

STATE OF MICHIGAN
IN THE SUPREME COURT

BARBARA A. ROBINSON,

Plaintiff-Appellant,

v

CITY OF LANSING, a ~~municipal~~
~~corporation,~~

Defendant-Appellee.

Supreme Court No.

Court of Appeals No. 282267

Ingham County Circuit Court
File No: 07-576-NO

J. Brown

OK

Michael E. Larkin (P40994)
Steven A. Hicks (P49966)
Sinas, Dramis, Brake,
Boughton & McIntyre, P.C.
Attorneys for Plaintiff-Appellant
3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 394-7500

Christine D. Oldani (P25596)
David K. Otis (P31627)
Plunkett & Cooney, P.C.
Attorneys for Defendant-Appellee
535 Griswold Street
Suite 2400 Buhl Building
Detroit, MI 48226
(313) 965-3900

138669

APPL

APPLICATION FOR LEAVE TO APPEAL
NOTICE OF HEARING
AND
PROOF OF SERVICE

FILED

APR 16 2009

CORBIN R. DAVIS
CLERK
MICHIGAN SUPREME COURT

Prepared by:

Michael E. Larkin (P40994)
Steven A. Hicks (P49966)
SINAS, DRAMIS, BRAKE,
BOUGHTON & McINTYRE, P.C.
Attorneys for Plaintiff-Appellant
3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 394-7500

Dated: April 16, 2009

34916



SINAS, DRAMIS,
LAKE, BOUGHTON
& McINTYRE, P.C.

Main Office:
3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

Detroit Area Office:
110 E. Big Beaver
Suite 108
Troy, MI 48083
Phone: (248) 689-8900

TABLE OF CONTENTS

	<u>Page(s)</u>
Index of Authorities	ii
Statement of Questions Presented	iii
Statement of Order Appealed from and Relief Requested	iv
Need for Review	iv
Introduction	1
Statement of Facts and Proceedings	2
Standard of Review	8
Argument	8
I. THE TWO-INCH RULE DOES NOT APPLY TO THIS CASE BECAUSE UNDER THE CLEAR UNAMBIGUOUS LANGUAGE IN MCL 691.1402a THE TWO-INCH RULE APPLIES ONLY TO SIDEWALKS ADJACENT TO COUNTY HIGHWAYS.	8
II. SUMMARY DISPOSITION ON REMAND WOULD BE PREMATURE IF SOUGHT BEFORE DISCOVERY IS CONDUCTED TO DETERMINE IF THE INFERENCE OF REASONABLE REPAIR UNDER MCL 691.1402a CAN BE REBUTTED	13
Conclusion	15

ATTACHMENTS

- Court of Appeals' Opinion Reversing and Remanding
- Trial Court's Order Denying Defendant's Motion for Summary Disposition
- Defendant's Motion for Summary Disposition
- Plaintiff's Response to Defendant's Motion for Summary Disposition
- Transcript of the Summary Disposition Motion Hearing
- HB 4010 and Legislative Analysis of HB 4010
- Unpublished Cases



**SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.**

Main Office:
3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

Detroit Area Office:
110 E. Big Beaver
Suite 108
Troy, MI 48063
Phone: (248) 689-8900

INDEX OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
<i>Allgaier v City of Warren</i> , Court of Appeals #268102 (August 22, 2006)	viii
<i>Baine v City of Inkster</i> , Court of Appeals #274261 (April 26, 2007)	vii
<i>Carr v City of Lansing</i> , 259 Mich App 376, 380; 674 NW2d 168 (2003)	7, 12
<i>Darity v City of Flat Rock</i> , Court of Appeals #256481 (February 21, 2006)	<i>passim</i>
<i>Glancy v City of Roseville</i> , 457 Mich 580, 589-92, 577 NW2d 897 (1998)	v, 5
<i>Griffin v City of Pontiac</i> , Court of Appeals #269988 (October 26, 2006)	vii
<i>Johnson-McIntosh v City of Detroit</i> , 266 Mich App 318, 701 NW2d 179 (2005)	12
<i>Jones v City of Flint</i> , Court of Appeals #263036 (November 17, 2005)	vii
<i>Jones v City of Ypsilanti</i> , 26 Mich App 574, 182 NW2d 795 (1970)	vi, 9, 10,
<i>Jurstik v City of Owosso</i> , Court of Appeals #276701 (May 22, 2008)	vii
<i>Listanski v Canton Charter Twp</i> , 452 Mich 678, 551 NW2d 98 (1996)	vi, 9, 10
<i>Noe v City of Detroit</i> , Court of Appeals #278727 (August 19, 2008)	iv, v, vii
<i>Rule v City of Bay City</i> , 387 Mich 281, 283, 195 NW2d 849 (1972)	v, 5
<i>Semons v City of St. Clair Shores</i> , Court of Appeals #274777 (October 30, 2007)	vii
<i>Smith v City of Warren</i> , Court of Appeals #255004 (February 23, 2006)	vii
<i>Stone v Williamson</i> , 482 Mich 144, 150, 753 NW2d 106 (2008)	8
<i>Talicio v City of Detroit</i> , Court of Appeals #224064 (July 27, 2001)	vii
<i>USF&G v Mich Cat Claims Ass'n</i> , 482 Mich 414, 422 759 NW2d 154 (2008)	8
<i>Williams v Redford Twp</i> , 210 Mich App 60, 64-65, 533 NW2d 10 (1994)	9
 <u>Statutes</u>	
MCL 41.228	10
MCL 691.1401	9
MCL 691.1402	<i>passim</i>



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:
1380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

STATEMENT OF QUESTIONS PRESENTED

- I. Does the two-inch rule apply to a sidewalk defect claim where the sidewalk is adjacent to a state trunkline highway, and not a county highway, given that MCL 691.1402a, which added the two-inch rule, sets forth additional limitations only as to the duty of a municipal corporation to repair and maintain “a portion of *county* highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation”?

