 314-315.

Defendant spends considerable time and energy in its brief arguing about the text of the two statutes and statutory construction. In Plaintiff's eyes this case is less about statutory interpretation and construction and more about statutory application. In other words, Plaintiff is not questioning the statutory analysis of the *Streng* court. Rather Plaintiff focuses on their analysis of whether MCL 224.21(3) is still good law, and applicable in county road cases.

Generally, a law that has been held to be unconstitutional is considered void ab initio. So even though a law may remain "on the books" it is in reality no law and is wholly void and ineffective for any purpose. See *Stanton v. Lloyd Hammond Produce Farms*, 400 Mich 135,144; 253 NW2d 114 (1977).

Accordingly, the plain text of MCL 224.21(3) is irrelevant. Whether the plain text clearly establishes that it applies to road commission cases is of no consequence once the law was found to be unconstitutional.

As noted above, this Court in *Brown*, found MCL 224.21(3) to be unconstitutional, and held that the notice provision found in MCL 691.1404(1)

applied instead to a case against Manistee County Road Commission after the plaintiff lost control of his motorcycle near a pothole.

Brown examined the two different notice provisions, primarily with reference to the fact that the notice under MCL 224.21(3) provided that notice should be given within 60-days of the occurrence, whereas notice under MCL 691.1404(1) must be provided within 120-days of the occurrence. This Court found no rational basis to support a 60-day notice requirement for claims against county road commissions, where a 120-day notice requirement applied to all other claims against other governmental entities with jurisdiction over highways. Thus, this Court declared MCL 224.21(3) unconstitutional and affirmatively held that the 120-day notice provision applied in action for personal injuries against a county road commission. *Brown* 452 Mich at 356. However, the *Brown* court also found that if the road commission did not suffer “actual prejudice”, the plaintiff’s claim was not barred by failure to give notice within the requisite 120-day time period. *Id.* at 366.

Subsequently, in *Rowland*, this Court once again applied the MCL 691.1404(1) notice provision to an action against a county road commission after the plaintiff allegedly tripped on uneven pavement while crossing the street.

Contrary to the pronouncements of the Court of Appeals in *Streng*, this Court overruled *Brown* only to the extent that *Brown* considered whether there was prejudice in determining the applicability of the notice period. Specifically, the Court stated:

MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written. As this Court stated in *Robertson v. DaimlerChrysler Corp.*, 465 Mich 732 (2002), “The Legislature is

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

The portion of *Brown* finding MCL 224.21(3) to be unconstitutional was never overturned or even addressed by this Court or the Legislature. *Rowland* only considered whether the “actual prejudice” “analysis” espoused in *Brown* was correctly decided; it did not discuss the portion of *Brown* finding that MCL 224.21 was unconstitutional as a violation of equal protection. *Rowland*, 477 Mich at 210.

To support its conclusion that *Brown* was overruled in its entirety, the court in *Streng* focused on the language in *Rowland* that stated, “Nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed”. *Streng*, 315 Mich App at 459 citing *Rowland*, 477 Mich at 214. Importantly, *Hobbs v. Michigan State Highway Dept.*, 398 Mich. 90; 247 NW2d 754 (1976) case was not a county road commission case and only dealt with the “actual prejudice” issue. There was no discussion of equal protection violations relative to the two notice provisions. It was solely within this context that this Court in *Rowland* stated, “Nothing can be saved”. Therefore, there is no basis to conclude that *Brown’s* constitutional examination of the 60-day notice provision in MCL 224.21 has been overruled.

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

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

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

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

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

Rowland, however, was not silent with regard to the applicability of 691.1404(1) as to county road commissions. This Court explicitly reaffirmed the equal protection holding of *Brown* by applying the GTLA stating:

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

As defined by the GTLA, "governmental agency" means this state or a political subdivision. MCL 691.1401(a). "Political subdivision" means a municipal corporation, county, **county road commission**, school district, community college

district, port district, metropolitan district, or transportation authority or combination of two or more of these when acting jointly. MCL 691.1401(e). *Rowland* obviously was a county road commission case and this Court specifically said that the 120-day notice provision must be met, not the 60-day notice provision.

