

STATE OF MICHIGAN
IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

BARBARA A. ROBINSON,

Plaintiff-Appellant,

S.Ct. No. 138669

v.

C.A. No. 282267

CITY OF LANSING, a Municipal
corporation,

L.C. No. 07-576-NO

Defendant-Appellee.

**BRIEF OF DEFENDANT-APPELLEE CITY OF LANSING IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL**

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COUNTER-STATEMENT OF THE QUESTIONS PRESENTED

I.

THE CLEAR AND UNAMBIGUOUS LANGUAGE OF MCL 691.1402a(2) SPEAKS OF “DISCONTINUITY DEFECT[S]” OF LESS THAN TWO INCHES IN SIDEWALKS OUTSIDE OF THE IMPROVED PORTION OF A “HIGHWAY” AND IN NO WAY NARROWS THE SCOPE OF HIGHWAYS COVERED BY THE STATUTE TO “COUNTY HIGHWAYS”. DOES PLAINTIFF’S POSITION TO THE CONTRARY, I.E., THAT THE TWO-INCH RULE APPLIES ONLY TO SIDEWALKS ADJACENT TO COUNTY HIGHWAYS, COMPEL A RULING DENYING PLAINTIFF’S REQUESTED RELIEF?

Defendant-Appellee City of Lansing says “YES”

Plaintiff-Appellant says “NO”.

II.

ON REMAND, A LOWER COURT HAS THE POWER TO TAKE SUCH ACTION AS LAW AND JUSTICE MAY REQUIRE SO LONG AS THE ACTION IS CONSISTENT WITH THE JUDGMENT OF THE APPELLATE COURT. DOES THIS RULE ALLOW FOR THE CIRCUIT COURT ON REMAND TO DECIDE DEFENDANT’S MOTION FOR SUMMARY DISPOSITION ON THE BASIS OF PHOTOGRAPHS AND MEASUREMENTS ALREADY PART OF THE RECORD AND TO RULE WITHOUT ANY FURTHER DISCOVERY BEING CONDUCTED?

Defendant-Appellee City of Lansing says “YES”

Plaintiff-Appellant says “NO”.

COUNTER-STATEMENT OF FACTS

A. Nature of Case

Barbara A. Robinson brings suit complaining of alleged injuries she received on December 4, 2005, when she stepped into a depressed or low-lying area of the city sidewalk adjoining westbound Michigan Avenue in the City of Lansing and fell. Relying upon the provisions of MCL 691.1402, Barbara Robinson charged that the City of Lansing breached its duty under that statute by failing to maintain its sidewalk in reasonable repair and in a condition reasonably safe for public travel. The City raised its governmental immunity as well as the provisions of MCL 691.1402a(2) as bars to Barbara Robinson's suit. The City's position was that, under MCL 691.1402a(2), a discontinuity defect of less than two inches creates a rebuttable inference that a sidewalk is in reasonable repair and that Barbara Robinson could not overcome that rebuttable inference here.

In reliance on its governmental immunity, the City brought a motion for summary disposition under MCR 2.116(C)(7). While the motion was pending, but before it was heard, Barbara Robinson filed a motion to strike MCL 691.1402a as an affirmative defense. Barbara Robinson also opposed the City's motion for summary disposition. By way of an order dated October 10, 2007, the circuit court granted Barbara Robinson's motion to strike. On the same day, the circuit court heard oral arguments on the City's motion for summary disposition, and, on November 8, 2007, entered an order denying the City's request for summary relief.

The City pursued an appeal of right. On March 5, 2009, the Court of Appeals issued its published opinion. It reversed the Ingham County Circuit Court's November 8, 2007 Order and remanded the matter for further proceedings so that the trial court may rule on the remaining issues in the case so as to allow the City to re-file its motion for summary disposition.

Barbara Robinson now seeks leave to appeal. The City opposes that requested relief and urges the Court to peremptorily affirm the Court of Appeals' March 5, 2009 Opinion and, failing that, deny Barbara Robinson's application for leave to appeal.

B. Factual Background

On December 4, 2005, at approximately 1:00 p.m., Barbara Robinson was walking westbound on Michigan Avenue. She was on the sidewalk adjacent to the Lansing Center (Complaint, ¶2). Allegedly, she stepped into a depressed or low-lying area of the sidewalk, lost her balance, tripped when her foot hit a raised, uneven area of brick on the sidewalk, and fell (Complaint, ¶3). Barbara Robinson insisted that the City of Lansing had jurisdiction over the site of her fall, a sidewalk abutting Michigan Avenue, which is a state trunkline highway (Complaint, ¶6).

