Michigan County Road Commission Self Insurance Pool
Open Litigated Files as of 05/24/2017

Last Name	First Name	Claim #	Type	Status	DOL	County	Type of Payment	Reserve Balance	Paid	Collected	Incurred
Flanagin	Carrie	AL40002013007251	AL	OL	12/9/2013	Kalkaska County Road Commission	Expense	453.79	61,160.98	0.00	61,614.77
Ann	Arbor Center for Independent Living	E&O81002014007512	E&O	OL	11/19/2014	Washtenaw County Road Commission	Expense	263.38	468.31	0.00	731.69
City of Chelsea		E&O81002014007512	E&O	OL	11/19/2014	Washtenaw County Road Commission	Expense	4,691.98	10,699.86	0.00	15,391.84
Beck	Clinton	E&O25002012007094	E&O	OL	2/25/2013	Genesee County Road Commission	Indemnity/BI	0.00	0.00	0.00	0.00
Blue	Charles	E&O25002012007094	E&O	OL	2/25/2013	Genesee County Road Commission	Indemnity/BI	0.00	0.00	0.00	0.00
Dunn	Ronnie	E&O25002012007094	E&O	OL	2/25/2013	Genesee County Road Commission	Expense	369.29	8,471.87	0.00	8,841.16
Ross	Kevin	E&O25002012007094	E&O	OL	2/25/2013	Genesee County Road Commission	Expense	-0.00	10,617.38	0.00	10,617.38
Carson	William	E&O15002015007663	E&O	OL	8/6/2015	Charlevoix County Road Commission	Expense	3,810.90	1,189.10	0.00	5,000.00
DAgostini and Sons	Lapeer County Road Commission	E&O44002015007892	E&O	OL	10/22/2015	Lapeer County Road Commission	Expense	10.67	2,989.33	0.00	3,000.00
KEPS Technology		E&O25002016008070	E&O	OL	8/5/2016	Genesee County Road Commission	Expense	2,158.61	2,104.37	0.00	4,262.98
Pniewski	Richard & Bette	E&O37002016008029	E&O	OL	7/14/2016	Isabella County Road Commission	Expense	26.04	73.96	0.00	100.00
Strom	Katherine	E&O11002016008208	E&O	OL	2/7/2017	Berrien County Road Commission	Expense	0.00	28.55	0.00	28.55
Wendling	Kenneth	E&O73002016008137	E&O	OL	11/1/2016	Saginaw County Road Commission	Expense	1,163.91	336.09	0.00	1,500.00
Brown	Lowell	GL32002013007657	GL	OL	1/25/2014	Huron County Road Commission	Expense	927.30	72.70	0.00	1,000.00
Brugger	Tim	GL56002013007594	GL	OL	4/27/2013	Midland County Road Commission	Expense	0.00	130,116.13	0.00	130,116.13
Denney	Matthew	GL41002014007391	GL	OL	5/18/2014	Kent County Road Commission	Expense	28,194.94	6,805.06	0.00	35,000.00
GUST	LEONARD	GL46002010006517	GL	OL	6/2/2010	Lenawee County Road Commission	Expense	1,350.00	33,402.59	0.00	34,752.59
Metcalf	Robert	GL49002013007248	GL	OL	12/16/2013	Mackinac County Road Commission	Expense	0.00	1,231.34	0.00	1,231.34
PEARCE	BRENDAN	GL23002014007742	GL	OL	3/8/2015	Eaton County Road Commission	Expense	0.00	7,890.18	0.00	7,890.18
MUSSER	ANDREW	GL23002014007742	GL	OL	3/8/2015	Eaton County Road Commission	Indemnity/BI	0.00	0.00	0.00	0.00
MUSSER	Melissa	GL23002014007742	GL	OL	3/8/2015	Eaton County Road Commission	Expense	0.00	0.00	0.00	0.00
GRINAGE	JOSPEH	GL23002014007742	GL	OL	3/8/2015	Eaton County Road Commission	Expense	0.00	0.00	0.00	0.00
HARSTON	Ryan	GL23002014007742	GL	OL	3/8/2015	Eaton County Road Commission	Expense	0.00	0.00	0.00	0.00
Rose	Preston	GL37002016008021	GL	OL	4/19/2016	Isabella County Road Commission	Expense	341.72	158.28	0.00	500.00
STRENG	KAREN	GL49002011007170	GL	OL	7/8/2011	Mackinac County Road Commission	Expense	23,167.38	36,832.62	0.00	60,000.00
Tomaszekwski	Randall	GL51002015007843	GL	OL	12/7/2015	Manistee County Road Commission	Expense	821.60	16,166.54	0.00	16,988.14

MCRCSIP CLAIMS REPORT
AL40002013007251

Carrie Flanagin **v** Kalkaska County Road Commission
D/A: 12/09/13 **LOCATION**: Rapid City Rd. 200 feet south of Amidon Rd.

PLAINTIFF ATTORNEY: Grant W. Parsons, Parsons Law Firm PLC
DEFENSE ATTORNEY: William Henn

ALLEGATIONS IN COMPLAINT: Negligent operation of a motor vehicle.

INJURIES/DAMAGES: Low back injury, bilateral lower extremity injuries requiring surgery, wage loss and disability.

FACTS OF ACCIDENT: This claim arises from a two vehicle accident involving a snow plow owned by the Kalkaska County Road Commission. On the date of loss the RC was performing snow removal operations. The RC driver was driving a 2002 Sterling tandem axle truck northbound on Rapid City Rd. clearing snow from the northbound lane and a portion of the shoulder. Ms. Flanagin was driving her 2008 Kia Optima southbound Rapid City Rd. at the same time. The allegation is that the RC driver crossed the center line into southbound traffic and struck Ms. Flanagin's vehicle head-on. Ms. Flanagin was taken to a local medical facility with "A" type injuries to seek treatment.

UPDATE (01/29/15): Mediation scheduled 03/27/15.

UPDATE (05/20/15): Mediation 05/27/15; No settlement authority going in as counsel/RC does not believe we have any liability in this case. Very aggressive/difficult plaintiff's counsel. Judge will rule on substantive motions on 06/02/15 (after mediation process). End of Discovery 05/31/15; Status Conference 06/02/15; Motions for Summary Disposition to be filed by 06/09/15; No trial date set at this time.

Plaintiff's attorney is smart enough to know his case is very weak re where RC truck came to rest after accident with regard to allegations that RC truck was in plaintiff's lane of travel at time of collision. Counsel for plaintiff's motion for sanctions is really his attempt to win the case without having to deal with the bad facts for plaintiff by trying to get the judge to sanction the road commission for liability.

UPDATE (06/23/15): Mediation was unsuccessful. Plaintiff's demand was $1.5 million. We did not offer a counter. Defense counsel's opinion remains that this is a very defensible case for the Road Comm. Believes the physical evidence at the crash scene, and most importantly the final resting places of the vehicles, establishes that the crash occurred in the NB lane, not the SB lane (plaintiff crossed the centerline). Case is not without obstacles – Pl's efforts to have Road Commission sanctioned for spoliation of evidence. Defense counsel believes these obstacles will be overcome. Plans to file MSD based on governmental immunity by deadline of 09/01/15. Case will either be dismissed or we will have a claim of appeal with an automatic stay of trial court proceedings

UPDATE (08/27/15): Motion for Summary Disposition to be heard 09/09/15 as well as Pl's Motion for Sanctions re Spoliation. Case remains very active and plaintiff's attorney has become even more deeply entrenched in his position that he cannot produce his experts because they have been hindered from forming their opinions by the refusal to produce Paul Palazzola for deposition. Plaintiff's counsel's response will likely be that he cannot respond to the motion because his experts have been unfairly hindered. At this point, strategy is to force him to explain, with precision, why that is the case. If we win the motion, we will be out of the case. If we lose the motion, we will have an automatic appeal and mandatory stay of trial proceedings.

UPDATE (11/12/15): Plaintiff's counsel continues to be very difficult. A hearing on Plaintiff's Motion to Strike all Defense Experts is set for 12/08/15. Plaintiff's counsel recently filed a renewed Motion to Default the Road Commission for perceived spoliation of evidence. No hearing date set yet. Defense counsel is preparing a supplemental brief supporting our Motion for Summary Disposition, a Response to the Renewed Motion for Sanctions based on Spoliation and a response to the Motion to Strike Defense Expert Witnesses. Once the Court rules on our Summary Disposition Motion, we will be in a position to take an appeal of right should we lose the Motion.

UPDATE (06/29/16): On 12/18/15 Defendant Kalkaska County Road Commission filed its Claim of Appeal with the Court of Appeals.

This matter has not been scheduled for Oral argument with the Court of Appeals, and likely will not be until sometime in 2017.

UPDATE (08/18/2016): On 8/24/2016 Attorney Bill Henn stated that Plaintiff/Appellee has not filed her brief. Once she files, we will have 21 days to file our reply brief.

This matter has not been scheduled for Oral argument with the Court of Appeals, and likely will not be until sometime in 2017.

UPDATE (02/03/2017): Plaintiff/Appellee has not filed her brief. Once she files, we will have 21 days from the date the Brief is filed to file a Reply Brief. This matter has not been scheduled for Oral Argument with the Court of Appeals, and likely will not be until sometime in the upcoming year. We continue to monitor the docket and updates in case law to remain prepared to file a reply brief as it is possible that the deadlines could be tight between Oral Arguments and due dates for the briefs.

Update (06/01/2017): On March 22, 2017, Bill Henn filed a Reply Brief in the Court of Appeals on behalf of the road commission. This case is unusual in the sense that the Plaintiff's brief opposing our appeal was not filed until two business days before the oral argument, so then we had 21 days to file our Reply. The Court of Appeals rejected our argument, and we are considering filing Leave to Appeal with the Michigan Supreme Court.

STATE OF MICHIGAN

COURT OF APPEALS

CARRIE S. FLANAGIN, Plaintiff-Appellee,	FOR PUBLICATION May 23, 2017 9:05 a.m.
v	No. 330887 Kalkaska Circuit Court
KALKASKA COUNTY ROAD COMMISSION, Defendant-Appellant, and	LC No. 14-011619-NI
ANDREW HENRY SCHLAGEL, Defendant.	

Before: CAVANAGH, P.J., and SAWYER and SERVITTO, JJ.

PER CURIAM.

The central issue in this case is whether a county road commission is immune from suit for an accident caused by a county snowplow that is operating on the wrong side of the road. We conclude that, while the motor vehicle code does authorize a plow truck to be operated in the opposing traffic lane, doing so may nevertheless present a situation in which the plow truck is being negligently operated and, in such cases, the resulting motor vehicle accident falls outside the scope of governmental immunity.

Defendant Kalkaska County Road Commission (defendant) appeals from an order of the circuit court denying its motion for summary disposition under MCR 2.116(C)(7) based on governmental immunity. On appeal, defendant argues that it is immune from suit because (1) MCL 257.603 and 257.634 authorizes a snowplow to cross the centerline of a road and (2) even if those statutes are inapplicable, plaintiff failed to establish a genuine issue of material fact that the plow truck was operated negligently and that this accident fell within the motor vehicle exception to governmental immunity, MCL 691.1405. We disagree and affirm. We review de novo the trial court's decision on a motion for summary disposition, *Oliver v Smith*, 290 Mich App 678, 683; 810 NW2d 57 (2010), the issue of whether immunity applies, *Co Rd Ass'n of Mich v Governor*, 287 Mich App 95, 118; 782 NW2d 784 (2010), and issues of statutory interpretation, *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

Plaintiff's suit alleges that she was injured when the vehicle she was driving collided with a plow truck operated by defendant Schlagel, who was subsequently dismissed from the suit, in the course of his employment with defendant. Plaintiff alleges that the accident occurred because Schlagel was driving too fast for the conditions and crossed the centerline of the road. Schlagel denies that he crossed the centerline and it is defendant's position that the accident was caused when plaintiff herself crossed the centerline. The issue of which vehicle crossed the centerline is relevant to the second issue on appeal (whether the motor vehicle exception to governmental immunity applies). But, for purposes of resolving the first issue, the applicability and effect of MCL 257.603 and 257.634, we will assume that it was the plow truck that crossed the centerline.

MCL 257.603 provides as follows:

> (1) The provisions of this chapter applicable to the drivers of vehicles upon the highway apply to the drivers of all vehicles owned or operated by the United States, this state, or a county, city, township, village, district, or any other political subdivision of the state, subject to the specific exceptions set forth in this chapter with reference to authorized emergency vehicles.
>
> (2) The driver of an authorized emergency vehicle when responding to an emergency call, but not while returning from an emergency call, or when pursuing or apprehending a person who has violated or is violating the law or is charged with or suspected of violating the law may exercise the privileges set forth in this section, subject to the conditions of this section.
>
> (3) The driver of an authorized emergency vehicle may do any of the following:
>
> (a) Park or stand, irrespective of this act.
>
> (b) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation.
>
> (c) Exceed the prima facie speed limits so long as he or she does not endanger life or property.
>
> (d) Disregard regulations governing direction of movement or turning in a specified direction.
>
> (4) The exemptions granted in this section to an authorized emergency vehicle apply only when the driver of the vehicle while in motion sounds an audible signal by bell, siren, air horn, or exhaust whistle as may be reasonably necessary, except as provided in subsection (5), and when the vehicle is equipped with at least 1 lighted lamp displaying a flashing, oscillating, or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc unless it is not advisable to equip a police vehicle operating as

an authorized emergency vehicle with a flashing, oscillating or rotating light visible in a 360 degree arc. In those cases, a police vehicle shall display a flashing, oscillating, or rotating red or blue light visible under normal atmospheric conditions from a distance of 500 feet to the front of the vehicle. Only police vehicles that are publicly owned shall be equipped with a flashing, oscillating, or rotating blue light that when activated is visible under normal atmospheric conditions from a distance of 500 feet in a 360 degree arc.

(5) A police vehicle shall retain the exemptions granted in this section to an authorized emergency vehicle without sounding an audible signal if the police vehicle is engaged in an emergency run in which silence is required.

(6) The exemptions provided for by this section apply to persons, teams, motor vehicles, and other equipment while actually engaged in work upon the surface of a highway but do not apply to those persons and vehicles when traveling to or from work. The provisions of this chapter governing the size and width of vehicles do not apply to vehicles owned by public highway authorities when the vehicles are proceeding to or from work on public highways.

MCL 257.634(1) provides as follows:

(1) Upon each roadway of sufficient width, the driver of a vehicle shall drive the vehicle upon the right half of the roadway, except as follows:

(a) When overtaking and passing another vehicle proceeding in the same direction under the rules governing that movement.

(b) When the right half of a roadway is closed to traffic while under construction or repair or when an obstruction exists making it necessary to drive to the left of the center of the highway. A driver who is driving on the left half of a roadway under this subdivision shall yield the right-of-way to an oncoming vehicle traveling in the proper direction upon the unobstructed portion of the roadway.

(c) When a vehicle operated by a state agency or a local authority or an agent of a state agency or local authority is engaged in work on the roadway.