The fact that *Rowland* did not revisit the viability of the notice provision in MCL 224.21(3) only leads to one logical conclusion. Simply put, this Court determined that MCL 691.1404(1) and not MCL 224.21(3) applied to road commissions. *Rowland*, 477 Mich at 200.

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

It has been argued that because MCL 224.21(3) was not raised by the parties or discussed in the opinion of *Rowland*, that it can be of no help to the Plaintiff. However, as this Court has stated:

[n]o one can seriously question the right of this Court to set forth the law as clearly as it can, irrespective of whether the parties assist the Court in fulfilling its constitutional function. Juris prudence of Michigan cannot be, and is not, dependent on whether individual parties accurately identify and elucidate controlling legal questions. *Mack v. City of Detroit*, 467 Mich 186, 209; 649 NW 2d 47 (2002) (This Court holding that the GTLA applied even though it was not raised or briefed by either parties).

So even if not raised by the Parties, this Court was not prohibited from addressing the issue. Moreover, for the sake of Michigan jurisprudence it would seem this Court would have been obligated to do so under the circumstances. Because, if it is as stated by the *Streng* Court, that the plain text of the statute make it clear that MCL 224.21 controls in road commission cases, then the only thing preventing it's application in *Rowland* was its unconstitutional status. Hence, the *Rowland* Court's application of the GTLA instead seems to be an explicit acknowledgement by this Court that MCL 224.21(3) was still unconstitutional.

However, the *Streng*, Court argued that *Rowland* expressed neither approval or disapproval of either notice statute. *Streng*, 315 Mich App at 459-460. Plaintiff would argue again that the exact opposite is true. Such an argument ignores this Court's subsequent rulings which continued to apply MCL 691.1404(1) in county road commission cases.

This Court applied MCL 691.1404(1) in *Rowland* and all the county road commission cases that immediately followed. See *Ells*; *Mauer*; and *Leech*.

It has also been argued that these subsequent cases are of no support because; they do not discuss the application of MCL 224.21(3), involved cases where the notice was filed after 120 days, and none involved a situation where the notice was filed after 60 days but before 120 days. *Brugger*, 324 Mich App at 330, (O'Brien J. dissenting).

The same cannot be said of *Whitmore v Charlevoix County Road Commission*. *Whitmore*, involved multiple issues, but the one that is most applicable here was the application of MCL 691.1404(1) over MCL 224.21(3). *Whitmore* 490 Mich at 965. The

road commission defendant had argued in the lower court that the plaintiff's notice did not meet the requirements of Sec. 1404(1) with regards to describing the "exact location" and nature of the defect. *Id.* In affirming in part, this Court found that the plaintiff's notice was sufficient to withstand summary disposition. *Id.*

There was no argument by either party that MCL 224.21(3) was applicable rather than Sec. 1404(1). *See plaintiff-appellee Whitmore's Supplemental Brief* 2011 WL 5893821 (Plaintiff-Appellee's Appendix #1); and *defendant-appellant Charlevoix County Road Commission's Application for Leave* 2011 WL 8025572 (Plaintiff-Appellee's Appendix #2). Plaintiff did not raise it, despite the fact, that MCL 224.21(3) does not contain the same specificity requirements as Sec. 1404(1) with regards to stating the "exact location".

