

IN THE SUPREME COURT

On Appeal from the Michigan Court of Appeals
Shapiro, PJ, and M. J. Kelly and O'Brien, JJ

TIM EDWARD BRUGGER, II,

Supreme Court Docket No. 158304

Plaintiff-Appellee,

Court of Appeals Docket No. 337394

v

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

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

Defendant-Appellant.

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

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

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Argument

A. Because of MCL 691.1402(1)—which Brugger never mentions—MCL 224.21(3) doesn't conflict with the GTLA.

Brugger asserts that MCL 224.21(3) and MCL 691.1404(1) are conflicting notice provisions.¹ He's wrong. MCL 691.1402(1)—which Brugger ignores²—expressly references MCL 224.21 as the statute that governs procedure for claims against county road commissions for the purposes of the GTLA. In light of that express reference, MCL 224.21(3) and the GTLA are harmonious on their face and “must be enforced as written.”³

B. *Rowland* overruled *Brown* in its entirety.

Brugger argues that *Streng* was wrongly decided because it deviated from *Brown*'s holding that MCL 224.21(3) violated constitutional guarantees of equal protection.⁴ His argument rests on two assumptions: (1) *Brown*'s equal-protection and prejudice holdings are unconnected and distinguishable; and (2) *Rowland* only overruled the prejudice holding, so the equal-protection holding survived. Both assumptions are incorrect.

First, as shown in the Road Commission's appellant's brief, *Brown*'s equal-protection and prejudice holdings—which Brugger seeks to separate and distinguish—were inextricably connected because *Brown*'s holding that the MCL 224.21(3)'s 60-day notice provision violated equal protection was founded on its conclusion that “[t]he only purpose...for a notice

¹ Brugger's MSC Appellee's Brief at 9.

² Brugger's failure to address MCL 691.1402(1)'s statement that, for GTLA purposes, MCL 224.21 governs procedures for highway-defect claims against county road commissions appears to be the root of his mistaken assertion that nothing in the GTLA limits the applicability of the general 60-day notice provision in county-road cases. See Brugger's MSC Appellee's Brief at 27-28.

³ *People v Lewis*, 503 Mich 162, 165; 926 NW2d 796 (2018).

⁴ Brugger's MSC Appellee's Brief at 9-16.

requirement is to prevent prejudice to the government agency.”⁵ And, because the only purpose the *Brown* court could imagine for the 60-day notice provision of MCL 224.21—prevention of prejudice to the government—was the same purpose served by the GTLA’s 120-day notice provision, it held that “we are unable to perceive a rational basis for the county road commission statute to mandate notice of a claim within 60 days.”⁶ In other words, *Brown*’s holding that notice provisions are only valid to prevent actual prejudice to the governmental entity being sued was part and parcel of its conclusion that it was unconstitutional for the Legislature to impose a different notice period on plaintiffs suing road commissions than plaintiffs suing other governmental entities. There was no daylight between those two concepts.

Second, because of the interrelatedness of *Brown*’s prejudice and equal-protection analysis, by overruling *Brown*’s prejudice holding, this Court in *Rowland* overruled *Brown* in its entirety (including the equal-protection analysis of MCL 224.21(3)). Indeed, the *Rowland* Court made this clear: “The simple fact is that *Hobbs* and *Brown* were wrong because they were built on an argument that governmental immunity statutes are unconstitutional or sometimes unconstitutional if the government was not prejudiced.”⁷ And it concluded that the foundational reasoning of *Hobbs*’ and *Brown*’s constitutional conclusions “has no claim to being defensible constitutional theory and is not rescued by musings to the effect that the justices ‘look askance’ at devices such as notice requirements...or the pronouncement that other reasons that could

⁵ *Brown v Manistee Co Rd Comm*, 452 Mich 354, 362; 550 NW2d 215 (1996), rev’d by *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007); Road Commission’s MSC Appellant’s Brief at 20-29.

⁶ *Brown*, 452 Mich at 363.