(d) Upon a roadway divided into 3 marked lanes for traffic under the rules applicable on the roadway.

We agree that the effect of MCL 257.603(6) and 257.634(1)(c) is that a plow truck operator is not necessarily committing a moving violation by driving across the centerline while plowing the

road.[1] But that does not lead to the conclusion that the driver is never negligent in such a situation and, therefore, cannot be liable for a resulting accident.

It is well established that MCL 257.603, while excusing certain drivers from obeying many "rules of the road," must nevertheless do so in a manner that does not endanger life or property. Such drivers must drive "with due regard for the safety of others." *Fiser v Ann Arbor*, 417 Mich 461, 472-473; 339 NW2d 413 (1983), overruled on other grounds by *Robinson v Detroit*, 462 Mich 439; 613 NW2d 307 (2000). See also *Kalamazoo v Priest*, 331 Mich 43, 46-47; 49 NW2d 52 (1951); *McKay v Hargis*, 351 Mich 409; 88 NW2d 456 (1958). As these cases point out, the Legislature has expressed its intent that, while drivers are excused from following the "rules of the road" under certain circumstances, they must do so in a reasonable manner that looks out for the safety of others on the road. Indeed, it is within the common experience of any driver who has encountered an emergency vehicle on the road: police cars, ambulances and fire trucks proceeding with lights and sirens and, while they may proceed through a red light, they do so only after slowing and ensuring that any cross-traffic has observed them and stopped. The same can be said when those vehicles need to cross the centerline of the road—they do so only after ensuring that it is, in fact, safe to do so.

And the fact that this case involves a plow truck instead of an authorized emergency vehicle does not change the result. While these earlier cases did deal with police vehicles, we hardly think that the Legislature intended to give greater ability to road work vehicles to disregard the rules of the road and the safety of others while engaged in road work than what it granted to emergency vehicles responding to an emergency. That is, if a police officer chasing a suspect, a fire truck going to a fire, or ambulance rushing a critical patient to the hospital is expected to nevertheless give due regard for the safety of others on the road, then certainly so must a plow truck.

In sum, we view these statutes as not establishing a sort of immunity from suit or an excuse to be negligent. Rather, they merely recognize that drivers, under the covered circumstances, are not violating these particular provisions of the motor vehicle code. Its applicability to a subsequent lawsuit arising out of a collision involving one of these vehicles is minimal. It might lead to the conclusion that a plaintiff could not successfully base on argument on negligence per se for the violation (because there would be no violation), but it would not lead to the conclusion that the operator of the emergency or road work vehicle cannot be considered negligent because the operator did not have to follow the rules of the road.

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[1] Arguably, MCL 257.634(1)(c) only applies to drivers who encounter work vehicles on a roadway, not to the operators of the work vehicles themselves. Because we conclude that this statute does not excuse a driver of a work vehicle from operating with due regard for the safety of others, we need not resolve that question. For purposes of this appeal, we will assume, without deciding, that MCL 257.634(1)(c) does apply to the plow truck and its operator.

Thus, the real question in this case is whether there is a genuine issue of material fact that the plow truck was being operated negligently and, thus, this case comes under the motor vehicle exception to governmental immunity. Defendant contends that it was entitled to summary disposition because (1) the submissions upon which plaintiff relies were untimely and (2) even if not untimely, they do not establish a genuine issue of material fact. We disagree.

At issue are the so-called Petersen affidavit and the Meyers crash report. The Meyers crash report was not submitted with plaintiff's primary response to defendant commission's motion, and the first version of the Petersen affidavit attached to plaintiff's response to the summary disposition motion was unsigned and unsworn. See *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 120; 839 NW2d 223 (2013) (holding that an unsworn, unsigned affidavit cannot be considered on a motion for summary disposition).

A court has discretion to consider late filed documents. See *Prussing v Gen Motors Corp*, 403 Mich 366, 370; 269 NW2d 181 (1978).[2] And, as the problem with the first Peterson affidavit was that it was not properly executed, not that it was untimely or irrelevant, the court's decision to consider it was not outside the range of principled outcomes. See *Radeljak v DaimlerChrysler Corp*, 475 Mich 598, 603; 719 NW2d 40 (2006).

Regardless, defendant contends that the second Petersen affidavit and the Meyers report do not generate an issue of material fact because the snowplow could legally cross the centerline. This argument is premised on the assumption that MCL 257.603 or MCL 257.634(1)(c) effectively granted defendant immunity, and, as discussed above, that argument lacks merit.

Defendant also asserts that Petersen and Meyers contradict each other as to the extent to which it was possible to reconstruct the accident. But that discrepancy has no bearing on whether there is a genuine issue of fact. It would be for a trier of fact to consider how any such discrepancy impacted the weight to be given the opinions, if indeed both were presented to the trier of fact.

The Meyers report concluded that the snowplow was four to six feet over the centerline at the time of crash. And Petersen averred that his analysis of the evidence suggested the snowplow was not in its lane of travel. While defendant could legally operate the snowplow over the centerline pursuant to statute, the statutory exemptions do not relieve the driver of performing his or her work in a non-negligent manner. Here, the degree to which the snowplow allegedly crossed the centerline and whether doing so was proper in light of the driver's ability to see oncoming traffic because of variables like the weather and the curve in the roadway, could allow a reasonable jury to conclude that the snowplow was negligently operated at the time of

[2] In *Prussing*, the Court held that a trial court did not abuse its discretion by failing to consider an untimely affidavit. *Prussing*, 403 Mich at 370. The reference to a court not having abused its discretion implies the existence of discretion.

the accident. Thus, the trial court correctly concluded that summary disposition was not appropriate.

Affirmed. Plaintiff may tax costs.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Deborah A. Servitto

MCRCSIP CLAIMS REPORT
E&O81002014007512

Ann Arbor Center for Independent Living
City of Chelsea
v Washtenaw County Road Commission

D/A: 8/1/2015

LOCATION: Washtenaw County

PLAINTIFF ATTORNEY: J. Mark Finnegan, P.C.
DEFENSE ATTORNEY: Wendy Hardt, Michael R Kluck & Associates

ALLEGATIONS IN COMPLAINT: Numerous issues with accessibility for individuals with disabilities on several Washtenaw County Road Commission constructions projects in 2013 & 2014. Requests injunctive relief and attorney fees and costs.

FACTS OF ACCIDENT: This is a class-action law suit, but does not seek any monetary award. It does request plaintiff's attorney fees and costs. The case resolves around whether the Washtenaw Road Commission is preparing curb ramps, walkways and pedestrian crossings at road construction sites in a way which is compliant with the Americans with Disabilities Act and accessible to persons with disabilities. It has been discovered that most of the access barriers at the construction sites have been placed by the local Townships in Washtenaw County and not the Road Commission.

As of this date, however, to the best of our knowledge, the Plaintiff has not raised any of the same issues with any of the local Townships.

UPDATE (11/12/15): Complaint was filed 08/27/15 with an Amended Complaint being filed on 09/11/15 dropping the individually named Defendants. Presently, named Defendants include: Road Commission, MDOT, Pittsfield Charter Twp and Ypsilanti Charter Twp. Complaint alleges violations of the Americans with Disabilities Act with regard to alleged access barriers in the sidewalks, curb cuts and pedestrian crossings throughout Washtenaw County. The AACIL is requesting declaratory and injunctive relief, requiring Defendants to correct the alleged access barriers.

Plaintiff's counsel has requested a meeting of all counsel to try to come to some sort of "consent decree" with regard to this litigation but no such meeting has yet been set.

UPDATE (02/18/16): Plaintiffs have filed a Motion for Leave to File a Second Amended Complaint. The proposed Second Amended Complaint is substantially different than the First Amended Complaint and would add a new organizational plaintiff: the National Federation of the Blind of Michigan

UPDATE (06/29/16): Defense counsel have requested AACIL to identify and state with specificity the location of each intersection, sidewalk, curb ramp, and walkway within the Washtenaw County road right-of-way that the Plaintiff(s) allege to be in violation of the Rehabilitation Act of 1973.

UPDATE (08/18/2016): August 15, 2016 received the ADA case against the city of Chelsea. As of August 16, 2016 the Court has still not entered any Scheduling Order nor has it rules on the Plaintiff's Motion for Leave to File a Second Amendment Complaint.

UPDATE (10/19/2016): September 19, 2016, a Motion of Summary Judgement on behalf of the Road Commission was filed. After we filed the Motion, Plaintiffs filed a Motion to Strike our Motion for Summary Judgement. We then filed a Motion for Dismissal of the Second Amended Complaint and withdrew the original Motion of Summary Judgment. Plaintiffs also withdrawn their Motion to Strike. MDOT has not filed a Motion to Dismiss the Second Amended Complaint. Plaintiffs now requested concurrence in Motion for Leave to file a Third Amended Complaint. We have refused to grant such concurrence.

UPDATE (11/10/2016): We have filed our Motion Summary of Disposition and are awaiting decisions. Discovery continues.

UPDATE (02/07/2017): Discovery continues. We have taken some of the deponent depositions, and more are scheduled for February 7, 2017. Once those are complete it is likely that upcoming pertinent dates would be scheduled and provided then.

UPDATE (06/01/2017): Judge denied our Motion for Summary Judgement, and allowed Plaintiff's to amend complaint to name the road commission as a defendant.

Received Order Amending Scheduling Order Dates:

Pretrial Disclosures	July 3, 2017
Motions in Limine	July 28, 2017
Final Pretrial Order	August 25, 2017
Final Pretrial Conference	September 5, 2017 at 3:30 p.m.
Trial Date	September 19, 2017 at 8:30 a.m.

MCRCSIP CLAIMS REPORT
E&O25002012007094

Ronnie Dunn/Kevin Ross **v** Genesee County Road Commission
D/A: 02/25/13 **LOCATION:**

PLAINTIFF ATTORNEY: Shereef Akeel (Ross & Dunn)
DEFENSE ATTORNEY: Michael R. Kluck & Associates

ALLEGATIONS IN COMPLAINT: Race Discrimination in violation of the Elliot-Larson Civil Rights Act; Retaliation in violation of the Violation of the Elliot-Larson Civil Rights Act.

INJURIES/DAMAGES: Loss of earnings, earning capacity, fringe benefits and mental anguish, physical and emotional distress, humiliation and embarrassment.

FACTS OF ACCIDENT: Plaintiffs, employees of the Genesee County Road Commission allege that they were subject to discrimination based on their race. Specifically, the four plaintiffs, who are African American, state that their failure to be promoted to a foreman position to which they applied was due, in whole or in part, to their race. The position was given to Michael Jaeger (Caucasian).

UPDATE (05/20/15): Appeal: Waiting for Oral Argument to be set.

UPDATE (06/23/15): No pertinent developments since 05/23/15 update.

UPDATE (08/27/15): No pertinent developments. Still waiting on oral argument to be scheduled on the consolidated appeals.

UPDATE (2/18/2016): On February 2, 2016 (unpublished) Michigan Court of Appeals reversed our Summary Judgement against Kevin Ross and Ronnie Dunn, and Affirmed on Clint Beck. Kevin Ross and Ronnie Dunn have been remanded back to the Trial Court.

UPDATE (06/29/16): Defense Counsel filed a Notice of Taking Deposition and Subpoena to obtain all medical records of Kevin Ross. The Court has adjourned the July 20, 2016 trial date until after the Case Evaluation has been scheduled after August, 2016.

UPDATE (08/18/2016): A case evaluation is scheduled for September 6, 2016 to evaluate and authorize an amount that is needed for the case and then will notify each attorney of its outcome. The evaluation should include a separate award as to each Plaintiff. Thereafter each party must file a written acceptance or rejection of the panel's evaluation within 28 days after service of the panel's evaluation. The failure to file a written acceptance or rejection within 28 days constitutes rejection. We understand that the Pool Board will not meet again after August 31, 2016 until December 2016, but we will need to know in September whether to accept the case evaluation award. Until then, we will not know the amount of the award.

On August 19, 2016 Wendy Hardt requested an increase of $50,000.00 in litigated reserves to ensure covering litigation expenses through the trial.

UPDATE (09/30/2016): A mandatory Settlement Conference is scheduled for December 6, 2016 and the trial is scheduled for December 7, 2016.

UPDATE (02/07/2017): The mandatory settlement conference has been adjourned from December 6, 2016 to March 21, 2017. The Notice to Appear provides that counsel and parties with authority to settle must appear. The trial date has been adjourned to March 22, 2017.

UPDATE (05/25/2017): On March 28, 2017, Wendy Hardt and Tom Derderian appeared in Genesee County Circuit Court for the start of the Dunn Trial. Unfortunately, because of the remodeling occurring in Judge Farah's courtroom, we were going to have even less time to get the trial completed this week than the Judge had originally thought. The courtroom he was going to borrow was not going to be available much the rest of the week. As a consequence, the Judge decided to adjourn the trial to a date when his courtroom will be completed. We will be going to trial on June 13th-16th. Those are firm dates that were set with both counsel in the Judge's chambers.

Settlement Authority: $50,000.00

MCRCSIP CLAIMS REPORT
E&O15002015007663

William Carson **v** Charlevoix County Road Commission
D/A:8/06/2015 **LOCATION**: 13654 Sandy Beach Road

PLAINTIFF ATTORNEY: Allen G. Anderson Smith & Johnson
DEFENSE ATTORNEY: Craig Lange

ALLEGATIONS IN COMPLAINT: This action arises under the Fair Labor Standards Act, 29 U.S.C. 207 215 (a) (3), and alleges unpaid overtime compensation; retaliatory termination from his employment of 17 years.

INJURIES/DAMAGES: Carson's employment was terminated March 13, 2015 as a result of insubordination.

OVERVIEW: Plaintiff began employment on May 12, 1997 as a Truck Driver. After a long history of insubordination and difficulty performing assigned work, Plaintiff was terminated by the RC with the assistance of Mike Kluck's law firm.

UPDATE (02/18/16): Counsel received a copy of letter from the EEOC to Plaintiff Carson. Plaintiff Carson has requested a Right to Sue letter as the period of time in which the EEOC has exclusive jurisdiction of this matter has expired. Opinion and Award issued in the matter of the Arbitration between Teamsters Local 214 and Charlevoix County Road Commission was received The Notice was issued directly to Plaintiff Carson. The court denied claimant's grievance claim. The arbitrator found no proof the road commission acted improperly.

UPDATE (11/10/2016):
Lawsuit was served on the Road Commission on September 15, 2016.
We have answered the complaint and filed our Affirmative Defenses on October 19, 2016.
On October 21, 2016 we filed our preliminary set of disclosure documents under the Federal Civil Rules of Civil Procedure.
November 21, 2016-Court's scheduling conference.

UPDATE (02/07/2016): Notice of taking of Plaintiff's Disposition was filed and is scheduled on February 27, 2017 at 1:00PM, at the Law Offices of Smith & Johnson in Traverse City, MI.