More importantly, there was no argument that MCL 224.21(3) should apply even though the plaintiff notice was served more than 60 days after the accident, but less than 120 days. (*See Plaintiff Appellee's Appendix #1 pg. 004b*). Certainly, if either the Court or the defendant in that case thought the constitutional status of MCL 224.21(3) had been changed it would have been the perfect opportunity to state so.¹

The answer for why MCL 224.21(3) was not raised is simple. No one was questioning the application of the GTLA. MCL 224.21(3) had been declared

¹ This specifically calls into question Defendant's assertions at oral argument in the trial court that the only reason MCL 224.21(3) was not raised in *Rowland* was that the plaintiff's notice was served after 120 days, therefore they didn't need to raise it, because plaintiffs notice failed under either statute. (The defendants in this case, *Rowland* and *Whitmore* were all represented by the same firm). (Trial Court Transcript p. 13 Defendant- Appellant's Appendix #12).

unconstitutional and there was no reason for this Court or the parties to discuss an invalid law.

The Court of Appeals in *Streng* has ignored the plain language in *Rowland* and concluded that this Court overruled the equal protection argument in *Brown*. That is not the case. Obviously, the Court of Appeals cannot overrule this Court, so their conclusion is faulty.

The Court of Appeals and all other lower courts are bound to follow the decisions of this Court, regardless of whether they are well reasoned or whether the Court of Appeals believes that the decisions to be correct, unless and until they are modified or overruled by the Supreme Court. *People v. Metamora Water Service, Inc.*, 276 Mich App 376; 741 NW2d 61 (2007). As this Court explained in *Boyd v. W.G. Wade Shows*, 443 Mich 515, 532; 505 NW2d 544 (1993) overruled on other grounds *Karaczewski v. Farbman Stein & Co.*, 478 Mich. 28; 732 NW2d 56 (2007):

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

This Court did not overrule the findings in *Brown* finding MCL 224.21(3) unconstitutional. Accordingly, Plaintiff requests that, this Court reaffirm the clear language in *Rowland* and find the Plaintiff has complied with the applicable statutory notice requirement MCL 691.1404(1).

II. If Correctly Decided, *Streng* Should Only Be Applied Prospectively.

Although the general rule is that judicial decisions are given full retroactive effect, *Hyde v. University of Michigan Board of Regents*, 426 Mich 223; 393 NW2d 847

(1986), a more flexible approach has been deemed warranted where injustice might result from full retroactivity. *Lindsey v. Harper Hospital*, 455 Mich 56,68; 564 NW2d 861 (1997). Prospective application may be appropriate where a court's holding overrules settled precedent or decides an issue of first impression whose resolution was not clearly foreshadowed. *Id.*

Michigan courts have adopted a three factor test when deciding whether or not a decision should have retroactive application. *Pohutski v. City of Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002). *Pohutski*, also noted that there is an initial threshold question that must be answered before any analysis of retroactivity can take place. *Id.*

According to *Pohutski*:

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) (opinion by Griffin, J.). *Id.* at 696.

Pohutski, was applied by both the Trial Court and the Court of Appeals and both found that *Streng*, did create new law and that the 3 factors justified the prospective application of that new rule.

A. New Principle of Law.

The *Streng* Court has created a new rule of law by breaking with longstanding settled precedent and holding that the MCL 224.21(3) notice provision is now once again applicable to county road commission cases.

In *Pohutski* this Court recognized that the practical effect of their decision was to create new law even though they were simply giving effect to the intent of the Legislature that could reasonably be inferred from the text of the statute in question, given the previous erroneous interpretations by the Court. *Pohutski* at 696.

Appellant argues that *Streng* cannot create new law because it simply is giving effect to the plain text of a statute. This argument misses the point, that prior to *Streng* any interpretation of the text in MCL 224.21(3) was irrelevant, because the law was considered void. It could not be followed, no matter what language it contained.

Regardless, this Court has previously found that overruling a case that had incorrectly interpreted a statute did still create new law. See *Bezeau v Palace Sports & Entertainment, Inc.* 487 Mich 455, 463; 795 NW2d 797(2010). This was true even though the Court's decision had simply interpreted the statute consistent with its plain language. *Id.* This Court stated that the new interpretation established a new rule of law because, it affected how the statute would be applied to parties that was inconsistent with how the statute had been previously applied. *Id.*

The same is true in this case. *Streng*, regardless of whether its interpretation is consistent with the plain text of the statutes, has changed how prior appellate courts including this Court have applied the conflicting notice provisions.

