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1. *Brugger v. Midland Cty. Bd. of Rd. Comm'rs, 324 Mich. App. 307*

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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 MCL 691.1404 **[**390]** of the governmental tort liability act (GTLA), MCL 691.1401 et seq. After suit was filed, the case progressed in typical fashion **[***2]** until this Court issued the decision in Streng v Bd of Mackinac Rd Comm'rs, 315 Mich App 449; 890 NW2d 680 (2016). In Streng, 315 Mich App at 462-463, 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.
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> 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 **[***3]** 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.

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[1] Rowland v Washtenaw Co Rd Comm, 477 Mich 197; 731 NW2d 41 (2007).

[2] Apparently, the trial court was referring to Pohutski v City of Allen Park, 465 Mich 675; 641 NW2d 219 (2002).

> **[*313]** And, therefore, the Court's . . . opinion [is that] it does not prevent the application of the GTLA provision of 691.1404. **[***4]**

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

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 NW2d 778 (1970), abrogated by Rowland v Washtenaw Co Rd Comm, 477 Mich 197, 222; 731 NW2d 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 NW2d 700 (1972), abrogated by Rowland, 477 Mich 222, 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 **[***5]** tortfeasors.[3] *Reich* did not address MCL 224.21, but shortly after it was decided, we concluded in Crook v Patterson, 42 Mich App 241, 242; 201 NW2d 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

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[3] The constitutionality of the GTLA notice provision was again addressed in Hobbs v Mich State Hwys Dept, 398 Mich 90; 247 NW2d 754 (1976). By the time that case was heard, the Legislature had amended MCL 691.1404 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; 211 NW2d 24 (1973), had upheld a 120-day notice provision in a different statute. In Hobbs, 398 Mich at 96, 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 NW2d 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. Brown, 452 Mich at 363-364. Finally, in Rowland v Washtenaw Co Rd Comm, 477 Mich 197, 200-201; 731 NW2d 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.

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 (listing published and unpublished cases applying the GTLA notice provision in actions against county road commissions). As was stated in **[**392]** Streng, 315 Mich App at 463, "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 **[***6]** 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 NW2d 539 (2005).

The rules governing retroactivity are found in Pohutski v City of Allen Park, 465 Mich 675, 695-696; 641 NW2d 219 (2002). In *Pohutski*, the Michigan Supreme Court acknowledged the general rule that judicial decisions are given full retroactive effect. Id. at 695. However, "a more flexible approach is warranted when injustice might result from full retroactivity." Id. at 696. 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 (citation omitted).]

We conclude that *Streng* should be given prospective-only application and that therefore, **[***7]** 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; Bezeau v Palace Sports & Entertainment, Inc, 487 Mich 455, 463; 795 NW2d 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, 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.

Also relevant **[***8]** 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, 471 Mich 411, 417; 684 NW2d 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. 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. Nevertheless, it did not dismiss them because "[t]he equities of [the] **[***9]** case . . . compel a different result." Id. at 432 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 App at 432.]

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 3. Plaintiff filed **[***10]** 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.

/s/ Douglas B. Shapiro

/s/ Michael J. Kelly

Concur by: Douglas B. Shapiro

Concur

SHAPIRO, P.J. (*concurring*).

As I stated in the majority opinion, Streng v Bd of Mackinac Co Rd Comm'rs, 315 Mich App

[5] Dorris v Detroit Osteopathic Hosp Corp, 460 Mich 26; 594 NW2d 455 (1999).

449; 890 NW2d 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 462-463. 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 **[***11]** 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]

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[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 NW2d 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 691.1401 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 691.1401, i.e., the sentence referring 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 691.1401 are not relevant to the relationship of MCL 691.1404 and MCL 224.21.

Streng, however, did not consider Apsey v Memorial Hosp, 477 Mich 120, 123; 730 NW2d 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. Apsey, 477 Mich at 124. 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 565.262. However, the defendant argued that the affidavit was not effective in Michigan because it did not satisfy MCL 600.2102(4). Id. at 125. 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 **[***12]** 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,

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[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 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 NW 460 (1924). In Wallace v Wallace, 23 Mich App 741, 747; 179 NW2d 699 (1970), the Court agreed that the relevant affidavit did not satisfy MCL 565.262 but concluded that such an error could be corrected *nunc pro tunc* and was not dispositive of the case.

consistently relied on and enforced MCL 565.262notary 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 NW2d 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. In other words, rather than viewing the two statutes as "conflicting" with one **[***13]** being "right" and the other being "wrong," the Court concluded that compliance with *either* of the statutes was sufficient. Id. at 124.

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. [Apsey, 477 Mich at 138-139 (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.

