

IN THE SUPREME COURT

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

TIM EDWARD BRUGGER, II,

Supreme Court Docket No. 158304

Plaintiff-Appellee,

Court of Appeals Docket No. 337394

v

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

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

Defendant-Appellant.

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**PROPOSED DEFENDANT-APPELLANT'S BRIEF IN RESPONSE TO SCOTT
CROUCH'S AMICUS CURIAE BRIEF**

Dated: October 16, 2020

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Argument

A. *Brown*'s equal-protection holding was predicated on—and inextricably intertwined with—its prejudice analysis. So, when *Rowland* overruled the totality of *Brown*'s prejudice analysis, it necessarily overruled *Brown*'s conclusion that MCL 224.21(3) violated equal-protection.

Crouch argues that the Court of Appeals wrongly decided *Streng* because it didn't follow this Court's overruled opinion in *Brown*.¹ He contends that *Brown* was never "clearly...overruled" and that, as a result, *Streng* was bound to follow that decision.² Leaving aside that *Rowland* completely overruled *Brown*, the essence of Crouch's argument—much like Brugger's—is that *Brown*'s equal-protection and prejudice holdings are unconnected and distinguishable and that *Rowland* only overruled the prejudice holding. Crouch is wrong.

As shown in the Road Commission's earlier briefing to this Court, *Brown*'s equal-protection and prejudice holdings—which Crouch seeks to separate and distinguish—were inextricably connected because *Brown* based its holding that MCL 224.21(3) lacked a rational basis on its conclusion that "[t]he only purpose...for a notice requirement is to prevent prejudice to the government agency."³ And, because of the interrelatedness of *Brown*'s prejudice and equal-protection analysis, by overruling *Brown*'s prejudice holding, this Court in *Rowland* overruled *Brown* in its entirety (including the equal-protection analysis of MCL 224.21(3)).⁴

Thus, based on a complete review of the analysis employed in both *Brown* and *Rowland*, it's clear that this Court in *Rowland* rejected the totality of the constitutional analysis and reasoning that formed the basis for its prior decisions—including the equal-protection rulings—

¹ Crouch's *Amicus Brief* at 2-14.

² *Id.* at 2, 11, citing *Associated Builders & Contractors v City of Lansing*, 499 Mich 172, 191; 880 NW2d 765 (2016).

³ *Brown v Manistee Co Rd Comm*, 452 Mich 354, 362-363; 550 NW2d 215 (1996), rev'd by *Rowland v Washtenaw County Road Commission*, 477 Mich 197; 731 NW2d 41 (2007); Road Commission's MSC Appellant's Brief at 20-29.

⁴ *Rowland*, 477 Mich at 210.

in *Hobbs* and *Brown*.⁵ So—just like its prejudice holding—*Brown*'s equal-protection analysis was “wrong” and “has no claim to being defensible constitutional theory.”⁶ It follows that, despite Crouch's (and Brugger's emphatic insistence to the contrary), *Rowland*'s repudiation of *Brown*'s “deeply flawed”⁷ prejudice reasoning also “clearly overruled” *Brown*'s analysis rejecting MCL 224.21(3)'s notice provision on equal-protection grounds.⁸ So, *Streng* wasn't bound to follow it. Accordingly, Crouch's argument that *Streng* was wrongly decided because it didn't follow *Brown* lacks merit.

B. MCL 691.1404(1) and MCL 224.21(3) don't conflict.

Crouch asserts that the notice provision in MCL 224.21(3) and MCL 691.1404(1) irreconcilably conflict because “one of those 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.”⁹ Indeed, Crouch contends that *Streng*'s decision to give effect to MCL 224.21(3)'s 60-day notice provision “unquestionably negates language contained in § 1404(1).”¹⁰ He's wrong again.

MCL 691.1402(1) expressly references MCL 224.21 as the statute that governs procedure for claims against county road commissions for the purposes of the GTLA. In light of that express reference, MCL 224.21(3) and the GTLA are harmonious on their face and “must be enforced as written.”¹¹ Indeed, the only reading of MCL 224.21, MCL 691.1402(1), and MCL 691.1404(1) that gives meaning and effect to each of the three statutes—which this Court is

⁵ *Rowland*, 477 Mich at 210.

⁶ *Id.*

⁷ *Id.*

⁸ See *Associated Builders & Contractors v City of Lansing*, 499 Mich 177, 191-192; 880 NW2d 765 (2016).

⁹ Crouch's *Amicus* Brief at 1-2.

¹⁰ Crouch's *Amicus* Brief at 16.