The lower court in this case analyzed the threshold question as follows:

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 establishing 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. (citations omitted). *Brugger*, 324 Mich App at 316.

This Court's order granting leave instructed the parties to compare *Pohutski*, with *Wayne County v. Hathcock*, 471 Mich 445, 484 684 NW 2nd 765 (2004). ("our decision today [overruling *Poletown Neighborhood Council v. Detroit*, 410 616 (1981)] does not announce a new rule of law, but rather returns our law to that which existed before *Poletown* and which was mandated by our constitution since it took effect in 1963.").

Hathcock is distinguishable from this case and *Pohutski*. First in *Hathcock*, this Court found that it was overruling a decision that was "a radical departure from fundamental constitutional principles, and over a century of this courts eminent domain juris prudence leading up to the 1963 Constitution". *Hathcock*, 471 Mich at 483. So unlike *Pohutski* and this case there was a significant question as to whether or not the *Poletown* decision actually represented well settled case law. In fact, Justice Young noted that the concurring judges, in the lower court had recognized that the case was ripe for reversal and had been criticized in the past. *Id.* at 454.

This Court provided a similar analysis in *Devillers v. Auto Club Insurance*, 473 Mich 562, 587 702 NW2d 539 (2005), where it found that it was not establishing new

law because the case being overruled had inexplicably departed from decades of precedent and thus could not be deemed clear and uncontradicted law.

Unlike both *Hathcock* and *Devillers* there was never a decision that questioned or was even critical of the application of the GTLA notice provision over Sec. 224.21(3).² It was understood to be the law of the land and parties followed it accordingly and without any major controversy.³

In *Chevron*, the apparent genesis for the threshold question, the Court noted that a decision establishes a new principal of law, such that it may be applied retroactively, if it overrules clear past precedent on which litigants may have relied, or by deciding issues of first impression whose resolution was not foreshadowed. *Chevron*, 404 US at 106. Unlike in *Poletown*, there was no foreshadowing or serious debate as to the application of the GTLA notice provision to cases involving county road commissions. It was not foreseeable that the GTLA notice provision would not apply in county road commission cases given that this Court continued to apply it up to the *Streng*, decision. See *Whitmore*; *Ells*; *Mauer*; and *Leech*. Mr. Brugger acted

² The only case Plaintiff is aware of that even challenged the application of the GTLA to road commission cases after *Rowland*, is the unpublished decision of *Ficke v. Lenawee County Drain Commissioner*, unpublished opinion Court of Appeals issued May 3rd, 2011 (Docket number 296076)(Plaintiff-Appellee's Appendix #3.). In *Ficke* the court rejected the plaintiff's argument that the GTLA did not apply noting that both *Brown* and *Rowland* require the 120 day notice provision set forth in MCL 691.1404(1) be applied to actions against county road commissions. *Id* at 5. Moreover, even the plaintiff in *Streng* agreed that the GTLA applied in county road cases, but made the argument that she could also satisfy the notice requirement by providing notice under MCL 224.21(3). The *Streng*, plaintiff argued her notice was sufficient under either statute. *Id.* at 454.

³ Defendant at oral argument in the trial court admitted that the *Streng* opinion was one that caught many attorneys who represent road commissions "off guard". (Trial Court Transcript p. 9 Defendant-Appellant's Appendix #12).

reasonably in his reliance on this Court's prior decisions. He followed the law. As stressed in *Chevron*, a court should not indulge in the fiction that the law now announced has always been the law and therefore, those who did not avail themselves of it have now waived their rights. *Chevron*, 404 US at 107.

