STATE OF MICHIGAN

COURT OF APPEALS

CHRISTOPHER ROBERT LEBLANC,

Plaintiff-Appellant,

v

WASHTENAW COUNTY ROAD COMMISSION,

Defendant-Appellee.

UNPUBLISHED
April 23, 2020

No. 347323
Washtenaw Circuit Court
LC No. 18-000882-NF

Before: FORT HOOD, P.J., and BECKERING and MARK T. BOONSTRA, JJ.

PER CURIAM.

Plaintiff appeals by right the trial court's order of dismissal granting defendant's motion for summary disposition under MCR 2.116(C)(7). We affirm.

I. FACTUAL BACKGROUND

This case arises from injuries sustained by plaintiff in a single-vehicle car crash on February 26, 2018. Plaintiff alleged that he struck a pothole while driving in Washtenaw County, which caused him to lose control, veer off the road, and strike a tree. Plaintiff served a presuit notice on defendant on June 11, 2018 pursuant to MCL 691.1404(1), and subsequently filed a complaint against defendant. Defendant responded by filing a motion for summary disposition pursuant to MCR 2.116(C)(7), claiming that the governmental tort liability act (GTLA), MCL 691.1401 *et seq*., provided immunity from tort liability because plaintiff did not satisfy the presuit notice requirements. Specifically, defendant alleged that plaintiff relied upon the notice requirements of MCL 691.1404(1), which, following this Court's opinion in *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016), were inapplicable. Defendant argued that, under *Streng*, the actual presuit notice requirements were found in MCL 224.21. The trial court agreed and granted defendant's motion for summary disposition. relying on *Streng* for the proposition that MCL 224.21 applies to suits against county road commissions and required plaintiff to serve his presuit notice on defendant within 60 days of his injury. This appeal followed.

II. STANDARD OF REVIEW

We review de novo a trial court's decision to grant summary disposition. *Bowden v Gannaway*, 310 Mich App 499, 503; 871 NW2d 893 (2015). A court may grant summary disposition under MCR 2.116(C)(7) "because of . . . immunity granted by law . . . ." "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999).

III. ANALYSIS

Plaintiff argues that the trial court erred by holding that the 60-day notice requirement contained in MCL 224.21 applies in this case, and contends instead that the 120-day notice provision found in MCL 691.1404(1) should apply. Plaintiff contends in the alternative that *Streng* wrongly departed from our Supreme Court's ruling in *Brown v Manistee Co Rd Comm*, 452 Mich 354; 550 NW2d 215 (1996), overruled by *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), and due to the confusion caused by the case, this Court should exercise its discretion and judicially toll the notice requirements. We disagree.

The GTLA grants a governmental agency immunity from tort liability if the agency "is engaged in the exercise or discharge of a governmental function." MCL 691.1407(1). "Immunity from tort liability, as provided by MCL 691.1407, is expressed in the broadest possible language—it extends to immunity to all governmental agencies for *all* tort liability whenever they are engaged in the exercise or discharge of a governmental function." *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156; 615 NW2d 702 (2000). However, the GTLA also enumerates several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency. See, e.g., MCL 691.1402. One exception is the defective highway exception. MCL 691.1402 provides in relevant part:

> (1) Each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21.

The GTLA also includes the following notice provisions:

> (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.

> (2) The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may lawfully be served with civil process directed against the governmental agency, anything to the contrary in the charter of any municipal corporation notwithstanding. [MCL 691.1404(1) and (2).]

MCL 224.21, referred to in MCL 691.1402(1), addresses the jurisdiction of county road commissions and provides in relevant part:

> (2) A county shall keep in reasonable repair, so that they are reasonably safe and convenient for public travel, all county roads, bridges, and culverts that are within the county's jurisdiction, are under its care and control, and are open to public travel.
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> (3) An action arising under subsection (2) shall be brought against the board of county road commissioners of the county and service shall be made upon the clerk and upon the chairperson of the board . . . . However, a board of county road commissioners is not liable for damages to person or property sustained by a person upon a county road because of a defective county road, bridge, or culvert under the jurisdiction of the board of county road commissioners, unless the person serves or causes to be served within 60 days after the occurrence of the injury a notice in writing upon the clerk and upon the chairperson of the board of county road commissioners. The notice shall set forth substantially the time when and place where the injury took place, the manner in which it occurred, the known extent of the injury, the names of any witnesses to the accident, and that the person receiving the injury intends to hold the county liable for damages. [MCL 224.21(2) and (3).]

