

STATE OF MICHIGAN  
IN THE SUPREME COURT

BARBARA A. ROBINSON,

Plaintiff-Appellant,

v

CITY OF LANSING, a municipal  
corporation,

Defendant-Appellee.

Supreme Court No. 138669

Court of Appeals No. 282267

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

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**PLAINTIFF-APPELLANT BARBARA ROBINSON'S REPLY BRIEF**  
**IN SUPPORT OF HER APPLICATION FOR LEAVE TO APPEAL**



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NOW COMES Plaintiff-Appellant, Barbara Robinson, by and through her attorneys, Sinas, Dramis, Brake, Boughton & McIntyre, P.C., and in response to Defendant-Appellee City of Lansing's Response to her Application for Leave to Appeal, states the following:

- 1. If the City of Lansing's is correct in its interpretation of MCL 691.1402a, MCL 691.1402a(1) is nothing more than surplusage, because it states what is already true under MCL 691.1402 and this Court's prior ruling in *Listanski v Canton Charter Twp*, 452 Mich 678, 551 NW2d 98 (1996).**

MCL 691.1402a(1) says that a municipal corporation has no duty to repair or maintain a sidewalk, unless it had 30 days notice of the existence of the defect in the sidewalk and the sidewalk defect was a proximate cause of the injury, death or damage. By its plain, unambiguous language, it applies only to sidewalks next to county highways. The case at bar involves a sidewalk adjacent to a state trunkline – not a county highway. Thus, in this particular case, the City of Lansing is obligated to maintain the sidewalk in question in “reasonable repair” and in a condition safe and convenient for travel” not because of MCL 691.1402a(1), but rather because of its obligations under MCL 691.1402.

In *Darity v City of Flat Rock*, Court of Appeals #256481 (February 21, 2006) (unpublished per curiam), the Court of Appeals rejected the defendant city's claim that, by enacting MCL 691.1402a(1), the Legislature limited the liability of municipal corporations to maintaining sidewalks adjacent to county highways as opposed to state trunkline roads. This Court presumably agreed with that conclusion because leave to appeal was denied. See Order denying leave to appeal in *Darity, supra*, 476 Mich 858, 718 NW2d 349 (2006). Thus, municipal corporations remain obligated to maintain sidewalks next to both state and county roads, regardless whether that duty is from MCL 691.1402 or MCL 691.1402(a)(1).

Simply put, MCL 691.1402a(1) alone did nothing to change the existing law in Michigan. MCL 691.1402 already obligated municipal corporations to maintain sidewalks



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next to both county and state roads. See *Listanski v Canton Charter Twp*, 452 Mich 678, 551 NW2d 98 (1996) (townships are municipal corporations responsible for maintaining sidewalks next to county roads); *Jones v City of Ypsilanti*, 26 Mich App 574, 182 NW2d 795 (1970) (municipal corporations must maintain sidewalks adjacent to state trunklines). Proximate cause was required in a sidewalk defect claim because recovery was limited under MCL 691.1402 to those persons injured “by reason of a failure of” a municipal corporation to keep a sidewalk “in reasonable repair” and “in a condition reasonably safe and fit for travel.” And, the same as MCL 691.1402a(1), MCL 691.1403 limited liability to situations where the government had 30 days notice of the existence of a sidewalk defect.

The fact is that MCL 691.1402a(1) has no meaning unless using the term “county highway” in that subsection limits application of the two inch rule in MCL 691.1402a(2). Otherwise, as stated above, MCL 691.1402a(1) merely restates the law of government liability for sidewalks next to county roads, while MCL 691.1402a(2) adopts the previously rejected 2 inch rule as to government liability for defective sidewalks next to a public road.