⁷ *Rowland*, 477 Mich at 210.

supply a rational basis were not to be considered because in the Court’s eyes the ‘only legitimate purpose’ of the notice provisions was to protect from ‘actual prejudice.’”⁸

From all of this, it’s clear that, in *Rowland*, this Court rejected the totality of the constitutional analysis and reasoning that formed the basis for its prior decisions in *Hobbs* and *Brown*. And, despite Brugger’s emphatic insistence to the contrary, *Brown*’s equal-protection holding was “built on an argument that governmental immunity statutes are unconstitutional or sometimes unconstitutional if the government was not prejudiced.”⁹ So—just like its prejudice holding—*Brown*’s equal-protection analysis was “wrong” and “has no claim to being defensible constitutional theory.”¹⁰ It follows, then, that *Rowland*’s repudiation of *Brown*’s prejudice reasoning also swept aside *Brown*’s analysis rejecting MCL 224.21(3)’s notice provision on equal-protection grounds. Once again, this Court said it best: “Nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed.”¹¹ Thus, Brugger’s argument that *Streng* is wrongly decided because it conflicted with *Brown* fails.

The same is true of Brugger’s argument that “the plain text of MCL 224.21(3) is irrelevant” and that MCL 224.21(3) is a dead letter—i.e., “wholly void and ineffective for any purpose.”¹² He posits that *Brown*’s holding that MCL 224.21(3) was unconstitutional renders the statute “void ab initio.”¹³ But, as shown above and in the Road Commission’s appellant’s brief, *Rowland* overruled *Brown* in its entirety.¹⁴ The result “is not that [*Brown*] is bad law, but that it

⁸ *Rowland*, 477 Mich at 210, quoting *Hobbs v State Hwys Dept*, 398 Mich 90, 96; 247 NW2d 754 (1976), rev’d by *Rowland*, 477 Mich 197 (citations and quotation marks omitted, emphasis added).

⁹ *Rowland*, 477 Mich at 210 (emphasis added).

¹⁰ *Id.*

¹¹ *Rowland*, 477 Mich at 214.

¹² Brugger’s MSC Appellee’s Brief at 9.

¹³ *Id.*

¹⁴ Road Commission’s MSC Appellant’s Brief at 20-29.

never was the law.”¹⁵ Consequently, MCL 224.21(3) may have temporarily been a dead letter before this Court’s opinion in *Rowland*. But, by completely overruling *Brown*, *Rowland* returned the law to its pre-*Brown* state and effectively resurrected and breathed new life into MCL 224.21(3). So nothing prevented *Streng* from enforcing MCL 224.21(3)’s plain language.

C. *Streng* wasn’t bound to follow *Rowland*’s application of MCL 691.1404(1) and didn’t create a new rule by not doing so.

Brugger also argues that *Streng* was incorrectly decided or, alternatively, created a new rule because it deviated from *Rowland*’s application of the 120-day notice provision contained in MCL 691.1404(1). Although he acknowledges that *Rowland* didn’t directly address the issue whether MCL 224.21(3) govern claims against county road commissions, Brugger tries to argue that *Rowland* “was not prohibited from addressing the issue” and was binding precedent on that issue because “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.”¹⁶

Brugger’s use of “seems” is telling and reveals the flaw in his logic. As shown in the Road Commission’s appellant’s brief, *Rowland* never mentioned MCL 224.21 or discussed whether applying different notice provisions to plaintiffs suing different government agencies violates equal protection. So it didn’t acknowledge anything about MCL 224.21(3) “explicitly.” To the contrary, any conclusions that Brugger thinks *Rowland* made regarding MCL 224.21(3) were necessarily implicit. But “implicit conclusions are not binding precedent.”¹⁷ It follows that

¹⁵ *Spectrum Health Hosp v Farm Bureau*, 492 Mich 503, 536; 821 NW2d 117 (2012) 536, quoting *Gentzler v Constantine Village Clerk*, 320 Mich 394, 398, 31 NW2d 668 (1948) (“The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is not that the former decision is bad law, but that it never was the law.”); *In re Palmer*, 371 Mich 656, 664; 124 NW2d 773 (1963).

¹⁶ Brugger’s MSC Appellee’s Brief at 14.

¹⁷ *Galea v FCA US LLC*, 323 Mich App 360, 375, 917 NW2d 694 (2018); see also *People v Heflin*, 434 Mich 482, 498 n 13, 456 NW2d 10 (1990) (“[J]ust as obiter dictum does not

Rowland's application of the 120-day notice provision of MCL 691.1404 was not binding precedent that *Streng* needed to follow. Brugger's argument to the contrary lacks merit.