C. The Instant Litigation

Following her fall, Barbara Robinson commenced this action. In her complaint, she charged the City with failure to maintain its sidewalk in reasonable repair and in a condition reasonably safe for public travel. In particular, she complained that the City

created and/or allowed the depressed or low-lying area to exist; created and/or allowed the raised, uneven brick to exist; and failed to repair the defect (Complaint, ¶10A.-C.)

The City denied any liability to Barbara Robinson. It raised its governmental immunity as well as the provisions of MCL 691.1402a(2) as a bar to the suit. In answering Barbara Robinson's interrogatories and request for production regarding affirmative defenses, the City clarified its position that, under MCL 691.1402a(2), a discontinuity defect of less than two inches creates a rebuttable inference that a sidewalk is in reasonable repair. In support, the City pointed to the photographs provided by Barbara Robinson of the site of her fall. Those revealed the brick area of the sidewalk in reasonable repair and a height difference of less than two inches where she allegedly tripped.¹

On September 4, 2007, the City moved for summary disposition pursuant to MCR 2.116(C)(7). The City premised its right to summary disposition on the fact that it did not breach any duty under MCL 691.1402(1) to keep the sidewalk in question in reasonable repair. More particularly, the City pointed to the photographs of the sidewalk and to the measurements of the height difference in the sidewalk, that being less than two inches. Based on those factors, the City insisted that Ms. Robinson would be unable to present admissible evidence to rebut the inference of reasonable repair provided in MCL 691.1402a(2) for a discontinuity defect of less than two inches. The City

¹ A copy of plaintiff's answers to interrogatories along with 21 color photographs depicting the area of Barbara Robinson's fall was attached as Exhibit 2 to the City's motion for summary disposition. Those photographs are likewise included with this brief as Exhibit A.

emphasized that the raised brick on the sidewalk was approximately one-half inch above the adjacent brick and that, because the brick was continuous, the depression before the uneven bricks could not be a discontinuity defect.

Subsequent to the City's filing of its motion for summary disposition, Barbara Robinson moved to strike MCL 691.1402a as an affirmative defense.² Doing so, she urged that the provisions of MCL 691.1402a were limited in their application to sidewalks next to county highways and did not pertain to sidewalks next to state trunklines.

The City disputed Ms. Robinson's contention that MCL 691.1402a applied only to sidewalks adjacent to county roads. It contended that the statute provided a rebuttable inference of reasonable repair for a discontinuity defect of less than two inches in favor of all municipal corporations for sidewalks adjacent to state trunklines, city streets, and county roads as evidenced in numerous Court of Appeals' opinions as well as the legislative history of 1999 PA 205, which became MCL 691.1402a.

Speaking to the legislative history of MCL 691.1402a, the City asserted that the statute was intended to partially restore the two-inch rule abolished by this Court and that the obvious intent of the legislature was to treat cities, villages, and townships the same

² On page 6 of the transcript of the proceedings of September 19, 2007, Ms. Robinson's counsel sought to justify the timing of the filing of the motion to strike MCL 691.1402a as an affirmative defense. Doing so, Mr. Larkin stated, "[t]echnically, perhaps, I should have given him 21 days notice for this motion . . ." He sought to justify plaintiff's pursuit of the motion on the ground that it raised only a legal issue that had to be decided by the circuit court.

such that it must be said that the provisions of MCL 691.1402a applied to all of those municipal entities.

The circuit court entertained oral arguments on the motion to strike on September 19, 2007. On October 10, 2007, that court signed an order granting plaintiff's motion to strike MCL 691.1402a as an affirmative defense to the complaint. That same day, the circuit court heard oral arguments on the City's motion for summary disposition. It agreed with Barbara Robinson and held that the two-inch rule applied only to city sidewalks adjoining county roads and denied the City's motion for summary disposition. On November 8, 2007, the circuit court entered an order denying the City's motion for summary disposition.

The City timely filed its claim of appeal on November 29, 2007. The Court of Appeals issued a published opinion on March 5, 2009. As part of its discussion of the fundamental principles of statutory construction, the Court reiterated the rule that, in construing a statute, the court must not read into a clear statute anything that is not within the manifest intention of the legislature as derived from the language of the statute itself. In short, if the plain and ordinary meaning of statutory language is clear, judicial construction is neither normally necessary nor permitted.

Applying that rule to the language of MCL 691.1402a, the Court of Appeals found it undisputed that the plain language of MCL 691.1402a(1) applies to delineate a municipal corporation's liability with respect to sidewalks and other installations abutting county highways. The Court also observed that §1402a(3) refers back to §1402a(1) to further delineate the municipal corporation's liability regarding lay person's use of off-

road vehicles. However, as the Court noted, the present dispute centers around determining whether the two-inch rebuttable inference provision of MCL 691.1402a(2), like the terms of MCL 691.1402a(1), was limited to county highways or whether, absent such an express limitation, §1402a(2) extended to sidewalks abutting any public roadway within a public corporation's jurisdiction.