UPDATE (06/01/2017): The applicable disposition was conducted and completed on February 27, 2017. On March 1, 2017, counsel for Plaintiff serves a "Reservation of Deposition Rights" requesting the right to submit a verified errata sheet. In addition to a telephone conference with counsel for Plaintiff, on March 13, 2017, Defendant's served a letter reserving the right to object to any errata sheet submitted by the Plaintiff's as untimely. On March 31, 2017, Plaintiff submitted a verified errata sheet. On April 14, 2017, Defendants served Counsel Plaintiff with a letter outlining their procedural and substantive objections to the submitted errata sheet and requested a conference call to discuss the matter further prior to filing this motion. Counsel for Plaintiff did not respond to the letter.

We were at a facultative mediation on May 27, 2017, which was successful. Case has been settled and the paperwork is being prepared.

MCRCSIP CLAIMS REPORT
E&O44002015007892

D'Agostini &Sons
KWA Water Auth.
D/A: 10/22/2015

v Lapeer County Road Commission
LOCATION: Intersection of Hamburg and Sheldon

PLAINTIFF ATTORNEY: Lawrence Benton, Edwards & Benton, PLC
DEFENSE ATTORNEY: Bill Henn, Henn Lesperance

ALLEGATIONS IN COMPLAINT: Breach of Contract

INJURIES/DAMAGES: Failed to return the road to the original condition as required.

FACTS OF ACCIDENT: D'Agostini & Sons is a contractor of the KWA Water Authority installation project. Part of their work traverses Lapeer County and they applied for and received permits from the Road Commission to work in the ROW under specific conditions. They also posted a $100,000 cash bond to provide the RC with security in case they failed to return the road to the original or better condition as required under the permit.

D'Agostini failed to return the road to the original condition as required, and the RC used the bond to repair that part of the road. The RC then asked for another bond, and D'Agostini refused. They also continued to fail to return the road to the original condition. Lapeer Road Commission issued a stop work order for two contractors working on road projects S-4005 (D'Agostini) and S-4006 (Zito) based on the Winter Maintenance Agreement between KWA and the Road Commission, which prohibits the contractors from performing any work during spring weight restrictions, which went into effect near the end of February.

The Road Commission was willing to cautiously approach the idea of permitting work during the restrictions subject to careful oversight of the condition of the roads. However, recently, the roads have so badly damaged by the contractors hauling materials to and from the work sites that the Road Commission felt it had no choice as a public safety matter. A Restraining order was filed on the county's path. There is no 3rd party liability claim.

UPDATE (06/29/16): On 05/12/16 the Court entered and Oder denying the Road Commission's Motion for Reconsideration pertaining to the previously filed Order appointing a special master. Though the Motion was denied, the Judge clarified at length the function of the special master, which will benefit the Road Commission.

On 05/17/16 Bill Henn met with corporate counsel and the Road Commission to discuss whether an appeal is warranted. Due to the improvement of circumstances in the field, the Road Commission elected not to pursue an appeal. However, the Road Commission has arranged to meet with D'Agostini, KWA, and its counsel to attempt to privately resolve as many of the outstanding issues as possible. This should narrow the issues to be litigated in the case, if not resolve them outright. That meeting is scheduled for 06/28/16.

Although the parties have agreed to a Special Master Contract with John C. Friend, PE, as of this date, the Special Master has not been utilized. The Road Commission prefers to eliminate as many issues as possible before involving Mr. Friend.

The litigation front has been quiet recently, likely due to the Court's reluctance to push the case until the project reaches "substantial completion," expected in July 2016. No scheduling order has been entered by the Court, but the parties have engaged in limited written discovery, including requests to admit, interrogatories and requests to produce.

Update (08/22/2016): The case is currently in a holding pattern and there is nothing new to report at this time.

Update (11/10/2016): The upcoming court dates are February 01, 2017 Discovery Ends, and February 15, 2017 MSDS filed & heard. Parties have one known contentious issue for the "Special Master" (repairing a portion of Clear Lake Road). Final inspection of the project may raise others when KWA/LDS tenders the highways back to the R.C.

Update (02/03/2017): Presently, the parties are preparing to present the one known contentious issue (the Road Commission's repaving of a portion of Clear Lake Road) to the court appointed Special Master. The parties will submit documents and position papers to the Special Master on February 3, 2017. Beyond this one issue, there are no other existing disputed issues at this time, although the Road Commission is in the process of performing a final inspection of the entire project. Other issues may arise in that inspection that will be submitted to the Special Master. Case Evaluation is to be scheduled sometime in May/June 2017.

Update (06/01/2017): On March 20, 2017 we received a letter from Bill Henn that with the discovery deadline being adjourned for 120 days, he did not see any immediate need to schedule further depositions. The Special Master scheduled a meeting on April 21, 2017 with the Larry Salstrom and Bill Henn at 11:00AM at the road commission. The Special Master has already met with counsel for the other parties. The parties have expressed an interest in an informal settlement meeting to discuss potentially resolving all issues related to the S4005 project and the S5005 project. Many issues that originally existed in the S5005 project (and which were likely to head to litigation) have been resolved through good faith negotiations. A global settlement of issues pertaining to those projects would culminate in the dismissal of the lawsuit.

The following are upcoming pertinent dates:
08/01/2017 Discovery Ends
08/14/2017 Summary Disposition Motions filed and heard

MCRCSIP CLAIMS REPORT

E&O01002015007767

KEPS Technology d/g/a ACD Telecom **vs.** Genesee County Road Commission
D/A: 06/10/2016 **LOCATION**: N. Genesee Rd.

PLAINTIFF ATTORNEY: Field Law Group, PLLC
DEFENSE ATTORNEY: William L. Henn, Henn Lesperance

ALLEGATIONS IN COMPLAINT: Seeking to have two Right of Way permits reinstated that were revoked on June 10, 2016 without notice or explanation.

FACTS OF ACCIDENT: Plaintiff KEPS Technologies, INC. filed a complaint and request for Preliminary and Permanent Injunctive Relief be issued on the R.C., directing that it reinstate two Right of Way permits that it revoked be reinstated. In addition, it is requested that the R.C. be directed to continue its review of other ROW permits that have been revoked without notice or explanation.

Update (09/09/2016): Attorney Bill Henn filed an answer to the complaint stating that the allegation contains conclusions of law requiring no answer, as contained in official statute books and Michigan Court Rules and not as pleaded in Plaintiff's complaint.

Update (11/03/2016): Plaintiff's attorney filed a Notice to Withdraw without prejudice filed on November 3, 2016, requesting to withdraw their Motion to Show Cause why Writ of Mandamus should not be issued without prejudice. Attorney Bill Henn is preparing a response to notice.

Update (02/03/2017): Presently, we are drafting a policy for the Road Commission to apply to all wireless network ROW applications. Because of the extended negotiations, the Motion for Writ of Mandamus has been adjourned several times, and as of 10/28/2016, has been withdrawn. No scheduling order has been entered by the Circuit Court. Mr. Henn continues to negotiate a settlement outside of the Court process, and indications are that once the Road Commission adopts the recommended policy, the lawsuit will be dismissed.

Update (05/25/2017): Received Stipulated Order of Dismissal (with prejudice) from defendant. All parties have accepted, case closed.

MCRCSIP CLAIMS REPORT
E&O37002016008029

Pniewski **v** Isabella County Road Commission
D/A: 07/14/2016 **LOCATION**: 7048 E. Battle Road

PLAINTIFF COUNSEL: Frederick C. Overdier/Braun Kendrick Finkbeiner P.L.C.
DEFENSE COUNSEL: William L. Henn/Henn Lesperance PLC

ALLEGATIONS IN COMPLAIN: Plaintiff wants to do garage reconstruction within the county highway right-of-way.

FACTS OF ACCIDENT: Plaintiffs are owners of real property a house and garage constructed in 1949, commonly known as 7408 East Battle Road, Clare, MI in Isabella County. Plaintiffs allege the road commission was fully aware of the garage being within the county highway right-of-way by virtue of paving the road in 2003. In 2015, a vehicle accident caused a collision with the garage, which resulted in them needing to reconstruct the same. When the plaintiff's applied for a permit from Isabella County Building Department, through their contactor, to rebuild the garage at the same location, a permit was posted that was issued by Isabella County Road Commission on May 12, 2016. After work had commenced, consistent to the permit, Plaintiff's received a copy of a letter describing it as a "cease and desist order", dated May 27, 2016. The Plaintiff's stated they were not served and did not receive the original document when it was filed. They received a photocopy of the document, and they sent correspondence regarding their dispute, and requested information from public authorities as to the background and rationale for the presentment of the "order".

UPDATE (08/23/2016): No update

UPDATE (06/01/2017): On April 28, 2017 Bill Henn attended the hearing on our Motion for Summary Disposition. At the commencement of the hearing, Judge Chamberlain advised he was willing to recuse himself in this matter because he and his brother had retained the same law firm as Plaintiff's counsel to adjudicate a private land dispute. The judge advised that there was a potential for the appearance of a conflict and if the road commission wanted him to recuse himself, he would. After discussing the matter with the road commission, the court was informed that we desired reassignment. The court has now reassigned the case to the Hon. Mark H. Duthie. Bill contacted the assignment and obtained a new hearing date on our Motion for Summary Disposition. Our motion will be held on July 14, 2017. At our request, the court has rescheduled the pre-trial to follow the hearing on our Motion for Summary Disposition on July 14, 2017. The road commission is not required to attend either hearing, Bill Henn will attend.

MCRCSIP CLAIMS REPORT
E&O11002016008208

Strom, Katherine **v** Berrien County Road Comm.
D/A: 02/07/17 **LOCATION**: Benton Harbor, MI

PLAINTIFF COUNSEL: Michael D. Homier, Foster Swift Collins Smith PC
DEFENSE COUNSEL: William L. Henn, Henn Lesperance PLC

ALLEGATIONS IN COMPLAIN: This is an action for declaratory and equitable relief for the protection of the environment under Part 17 of the Michigan Natural Resources and Environmental Protection Act.

FACTS OF ACCIDENT: Plaintiff owns interest in certain real property, located at 19035 Nye Road in Galien Township, Berrien County, Michigan. Nye Road currently crosses Dowling Creek, which traverses plaintiff's property. The crossing is located in a rural area with minimal traffic. Dowling Creek is a flood plain, and associated wetlands are ecologically diverse, with mature trees and rare plants. The road commission intends on tearing down an existing crossing of Nye Road, and construct a substantially larger bridge, and Mrs. Strom wishes to protect the environment.

UPDATE (06/01/2017): On May 17, 2017 Bill Henn attended the road commission board meeting, where he recommended that the road commission enter into a voluntary stay of Circuit Court proceedings pending the outcome of the contested petition between Plaintiff's and the MDEQ. The board agreed with Mr. Henn, but we are still unaware of what issues need to be litigated-if any-before the outcome of that proceeding, so at this time there is no point in moving ahead with the Berrien County Circuit Court action. The stay will be subject to the Court's approval, but Bill does not anticipate any difficulty there. He will continue to update us on the status.

MCRCSIP CLAIMS REPORT

E&O73002016008137

Wendling, Kenneth **v** Saginaw County Road Comm.
D/A: 06/05/2013 **LOCATION**:

PLAINTIFF COUNSEL:Victor J. Mastromarco, Jr., Kevin J. Kelly,The MastromarcoFirm
DEFENSE COUNSEL: Michael R. Kluck, Kluck & Associates

ALLEGATIONS IN COMPLAIN: Plaintiff was working with a crew on a trench that allegedly collapsed around Mr. Wendling, causing significant injury to his left arm and open fracture of the wrist.

FACTS OF ACCIDENT: Plaintiff was treated at Henry Ford Hospital in Detroit where he underwent orthopedic treatment. Plaintiff remained off work until June 16, 2014. After that Plaintiff's physician allowed Mr. Wendling to return to work with restriction limiting work and hours he was able to perform. On August 18, 2014 Plaintiff suffered a second work-related injury to his left arm. Plaintiff followed up with his orthopedic physician and underwent occupational therapy while remaining off work. On September 19, 2014 Plaintiff was convicted of operating while impaired by liquor and, as a result, his CDL/CMV privileges were suspended. Plaintiff alleges he was wrongfully terminated due to his injury and impairment.

UPDATE (02/03/2017): Mike Kluck is in the process of gathering all information on this and has received a Notice of Pre-Trial, scheduled for July 20, 2017 at 8:45am, and Notice of Trial, scheduled to commence on October 17, 2017 at 9:00am.

UPDATE (06/01/2017): Mike Kluck has been settled, and paperwork is currently being prepared.

MCRCSIP CLAIMS REPORT
GL32002013007657

Brown, Lowell **v** Huron County Road Commission
D/A: 01/25/14 **LOCATION**: Etzler Road

PLAINTIFF ATTORNEY: Michael Canner, Brining, Natker
DEFENSE ATTORNEY: R. Michael John, Zanetti & John, P.C.

ALLEGATIONS IN COMPLAINT: Mr. Brown was shoveling snow in his driveway when he saw the CRC plow truck speeding up Etzler Road. Mr. Brown saw the truck was approaching at a high rate of speed and in a reckless manner so he dashed toward his parked vehicle. He opened his door but the CRC plow truck threw a dangerous volume of snow onto his vehicle forcing the door to close on Mr. Brown's legs.

INJURIES/DAMAGES: Displaced mid-shaft tibia fracture in lower right leg.

FACTS OF ACCIDENT: Snowplow passed by Brown's driveway as Brown was attempting to get into the cab of his truck; the force of the snow coming off the plow struck against the pick-up door causing it to pinch Brown's leg between door and rocker panel.

UPDATE (06/23/15): Comprehensive litigation report from Mike John attached as well as pertinent Exhibits. Brown, a 78 yr old male, was shoveling snow away from his Ford F-150 pick-up that was sitting in the driveway with the front end facing the road. As Brown attempted to get into the driver's side of his truck, a WB Huron RC snow plow passed by. The snow coming off the plow struck against the pick-up door causing it to pinch Mr. Brown's leg between the door and rocker panel. Defense counsel does not believe a request for settlement authority should be made at this time.

UPDATE (02/18/16): Case continues to be "on notice". No suit filed at this this time Statute of Limitations is three years to file suit so claim will be closing 1/25/2017.

UPDATE (05/28/16): Defense counsel looked into case after no action was taken on pending lawsuit after settlement negotiations broke down. It has been discovered through investigation that Mr. Brown died December 18, 2015. The estate may still file a lawsuit; however, counsel does not feel this will happen. Statute of limitations is January 2017

UPDATE (07/12/16): Brown family attorney Mike Canner wanted to reopen settlement negotiations. His plan now is to file a lawsuit. He conceded that he does not have

enough info at this time to file the suit as a wrongful death suit, i.e. no evidence that “a” cause of Mr. Brown’s death was his motor vehicle accident injuries. Instead he will file a survivor action under MCL 600.2921. He made clear that once the lawsuit is filed and served he will broach the subject of settlement again.

UPDATE (11/10/2016): No Activity

UPDATE (02/03/2017): January 25, 2017 the Road Commission received a lawsuit from the Estate of Lowell Brown. We have assigned the case to Mike John at Zanetti & John, P.C. He is reviewing all paperwork regarding the claim at this time.