Plaintiff-Appellant, Barbara Robinson, answers “No.”

Defendant-Appellee City of Lansing answers “Yes.”

- II. Does the two-inch rule alone warrant dismissing a sidewalk defect claim where a photograph shows the defect to be less than 2 inches before any discovery has been conducted to determine if the plaintiff can rebut the inference of no negligence created by the two-inch rule?

Plaintiff-Appellee, Barbara Robinson, answers “No.”

Defendant-Appellant City of Lansing answers “Yes.”



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

STATEMENT OF ORDER APPEALED FROM AND RELIEF REQUESTED

Plaintiff-Appellant, Barbara Robinson, seeks peremptory reversal or leave to appeal from the Court of Appeals' decision, which not only reversed the Court of Claims' ruling as to whether the two-inch rule applies to this sidewalk defect claim but also remanded the this case to the trial court so that "the City may refile its motion for summary disposition." See the Court of Appeals' Opinion, p 7, a copy of which is attached to this Application, along with the Trial Court's Order Denying Defendant's Motion for Summary Disposition.

NEED FOR REVIEW

This Court should review this case because it presents a significant legal question as to the interpretation of MCL 691.1402a and the application of the two-inch rule to municipalities charged with repairing and maintaining municipal sidewalks in good repair. Unlike *Noe v City of Detroit*, Court of Appeals #278727 (August 19, 2008), an unpublished Court of Appeals' ruling in which this Court recently denied leave to appeal in a case involving application of the two-inch rule and the rebuttable inference it created, this case involves a question of (1) how to interpret the actual text of MCL 691.1402a in terms of what government entities are actually entitled to employ it as a defense to sidewalk defect claims, (2) whether MCL 691.1402a is ambiguous, and (3) if so, what the legislative history of MCL 691.1402a can tell us about the Legislature's intent in adopting the two-inch rule as part of a statute which is seemingly limited to sidewalks adjacent to *county highways*.

Furthermore, this case involves a procedural issue of when summary disposition is appropriately granted given that the inference of reasonable repair because it is "rebuttable" presumably should afford the plaintiff an opportunity to conduct discovery. In *Noe, supra*, this issue was not presented because it appears discovery was completed. As this Court knows, leave to appeal was denied in *Noe, supra*, by a controlling majority of four justices (Weaver, Young, Markman, and Corrigan). *Noe, supra*, Supreme Court #137392 (March 18, 2009). Justices Hathaway, Kelly and Cavanagh would have granted



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

leave to appeal, presumably to review how the rebuttable inference of reasonable repair is to be applied to sidewalk defect claims. A motion for reconsideration in *Noe, supra*, is still pending. Clearly, the questions presented in this case differ from those in *Noe, supra*.

Under the Court of Appeals' ruling in this case, which is published, municipal corporations are entitled under MCL 691.1402a to a rebuttable inference that a sidewalk was maintained in reasonable repair so long as the injured person tripped on a discontinuity defect in the sidewalk that is less than two inches, regardless of where the sidewalk is located. In sum, municipal corporations receive the same protection from liability under the two-inch rule, whether the sidewalk is next to a city, county or state road.

While such an approach is obviously uniform in its application to sidewalks, it nonetheless violates the statute's clear, unambiguous language and extends the protection of the two-inch rule beyond the actual concerns raised by municipal corporations about having responsibility for miles of sidewalks next to county highways, which is what the legislation proposing the two-inch rule was intended to address when it was first adopted. See discussion, *infra*, pp 7-8, regarding the legislative history behind MCL 691.1402a.

In other words, despite express language limiting the application of MCL 691.1402a to "a portion of *county highway* outside the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation," the Court of Appeals concluded that the two-inch rule found in subsection (2) of MCL 691.1402(a) applied to all sidewalks over which municipal corporations had a duty to repair and maintain, regardless of location, and regardless of whether that duty arose from MCL 691.1402a, or from MCL 691.1402, which MCL 691.1402a was intended to fix legislatively.

Clearly, under MCL 691.1402a, the very rule rejected by this Court in *Rule v City of Bay City*, 387 Mich 281, 283, 195 NW2d 849 (1972), has now been adopted legislatively. See also *Glancy v City of Roseville*, 457 Mich 580, 589-92, 577 NW2d 897 (1998) (refusing to revive common law two-inch rule for municipal corporations subject to liability under MCL



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

1380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

691.1402). The question now is how broadly the two-inch rule should be applied under MCL 691.1402a. Is the statutory two-inch rule limited to sidewalks next to county roads? Do the words “county highway” in MCL 691.1402a limit how the two-inch rule is applied?