In addressing that issue, the Court of Appeals first noted the absence of any binding case law on the issue of whether §1402a(2) applies only to county highways. The Court instead observed that case law, published and unpublished, simply addressed or applied the rules to sidewalks without describing the nature of the adjacent road. Thus, the Court of Appeals could discern no prevailing rule from those cases that would have mandated a decision one way or the other.

The Court cautioned that there was no need to look beyond the statute to discern the intent of the legislature. By its clear and unambiguous terms, §1402a(1) clearly refers to and applies to county highways. However, §1402a(2) did not contain language about county highways but rather referred to a sidewalk, trailway, crosswalk or other installation outside the improved portion of the highway designed for vehicular travel and had no further language of limitation in subsection (2) relating to such a highway. Finally, the Court observed that the provisions of §1402a(3) referred to a statute, which by its express terms, encompasses all kinds of streets, roads, and highways expressly referring back to the liability imposed in subsection (1).

Focusing upon the absence of any reference to subsection (1) in §1402a(2), the Court of Appeals said that it must accept as intentional the legislature's omission in MCL

691.1402a(2) of any reference to “county highways” or to subsection (1) as the Court could not read any such reference in the plain language of the statute. Based upon that rationale, the Court confirmed the application of the rebuttable inference of MCL 691.1402a(2) to sidewalks along public highways:

Accordingly, we conclude that MCL 691.1402a(2) is not limited in its application to county highways. Rather, it applies to any “sidewalk railway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel,” with the term “highway” therein meaning “any public highway, road or street that is open for public travel.” Thus, MCL 691.1402a(2) applies here and there is a rebuttable inference that the City maintained the sidewalk upon which Robinson tripped in reasonable repair.

(Slip Op, pp 5-6).

Before concluding its opinion, the Court of Appeals spoke to the decision in *Darity v City of Flat Rock*, 2006 WL 397901 (2006). That plaintiff’s decedent was injured when he fell off of his bicycle on a debris-covered sidewalk adjacent to a state trunk line. In defense of the case, the City of Flat Rock argued that, under MCL 691.1402a, cities are liable only for sidewalks adjacent to county highways. The *Darity* court ruled that, because the sidewalk at issue was adjacent to a state trunk line and not a county road, MCL 691.1402a did not govern the action. With *Darity* being an unpublished opinion, the Court of Appeals commented that it had no precedential value and that, in any event, it did not specifically address the language of §1402a(2). The only part of §1402a at issue in *Darity* was subsection (1) which clearly and unambiguously dealt with sidewalks adjacent to county highways. Therefore, the Court of Appeals ruled that any interpretation of MCL 691.1402a(2) that could arguably be obtained from *Darity*

was dicta. That led the Court of Appeals to conclude that the trial court erred to the extent that it relied on *Darity* in denying the City of Lansing's motion and that the trial court should have allowed the City of Lansing to raise the two-inch rule as a defense. Therefore, the Court of Appeals reversed and remanded for further proceedings so that the trial court may rule on the remaining issues in the case in order that the City might re-file its motion for summary disposition.

STATEMENT OF THE STANDARD OF REVIEW

An appellate court reviews a lower court's grant or denial of summary disposition *de novo*, *Groncki v Detroit Edison Co*, 453 Mich 644, 649; 557 NW2d 281 (1996); *Grimes v Dept of Transportation*, 475 Mich 72, 76; 715 NW2d 275 (2006); and *Renny v MDOT*, 478 Mich 490, 495; 734 NW2d 518 (2007). More particularly, a court reviews summary disposition orders under MCR 2.116(C)(7) *de novo*, *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When evaluating motions for summary disposition based on governmental immunity under MCR 2.116(C)(7), a court accepts the complaint and all documentary evidence as true "unless affidavits or other appropriate documents specifically contradict them," *Fane v Detroit Library Comm'n*, 465 Mich 68, 74; 631 NW2d 678 (2001).

A court approaches the task of statutory interpretation by seeking to give effect to the legislature's intent as expressed in the statutory language. See, *Renny, supra*, and *Griffith v State Farm Mutual Automobile Ins Co*, 472 Mich 521, 526; 697 NW2d 895 (2005). When the language of a statute is unambiguous, the legislature's intent is clear and judicial construction is neither necessary nor permitted, *Renny, supra*. Questions of statutory interpretation are also reviewed *de novo* on appeal, *Romain v Frankenmuth Mutual Ins Co*, 483 Mich 18; 762 NW2d 911 (2009) and *Daimler-Chrysler Corp v State Tax Comm'n*, 482 Mich 220; 753 NW2d 605 (2008), citing *City of Taylor v Detroit Edison Co*, 475 Mich 109, 115; 715 NW2d 28 (2006).

