Court of Appeals, State of Michigan

For Publication

ORDER

Tim Edward Brugger II v Midland County Board of Road Commissioners

Docket No. 337394

LC No. 15-002403-NO

Douglas B. Shapiro
Presiding Judge

Michael J. Kelly

Colleen A. O'Brien
Judges

The motion for reconsideration is DENIED for the reasons set forth below.

Defendant argues that we should follow the decision in *Harston v Eaton County Road Commission*, ___ Mich App ___; ___ NW2d ___ (2018) (docket #338981), which held that *Streng v Bd of Mackinac Co Rd Comm'rs*, 315 Mich App 449; 890 NW2d 680 (2016) was retroactive. However, *Harston* was decided after our published decision in this case. As the first published Court of Appeals case to decide the issue of *Streng's* retroactivity, our decision controls. The *Harston* panel failed to adhere to MCR 7.215(j) which provides:

> ***Precedential Effect of Published Decisions.*** **A panel of the Court of Appeals must follow the rule** of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court or a special panel of the Court of Appeals as provided in this rule. [Emphasis added.]

Because *Harston* was decided after this case, we need not consider it. However, we do so in hopes of providing clarification to the bench and bar. *Harston* concluded that *all* judicial rulings involving the reinterpretation of a statute are to be applied retroactively. *Harston* based this conclusion on its reading of *W A Foote Mem Hosp v Mich Assigned Claims Plan*, 321 Mich App 159; 909 NW2d 38 (2017), oral argument gtd on the application 911 NW2d 470 (2018).[1]

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[1] *Foote Memorial* was not mentioned in the briefing in this case even though it was decided before defendant's brief was filed. Further, prior to argument, defendant did not file a supplemental brief to advise us that it believed that *Foote Memorial* was relevant, let alone controlling, precedent by which this case must be decided. We also take judicial notice of the fact that *Foote Memorial* was similarly not cited in the initial briefing to the *Harston* panel. It was briefed in *Harston* only when the panel *sua sponte* directed the parties to file supplemental briefs addressing it. Thus, it would appear that defendants did not, until invited to by the *Harston* panel, conclude that *Foote Memorial* was worth briefing, let alone dispositive of the case before us.

The holding in *W A Foote Mem Hosp* was that the decision in *Covenant Med Ctr, Inc v State Farm Mut Auto Ins Co*, 500 Mich 191; 895 NW2d 490 (2017), is to be given retroactive application. Our opinion does not contradict that holding. The *Harston* panel cited *Foote Memorial* for the principal, previously articulated in *Spectrum Health v Farm Bureau Mut Ins Co of Mich*, 492 Mich 503; 821 NW2d 117 (2012), that "a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation." In *Foote Memorial*, we were considering whether or not *Covenant, a decision of a court of supreme jurisdiction overruling a former decision,* should be given retroactive application. Similarly, in *Spectrum Health*, the Supreme Court was considering its own previous decision, i.e. a decision of the court of supreme jurisdiction. We are unaware of any case, and none was cited in *Harston*, that holds that this rule applies to decisions of this Court or any other intermediate Court of Appeal. *Streng* was a decision of this Court, not of the Supreme Court. Given the clear demarcation of this principle of retroactivity to decisions of the Supreme Court, it is difficult to understand why the *Harston* court concluded that *Foote Memorial* "controls this case in all respects." Neither the holding of *Foote Memorial*, i.e. that the Supreme Court's decision in *Covenant* was retroactive, nor its analysis, i.e. that decisions of "the court of supreme jurisdiction" should be given retroactive application are controlling here.

The "first-out" rule set forth in MCR 7.215(C)(2) was adopted due to the confusion created by conflicting decisions by different panels of this Court. Unfortunately, the *Harston* decision has resulted in exactly the type of confusion the rule was intended to avoid. That confusion is unwarranted. Our published opinion in this case was the first Court of Appeals' decision addressing the retroactivity of *Streng* and so is precedentially binding pursuant to MCR 7.215(C)(2). *Harston* was the second case addressing the issue and is not precedentially binding.

The clerk is directed to provide a copy of this order to the Supreme Court Reporter of Decisions for publication in the Michigan Appeals Reports.

O'Brien, J., would grant the motion for reconsideration.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUL 12 2018

Date

Chief Clerk