While the latter position may be a seemingly plausible interpretation of MCL 691.1402a(2), it must be recognized that, by accepting that view, MCL 691.1402a(1) is rendered nugatory and that particular subsection becomes nothing more than surplusage. As this Court emphasized in its recent ruling in *Odom v Wayne County*, 482 Mich 459, 471, 760 NW2d 217 (2008), “[w]e read every word, phrase, and clause in a statute to avoid rendering any portion of the statute nugatory or surplusage” [quoting from *Herald Co, Inc v Eastern Mich Univ Bd of Regents*, 475 Mich 463, 470, 719 NW2d 19 (2006)]. Obviously, such a result is one to be avoided under well-established rules of statutory construction.



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In the opposing view – appellant’s view – both MCL 691.1402a(1) and MCL 691.1402a(2) have meaning. MCL 691.1402a(1) clarifies that MCL 691.1402a addresses the liability of municipal corporations for sidewalks adjacent to county highways only (while leaving intact through its silence the rule that a municipal corporation’s responsibility for maintaining a sidewalk next to a state trunkline under this Court’s ruling in *Jones, supra*). MCL 691.1402a(2), in turn, provides a meaningful limitation on that liability of municipal corporations for sidewalks adjacent to county highways, which is consistent with the legislative purpose of limiting liability for municipal corporations as it pertains to sidewalks located adjacent to the vast number of miles of county highways in the State of Michigan.

2. **Other well-established rules of statutory construction require that the application of the two inch rule established in MCL 691.1402a(2) be read in the context of the new statute, MCL 691.1402a, as a whole, and thus, with regard to the limitations placed on it in MCL 691.1402(a)(1), namely its restriction to sidewalks adjacent to county highways only.**

Clearly, if MCL 691.1402a(1) is to have any meaning, it must come from the 2 inch rule, because that rule is the only truly limiting provision contained within MCL 691.1402a. Unless MCL 691.1402a(1) is interpreted as limiting the two inch rule to sidewalks adjacent to *county* highways, it is nothing more than a restatement of existing law in Michigan. Under the City of Lansing’s view of MCL 691.1402a, the Legislature “clarified” the liability of municipal corporations as to defective sidewalks adjacent to county highways, even though, under *Listanski, supra*, no such clarification was needed and the law in Michigan was well-established, although admittedly not very well-liked by the municipal corporations.

It is unclear (and the City provides no explanation) why the Legislature did not, at the same time, clarify liability for municipal corporations as to defective sidewalks adjacent to state roads. But presumably, the concern over sidewalks adjacent to state roads paled



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in comparison to the miles and miles of sidewalks next to county highways which cities and townships now had a statutory obligation to maintain and repair to ensure safe traveling. For that reason, adopting a 2 inch rule for sidewalks next to state roads was not a priority.

While the City of Lansing reads much into the language used in MCL 691.1402a(3), that subsection actually adds nothing to the discussion because it merely reiterates a provision added previously to the existing statute as MCL 691.1402(4), which simply confirmed that liability was limited by the provisions regarding off-road vehicles contained in the Natural Resources and Environmental Protection Act (NREPA), MCL 381.81131. In enacting MCL 691.1402a, the Legislature merely wanted to include the same proviso. MCL 691.1402a(2), e.g., the 2 inch rule provision, however, is no mere proviso – it is a substantive change to the law of governmental immunity as to defective sidewalk claims, as it existed in Michigan under MCL 691.1402, and this Court’s ruling in *Listanski, supra*. Effectively, it adopts the 2 inch rule that was previously rejected by this Court in *Glancy v City of Roseville*, 457 Mich 560, 577 NW2d 897 (1998) and applies that rule to any claim against a municipal corporation involving a defect in a sidewalk next to a county highway.

- a. **Reading the two inch rule provision, MCL 691.1402a(2), within the context of MCL 691.1402a, as a whole, compels application of that rule to sidewalks adjacent to county highways only.**

The context in which a word is used is a relevant consideration in statutory construction. See *2A Sutherland*, Statutory Construction, § 47.2 (7<sup>th</sup> Edition), in which the authors comment that “[i]nherent in the use of textual consideration as resource materials for the interpretation of statutes is the problem of determining how much of the statutory context of the particular word or passage is relevant and probative for its construction.”