UPDATE (06/01/2017): On March 31, 2017 we received a copy of the death certificate regarding Mr. Lowell Brown on December, 18, 2015. The document establishes that Mr. Brown died in McLaren Bay Regional Hospital, where he was treated for right lung pneumonia during which he suffered cardiac arrhythmia which is listed as immediate cause of death, and the manner listed as “natural”. In Mr. Mike John’s view the document does not establish that Mr. Brown’s motor vehicle accident injuries caused or contributed to his death, but he cannot rule out the possibility of medical testimony that his injuries significantly reduced his activity levels which could result in a wrongful death suit.

Mr. John has sent two sets of interrogatories and a request for production of documents to plaintiff. Once he receives those back, he will be able to order the plaintiff’s medical records, pre and post-accident.

MCRCSIP CLAIMS REPORT
GL56002013007594

Tim Brugger **v** Midland County Road Commission
D/A: 04/27/13 **LOCATION**: N. Geneva Road

PLAINTIFF ATTORNEY: Donald N. Sowle, Sowle Law
DEFENSE ATTORNEY: D. Adam Tountas, SHRR

ALLEGATIONS IN COMPLAINT: Failure to maintain subject roadway; not reasonably safe and convenient for public travel as a result of "large potholes in the travel (sic) portion of the roadway.

INJURIES/DAMAGES: Traumatic brain injury (TBI), subarachnoid and intracerebral hemorrhage, lacerated spleen, R wrist fx, L femur fx requiring open reduction and internal fixation, phalanx (finger) fx, displaced spinal fx's at T-3 through T-7, basilar occipital skull fx's, other less significant injuries. Injuries resulted in disfigurement, impaired cognitive functions and loss of hearing.

FACTS OF ACCIDENT: Single motorcycle accident. Plaintiff, age 31 on D/A, was driving a 2011 Harley Davidson (no helmet) SB on N Geneva Road at a "high rate of speed," lost control on the "poor road surface" and overturned, falling off the motorcycle. Motorcycle skidded into the ditch impacting the embankment. Brugger was assigned a hazardous action of "speed too fast" (03) but not issued any citations. Alcohol was a factor in this crash (.07% BAC-hospital records).

UPDATE (05/20/15): No pertinent dates; no pre-trial schedule received from Court.

UPDATE (06/23/15): Investigation and discovery continue. Motorcycle found and to be examined in July 2015.

UPDATE (08/27/15): Accident reconstruction/motorcycle inspection concluded by expert. PI utilizing low beam at the time of crash. Low beam, as opposed to high beam, at nighttime on an unlit roadway believed to have significantly impacted PI's ability to observe his surroundings. Additionally, based upon the roadway features, expert skeptical that pothole identified by law enforcement played any role in the crash. Investigation and discovery continue.

UPDATE (11/12/15): Plaintiff's deposition adjourned to force a more comprehensive narrative account of the crash.

UPDATE (2/18/16): Motion to compel that narrative, by way of a supplemental written Interrogatory response. Discovery to be extended 90 days. If Plaintiff cannot provide narrative of how crash occurred by way of expert accident Reconstructionist, a Motion to have case dismissed will be filed.

UPDATE (06/29/16): Counsel has concluded the Discovery phase of the lawsuit. Counsel defended the depositions of several Road Commission representatives successfully which supports the position that the Plaintiff knew that operating a motorcycle while legally intoxicated was risky while driving on North Geneva road that was deemed "rough" by family members and friends. Over the next 45 days, Counsel will depose the Plaintiff's treating physicians to obtain a clear picture of the Plaintiff's injuries, prognosis for recovery and to prepare the rebuttal analysis.

UPDATE (08/25/2016): Discovery to remain open until December 31, 2016. Defendant Road Commission's Dispositive Motion (in light of Streng opinion) to be filled mid-fall (Judge and Plaintiff's counsel aware of our intent). Our Neuropsychological Expert passed away unexpectedly last week. We are currently wrapping up our Expert Depositions.

UPDATE (09/28/2016): Finishing with expert deposition practice by the end of next month. At that point, we intend to move for summary disposition based upon the Plaintiff's pre-suit notice. If we win, the case is over, and the Plaintiff will likely appeal. If we lose, the Road Commission is entitled to an immediate appeal. Either way, the trial proceedings will be stayed for roughly one year. In light of the above, the Court, which is aware of our impending motion, elected not to set a trial date.

UPDATE (11/20/2016): Discovery closes December 31, 2016. We are preparing to file a

Motion Summary of Disposition-in light of the Streng opinion-on notice deficits.

UPDATE (02/03/2017): Before the end of last year, we filed a Motion for Disposition (in light of Streng Opinion). Hearing on Motion for Summary Disposition is scheduled for February 10, 2017 at 3:00PM.

UPDATE (06/01/2017): Motion of Summary Disposition was denied. Once the order is entered, it will constitute a "final order" under the Michigan Court Rules and, as such, become immediately appealable. We recommend that you appeal the trial court's ruling.

MCRCSIP CLAIMS REPORT
GL41002014007391

Matthew Denney **v** Kent County Road Commission
D/A: 05/18/14 **LOCATION**: Peach Ridge Ave, NW

PLAINTIFF ATTORNEY: Thomas R. Behm, Gruel Mills Nims & Pylman, PLLC
DEFENSE ATTORNEY: William L. Henn, Henn Lesperance

ALLEGATIONS IN COMPLAINT: Failure to properly maintain road surface (potholes)

INJURIES/DAMAGES: Fatal

FACTS OF ACCIDENT: Claimant, age 42 on D/A, was operating motorcycle NB on Peach Ridge Ave., NW, a two lane, paved local road governed by the basic speed law. Road is straight where the accident occurred but was vertical curves following the natural topography of the land. Claimant crested a hill and reportedly drove through a pothole several feet in diameter and 4-1/2" deep. Claimant lost control, separated from his motorcycle and landed on the pavement where he was struck by a following motorcycle, operated by Darrin Smigiel. Daytime accident (8:26 a.m.). Clear weather and dry road conditions. No alcohol/drug involvement. No helmet worn by claimant.

UPDATE (01/29/15): Case evaluation set for September, 2015.

UPDATE (05/20/15: On 04/17/15, Judge Buth granted our partial MSD motion. Significance is that plaintiff no longer has any viable claim for lost wages of the decedent, loss of earning capacity of the decedent or loss of support of the decedent. This would have been a very large component of the damage module. As it stands, plaintiff is relegated to seeking damages for conscious pain and suffering (which will be contested based on the apparent instantaneous nature of the death), funeral, medical and burial expenses. Judge agreed that basically, because the highway exception to governmental immunity only allows recoverable damages to the person who sustained the bodily injury. Bill exploited the difference in the language between the Highway Exception and Wrongful Death Act to argue that the Denney beneficiaries are precluded from recovery because they did not suffer the bodily injury. This ruling eliminates a huge portion of the damages that plaintiff would have claimed in this case - loss of consortium and loss of financial

Plaintiff may file a Motion for Reconsideration. Facilitative Mediation is set for 07/28/15. Plaintiff's expert will testify roadway was defective for more than 30 days and RC should have known of defects; will be part of mediation briefing. No trial date set.

UPDATE (06/23/15): Pl's Motion for Reconsideration was denied by the Court. The ruling dismissing Pl's claims for loss of support, loss of services, etc… stands unaltered. Plaintiff will be filing an Application for Leave to Appeal the decision granting partial summary disposition to the Road Commission (due 06/30/15).

UPDATE (08/27/15): Stipulation to Stay Proceedings Pending the Outcome of Plaintiff's Interlocutory Appeal entered by the Circuit Court on 07/27/15. No set timetable for the Court of Appeals to make a decision. Typically approx. 4 months.

UPDATE (02/18/16): In Appeals Court-Court granted the Plaintiff's Application for Leave to Appeal. Counsel filed an Appellee's brief which Plaintiff answered with an Appellant brief.

UPDATE (06/29/16): Plaintiff filed her Application for Leave to Appeal on 06/30/15, and this office filed our Appearance on 07/15/15.

The Plaintiff/Appellant's Brief on Appeal was filed 12/22/15 and our Appellee's Brief was filed on 03/22/16, followed by Appellant's Reply Brief on 04/11/16. On 04/12/16, The Negligence Law Section State Bar of Michigan filed a Motion to submit an Amicus Brief supporting Plaintiff's claim, which was granted 05/05/16. By court order, the Amicus Brief was required to be filed no later than 06/02/16, but oddly, no amicus brief was filed.

This matter has not been scheduled for Oral argument with the Court of Appeals, and likely will not be for quite a number of months.

UPDATE (07/20/16): Received a letter of supplemental authority from the Plaintiff's counsel. That letter alerted the Court to the recent Streng decision and its conclusion that a plaintiff may recover for all damages flowing from a bodily injury in a highway exception claim. Oddly, however, the Streng decision—if correct (which we believe it is not and have appealed to the Supreme Court)—would require dismissal of the Denney case for failure to comply with the notice requirements of MCL 224.21.

UPDATE (10/28/16): Oral argument of this matter was heard in the Court of Appeals, on 10/4/16. To date, an opinion has not been issued by the Court. Once the opinion is issued, the losing side will have 42 days in which to file an application for leave to appeal with the Michigan Supreme Court. We will continue to monitor this matter and report once an opinion is issued.

UPDATE (1/27/17): Received Plaintiff's Answer Opposing our Application for Leave to Appeal. There were no surprising arguments that arose. Bill Henn will file a reply within 21 days (February 14, 2017).

UPDATE (06/01/2017): On February 14, 2017, Bill Henn filed his reply brief to Plaintiff stating that they had mischaracterized and misrepresented Defendant's legal arguments. Our request for Leave to Appeal was denied, and we are filing a Motion for Reconsideration by June 14, 2017 (within the 21 day requirement). Barring reconsideration the case will return to trial court at which time we will file for Motion for Summary Dismissal under Streng. The Supreme Court typically takes 6-8 months to act on an Application, and Mr. Henn will report any developments as they occur.

MCRCSIP CLAIMS REPORT
GL46002010006517

Lenard Gust **v** Lenawee County Road Commission
D/A: 06/02/10 **LOCATION**: 13654 Sandy Beach Road

PLAINTIFF ATTORNEY: Harvey A. Koselka, Koselka DeVine, PLC
DEFENSE ATTORNEY: Allen J. Philbrick, Conlin, McKenney & Philbrick , P.C.

ALLEGATIONS IN COMPLAINT: Unconstitutional taking of land without just compensation, trespass, willful and wanton negligence.

INJURIES/DAMAGES: Cash value of plaintiff's damage to his real and personal property and loss of use of his property. (No specific dollar amount claimed by plaintiff).

FACTS OF ACCIDENT: Plaintiff owns land along both sides of Sandy Beach Road, a paved, primary road. Plaintiff alleges that a drain exists under Sandy Beach Road that allows surface water to drain from west to east. Plaintiff further alleges that he is experiencing flooding and water damage to his property due to the road commission's failure to maintain the drain.

UPDATE (01/29/15): Comprehensive post-trial report received from Counsel Philbrick. Decision to be made regarding taxing of costs as it relates to appeal and involvement.

UPDATE (05/20/15): Plaintiffs filed Motion for Judgment Notwithstanding Verdict and requested a new trial on the issue of damages and motion to reinstate the claim against Orrin Gregg, former Managing Director of the RC. Counsel's first impression is that they are attempting to recast their argument in defiance of both the COA and the Jury Verdict itself. Our counsel has now filed a Motion for Case Evaluation Sanctions as well which is scheduled for 06/08/15; the same day as plaintiffs' motions for JNOV, etc. Counsel will provide a comprehensive report after these motions on 06/08/15 regarding future handling.

UPDATE (06/23/15): Hearing took place on 06/08/15. Court will issue written opinion on Pl's motions for JNOV, New Trial and Relief from Order on 06/25/15. At that time, defense counsel will argue our Motion for Case Evaluation Sanctions totaling $132,105.00 ($125,765.00 in attorney fees and $6,340.16 in taxable costs).

UPDATE (08/27/15): Order granting our Motion for Award of Case Evaluation Sanctions entered 08/20/15; agreed to stipulate to reducing attorney fees by about $2,000 pertaining to short-lived MDEQ lawsuit (conceded on this and did not incur expense of defense counsel preparing for and attending hearing. Pl's

motions were denied. Allen Philbrick still thinks there could be a Claim of Appeal filed; Pl's have until 09/10/15 to do so. While we have already recognized, and even stated, that we do not intend to dispossess the Gusts of their home. Defense counsel believes we should look into filing a Judgment Lien and recording same with the County Register of Deeds. At the very least, this would put a cloud over the title to the property in case the Gusts ever wanted to sell it, convey it to their children, etc. May give us some form of protection against any renewed claims should the property flood again due to the Gusts' ongoing failure to repair their drain field.

UPDATE (2/18/16): Plaintiffs filed their Claim of Appeal and also filed a Motion for Expedited Consideration. The Motion to Expedite was denied by the Court of Appeals. Plaintiffs will now file their brief and we will file our response (this will take several months).

UPDATE (07/21/16): Case has been submitted to the Court of Appeals on Briefs. Waiting to get notice of a date for oral argument.

UPDATE (10/18/16): No pertinent updates

UPDATE (11/10/16): No update

UPDATE (02/02/2017): Oral arguments have been scheduled for February 14, 2017.

UPDATE (06/01/2017): On April 28, 2017, Allen Philbrick let us know he filed a Brief in Opposition to the Gusts' Application for Leave to Appeal to the Supreme Court. Much of it repeats the various arguments we have made on three occasions to the Supreme Court, he did find while doing this Brief that the Plaintiffs had really reconfigured some of their arguments, but he stated the gist of the matter remains the same. Most typically the Supreme Court takes about 90-120 days to consider an application. Again, the odds are quite low that the court would grant leave, but he will make sure to stay on top of it and notify us of any new status reports.

STATE OF MICHIGAN

IN THE SUPREME COURT

LEONARD GUST and SHARON GUST

Plaintiffs/Appellants,

v.

LENAWEE COUNTY ROAD COMMISSION,

Defendant/Appellee.

Court of Appeals No. 329062

Lenawee Circuit Court
Case No. 10-003769 CZ
Honorable Anna Marie Anzalone

_____/

PLAINTIFFS-APPELLANTS' REPLY BRIEF
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

John J. Koselka (P48740)
Harvey A. Koselka (P16160)
KOSELKA DEVINE, PLC
Attorney for Plaintiffs-Appellees
1546 West Maumee Street
Adrian, Michigan 49221
(517) 266-5254

Having reviewed Defendant's Response, the Gusts feel it necessary to reply to several of the more misleading and/or unsupported claims.

I. Plaintiffs/Appellants Preserved All Arguments Raised in this Application

Defendant/Appellee falsely argues that the Gusts' arguments in this Application were never raised in the trial court. Specifically, defendant asserts that at no time did the Gusts argue that (1) Defendant's operation and maintenance of Sandy Beach Road constituted affirmative acts aimed directly at the property of the Gusts as a matter of law, or (2) failure to act in light of an affirmative duty to do so constitute a basis for the claim of inverse condemnation. These claims are false, for these arguments were presented in numerous forms throughout the litigation.