D. MCL 224.21(3) doesn't violate constitutional equal protection by imposing a 60-day notice requirement on highway-defect plaintiffs suing county road commissions.

Brugger's argument that *Streng* was wrongly decided because MCL 224.21(3) violates equal protection is based focused exclusively on *Brown*. That is, aside from arguing that *Brown*'s equal-protection holding survived *Rowland*'s statement that "[n]othing can be saved,"¹⁸ Brugger doesn't even attempt to make the case that MCL 224.21(3) violates equal protection.

That might be because it doesn't. *Rowland* recognized that, "[w]ith economic or social legislation" like a governmental liability notice statute "there can be distinctions between classes of persons if there is a rational basis to do so."¹⁹ Indeed, such "legislation invariably involves line drawing and social line drawing does not violate equal protection guarantees when it has a 'rational basis,' i.e., as long as it is rationally related to a legitimate governmental purpose."²⁰ And, because the Legislature didn't have to create a highway-defect exception to governmental immunity "it surely has authority to allow such suits only upon compliance with rational notice limits."²¹ This is consistent with the well-established principle that, because exceptions to

constitute binding precedent, we reject the dissent's contention that 'implicit conclusions' do so."); *People v Beck*, 504 Mich 605, 617 n 9; 939 NW2d 213 (2019), quoting *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 597-598; 374 NW2d 905 (1985) ("[S]tatements concerning a principle of law not essential to determination of the case are obiter dictum and lack the force of an adjudication."); *McNally v Wayne Co Bd of Canvassers*, 316 Mich 551, 558, 25 NW2d 613 (1947) (citations omitted) ("[t] is a well-settled rule that any statements and comments in an opinion concerning some rule of law or debated legal proposition not necessarily involved nor essential to determination of the case in hand are, however illuminating, but obiter dicta and lack the force of an adjudication.").

¹⁸ *Rowland*, 477 Mich at 214.

¹⁹ *Rowland*, 477 Mich at 207.

²⁰ *Rowland*, 477 Mich at 207.

²¹ *Rowland*, 477 Mich at 212.

governmental immunity are entirely optional, the Legislature “could attach to the right conferred [by the exception] any limitations it chose.”²² Furthermore, “it is [a court’s] duty in rational basis cases to find constitutionality if any state of facts known of which could be reasonably be assumed affords support for the statute.”²³

Based on those principles—and the list of legitimate purposes for a notice requirement articulated in *Rowland*²⁴—it’s clear that *Streng* was correctly decided because there are numerous reasons why it is rational—and, thus, constitutional—for the Legislature to impose different notice requirements on plaintiffs suing county road commissions than plaintiffs suing other governmental entities.²⁵ Brugger doesn’t address these arguments. As a result, Brugger fails to establish that MCL 224.21(3)’s and MCL 691.1402(1)’s imposition of a 60-day notice requirement on highway-defect plaintiffs suing county road commission lacks a rational basis or is otherwise unconstitutional.

²² *Rowland*, 477 Mich at 212, quoting *Moulter*, 155 Mich at 168-169; see, e.g., *Atkins v Suburban Mobility Auth for Regional Transp*, 492 Mich 707, 714; 822 NW2d 522 (2012) (“[B]ecause the government may voluntarily subject itself to liability, it may also place conditions or limitations on the liability imposed.”); *Moulter v City of Grand Rapids*, 155 Mich 165, 168-169; 118 NW2d 919 (1908) (“The right to recover for injuries arising from want of repair of sidewalks, etc., is a purely statutory one in this state. It being optional with the Legislature whether it would confer upon persons injured a right of action therefor or leave them remediless, it could attach to the right conferred any limitations it chose. Whether the limitations imposed are reasonable or unreasonable in such cases are questions for the Legislature, and not for the courts.”); *Atkins*, 492 Mich at 714-715 (“Statutory notice provisions are a common means by which the government regulates the conditions under which a person may sue governmental entities. It is well established that statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate.”).

²³ *Rowland*, 477 Mich at 212 (citations and question marks omitted).

²⁴ *Rowland*, 477 Mich at 211-212 (possible purposes include allowing for fresh and timely investigation, “allowing time for creating reserves..., reducing the uncertainty of the extent of future demands, or even to force the claimant to an early choice regarding how to proceed.”).