ARGUMENT I

NOTHING IN THE LANGUAGE OF MCL 691.1402A(2) CONFINES THE OPERATION OF THE TWO-INCH RULE TO SIDEWALKS ADJACENT TO COUNTY HIGHWAYS AND THUS THE COURT PROPERLY DENIES PLAINTIFF’S REQUESTED RELIEF.

A. The Statutory Scheme

A governmental agency is shielded from tort liability when it is engaged in the exercise or discharge of a governmental function and its conduct does not fall within one of the statutory exceptions to immunity, MCL 691.1407(1).³ Pursuant to the highway exception to governmental immunity found at MCL 691.1402(1), a person who sustains bodily injury or property damage “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”.⁴ The definition of a “highway” is found at MCL 691.1401(e). There, a

³ MCL 691.1407(1) states that:

Except as otherwise provided in this Act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this Act, this Act does not modify or restrict the immunity of the State from tort liability as it existed before July 1, 1965, which immunity is affirmed.

⁴ MCL 691.1402 states in pertinent part that:

(1) 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 a failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe

“highway” means “a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway”. Per MCL 691.1402(1), the duty to repair and maintain by the state and county road commissions 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”.

B. MCL 691.1402a

1. The Language

The proper disposition of this appeal rests upon the correct interpretation and application of the provisions of MCL 691.1402a. That statute reads as follows:

(1) Except as otherwise provided by this section, 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. This subsection does not prevent or limit a municipal corporation’s liability if both of the following are true:

(a) At least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in the sidewalk, trailway, crosswalk, or other installation

and fit for travel may recover the damages suffered by him or her from the governmental agency. . . . The duty of the state and the county road commissions to repair and maintain highways, and the liability for the duty, 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. . . .

outside of the improved portion of the highway designed for vehicular travel.

(b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.

(2) 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 designed for vehicular travel in reasonable repair.

(3) A municipal corporation's liability under subsection (1) is limited by Section 81131 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.81131.

2. The Purpose of MCL 691.1402a

MCL 691.1402a took effect on December 21, 1999. It creates no liability for municipalities that would otherwise not exist, *Carr v Lansing*, 259 Mich App 376; 674 NW2d 168 (2004). It is an exception to MCL 691.1402(1), *Carr, supra*, at pp 380-381. As the *Carr* court observed, the obvious purpose of MCL 691.1402a(1) is to limit the liability that municipalities would otherwise face to maintain sidewalks, trailways, crosswalks, or other installations by virtue of the exclusion of municipalities from the fourth sentence of MCL 691.1402(1), which limits state and county liability to the improved portion of the highway designed for vehicular travel. *Id.* In short, the goal of MCL 691.1402a(1) is to clarify that a municipal corporation has no duty to repair or maintain portions of a county highway outside the improved portion of the highway unless certain requirements are met.

3. The Operation of MCL 691.1402a

There are both intrinsic aids and extrinsic aids which assist in the statutory construction process. Intrinsic aids are those which derive their meaning from the internal structure of the text, 2 Sutherland, *Statutory Construction*, §45:14 (7th Ed). Extrinsic aids, on the other hand, consist of information which comprises the background of the text, such as legislative history and related statutes, *id.*

Resorting to a section by section interpretation of MCL 691.1402a, it is clear that the sections comprising MCL 691.1402a stand alone and no other section or part may be applied to create doubt, *Sutherland, supra*, at §47.2. A court is bound to read a statute in such a way as to pay attention to the statute's internal structure and to the functional relation between the parts and the whole, *Shields v Shell Oil Co*, 237 Mich App 682; 604 NW2d 719 (1999), judgment rev'd on other gds, 434 Mich 940; 621 NW2d 215 (2000); *Lamotte v Miller's Nat'l Ins Co*, 180 Mich App 271; 446 NW2d 632 (1989), rev'd on other gds, 438 Mich 1; 475 NW2d 13 (1991); and *Transamerica Ins Corp of America v Buckley*, 169 Mich App 540; 426 NW2d 696 (1988). Because MCL 691.1402a deals with distinct subjects, it is divided into three sections.