First, the Gusts presented these arguments in their complaint, as stated in Plaintiffs' Third Amended Complaint filed on December 14, 2011 (Exhibit 1);

> 9. That Sandy Beach Road, which incorporated a metal culvert, was constructed and maintained by Defendant Road Commission at said location several feet higher than the adjacent lands on each side of Sandy Beach Road
> .
> 10. That ***Sandy Beach Road at said location now acts as a dam*** preventing water from the north side of Sandy Beach Road from naturally flowing downhill to the lands on the south side of Sandy Beach Road and from there to adjoining lands.
>
> * * *
>
> ***12.*** That ***said metal culvert enabled the surface water from the north*** of Sandy Beach Road at that location ***to flow under said roadway and resume its natural flow to the south off from and away from Plaintiff's lands.***
>
> 13. That ***within approximately the past seven years said metal culvert***, which is/was an integral part of said roadway (MCLA 254.1), and which is not and never has been connected to a drain, ***ceased to function effectively thereby causing said road and roadway to serve effectively as a dam***, as aforesaid.
>
> 14. That ***Defendant Road Commission had and has a duty to Plaintiffs and to the public to maintain said culvert***.
>
> * * *

24. That ***Defendant Road Commission and Defendant Road Commissioners have abused and are abusing their powers by not maintaining and/or repairing said metal culvert***, which is a part of said roadway.
(Emphasis added).

Second, Defendant blatantly ignores the extensive motion and appellate history of this case when arguing on page 29 of its Brief:

> "At no time before the jury rendered its verdict did the Gusts present the trial court with the arguments they now make in support of the proposition that the Road Commission committed a taking as a matter of law. ***If that position were legally correct, there would have been no need for a jury trial; the trial court would have simply granted summary disposition for the Plaintiffs***."

The Court did grant Plaintiffs summary disposition in 2012 on June 25, 2012, holding that they were entitled to summary disposition on the taking claim as a matter of law. (Exhibit 2, Plaintiff's Motion and Briefs). An Order was subsequently entered on July 30, 2012. In both the trial briefs and in the following excerpt from the Gusts' appellate brief filed in response to Defendants' appeal in 2012, Plaintiffs presented substantially the same arguments, asserting:

> In carrying out its duties, the Road Commission must act not only within the statutory controls, but also in regards to not interfering with the neighboring property owners' rights. The Road Commission cannot, ***through either action or neglect***, cause a party to lose the use of its property without adequate compensation. As the Supreme Court noted in *Bennett v The County of Eaton*, 340 Mich 330, 337-338 (1954), a case in which the Court found a taking by the public authority when the crowning on a highway diverted the natural flow of surface water,
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In this case, the Road Commission admits that beginning in 2004 Sandy Beach Road began to act as a dam, stopping the natural flow of water and interfering with the Gusts' use of their property. Yet from 2004 through 2011, the Road Commission refused to repair the road but continued to keep it open. The Road Commission stopped the Gusts from removing the obstruction in 2010, asserting its exclusive right to operate and maintain Sandy Beach Road to stop the Gusts from protecting their property when they attempted to unblock the culvert in

2010.[1] The dispositive and admitted fact in this case is that Sandy Beach Road caused the flooding of the Gusts property. Simply stated -- no road, no flood. This Court's holding in *Peterman* mandates that the decision of the Court of Appeals be reversed and that the case be remanded to the trial court for action.

III. Defendant's factual defenses are red herrings designed to mislead the Court

The jury made no factual findings at trial, and the question of causation was not addressed. Yet, Defendant made numerous false and/or misleading factual assertions in its Brief that the Gusts need to address.

a. Road Commission's knowledge of culvert

The Road Commission insists on pages 6 and 40 of its brief that it "only learned of the existence of the pipe for the first time in 2011," a statement the Road Commission has made throughout the litigation. The Road commission asserts that the pipe was connected to drain tile on both sides of Sandy Beach Road. Both of those statements are false.

Regarding the Road Commission's knowledge of the culvert pipe, the Gusts informed the Road Commission of the issue with the culvert in 2004, which the Road Commission admits. Although denying ownership, the Road Commission acknowledged the presence of the pipe in its letters of 2009 and 2010, describing it as "an old private tile" that "just happens to cross Sandy Beach Road to an outlet elsewhere."

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[1] The Road Commission argues that the Gusts could have obtained the repairs by "simply" getting a permit. This statement is disingenuous to the truth. Although the permit would have cost only $50.00, the Gusts would have been obligated to hire a bonded contractor to perform the work, which would have required the Gusts to post a bond sufficient to cover any repairs to the road during the work. As stated in the Application for Leave, the Road Commission spent over $40,000 to replace the culvert, plus additional costs for engineering and plans.

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b. Culvert was installed after the Road Commission assumed control of Sandy Beach Road in 1932.

At trial, two witnesses testified that the culvert was installed in the early 1960's, and the Road Commission admitted that the age of the culvert tile removed was consistent with that history. Roger White testified that the new steel culvert that was installed in 1963 or 1964 as part of a rebuild of the road. At the time of its installation, the new culvert was very visible, with both ends exposed and nothing connected to it.[2] Mr. White's testimony was supported by Charles Hawes, who testified that he also remembered the construction project in 1963 or 1964. He described how the bulldozers took off the top of the hill and pushed the dirt into the low area, flattening out the road.[3] He specifically recalled that new steel culverts were installed under the road, including in the area on the Gusts' property.[4] Mr. Dawes explained that he used to hunt in the area and recalled his dogs chasing raccoons into the culvert.[5]

Mr. White's and Mr. Hawes' testimony was consistent with the testimony of the Road Commission's Operations Manager, Robert Lewis, and by its expert engineer, Steve Purri, PE. Mr. Lewis estimated the age of the pipe that was removed at approximately 30 years.[6] Mr. Purri testified that the culvert by the Gusts' property was probably in the ground for 20 to 40 years.[7] Mr. Purri further agreed that the failure of the culvert starting in 2004 was consistent with it

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being installed in 1963-64.[8] Accordingly, the Road Commission did not inherit the culvert when it assumed control of the road in 1932.

The Road Commission focused much of its defense on the assertion that it did not install the culvert at issue. As the Gusts argued to the trial court and to Court of Appeals in 2014, this issue is irrelevant for two reasons. First, MCL 254.1 states that the culvert is part of the road. This statute makes no reference as to how the culvert came to be under the road or who installed it. Accordingly, whether the Road Commission initially installed the culvert or simply benefitted from the actions of others, MCL 224.21 (2) and MCL 254.1 mandate that maintaining the culvert is the responsibility of the Road Commission.

Second, the culvert is not the cause of the flooding on the Gusts' property. Sandy Beach Road and its elevated construction is what has interfered with the natural flow of ground water, not the culvert. But for the existence of Sandy Beach Road, there would be no issue with flooding. The presence of a functional culvert just prevents Sandy Beach Road from acting as a dam, a fact evidenced by the restored flow after the new culvert was installed.

c. Drainage tile to north and south has no causal connection to flooding

The Road Commission's arguments regarding the drainage tile are a red-herring designed to mask causation. In short, this case is about Sandy Beach Road impeding and otherwise stopping the natural flow of ***surface water*** when the culvert failed beginning in 2004. Pursuant to the natural flow doctrine and the Road Commission's admissions, the Road Commission cannot interfere with the natural flow of ***surface water***.

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water cannot drain into a tile, it will just remain as surface water and continue to follow the natural flow. The parties agree that the natural flow is from north to south in the area of the Gusts' property.

As admitted by the Road Commission, after the culvert failed, water could not flow south and, instead, flooded the Gusts' property on the north side of the road. Whether surface or sub-surface water, no water could flow past the road from the north. All water was stopped by the road once the culvert failed. Plaintiff's expert explained that had the culvert allowed water to pass, then both the surface and sub-surface water would have drained during cross-examination, but Defendant omitted that testimony from its excerpt. Specifically, Mr. Farhner testified:

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> Q. This whole system that we're talking about is all really designed to take subsurface water?
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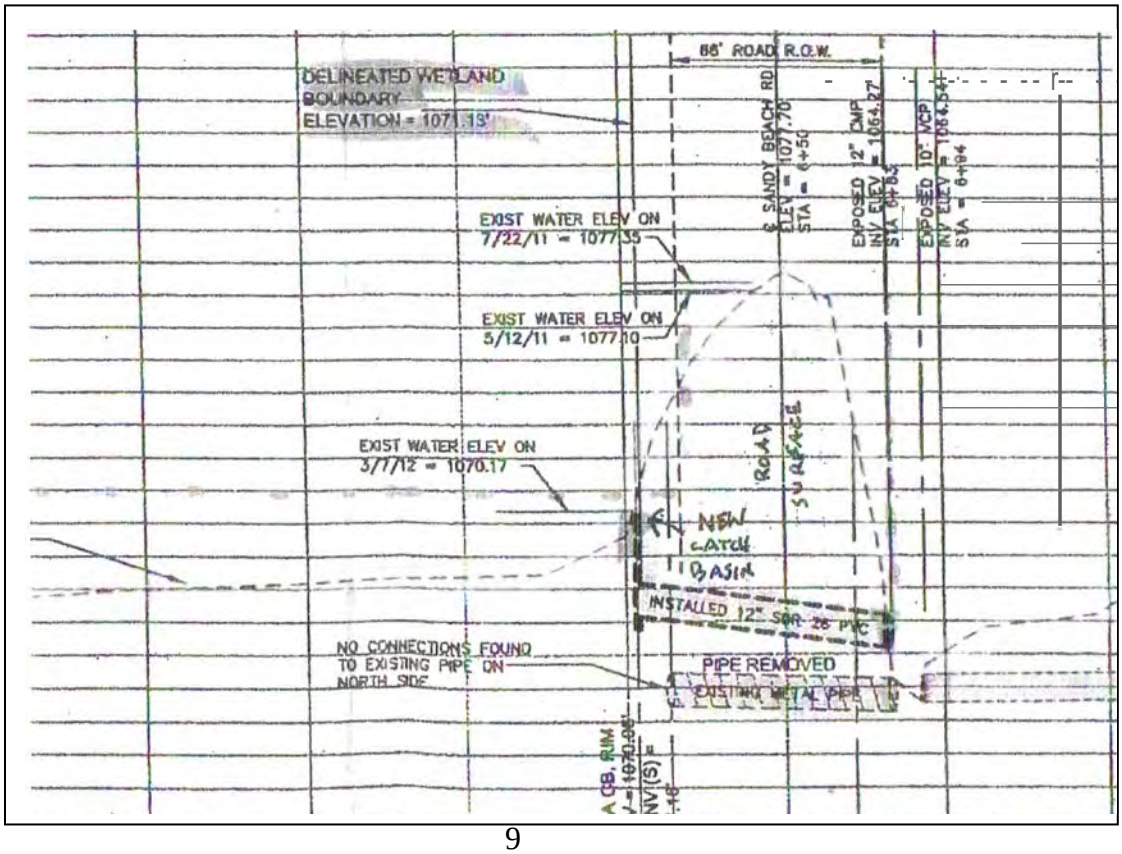
surface water, and the lake which covered the Gusts farm for the previous seven years gradually drained away. Defendant admits that no one did any work to repair any of the drainage tile, and the obvious reason is because none was needed. The only repair needed to stop the flooding and to restore the natural flow of the surface water was the replacement of the culvert.

d. Road Commission's assertion that water never reached roadway until 2010 is blatantly misleading

The Road Commission argued on page 42 of its Brief that Sandy Beach Road did not act as a dam until 2010 because the "the water never got to the -- to the right-of-way of Sandy Beach Road until 2010." Recognizing that this statement serves as an admission that Sandy Beach Road did act as a dam beginning in 2010, the Road Commission's attempt to minimize the impact is based solely on the Road Commission's premise that the road is limited to the 66' right-of-way set by statute. As reflected on the diagram prepared by Defendant below (Exhibit 1 in Plaintiffs' Application for Leave), the base of the road extends outside of the 66' right of way ("R.O.W.").



Although the water did not reach the right-of-way until 2010, but by that time the flood water was already ten (10) feet deed against the embankment, and the Gusts' farm was already turned into a lake.

Conclusion

Beginning in 2004, the Road Commission maintained and operated Sandy Beach Road, which acted as a dam and flooded the Gusts' property, depriving the Gusts of its use. The trial court granted Plaintiffs summary disposition because no genuine issue of material fact existed. Now, with all the facts presented, the material facts support a judgement in the Gusts favor as a matter of law. The Gusts are entitled to compensation, having been forced to watch their home and farm be destroyed by a road and a road commission over which they have no control. The Gusts request this Court to reverse the ruling of the Court of Appeals, vacate the judgment in the trial court, hold that the taking has occurred as a matter of law, and remand the case back to the trial court for a determination of causation and damages.

WHEREFORE, Leonard and Sharon Gust request this Court to grant them leave to appeal.

Respectfully Submitted,

Dated: May 19, 2017

By: _____

Harvey A. Koselka (P16160)
John J. Koselka (P48740)
KOSELKA DeVINE, PLC
Attorneys for Plaintiffs/Appellees
1546 West Maumee Street
Adrian, Michigan 49221
(517) 266-5254

STATE OF MICHIGAN

IN THE SUPREME COURT

LEONARD GUST and SHARON GUST

Plaintiffs/Appellants,

v.

LENAWEE COUNTY ROAD COMMISSION,

Defendant/Appellee.

Court of Appeals No. 329062

Lenawee Circuit Court
Case No. 10-003769 CZ
Honorable Anna Marie Anzalone

_____/

PLAINTIFFS-APPELLANTS' REPLY BRIEF
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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Harvey A. Koselka (P16160)
KOSELKA DEVINE, PLC
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Having reviewed Defendant's Response, the Gusts feel it necessary to reply to several of the more misleading and/or unsupported claims.

I. Plaintiffs/Appellants Preserved All Arguments Raised in this Application

Defendant/Appellee falsely argues that the Gusts' arguments in this Application were never raised in the trial court. Specifically, defendant asserts that at no time did the Gusts argue that (1) Defendant's operation and maintenance of Sandy Beach Road constituted affirmative acts aimed directly at the property of the Gusts as a matter of law, or (2) failure to act in light of an affirmative duty to do so constitute a basis for the claim of inverse condemnation. These claims are false, for these arguments were presented in numerous forms throughout the litigation.

