

STATE OF MICHIGAN  
IN THE SUPREME COURT

On Appeal From the Michigan Court of Appeals  
Shapiro, PJ, M.J. Kelly and O'Brien

TIM EDWARD BRUGGER, II,

Plaintiff-Appellee,

-vs-

BOARD OF COUNTY ROAD COMMISSIONERS  
FOR THE COUNTY OF MIDLAND, AKA  
MIDLAND COUNTY ROAD COMMISSION, a  
Governmental agency,

Defendant-Appellant

Supreme Court No. 158304

Court of Appeals No. 337394

Midland County Circuit Court  
No. 15-2403-NO B

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STATE OF MICHIGAN

IN THE SUPREME COURT

On Appeal From the Michigan Court of Appeals  
O'Connell, PJ, K.F. Kelly and Riordan

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

Plaintiff-Appellant,

-vs-

THE EATON COUNTY ROAD COMMISSION,

Defendant-Appellee,

and

LAWRENCE BENTON, Personal Representative of  
the ESTATE OF MELISSA SUE MUSSER, Deceased;  
and PATRICIA JANE MUSSER

Supreme Court No. 158069

Court of Appeals No. 338990

Eaton County Circuit Court  
No. 16-29-NI

Defendants

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**PROPOSED BRIEF *AMICUS CURIAE*  
ON BEHALF OF SCOTT CROUCH**

**MARK GRANZOTTO, P.C.  
MARK GRANZOTTO (P31492)  
Attorney for Amicus Curiae Scott Crouch  
2684 Eleven Mile Road, Suite 100  
Berkley, Michigan 48072  
(248) 546-4649**

**NOLAN & SHAFER, PLC**

**DAVID P. SHAFER (P53497)  
Attorney for Amicus Curiae Scott Crouch  
40 Concord Avenue  
Muskegon, Michigan 49442  
(231) 722-2444**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
INDEX OF AUTHORITIES.....	ii
STATEMENT REGARDING QUESTIONS PRESENTED .....	iv
STATEMENT OF MATERIAL PROCEEDINGS AND FACTS .....	1
ARGUMENT .....	2
I.    THE COURT OF APPEALS DECISION IN <i>STRENG</i> WAS WRONGLY DECIDED.....	2
A.    The <i>Streng</i> Court Failed to Follow This Court’s Explicit Holding in <i>Brown v Manistee County Road Commission</i> , 452 Mich 354; 550 NW2d 215 (1996) .....	2
B.    There Are Other Reasons Why The <i>Streng</i> Court Erred In Concluding That MCL 224.21(3)’s Notice Provision Controlled In A Cause Of Action Filed Against A county Road Commission. ....	14
RELIEF REQUESTED.....	26

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Antrim County Bd. v Lapeer County Bd.</i> , 332 Mich 224; 50 NW2d 769 (1952) . . . . .	21
<i>Associated Builders &amp; Contractors v City of Lansing</i> , 499 Mich 172; 880 NW2d 765 (2016) . . . . .	2
<i>Attorney General v Showley</i> , 307 Mich 690; 12 NW2d 439 (1943). . . . .	21
<i>Burke v Burke</i> , 34 Mich 451 (1876) . . . . .	16
<i>Carver v McKernan</i> , 390 Mich 96; 211 NW2d 24 (1973) . . . . .	3
<i>Center Line v 37<sup>th</sup> District Judges</i> , 403 Mich 595; 271 NW2d 526 (1978) . . . . .	20
<i>Davidson v City of Muskegon</i> , 111 Mich 454; 69 NW 670 (1897) . . . . .	3
<i>Detroit Police Officers Ass’n v City of Detroit</i> , 391 Mich 44; 214 NW2d 803 (1974) . . . . .	14
<i>Forest v Parmalee</i> , 402 Mich 348; 262 NW2d 653 (1978) . . . . .	22
<i>Grubaugh v City of St. Johns</i> , 384 Mich 165; 180 NW2d 778 (1970). . . . .	3
<i>House Speaker v State Administrative Bd.</i> , 441 Mich 547; 495 NW2d 539 (1993). . . . .	14
<i>Jespersion v Auto Club Ins. Ass’n</i> , 499 Mich 29; 878 NW2d 799 (2016). . . . .	15
<i>Jourdin v City of Flint</i> , 355 Mich 513; 54 NW2d 900 (1959) . . . . .	21
<i>Metropolitan Life Ins Co. v Stoll</i> , 276 Mich 637; 268 NW 763 (1936) . . . . .	21
<i>Old Orchard v Hamilton Mutual Ins Co.</i> , 434 Mich 244; 454 NW2d 73 (1990). . . . .	21
<i>Omne Financial, Inc. v Shacks, Inc.</i> , 460 Mich 305; 596 NW2d 591 (1999). . . . .	15
<i>People v Bewersdorf</i> , 438 Mich 55; 475 NW2d 231 (1991) . . . . .	14
<i>People v Flynn</i> , 330 Mich 130; 47 NW2d 47 (1951) . . . . .	21
<i>People v Marxhausen</i> , 204 Mich 559; 171 NW 557 (1919). . . . .	21
<i>People v Webb</i> , 458 Mich 265; 580 NW2d 884 (1998) . . . . .	14

*Pohutski v City of Allen Park*, 465 Mich 675; 641 NW2d 219 (2002)..... 17

*Porter v Edwards*, 114 Mich 640; 72 NW 614 (1897)..... 21

*Reich v State Highway Dept*, 386 Mich 617; 194 NW2d 700 (1972)..... 3

*Ross v Consumers Power Co. (On Rehearing)*, 420 Mich 567; 363 NW2d 641 (1984) ..... 6

*Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007) ..... 8

*Shah v State Farm Mut Auto Ins Co*, 324 Mich App 182; 920 NW2d 148 (2018)..... 2

*Shirilla v City of Detroit*, 208 Mich App 434; 528 NW2d 763 (1995)..... 15

*State Treasurer v Schuster*, 456 Mich 408; 572 NW2d 628 (1998)..... 15

*Streng v Board of Mackinac County Road Commissioners*,  
315 Mich App 449; 890 NW2d 680 (2016) ..... 1

*Valentine v McDonald*, 371 Mich 138; 123 NW2d 227 (1963)..... 21

*Wayne County Prosecutor v Dept of Corrections*, 451 Mich 569; 548 NW2d 900 (1996) ..... 14

*Yono v Dep’t of Transportation*, 499 Mich 636; 885 NW2d 445 (2016)..... 16

**Statutes**

MCL 224.21(2)..... 24

MCL 224.21(3)..... 1

MCL 257.1118 ..... 3

MCL 691.1402(1)..... 23

MCL 691.1404(1)..... 1

MCL 691.1411 ..... 22

**Court Rules**

MCR 7.312(H)(4)..... 1

**STATEMENT REGARDING QUESTIONS PRESENTED**

- I. SHOULD THIS COURT CONCLUDE THAT THE COURT OF APPEALS DECISION IN *STRENG v BOARD OF MACKINAC COUNTY ROAD COMMISSIONERS*, 315 Mich App 449; 880 NW2d 680 (2016), WAS WRONGLY DECIDED?