As to the first section of MCL 691.1402, the court in *Nawrocki v Macomb County Road Comm'n*, 463 Mich 143; 615 NW2d 702 (2000), acknowledged the gap that exists between the improved portion of the highway designed for vehicular travel and the broader notion of "a highway" as that is defined at MCL 691.1401(e). It said about MCL 691.1402a that it seeks to fill that gap, at least with respect to county highways. Stated otherwise, by its plain terms, MCL 691.1402a(1) applies only to portions of a "county

highway outside the improved portion of a highway designed for vehicular travel, *Carr, supra*, at p 381. Thus, in its first part, MCL 691.1402a provides that a municipality does not have a duty to maintain the portion of a county highway outside the improved portion of the highway designed for vehicular travel unless it knew or should have known of the defect and the defect is a proximate cause of the plaintiff's injury.

It is the second subsection of MCL 691.1402a that is at issue here. MCL 691.1402a(2) creates a rebuttable inference of reasonable repair by a municipal corporation where a discontinuity defect is less than two inches. Nothing in the plain language of MCL 691.1402a(2) limits the two-inch rule to sidewalks adjoining county highways. In fact, based upon an examination of the structure of MCL 691.1402a, along with application of rules of statutory construction, it is the City's position that, with the passage of MCL 691.1402a(2), a municipal corporation may avail itself of the two-inch rule as to any "highway".

The third and final matter included within the scope of MCL 691.1402a relates to a municipal corporation's liability under the Natural Resources and Environmental Protection Act. A reading of MCL 691.1402a thus reveals that the statute covers three separate and distinct areas. It is really a compendium of various facets of highway liability.

The Court of Appeals found no need to look beyond the terms of MCL 691.1401a to discern the intent of the legislature. It observed that §1402a(1) clearly referred to and applied to county highways. On the other hand, §1402a(2) contained no language about county highways but rather generally referred to sidewalks, trailways, crosswalks, or

other installations outside the improved portion of the highway designed for vehicular travel and there was no further language of limitation in subsection (2) relating to such a county highway. For its part, §1402a(3) refers to a statute which, by its express terms, encompasses all kinds of streets, roads, and highways and expressly refers this back to those liabilities imposed under subsection (1).

Moreover, §1402a(2) lacks any reference to subsection (1) of the statute.

Therefore, and properly so, the Court of Appeals was bound to accept as intentional the legislature's omission in subsection (2) of any reference to "county highway" or to subsection (1) and a court cannot read any such references into the plain language of the statute. That being the case, the Court of Appeals properly concluded that subsection (2) of MCL 691.1402a allows municipal corporations to rely upon the rebuttable inference of reasonable care created by a discontinuity defect of two inches or less regardless of whether the sidewalk is adjacent to a county highway:

Accordingly, we conclude that MCL 691.1402a(2) is not limited in its application to county highways. Rather it applies to any "sidewalk, railway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel", with the term "highway" therein meaning "any public highway, road or street that is open for public travel." Thus, MCL 691.1402a(2) applies here and there is rebuttable inference that the City maintained the sidewalk upon which Robinson tripped in reasonable repair.

In this reading of MCL 691.1402a, the Court of Appeals treats the statute in such a way as to pay attention to the statute's internal structure and to the functional relation between the parts and the whole, *Transamerica Ins Corp of America v Buckley*, 169 Mich App 540; 426 NW2d 696 (1988). The starting point in statutory construction is to read

and to examine the text of a statute and to draw inferences concerning the meaning thereof from its composition and structure. The court in *Regents of Univ of Michigan v Washtenaw County Coalition Against Apartheid*, 97 Mich App 532; 296 NW2d 94 (1980) dealt with the provisions of MCL 15.265, part of Michigan's Open Meetings Act. The statutory provision contained five subsections. The defendants argued that because subsection (5) did not expressly permit a change of location of a recessed meeting, it was forbidden and that the change of location that occurred in that case converted the meeting from "recessed" to "rescheduled" under the Act.

The court found that principles of statutory construction did not support the defendant's position. Each of the five subsections of MCL 15.265 dealt with a distinct topic and did not require interpolation of language from the other clearly independent provisions except when expressly referred to. Further, the court found that the language of subsection (5), which pertained to recessed meetings, was clear and unambiguous. Thus, the plain meaning controlled. The court found no support for the position advanced by the defendants that relocation of a meeting changes its categorization from "recessed" to "rescheduled".