First, the Gusts presented these arguments in their complaint, as stated in Plaintiffs' Third Amended Complaint filed on December 14, 2011 (Exhibit 1);

> 9. That Sandy Beach Road, which incorporated a metal culvert, was constructed and maintained by Defendant Road Commission at said location several feet higher than the adjacent lands on each side of Sandy Beach Road
> .
> 10. That ***Sandy Beach Road at said location now acts as a dam*** preventing water from the north side of Sandy Beach Road from naturally flowing downhill to the lands on the south side of Sandy Beach Road and from there to adjoining lands.
>
> * * *
>
> ***12.*** That ***said metal culvert enabled the surface water from the north*** of Sandy Beach Road at that location ***to flow under said roadway and resume its natural flow to the south off from and away from Plaintiff's lands.***
>
> 13. That ***within approximately the past seven years said metal culvert***, which is/was an integral part of said roadway (MCLA 254.1), and which is not and never has been connected to a drain, ***ceased to function effectively thereby causing said road and roadway to serve effectively as a dam***, as aforesaid.
>
> 14. That ***Defendant Road Commission had and has a duty to Plaintiffs and to the public to maintain said culvert***.
>
> * * *

24. That ***Defendant Road Commission and Defendant Road Commissioners have abused and are abusing their powers by not maintaining and/or repairing said metal culvert***, which is a part of said roadway.
(Emphasis added).

Second, Defendant blatantly ignores the extensive motion and appellate history of this case when arguing on page 29 of its Brief:

> "At no time before the jury rendered its verdict did the Gusts present the trial court with the arguments they now make in support of the proposition that the Road Commission committed a taking as a matter of law. ***If that position were legally correct, there would have been no need for a jury trial; the trial court would have simply granted summary disposition for the Plaintiffs***."

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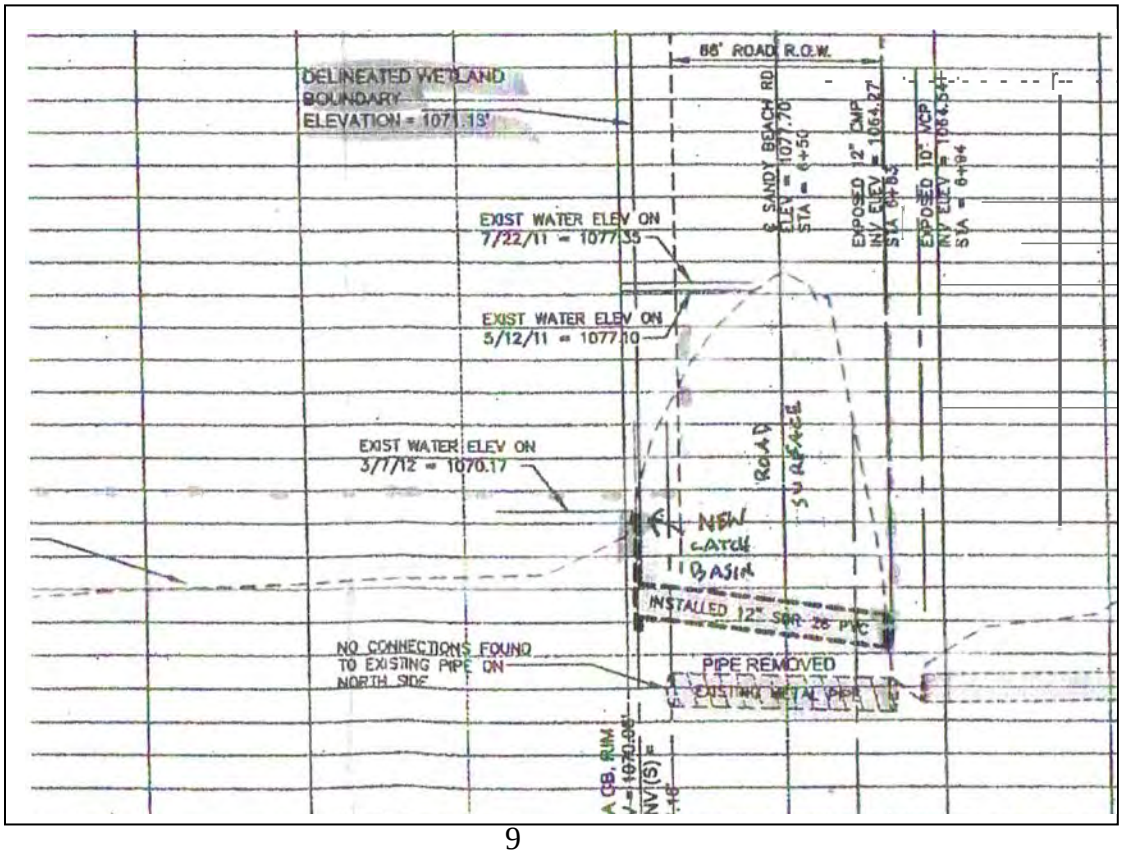

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MCRCSIP CLAIMS REPORT
GL4900201300724 8

Robert Metcalf **v** Mackinac County Road Commission
D/A: 12/16/13 **LOCATION**:

PLAINTIFF ATTORNEY: Harry Ingleson, II, P.C.
DEFENSE ATTORNEY: William L. Henn, Henn Lesperance

ALLEGATIONS IN COMPLAINT: Road Commission damaged plaintiff's property by building a road across his property to access gravel and sand reserves and alleged placed the road in the wrong location.

INJURIES/DAMAGES: Unspecified damages in excess of $25,000.00.

FACTS OF ACCIDENT: Plaintiff is a property owner in Mackinac County who has gravel and sand reserves on his property. The Mackinac CRC contracted with plaintiff to remove gravel and sand for R.C. purposes. The reserves were less than expected and, as a result, plaintiff was paid less than he anticipated since the amount he was to be paid was dependent on the number of cubic yards harvested. Plaintiff then started to complain about the location of the access road that was built by the R.C. across plaintiff's property but plaintiff advised the R.C. that he wouldn't "sue" over the location of the road if the R.C. agreed to buy more sand and gravel located on other portions of his property. Plaintiff's quasi-blackmail tactics raised "red flags" at the Mackinac CRC and the R.C. did not agree to purchase additional sand and gravel from the plaintiff.

UPDATE (08/27/15): Appeal. Oral argument not yet set.

UPDATE (2/18/2016): Application for leave to appeal to the Michigan Supreme Court has been filed. Court erred in allowing plaintiff too much time, and while the court may have identified the correct test as to whether the claim is tort or contract, it failed to properly apply that test in this instance. The Circuit Court proceedings will remain stayed by operation of Court Rule in the meantime.

UPDATE (06/29/16): Court of Appeals reversed lower court's decision. The Road Commission has decided, in accordance to the recommendation of defense counsel; to file an application for leave to appeal to the MI Supreme Court.

On 02/02/16, the Road Commission filed its Application for Leave to Appeal with the Michigan Supreme Court.

On 02/22/16, Attorney Harry Ingleson II, filed his Appearance with the Supreme Court on behalf of Plaintiff-Appellants.

On 03/11/16, Plaintiff- Appellants Response to Application for Leave in Appeal with the Michigan Supreme Court was due. As of 06/22/16/ Plaintiff- Appellants Response has not been filed.

No decision has been made by the Supreme Court, and there is no set timetable to do so. If the Court declines to take case, the matter will be sent back to Circuit Court for further proceedings.

UPDATE (08/14/16): Received Order of the Supreme Court denying our Application for Leave to Appeal. We have 21 days to file a motion for reconsideration, but such motions are rarely granted and I do not recommend filing one in this instance. In the near future, the Circuit Court will schedule a pre-trial conference.

UPDATE (9/22/16): On 9/30/16, an Order was entered via stipulation for substitution of counsel. The law firm of Garan Lucow Miller has withdrawn as counsel for the Mackinac County Road Commission, and Bill Henn has entered his appearance as counsel.
A Status Conference was held in the Mackinac County Circuit Court on 10/21/16. At that hearing, the Court allowed 120 days for discovery, with witness lists to be exchanged within 60 days. No other dates were specified. A Scheduling Order should be issued by the Court shortly.

UPDATE (11/10/16): Still pending

UPDATE (02/02/2017): Litigation of this matter is ongoing, as well as continued discovery. The depositions of Plaintiff's were previously scheduled, and cancelled by Plaintiffs' counsel who informed us that Plaintiffs are in declining health, including their mental health, and are not able to work with their attorney to facilitate their own representation. A hearing has been scheduled to appoint conservators in early February 2017. There is also an offer to settle this matter for $2,500.00 which will be discussed following the appointment of a conservator.

A scheduling order was issued on 01/09/2017. The following are pertinent dates:

02/18/2017 Discovery Ends

02/20/2017 All Motion Hearing to be filed AFTER the close of discovery.

02/20/2017 Case Evaluation scheduled to take place AFTER the close of discovery.

UPDATE (06/02/2017): Settlement was reached, and a Settlement Agreement and signed Release are on file. Order of Dismissal signed by Circuit Court Judge.

MCRCSIP CLAIMS REPORT
GL23002014007742

Brandon Pearce **v** Eaton County Road Commission
Ryan Harston
John Musser
D/A 03/08/2015 **LOCATION**: Mason Road near its intersection with Kinsel Highway

PLAINTIFF ATTORNEY: Various
DEFENSE ATTORNEY:
D. Adam Tountas/Stephanie Hoffer, SHRR

ALLEGATIONS IN COMPLAINT: Faulty roadway, defect that allowed for the unnatural accumulation of water, pothole in roadway, standing water in pothole.

INJURIES/DAMAGES: Unknown, with at least three fatalities

FACTS OF ACCIDENT: On March 8, 2015, Melissa Sue Musser, a 31-year-old female, was driving a 2002 minivan southbound on North Mason Road near its intersection with Kinsel Highway. There were 5 passengers inside the vehicle. The UD-10 status that Musser was southbound when her vehicle went through a large water puddle, lost control, and left the roadway. The minivan rolled over and eventually struck a tree, killing Musser and one of her passengers, who was 15 years old. We have received 5 Notices of Intent to Sue, and the underlying allegations are all basically the same: North Mason Road contained a defect that allowed for the unnatural accumulation of water, which caused the minivan to hydroplane.

Under Michigan law, the mere accumulation of water does not constitute a roadway defect capable of triggering highway exception. As a result, in order to prevail on any forthcoming claims, the presumptive plaintiffs will need to prove that North Mason Road contained a persistent defect (i.e., one that exists at all times and under all weather conditions) that rendered it unsafe for public travel. If they cannot do so, the Road Commission will prevail.

UPDATE (08/27/15): At the end of last month, we traveled to the site of the accident for three reasons: to interview the investigating police officer; inspect the site of the crash with our accident reconstructionist, David Sallmann; and inspect the minivan so as to download the data vent recorder. Our inspection yielded several salient facts about the underlying crash, including the following: Musser was driving the minivan more than 20 miles over the speed limit at the time of the incident; alcohol likely played a factor in the crash (a beer can was observed inside the minivan upon our inspection; the tread depth on the minivan's tires were below the recommended depth (2-32nds of an inch); and one of the tires was a spare, otherwise known as a "donut" tire.

We are scheduled to return to the site with Gilbert Baladi, a materials engineer on Tuesday, August 25, 2015, so that he can observe the roadway condition. Once that site visit is complete, there will be no more major activity before suit is filed.

UPDATE (2/18/2016): Counsel filed and Answer and Affirmative Defenses in response to plaintiff amended his complaint. We deny the existence of the alleged roadway defect, and assert comparative negligence on the part of the plaintiff for, among other things, electing to ride in a vehicle being operated by someone who was visibly intoxicated. We signed a stipulation and order allowing John Musser, to join this litigation as an additional plaintiff. Brendan Pearce, who is now deceased, has sued the Road Commission in a separate proceeding. Our desire is to consolidate that lawsuit with this one so as to conserve time and resources. Plaintiff's counsel, Mr. Collison agreed.

Plaintiffs' initial complaint improperly identified the Road Commission as a subdivision of Eaton County. The Plaintiff stipulated to the dismissal of his claims against Eaton County, only. An order was entered and we are waiting to hear back regarding the order.

UPDATE (06/29/2016): Pleadings & Dispositive Motion filed in opposition to Ryan Harston's motion to stay the underlying case on account of his incarceration. Defendant Melissa Musser filed her own opposition to Mr. Harston's motion.

Counsel received the Court's ruling on our motion to dismiss Brendon Pearce's wrongful death claim on account of his defective notice. The Court's written opinion denied the Road Commission's motion to dismiss.

Defense Counsel suggest an immediate appeal of the Court's ruling on our motion to dismiss, also this appeal will stay Pearce's lawsuit, in the interest of conserving costs. Counsel intends to withdraw the objection to Harston's motion for stay.

Update (8/25/2016): Our Motion for Summary Disposition based on Plaintiff Pearce's Notice was denied. On August 8, 2016 we filed our Brief on Appeal and on September 12, 2016 Plaintiff Pearce's response is due, case is stayed until Appeal is resolved.

Update (10/14/2016): Submitted a request for Court to deny Plaintiff's Motion to Affirm. Further, because Plaintiff failed to analyze the applicable rules and apply the rules to the arguments made in the Road Commission's Brief. We requested to be awarded the costs (including attorney fees) incurred in responding to the Motion. Case is stayed until Appeal is resolved.

Update (11/10/2016): Our motion for Summary Disposition based on Plaintiff Pearce's Notice was denied. Case was appealed, and our appeal was denied. We are evaluating taking this decision to the Michigan Supreme Court with Streng. Stephanie is meeting with Bill Henn to discuss.

UPDATE (02/03/2017): Our Motion for Summary Disposition based on Plaintiff Pearce's Notice was denied. Court of Appeals summarily affirmed the Trial Court's decision (in Plaintiff's favor). Application to Appeal filed with the Michigan Supreme Court. Trial Court proceedings will resume unless stayed pending Application to the Supreme Court.

UPDATE (06/01/2017): Received Plaintiff's Response to Road Commissions Summary Disposition and Brief in Support.

MINDELL / LAW
attorneys & counselors*

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AMY MINDELL

April 18, 2017

Eaton County Circuit Court
1045 Independence Blvd; Suite 200
Charlotte, MI 48813
ATTN: CIRCUIT COURT CLERK'S OFFICE

RE: Joseph Grinage vs. Est. of Musser, et al
Case No.: 15-1226-NI & 16-29- NI
Hon. John D. Maurer

Dear Sir/Madam:

Enclosed for filing with the Court please find:

- Plaintiff's, Joseph Grinage, Response to Defendant's Eaton County Road Commission Motion for Summary Disposition and Proof of Service

Please return a time-stamped copy of same to the undersigned in the enclosed self-addressed, stamped envelope.

Thank you for your kind attention.

Very truly yours,

John Scott B. Buell
jbuell@mindellfirm.com

JSB/lap
Encls.

cc w/encls: Hon. John D. Maurer
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STATE OF MICHIGAN

IN THE EATON COUNTY CIRCUIT COURT

JOSEPH GRINAGE,

Plaintiff,

-vs-

Case No.: 15-1226-NI
and 16-29-NI

Hon. John D. Maurer

ESTATE OF MELISSA SUE MUSSER,
PATRICIA JANE MUSSER, and
EATON COUNTY ROAD COMMISSION,

Defendants.

- AND -

RYAN HARSTON,

Plaintiff,

-vs-

Case No.: 15-1226-NI
Hon. John D. Maurer

ESTATE OF MELISSA SUE MUSSER,
PATRICIA JANE MUSSER, and
EATON COUNTY ROAD COMMISSION,

Defendants.