Amicus Curiae says “Yes.”

Plaintiffs say “Yes”.

Defendants say “No”.

**STATEMENT OF MATERIAL PROCEEDINGS AND FACTS<sup>1</sup>**

Confusingly, there are two Michigan statutes that pertain to the presuit notice that must be provided in a situation in which a party intends to sue a county road commission for injuries sustained due to a defective road. These two statutes differ both in terms of the required contents for such a presuit notice as well as the timing of that notice. One of these two statutes, MCL 224.21(3), is part of Michigan’s highway code. That provision states that a county road commission is not liable for damage unless the injured party provides written notice of the accident within 60 days of its occurrence.

The Governmental Tort Liability Act (“GTLA”) has its own notice provision for cases brought against any governmental agency arising out of an allegedly defective road, including claims against county road commissions. That provision, MCL 691.1404(1), specifies that written notice of the accident must be provided within 120 days of the date of the claimant’s injury.

In May 2016, a panel of the Court of Appeals decided the case of *Streng v Board of Mackinac County Road Commissioners*, 315 Mich App 449; 890 NW2d 680 (2016), in which it held that an injured party must provide presuit notice within the 60-day period provided in MCL 224.21(3).

On April 24, 2020, this Court issued orders granting leave to appeal in these two cases. *Brugger v Midland County Board of Road Commissioners*, \_\_\_ Mich \_\_\_; 941 NW2d 379 (2020); *Pearce v Eaton County Road Commission*, \_\_\_ Mich \_\_\_; 941 NW2d 378 (2020). In its orders granting leave to appeal, the Court identified several issues that it wanted the parties to brief arising out of the Court of Appeals decision in *Streng*. Among the issues on which the Court has requested

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<sup>1</sup>Pursuant to MCR 7.312(H)(4), the undersigned represents that no counsel for any of the parties was involved in the preparation of this brief. The undersigned further represents that none of the parties to these cases made a financial contribution toward the preparation of this brief.

briefing is on the question of whether *Streng* was correctly decided. It is that issue that will be addressed in this brief.

## ARGUMENT

### **I. THE COURT OF APPEALS DECISION IN *STRENG* WAS WRONGLY DECIDED.**

The first issue that the Court has asked the parties to brief in its April 24, 2020 orders is whether the Court of Appeals decision in *Streng* was correctly decided. For the various reasons outlined in this brief, this Court should conclude that the *Streng* Court was in error in concluding that a defective highway claim against a county road commission is governed by the presuit notice provision contained in MCL 224.21(B).

#### **A. The *Streng* Court Failed to Follow This Court’s Explicit Holding in *Brown v Manistee County Road Commission*, 452 Mich 354; 550 NW2d 215 (1996).**

All of Michigan’s lower courts, including the Court of Appeals, are “bound to follow decisions by this Court except where those decisions have clearly been overruled or superseded.” *Associated Builders & Contractors v City of Lansing*, 499 Mich 172, 191; 880 NW2d 765 (2016); *Shah v State Farm Mut Auto Ins Co*, 324 Mich App 182, 201; 920 NW2d 148 (2018). In the judicial hierarchy in the state, there is no place for a conflict between a decision of this Court and the Michigan Court of Appeals.

The Court of Appeals in *Streng* failed to give effect to a prior holding of this Court on the subject of presuit notice in a highway defect case. To understand why, a brief history of Michigan’s somewhat contorted judicial treatment of statutory presuit notice provisions is necessary.

Presuit notice requirements in suits for damages against governmental agencies have been

in existence for some time. *See e.g. Davidson v City of Muskegon*, 111 Mich 454; 69 NW 670 (1897). In 1969, however, this Court decision in *Grubaugh v City of St. Johns*, 384 Mich 165; 180 NW2d 778 (1970), cast doubt on the enforcement of such statutes. The Court held in *Grubaugh* that due process precluded enforcement of a statute requiring presuit notice to a governmental entity within 60 days of an accident. The Court in *Grubaugh* reached this result on the ground that the Legislature could not establish requirements in cases filed against governmental agencies that were different from those applicable in suits against private litigants. 387 Mich at 174-175.

Several years after *Grubaugh*, the Court in *Reich v State Highway Dept*, 386 Mich 617; 194 NW2d 700 (1972), concluded that a presuit notice provision that required written notice within 60 days of an accident violated another constitutional guarantee, equal protection. The *Reich* Court reasoned that the “diverse treatment of members of a class along the lines of governmental or private tort-feasors bears no reasonable relationship under today’s circumstances . . .” *Id.*, at 623.

Three years after *Reich* was decided, this Court ruled that not all statutory presuit notice requirements were constitutionally infirm. In *Carver v McKernan*, 390 Mich 96; 211 NW2d 24 (1973), the Court enforced a presuit notice provision contained in the Motor Vehicle Accident Claims Act, MCL 257.1118. The Court held in *Carver* that a presuit notice could pass constitutional muster if it served a legitimate purpose. Specifically, the *Carver* Court observed that “[t]he failure to give notice may result in prejudice to the [defendant] according to whatever reason justifies the notice requirement.” 390 Mich at 100.

While *Carver* did not involve a suit for damages filed against the state, county or municipality, the rationale of that ruling was later applied to such entities in this Court’s decision in *Hobbs v Michigan State Highway Dep’t*, 398 Mich 90; 247 NW2d 754 (1976). In *Hobbs*, the

plaintiff sued the State Highway Department for injuries her decedent sustained in an automobile accident. Plaintiff alleged that these injuries resulted from the negligent design and construction of a highway. The plaintiff failed to comply with the 120-day presuit notice requirement of MCL 691.1404(1), and the defendant moved to dismiss her claim on that basis.