Significantly, the impetus for the actual legislation that later created MCL 691.1402a was quite simply the fact that municipal corporations were very concerned about having responsibility for sidewalks located next to county highways. See discussion, *infra*, pp 7-8. Under MCL 691.1402, the burden of maintaining sidewalks adjacent to county highways fell on municipal corporations whenever the sidewalk was located within its boundaries. See *Listanski v Canton Charter Twp*, 452 Mich 678, 551 NW2d 98 (1996) (townships are municipal corporations responsible for maintaining sidewalks next to county highways). Accordingly, the townships (and then, the cities) sought to reduce their liability by adopting legislatively the same two-inch rule previously rejected by the appellate courts in Michigan.

While the same was true for sidewalks located next to state trunkline highways – see generally, *Jones v City of Ypsilanti*, 26 Mich App 574, 182 NW2d 795 (1970) – those sidewalks were far fewer in number given the limited number of miles of state trunkline highway, especially within municipal boundaries, as compared to county roads in Michigan. According to the County Roads Association of Michigan (CRAM), 75% of all roads in Michigan are county roads. In contrast, only 8% of Michigan roads are state trunklines. See video clip on the website for CRAM, which can be found at www.micountyroads.org. It is unclear from the legislative history whether failing to address responsibility for sidewalks next to state trunklines was intended or simply overlooked. But regardless, both MCL 691.1402 and MCL 691.1402a continue to impose a duty to repair and maintain sidewalks on municipal corporations. The question now is how the two-inch rule applies.

The legal issue in this case, which is one of first impression, is whether the use of the words “county highway” in subsection (1) of MCL 691.1402a also limits the application of the two-inch rule subsection (2) of the same section to sidewalks next to county roads.



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

In addition, this case raises an equally important question as to how these two-inch rule cases will be handled procedurally by trial judges. Not surprisingly, interpreting and applying the statutory two-inch rule to actual cases has also been much contested since it was enacted. There have been disputes over whether the discontinuity defect is about vertical height disparity only or also could mean the length of a gap on the horizontal plane. See *Semons v City of St. Clair Shores*, Court of Appeals No 274777 (October 30, 2007), (a discontinuity defect creating a horizontal gap in the sidewalk of two inches or more triggered the statutory duty to maintain the sidewalk in reasonable repair, even though no defect equal to or more than two inches could be found measuring the defect vertically).

There have been disputes over whether other defects in addition to the discontinuity are relevant in determining whether the sidewalk was maintained in reasonable repair. See *Baine v City of Inkster*, Court of Appeals #274261 (April 26, 2007) (general state of disrepair of sidewalk not grounds to avoid two-inch rule where plaintiff did not claim she fell on the sidewalk because of anything other than the raised section of concrete); *Griffin v City of Pontiac*, Court of Appeals #269988 (October 26, 2006). In this case, however, Ms. Robinson also has alleged that a depression in the sidewalk caused her to lose her balance and stumble forward before she tripped on the raised bricks. [Complaint, ¶¶ 2-3, 16]. Thus, Ms. Robinson actually claimed that two separate defects in the sidewalk in question – a depression and the raised bricks – caused her to trip, fall and sustain injuries.

Most importantly, there have also been many disputes over what evidence rebuts the inference that the sidewalk was in reasonable repair and whether other evidence can effectively counter what seems clear from a photograph. See generally, *Baine, supra*; *Noe, supra*; *Jurstik v City of Owosso*, Court of Appeals #276701 (May 22, 2008); *Allgaier v City of Warren*, Court of Appeals #268102 (August 22, 2006); *v City of Warren*, Court of Appeals #255004 (February 23, 2006); *Jones v City of Flint*, Court of Appeals #263036 (November 17, 2005); *Talicio v City of Detroit*, Court of Appeals #224064 (July 27, 2001).



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

In none of these cases was summary disposition granted based solely on a photograph and before the plaintiff had a chance to conduct some discovery in an effort to determine whether the inference of reasonable repair under MCL 691.1402a could be rebutted.

Unlike the above cases, the City of Lansing moved for summary disposition before any meaningful discovery was conducted in this case. No depositions were taken. No experts were asked to opine as to whether the sidewalk was maintained in reasonable repair. For the City of Lansing, this case boils down to a photograph showing the raised bricks as creating a so-called “discontinuity defect” less than two inches. According to the measuring tape shown in the photograph, the discontinuity defect here is only 1 and 3/4 inches. While the above cases obviously relied on the photographs, none were dismissed before the plaintiff even had a chance to conduct relevant discovery to rebut the inference.

On appeal, however, in this case, the Court remanded this matter for further proceedings but also stated clearly that “the City may refile its motion for summary disposition”. No mention whatsoever was made by the Court as to when such a motion would be appropriate in this case. Given that the City of Lansing filed this motion almost immediately the first time around, it is anticipated that another summary disposition will be filed as soon as this case returns to the trial court. It seems unlikely that the City of Lansing will wait for discovery to be completed in the case at bar when the Court of Appeals has seemingly given the City the “green light” to seek summary disposition again on remand.

The question for this Court is whether such a procedure of “eye-balling” the defect and assessing whether it is less than two inches meets the statutory requirements when all that having a discontinuity defect of less than two inches does under the statute is create a *rebuttable inference* that the sidewalk was maintained in reasonable repair. The cavalier manner in which the lower courts have handled this procedural issue also warrants review by this Court. If no genuine opportunity is afforded to develop evidence in an attempt to rebut the inference of no liability under the statute, the statute’s clear intent is violated.