It is also important to note that both *Hathcock* and *Devillers* applied their findings with limited retroactivity. *Devillers*, 473 Mich at 587 & n 57; *Hathcock*, 471 Mich at 484. Accordingly, those decisions only applied to pending cases in which a specific challenge had been raised and preserved at the time the new decision was issued. *Id*; *See also People v. Cornell* 466 Mich 335, 367; 646 NW2d 127(2002) (This Court similarly applying limited retroactivity only to those cases pending on appeal in which the issue had been raised and preserved.) This Court has recognized that limited retroactivity is appropriate where there has been extensive reliance on the previous rule. *Gladych v. New Family Homes Inc.* 468 Mich 594, 606; 664 nW2d 70 (2003).

Here, Defendant never raised the issue of application of MCL 224.21(3) until almost 7 months after the *Streng* decision. In this case, limited retroactivity, similar to that applied in the cases above, would have the net effect of prospective application given Defendant failure to timely raise MCL 224.21(3) as an issue in this case.

B. The *Pohutski* Factors.

Turning to the 3 factor test under *Pohutski* the Court must first consider the purpose of the new rule. Presumably the new rule in *Streng* was to correct an error in interpretation/application of the governmental immunity statute that had been "overlooked" by the courts and litigants for decades. As noted in *Pohutski* this

purpose is served by prospective application. *Pohutski*, 465 Mich at 697. There is no compelling reason that the *Streng* decision needs to be given retroactive effect. Up and till *Streng* the parties to both sides of county road defect cases operated under the understanding that the GTLA and not MCL 224.21(3) was applicable. Prospective application would acknowledge the reliance by all parties involved in these types of cases and clarify the issue for the future. Whereas, retrospective application would not only upset decades of precedent, it would create confusion and legal turmoil in pending cases. Cases that prior to *Streng*, had none. This would seem to be the exact opposite of what the *Streng* decision apparently sought to accomplish by seeking to clarify the applications of the notice provisions.

As to the second factor, the extent of reliance, 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 since *Brown's* ruling that the 60-day notice provision was unconstitutional, have applied the 120-day notice to road commission cases. *Streng*, 315 Mich App at 460.

In fact, to Plaintiff's knowledge individual county road commissions, prior to *Streng*, exclusively argued that the 120-day notice provision applies to them, and not MCL 224.21(3). There can no argument that the application of the GTLA over the years in defective road cases was more advantageous to defendants than it was to plaintiffs. The heightened requirements of the GTLA, the longer notice period notwithstanding, generally favored the defendants.

As for the third prong of the test, effect on the administration of justice, if the decision is applied retroactively, cases which have relied on this Court's own clear

and unambiguous language that the 120-day notice provision applies will be dismissed, and it would amount to a gross miscarriage of justice for litigants who have operated under undisputed decades long legal authority regarding the applicable notice provision.

Streng, was not this Court overruling prior precedent, it was the Court of Appeals changing the common understanding of this Court's precedent. To argue that *Rowland* expressed no preference for which notice provision applied ignores the explicit language of the decision and its progeny. Plaintiff should, at a minimum, have the right to rely on the explicit language of this Court when it comes to matters of application and procedure under the law.

C. Equity

The equities in this case require a more flexible approach when considering whether to apply *Streng* retroactively. As Judge Shapiro noted "the legislature adopted two conflicting sets of requirements regarding the timing and content of the pre-suit notice. And for decades, the judiciary has decided many pre-suit notice cases based on the requirements of GTLA, with no reference to MCL 224.21(3). The roll of the government in creating confusion concerning a legal standard weigh strongly against sanctioning a party for acting in good faith on the basis of the apparent law." *Brugger*, 324 Mich App at 317.

Retroactive application would deprive the Plaintiff of his cause of action while prospective would merely restore all parties to where they were prior to *Streng*. The Road Commissions would not be adversely harmed. They would still maintain all of

their defenses and would be entitled to the application of the GTLA notice provision, which is the position they had previously advocated for.