The Court in *Hobbs* reaffirmed its holding in *Reich* that enforcement of presuit notice statutes would offend equal protection principles. *Id.*, at 95. But, the *Hobbs* Court recognized that its decision in *Carver* had held that not all such presuit notice provisions would be deemed unconstitutional. The *Hobbs* Court thus held that “actual prejudice . . . due to lack of notice within 120 days is the only legitimate purpose” behind MCL 691.1404's presuit notice requirement. 398 Mich at 96. As a result, “absent a showing of such prejudice the notice provision contained in [MCL 691.1404(1)] is not a bar to claims filed pursuant to MCLA 691.1402.” 398 Mich at 96.

The rule of law announced in *Hobbs* remained controlling authority for over thirty years. The statutory presuit notice requirements contained in MCL 224.21(3) and §1404(1) remained on the books, but the plaintiff's failure to comply with these statutory notice provisions would be grounds for dismissal of a highway defect claim only if the defendant could establish that it suffered actual prejudice because of the plaintiff's failure to provide a timely notice.

On June 12, 1988, Billy Brown was riding his motorcycle in Filer City in Manistee County when he encountered a pothole. In attempting to dodge the pothole, he lost control of his motorcycle, fell and was injured. Sixty-one days after the accident occurred, the Manistee County Road Commission resurfaced the road where Brown had sustained his injury.

Brown apparently did not serve any presuit notice of his accident on the county or the county road commission. Instead, he just filed suit against the county road commission in June 1990. The

Road Commission moved for summary disposition on the ground that Brown had failed to comply with the 60-day notice requirement contained in MCL 224.21(3). The road commission argued that it suffered the prejudice that this Court required in *Hobbs* since, if a notice had been timely provided during the 60-day period provided in MCL 224.21(3), it would have been able to preserve relevant evidence pertaining to Brown's accident before resurfacing the road where the accident occurred. The circuit court agreed with the road commission and granted summary disposition.

The circuit court's grant of summary disposition was affirmed by the Court of Appeals. *Brown v Manistee County Road Commission*, 204 Mich App 574; 516 NW2d 121 (1994). Because of the nature of the prejudice that the defendant was claiming based on the resurfacing of the road sixty-one days after the accident, the first issue that the panel had to decide in *Brown* was "whether *Brown* is subject to the sixty-day notice requirement set forth in MCL 224.21 such that Brown's claim is barred for failure to give notice within the required statutory period." 204 Mich App at 576. In determining that issue, the panel in *Brown* addressed which of the two presuit notice provisions, MCL 224.21(3) or §1404(1), applied. 204 Mich App at 576-577. The Court of Appeals majority in *Brown*<sup>2</sup> determined that the statutory notice period applicable to Brown's case was MCL 224.21(3) and its requirement that notice be provided within 60 days of an accident.

Based on its conclusion that the 60-day notice period of MCL 224.21(3) was controlling, the *Brown* majority affirmed the grant of summary disposition, finding that under the test adopted in

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<sup>2</sup>Judge Janet Neff dissented from the majority's determination. 204 Mich App at 578-580. In her view, the language of MCL 691.1404(1) indicated that it applied to all cases and, on that basis, she concluded the 120-day period of that statute was appropriate. Judge Neff found further support of her determination in the fact that "the sixty-day notice provision has not been applied in any reported cases involving road commissions since MCL 691.1404 was amended in 1970." 204 Mich App at 579 (J. Neff, dissenting).

*Carver* and *Hobbs*, the notice statute was enforceable because the defendant road commission sustained prejudice due to Brown's failure to timely notify it of the accident. 204 Mich App 577-578.

The plaintiff in *Brown* applied for leave to appeal in this Court. In June 1995, the Court granted leave to appeal. *Brown v Manistee County Road Commission*, 449 Mich 860; 535 NW2d 793 (1995). The Court's order granting leave in *Brown* was limited to the following three questions:

Whether the plaintiff's action is governed by the 60-day notice provision of M.C.L. § 224.21; M.S.A. § 9.121, or the 120-day notice provision of M.C.L. § 691.1404; M.S.A. § 3.996(104); whether the rule set forth by this Court in *Hobbs v. Highway Department*, 398 Mich. 90, 247 N.W.2d 754 (1976), requiring a showing of prejudice, should be overruled; and, if it is determined that the rule in *Hobbs, supra*, remains valid law, whether there has been a showing of prejudice in the instant case

*Id.*

In July 1996, this Court issued its decision in *Brown*, reversing the grant of summary disposition in favor of the defendant. *Brown v Manistee County Road Commission*, 452 Mich 354; 550 NW2d 215 (1996). The Court's opinion in *Brown* began with a reiteration of the three separate issues on which it granted leave. *Id.*, at 356. The opinion then proceeded to address the first of these three issues: "whether the plaintiff's action is governed by the sixty-day notice provision of MCL 224.21 . . . or the 120-day notice provision of MCL 691.1404 . . ." 452 Mich at 356.

The Court in *Brown* went on to hold that the 120-day period provided in §1404(1) would control. 452 Mich at 361-363. In reaching this conclusion, the *Brown* Court stressed the Legislature's intent "to provide uniform liability and immunity to both state and local governmental agencies." *Id.*, at 361, quoting *Ross v Consumers Power Co. (On Rehearing)*, 420 Mich 567, 614; 363 NW2d 641 (1984). For that reason, the Court in *Brown* noted that having two distinct notice periods in two

statutes was “suspect.” 452 Mich at 361.

The *Brown* Court analyzed the two statutes under the equal protection clause and concluded, “we are unable to perceive a rational basis for the county road commission statute to mandate notice of the claim within sixty days.” *Id.*, at 363. For that reason, the *Brown* Court found the sixty-day notice period in MCL 224.21(3) to be unconstitutional. 452 Mich at 364.

After deciding which of the two notice statutes would govern in a case filed against a county road commission, the *Brown* Court turned to the second issue on which it had granted leave – whether its prior decision in *Hobbs*, which required a showing of prejudice before a statutory presuit notice provision would be enforced, should be overruled. 452 Mich at 365-368. The *Brown* majority was not convinced that *Hobbs* was wrongly decided and, resting on the doctrine of stare decisis, the Court held in *Brown* that it would not overrule *Hobbs*.