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

INTRODUCTION

This sidewalk defect claim arises out of serious personal injuries Barbara Robinson suffered when she tripped and fell on a city sidewalk in downtown Lansing. Essentially, the City of Lansing argued that the two-inch rule under MCL 691.1402a barred her claim because the “discontinuity defect” in the brick sidewalk where Ms. Robinson was injured appeared to be less than two inches based on photographs of the area. In response, Ms. Robinson contended that MCL 691.1402a did not apply to her claim, because MCL 691.1402a, by its terms, is limited to claims involving sidewalks next to “county highways”. Ms. Robinson tripped and fell on a sidewalk located adjacent to a state trunkline highway.

In support of her position, Ms. Robinson relied upon an unpublished per curiam Court of Appeals’ ruling in *Darity v City of Flat Rock*, Court of Appeals #256481 (February 21, 2006) in which Judges Meter, Whitbeck, and Schuette interpreted MCL 691.1402a as applying only to sidewalks next to county highways, and not a sidewalk by a state trunkline highway. The trial judge denied the City’s motion for summary disposition on legal grounds because he agreed with this Court’s prior ruling in *Darity, supra*, that MCL 691.1402a, based on its clear, unambiguous language applied only to sidewalks next to county roads. In fact, the trial judge first granted a motion to strike the two-inch rule as a defense in this case because the city sidewalk in question runs along a state trunkline, not a county road.

On appeal, in this case, however, the Court of Appeals, Judge Whitbeck this time presiding, along with Judges O’Connell and Owens, reached a different result and concluded that MCL 691.1402a, despite its clear, unambiguous wording, did not limit application of the two-inch rule to sidewalks adjacent to county highways. Instead, the panel in this case concluded that any such statement in *Darity, supra*, was merely dicta. More importantly, the panel in this case held that the two-inch rule, MCL 691.1402a(2), applies to all sidewalks, but its unique notice provisions, MCL 691.1402(a)(1) apply only to municipal corporations that repair and maintain sidewalks adjacent to county highways.

While the City may be justified in asserting that some legislators clearly intended to expand the scope of governmental immunity for all sidewalk claims by enacting MCL



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

1380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

691.1402a, the actual language used in amending the existing law changed immunity for municipalities only as to sidewalks next to county highways. The text of MCL 691.1402a could not be much clearer, and contrary to the Court of Appeals' holding below, there is no distinction as to how it applies between MCL 691.1402(a)(1) and MCL 691.1402(a)(2). MCL 691.1402(a) clarifies the limited obligations of municipal corporations to repair and maintain sidewalks, but by its terms, it applies only to sidewalks next to county highways. If municipalities seek broader immunity than that granted to them by MCL 691.1402a, the Legislature can amend MCL 691.1402a to cover sidewalks next to all roads in Michigan. However, that change is clearly one to be made by the Legislature and not by this Court.

Ms. Robinson asks simply that this Court apply the clear, unambiguous language used in MCL 691.1402a and thus affirm the sound ruling of the trial judge in denying the City of Lansing summary disposition under the two-inch rule. Alternatively, Ms. Robinson requests that this case be remanded to the trial court, not simply so the City "may refile its motion for summary disposition" as the Court of Appeals suggested in its ruling, but also so discovery can be completed before any ruling is made as to whether the two-inch rule, and the inference of reasonable repair it creates, can be effectively rebutted in this case.

STATEMENT OF FACT AND PROCEEDINGS

Ms. Robinson first began to lose her balance when she stepped in a depressed area on a brick sidewalk in front of the Lansing Center on the business section of Michigan Avenue east of the State Capitol in downtown Lansing. She then tripped over some raised bricks next to the depression and fell forward severely fracturing her right wrist. [Complaint, ¶¶ 2-3, 16]. On the next page is a photograph showing the depressed area in the middle of the sidewalk, as well as the raised bricks, which formed a solid hard edge, varying in height, but completely transecting the path of any pedestrian using the sidewalk. The orange line painted on the raised bricks was not present at the time of the accident.



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

1380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510



**SINAS, DRAMIS,
RAKE, BOUGHTON
& MCINTYRE, P.C.**

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
hone: (517) 394-7500
Fax: (517) 394-7510

In the Complaint she filed against the City of Lansing Ms. Robinson alleged that “while walking westbound on the sidewalk adjacent to the Lansing Center along Michigan Avenue [in downtown Lansing], “she stepped into a depressed or low lying area of the sidewalk, lost her balance, and tripped when her foot hit a raised, uneven area of brick on the sidewalk causing her to fall and sustain [serious injuries].” [Complaint, ¶¶ 2-3].

As a proximate result of her falling and being injured, Ms. Robinson sustained “a comminuted fracture of the proximal right ulna with dislocation of the radial head necessitating two separate surgical procedures, multiple courses and months of physical therapy, extended medical care and treatment.” [Complaint, ¶ 16]. She sought damages for past and future pain and suffering as a result of those injuries. [Complaint, ¶¶ 17-18].

This sidewalk is located in a heavily traveled area in downtown Lansing. The raised bricks crossed the entire width of the sidewalk in front of one of the main entrances to the Lansing Center. The Lansing Center is on Michigan Avenue a few blocks from the State Capitol and other state office buildings. The Lansing Center is used to host conventions, meetings, and other publicly attended events. It is located next to Oldsmobile Park where minor league baseball is played during the summer months in Lansing. Across the street from the Lansing Center are bars, restaurants, offices, and museums. Public parking is found below and behind the building. The Riverwalk pedestrian and bicycle trail is also accessible from the Lansing Center, as is the Radisson Hotel, which is the only major hotel found in downtown Lansing. Because discovery had only just begun when the City moved to dismiss this case, a complete record was not developed in this regard, but presumably the City does not dispute the basic facts about the Lansing Center and downtown Lansing.

