STATE OF MICHIGAN

COURT OF APPEALS

HUBERT E. KLINE, Plaintiff-Appellee,	FOR PUBLICATION March 1, 2011
v	No. 295652 Court of Claims
DEPARTMENT OF TRANSPORTATION, Defendant-Appellant.	LC No. 09-000088-MZ

Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

HOEKSTRA, P.J., *(concurring in part and dissenting in part).*

I concur with the result reached by the majority to reverse, but respectfully disagree with their conclusion that *McCahan v Brennan*, ___ Mich App ___; ___ NW2d ___ (2011) was wrongly decided. To the contrary, I would hold that *McCahan* was correctly decided. Consequently, I disagree with the majority invoking the conflict resolution procedure, MCR 7.215(J)(2).

Both here and in *McCahan*, the only argument for dismissal by defendants was that plaintiffs in these cases failed to file within six months of the accident a notice of intention to file a claim with the clerk of the court of claims as required by MCL 600.6431(3).[1] In both cases, plaintiffs sought to excuse their failure to comply with the six-month requirement by arguing that their lack of compliance did not prejudice defendants. In deciding this issue, the Court in *McCahan* addressed whether the Supreme Court's holding in *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007), that enforcement of the notice provision of MCL

[1] MCL 600.6431(3) provides:

> In all actions [against the state] for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

691.1404[2] was not contingent on a showing of prejudice, should apply to MCL 600.6431. It concluded:

> While *Rowland* did directly deal with a claim arising under the defective highway exception to governmental immunity, we, like Justice CORRIGAN, are not persuaded that the *Rowland* rationale is somehow limited to MCL 691.1404. Indeed, one of the cases that *Rowland* reviewed and rejected, *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973), dealt with a six-month notice requirement under the Motor Vehicle Accident Claims Act, MCL 257.1118. In rejecting *Carver* and other cases, *Rowland* stated that "[i]n 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." *Rowland*, 477 Mich at 213. Ultimately, *Rowland*, 477 Mich at 219, concluded that "MCL 691.1404 is straightforward, clear, unambiguous, and not constitutionally suspect. Accordingly, we conclude that it must be enforced as written." The same can be said of MCL 600.6431(3).
>
> I agree with the above quoted analysis.
>
> /s/ Joel P. Hoekstra

---

[2] MCL 691.1404(1) provides:

> 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.