¹¹ *People v Lewis*, 503 Mich 162, 165; 926 NW2d 796 (2018).

required to do¹²—is the one adopted by *Streng*—i.e., that the general 120-day provision in § 1404(1) applies to all governmental-liability claims except those listed in § 1402(1), which are governed by MCL 224.21(3). In contrast, the statutory interpretations suggested by Crouch, Brugger, and Pearce would negate the clear and unambiguous language of both MCL 691.1402(1) and MCL 224.21(3)—something this Court must avoid doing because it violates one of the chief rules of statutory interpretation.¹³

C. The purpose of the GTLA doesn’t allow Crouch (or this Court) to wish the text of MCL 691.1402(1) or MCL 224.21(3) out of existence.

Crouch also argues that *Streng* was incorrectly decided because, in his view, giving meaning to MCL 224.21(3)’s 60-day notice provision “is directly at odds with what this Court has repeatedly identified as a principle purpose behind the GTLA”—i.e., “to make uniform the liability of municipal corporations, political subdivisions, and the state and its agencies.”¹⁴ In Crouch’s view, *Streng* “offends [the] underlying purpose of the GTLA” because it “held that the

¹² *Nowell v Titan Ins. Co.*, 466 Mich 478, 483, 648 NW2d 157 (2002) (“In such a case of tension, or even conflict, between sections of a statute, it is our duty to, if reasonably possible, construe them both so as to give meaning to each; that is, to harmonize them.”); Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), p 174 (“If possible, every word and every provision is to be given effect None should needlessly be given an interpretation that causes it to duplicate another provision”); *Reading Law*, p 67 (“The presumption of validity disfavors interpretations that would nullify the provision....”); *Reading Law*, p 180 (“The provisions of a text should be interpreted in a way that renders them compatible, not contradictory.”).

¹³ *Iliades v Dieffenbacher North America Inc*, 501 Mich 326, 336; 915 NW2d 338 (2018) (“This Court must give effect to every word, phrase, and clause in a statute, and, in particular, consider the plain meaning of the critical word or phrase as well as its placement and purpose in the statutory scheme, to avoid rendering any part of the statute nugatory or surplusage.”); *SBC Health Midwest, Inc v City of Kentwood*, 500 Mich 65, 71; 894 NW2d 535 (2017) (“This Court, as with all other courts, must give effect to every word, phrase, and clause in a statute, to avoid rendering any part of the statute nugatory or surplusage.”); *Reading Law*, p 180 (“The imperative of harmony among provisions is more categorical than most other canons of construction because it is invariably true that intelligent drafters do not contradict themselves.... Hence there can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously.”).

¹⁴ Crouch’s *Amicus* Brief at 16.

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 governmental entit[ies] would be controlled by the notice provision provided in the GTLA.”¹⁵

In other words, Crouch effectively contends that this Court should disregard the plain language of MCL 691.1402(1) and MCL 224.21(3) because, in his view, it conflicts with the “purpose” of the GTLA. But that’s not how this Court interprets statutes.

“Purpose” derived from the statutory text is “an appropriate consideration in statutory interpretation.”¹⁶ But “purpose—even purpose as most narrowly defined—cannot be used to contradict text or to supplement it.”¹⁷ On the contrary, “[p]urpose sheds light only on deciding which of various *textually permissible meanings* should be adopted.”¹⁸ Indeed, this Court has recognized that “the plain meaning of the language used in a statute will not be departed from in its construction” even if “the purpose of the enactment be defeated by following it.”¹⁹

¹⁵ *Id.* at 16-18.

¹⁶ *People v Wood*, ___ Mich ___; ___ NW2d ___ (2020) (Docket No. 159063); 2020 WL 4342281 at *7, quoting *Reading Law*, p 56 (finding the purpose to be an appropriate consideration in statutory interpretation when it is “derived from the text, not extrinsic sources”).

¹⁷ *Reading Law*, p 57; *Perkovic v Zurich American Ins. Co.*, 500 Mich 44, 53, 893 NW2d 322 (2017) (concluding that the purpose of a statutory notice provision cannot “override[] the requirements enshrined in the statutory language itself.”); *State v McQueen*, 493 Mich 135, 155 n 57; 828 NW2d 644 (2013) (“[T]he purpose of any statutory text is communicated through the words actually enacted. By giving effect to the text of § 4(d), the Court *is* giving effect to the purpose of the MMA.”); *People v Peals*, 476 Mich 636, 642; 720 NW2d 196 (2006) (Recognizing that “the manifest purpose of the instant statute” is “reflected in its text.”)