In *Streng*, we unequivocally held that MCL 224.21 applies to actions against county road commissioners. *Streng*, 315 Mich App at 463. In so doing, we also noted that *Brown*, the case relied on by plaintiff, was repudiated in its entirety by our Supreme Court's subsequent opinion in *Rowland*. *Id*. at 459.[1] However, more recently, in *Brugger v Midland Co Bd of Rd Comm'rs*, 324

[1] In *Brown*, our Supreme Court held that the 60-day notice requirement found in MCL 224.21 was unconstitutional and applied the 120-day notice requirement of MCL 691.1404(1) in its place. *Brown*, 452 Mich at 363-364, 368. *Brown* further held that the 120-day notice provision of MCL 691.1404(1) required a showing of prejudice. *Id*. at 368. Eleven years later, in *Rowland*, the Supreme Court explicitly took issue with *Brown*'s prescription of a notice requirement:

> We reject the hybrid constitutionality of the sort *Carver*, *Hobbs*, and *Brown* engrafted onto our law. In reading an "actual prejudice" requirement into the statute, this Court not only usurped the Legislature's power but simultaneously made legislative amendment to make what the Legislature wanted—a notice provision with no prejudice requirement—impossible. *Hobbs* and *Brown* are remarkable in the annals of judicial usurpation of legislative power because they

Mich App 307, 316; 920 NW2d 388 (2018), this Court took issue with *Streng*'s interpretation of whether *Rowland* overturned *Brown* in its entirety, and instead decided that *Streng* "effectively established a new rule of law departing from the longstanding application of MCL 691.1404(1) by Michigan courts." Regardless, in that case, we were asked to convene a conflict panel under MCR 7.215(J)(2) and (3)—something plaintiff did not request in this case—and declined to do so. *Id*. at 315. A subsequent panel of this Court further reiterated *Streng*'s holding that MCL 224.21 applies to claims brought against county road commissions. *Harston v Eaton County*, 324 Mich App 549, 560; 922 NW2d 391 (2018).

Streng remains the law in Michigan, and plaintiff's request that we essentially overlook the case is something we simply cannot do. A published opinion of this Court has precedential effect under the rule of stare decisis and binds lower courts and tribunals. See *Catalina Mktg Sales Corp v Dep't of Treasury*, 470 Mich 13, 23; 678 NW2d 619 (2004); MCR 7.215(J)(1); see also *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 435-438; 751 NW2d 8 (2008) (discussing the circumstances under which a decision of the Court of Appeals becomes the rule of law under MCR 7.215(J)(1)). Until and unless the Supreme Court overrules the *Streng* decision, "all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete." See *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006). We therefore decline to hold that the 120-day notice provision found in MCL 691.1404(1) governs plaintiff's claim.

Plaintiff argues in the alternative that we should apply equitable tolling to his cause of action, because the state of the caselaw concerning notice periods left him justifiably confused. We disagree.

Equitable tolling is an equitable remedy that "operates to relieve the strict command of a legislatively prescribed limitation because of considerations deeply rooted in our jurisprudence." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 595; 702 NW2d 539 (2005). For example, equitable tolling has been applied in cases in which a plaintiff did not bring suit within the limitations period because of inducement by the defendant or because of fraudulent concealment. See *id*. We have also noted that equitable tolling of limitations periods may be appropriate when "courts themselves" create confusion. *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 406; 738 NW2d 664 (2007).

> not only seized the Legislature's amendment powers, but also made any reversing amendment by the Legislature impossible. *Nothing can be saved from* Hobbs *and* Brown *because the analysis they employ is deeply flawed*. [*Rowland*, 477 Mich at 213-214 (emphasis added).]