The sidewalk on which Ms. Robinson lost her balance, tripped, fell, and was injured is maintained by the City of Lansing. [Answer, ¶ 6]. The City admitted that the sidewalk was adjacent to a state trunkline highway, in this case, Michigan Avenue in downtown Lansing. [Answer, ¶ 5]. The City, however, claimed that the sidewalk was in “reasonable



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

repair” when Ms. Robinson was injured. [Affirmative Defenses, ¶ 4]. The City also claimed that the sidewalk was “safe and convenient for public travel.” [Affirmative Defenses, ¶ 4].

Notwithstanding the fact that discovery had just started, the City moved for summary disposition almost immediately in this case – on September 4, 2007, before any depositions were taken and at a time when only routine discovery had been exchanged. Discovery was not scheduled to end in this case until January 30, 2008. Furthermore, the deadline for summary disposition motions to be heard did not run until February 29, 2008.

The City’s motion argued primarily that the statutory “two-inch” rule should be applied to this sidewalk defect claim. The statutory two-inch rule is a “rebuttable inference” under MCL 691.1402a that a sidewalk next to a county road is reasonably safe for public travel if there is no “discontinuity defect” greater than or equal to two inches. Previously, there had been a common law two-inch rule in Michigan but it was abolished decades ago by this Court in *Rule v City of Bay City*, supra, and *Glancy v City of Roseville*, supra.

The trial judge, however, did not address whether the inference created by the two-inch rule could be rebutted, because presumably, the judge was not in a position to rule on whether the inference could be rebutted given that discovery had only just begun and no depositions had yet been taken. Instead, the trial judge merely ruled that the statutory two-inch rule did not apply to a sidewalk adjacent to a state trunkline highway, given the clear unambiguous language of MCL 691.1402a limiting its application to sidewalks next to “county highways.” Thus, the motion was denied on legal grounds only, not on the facts. Essentially, the trial judge was forced to decide the motion for summary disposition based only on the allegations made by Plaintiff in the Complaint and a number of photographs, which were the only exhibits attached to the motion aside from a copy of the Complaint.

To support its two-inch rule claim under MCL 691.1402a, the City relied solely upon photographs taken of the brick sidewalk in question, including the above photograph, which does not appear to show a “discontinuity” defect equal to or greater than two inches. The City, however, ignored the fact that the alleged defect in this case was not limited to a



SINAS, DRAMIS,
RAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

discontinuity on the surface of the brick sidewalk. In this instance, the alleged defect also included a depressed area of sidewalk which first caused Ms. Robinson to lose her balance even before she actually tripped on the raised bricks on the sidewalk in question.

The City's motion for summary disposition was based primarily on a single affirmative defense – the claim that the two-inch rule barred this sidewalk defect claim. Upon receipt of the City's motion to dismiss the case, Plaintiff's counsel filed a motion to strike the two-inch rule as an affirmative defense in this case because, under the clear, unambiguous language of the statute, MCL 691.1402a, the two-inch rule did not apply to a sidewalk such as this one located next to a state trunkline highway, not a county road.

After a hearing on the motion to strike the two-inch rule as an affirmative defense in this case, the trial judge concluded that the statute's unambiguous wording limited the two-inch rule's application to cases involving sidewalks next to county highways. Because it was undisputed that Michigan Avenue in downtown Lansing remains a state trunkline highway, the trial judge dismissed the two-inch rule as an affirmative defense to this claim. See Transcript of the September 19, 2007 Motion Hearing, p 10. Subsequently, having already concluded that the two-inch rule was not an affirmative defense in this case, the trial judge found no basis to grant the City's summary disposition motion. Transcript, p 5.

In sum, the trial judge concluded that the City of Lansing was not entitled to claim the "two-inch" rule as an affirmative defense in this case, because the sidewalk in question was located adjacent to a state trunkline highway, and not a county highway, as is required by the clear, unambiguous language used in the text of MCL 691.1402a. Consequently, in the trial judge's mind, the "two-inch" rule had no bearing on the outcome of this motion.

In support of his ruling, the trial judge relied upon a previous ruling by this Court in a factually similar unpublished case involving a city sidewalk located adjacent to a state trunkline highway. *Darity v City of Flat Rock* (unpublished per curiam) Court of Appeals No 256481 (February 21, 2006) (Judge Meter presiding, with Judges Whitbeck and



SINAS, DRAMIS,
RAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

Schuetter). In *Darity*, this Court seemingly rejected the argument that MCL 691.1402a limited municipalities' liability for sidewalks not adjacent to county highways, stating:

Because the sidewalk at issue was adjacent to a state trunkline and not a county road, MCL 691.1402a does not govern this action. . . .

