

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.

138669  
OFAE'S SUPP

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

PROOF OF SERVICE

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## INTRODUCTION

On numerous occasions over the course of its history, the Court has opined on matters of statutory construction. As a result, the State's jurisprudence is replete with case law authority articulating the rules to be followed in interpreting and in applying statutes. In fact, much of the Court's decisionmaking in the area of statutory construction has occurred in conjunction with the legislation comprising Michigan's statutory governmental immunity scheme, MCL 691.1401, *et seq.* As a result, the rules controlling the outcome of this case are well established and need only be applied by the Court to the facts and circumstances presented here. The straightforward application of fundamental principles of statutory construction concerning the admittedly clear and unambiguous language of MCL 691.1402a will lead to the proper result. That is a peremptory affirmance of the court of appeals' opinion [*Robinson v Lansing*, 282 Mich App 610; 765 NW2d 25 (2009)] finding that the two-inch rule applies to all sidewalks as to which municipalities have a duty to repair and maintain. Failing that, the City asks that the Court deny Barbara Robinson's application for leave to appeal. Barbara Robinson simply cannot make the showing necessary to warrant the Court's full review of the matter, MCR 7.302(B).

The principal issue before the Court is whether the two-inch rule, which was reintroduced in Michigan in 1999 PA 205 as MCL 691.1402a(2), is available to Michigan municipal corporations in defense of defective sidewalk claims, no matter which governmental entity has jurisdiction over the adjoining highway. For her part, Barbara

Robinson would have the Court hold that, since MCL 691.1402a(1) references only county highways, the two-inch rule found in MCL 691.1402a(2) is likewise only viable when a defective sidewalk adjoins a county highway. The City of Lansing disagrees. Invoking well-settled rules of statutory construction, the City maintains that the rebuttable inference of reasonable care arising from the presence of a discontinuity defect of two inches or less in a sidewalk applies to sidewalks bordering state trunklines, county highways, and city streets alike. Nothing in the clear and plain language of §1402a(2) counsels to the contrary.

The two inch rule embodied in MCL 691.1402a(2) was a prompt response by the Michigan legislature to the Court's rejection of the two inch rule in *Glancy v Roseville*, 457 Mich 580; 577 NW2d 897 (1998). Once the *Glancy* Court signaled its rejection of the common law two inch rule, the legislature sprang into action. The legislature passed MCL 691.1402a(2) effective 12/1/99 and there, without any limitation on the invocation of the defense, provided for a rebuttable inference of reasonable care in those instances when a discontinuity defect in a sidewalk is less than two inches. Amongst other things, the two inch rule spares municipalities from being required to keep sidewalks within their jurisdiction as smooth as glass. The statutory two inch rule also evidences the legislature's intention that minor imperfections in a sidewalk may not be actionable. Such an approach is one that accounts for the ever-changing weather conditions in Michigan. Depending on the state of the weather, sidewalks routinely move and slabs of sidewalks rise and sink depending on the state of the weather. Any resulting sidewalk differential of less than two inches shall result in a rebuttable inference of reasonable care

on the part of any municipal corporation. Further, in these difficult economic times, municipalities do not need additional lawsuits presenting yet another drain on their already dwindling resources. Thus, municipal corporations are entitled to the same protection from liability under the two-inch rule whether the sidewalk is adjacent to a state, county or municipal highway.

The second issue Barbara Robinson presents to the Court is a procedural one. Specifically, Ms. Robinson looks to the Court to give direction to the circuit court as to the proper manner of procedurally handling two-inch rule cases. Barbara Robinson raises numerous facets of the two-inch rule which she anticipates may cause some challenges to courts in highlighting the two-inch rule of MCL 691.1402a(2). But she does so prematurely. By urging the Court to hold that she must be allowed to conduct some discovery on remand, Barbara Robinson invites the Court to dictate the manner in which the case will be tried, if at all. The number and type of proofs are best left to the litigants and review by this Court must await the development of a full record.

## ARGUMENT I

### THE CITY OF LANSING PROPERLY INVOKES THE PROVISIONS OF MCL 691.1402a(2) IN DEFENSE OF PLAINTIFF'S DEFECTIVE SIDEWALK CLAIM.

In the early British decision in *Attorney General v Sillem*, 2 H and C 431, 159, Eng Rep 178 (1864), the court offered the following analysis for use in construing statutes:

To discover the true construction of any particular clause of a statute, the first thing to be attended to, no doubt, is the actual language of the clause itself, as introduced by the preamble; second, the words or expressions which obviously are by design omitted; third, the connection of the clause with other clauses in the same statute, and the conclusions which on comparison with other clauses, may reasonably and obviously be drawn . . . If the comparison of one clause with the rest of the statute makes a certain proposition clear and undoubted the act must be construed accordingly and ought to be so construed as to make it a consistent whole . . . If after all that that cannot be done, the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail.

