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BILL ANALYSIS



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Senate Bill 1475 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Wayne Kuipers
Committee: Judiciary

Date Completed: 11-22-10

RATIONALE

Under the governmental immunity law, subject to various exceptions, a governmental agency is immune from civil liability if it is engaged in a governmental function. One of the exceptions imposes liability with respect to highways: All governmental agencies, including the State, counties, and municipalities, have a duty to maintain highways under their jurisdiction in reasonable repair. The duty of the State and counties is limited to "the improved portion of the highway designed for vehicular travel", and specifically does not include sidewalks. Although that limitation does not apply to municipalities, the law states that a municipality has no duty to maintain a portion of a county highway outside the improved portion of the highway, including a sidewalk, unless certain conditions are met. Also, if a "discontinuity defect" in a sidewalk is less than two inches, there is a rebuttable inference that the municipality maintained the sidewalk in reasonable repair. This "two-inch" rule was the subject of an April 2010 decision of the Michigan Supreme Court, which held that the rule applies only to sidewalks adjacent to county highways (*Robinson v City of Lansing*, discussed below). As a result, a municipality cannot use the two-inch rule as a defense if a sidewalk is adjacent to a State highway. Many people disagree with this holding, and believe that legislation should revise the statutory language on which the Court based its decision.

CONTENT

The bill would amend provisions of the governmental immunity law that address the liability of a municipality

for defects in a sidewalk, to apply the two-inch rule to sidewalks adjacent to municipal and State highways, in addition to sidewalks adjacent to county highways.

Under Section 2a of the law, except as otherwise provided, a municipal corporation (a city, village, or township) does not have a duty to repair or maintain a portion of a county highway outside of the improved portion of the highway, including a sidewalk, trailway, crosswalk, or other installation. This does not limit liability if the municipality knew or should have known of a defect at least 30 days before the relevant injury, death, or damage, and the defect was a proximate cause of the injury, death, or damage. In addition, a discontinuity defect of less than two inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway, in reasonable repair.

The bill provides, instead, that a municipal corporation would have no duty to repair or maintain a county or State highway, but would have to maintain an existing sidewalk adjacent to a municipal, county, or State highway pursuant to Section 2(1) (the section imposing on all governmental agencies a duty to maintain highways under their jurisdiction in reasonable repair). A municipal corporation's liability arising from a duty to maintain a sidewalk under this provision would be limited by Section 2b.

The bill would add Section 2b to state that a discontinuity defect of less than two inches,

measured vertically, in a sidewalk would create a rebuttable presumption that a municipal corporation with a duty to maintain the sidewalk maintained it in reasonable repair. This presumption could be rebutted by evidence of specific facts showing that there was a dangerous condition in the sidewalk itself of a particular character that was a proximate cause of the injury.

The bill states that "sidewalk" would include a public sidewalk, trailway, crosswalk, or other public installation situated outside of and adjacent to the improved portion of a highway designed for vehicular travel.

In addition, Section 2(1) provides that the duty of the State and county road commissions to repair and maintain highways extends only to the improved portion of the highway designed for vehicular travel, "and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel". The bill would delete the language in quotations.

MCL 691.1401 et al.

BACKGROUND

In *Robinson v City of Lansing*, the Michigan Supreme Court addressed the two-inch rule in the governmental immunity law (486 Mich 1). The plaintiff in that case was injured when walking along a sidewalk adjacent to Michigan Avenue in Lansing. Michigan Avenue is a State highway maintained by the City of Lansing. The injury involved a depressed area of the sidewalk that was less than two inches.

The defendant raised the two-inch rule as an affirmative defense and claimed that the plaintiff had not rebutted the inference that the city had maintained the sidewalk in reasonable repair. The plaintiff claimed that the rule applied only to sidewalks adjacent to county highways. The trial court agreed with the plaintiff and denied the defendant's motion for summary disposition. The Michigan Court of Appeals reversed, but the Michigan Supreme Court agreed with the trial court.

According to the Supreme Court, the two-inch rule originally was a common law rule,

and had been described by the Court in 1962 as meaning: "a depression in a walk which does not exceed 2 inches in depth will not render a municipality liable for damages incident to an accident caused by such depression." That is, defects of two inches or less constituted "reasonable repair" as a matter of law. The Court abolished the rule in 1972 but the Legislature codified it in 1999 when Section 2a was enacted.

The Court in *Robinson* analyzed the language of Section 2a, which begins by providing that a municipality is not liable for a portion of a *county* highway, including a sidewalk, unless certain criteria are met. The Court found that subsequent references to "the" highway in that section mean a county highway. The Court reached this conclusion for several reasons.