The holdings reached by the Court in *Brown* were summarized in the concluding paragraph of the Court’s opinion:

We reverse the holding of the Court of Appeals that the sixty-day provision applies, and hold that the 120-day notice provision applies to lawsuits against a county road commission. Further, we hold that *Hobbs* is still good law. Finally, we hold that the defendant road commission has not established that it has suffered prejudice from the plaintiff’s failure to serve notice within the 120-day period, because it repaved the road before the expiration of the notice period.

452 Mich at 368-369.

Two justices dissented from the majority’s decision in *Brown* in an opinion authored by Justice Dorothy Comstock Riley. Justice Riley began her dissent by acknowledging that she had no disagreement with the majority’s resolution of the first issue on which leave to appeal was granted: “I agree with the majority’s conclusion that plaintiff must comply with the 120-day notice

requirement.” 452 Mich at 369 (J. Riley, dissenting). Thus, the dissent in *Brown* acknowledged that it was §1404(1), not MCL 224.21(3), that would govern the presuit notice to be provided to a county road commission.

Justice Riley, however, disagreed with the majority’s conclusion that *Hobbs* with its requirement of prejudice was correctly decided. Justice Riley found §1404(1)’s notice requirement to be “straightforward, clear and unambiguous,” and she rejected “the requirement of prejudice engrafted upon the statutory notice provision by *Hobbs*.” 452 Mich at 369 (J. Riley, dissenting).

Nearly ten years later, in March 2006, this Court once again granted leave to appeal to consider whether *Hobbs* and its requirement of prejudice before a presuit notice statute would be deemed enforceable should be overruled. *Rowland v Washtenaw County Road Commission*, 474 Mich 1099; 711 NW2d 376 (2006). In *Rowland*, the plaintiff, claiming injury based on a road defect, served the road commission with notice of her claim 140 days after her accident. The lower courts in *Rowland* excused this violation of the 120-day notice provision of §1404(1) on the ground that the defendant sustained no prejudice.

On May 2, 2007, the Court released its decision in *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007), rejecting the constitutional analysis employed in *Hobbs* and overruling the conclusion reached in *Hobbs* and *Brown* that a statutory presuit notice requirement would be enforceable only if the defendant sustained prejudice as a result of a defect in that notice.

The *Rowland* Court began its discussion of this question with an overview of the relevant Michigan case law pertaining to notice statutes. 477 Mich at 205-209. Following that discussion, the *Rowland* opinion contained a section explaining the majority’s conclusion that *Hobbs* and *Brown*

were wrongly decided. That section of the *Rowland* opinion began with the following:

The simple fact is that *Hobbs* and *Brown* were wrong because they were built on an argument that governmental immunity notice statutes are unconstitutional or at least sometimes unconstitutional if the government was not prejudiced. This reasoning has no claim to being defensible constitutional theory.

*Id.*, at 210.

Relying on Justice Riley's dissent in *Brown*, the *Rowland* Court found that §1404(1) did not violate the equal protection clause under the rational basis test. *Id.*, at 210. The *Rowland* Court then held as follows:

The notice provision passes constitutional muster. 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 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.

*Id.*, at 213.

Having rejected the constitutional analysis employed in *Hobbs* and *Brown*, the *Rowland* Court reached the following conclusion:

We conclude that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect must be served on the governmental agency within 120 days of the injury.

*Id.*, at 200.

Nine years after *Rowland* was decided, a panel of the Court of Appeals in *Streng* was presented with the question of whether the notice provision of MCL 224.21(3) or §1404(1) would

control in a cause of action filed against a county road commission.<sup>3</sup> Based on its analysis of these two statutes and the GTLA, the *Streng* Court ultimately concluded that MCL 224.21(3) and its 60-day notice period were applicable in such a case. 315 Mich App at 455-463.

In the course of its decision, the *Streng* Court noted that this Court's decision in *Brown* represented the only other case that "has substantively considered the potential conflicts between the highway code and the GTLA." 315 Mich App at 460. The *Streng* Court concluded, however, that it was not required to follow *Brown*'s determination that §1404(1)'s notice provision applied in these circumstances. 315 Mich App at 459-460.

In arriving at this conclusion, the *Streng* Court pointed to language in the *Rowland* decision, where the Court, after rejecting *Hobbs* and *Brown* for engrafting an "actual prejudice" requirement onto §1404(1), stated that "[n]othing can be saved from *Hobbs* and *Brown*." 477 Mich at 214. The *Streng* Court took this language to mean that the Court in *Rowland* had overruled the entirety of the *Brown* decision, including the *Brown* Court's explicit holding that, in a cause of action against a county road commission, it is §1404(1)'s notice provision that applies, not MCL 224.21(3).

There is obviously a conflict between this Court's holding in *Brown* and the Court of Appeals determination in *Streng*. The central question becomes whether the Court's holding in *Brown* resolving the potential conflict between MCL 224.21(3) and §1404(1) represents *binding* precedent.

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<sup>3</sup>In *Streng*, the Court of Appeals reviewed a case against a county road commission, which is why MCL 224.21(3) - which applies exclusively to county road commissions - came into play. Under a Michigan statute passed in 2012, MCL 334.6, counties were given the authority to eliminate their county road commissions. To date, seven Michigan counties (Berrien, Calhoun, Ingham, Ionia, Jackson, Macomb and Wayne) have taken the necessary steps to eliminate their county road commissions. What was not addressed in *Streng* (and need not be addressed in the two cases presently before this Court) is whether the rationale of the *Streng* decision, even if that decision were upheld by this Court, would apply in these seven counties which no longer have a county road commission.

This critical issue revolves around the question of whether the holding in *Brown* that §1404 is the applicable notice statute in these circumstances survived the Court's later ruling in *Rowland*.

This Court has emphasized that its decisions must be followed by all lower courts in this state unless those decisions have been *clearly* overruled by this Court. *Associated Builders*, 499 Mich at 191. Here, it cannot be said that the *Brown* Court's decision resolving the conflict between MCL 224.21(3) and §1404(1) was clearly overruled by the Court in *Rowland*. Indeed, there is every indication in *Rowland* that this later decision meant to leave in place *Brown's* resolution of the conflict between MCL 224.21(3) and §1404(1) in a cause of action filed against a county road commission.