Although the *Rowland* Court made no specific mention of the 60-day notice provision of MCL 224.21, or the *Brown* Court's holding that it was unconstitutional, we noted in *Streng* that the language of *Rowland* was clear, and that *Rowland* "repudiated the entirety" of *Brown*. *Streng*, 315 Mich App at 459.

In *Brugger*, this Court remarked on the state of the law both before and after *Streng* in determining that *Streng* should be applied prospectively. *Brugger*, 324 Mich App at 315. The *Brugger* Court noted:

> *Streng* should be applied prospectively as it is at variance from what was understood to be the law for at least 40 years, and plaintiff's failure to comply with MCL 224.21(3) was the result of "the preexisting jumble of convoluted case law through which the plaintiff was forced to navigate." *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 590 n 65; 702 NW2d 539 (2005).
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> Also relevant is the fact that the confusion concerning the law was not created by plaintiff but, rather, by the Legislature and the Judiciary. The Legislature adopted two conflicting sets of requirements regarding the timing and content of the presuit notice. And for decades, the Judiciary has decided many presuit notice cases based on the requirements of the GTLA, with no reference to MCL 224.21(3). The role of the government in creating confusion concerning a legal standard weighs strongly against sanctioning a party for acting in good faith on the basis of the apparent law. For instance, in *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 417; 684 NW2d 864 (2004), the plaintiff filed an action against the defendant healthcare provider sounding in ordinary negligence. The defendant argued that two of the plaintiff's claims sounded in medical malpractice and that those claims should therefore be dismissed because, although the action had been filed during the three-year limitations period for negligence cases, it had not been filed within the two-year limitations period for medical malpractice. *Id*. at 418. The Supreme Court concluded that the two counts in question sounded in medical malpractice and that "under ordinary circumstances [those counts] would be time-barred." *Id*. at 432. Nevertheless, it did not dismiss them because "[t]he equities of [the] case ... compel a different result." *Id*. [*Brugger*, 324 Mich App at 315-317.]

Plaintiff argues that under *Brugger* and *Bryant*, we should apply equitable tolling to the presuit notice period applicable to his claim. We disagree. Our Supreme has stated that its decision to apply equitable tolling in *Bryant* was appropriate "because of 'the preexisting jumble of convoluted caselaw through which the plaintiff was forced to navigate.' " *Trentadue*, 479 Mich at 406, quoting *Devillers*, 473 Mich at 590 n 65. And in *Brugger*, although we noted that such a "preexisting jumble" of caselaw had existed before *Streng*, we did not apply equitable tolling; we merely held that *Streng* applied prospectively. *Brugger*, 324 Mich App at 325.

Importantly also, even assuming that equitable tolling can apply to presuit notice periods, the plaintiff in *Brugger* filed his presuit notice two years and nine months *before Streng* was decided. *Id*. at 311. By contrast, plaintiff in this case filed his presuit notice two years and one month *after Streng* was issued. To the extent that justifiable confusion concerning the applicable notice period may have existed before *Streng* was issued, *Streng* definitively resolved it. And even if *Brugger* correctly held that *Streng* should be applied prospectively, its prospective application

in this case bars plaintiff's claim.[2] Although plaintiff may believe that *Streng* was wrongly decided, the state of the law concerning presuit notice requirements, as it existed at the time of his accident, was anything but a "preexisting jumble of convoluted caselaw." *Trentadue*, 479 Mich at 406 (citation omitted). To the contrary, *Streng* definitively decided the issue, and no opinions published after *Streng* contradict its essential holding. We therefore decline to apply equitable tolling to save plaintiff's claim.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Jane M. Beckering
/s/ Mark T. Boonstra

[2] The defendant road commission in *Brugger* applied for leave to appeal our decision to the Michigan Supreme Court. That application was held in abeyance pending our Supreme Court's decision in *W.A. Foote Mem Hosp v Michigan Assigned Claims Plan*, 504 Mich 985; 934 NW2d 44 (2019). See *Brugger v Midland Co Bd of Road Comm'rs*, unpublished order of the Michigan Supreme Court, entered December 4, 2018 (Docket No. 158304; 920 NW2d 131). Our Supreme Court issued its opinion in *Foote* on October 25, 2019. The Court has not yet issued further orders regarding the *Brugger* defendant's application.