The distinction between a subsection and an independent section of a statute is that, by its nature, the subsection is placed within a context and thereby limited to the degree that an independent section is not. See, *Gibbons v Newcastle Area School District*, 543 A2d 1087 (PA 1988) and *Zoll & Branch, PC v Asay*, 932 P2d 592 (Utah, 1997). The real sense of the legislature is found in the terms and arrangement of a statute, *In re Perry*, 157 F Supp 910 (WD Mich, 1958). In addition, one of the time-

honored maxims of statutory construction is “expressio unius exclusio est alterius”. That means that inclusion by specific mention excludes what is not mentioned. That is to say that express mention in a statute of one thing implies the exclusion of other similar things and puts an end to or renders ineffective that which is implied, *Sebewaing Industries, Inc v Sebewaing Village*, 337 Mich 530; 60 NW2d 444 (1953) and *In re Estate of Vellenga*, 120 Mich App 699; 327 NW2d 340 (1982). That maxim is applicable here.

In particular, MCL 691.1402a(1) refers to a “county highway”. But, MCL 691.1402a(2) offers no such limiting language and speaks only of a “highway”. That means that the provisions of subsection (1) apply to a municipal corporation’s duty insofar as a county highway is concerned, whereas the two-inch rule found in subsection (2) applies to the condition of all sidewalks, trailways, crosswalks, or other installations outside the improved portion of “the highway”, there being no inclusion of the modifier “county” as to any of those. The only explanation is that the legislature intended that the provisions of subsection (1) apply only to county highways, while the provisions of subsection (2) are not so limited in scope. The “two inch” rule applies to all public highways.

As further support for its position, the City of Lansing refers to the First Analysis of House Bill 4010 [which is codified at MCL 691.1402a] conducted by the House Legislative Analysis Section and dated June 2, 1999. Speaking about House Bill 4010 and describing the arguments advanced in favor of the legislation, the Analysis states as follows:

The bill would provide protection to townships, cities, and villages against “slip and fall” and similar lawsuits on sidewalks, bike paths, trailways, and similar installations along the side of county highways. It limits liability to instances in which the municipality knew or, in the exercise of reasonable diligence, should have known of the defect at least 30 days before the occurrence of an injury, death, or damage, and where the defect was a proximate cause. Also, the bill would partially restore what is commonly referred to as the “two-inch rule” (abolished by the State Supreme Court in 1972). It would specify that a “discontinuity defect” of less than two inches would create a rebuttable inference that the municipality maintained the sidewalk, crosswalk, etc., in reasonable repair. The bill treats townships, cities, and villages alike. (emphasis in original)

This Analysis provides no basis to conclude that the two-inch rule was intended to apply only to sidewalks adjoining county highways.⁵

C. The Unpublished Court of Appeals’ *Darity* Decision is not Applicable

Properly so, the Court of Appeals rejected Barbara Robinson’s reliance upon the case of *Darity v Flat Rock*, Ct of Apps Docket No. 256481 (2/21/06) (Tr, 9/19/07, p 10). The *Darity* plaintiff’s decedent was injured when he fell off his bicycle on a debris-covered sidewalk adjacent to a state trunk line. In defense of the case, the city argued that under MCL 691.1402a, the city was reliable only for sidewalks adjacent to county highways. Concerning *Darity*, the Court of Appeals noted that, as an unpublished opinion, it had no precedential value and that, although a court may rely on unpublished

⁵ A like conclusion results from the fact that the same language is found in the Second Analysis conducted by the House Legislative Analysis Section on January 4, 2000. In its analysis of House Bill 4010, the Senate Fiscal Agency stated as follows:

A discontinuity defect of less than two inches would create a rebuttable inference that the municipal corporation maintained in reasonable repair, the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.

cases to the extent that they present persuasive reasoning on an issue, they are not binding authorities. Second, the Court of Appeals found that *Darity* did not specifically address the language of §1402a(2) as the only part of §1402a that was at issue in *Darity* was subsection (1), which clearly and unambiguously deals only with sidewalks adjacent to county highways. Speaking to the *Darity* decision as a whole, the Court of Appeals found that any interpretation of MCL 691.1402a(2) that could arguably be obtained from *Darity* was dicta. Furthermore, the Court of Appeals found that the *Darity* court's conclusion that §1402a did not absolve the City of Flat Rock of liability was limited to the facts of that case and any broader rule intended by the *Darity* panel was dicta. The Court of Appeals in this case correctly concluded that the trial court erred to the extent that it relied on *Darity* in denying the City of Lansing's motion for summary disposition and that the trial court should have allowed the City of Lansing to raise the two-inch rule as a defense.

Contrary to *Darity*, the issue here is not the operation of MCL 691.1402a(1) but rather the working of MCL 691.1402a(2). That was formerly known as the "two-inch rule". The statutory formulation followed the Court's rejection of the two inch rule in *Glancy v City of Roseville*, 457 Mich 560; 577 NW2d 897 (1998).