To begin with, it is obvious that the Court in *Brown* had before it several distinct legal issues. The Court initially identified those distinct issues in its order granting leave to appeal, *Brown*, 449 Mich at 860, and again in the very first paragraph of its July 1996 opinion. 452 Mich at 356. These distinct legal questions included first, "whether the plaintiff's action is governed by the sixty-day notice provision of MCL 224.21 . . . or the 120-day notice provision of MCL 691.1404 . . ." Second, the *Brown* Court was presented with the separate question of whether its prior decision in *Hobbs* should be overruled.

The *Brown* Court held unanimously<sup>4</sup> with respect to the first of these issues that the controlling notice provision in a suit against a county road commission is §1404(1). A majority of the Court further ruled that it did not find its prior ruling in *Hobbs* to be wrongly decided and it refused to overrule that precedent.

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<sup>4</sup>The majority's resolution of the potential conflict between MCL 224.21(3) and §1404(1) was joined by Justice Riley in her dissent. 452 Mich at 369.

Ten years after *Brown*, the Court decided to revisit only one of the two distinct issues that *Brown* had ruled on. The Court in *Rowland* addressed *only* the question of whether *Brown* was correct in reaffirming *Hobbs* and its engrafting of an actual prejudice requirement on the enforcement of a statutory presuit notice provision. *Rowland* found *Hobbs* and *Brown* to be wrongly decided because they had found that presuit notice statutes “are unconstitutional...if the government is not prejudiced.” 477 Mich at 210.

It is this aspect of *Brown* that the Court overruled in *Rowland*. It is true that this Court in *Rowland*, in summing up its serious dissatisfaction with the constitutional analysis that led to the decisions in *Hobbs* and *Brown*, stated that “nothing can be saved from *Hobbs* and *Brown* because the analysis they employ is deeply flawed.” 477 Mich at 214. It is this statement from *Rowland* that led the *Streng* Court to conclude that it was resolving the conflict between MCL 224.21(3) and §1404(1) on a clean slate. 315 Mich App at 459.

But read in context, the statement in *Rowland* that “nothing can be saved” from the flawed analysis in *Hobbs* and *Brown* was a reference to *Hobbs* and the *one part* of the *Brown* decision addressing whether a presuit notice statute could be enforced in the absence of actual prejudice to the governmental entity involved. Indeed, two sentences before the *Rowland* Court made its statement that “nothing can be saved” from *Hobbs* and *Brown*, it explained why these decisions could not be “saved”: “In reading an ‘actual prejudice’ requirement into the statute, this Court [in *Hobbs* and *Brown*] 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.” *Id.*, at 213.

Thus, it is obvious from a complete reading of *Rowland* that what the Court was overruling

in that case was the section of the *Brown* decision that refused to disturb its prior decision in *Hobbs* and its constitutionally imposed requirement of actual prejudice before a statutory notice provision would be deemed enforceable.

*Rowland* did not in any way disturb the other holding that the *Brown* Court had announced – that the notice provision of §1404(1), not MCL 224.21(3), would control in a case filed against a county road commission. As the *Streng* Court correctly observed, “[t]he *Rowland* Court made no mention of MCL 224.21 nor did it discuss the reasoning in *Brown II* regarding the notice period . . . *Rowland* expressed neither approval nor disapproval regarding that choice...” 315 Mich App 459-460. This acknowledgment in *Streng* should have led the panel in that case to only one possible conclusion – the Court’s decision in *Rowland* did not *clearly* overrule *Brown*’s holding that, in a cause of action filed against a county road commission, it is the 120-day notice provision contained in §1404(1) that will control, not the sixty-day period of MCL 224.21(3).

Indeed, it seems impossible to come to the conclusion that *Rowland* *clearly* overruled this holding in *Brown* when one considers the *Rowland* Court’s own description of the result that it was reaching. The *Rowland* Court summarized that result as follows:

We conclude that the plain language of this statute should be enforced as written: notice of the injuries sustained and of the highway defect *must be served on the governmental agency within 120 days of the injury.*

477 Mich at 200 (emphasis added).

Thus, the end result of the Court’s overruling of *Hobbs* and *Brown* was that the plaintiff was required to provide notice of his accident to the county road commission *within the 120-day period provided in §1404(1)*. Far from *clearly* overruling *Brown*’s determination that §1404(1) was the operative presuit notice provision in a case filed against a county road commission, *the Rowland*

*decision actually reaffirmed Brown's determination that it was the 120-day notice period of §1404(1) that would control in such a case.*

This Court in *Brown* resolved all disputes as to which of the two conflicting notice statutes would govern in a case filed against a county road commission. In deciding the issue presented to it in *Streng*, the Court of Appeals was required to adhere to the ruling announced by this Court in *Brown*.<sup>5</sup> The Court in *Streng* erred in failing to do so.

**B. There Are Other Reasons Why The *Streng* Court Erred In Concluding That MCL 224.21(3)'s Notice Provision Controlled In A Cause Of Action Filed Against A County Road Commission.**

The *Streng* Court was presented with the thorny problem of construing two statutes, both applicable to county road commissions and both providing for a notice to be sent to the county road commission before filing suit. Yet, one of these two statutes calls for the presuit notice to be served within 60 days of the accident, while the other calls for such a notice to be provided within 120 days.

A court faced with potentially conflicting statutes must “endeavor to read them harmoniously and to give both statutes a reasonable effect.” *House Speaker v State Administrative Bd.*, 441 Mich 547, 568; 495 NW2d 539 (1993); *People v Webb*, 458 Mich 265, 273-274; 580 NW2d 884 (1998); *Wayne County Prosecutor v Dept of Corrections*, 451 Mich 569, 577; 548 NW2d 900 (1996). Conflicting statutes are to be harmonized if possible. *Detroit Police Officers Ass'n v City of Detroit*, 391 Mich 44, 65, n. 12; 214 NW2d 803 (1974); *People v Bewersdorf*, 438 Mich 55, 68; 475 NW2d 231 (1991); *People v Webb*, 458 Mich at 274 (“If statutes lend themselves to a construction that

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<sup>5</sup>As will be seen in the next section of this brief, the *Brown* case is not the only decision of this Court that the *Streng* Court failed to be guided by. As will be discussed, *infra*, the *Streng* Court should also have considered the implications of the Court's decision in *Forest v Parmalee*, 402 Mich 348; 262 NW2d 653 (1978).

avoids conflict, then that construction should control.”); *House Speaker*, 441 Mich at 568-569.