In addition to examining the language of Section 2a itself, the Court analyzed the rule and Section 2a in the context of the governmental immunity law as a whole. Since Section 2(1) already imposes a duty on municipalities to maintain sidewalks in reasonable repair, the court found that Section 2a "was plainly not enacted to introduce such liability on municipalities. Instead, it was enacted to *limit* this liability." Also, under Section 3, a governmental agency is not liable for injuries or damages caused by a defective highway unless the governmental agency knew or should have known of a defect, and had a reasonable opportunity to repair it, at least 30 days before an injury occurred. Section 2 imposes liability if a person sustains injury or damage "by reason of failure" of a governmental agency to maintain a highway in reasonable repair, and the Court previously held that proof of causation requires proof of proximate cause. Since those provisions existed before Section 2a was enacted and apply to all highways, the Court found that the significance of Section 2a is its limitation to *county* highways.

The Court concluded, "[T]he two-inch rule...does not apply to sidewalks adjacent to state highways; it only applies to sidewalks adjacent to county highways."

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would help protect municipalities from liability for defects in sidewalks regardless of which governmental agency has jurisdiction over the highway adjacent to a sidewalk. Although the Supreme Court's decision in *Robinson* was unanimous, two justices stated in concurring opinions, "[T]o the extent that the majority opinion in this case has adopted an incorrect interpretation of this statute, I urge the Legislature to clarify its intent with regard to the 'two-inch rule' of the highway exception to governmental immunity." The bill would do just that.

Under the bill, there would be a presumption that a municipality maintained any existing sidewalk in reasonable repair if a defect were less than two inches deep or two inches high. While the bill would preserve the duty of municipalities to maintain sidewalks, it would allow them to raise the two-inch rule as a defense to any sidewalk negligence claim (involving a discontinuity defect of less than two inches). An injured party could rebut the presumption by showing that a defect of less than two inches presented a particularly dangerous condition. As currently required, the plaintiff also would have to show that the defect was a proximate cause of the injury.

In addition, the bill would provide clarity by requiring sidewalk defects to be measured vertically. Evidently, cases have disputed whether defects should be measured vertically, horizontally, or both.

Supporting Argument

Under the bill, if a sidewalk defect were less than two inches high or deep, there would be a "rebuttable presumption", rather than a "rebuttable inference", that the municipality maintained the sidewalk in reasonable repair. In a 2008 opinion, the Michigan Court of Appeals distinguished between a presumption and an inference (*Gadigian v City of Taylor*, 282 Mich 179). According to the Court, an inference allows the trier of fact (the judge or jury) to draw a conclusion from the evidence, but the trier of fact is free to accept or reject the inference. In the case of a presumption, however, the party against whom the presumption is directed has the burden of going forward with evidence to rebut the presumption, and the trier of fact is compelled to take into account the presumed fact when assessing the other

evidence. Although the Michigan Supreme Court vacated the *Gadigian* opinion (but affirmed the result), the bill would ensure that future courts treated the two-inch rule as a presumption that the judge or jury would have to accept unless the plaintiff were able to rebut it. The bill also would clarify the type of evidence required to overcome the presumption.

Opposing Argument

The bill could significantly expand the liability of the State and county road commissions by striking the language in Section 2(1) that expressly excludes the following from their duty to maintain highways: sidewalks, crosswalks, and other installations outside the improved portion of a highway designed for vehicular travel. Since the law's definition of "highway" includes sidewalks, crosswalks, and other items on a highway, the result of the amendment would be to expand highway liability by imposing a duty on the State and county road commissions with respect to sidewalks, crosswalks, and installations outside of the improved portion of the highway. In effect, the bill would reallocate liability from municipalities to the State and county road commissions.

Response: The law states, and would continue to state, "The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel." In *Nawrocki v Macomb County Road Commission*, the Michigan Supreme Court examined the sentence containing that language and the exception for sidewalks, and concluded, "We believe the plain language of this sentence definitively limits the state and county road commissions' duty with respect to the *location* of the alleged dangerous or defective condition; if the condition is not located in the actual roadbed designed for vehicular travel, the narrowly drawn highway exception is inapplicable and liability does not attach" (463 Mich 143). Although the bill would delete the portion of the sentence regarding sidewalks, it also specifies that "sidewalk" would include an installation situated *outside* the improved portion of a highway designed for vehicular use.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would result in indeterminate savings to local units of government related to future liability claims.

Fiscal Analyst: Bill Bowerman

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.