- AND –

LYNN PEARCE, Personal Representative of the
Estate of BRENDON PEARCE, Deceased,

Plaintiff,

-vs-

Case No.: 16-29-NI
Hon. John D. Maurer

LAWRENCE BENTON, Personal Representative of

The ESTATE OF MELISSA SUE MUSSER, Deceased
PATRICIA JANE MUSSER, and
EATON COUNTY ROAD COMMISSION,

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/

PLAINTIFF'S, JOSEPH GRINAGE, RESPONSE TO DEFENDANT'S EATON COUNTY ROAD COMMISSION MOTION FOR SUMMARY DISPOSITION

NOW COMES Plaintiff, JOSEPH GRINAGE, by and through his attorneys, MINDELL LAW, and in Response to Defendant's, EATON COUNTY ROAD COMMISSION, states as follows:

1. Admit.
2. Deny.
3. Admit
4. Admit.

5. Deny. See attached brief.

6. Deny. See attached brief.

WHEREFORE, Plaintiff, JOSEPH GRINAGE, respectfully requests that this Honorable Court deny Defendant's, EATON COUNTY ROAD COMMISSION, Motion for Summary Disposition.

Respectfully submitted,

MINDELL LAW

By:_____

JEFFREY D. MALIN
JOHN SCOTT B. BUELL
Attorney for Plaintiff
32500 Telegraph, STE 104
Bingham Farms, MI 48025
(248) 353-5595

4/18/17

STATE OF MICHIGAN

IN THE EATON COUNTY CIRCUIT COURT

JOSEPH GRINAGE,

Plaintiff,

-vs-

Case No.: 15-1226-NI
and 16-29-NI

Hon. John D. Maurer

ESTATE OF MELISSA SUE MUSSER,
PATRICIA JANE MUSSER, and
EATON COUNTY ROAD COMMISSION,

Defendants.

- AND -

RYAN HARSTON,

Plaintiff,

-vs-

Case No.: 15-1226-NI
Hon. John D. Maurer

ESTATE OF MELISSA SUE MUSSER,
PATRICIA JANE MUSSER, and
EATON COUNTY ROAD COMMISSION,

Defendants.

- AND –

LYNN PEARCE, Personal Representative of the
Estate of BRENDON PEARCE, Deceased,

Plaintiff,

-vs-

Case No.: 16-29-NI
Hon. John D. Maurer

LAWRENCE BENTON, Personal Representative of

The ESTATE OF MELISSA SUE MUSSER, Deceased
PATRICIA JANE MUSSER, and
EATON COUNTY ROAD COMMISSION,

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/

PLAINTIFF'S, JOSEPH GRINAGE BRIEF IN SUPPORT OF HIS RESPONSE TO DEFENDANT'S, EATON COUNTY ROAD COMMISSION, MOTION FOR SUMMARY DISPOSITION

Background

Plaintiff, Joseph Grinage, (hereafter "Mr. Grinage") largely concurs with Plaintiff Harston's depiction of the factual events of the March 8, 2015 crash that is the subject of this lawsuit, as stated in Plaintiff Harston's Response Brief at 5-6. Mr. Grinage was also a passenger in the vehicle being driven by Melissa Musser on March 8, 2015. He was ejected from the vehicle in the crash suffered grievous injuries including, but certainly not limited to: a fractured left femur requiring surgery, fractured vertebrae in his back and neck requiring surgery, several

broken ribs, and a closed head injury. Mr. Grinage served his Notice of Intent to File a Claim on the Roadway Commission on July 3, 2015- 116 days after the crash.

Argument

Defendant, Eaton County Roadway Commission, (hereafter "the Commission") brings the instant Motion for Summary Disposition arguing that Mr. Grinage and other Plaintiffs failed to adhere to the proper notice requirements provided by MCL 224.21, and therefore, their claims must be dismissed. As it pertains to Mr. Grinage, the Commission argues that Mr. Grinage's Notice was not filed within 60 days of the incident and was therefore not timely under MCL 224.21. **The Commission's argument fails because the proper notice period is not the 60-day requirement given by MCL 224.21, but rather the 120-day notice period provided for in MCL 691.1404**. *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007). As recently as 2007, the Michigan Supreme Court held that the 120-day notice period given in 691.1404 is the proper notice period in a decision **holding for Defendant, Eaton County Road Commission, on that basis**. *Ells v. Eaton County Rd. Comm'n*, 480 Mich 902 (2007). The Commission's Motion for Summary Disposition must be denied because Mr. Grinage served notice on the proper parties within the 120-day notice period in full compliance with MCL 691.1404.

As stated by the Court of Appeals in *Streng v Mackinac County Road Commission*, 315 Mich App 449 (2016):

> **It appears that the sixty-day notice provision [of MCL 224.21] has not been applied in any reported cases involving county road commissions since MCL 691.1404... was amended in 1970. *Id.* at 460.**

Clearly, the *Streng* Court recognized that, despite their new interpretation of 691.1404, **all previous cases involving the roadway defect statute have applied the 120-day notice provision.**

If *Streng* somehow has changed decades of precedent, it can only do so *prospectively,* not *retroactively;* as the Commission would require to prevail in the instant motion against Mr. Grinage. The Michigan Supreme Court has held that "where statutory construction has been involved, **this Court has limited the retroactivity of a decision when justice so required."** *Gusler v Fairview Tubular Products*, 412 Mich 270; 315 (1981); *Franges v General Motors Corp,* 404 Mich 590 (1979).

In deciding whether or not to give a Court of Appeals decision retroactive application there are three factors to consider: 1) the purpose of the new rule; 2) **the general reliance on the old rule;** and 3) **the effect on the administration of justice**. *Jahner v Department of Corrections,* 197 Mich App 111 (1992). All three factors support limiting retroactivity in this matter, as there was unquestionably reliance on the established MCL 691.1404 120-day notice provision prior to *Streng.*

To deny Mr. Grinage his ability to pursue his claim based on the Commission's argument would severely affect the administration of justice, as the result would be automatic dismissal of the case without even getting to the merits. That result would be particularly adverse to the administration of justice because **the Commission was not prejudiced in any way by Mr. Grinage complying with the established MCL 691.1404 120-day notice provision.** As will be explained in further detail, for all of the above reasons, the Commission's instant Motion for Summary Disposition must be denied.

1. **The MCL 691.1404 120-day Notice Provision is the Controlling Notice Provision According to Supreme Court Precedent**

MCL 691.1404 provides as follows:

> (1) 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 otherwise provided in subsection (3) shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

The Michigan Supreme Court has had the opportunity to interpret this statute many times over the past 25 years and in **each and every instance, the Court applied the 120-day notice provision as stated in 691.1404.** See *Rowland, supra,* 477 Mich 197 (2007); *Appel v. State, Dep't of Highways*, 398 Mich. 110 (1976); *Beasley v State*, 483 Mich 1025 (2009); *Ells v. Eaton County Rd. Comm'n*, 480 Mich 902 (2007). These cases supplement the list of other eight cases cited to in the *Streng* decision.

Statutory interpretation by the Michigan Supreme Court is binding on the lower Courts. When interpreting a statute, it is the Michigan Supreme Court's primary obligation to ascertain and effectuate the intent of the Legislature. *Lash v. City of Traverse City,* 479 Mich. 180, 735 (2007). The Michigan Supreme Court clearly interpreted MCL 691.1404 as having a 120-day notice period is the proper notice time period for such cases. Therefore, the *Streng* decision is in direct conflict with the Supreme Court's higher authority and until the Supreme Court overturns the decades of precedent; the MCL 691.1404 120-day notice is still the law of the land.

2. **The *Streng* Court's Interpretation of 691.1404 and the Use of the MCL 224.21 60-Day Notice Provision Should Not be Applied Retroactively.**

In the event that this Court finds that *Streng* has overruled established prior precedent; the new 60-day notice period given by *Streng* cannot apply retroactively. The general rule in Michigan is that appellate court decisions are to be given full retroactivity **unless limited**

retroactivity is justified." *Fetz Engineering Co* v *Ecco Systems, Inc,* 188 Mich App 362, 371 (1991). In deciding whether to give retroactive application, "[t]here are three key factors" to be considered: "(1) the purpose of the new rule; (2) the general reliance on the old rule; and (3) the effect on the administration of justice." *Jahner v Department of Corrections,* 197 Mich App 111, 113-114 (1992); quoting *People v Hampton*, 384 Mich 669, 674; (1971). This framework has been utilized in similar Michigan Supreme Court cases to limit a subsequent Court decision from applying retroactively. See *Pohutski v. City of Allen Park*, 465 Mich. 675 (2002); *Riley v. Northland Geriatric Center*, 431 Mich. 632 (1988); *Tebo v Havlik,* 418 Mich 350 (1984).

Pohutski v City of Allen Park and *Tebo v Havlik* are two very instructive cases over the issues involved in the instant motion. Both are procedurally analogous and clearly show that *Streng* should not be applied retrospectively in this instance.

A. *Pohutski v. City of Allen Park*

In *Pohutski, supra,* 465 Mich 675 (2002), two cases involving the government tort immunity act were consolidated for appeal. The issue before the Court was whether or not the governmental tort liability act, specifically MCL 691.1407, permitted the common law trespass-nuisance exception to governmental immunity cases. *Id.* at 678. The Court held that the prior precedent of *Hadfield v Oakland Co Drain Comm'r*, 430 Mich. 139 (1988) had erroneously interpreted 691.1407, and held that a plain reading of the statute did not provide for the trespass-nuisance exception to governmental immunity. *Id.* at 690. The Court explicitly overruled *Hadfield* and rectified "*Hadfield's* misconstruction of the statutory text." *Id.*

Although the Court explicitly overruled *Hadfield,* the Court went on to hold that their decision would only apply ***prospectively***; to all actions filed after the date of the decision. *Id.* at

699. The Court explained their reasoning as follows; specifically how the circumstances satisfied the three-part test to limit retroactivity:

> After taking into account the entire situation confronting the Court, **we hold that our decision shall have only prospective application.**
>
> Although the general rule is that judicial decisions are given full retroactive effect, *Hyde v Univ of Michigan Bd of Regents*, 426 Mich. 223, 240; 393 N.W.2d 847 (1986), **a more flexible approach is warranted where injustice might result from full retroactivity.** *Lindsey v Harper Hosp*, 455 Mich. 56, 68; 564 N.W.2d 861 (1997). **For example, a holding that overrules settled precedent may properly be limited to prospective application.**
>
> * * *
>
> ...three factors to be weighed in determining when a decision should not have retroactive application. Those factors are: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect of retroactivity on the administration of justice. *People v Hampton*, 384 Mich. 669, 674; 187 N.W.2d 404 (1971). In the civil context, a plurality of this Court noted that *Chevron Oil v Huson*, 404 U.S. 97, 106-107; 92 S. Ct. 349; 30 L. Ed. 2d 296 (1971), recognized an additional threshold question whether the decision clearly established a new principle of law. *Riley v Northland Geriatric Center* (After Remand), 431 Mich. 632, 645-646; 433 N.W.2d 787 (1988).(GRIFFIN, J.).
>
> We turn first to the threshold question noted in *Riley*. Although this opinion gives effect to the intent [*697] of the Legislature that may be reasonably be inferred from the text of the governing statutory provisions, practically speaking our holding is akin to the announcement of a new rule of law, given the erroneous interpretations set forth in *Hadfield* and *Li*. See *Riley*, supra; *Gusler v Fairview Tubular Products*, 412 Mich. 270, 298; 315 N.W.2d 388 (1981).
>
> **Application of the three-part test leads to the conclusion that prospective application is appropriate here.** First, we consider the purpose of the new rule set forth in this opinion: **to correct an error in the interpretation of § 7 of the governmental tort liability act.** Prospective application would further this purpose. See *Riley*, supra at 646. **Second, there has been extensive reliance on *Hadfield's* interpretation of § 7 of the governmental tort liability act.** In addition to reliance by the courts, insurance decisions have undoubtedly been predicated upon this Court's longstanding interpretation of § 7 under *Hadfield*: municipalities have been encouraged to purchase insurance, while homeowners have been discouraged from doing the same. Prospective application acknowledges that reliance. **Third, prospective application minimizes the effect of this decision on the administration of justice.**
>
> * * *

> Thus, if we applied our holding in this case retroactively, the plaintiffs in cases currently pending would not be afforded relief under *Hadfield* or 2001 PA 222. **Rather, they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing.**
>
> Accordingly, this decision will be applied only to cases brought on or after April 2, 2002. In all cases currently pending, the interpretation set forth in *Hadfield* will apply.
>
> *Id.* at 696-699.

The Court's reasoning in *Pohutski* is directly applicable to the instant case. First, in *Pohutski,* as in the instant case, a previous statutory interpretation of the GTLA was at issue. Like the instant case, in *Pohutski,* the Michigan Supreme Court overruled a previously unquestioned prior precedential interpretation of the GTLA provision at issue. That prior interpretation had existed for about 14 years before *Pohutski* was decided.

Where in *Pohutski,* the issue was whether a common law defense was available under MCL 691.1407; in the instant matter, the issue is which notice provision is proper under the MCL 691.1404. **Both issues require the same legal analysis in determining whether or not the new rule is to be retroactively applied.** It is worth again pointing out that in the present matter, it is not the Michigan Supreme Court that has explicitly overruled *Rowland* and its progeny, but rather the Court of Appeals.

The three-part test for retroactivity was satisfied in *Pothutski,* and is satisfied in the instant matter for the exact same reasons. In *Pothutski,* the Court held that the purpose of their new holding was "to correct an error" in the Court's previous interpretation of the governmental immunity act. *Id.* at 697. The Commission argues that *Streng* made the same kind of interpretative correction, thus changing the established rule. Therefore, the purpose of the rule in *Pohutski* and the instant matter are the same, and the first prong of the test is fulfilled in both.

Additionally, according to *Pohutski,* the second prong is satisfied in the instant matter as well. The *Pohutski* Court held that the second element of reliance was met because there had been "extensive reliance on *Hadfield's* interpretation of § 7 of the governmental tort liability act. In addition to reliance by the courts, insurance decisions have undoubtedly been predicated upon this Court's longstanding interpretation of § 7 under *Hadfield" Id.* at 698. Like the prior reliance on *Hadfield* in *Pohutski,* prior to *Streng,* there was unquestioned reliance on the MCL 691.1404 120-day notice provision. Again, as stated by the *Streng* Court itself: **"the sixty-day notice provision [of MCL 224.21] has not been applied in any reported cases involving county road commissions since MCL 691.1404... was amended in 1970."** *Streng, supra* at 460. By *Streng's* own words, the statute had only been construed as to apply the 120-day notice provision prior to its new holding. Therefore, there was complete justifiable reliance on the prior precedent on Mr. Grinage's part, and second part of the test for limiting retroactivity is clearly met as well.