¹⁸ *Wood*, ___ Mich ___; 2020 4342281 at *7, quoting *Reading Law*, p 57

¹⁹ *People v Pinkney*, 501 Mich 259, 286 n 68; 912 NW2d 535 (2018), quoting Endlich, *Commentary on the Interpretation of Statutes* (1888), § 22, p 29 (“It has been seen that the plain meaning of the language used in a statute will not be departed from in its construction, though the purpose of the enactment be defeated by following it.”); *Perkovic v Zurich American Ins. Co.*, 500 Mich 44, 53; 893 NW2d 322 (2017) (“The Court of Appeals’ reliance on the perceived purpose of the statute runs counter to the rule of statutory construction directing us to discern legislative intent from plain statutory language.”).

The reason that purpose can't override the text is that, when it comes to statutory interpretation, "[t]he words of a governing text are of paramount concern."²⁰ That is, when interpreting statutes, this Court's primary "goal is to give effect to the Legislature's intent," which it does by "focusing *first* on the statute's plain language."²¹ Indeed, statutory interpretation that ignores this principle and disregards the plain language of the statutory text in lieu of its purpose is "illegitimate."²²

Here, the Legislature's intent is apparent from the clear and unambiguous language of the relevant statutes—MCL 224.21(3), MCL 691.1402(1), and MCL 691.1404(1). So, the text is where this Court's statutory analysis begins and ends. Contrary to Crouch's suggestion, there is simply no need for this Court to consider the purpose of the GTLA. And, even if there was, that purpose wouldn't authorize this Court to disregard the GTLA's plain statutory language.

D. The statutory history of the GTLA and MCL 224.21(3) doesn't allow Crouch to do violence to the text of MCL 691.1402(1).

Crouch argues that the statutory history of the GTLA demonstrates that the Legislature didn't intend that MCL 691.1402(1) means what it says—i.e., that MCL 224.21(3) governs the "procedure" for highway-defect claims against county road commissions.²³ Specifically, he contends that the language in MCL 691.1402(1) "pointing towards" MCL 224.21(3) was

²⁰ *Reading Law*, p 56 ("The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means."); *People v Wood*, ___ Mich ___, ___ NW2d ___ (2020) (Docket No. 159063); 2020 WL 4342281 at *7 (This Court's "job is not to choose which definition the Legislature *should* have adopted to accomplish its goal in the best possible way; our goal is to interpret the text that is provided to us.").

²¹ *Ally Financial Inc v State Treasurer*, 502 Mich 484, 493; 918 NW2d 662 (2018), quoting *Madugula v Taub*, 496 Mich 685, 696; 853 NW2d 75 (2014) (internal quotation marks and citation omitted, emphasis added).

²² *Ronnisch Construction Group, Inc v Lofts on the Nine, LLC*, 499 Mich 544, 572 n 12; 886 NW2d 113 (2016) (Young, C.J., dissenting), citing *Reading Law*, p 233 ("Statutory interpretation, whether liberal or strict, is rendered illegitimate when the fair meaning of a text is disregarded.").

²³ Crouch's *Amicus* Brief at 19-21.

rendered nugatory by the 1970 amendments to the GTLA that changed MCL 691.1404(1) from a 60-day notice provision to a 120-day notice provision.²⁴ Thus, although Crouch acknowledges that the Legislature didn't remove the language in MCL 691.1402(1) "pointing toward" MCL 224.21(3) when it amended MCL 691.1404(1), he nonetheless concludes that this must've been a legislative mistake that justifies ignoring MCL 691.1402(1).²⁵ Crouch is wrong here, too. Indeed, he has it exactly backwards.

Statutory history is a relevant consideration when determining the context of a statute because "a change in the language of a prior statute presumably connotes a change in meaning."²⁶ That is, "a change in statutory language is presumed to reflect either a legislative change in the meaning of the statute itself or a desire to clarify the correct interpretation of the original statute."²⁷ But the opposite is true as well: "no change in the text connotes no change in its meaning."²⁸

Here, in 1970, the Legislature amended MCL 691.1401(1) to include a 120-day notice provision rather than a 60-day notice provision. But, at the same time, it didn't amend the language of MCL 691.1402(1) or the language of MCL 224.21(3). So, while the relevant statutory history demonstrates that the Legislature intended to change MCL 691.1404(1)'s general notice provision from 60 to 120 days, it also demonstrates that the Legislature *didn't* intend to alter those statutes that expressly provided a specific subset of governmental-liability

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Ray v Swager*, 501 Mich 52, 80 n 68; 903 NW2d 266 (2017); *People v Pinkney*, 501 Mich 259, 276 n 41; 912 NW2d 535 (2018), quoting *Reading Law*, p 256 ("Unlike legislative history, statutory history—the narrative of the 'statutes repealed or amended by the statute under consideration'—properly 'form[s] part of the context of the statute'").