MCL 691.1402a "creates no liability for municipalities that would not otherwise exist. . . . The obvious purpose of § 1402a is to limit the liability municipalities would otherwise face to maintain sidewalks. . . ." *Carr v City of Lansing*, 259 Mich App 376, 380; 674 NW2d 168 (2003). In enacting MCL 691.1402a, the Legislature implicitly recognized that by virtue of MCL 691.1402, municipal corporations faced liability for portions of county highways that were outside the improved portion designed for vehicular travel. MCL 691.1402 does not provide a basis for concluding that municipal corporations have a lesser degree of liability with respect to portions of state highways that are outside the improved portion designed for vehicular travel. Yet in enacting MCL 691.1402a, the Legislature decided to limit liability with respect to county roads only. The Legislature's failure to impose similar limits with respect to state roads does not suggest that the Legislature was unaware of that liability or did not intend that liability would exist. Rather, the absence of a provision concerning portions of state highways outside the improved portion means that a municipal corporation's liability for those areas pursuant to MCL 691.1402 remains unreduced. [Ex. 1] [Court's Emphasis]

Subsequently, leave to appeal was denied in *Darity*, 476 Mich 858, 718 NW2d 349 (2006). At that time, the panel did not suggest that its ruling interpreted only subsection (1) of MCL 691.1402a; in fact, to the contrary, the Court of Appeals' panel in *Darity, supra*, repeatedly referred to MCL 691.1402a as if it was interpreting the meaning of the whole section.

On appeal, in this case, the City of Lansing asked the Court of Appeals to revisit how it had interpreted MCL 691.1402a. Simply put, the City sought to find another panel of the same Court willing to disagree with not only their colleagues in *Darity, supra*, but also, the Supreme Court, which also found nothing wrong with the ruling in that case. Evidently, that endeavor was worthwhile, because the Court of Appeals reversed the lower court's ruling on MCL 691.1402(a) and found that the two-inch rule applied in this case.



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

1380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

Ms. Robinson contends on appeal that MCL 691.1402a can only give rise to one interpretation – that MCL 691.1402a, and thus, the two-inch rule, applies only to sidewalks adjacent to county roads, and not those found adjacent to state trunklines, as in this case. Accordingly, this Court should either peremptorily reverse the Court of Appeals' opinion and reinstate the trial court's ruling or grant leave to appeal from the Court of Appeals' ruling. Alternatively, this Court should grant leave to appeal or otherwise clarify that on remand, and before any further motions for summary disposition are filed, discovery must be conducted to determine if the inference created by the two-inch rule can be rebutted.

STANDARD OF REVIEW

The standard of review on appeal is de novo when it comes to a question of statutory interpretation. See generally, *USF&G v Mich Cat Claims Ass'n*, 482 Mich 414, 422 759 NW2d 154 (2008). In *USF&G v MCCA*, supra this Court reiterated the following:

When interpreting a statute, our primary obligation is to ascertain the intent of the Legislature. To do so, we begin with the language of the statute, ascertaining the intent that may be reasonably inferred from its language.

If the statute is unambiguous on its face, the Court presumes that the Legislature intended the meaning expressed. *Stone v Williamson*, 482 Mich 144, 150, 753 NW2d 106 (2008).

ARGUMENT

I. THE TWO-INCH RULE DOES NOT APPLY TO THIS CASE BECAUSE UNDER THE CLEAR UNAMBIGUOUS LANGUAGE IN MCL 691.1402a THE TWO-INCH RULE APPLIES ONLY TO SIDEWALKS ADJACENT TO COUNTY HIGHWAYS.

In Michigan, municipal corporations, including cities, townships and villages, must maintain sidewalks in “reasonable repair” so that the sidewalks are “reasonably safe and convenient for public travel.” MCL 691.1402(1) provides in this regard the following:



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

Except as otherwise provided in section 2a, 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 term "highway" includes sidewalks. MCL 691.1401(1)(e). However, MCL 691.1402 expressly limits the duty of state and county road commissions (but not municipal corporations) to the improved portion of the highway designed for vehicular travel, which does not include sidewalks. Thus, cities must maintain sidewalks under MCL 691.1402.

In *Jones v City of Ypsilanti*, 26 Mich App 574, 182 NW2d 795 (1970), the Supreme Court specifically held that cities are responsible for maintaining sidewalks next to state trunkline highways under MCL 691.1402. See also *Williams v Redford Twp*, 210 Mich App 60, 64-65, 533 NW2d 10 (1994). Thus, in the case at bar, the City clearly had a duty to maintain the sidewalk in question because it is located next to a state trunkline highway. See also *Darity, supra*, which confirmed that passage of MCL 691.1402 did nothing to change the cities' obligation to repair sidewalks next to state trunklines because MCL 691.1402a, by its specific terms, applied only to sidewalks adjacent to "county highways."

Similar to *Jones, supra*, in *Listanski v Canton Charter Twp*, 452 Mich 678, 551 NW2d 98 (1996), the Supreme Court held that townships are liable for injuries occurring on sidewalks abutting county roads within their boundaries. In *Listanski*, however, the Court overruled a Court of Appeals' decision which concluded that townships were not liable in sidewalk injury cases because townships, unlike cities, lacked sufficient jurisdiction over sidewalks within their boundaries. In *Listanski, supra*, the lower court focused on the fact that townships must seek approval from the state or county in order to construct, repair



SINAS, DRAMIS,
RAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

or maintain sidewalks along state or county roads under MCL 41.228(1). But, the Supreme Court did not find that point determinative of whether the townships still had jurisdiction.

