STATE OF MICHIGAN

COURT OF APPEALS

CHRISTINA McCAHAN,

Plaintiff-Appellant,

v

SAMUEL KELLY BRENNAN,

Defendant,

and

UNIVERSITY OF MICHIGAN REGENTS

Defendant-Appellee.

FOR PUBLICATION
February 1, 2011

No. 292379
Court of Claims
LC No. 08-000147-MZ

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

FITZGERALD, J. (*dissenting*).

The majority concludes, on the basis of *Rowland v Washtenaw Co Rd Comm*, 447 Mich 197; 731 NW2d 41 (2007), that plaintiff's failure to comply with the plain language of the notice requirement of MCL 600.6431(3) mandated summary disposition in favor of defendant. Because the case before us construes a statute other than MCL 600.6431(3), I respectfully dissent for the reasons stated by Judge Murphy in his dissenting opinion in *Property and Casualty Insurance Co of the Hartford v Dep't of Transportation*, unpublished opinion per curiam opinion of the Court of Appeals, issued April 22, 2010 (Docket No. 285749), which I quote in its entirety and whose reasoning I adopt:

> Because *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), did not construe the language in MCL 600.6431(3), and because our Supreme Court has evidently decided not to extend the holding in *Rowland* to MCL 600.6431(3), I am not prepared to disavow *May v Dep't of Natural Resources*, 140 Mich App 730; 365 NW2d 192 (1985).[1] In *May*, this Court held that a plaintiff's claims are not barred by failure to comply with MCL 600.6431(3) unless the defendant established that it was prejudiced by the noncompliance. *May* has not been reversed or explicitly overruled.

> *Rowland* interpreted MCL 691.1404(1), which differs from the statute at issue here, MCL 600.6431(3). MCL 691.1404(1) provides that compliance with the notice provision is "a condition to any recovery for injuries sustained by reason of any defective highway;" however, MCL 600.6431(3) does not contain comparable "recovery precondition" language. More importantly, our own Supreme Court does not appear to be prepared to extend the holding in *Rowland* to MCL 600.6431(3). In *Beasley v Michigan*, 483 Mich 1025; 765 NW2d 608 (2009), the Michigan Supreme Court denied an application for leave to appeal relative to an order of this Court that had denied leave to appeal, which in turn pertained to an order by the Court of Claims denying summary disposition to the state. As reflected in a concurring opinion issued by CHIEF JUSTICE KELLY in *Beasley*, the state brought the motion for summary disposition on the basis that the plaintiff, who had been injured in a motor vehicle accident involving a state-owned vehicle, failed to comply with the notice requirement of MCL 600.6431(3). Thus, while I recognize that Supreme Court orders denying leave do not have precedential value, the order does appear to signal a mindset that *Rowland* is inapplicable to MCL 600.6431(3).
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> Until the Supreme Court decides to substantively address the impact of *Rowland* on MCL 600.6431(1), which I encourage it to do as soon as possible, I will continue to recognize and respect this Court's decision in *May*. In my opinion, it defies logic to dismiss plaintiffs' claims here, where in *Beasley* the plaintiff is being permitted to proceed in the Court of Claims with the apparent blessing of the Supreme Court.

I would reverse the order granting summary disposition in favor of defendant. While in some cases under MCL 600.6431(3) a remand for a determination whether a defendant can establish that it was prejudiced by a plaintiff's failure to file a claim with the Court of Claims within six months of the accident will be warranted, such a remand in this case is not necessary. The accident occurred on December 12, 2007. On May 7, 2008, plaintiff's counsel sent a letter to the university, addressed to the office of legal counsel, indicating that counsel intended to represent plaintiff in a lawsuit over the accident. On May 28, 2007, a senior claims representative of the University of Michigan Risk Management Services sent a letter to plaintiff's counsel acknowledging counsel's letter and indicating that the university would conduct a full investigation into the accident. The representative also requested additional information about the accident. The university's counsel was also provided a copy of the letter from the representative. Clearly, the university had actual knowledge of plaintiff's intention to file a claim within six months following the accident. Under these circumstances, I would remand for trial.

/s/ E. Thomas Fitzgerald