The *Glancy* court described the two-inch rule as a bright-line rule stating that defects of two-inches or less constitute "reasonable repair" as a matter of law. Citing *Weisse v Detroit*, 105 Mich 482, 483; 63 NW 423 (1895), the *Glancy* court said that the roots of the two-inch rule could be traced to *Weisse*, which involved injuries allegedly rising out of a defective crosswalk. The *Weisse* court had noted that, in 1887, the

legislature amended the statute imposing a duty on municipalities to maintain highways and that it required “reasonable repair” rather than “good repair” and imposed a duty that streets be “reasonably safe”, not absolutely safe. The *Weisse* court held that the street at issue was reasonably safe despite the alleged defect of approximately two inches and that the trial court should have given the defendant’s request to charge “as a matter of law that no such defect existed as authorized to recovery”.

This Court abolished the two-inch rule in *Rule v Bay City*, 387 Mich 281; 195 NW2d 849 (1972). In doing so, the Court agreed that the two-inch rule had gradually hardened into a rule of law to the effect that, where a defect in a walk is less than two inches in depth, the walk would be considered to be safe and the city would be free from negligence. As part of its discussion, the *Glancy* court noted that tort actions against governmental agencies generally raise two separate issues. The first is whether the plaintiff has pled a cause in avoidance of governmental immunity. The second is whether the plaintiff can establish the elements of a negligence action. The question of whether a defect is over two inches bears on the issue of negligence, i.e., whether the municipality failed to keep the sidewalk in “reasonable repair”. Under the two-inch rule, a plaintiff is barred from recovery because he or she would be unable to prove actionable negligence, i.e., lack of reasonable repair, rather than because of governmental immunity for defects of two inches or less. Thus, the two-inch rule was not a rule of common law immunity but rather was a common law threshold for negligence based on the reasonable repair standard of care of the statutory highway exception.

The *Glancy* court left it to the legislature as being better positioned than the judiciary to consider policy arguments and to make policy choices. While the judiciary has authority to formulate policy regarding common law issues, which could include adopting a bright-line rule, it may not adopt rules that change statutes on the basis of policy arguments. The judiciary's role in determining the policy behind the statute is to attempt to determine the policy choice the legislature made.

The *Glancy* court held that the amendment to §1402(1) did not resuscitate “the two-inch rule after its abolition in *Rule, Glancy, supra*, at p 589. Rather than eliminating all sidewalk injury claims arising from the defects of less than two inches, and instead of creating a “rebuttable presumption” that defects of less than two inches remain consistent with reasonable maintenance, the legislature utilized the catchall term “rebuttable inference”.

MCL 691.1402a(1) does not create a cause of action against a municipality for a defect in a highway or an exception to governmental immunity but instead creates an exception to the duty to maintain highways, including sidewalks, imposed by MCL 691.1402, *Johnson-McIntosh v Detroit*, 266 Mich App 318, 323; 701 NW2d 179 (2005) [“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.”] Accordingly, it is not reasonable for a plaintiff to contend that suit is brought under MCL 691.1402a inasmuch as that statutory provision does not create any cause of action. Rather, a plaintiff's complaint alleging a violation of the defendant's statutory duty to maintain the sidewalk at issue can only be reasonably considered as having been

brought under MCL 691.1402 which creates the relevant statutory duty for a governmental agency to maintain sidewalks.

ARGUMENT II

**PLAINTIFF CANNOT SUCCEED IN HER EFFORTS
TO HAVE THIS COURT CONSTRAIN THE CIRCUIT
COURT ON REMAND TO PROCEED IN THE
FASHION PRESCRIBED BY PLAINTIFF AND THUS
THE COURT PROPERLY DENIES PLAINTIFF'S
REQUESTED RELIEF.**

Anticipating the proceedings on remand, Barbara Robinson seeks to constrain the circuit court by having this Court dictate that the circuit court must allow discovery to be conducted by Barbara Robinson on remand as to the inference of reasonable repair under MCL 691.1402a(2). In short, Barbara Robinson seeks a ruling from this Court that, in and of themselves, the numerous photographs and measurements which the City of Lansing supplied the circuit court in conjunction with its motion filings are legally insufficient to satisfy the rebuttable inference of reasonable care established in MCL 691.1402a(2). Barbara Robinson makes this argument notwithstanding her acknowledgment that “nothing obligated the City of Lansing to wait until discovery was completed to bring a summary disposition motion . . .” (Pltf’s App for Lv to Appeal, p 13). She aims to prevent the circuit court from ruling on a motion for summary disposition based upon photographs alone and urges that the parties be required to expend time and resources to come forth with evidence other than the photographs sufficient to sustain their respective positions.