After the Supreme Court's ruling in *Listanski, supra*, the townships proceeded to lobby the Michigan Legislature to change the law. Initially, the townships sought legislation affirming that townships had no duty or liability for "any portion of county highway", including sidewalks, unless the township had specifically contracted with the county to maintain and repair the sidewalk in question. However, as initially introduced, House Bill 4010 would have simply added language to the existing highway exception provisions contained in MCL 691.1402. If HB 4010, as introduced had been passed, townships, similar to the state and county road commissions, would have had no duty to repair sidewalks, absent some contractual agreement with the county. Attached hereto is a copy of HB 4010, as introduced on January 13, 1999, along with a summary of the legislation.

As part of the legislative process, however, changes were made to the bill as originally introduced. MCL 691.1402a reflects the language after the bill was changed. Instead of amending MCL 691.1402, the changes were made by adding MCL 691.1402a. The changes to the bill were significant because not only did the townships fail to get the complete immunity from liability they had sought originally, but also, the bill was broadened to include all municipal corporations, meaning cities and villages, and not simply townships. Further, the two-inch rule was adopted as a rebuttable inference to limit sidewalk claims.

In the end, however, no change was ever made to the language "any portion of county highway" from the original version of HB 4010. Thus, the legislation still did not address sidewalks adjoining roads other than county highways, such as state trunkline highways. As such, the two-inch rule still did not apply to cases involving sidewalks next to state roads. In short, the legislation only reversed *Listanski, supra*, not *Jones, supra*.

While MCL 691.1402a resolved the townships' concerns – if not by giving them complete immunity, at least by, providing them with the two-inch rule as a defense to such



SINAS, DRAMIS,
LAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

claims – the new law did not do what the cities had presumably wanted and intended. For whatever reason, leaving the word “county” next to the word “highway” was not recognized as a problem. According to the County Roads Association of Michigan, 75% of all roads in Michigan are county roads. In contrast, only 8% of Michigan Roads are state trunklines. See generally, the website for CRAM, which can be found at www.micountyroads.org. Thus, it seems equally plausible that the municipalities recognized that the word “county” was still being used in the amended bill, but simply did not feel it needed to be changed.

In *Darity, supra*, this Court recognized and affirmed that MCL 691.1402a applied only to sidewalks next to county roads when it held that regardless of the new provisions of law enacted in MCL 691.1402a, the city still had jurisdiction over a sidewalk located next to a state trunkline highway, as in this case. In other words, the limitations on claims against municipal corporations adopted by the Legislature in enacting MCL 691.1402a simply have no application when it comes sidewalks adjacent to state trunkline highways. This Court could not have been clearer in saying that MCL 691.1402a does not apply to cases involving a sidewalk next to a state trunkline highway than when it said the following:

Defendant also relies on MCL 691.1402a in support of its argument that the Legislature rendered cities liable only for sidewalks adjacent to *county* highways. [Court’s emphasis].

Because the sidewalk at issue was adjacent to a state trunkline and not a county road, MCL 691.1402a does not govern this action. [Emphasis added].

From a textualist viewpoint, the reasoning in *Darity* is sound. MCL 691.1402a says what it says and only the Legislature can change that. In *Darity, supra*, the Court further stated:

... in enacting MCL 691.1402a, the Legislature decided to limit liability with respect to county roads only. The Legislature’s failure to impose similar limits with respect to state roads does not suggest that the Legislature was unaware of that liability or did not intend that liability would exist. Rather, the absence of a provision concerning portions of state highways outside the improved portion means that a municipal corporation’s liability for those areas pursuant to MCL 691.1402a remains unreduced. [Emphasis added].



SINAS, DRAMIS,
RAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

As such, MCL 691.1402a has no bearing on the defense of this particular sidewalk claim.

In sum, the Court of Appeals had already decided the issue involved in this appeal. Although *Darity* is unpublished, and thus not precedential under MCR 7.215, the case is persuasive because no other result could be reached based on the statute's wording. Numerous other panels of this Court have, by implication, reached the same conclusion. For example, in *Carr v City of Lansing*, 259 Mich App 376, 381, 674 NW2d 168 (2003), the Court of Appeals reached the same basic holding, albeit on a different statutory question, in a published, and thus, precedential opinion, when it said the following:

Moreover, by its plain terms, § 1402a applies only to "a portion of a *county* highway outside of the improved portion of the highway designed for vehicular travel" (emphasis added), but only a state highway and a city street are involved in this case. [Court's Emphasis in Italics and Parentheses].

Similarly, in *Johnson-McIntosh v City of Detroit*, 266 Mich App 318, 701 NW2d 179 (2005), a special panel of the Court of Appeals stated that "Section 2a, MCL 691.1402a, provides limited immunity for a municipality with regard to the portions of county highways not designed for vehicular travel that fall within its borders." Immunity is limited, not broad, because MCL 691.1402a applies only to installations, like sidewalks, next to county roads.

While the City will presumably note that other than *Darity, supra*, these cases merely show judges struggling with the question of municipal jurisdiction in light of MCL 691.1402a, none of the above cited cases (or any of the judges involved in those cases), however, had any trouble interpreting MCL 691.1402a. Contrary to the City's likely counter-argument, all of the judges involved in these cases recognized that the two-inch rule applies only to area adjacent to county highways, under the statute's plain language.