Adherence to that time-honored approach compels the conclusion here that the court of appeals properly reversed and remanded the instant case to the trial court for further proceedings, including the City's pursuit of a motion for summary disposition.

#### **A. The Actual Language of MCL 691.1402a**

MCL 691.1402a 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 or 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 a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.<sup>1</sup>
  - (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 §81131 of the Natural Resources and Environmental Protection Act, 1994 PA 451, MCL 324.81131.<sup>2</sup>

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<sup>1</sup> MCL 691.1401a defines a "municipal corporation" to mean "a city, village, or township or a combination of two or more of these when acting jointly".

<sup>2</sup> MCL 324.81131 provides that

A municipality is immune from tort liability for injuries or damages sustained by any person arising in any way out of the operation or use of an ORV on maintained or unmaintained roads, streets, shoulders, and rights-of-way over which . . . the municipality has jurisdiction. The immunity provided by this subsection does not apply to actions that constitute gross negligence. As used in this subsection, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

MCL 691.1402a is an exception to MCL 691.1402(1).<sup>3</sup> The obvious purpose of MCL 691.1402a is to limit the liability that municipalities 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. In particular, §1402a(1) delineates a municipal corporation's liability with respect to sidewalks abutting county highways, *Robinson, supra*, at p 616. §1402a(2) limits the liability of municipal corporations by adopting the two-inch rule in statutory form and by creating a rebuttable inference of reasonable care on the part of municipal corporations for discontinuity defects in sidewalks, trailways, crosswalks, or other installations outside the improved portion of the highway designed for vehicular travel of less than two inches. Finally, §1402a(3) explicitly limits the liability of municipalities to acts of gross negligence as to persons operating or using an ORV on roads, streets, shoulders and right-of-way over which the municipality has jurisdiction.

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<sup>3</sup> MCL 691.1402(1) reads in pertinent part as follows:

(1) Except as otherwise provided in §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 a governmental agency. . . . The duty of the State and the county road commission is to repair and maintain highways, and the liability for that 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 the improved portion of the highway designed for vehicular travel. . . .

The court in *Carr v Lansing*, 259 Mich App 376; 674 NW2d 168 (2004) found it clear that MCL 691.1402a creates no liability for municipalities that would not otherwise exist. *Id.* at p 380. The *Carr* court also ruled that, by its plain terms, MCL 691.1402a(1) applies only to that portion of a county highway outside the improved portion of the highway designed for vehicular travel.

While MCL 691.1402a(1) clearly refers to and applies to county highways, MCL 691.1402a(2) does not contain “county highway” language. Rather, it mentions sidewalks, trailways, crosswalks, or other installations outside of the improved portion of the highway designed for vehicular travel and there is no qualifying language of limitation in MCL 691.1402a(2) relating to a county highway. In the absence of any mention of “county highway” in MCL 691.1402a(2), it cannot be said that the two inch rule is limited in its applications to sidewalks along county highways.

Since it is clear that §1402a is not a liability-creating statute, the City of Lansing should have full use of the two-inch rule defense. To deprive the City of the two-inch rule defense as to state highways and other public highways would be to increase its liability. That is contrary to the legislative intent underlying MCL 691.1402a.

**B. Words or Expressions Omitted by Design**

Properly so, the court of appeals accepted as intentional the legislature’s omission in MCL 691.1402a(2) of any reference to “county highways” or to MCL 691.1402a(1). Fundamental rules of statutory construction dictate that, when the legislature has employed a term in one place and excluded it in another, it should not be implied where excluded, *Leisnoi, Inc v Stratman*, 154 F3d 1062 (9<sup>th</sup> Cir, 1988) and *Universal*

*Construction Co, Inc v Occupational Safety & Health Review Comm'n*, 182 F3d 726 (10<sup>th</sup> Cir, 1999). In construing a statute, a court must presume that every word in a statute has been used for some purpose and that every word excluded was excluded for a purpose, *Walker v City of Georgetown*, 86 SW3d 249 (Tex, 2002).