²⁵ Road Commission’s MSC Appellant’s Brief at 26-29.

E. *Streng* didn't create a "new rule" for retroactivity purposes.

Brugger also argues that *Streng* "created a new rule of law by breaking with longstanding settled precedent" by "holding that the MCL 224.21(3) notice provision is now once again applicable to county road commission cases."²⁶ He's wrong for several reasons.

First, Brugger's "new rule" argument presumes that *Brown* wasn't completely overruled by *Rowland*. But that's not true.²⁷ And, because *Rowland* overruled *Brown* in its entirety, the "longstanding settled precedent" that Brugger touts as contrary to *Streng* was neither settled nor precedent; rather, it's as if *Brown* "never was the law."²⁸ So, *Streng* didn't create a new rule because it didn't overrule anything.

Second, Brugger's reliance on the pre-*Streng* case law that applied MCL 691.1404(1)'s 120-day notice provision is misplaced. As Brugger admits, none of this case law addressed the distinction between MCL 691.1404(1) and MCL 224.21(3), directly or indirectly.²⁹ So, even though those courts theoretically *could* have addressed the issue, it doesn't matter because they didn't. And, because implications don't constitute binding precedent, the opinions Brugger relies on don't constitute the sort of settled, clear, and uncontradicted case law that *Streng* would need to overrule to be a "new rule" for retroactivity purposes.³⁰

²⁶ Brugger's MSC Appellee's Brief at 18.

²⁷ Road Commission's MSC Appellant's Brief at 20-29.

²⁸ *Spectrum Health Hosp*, 492 Mich at 536 (citation omitted). Brugger's assertion that MCL 224.21(3) was "void" before *Streng* fails for the same reason.

²⁹ Brugger's MSC Appellee's Brief at 14-16, 20-21.

³⁰ *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 587; 702 NW2d 539 (2005) (citations and quotation marks omitted, emphasis in original) ("[P]rospective-only application of our decisions is generally limited to decisions which overrule *clear and uncontradicted* case law."); *Pohutski v City of Allen Park*, 465 Mich 675, 695-696; 641 NW2d 219 (2002) ("[A] holding that overrules settled precedent may properly be limited to prospective application."); *Lincoln v General Motors Corp*, 461 Mich 483, 491-492; 607 NW2d 73 (2000) (Finding that a judicial decision did not establish a new principle of law because the case law it expressly overruled was not "a clear and uncontradicted holding with regard to the issues resolved [by the decision]")

Finally, because *Rowland's* rejection of *Brown's* constitutional analysis returned the state of the law to its pre-*Brown* status and breathed new life into MCL 224.21(3), *Streng* holding was neither “unforeseeable” nor “indefensible” based on the plain language of MCL 224.21(3) and MCL 691.1402(1)'s unambiguous statement that the “procedure” governing highway-defect claims against county road commissions “shall be as provided in ... MCL 224.21.”³¹

In sum, *Streng* didn't create a new rule of law because: (1) it didn't expressly overrule any prior judicial decisions; (2) even if it did, the pre-*Streng* state of the law about what notice provision controlled highway-defect claims against county road commissions was—at best—unsettled, unclear, and contradicted; and (3) its holding was neither “unforeseeable” nor “indefensible.” So *Streng* applies retroactively, including to Brugger's case.

F. The *Pohutski* Factors favor applying *Streng* retroactively.

Because *Streng* didn't create a new rule of law, this Court doesn't need to address the *Pohutski* factors. Regardless, they favor retroactivity for the reasons stated in the Road Commission's appellant's brief.³² With respect to the second factor (reliance on the old rule), Brugger argues that it favors prospective application because “there has been a nearly 50-year reliance on the prior application of the 120-day notice provision to cases involving county road commissions.”³³ He's wrong for two reasons. First, based on *Paul, Grimes*, and *W A Foote*, the reliance that Brugger touts is irrelevant because future highway-defect plaintiffs don't drive on

³¹ *People v Doyle*, 451 Mich 93, 108; 545 NW2d 627 (1996) (finding that prior decision was not a new rule because it was not “unexpected,” “unforeseeable,” or “indefensible,” under the law existing at time and, thus, did not present the “special circumstances” that would require prospective application); *Employees Mut Ins Co v Morris*, 460 Mich at 195 (“Only if this Court's decision can be said to be “unexpected” or “indefensible” in light of the law in place at the time of the acts in question would there be a question about whether to afford the decision complete retroactivity.”).