²⁷ *Ray v Swager*, 501 Mich 52, 80; 903 NW2d 266 (2017), citing *Bush v Shabahang*, 484 Mich 156, 167; 772 NW2d 272 (2009).

²⁸ *Pinkney*, 501 Mich at 282 n 55.

claims are subject to a 60-day notice provision.²⁹ And the subsequent statutory history confirms that the Legislature intended that MCL 224.21(3)'s 60-day notice provision would continue to apply to highway-defect claims against county road commissions.³⁰ That's because, since 1970, the Legislature has amended MCL 691.1402 four times without removing the language referencing MCL 224.21. It has also amended MCL 224.21(3) without changing the 60-day requirement.

It is not for this Court to ignore the Legislature's decision to retain the language of MCL 691.1402(1) applying MCL 224.21(3)'s 60-day notice provision to highway-defect claims against a county road commission.³¹ Nor should it assume that the Legislature made a mistake when it repeatedly amended MCL 691.1402(1) without removing the language at issue.³² Rather, this Court's job is to apply the plain language of the text as it exists.³³ Crouch's suggested interpretation does violence to the text. So, it should be disregarded.

²⁹ See *Pinkney*, 501 Mich at 282 n 55

³⁰ For amendments of MCL 691.1402, see 278 PA 1990; 150 PA 1996; 205 PA 1999; 50 PA 2012. For amendment of MCL 224.21, see 23 PA 1996.

³¹ *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125 n 25; 894 NW2d 552 (2017), quoting *Reading Law*, pp 57–58 (“[T]he limitations of a text—what a text chooses *not* to do—are as much a part of its ‘purpose’ as its affirmative dispositions. These exceptions or limitations must be respected, and the only way to accord them their due is to reject the replacement or supplementation of text with purpose.”);

³² *Reading Law*, p 95 (“The search for what the legislature ‘would have wanted’ is invariably either a deception or a delusion.”).

³³ *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999) (“When a legislature has unambiguously conveyed its intent in a statute, the statute speaks for itself and there is no need for judicial construction; the proper role of a court is simply to *apply* the terms of the statute to the circumstances in a particular case.”); *Pace v Edel–Harrelson*, 499 Mich 1, 6; 878 NW2d 784 (2016) (“When the plain and ordinary meaning of statutory language is clear, judicial construction is neither necessary nor permitted.”).

E. *Streng* isn't contrary to MCL 224.21(2).

Finally, Crouch argues that even if MCL 691.1402(1) and MCL 224.21(3) mean what they say—i.e., that highway-defect claims against county road commissions are governed the “liability, procedure, and remedy” of MCL 224.21—*Streng* was still incorrectly decided because of the language of MCL 224.21(2) “in effect sends the reader back the GTLA.”³⁴ Specifically, he contends 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.”³⁵ This argument is easily dispatched.

Recall that MCL 691.1402(1) states that “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.” In turn, MCL 224.21(2) states that “[t]he 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 apply to counties adopting the county road system.”³⁶ Thus, by their plain language, while MCL 691.1402(1) sends “liability, procedure, and remedy” to MCL 224.21, MCL 224.21(2) sends “liability” back to the GTLA.

Crouch maintains that this was a 1-to-1 transfer, i.e., that MCL 224.21(2) returned to the GTLA the “liability, procedure, and remedy” that MCL 691.1402(1) sent to it.³⁷ He’s wrong. The Legislature’s use of different words in MCL 224.21(2)—“liability” instead of “liability, procedure, and remedy”—demonstrates that the portion of highway-defect claims against county

³⁴ Crouch’s *Amicus* Brief at 21-24, quoting *Streng*, 315 Mich App at 462.

³⁵ *Id.* at 23-24, quoting MCL 691.1402(1).

³⁶ MCL 224.21(2) (emphasis added).