That court reiterated the point that, absent doubt as to the legislative intent, a court will not read into a statute a prohibition that is not there. The *Walker* plaintiffs were potential proprietors of batting cages in a driving range complex. They brought an action against the city for declaratory and injunctive relief and damages based upon the city's alleged failure to comply with certain statutory and constitutional provisions before entering into a lease with a private company to construct a batting cage facility on city parkland. The plaintiffs insisted that the city was required to post notice and hold a hearing before leasing the park land in question. The city responded that the notice requirement applied only when a political subdivision was contemplating a change in use of public park land. The plaintiffs replied that the lease entailed a change in use because the batting cages would convert public land into a commercial facility operated by a private entity. In setting out to ascertain the meaning of the controlling Texas statutes, the court observed that, in construing a statute, a principal aim is to give effect to the legislature's intent.<sup>4</sup> It also clarified that it considered the plain and common meaning of

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<sup>4</sup> The *Walker* plaintiffs argued that the city failed to comply with certain sections of the local government code. For the plaintiffs to prevail, it was incumbent upon the court to find that the sections of the government code applied to a lease of public land. In pertinent part, those sections read as follows:

a statute's words and examined the entire statute, not only the disputed sections.

Furthermore, the court was guided by the rule that every word in the statute has been used for some purpose and that every word excluded was excluded for a purpose, citing *Renaissance Park v Davila*, 27 SW3d 252, 256 (Tex, 2000).

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§253.001. The Sale of Parkland, the Municipal Building Site, or Abandoned Railway.

- (a) Except as provided by Subsection (b), the governing body of the municipality may sell and convey land or an interest in land that the municipality owns, holds, or claims as a public square, park, or site for the city hall or other municipal building that is an abandoned part of the street or alley. A sale under this section may include the improvements on the property.
- (b) Land owned, held, or claimed as a public square or park may not be sold unless the issue of the sale is submitted to the qualified voters of the municipality at an election and is approved by a majority of the votes received at the election; provided, however, this provision shall not apply to the sale of land or right-of-way for drainage purposes to a district, county, or corporation acting on behalf of a county or district.

\* \* \*

§272.001(a) of the local government code provided that:

(a) Except for the types of land and interest covered by Subsection (b), (g), (h), (i), or (j), and except as provided by Section 253.008, before land owned by a political subdivision of a state may be sold or exchanged for other land, notice to the general public of the offer of the land for sale or exchange must be published in a newspaper of general circulation and neither the county in which the land is located or, if there is no such newspaper, in an adjoining county. The notice must include a description of the land, including its location, and the procedure by which sealed bids to purchase land or offers to exchange the land may be submitted. The notice must be published on two separate dates and the sale or exchange may not be made until after the 14<sup>th</sup> day after the date of the second publication.

The plain language of §253.001 indicates that the legislature intended that only the sale of public park land be subject to the election requirements outlined in subsection (b). Nowhere in subsection (b) does the term “lease” appear, or any other term of exchange aside from the term “sale”. As the City points out, the fact that the term “lease” appears elsewhere in Chapter 253 of the local government code indicates that when the legislature intended for a provision to apply to a lease, it said so.

However, subsection (a) simply authorizes the municipality to sell and convey land or interest in land and certain types of properties, including parks. *Id.* Subsection (b) restricts the general grant of authority by requiring an election when the municipality contemplates the sale of such property. *Id.* As the legislature intended for the election requirements of subsection (b) to apply to a “lease” of an “interest in land” it could have so provided in the statute.

86 SW3d at 257.

Michigan has also embraced the rule that matters excluded from a statute are intended to be excluded. In *Faircloth v Family Independence Agency*, 232 Mich App 391; 591 NW2d 314 (1998), the court observed that appellate courts eschew the insertion of words in statutes unless necessary to give intelligible meaning or to prevent absurdity without regard to the court’s own estimate of the wisdom of the legislation. See also, *Cherry Growers, Inc v Michigan Processing Apple Growers, Inc*, 240 Mich App 153; 610 NW2d 613 (2000). In that case, the Agricultural Marketing and Bargaining Board (AMBB) sought to compel arbitration before a joint settlement committee with the agricultural committee processor to establish minimum prices and terms for purchase of process apples. The issue of whether the plaintiff was subject to arbitration rested upon a determination of whether the plaintiff was an “association” as defined in §2 of the governing statute. The manner in which the court resolved this issue attests to the

validity of the City of Lansing's position in this case. The *Cherry Growers* court found that the omission of words from the statute at issue was intentional:

The definition of an association under §2 of the AMBA does not require that the associate meet the requirements under §7. Had the legislature intended a one-number-one-vote requirement in the §2 definition, it certainly could have expressly set forth its intent, as it did in §7, for an association seeking accreditation. Provisions of a statute must be read in the context of an entire statute so as to produce a harmonious and consistent whole. *Weems v Chrysler Corp*, 448 Mich 679, 699-700, 533 NW2d 287 (1995). The omission of a provision in one part of a statute, which is included elsewhere in the statute, should be construed as intentional. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993). Under the plain language of the AMBA, an association need not meet the one-number-one-vote requirement unless it is seeking the accreditation under §7.