But, a court, engaged in an effort to harmonize two statutes does not have the authority to rewrite those statutes. *Shirilla v City of Detroit*, 208 Mich App 434, 439-440; 528 NW2d 763 (1995); cf *Lesner v Liquid Disposal, Inc.*, 466 Mich 95, 101; 643 NW2d 553 (2002) (statutes are to be applied “as enacted without addition, subtraction or modification.”). Moreover, a court engaged in the process of attempting to harmonize two statutes does not have the authority to negate the language of one of these statutes, thereby rendering any portion of that statute to be without effect. As expressed by this Court in *State Treasurer v Schuster*, 456 Mich 408, 419; 572 NW2d 628 (1998), a harmonious reading of two statutes must be accomplished “without rendering any relevant provision surplusage or nugatory.” Rather, as this Court indicated in *House Speaker*, a court striving to read two statutes harmoniously is compelled “to give both statutes a reasonable effect.” 441 Mich at 568.

These basic principles expose one error in the analysis employed by the Court of Appeals in reaching the conclusion that it did in *Streng*. The *Streng* Court ruled that “to follow the procedural requirements of the GTLA rather than those of MCL 224.21 . . . would render the specific terms of MCL 224.21 nugatory . . .” 315 Mich App at 463. But, the legal issue that the panel was called upon to resolve in *Streng* could *not* be decided on the basis of the interpretive tool that requires courts to construe statutes in such a way as to avoid rendering any part of that statute nugatory. See *Jespersion v Auto Club Ins. Ass’n*, 499 Mich 29, 34; 878 NW2d 799 (2016).

The reason for this is simple. *Streng* suggested that its holding in favor of the application of MCL 224.21(3) was appropriate because any other conclusion would render part of that statute nugatory. But, the same is true with respect to the Court’s adoption of MCL 224.21(3) as controlling

- that result unquestionably negates language contained in §1404(1). MCL 691.1404(1) specifically provides that “as a condition to *any* recovery for injuries sustained by *any* defective highway . . .” the plaintiff must serve a presuit notice within 120 days of an accident. Obviously, the *Streng* Court, by choosing to apply MCL 224.21(3) and not §1404(1), has negated the broad language of §1404(1).

The two statutes at issue in this case cover the same subject matter yet contain both differences in the content of the presuit notice each requires and in the timing of when these notices must be served. In confronting such conflicting statutes, the Court’s role is ultimately the same as it is in any other case where it is called upon to interpret statutory language - the Court role is to do its best to discern legislative intent. *Cf Lindsey v Harper Hospital*, 455 Mich 56, 65; 564 NW2d 861 (1997) (“it is appropriate to harmonize statutory provisions that serve a common purpose when attempting to discern the intent of the Legislature.”); *Burke v Burke*, 34 Mich 451, 453 (1876) (“If there is an apparent conflict . . . we must examine the entire section, and, if possible, harmonize and give effect to various provisions, according to the evident intent of the Legislature.”).

There are a number of interpretative guideposts supporting the conclusion that the *Streng* Court’s conclusion that the 60-day notice period contained in the highway code is to apply was incorrect. First, *Streng* reaches a result that is directly at odds with what this Court has repeatedly identified as a principal purpose behind the GTLA. In *Yono v Dep’t of Transportation*, 499 Mich 636; 885 NW2d 445 (2016), the Court cited to the first sentence to the title of the Public Act that created the GTLA: “AN ACT to make uniform the liability of municipal corporations, political subdivisions, and the state and its agencies . . .” *Id.*, at 645-646 and n. 24; *see also Odum v Wayne County*, 482 Mich 459, 467-468; 760 NW2d 217 (2008) (holding that the GTLA “restored governmental immunity for municipalities and provided ‘uniform treatment for state and local

agencies.”). Moreover, in its first significant decision on the GTLA, the Court observed that the GTLA “was intended to provide uniform liability and immunity to both state and local governmental agencies.” *Ross v Consumers Power*, 420 Mich 567, 614; 363 NW2d 641 (1984); *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002).

Prior to the adoption of the GTLA, governmental liability was covered by a patchwork of statutes under different provisions in the Michigan Compiled Laws. The purpose of the GTLA was to unify governmental tort liability so that the state and *all* of its political subdivisions were subject to the same law. The decision in *Streng* offends this underlying purpose of the GTLA. It held that the presuit notice provision with respect to highway defect claims would not be uniform; county road commissions would be governed by one notice provision, while all other governmental entities would be controlled by the notice provision provided in the GTLA.

It should not be particularly surprising that in *Brown*, the decision of this Court that actually determined which of these two statutes would apply in a cause of action against a county road commission, this Court cited in support of its conclusion the GTLA’s goal of uniformity - “we have previously discerned the legislative intent ‘to provide uniform liability and immunity to both state and local governmental agencies.’” *Brown*, 452 Mich at 361.

As the *Streng* panel itself acknowledged, “[h]aving two sets of rules that vary depending on the type of agency being sued is contrary to [the GTLA’s] goal of uniformity.” 315 Mich App at 462. Despite its acknowledgment of the GTLA’s overriding purpose to make the law uniform as to all governmental entities, the Court of Appeals in *Streng* concluded that county road commissions would be subject to a presuit notice provision that is inapplicable to any other governmental entity. This conclusion was at odds with the basic purpose behind the GTLA, uniformity in the application

of the law applicable to governmental liability.<sup>6</sup>

*Streng* was also incorrectly decided because the Court of Appeals did not properly piece together the relevant statutes. *Streng* addressed the question of how two statutes were to be read together when *both* pertain to presuit notice and *both* apply to county road commissions, yet have dramatically different periods in which to provide that notice.

In resolving this question, there are several statutes that come into play beyond MCL 224.21(3) and §1404(1). The first of these relevant statutes is in MCL 691.1402(1), the section of the GTLA that provides an exception to immunity for injuries sustained as a result of a defective highway. That section provides in pertinent 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 provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21.*

MCL 691.1402(1) (emphasis added).

In *Streng*, the Court of Appeals relied heavily on the above italicized language in §1402(1) as evidence that “the GTLA expressly points in the direction” of MCL 224.21 to determine the “liability, procedure and remedy” applicable where a case involves a county road commission.