The same authors further caution that “[t]he risk of misunderstanding as a result of allowing



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irrelevant portions of a text to influence the meaning attributed to the segment of text being construed is probably just as risky as taking any statement out of context." *Id.*, at § 47.2.

Among the types of interpretation which depend on context is "whole act" interpretation, which the authors describe as being the following method:

The latter method is "the most realistic view" of the fact that a legislature passes judgment upon the act as an entity, not giving one portion of the act any greater authority than another. Thus any attempt to segregate any portion or exclude any portion from consideration is almost certain to distort the legislative intent. The "whole act" approach" does not preclude giving some portions of the act greater authority to override implications of other portions in interpretation. *Id.*, at § 47.2.

If the Governmental Tort Liability Act, MCL 691.1401, et seq., in particular, the highway exception provisions as to governmental immunity, MCL 691.1401 through MCL 691.1404, including obviously the newest provision added to the highway exception, MCL 691.1402a, are read together as a whole, there can be little doubt that MCL 691.1402a was intended solely to alleviate the harshness of having municipal corporations bear the responsibility for maintaining sidewalks next to the vast number of miles of county roads in Michigan.

Clearly, there is a reason that the section was numbered as MCL 691.1402a, rather than simply being incorporated into the existing MCL 691.1402. It was intended to be simply an exception to the highway exception applicable to sidewalks adjacent to county roads only. By adding the change as a new numbered section, it was clear that the exception to the exception, and thus, the application of the 2 inch rule applied only to sidewalks adjacent to county highways, and not sidewalks next to state trunklines or the city streets. If the two inch rule were added to the existing statute, MCL 691.1402, its application to sidewalks adjacent to county highways only might have been misinterpreted.



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- b. **Reading the word “highway” in MCL 691.1402a(2) as meaning “county highway” is permissible when all three sections of MCL 691.1402a are read together as a whole and the purview of new statute is considered.**

Similar to “whole act” interpretation is the method of statutory interpretation known as “purview” interpretation. Under this other well-established method, instead of focusing broadly on the “whole act”, “the language of the entire enacted part of the statute must be read together and the determination of ambiguity made upon the basis of the entire enacted part.” *Id.*, at § 47.2. In this instance, the entire enacted part, meaning MCL 691.1402a, must be read together. In 2A Sutherland, Statutory Construction, at § 47.6, the authors, commenting on how to interpret the “purview” of a statute, state the following:

In construing provisions in the purview, or body, of an act, which consists of everything subsequent to the enacting clause, all matter contained therein must be interpreted together. **It is presumed that all of the matter, regardless of the form of sectioning, must harmonize with the other sections of the act and with the purpose of the legislation.** Therefore, it is an elementary rule of construction that all sections of an act relating to the same subject matter should be considered together unless to do so would be plainly contrary to the legislative intent. Insofar as possible the separate effect of each individual part or section of an act is made consistent with the whole. [Emphasis added].

If MCL 691.1402a(1) and MCL 691.1402a(2) are read together, along with MCL 691.1402, the obvious result would be to conclude that the 2 inch rule added by MCL 691.1402a(1) is limited in its application to sidewalks next to county roads based on MCL 691.1402a(1).

- c. **Substituting “county highway” for “highway” in MCL 691.1402a(2) is permissible under well-established rules of statutory construction**

Moreover, it is also well-established in the rules of statutory construction that one word may be substituted for another word “if necessary to carry out the legislative intent or express clearly manifested meaning.” 2A Sutherland, Statutory Construction, § 47.36, states in this regard, as to substitution of words and phrases in a statute, the following:



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Courts have permitted the substitution of one word for another where it is necessary to make the act harmonious or to avoid repugnancy or inconsistency, where the literal interpretation is not consistent with the legislative intent, where the word to be substituted can be gathered from the context of the act, where the word to be substituted is found in the enrolled act, in the act as published, as amended, in the title or subtitle, by reference to other statutes, or the original bill, where it is obvious that the word used in the act is the result of clerical error, where the substitution will make the act sensible, give it force and effect, or make it rational, where it leads to an unreasonable result as written, where the word to be substituted can be collected from extrinsic evidence, or where there will be beneficial results by the substitution.