See also, 2A Sutherland, *Statutory Construction* §§46:5, 46:6 (7<sup>th</sup> Ed). There the Authors reiterate the general rule that words excluded from a statute must be presumed to have been excluded for a purpose. Courts should generally not speculate about the legislature's intent beyond the words actually used in the statute, *In re MCI*, 460 Mich 396, 414-415; 596 NW2d 164 (1999). Thus, a court properly assumes that an omission was intentional, *Cherry Growers, Inc, supra*. Citing *Cherry Growers, supra*, the court in *Village of Holly v Holly Twp*, 267 Mich App 461; 705 NW2d 532 (2005) held that the omission of a provision in one part of a statute which was included elsewhere in the statute should be construed as intentional. In the confines of the facts before it, the *Village of Holly* court said that it could not, under the guise of statutory interpretation, give an option to taxing jurisdictions at the TIF or development plan stage when the

legislature had not provided for any. A court should not include in a statute provisions that the legislature has not included.

Adherence to these rules underscores the propriety of the court of appeals' holding that the two-inch rebuttable inference provision of MCL 691.1402a(2) extends to sidewalks abutting any public roadway within a municipal corporation's jurisdiction and, unlike the provisions of MCL 691.1402a(1), is not limited to county highways. Although §1402a(1) clearly mentions and applies to county highways, MCL 691.1402a(2) does not contain similar restrictive language. It refers to sidewalks, trailways, crosswalks or other installations outside the improved portion of the highway designed for vehicular travel. In accord with the above cited rules, the court of appeals properly accepted as intentional, the omission in §1402a(2) of any reference to "county highways" or to subsection (1).

Any argument that the court of appeals' opinion here merely serves to resurrect the two-inch rule abandoned by the court in *Glancy, supra*, is just wrong. The clear and unambiguous language of MCL 691.1402a(2) provides that the existence of a discontinuity defect of less than two inches raises a rebuttable inference of reasonable care by the responsible municipality. This is not the "bright-line" test of the common law two-inch rule. Nor is it properly characterized as "tape-measure justice". The two-inch rule is a rule of negligence and not a rule of immunity. It is a notion which has now been embraced by Michigan's legislature and done so without restricting the right of any municipality to assert the defense.

Since there is no dispute here that the language of MCL 691.1402a is clear and unambiguous, there is no need for the Court to resort to extrinsic aids to interpret the

statute. That means that any discussion of any concerns by municipalities serving as the impetus for the passage of §1402a are beside the point. The legislative history is not telling of anything.

**C. The Connection of the Two-Inch Rule Falls**

Examining the provisions of MCL 691.1402a, it is clear that the sections comprising the statute stand alone and no other section or part may be applied to create doubt, *Sutherland, supra*, at §47.2. Because MCL 691.1402a deals with distinct subjects, it is divided into three separate sections. In MCL 691.1402a(1), the statute 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 was the proximate cause of the plaintiff's injury. For its part, MCL 691.1402a(2) creates a rebuttable inference of reasonable repair by a municipal corporation where a discontinuity defect is less than two inches. The third and final part of the statute relates to a municipal corporation's liability under the Natural Resources and Environmental Protection Act.

A reading of MCL 691.1402a and attention to the structure of the statute underscores the fact that the statute is not limited in its scope and application of county roads. The statute includes distinct, but related, matters therein. The starting point in statutory construction is to read and to examine the text of the statute and to draw inferences concerning the meaning thereof from its composition and structure. The only explanation of legislative intent consistent with the structure and format of §1402a is that

the two-inch rule found there applies to the conditions of all sidewalks, trailways, crosswalks, and other installations outside the improved portion of a public highway.