Nonetheless, the City is correct to recognize that some other panels of this Court have applied the two-inch rule to cases against municipal defendants and dismissed such cases by applying the two-inch rule. However, without the benefit of the record in those



SINAS, DRAMIS,
RAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

cases, it is impossible to know what that fact means when it comes to interpreting the statute's meaning and its application to municipal sidewalks adjacent to non-county roads.

The City would have us believe that these decisions confirm that a broader interpretation of the statute must be applied. However, it is more plausible that no one bothered to make the argument being made in this case about the statutory two-inch rule. It is also possible that this issue did not come up in those cases because the sidewalk was next to a county road. Without the benefit of the record in each case, there is no way of knowing. Regardless, this case should be decided on its facts and counsel's arguments. This case should be decided most importantly based on the language used in MCL 691.1402a and not merely by referring to some other appellate ruling under the same law.

II. SUMMARY DISPOSITION ON REMAND WOULD BE PREMATURE IF SOUGHT BEFORE DISCOVERY IS CONDUCTED TO DETERMINE IF THE INFERENCE OF REASONABLE REPAIR UNDER MCL 691.1402a CAN BE REBUTTED

In this instance, the City of Lansing filed its summary disposition motion in the nascent stages of this litigation. Although nothing obligated the City of Lansing to wait until discovery was completed to bring a summary disposition motion, unlike many summary disposition claims based on governmental immunity, the facts in this case, however, are paramount. In this case, the issue will always be one of whether the sidewalk was in "reasonable repair" and in a condition "reasonably safe and convenient for public travel."

Effectively, the City of Lansing asked the trial judge to "eye-ball" the condition of the sidewalk in question, based on photographs alone, and affirm as a matter of law that the sidewalk was in "reasonable repair" and "reasonably safe and convenient for public travel." Primarily, the City of Lansing relied upon the so-called "two-inch rule" as the statutory authorization for the trial judge to make such a ruling solely by "eye-balling" the condition.

In this case, however, the trial judge had already held that the "two-inch rule" did not apply because the sidewalk was located next to a state trunkline highway, not a county



SINAS, DRAMIS,
RAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

road, as is required by the plain, unambiguous language of MCL 691.1402(a) which states that “a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation.”

Absent the two-inch rule, there was nothing supporting the City’s claim that as a matter of law the sidewalk was in “reasonable repair” and “reasonably safe and convenient for public travel” other than some photographs of the sidewalk’s condition at the time of the accident. Photographs alone, however, do not tell us something was in reasonable repair. Photographs simply attempt to show the condition which is claimed to have caused harm.

Moreover, even if the “two-inch rule” had applied, the City would only have been entitled to a “rebuttable inference” that the sidewalk in question was in “reasonable repair” at the time of this event. In other words, Ms. Robinson would have had an opportunity to rebut the inference that the City fulfilled its statutory obligations under MCL 691.1402(1). Presumably, expert testimony would have been utilized to rebut the inference that the sidewalk was in “reasonable repair.” No such evidence was presented at the hearing because the trial judge had already ruled that the two-inch rule did not apply to this case.

Even more importantly, no opportunity was presented to develop additional evidence to rebut the inference of reasonable repair because discovery was not completed. If this Court denies leave to appeal, thus letting the legal interpretation of the Court of Appeals stand, this Court should still clarify that Ms. Robinson is entitled on remand to an opportunity to perform some discovery in an effort to rebut the inference that the brick sidewalk in question was maintained by the City of Lansing in a state of reasonable repair.



SINAS, DRAMIS,
RAKE, BOUGHTON
& MCINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510

CONCLUSION

In order to succeed on its motion for summary disposition, the City was required to establish as a matter of law that the sidewalk in question was in "reasonable repair" and in a condition "reasonably safe and convenient for public travel" under MCL 691.1402(1). Given that almost no discovery was performed, summary disposition was, and continues to be, premature in this case. Thus, summary disposition was properly denied, regardless of whether the judge's legal ruling stands on how to interpret and apply the two-inch rule.

This Court, however, should affirm the trial judge's ruling that the two-inch rule has no application to this case because it applies only to sidewalks adjacent to county highways under MCL 691.1402a. The plain language of MCL 691.1402a is unambiguous and it applies only to sidewalks adjacent to county highways, and not state roads, as in this case. Alternatively, this Court should remand this case to the trial court so that discovery can be conducted and Plaintiff can have a full opportunity to rebut the inference created by the two-inch rule – after all, it is a rebuttable inference, not a conclusive presumption.

WHEREFORE, Plaintiff-Appellee, Barbara Robinson, by and through her attorneys, Sinas, Dramis, Brake, Boughton & McIntyre, P.C., requests that this Court peremptorily reverse or grant leave from the Court of Appeals' decision to review a novel question of statutory interpretation, or alternatively, remand the case for discovery so that a full and fair opportunity is provided to Ms. Robinson to rebut the inference created by the two-inch rule.

Respectfully submitted:

**SINAS, DRAMIS, BRAKE,
BOUGHTON & McINTYRE, P.C.**
Attorneys for Plaintiff-Appellant

By: 

Michael E. Larkin (P40994)
Steven A. Hicks (P49966)
3380 Pine Tree Road
Lansing, MI 48911-4207
(517) 394-7500

Dated: April 16, 2009



SINAS, DRAMIS,
BRAKE, BOUGHTON
& McINTYRE, P.C.

Main Office:

3380 Pine Tree Road
Lansing, MI 48911
Phone: (517) 394-7500
Fax: (517) 394-7510