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<sup>6</sup>In their arguments to this Court, the defendants have asserted that the Court should apply one interpretative principle that this Court has on occasion employed when statutes are found to be in conflict with each other - that the more specific statute should control over the general. *See e.g. Imlay Township Primary School v State Board of Education*, 359 Mich 478, 485; 102 NW2d 720 (1960). But this interpretive principal should not be controlling where, as here, what defendants would characterize as the general statute (the GTLA) is itself designed to achieve uniformity in its application.

*Streng*, 315 Mich App at 462-463. According to the *Streng* Court:

MCL 691.1402(1) expressly directs a person injured on a county road to proceed in accordance with MCL 224.21 ("The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in ... MCL 224.21.") . . . Despite multiple legislative amendments to the GTLA and the highway code, the notice provisions of MCL 224.21 remain in effect and have not been substantively changed. To follow the procedural requirements of the GTLA rather than those of MCL 224.21-particularly in light of the fact that the GTLA expressly points in the direction of the latter-would render the specific terms of MCL 224.21 nugatory, something we avoid, whenever possible.

*Id.*, at 463.

The *Streng* Court's analysis of the import of the language contained in §1402(1) "pointing in the direction" of MCL 224.21 ignores one important piece of the history behind these two statutes. What is critical to an understanding of the interrelationship between these statutes and critical to a determination of the Legislature's intent is that, when the GTLA was originally passed in 1964, there was, in fact, a uniformity in the presuit notice period between §1404(1) and MCL 224.21(3). This is because, when §1404 was first enacted in 1964, it provided for a presuit notice period of 60 days, the same as that contained in MCL 224.21(3). See *Smith v City of Warren*, 11 Mich App 449, 451; 161 NW2d 412 (1968); *Republic Franklin Ins Co v City of Walker*, 17 Mich App 92, 97, fn. 5; *Crook v Patterson*, 42 Mich App 241, 242; 201 NW2d 676 (1972).

Thus, when the GTLA was first passed in 1964, it had the language that is still contained in MCL 691.1402(1) "pointing toward" MCL 224.21 and the GTLA also had its own presuit notice provision that happened to call for the same period of time for the service of that notice as MCL 224.21 - sixty days from the date of the accident. But, in 1970, the Legislature amended the GTLA. In that amendment, the Legislature left §1402(1) and its language "pointing toward" MCL 224.21, but it amended §1404(1)'s presuit notice provision by removing the 60 day notice period in that

section’s original versing and substituting in its place the 120-day period presently found in that statute: “as a condition to any recovery for injuries sustained by reason of a defective highway, the injured persons, within *120 days* from the time the injury occurred, . . . shall service in the governmental agency of the occurrence . . .” MCL 691.1404(1) (emphasis added).

The intent of the Michigan Legislature in enacting the 1970 amendment of §1404(1) should be clear. The Legislature intended that in *every* case premised on a defective highway, the plaintiff would have to serve the governmental unit involved with a presuit notice within 120 days of the accident. It is the intent of the Legislature in enacting the 1970 amendment to §1404(1) that should have guided the Court on Appeals in *Streng*.<sup>7</sup>

In this context, it is another interpretive guide to legislative intent that should have come into play in resolving the obvious conflict between §1404(1) and MCL 224.21(3). One of the basic interpretive tools that this Court has employed where two statutes are found to be in conflict is that the latter passed statute “must control as the more recent expression of legislative intention.” *Center Line v 37<sup>th</sup> District Judges*, 403 Mich 595, 607; 271 NW2d 526 (1978). The courts of this state have frequently applied this “doctrine of last enactment” in resolving otherwise irreconcilable conflicts between statutes.<sup>8</sup> This tool of interpretation was aptly described by this Court in *Jourdin v City of*

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<sup>7</sup>In her dissent from the Court of Appeals majority decision in *Brown* that reached a conclusion identical to that later arrived at by the panel in *Streng*, Judge Janet Neff noted that the sixty-day notice provision of MCL 224.21(3) “has not been applied in any reported cases involving county road commissions since MCL 691.1404 . . . was amended in 1970.” 204 Mich App at 579. Judge Neff was entirely correct in locating the 1970 amendment of §1404(1) as the appropriate indicator of the Legislature’s intent.

<sup>8</sup>The following is a partial list of cases, spanning over 100 years, in which this Court has recognized that, where two statutes conflict, it is the most recently passed act which must control: *Old Orchard v Hamilton Mutual Ins Co.*, 434 Mich 244, 257; 454 NW2d 73 (1990); *Valentine v McDonald*, 371 Mich 138, 144; 123 NW2d 227 (1963); *Antrim County Bd. v Lapeer County Bd.*,

*Flint*, 355 Mich 513; 54 NW2d 900 (1959), as follows:

"All consistent statutes which can stand together, though enacted at different dates, relating to the same subject, and hence briefly called statutes in pari materia, are treated prospectively and construed together as though they constituted one act. \* \* \* They are all to be compared harmonized if possible, and, *if not susceptible of a construction which will make all of their provisions harmonize, they are made to operate together so far as possible consistently with the evident intent of the latest enactment.*"

*Id.*, at 523 (emphasis added).

In this case, the last and clearest expression of legislative intent is to be found in the 1970 amendment of §1404(1). While the Legislature, in amending §1404(1) in 1970, could certainly have eliminated all confusion by removing from §1402(1) the language "pointing toward" MCL 224.21(3), what is clear from the first sentence of §1404(1) is that, when the Legislature amended that statute in 1970, it intended that in *any case* arising out of injuries sustained as a result of a defective highway, the plaintiff would have to provide notice of that accident within 120 days of its occurrence.

There is yet another reason why the decision reached by the panel in *Streng* should be rejected. There is another subsection of MCL 224.21 adding confusion to this issue, a section of that statute that was briefly discussed in *Streng*. That subsection is MCL 224.21(2), which provides:

(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. *The provisions of law respecting the liability of townships, cities, villages, and corporations for damages for injuries resulting from a failure in the performance of*

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332 Mich 224, 228; 50 NW2d 769 (1952); *People v Flynn*, 330 Mich 130, 141; 47 NW2d 47 (1951); *Attorney General v Showley*, 307 Mich 690, 697-698; 12 NW2d 439 (1943); *Metropolitan Life Ins Co. v Stoll*, 276 Mich 637, 641; 268 NW 763 (1936); *People v Marxhausen*, 204 Mich 559, 576-577; 171 NW 557 (1919); *Porter v Edwards*, 114 Mich 640, 643; 72 NW 614 (1897).