## ARGUMENT II

**ON REMAND, THE CITY SHOULD BE ALLOWED TO PROCEED IN THE MANNER OF ITS OWN CHOOSING AND SHOULD NOT BE CONSTRAINED IN ITS MEANS OF DEFENDING THE SUIT BASED ON THE TWO-INCH RULE OF MCL 691.1402a(2).**

In her application for leave to appeal, Barbara Robinson seeks to prevail on the Court to answer various questions as to how trial courts will procedurally handle the “two-inch cases”. Apparent from her argument is that what Ms Robinson is really looking for is to have this Court dictate to the circuit court here the manner in which any proceedings on remand must be handled. More specifically, Barbara Robinson wants the Court to declare that she must be allowed to engage in discovery before the circuit court entertains or decides any motion for summary disposition filed by the City. That is not the role of this Court. The power of a lower court on remand is to take such action as law and justice require, *People v Fisher*, 449 Mich 441; 537 NW2d 577 (1995).

In addition, based upon the limited record before it, it is not for this Court to presently decide the type and nature of proofs needed to give rise to a rebuttable inference of reasonable repair. The question of whether the City’s reliance on photographs showing the actual measurement of the sidewalk discrepancy is appropriate is one properly reserved for the circuit judge. Because of the manner in which the trial court proceedings progressed, the circuit court has yet to rule on the matter and thus this issue is not ripe for review. *Swickard v Wayne County Medical Examiner*, 438 Mich 536; 475 NW2d 304 (1991). The general rule adhered to by this Court is that issues,

questions, points, or contentions not presented in the trial court and properly preserved for review will not be disturbed on appeal, *Allied Building Credits v Mathewson*, 335 Mich 270; 555 NW2d 826 (1952) and *Poelman v Payne*, 332 Mich 597; 52 NW2d 229 (1952). Stated otherwise, nothing which occurred in the progress of a trial is to be put forward as reason or grounds for appeal in the Supreme Court unless it was brought to attention by the trial court and passed on directly or indirectly, *Ruzitz v Serbian Nat'l Home Society*, 315 Mich 292; 24 NW2d 125 (1946). However, if the Court chooses to speak to this issue, it may want to consider the following points.

In *Noe v Detroit*, 2008 WL 3851572 (8/19/08), the plaintiff asserted that, based on the estimates regarding the size of the discontinuity in the pavement, genuine issues of material fact existed and that thus precluded application of any presumption of reasonable maintenance by the defendants. Yet, the plaintiff never provided any actual measurements but relied solely on opinion and conjecture in support of her allegations. Reiterating the point that actual measurements are preferred and control as a matter of law over estimates, the *Noe* court held that the factual measurements in evidence showed that the trial court did not err in granting summary disposition to the defendant based upon the plaintiff's failure to rebut the presumption of reasonable repair in accordance with §1402a(2). Citing *Baldinger Estate v Ann Arbor*, 372 Mich 685; 127 NW2d 837 (1964), the court explained that the case stood for the proposition that the practice of permitting juries to base their verdicts upon guesses or estimates of distances or conditions which are susceptible to actual measurements must be condemned. It is the

duty of a plaintiff who seeks to recover damages for negligence to place before the jury evidence of the actual conditions when it was within the plaintiff's power to do so.

In *Gadigian v City of Taylor*, 282 Mich App 179; \_\_\_\_ NW2d \_\_\_\_ (2008), the court said about MCL 691.1402a(2) that the statute provides that a discontinuity defect of less than two inches creates a rebuttable inference of reasonable repair. To the court's way of thinking, that meant that a municipal corporation may defend a negligence claim by simply relying on the statutory language. If a plaintiff offers contrary evidence, then, as in other cases involving an inference, the trier of fact weighs all of the evidence in order to reach a verdict. If a plaintiff fails to offer contrary evidence, the inference results in a summary disposition or directed verdict for the municipality.

In footnote 2 of its opinion in *Handley v Ann Arbor*, 2009 WL 2351484 (7/30/09), the court dealt with that plaintiff's assertion that the defendant had failed to produce any evidence that the defect was less than two inches. The court responded by saying that its review of the record revealed that, in fact, the plaintiff's evidence failed to show that the defect was greater than two inches. The plaintiff's photographic evidence demonstrated that the defect was approximately one and 1/8ths inches where the plaintiff's wheel struck the defect. For that reason, the court did not consider there to be a genuine dispute regarding whether the discontinuity was less than two inches.

Here, Barbara Robinson seeks to burden the City of Lansing with the task of engaging in substantial discovery before being able to move for summary disposition on Barbara Robinson's claim under §1402. Barbara Robinson seeks a ruling from this Court that, in effect, a municipality may not rely upon photograph evidence demonstrating that

the discontinuity defect was less than two inches. Yet, in light of the availability of such objective measurements, other evidence fails. It does not state a question of fact as to whether a city is entitled to rebuttable inference that it maintained its sidewalk in reasonable repair.

**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.

PLUNKETT COONEY

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