The power of a lower court on remand from a reviewing court is to take such action as law and justice may require as long as the action is not inconsistent with the judgment of the appellate court, *Sokel v Nickoli*, 356 Mich 460; 97 NW2d 1 (1959). If no

directions have been given by the appellate court, the lower court has the ordinary power of respecting a judgment as it would have if the judgment had been entered by itself in the first instance, *Garwood v Burton*, 274 Mich 219; 264 NW 349 (1936). A remand for a specific purpose does not prevent the court below from taking any action which justice requires so long as that action is not inconsistent with the judgment of the remanding tribunal, *Taines v Munson*, 42 Mich App 256; 201 NW2d 685 (1972). Remand for a determination on the issue of individual negligence does not preclude a trial court from entering summary judgment on such an issue, *Berger v Mead*, 127 Mich App 209; 338 NW2d 919 (1983). These authorities underscore the lack of merit in Barbara Robinson's position that she is somehow entitled to a ruling from this Court mandating the manner in which the City brings its motion for summary disposition in limiting the power of the circuit court to consider their motion under the terms and conditions dictated by Barbara Robinson. As long as the City's motion meets the requirements of MCR 2.116(C)(7), even if that means only submitting the photographs and measurements already part of the lower court record, summary disposition is properly awarded to the City of Lansing.

In *Gadigian v City of Taylor*, 282 Mich App 179; ____ NW2d ____ (2008), the court spoke to the meaning of a rebuttable inference vis-à-vis a rebuttable presumption. Citing *Black's Law Dictionary* (8th Ed), that court defined an inference as "a conclusion reached by considering other facts and deducing a logical consequence from them." On the other hand, in a civil case, a presumption "imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption. . .", MRE 301.

The *Gadigian* court further explained that an examination of the doctrine of res ipsa loquitur, which involves the use of inferences rather than of presumption, illustrates the important differences between the two legal concepts. The doctrine of res ipsa loquitur entitles a plaintiff to a permissible inference of negligence from circumstantial evidence. Once the plaintiff establishes an inference of negligence, the defendant may attempt to explain away or avoid the inference.

Applying those rules to the facts in the case at bar, the City established an inference of reasonable care by and through its introduction of photographs showing a discrepancy of less than two inches in the subject sidewalk.

The rebuttable inference described in MCL 691.1402a(2) allows the trier of fact to conclude that a municipality has properly maintained its sidewalk when “a discontinuity defect of less than two inches exists, but it does not compel the trier of fact to do so.

Concerning the impact of those rules upon the rebuttable inference found in MCL 691.1402a(2), the *Gadigian* court found as follows:

The statute at issue in this case provides that a “discontinuity defect of less than two inches” “creates a rebuttable inference of reasonable repair”. These words mean that a municipal corporation may defend a negligence claim by simply relying on the statutory language. If the plaintiff offers “contrary evidence,” as in any other case involving an inference, “the trier weighs all the evidence” to reach a verdict . . . if the plaintiff fails to offer contrary evidence, the inference results in some predisposition or a directed verdict for the municipality.

Thus, the City of Lansing may defend the negligence claim by simply relying on the statutory language and the photographs and measurements it has already furnished to the circuit court. Those suffice to sustain the statutory inference that the City’s sidewalk was

in reasonable repair at the time of Barbara Robinson's fall. The City has provided evidence of actual measurements revealing the depth of the alleged discontinuity. Actual measurements are preferred and control as a matter of law over estimates, *Baldinger v ANR Co*, 372 Mich 685, 691 fn2; 127 NW2d 837 (1964). The *Baldinger* case stands for the proposition that guesses or estimates of a plaintiff and her witness have no weight as against the positive testimony of actual measurements. That being the situation, the circuit court may, in the absence of any further discovery, find no legitimate issue of material fact that the discontinuity was less than two inches and that a rebuttable inference of reasonable repair existed.

The judiciary is not the constitutional venue for debate over the legislature's policy choices. Rather, the judiciary's duty is to interpret the statute as written, not to rework the statute, *Elezovic v Ford Motor Co*, 472 Mich 408; 697 NW2d 851 (2005). That court also made the point that the policy behind a statute cannot prevail over what the text actually says; the text must prevail. A court must consistently look to enforce the plain language of statutes rather than some imagined legislative purpose supposedly lurking behind the statute, *People v Houston*, 473 Mich 399; 702 NW2d 530 (2005).

RELIEF

WHEREFORE, defendant-appellee the City of Lansing respectfully requests that the Court peremptorily affirm the Court of Appeals' March 5, 2009 Opinion and, failing that, deny Barbara Robinson's application for leave to appeal.

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