Apsey unmistakably leads to the conclusion that compliance with the presuit notice requirements of *either* MCL 600.1404(1) *or* MCL 224.21(3) is sufficient to proceed to suit. I believe that *Streng* was wrongly decided and **[***14]** should have adopted that view.

/s/ Douglas B. Shapiro

Dissent by: Colleen A. O'Brien

Dissent

[*322] O'BRIEN, J. (*dissenting*).

"[T]he general rule is that judicial decisions are to be given complete retroactive effect." Hyde v Univ of Michigan Bd of Regents, 426 Mich 223, 240; 393 NW2d 847 (1986). Because I believe that Streng v Bd of Mackinac Co Rd Comm'rs, 315 Mich App 449, 463; 890 NW2d 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 NW2d 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 NW2d 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. . . .
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> Two years **[***15]** later, in *Reich v State Hwy Dep't, 386 Mich 617; 194 NW2d 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 NW2d 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 **[***16]** 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.
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> Considering the same point, Justice BRENNAN in his dissent in *Reich* pithily pointed out the problems with the majority's analysis:
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> > 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*(BRENNAN, J., dissenting).]
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> The next year, in *Carver v McKernan, 390 Mich 96; 211 NW2d 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

[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*.

(MVACF). The reasoning was that while some notice provisions may be constitutionally **[***17]** 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 NW2d 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*.

Returning to the *Carver* approach in 1976, this Court in [*Hobbs v Michigan State Hwy Dep't, 398 Mich 90, 96; 247 NW2d 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 **[***18]** 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*].
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> **[*325]** Finally, in 1996, in [*Brown v Manistee Co Rd Comm, 452 Mich 354; 550 NW2d 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 NW2d 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 363-364*, and that "[t]his Court is no longer persuaded that notice requirements are unconstitutional per se," *Brown, 452 Mich at 361 n 12*. Instead, the *Brown* Court held that *MCL 224.21* violated the *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. 362-364*

In 2007, **[***19]** 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:

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[4] Overruled by *Rowland, 477 Mich 197; 731 N.W.2d 41*.

[5] Overruled by *Rowland, 477 Mich 197; 731 N.W.2d 41*.

> 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*, quoting *Carver, 390 Mich at 99*, 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*. [*Rowland, 477 Mich at 210*.]

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 **[***20]** rejected "the hybrid constitutionality of the sort *Carver, Hobbs*, and *Brown* engrafted onto our law." *Id. at 213*.

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*. 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. 362*. *Rowland* expressly overruled *Brown* and its "reading an 'actual prejudice' requirement into" notice statutes. *Rowland, 477 Mich at 213*. *Rowland* also rejected the idea that the sole purpose of a notice statute was to prevent prejudice. See *id. at 211-213*. In so doing, it rejected the reasoning in *Brown* that *MCL 224.21* was unconstitutional. See *Brown, 452 Mich at 362*.

[*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)* **[***21]** 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*.

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 NW2d 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 NW2d 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 NW2d 787 (1988)* (GRIFFIN, J.).

Guiding this analysis are the principles that prospective-only application is an "extreme measure," *Co of Wayne v Hathcock, 471 Mich 445, 484 n 98; 684 NW2d 765 (2004)*, and that decisions are generally **[**399]** given retrospective application, *Hyde, 426 Mich at 240*.

[*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. **[***22]** 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 NW2d 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 **[***23]** 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

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[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*. 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*. 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*.]

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 US LLC, 323 Mich App 360, 375; 917 NW2d 694* (2018); see also *People v Heflin, 434 Mich 482, 499 n 13; 456 NW2d 10 (1990)* ("[J]ust as obiter dictum does not constitute binding precedent, we reject the dissent's contention that 'implicit conclusions' do so.").

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 **[***24]** 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)*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 **[***25]** 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, 471 Mich 411; 684 NW2d 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 **[***26]** sounded in medical malpractice or ordinary negligence. Id. at 414. 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. 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]

[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.

plaintiff's medical malpractice claims [were] time-barred." *Id. at 432*. 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 **[***27]** statutory period of limitations, see *id. at 418-419*, and the Supreme Court ultimately allowed her claims to go forward, *id. at 432*.

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 difficultly 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 **[***28]** 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 **[***29]** 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*, 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*. Accordingly, *Streng* concluded that the procedural notice requirements **[***30]** 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*. 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 NW2d 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), MCL 565.261 et seq.]* **[*335]** is an additional or alternative method of proving notarial acts. As an "additional" method, the URAA does not replace **[***31]** 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*.]

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 **[***32]** whether *Streng* was wrongly decided. See *Mich Ed Ass'n v Secretary of State, 489 Mich 194, 218; 801 NW2d 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.

/s/ Colleen A. O'Brien

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[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.