³⁷ Crouch’s *Amicus* Brief at 21-24.

road commissions governed by the GTLA (“liability”) is different than the portion governed by the Highway Code (“procedure” and “remedy”).³⁸ Furthermore, the Legislature’s decision to omit words in MCL 224.21(2) that were included in MCL 691.1402(1) cannot be construed as inadvertent or unintentional.³⁹ And, contrary to Crouch’s suggestion, this Court can’t simply ignore the omission and treat MCL 224.21(2) transferal of “liability” back to the GTLA as also transferring “procedure” and “remedy.” That’s because doing so would be an impermissible usurpation of the Legislative power.⁴⁰

Instead, this Court should merely “give effect to every word, phrase, and clause” in both MCL 691.1402(1) and MCL 224.21⁴¹ and hold that MCL 224.21 governs “procedure.” And, because statutory notice requirements are procedural, the 60-day notice provision supplied by

³⁸ *United States Fidelity Ins. & Guaranty Co. v Mich Catastrophic Claims Ass’n (On Rehearing)*, 484 Mich 1, 14, 795 NW2d 101 (2009) (“When the Legislature uses different words, the words are generally intended to connote different meanings.”); *Reading Law*, § 25; see also 2A Sutherland, *Statutes and Statutory Construction*, § 46:6, p 261 (“Different words used in the same, or a similar, statute are assigned different meanings whenever possible.”); *Reading Law*, p 170 (“A word or phrase is presumed to bear the same meaning through a text; a material various in terms suggests a variation in meaning.”)

³⁹ *Nickola v MIC Gen Ins Co*, 500 Mich 115, 125; 894 NW2d 552 (2017) (“The omission of a provision in one part of a statute that is included in another part of the same statute should be construed as intentional.”); *Farrington v Total Petroleum, Inc.*, 442 Mich 201, 210, 501 NW2d 76 (1993) (“Courts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there.”); *Reading Law*, p 93 (“Nothing is to be added to what the text states or reasonably implies (*casus omissus pro omisso habendus est*). That is, a matter not covered is to be treated as not covered.”) (formatting altered).

⁴⁰ *People v Pinkney*, 501 Mich 259, 286 n 67; 912 NW2d 535 (2018), citing, e.g., *Malpass v Dep’t of Treasury*, 494 Mich 237, 251, 833 NW2d 272 (2013) (“[T]o supply omissions transcends the judicial function.” (citations and quotation marks omitted)); *Hobbs v McLean*, 117 U.S. 567, 579, 6 S Ct 870, 29 L Ed 940 (1886) (“When a provision is left out of a statute, either by design or mistake of the legislature, the courts have no power to supply it. To do so would be to legislate and not to construe.”); and Crawford, *Construction of Statutes* (1940), § 169, p 269 (“Omissions in a statute cannot, as a general rule, be supplied by construction. ... As is obvious, to permit the court to supply the omissions in statutes, would generally constitute an encroachment upon the field of the legislature.”).

⁴¹ See *Iliades*, 501 Mich at 336.

MCL 224.21(3) controls highway-defect claims against county road commissions.⁴² Since that’s exactly what *Streng* did, it was correctly decided.

Dated: October 16, 2020

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⁴² In Michigan, it’s well-established that statutory notice requirements like the one contained in MCL 224.21(3) are procedural, not substantive. See, e.g., *Rusha v Dept of Corrections*, 307 Mich App 300, 311; 859 NW2d 735 (2014) (“The statutory notice requirement does not abrogate a substantive right, but rather provides the framework within which a claimant may assert that right.”); *American States Ins. Co. v Dep’t of Treasury*, 220 Mich App 586, 590, 560 NW2d 644 (1996) (statutory notice provisions are “ ‘procedural protections’ ”) (citation omitted). So the fall within the “procedure” controlled by MCL 224.21 rather than the substantive “liability” transferred back to the GTLA. The case that Crouch relies on—*Forest v Parmalee*—is distinguishable because it involved a statute of limitations rather than a statutory notice provision and did not address the distinction between “procedure” and “liability” in MCL 691.1402(1). See *Forest v Parmalee*, 402 Mich 348, 355 n 2; 262 NW2d 653 (1978). And, while there’s a split in Michigan case law over whether statutes of limitation are substantive or procedural, there is no such dispute over notice requirements. Compare *Forest*, 402 Mich at 359 (“Statutes of limitation are generally considered to be procedural requirements.”); and *Lothian v City of Detroit*, 414 Mich 160, 166; 324 NW2d 9 (1982) (“In general, statutes of limitations are regarded as procedural, not substantive.”); with *DeCosta v Gossage*, 486 Mich 116, 138; 782 NW2d 734 (2010) (citations omitted). (“Statutes of limitations are not procedural; rather, they are substantive in nature.”) *Gladych v New Family Homes, Inc*, 468 Mich 594, 600; 664 NW2d 705 (2003) (“Statutes regarding periods of limitation are substantive in nature.”).