³² Road Commission's MSC Appellant's Brief at 45-49.

³³ Brugger's MSC Appellee's Brief at 22.

county roads (or take any other actions) based on the assumption that they have 120-days to provide notice of a claim against a county road commission.³⁴ Second, even if it was otherwise relevant, any post-*Rowland*, pre-*Streng* reliance on the 120-day notice period was unreasonable because of *Rowland*'s total overruling of *Brown*; the plain language of MCL 224.21(3); and the plain language of MCL 691.1402(1) which mandates that the highway code governs procedure for claims against county road commissions (but which Brugger never even mentions).³⁵

Brugger argues that the last factor, effect on the administration of justice, favors prospective application because applying *Streng* retroactively would “amount to a gross miscarriage of justice for litigants who have operated under undisputed decades long legal authority regarding the applicable notice provision.”³⁶ But whether litigants incorrectly and unreasonably assumed that MCL 224.21(3) and MCL 691.1402(1) were dead letters post-*Rowland* speaks to the second factor, not the third. Regardless, applying *Streng* retroactively wouldn't materially affect the administration of justice because: (1) it only applies to a “limited number of cases”³⁷; (2) applying *Streng*'s common-sense, plain-language holding retroactively ensures consistency in the law as the Legislature enacted it;³⁸ and (3) applying *Streng*

³⁴ *Paul v Wayne County Dept of Pub Serv*, 271 Mich App 617, 622-623; 722 NW2d 922 (2006); *Grimes v Mich Dept of Transp*, 475 Mich 72, 87 n 49; 715 NW2d 275 (2006); *W A Foote Mem Hosp v MACP*, 321 Mich App 159, 193-195; 909 NW2d 38 (2017).

³⁵ Brugger also argues that he should have been able to rely on *Rowland*'s “explicit language” in concluding that MCL 224.21(3) was unconstitutional and void. Brugger's MSC Appellee's Brief at 23. But, yet again, *Rowland* didn't address MCL 224.21(3) or its relationship with the GTLA. So Brugger couldn't reasonably rely on any “implicit conclusions.” *Heflin*, 434 Mich at 498 n 13 (“[J]ust as obiter dictum does not constitute binding precedent, we reject the dissent's contention that ‘implicit conclusions’ do so.”)

³⁶ Brugger's MSC Appellee's Brief at 23.

³⁷ See *McNeel v Farm Bureau*, 289 Mich App 76, 96-97; 795 NW2d 205 (2010).

³⁸ See *W A Foote*, 321 Mich App at 193-194, quoting *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191, 201; 895 NW 2d 490 (2017) (finding that the stated purpose of *Covenant*—to “conform our caselaw to the text of the applicable statutes to ensure that those to

retroactively furthers the administration of justice by giving effect to the limits that the Legislature—in an exercise of its full discretion to limit governmental liability however it chooses—has placed on liability against county road commissions (i.e., the 60-day notice provision contained in MCL 224.21(3)).³⁹ And, even if those reasons didn’t exist, the third *Pohutski* factor would be a wash because “the interests of plaintiffs and defendants are opposed in these matters; although plaintiffs may be denied relief for stale claims, defendants and the judiciary are relieved from having to defend and decide cases based on deteriorated evidence.”⁴⁰

In sum, the three *Pohutski* factors weigh in favor of applying *Streng* retroactively. So there are no “exigent circumstances” justifying “extreme measure” of prospective application.

Conclusion

For the reasons stated above and in the Road Commission’s appellant’s brief *Streng* was correctly decided and it applies retroactively because it didn’t clearly create a new rule of law and, even if it did, the three *Pohutski* factors favor retroactive application. The Court of Appeals majority erred by ruling to the contrary. This Court should reverse that error.

DATED: September 25, 2020

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whom the law applies may look to those statutes for a clear understanding of the law” favored retroactivity in order to ensure consistency in the law).

³⁹ *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 401; 738 NW2d 664 (2007) (holding that “prospective-only application is inappropriate” where “the very purpose of our holding is to respect limits the Legislature has placed” on a plaintiff’s ability to bring or maintain a suit).

⁴⁰ *Trentadue*, 479 Mich at 401.