*the same duty respecting roads under their control apply to counties adopting the county road system.*

MCL 224.21(2) (emphasis added).

As the *Streng* Court noted somewhat perplexedly, while §1402(1) with its reference to MCL 224.21, “points in the direction of” the provisions in the highway code as controlling, the above-italicized language contained in MCL 224.21(2), “in effect sends the reader back to the GTLA.” 315 Mich App at 462. Despite the fact that the panel in *Streng* viewed MCL 224.21(2) as referring coverage of the presuit notice requirement back to the GTLA, it still concluded that MCL 224.21(3)’s notice provision would control.

In reaching this conclusion, the *Streng* court failed to take into account that this Court has already construed the interrelationship between the GTLA and the highway act, focusing on the language contained in MCL 224.21(2). The decision of this Court that the *Streng* panel should have considered in this context is *Forest v Parmalee*, 402 Mich 348; 262 NW2d 653 (1978).

*Forest* was a case in which the plaintiffs were injured in an automobile accident and initially filed claims only against private individuals. Plaintiffs later filed an amended complaint naming for the first time a county road commission based on the exception to governmental immunity found in MCL 691.1402. The amended complaint was filed more than two years after the accident. The road commission filed a motion for summary disposition claiming that the two year statute of limitations contained in a provision of the GTLA, MCL 691.1411, barred plaintiffs’ claims.

The plaintiffs in *Forest* made two arguments as to why the two-year limitations period provided in MCL 691.1411 was inapplicable to their case. They contended that the enforcement of this statute of limitations violated equal protection. This argument is not of concern here. What is relevant to this case, however, is the second argument that plaintiffs offered against the application

of the GTLA's two-year limitations period.

The plaintiffs alternatively argued that MCL 691.1411's limitations period was not applicable at all in a cause of action filed against a county road commission. In support of that argument, the plaintiffs in *Forest* relied on the same language contained in MCL 691.1402(1) that proved so significant to the Court of Appeals in *Streng* – “the liability, procedure and remedy as to county roads ... shall be as provided in ... section 224.21.” Thus, the plaintiffs in *Forest* contended that the GTLA in §1402(1) handed over all questions of “liability, procedure and remedy” in cases involving a county road commission to the highway code. On that basis, plaintiffs contended in *Forest* that MCL 691.1411 and its two-year statute of limitations was inapplicable and the general three-year statute of limitations would apply to their claims.

This Court in *Forest* rejected plaintiffs' argument, concluding that MCL 691.1411 represented the applicable statute of limitations in plaintiff's cause of action against the road commission. The Court reached this result based on the following analysis of the interrelationship between the GTLA and MCL 224.21 :

Plaintiffs Forest and Mills raise an additional issue whether the two-year statute of limitations is applicable to a county road commission or whether it was repealed by implication. Plaintiffs submit that M.C.L.A. § 691.1402 *supra*, states that liability as to county roads shall be as provided in § 21, chapter 4 of Act No. 283 of the Public Acts of 1909, as amended, being M.C.L.A. §224.21; M.S.A. §9.121. However, *examination of the latter statute discloses that “the provisions of law respecting the liability of townships, cities, villages and corporations for damages for injuries resulting from a failure in the performance of the same duty respecting roads under their control” shall apply to counties adopting the county road system. The statute last referred to was found at M.C.L.A. §242.1 et seq; M.S.A. §9.591 et seq; which was repealed by M.C.L.A. §691.1414; M.S.A. §3.996(110). Hence, the liability of defendant is to be found in M.C.L.A. §691.1402, supra, and the two-year limitation applies.*

*Id.*, at 356, n. 2 (emphasis added).

The Court in *Forest* specifically rejected the plaintiffs’ argument that, by placing language in §1402(1) making the liability, procedure and remedy of the county road commission governed by MCL 224.21, the Legislature had shifted this liability away from the GTLA and into the highway code. This Court reached that result by noting that language that is now contained in MCL 224.21(2), which make the provisions of law respecting the liability of townships and cities applicable to counties, was taken from another set of statutes, MCL 242.1 *et seq.* But, as the Court pointed out in *Forest*, this other set of statutes had been expressly repealed in the adoption of the GTLA.<sup>9</sup>

The end result of this Court’s decision in *Forest* was that, in a cause of action filed against a county road commission, the procedure set out in the GTLA with respect to the statute of limitations controlled that case despite the language contained in §1402(1) that might suggest otherwise. The same result should hold true here. The Court’s decision in *Forest* teaches that despite the language in §1402(1) that appears to transfer “liability, procedure and remedy” to the highway code in cases filed against a county road commission, ultimately, it is the provisions in the GTLA that must control.

For all of these reasons, this Court should conclude that the Court of Appeals in *Streng* erred in concluding that a defective highway claim against a county road commission is governed by the presuit notice provision of MCL 224.21(3).

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<sup>9</sup>This Statutory repealer is found in MCL 691.1414, which provides:

Chapter 22 of Act No., 283 of the Public Acts of 1909, as amended, being sections 242.1 to 242.8 of the Compiled Laws of 1948; section 2904 of Act No. 236 of the Public Acts of 1961, being section 600.2904 of the Compiled Laws of 1948; Act No. 59 of the Public Acts of 1951, as amended, being sections 124.101 to 124.103 of the Compiled Laws of 1948, are repealed.

**RELIEF REQUESTED**

Based on the foregoing, amicus curiae, Scott Crouch, requests that this Court determine that the Court of Appeals erred in concluding that MCL 224.21(3)'s sixty-day notice period would apply in a cause of action filed against a county road commission. On that basis, the Court should conclude that the presuit notices filed on behalf of both Tim Brugger and Lynn Pearce were timely.

**MARK GRANZOTTO, P.C.**

/s/ Mark Granzotto

**MARK GRANZOTTO (P31492)**

Attorney for *Amicus Curiae* Scott Crouch

2684 Eleven Mile Road, Suite 100

Berkley, Michigan 48072

(248) 546-4649

**NOLAN & SHAFER, PLC**

/s/ David P. Shafer

**DAVID P. SHAFER (P53497)**

Attorney for *Amicus Curiae* Scott Crouch

40 Concord Avenue

Muskegon, Michigan 49442

(281) 722-2444

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