With the exception of clerical error, of which there is no evidence in this case, most, if not all, of the rationales for substituting one word for another, in this case, "county highway" for "highway" in MCL 691.1402a(2), can be a compelling basis for reading MCL 691.1402a in a limited fashion that would apply the 2 inch rule only to sidewalks next to county roads.

- d. The concept of statutory interpretation known as "expressio unius est exclusion alterius", which is relied upon by the City of Lansing, has no application in this instance, because the terms "highway" and "county highway" are not being used as part of an associated group or series.**

The broad notion that by saying one thing other things have necessarily been excluded is typically only applied in situations where a list of items has been provided in a statute and the question is whether some other non-listed items are also included. In this instance, there is no attempt in MCL 691.1402a to establish a group or series of items. In short, the concept of expression unius exclusion alterius has no application to this situation. Even if it did have some application in this situation, because MCL 691.1402a uses both "county highway" and "highway", another well-established rule of construction favoring the more specific term over the more general term would favor reading the statute narrowly. See 2a Sutherland, Statutory Construction, § 47.16, Associated words (noscitur a sociis).



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**3. Limiting application of the two inch rule provision in MCL 691.1402a(2) to claims involving sidewalks adjacent to county highways fulfills the legislative purpose of limiting municipal corporation's liability for the vast number of miles sidewalks adjacent to county highways, as cities and townships feared when this Court first ruled in *Listanski, supra*.**

The fundamental concern for municipal corporations has always been the fact that under *Listanski, supra*, those entities are responsible for sidewalks next to county roads. 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](http://www.micountyroads.org).

Obviously, given the sheer number of county roads, approximately 91,000 miles, according to CRAM, maintaining sidewalks adjacent to them is a huge task. In contrast, most state trunkline highways do not have sidewalks adjacent to them, with the exception of those roads traditionally designated as state trunklines, like Michigan Avenue in Lansing.

Understandably, municipal corporations wanted to lessen the burden on them in maintaining sidewalks adjacent to county roads. After this Court's ruling in *Listanski, supra*, the townships began a legislative push to alleviate that burden. Initially, the townships sought a bill to amend MCL 691.1402 that would exempt them in the same manner as state and county roads. See Exhibits to the Application for Leave to Appeal re HB 4010. However, when the cities chimed in seeking the same relief, the bill morphed into a 2 inch rule designed to lessen the burden on all responsible for sidewalks next to county roads.

Notwithstanding this fact, however, the bill did not change from its essential purpose, which was dealing with the municipal corporation's responsibility to maintain sidewalks next to county roads. The legislative history could not be clearer on this point.



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If the sole purpose was to adopt a 2 inch rule for all sidewalks, the bill could have said that. But, it did not. Clearly, the Legislature's goal was to lessen a particular burden on municipal corporations, e.g., the duty to maintain sidewalks next to county highways.

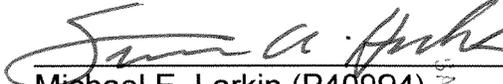
From a public policy standpoint, it probably made some sense for the Legislature to create a higher standard for personal injury claims involving defects on what were likely less traveled sidewalks because of their location adjacent to county highways. However, to implement that standard for all sidewalks, regardless of location, would make it much harder to bring personal injury claims even for defects on the most traveled sidewalks, such as the one at issue in this case, which is in downtown Lansing's business district. Such a result is clearly not at all what the Legislature intended in enacting MCL 691.1402a.

WHEREFORE, Plaintiff-Appellant, Barbara Robinson, by and through her attorneys, Sinas, Dramis, Brake, Boughton & McIntyre, P.C., requests that this Court either peremptorily reverse the Court of Appeals' ruling or grant leave to appeal from that erroneous decision in order to review a truly novel question of statutory interpretation, which will greatly affect all who bring defective sidewalk claims against the government.

Respectfully submitted:

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