This Court has previously exercised discretion in enforcing procedural time limits when the courts themselves have created confusion and the litigants have relied on to their detriment to the preexisting case law. See e.g. *Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 471 Mich 411; 684 NW2d 864 (2004).

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

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

As set forth above, that is exactly what has occurred here. The Court of Appeals in *Streng*, has essentially disregarded nearly 50 years of legal precedent. In addition, they have taken the unusual step of determining that the notice provision of MCL 224.21 that was found unconstitutional by this Court was applicable because other courts, including this Court, had simply overlooked the notice provision and its applicability to county road commission cases. Such an outcome could not have been predicted.

Rowland specifically and clearly stated that a plaintiff in a county road commission case “must” comply with the 120-day notice provision. *Streng* has now flipped *Rowland* on its head and says it doesn’t mean what it says. If a litigant cannot rely on the express language of this Court, but rather must try to anticipate what issues the court may have “overlooked” the judicial system is going to be impossible for litigants to navigate.

Plaintiff filed his Notice more than two years and nine months before *Streng* was decided. 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. All of the relevant case law published or unpublished only applied the GTLA notice provision. The case law was so well settled that even the county road commission defendant in *Streng* argued for the application of the 120-day notice provision.⁴

The Defendant in this case never 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(3) or that the notice was not served on the County Clerk. (Plaintiff-Appellee’s Appendix #4). It is clear that this Defendant operated under the understanding that the 120-day notice provision of MCL 691.1404(1) was applicable.

⁴ The defense counsel in *Streng* was, perhaps not coincidentally, a former partner in the firm representing this Defendant. (Trial Court Transcript p. 15 Defendant-Appellant’s Appendix #12).

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 or even thought that it was arguable 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(1), then the Plaintiff should not be penalized for a similar confusion about its application. Just as this Court in *Bryant* tolled the statute of limitations, based on what Justice Markman called an "understandable confusion" of the law, this Court would be well within its discretion to extend the time allowed to provide notice pursuant to MCL 224.2(3)1 or in the alternative find that Plaintiff's current notice was timely and properly served.

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

The equities favor tolling or prospective application. Failure to allow for either would be manifestly unjust to Plaintiff who was simply following the established law.

III. MCL 224.21(3) Violates The Plaintiff's Constitutional Right To Equal Protection Under The Laws Of The State Of Michigan And The United States.

If the *Streng*, court is correct that this Court in *Rowland*, not only reversed the actual prejudiced finding, but also overruled the equal protection argument regarding the notice provision of MCL 224.21(3), then it did so without any discussion of the issues. It goes without saying that the county defendant in *Streng*, would not have the same constitutional concerns as an individual such as the Plaintiff in this case.

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

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

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

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

Application of MCL 691.1404(1) over MCL 224.21(3) is the more reasonable approach given that the GTLA is the more recent statute and is part of a statutory scheme whose purpose was to provide a more uniform approach.

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

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

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

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

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

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

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

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

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

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

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

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

Presumably, that is why this Court in *Brown* over 20 years ago found that the notice provision in MCL 224.21(3) 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 224.2(3)1 has been overturned in *Rowland*, then this Court is obligated to consider the equal protection arguments of this Plaintiff.

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

RELIEF REQUESTED

The Michigan Supreme Court in *Rowland* set forth that MCL 691.1404(1) and not MCL 224.21(3) was applicable in cases involving county road commissions. 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.

Plaintiffs would argue that in the first instance, the Supreme Court's *Rowland* decision stands as the law today and that MCL 224.2(3)1 is still unconstitutional.

To the extent that *Streng* is determined to have been correctly decided then it should not be applied retroactively. *Streng* clearly establishes a new principle of law,

changing nearly 50 years of precedent, and the *Pohutski* factors favor prospective application.

Finally, to the extent necessary the Court should revisit the equal protection arguments that were first raised in the *Brown* decision and hold that MCL 224.21(3) is unconstitutional.

For these reasons the Order of the Circuit Court should be affirmed.

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