Finally, and most importantly, the *Pohutski* Court found that "prospective application minimizes the effect of this decision on the administration of justice." *Pohutsky, supra.* at 699. The Court went even further to state that "if we applied our holding in this case retroactively, the plaintiffs in cases currently pending would not be afforded relief under *Hadfield* or 2001 PA 222. **Rather, they would become a distinct class of litigants denied relief because of an unfortunate circumstance of timing.** Like the plaintiffs in *Pohutski,* Mr. Grinage and other plaintiffs would be denied relief because of an unfortunate circumstance of timing, should *Streng* be applied retroactively. This would be extremely adverse to the administration of justice and thus the third and final prong is satisfied.

The circumstances in *Pohutski* are very analogous to the circumstances before this Court in the instant matter. Because the three-prong test is met, the 60-day notice requirement provided

by *Streng,* if controlling, should not be applied retroactively to this case and Defendant's motion must be denied.

B. *Tebo v Havlik*

The Michigan Supreme Court also dealt with a similar circumstance in *Tebo v Havlik,* 418 Mich 350 (1984). In *Tebo,* the Michigan Supreme Court had to decide whether the then-recent Michigan Supreme Court decision in *Putney v Haskins*, 414 Mich 181 (1982), articulating a new interpretation of the "name and retain" provision of the dramshop act, would apply retroactively or prospectively in two separate dramshop actions that were consolidated for appeal. The Michigan Supreme Court held that the new interpretation of the "name and retain" provision given in the *Putney* decision could not be retroactively applied:

> Of course, *Buxton* was implicitly overruled by *Putney*. Until *Putney* was decided by this Court, however, *Buxton* remained as the uncontradicted interpretation of the name and retain provision. Nonetheless, it is argued that any reliance by plaintiffs on *Buxton* was misplaced because it was a decision of the Court of Appeals, rather than one of this Court. This argument fails to take into account the structure of the Michigan appellate system...
>
> **... In light of the unquestioned status of *Buxton* at the time *Putney* was decided by this Court, it would be unjust to apply *Putney* retroactively to persons other than those before the Court in that case.**
>
> In contrast to the harsh effect which the full retroactivity of *Putney* would have on injured plaintiffs, prospective application will have little effect on dramshop defendants in those pending cases where settlement agreements have been made, even though the defense of *Putney* will be unavailable. For them, the law will simply remain as it was from 1976 to 1982. We hold that *Putney v Haskins* is applicable to all cases where settlement agreements are entered into with the allegedly intoxicated person **after the date of decision in *Putney.*** *Id.* at 361-365.

Again, the circumstances in *Tebo* are almost identical to the circumstances before this Court in the instant Motion for Summary Disposition. Like the plaintiffs in *Tebo,* Mr. Grinage complied with the "uncontradicted interpretation" of the MCL 691.1404 notice provision at the time he served his Notice of Intent. Again, the *Streng* Court acknowledged that the sixty-day

notice provision had not been applied in any reported cases involving county road commissions since 1970. *Streng, supra* at 460. It is beyond dispute that 691.1404 was the law of the land until *Streng,* and that Mr. Grinage relied upon the prior precedent holding that the 120-day notice provision was controlling.

Furthermore, the *Tebo* Court's reasons for holding that the newer interpretation of the "name and retain" provision not be retroactively applied is the same argument plaintiff makes before this Court in the instant matter: given the **unquestioned** status of the 691.1404 120-day notice provision, as applied in literally all precedential roadway defect cases, it would be **unjust** to apply *Streng* retroactively to persons other than those before the Court in that case.

Finally, the *Tebo* Court also recognized that the drastic contrast in prejudice that would result if the *Putney* holding was applied retroactively. As in the instant matter, retroactive application would result in dismissal for the plaintiffs, but for there would be no prejudice whatsoever for the defendants. Like the defendants in *Tebo,* if the 120-day notice period is applied in this instance, as it pertains to the defendants in this case, the law will simply remain as it was from 1972 to 2016. For all of these reasons, the *Streng* decision should not be retroactively applied and the Commission's Motion for Summary Disposition must be denied.

Conclusion

As attorneys, it is our job to follow established precedent and interpretations of the law as they exist at the time of filing a lawsuit. That is precisely what counsel for Mr. Grinage did. All of the factors of the limited retroactivity test are satisfied and analogous Michigan Supreme Court cases have limited retroactivity in almost the exact same situations. It would be contradictory to the interest of justice and to common sense as well to allow the *Streng* notice requirements to be retroactively applied when *Streng* itself acknowledges that the 60-day notice

provision has never been applied before it was decided. Furthermore, there was absolutely no prejudice upon the Commission by Mr. Grinage's compliance with the established and unquestioned 120-day notice provision and there is no reason why the circumstances in the instant matter do not present a clear situation where limited retroactivity is warranted. Mr. Grinage respectfully asks this Court to deny the Commission's Motion for Summary Disposition and allow Mr. Grinage to have his case continue to be heard and decided on its merits.

WHEREFORE, Plaintiff, JOSEPH GRINAGE, respectfully requests that this Honorable Court deny Defendant's, EATON COUNTY ROAD COMMISSION, Motion for Summary Disposition.

Respectfully submitted,

MINDELL LAW

By: _____

JEFFREY D. MALIN
JOHN SCOTT B. BUELL
Attorney for Plaintiff
32500 Telegraph, STE 104
Bingham Farms, MI 48025
(248) 353-5595

4/18/17

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses as described on the pleadings on April 18, 20 17

By: ☑ U.S. Mail ☐ FAX
☐ Hand Delivered ☐ UPS
☐ Federal Express ☐ Other

Signature _____

MCRCSIP CLAIMS REPORT
GL37002016008021

Rose, Preston **v** Isabella County Road Comm.
D/A: 05/19/2016 **LOCATION**: County Line Road

PLAINTIFF COUNSEL: Anthony G Costanzo
DEFENSE COUNSEL: Henn Lesperance PLC

ALLEGATIONS IN COMPLAIN: Alleges the Road Commission tilled up a large rock and left it in the road. Plaintiff ran over rock and cause extensive damage to the vehicle

INJURIES/DAMAGES: Plaintiff ran over rock and cause extensive damage to vehicle

FACTS OF ACCIDENT: Rose was driving down S. County Line Road and hit a "large" rock causing damage to her vehicle. Broke motor mount bolts and transmission. Claiming $2802.22 damage in repair.

UPDATE (07/07/16): Road Commission received copy of the Notice and Complaint/Notice of Intent

UPDATE (07/12/16): Bill Henn filed demand and order for Removal from Small Claims Court.

UPDATE (08/18/16): Bill Henn filed Summary of Disposition

UPDATE (12/29/16): Plaintiff filed a Motion for Reconsideration

UPDATE (02/28/17): Plaintiff's counsel offered to settle with and release the Road Commission for $4,000. Settlement was declined.

UPDATE (06/01/17): Court granted Plaintiff's Motion for Reconsideration. Pretrial Conference scheduled for June 2, 2017.

MCRCSIP CLAIMS REPORT
GL49002011007170

Karen Streng **v** Mackinac County Road Commission
D/A: 07/08/11 **LOCATION**: Hwy. 33, 1.1 mile N. of Camp A Road

PLAINTIFF ATTORNEY: Richard Radke, Jr. P.C.
DEFENSE ATTORNEY: William L. Henn, Henn Lesperance

ALLEGATIONS IN COMPLAINT: Failure to properly maintain road surface (crack sealing performed by Road Commission allegedly created a slippery condition).

INJURIES/DAMAGES: Right femoral condyle and tibia plateau fx. Requiring total knee replacement, rt. Rotator cuff tear requiring surgical repair, multiple right rib fx., fx. C6, multiple broken teeth, multiple lacerations, contusions, abrasions.

FACTS OF ACCIDENT: Single motorcycle accident. Plaintiff, age 65 was operating motorcycle on Hwy. 33, a two lane, paved primary road governed by the basic speed law. Plaintiff lost control traveling through a right curve, left the road on the outside of the curve and struck a tree. Right turn warning sign precedes curve for NB motorists with 40 mph. speed advisory panel and chevrons are located through the curve. Double yellow centerline. Daytime accident (4:46 p.m.) Clear weather conditions road Conditions. No alcohol involvement.

UPDATE (5/20/15): Briefing in Court of Appeals has been completed; waiting for assignment of hearing date by the Court of Appeals, which may take another 6 to 10 months.

UPDATE (08/27/15): Briefing in Court of Appeals complete
Assignment of hearing date by the Court of Appeals-may take up to 6 months.

UPDATE (2/18/2016): Oral arguments took place on 12/1/2015 at the Michigan Court of Appeals. Awaiting on a decision.

UPDATE (06/29/16): COA published decision 5/24/2016; Affirmed the denial of our MSD by the trial court. We are filing a leave to Appeal the COA decision to the Michigan Supreme Court. Briefing in Court of Appeals has been completed.

Oral arguments were heard on 12/01/15.

On 05/24/16 the Court of Appeals issued an Opinion in favor of Plaintiff. The Court concluded that the notice provision of the Governmental Tort Liability Act, MCL 691.1404, does not apply to highway claims against County Road Commissions. Rather, the Court held that the much older notice provision of the County Highway Law applies to claims against Road Commissions.

We are currently preparing our application for leave to appeal in the Michigan Supreme Court, due on 07/05/16.

Update (08/25/2016): We received the Plaintiff's answer to our application for Leave to Appeal to the Michigan Supreme Court. There are no surprising arguments. We filed our reply brief by August 19, 2016, after that briefing was concluded and the Court will decide whether to take the case. The entire process takes 4-6 months.

Update (10/14/2016): No update still waiting for Court Decision

UPDATE (02/02/2017): An application has been filed with the Michigan Supreme Court. Plaintiff filed an Answer, which does not raise any new issues of note, and to which Defendant filed a Reply Brief. On 12/21/2016 the Supreme Court denied leave to appeal in this case. Thereafter, the Road Commission filed its Motion for Reconsideration based on the Court of Appeals erroneous interpretation of MCL 224.21 along with the aforementioned and arguments regarding the applicability of the notice of provisions of the GTLA to road commissions. The Motion for Reconsideration is currently pending before the Supreme Court.

CRA has recently agreed to file an amicus brief in support of the Road Commission's position.

UPDATE (06/01/2017): The Supreme Court denied our Motion for Reconsideration, and the case now returns to the Circuit Court for scheduling.

Order

Michigan Supreme Court
Lansing, Michigan

May 24, 2017

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

154034(43)

KAREN L. STRENG,
Plaintiff-Appellee,

v

SC: 154034
COA: 323226
Mackinac CC: 2013-007445-NI

BOARD OF MACKINAC COUNTY ROAD COMMISSIONERS,
Defendant-Appellant.
_____/

On order of the Court, the motion for reconsideration of this Court's December 21, 2016 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously.

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

May 24, 2017

Clerk

d0517

MCRCSIP CLAIMS REPORT
GL51002015007843

Randall Tomaszekwski **v** Manistee County Road Commission & MDEQ
D/A: 12/07/15 **LOCATION:** Richley Creek at the Gilbert Road crossing

PLAINTIFF ATTORNEY: Edward K. McNeely, Raymond March, Carol March
DEFENSE ATTORNEY: William Henn, Henn Lesperance

ALLEGATIONS IN COMPLAINT: Plaintiff charges flooding to his property, violation of Michigan Environmental Protection Act, discharging a substance into the waters that may be injurious to public health, safety and/or welfare to animals or plants or the value of fish or game; Inverse Condemnation, by flooding Plaintiffs 'property, the Road Commission has appropriated Plaintiffs' land without paying just compensation.

INJURIES/DAMAGES: Plaintiff alleges that the removal of the restrictor pipe led to flooding of their property which is downstream from Gilbert Road crossing.

FACTS OF ACCIDENT: Summer of 2013, Manistee road commission replace a 66 foot long by 48 inch diameter culvert on Gilbert Road. In September 2014, Plaintiff Tomaszekwski- property owner directly downstream from the Gilbert Road crossings- begin to experience flooding on his property. The Plaintiff filed a complaint seeking to enjoin the Manistee County Road Commission from removing the 48 restrictor pipe currently situated in Richley Creek at the Gilbert Road crossing in Manistee County. On November 24, 2015 the court entered a temporary restraining order to prevent the Road Commission from removing the restrictor from the pipe.

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UPDATE (2/18/2016): Defendant/Cross-Plaintiff filed its Motion and Brief for Summary of Disposition. Essentially, the Marches argue that they have not "wrongfully" retained the Road Commission property because all they have done is revoke permission to enter their land. The hearing on the motion is set for February 22, 2016, along with a hearing on cross-defendants' objection to our motion concerning injunctive relief against the Marches.

UPDATE (06/28/2016): Counsel filed motion to Answer with Affirmative Defenses and Jury Demand in response to the MDEQ"s enforcement action. Counsel also responded to the MDEQ's motion to consolidate. Counsel recommended that the Pool was not oppose the motion, because combining the cases will promote judicial efficiency. The MDEQ will be an ally in defending the claims brought by the Tomaszewski's against the Road Commission. A new scheduling order will be entered for the MDEQ action against the Road Commission.

A pretrial conference in that case has been set for June 27, but parties are likely to agree to an order in advance.

UPDATE (7/14/2016): Received Response to Road Commission's Second Motion for Summary Disposition. Wherefore, Plaintiffs request that the Court deny the Road Commission's request to summarily dismiss their complaint.

UPDATE (10/28/2016): On 07/11/16, Plaintiffs filed a Complaint against Conservation Resource Alliance, the Grand Traverse Regional Land Conservancy, and Ducks Unlimited alleging Trespass, Nuisance and Abatement, and Willful and Wanton Misconduct. Defendants Motion for Protective Order to bar Plaintiff's from obtaining the Depositions of County Road Commission Board members was heard and denied. Per agreement, Plaintiff's counsel is to submit a proposed order to the Court outlining the Court's decision. As of 10/28/16, the Order has not yet been submitted by Plaintiff's Counsel.

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UPDATE (11/10/2016): Co-Defendants have filed their answers. Discovery is ongoing. Mediation is to be completed by February 01, 2017, and Discovery to be concluded by March 15, 2017.

UPDATE (02/03/2017): Co-Defendants, Duck's Unlimited, Conservation Resource Alliance and The Grand Traverse Regional Land Conservancy have all filed their Answers to the Complaint. Discovery is ongoing and depositions of the Tomaszewskis took place on 01/23/2017. Mr. and Mrs. March were scheduled as well on 1/23/2017; however, we were advised late on 1/20/2017 that the Marches would not be appearing as Mr. March had sustained injuries while chopping down a tree and fractured his ankle requiring surgery. Both Mr. and Mrs. Marches' depositions have been rescheduled to 2/02/2017. Depositions for Plaintiffs' experts Matt Keiser and Corey Kandow of Abonmarche are scheduled to 2/15/17. The Mediation in this matter is scheduled with Joseph Quandt on 3/20/17 to be held at the offices of the Michigan Department of Environmental Quality in Lansing, MI. The following are upcoming pertinent dates:

UPDATE (06/01/2017): Court has allowed us to conduct discovery until May 31, 2017. Motions for Summary Disposition must be filed by June 30, 2017.