

**IN THE SUPREME COURT**

**Appeal from the Court of Appeals**

**Hon. Kurtis T. Wilder, P.J., Hon. Patrick M. Meter, and Hon. Deborah A. Servitto**

**MOHAMED MAWRI,**  
Plaintiff-Appellant,

SC: 139647  
COA: 283893  
Wayne CC: 06-617502-NO

vs.

**CITY OF DEARBORN,**  
Defendant-Appellee.

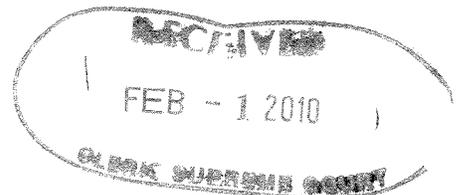
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**BRIEF ON APPEAL - APPELLANT**

**ORAL ARGUMENTS REQUESTED**

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## QUESTIONS PRESENTED

- I. Whether the location and nature of the defect provided in the pre-lawsuit notice in this matter either strictly complied or at the least substantially complied with statutory notice requirements?

MI Court of Appeals Answers:	No
The Trial Court Answers:	Yes
Appellant Answers:	Yes
Appellee Answers:	No

- II. Whether Government Immunity does not apply to Michigan municipalities for failing to repair or maintain its sidewalks where the sidewalk defect was present for at least 30 days before the injury date and where the defect is a proximate cause of the injury?

MI Court of Appeals Answers:	Did not answer
The Trial Court Answers:	Did not answer
Appellant Answers:	Yes
Appellee Answers:	No

- III. Whether a question of fact is present that the defect was greater than two inches and in the alternative any inference that the sidewalk was in reasonable repair is rebutted based on affidavits, photographs, and the expert report of Steven Ziembra?

MI Court of Appeals Answers:	Did not answer
The Trial Court Answers:	Did not answer
Appellant Answers:	Yes
Appellee Answers:	No

- IV. Whether the sidewalk in this matter had a persistent defect making it unsafe for public travel at all times and which combined with the *unnatural* accumulation of ice caused injuries to Mr. Mawri?

MI Court of Appeals Answers:	Did not answer
The Trial Court Answers:	Did not answer
Appellant Answers:	Yes
Appellee Answers:	No

V. Whether pre lawsuit notice requirements should be construed more fairly by requiring that Defendant prove it was prejudiced on the facts of the case and the case of Rowland v Washtenaw Co Rd Comm, 477 Mich 197 (2007) should be overruled and prior 30 year precedent reaffirmed or in the alternative this court should hold that a pre lawsuit notice provision is out right unconstitutional?

MI Court of Appeals Answers:	Did not answer
The Trial Court Answers:	Did not answer
Appellant Answers:	Yes
Appellee Answers:	No

**STATEMENT OF JURISDICTION**

This Court's jurisdiction is premised on Michigan Rules of Court 7.301 and 7.302.

## STATEMENT OF FACTS

This is a slip and fall cause of action arising out of a defective and ice covered sidewalk in the city of Dearborn on March 2, 2006 at 9:30 p.m. (11a).

The area of the sidewalk where Mr. Mawri fell was tipped more than 2 inches which Defendant knew about before Plaintiff fell and repaired after he fell. (12a, 13a, 14a - 16a).

From the scene, Mr. Mawri was rushed by ambulance to Oakwood Hospital where he presented with a fractured right hip which was surgically corrected by open reduction internal fixation and hardware implants. (17a - 30a). He continued follow up treatment with Dr. Kahn, Dr. Suleiman, and Dr. Lerner. (17a - 30a). Dr. Lerner prescribed pain medications and muscle relaxers.

Mr. Mawri continues to date to suffer from pain, scars, and needs medical care.

His total outstanding medical bills exceed \$85,000.00 and of that he has an outstanding balance owed to Oakwood Hospital alone in the amount of \$70,885.00 and to Dr. Lerner in the amount of \$2,590.00. (31a, 32a). His claim for damages includes medical bills, wage loss, future wage loss, attendant care, pain and suffering, and emotional distress equaling \$838,885.00.

After Mr. Mawri fell, he hired Attorney Ernest F. Friedman who sent statutory notice by cover letter to Defendant's corporate counsel on May 26, 2006. (33a). Defendant's insurer acknowledged receiving this statutory notice in a return cover letter dated August 4, 2006. (34a). Defendant's insurer sent a second cover letter to attorney Ernest Friedman further acknowledging notice of the claim on September 8, 2006. (35a). Defendant was served with the complaint on July 23, 2006. (36a). Proof of service was filed with the lower court on or about September 7, 2006. (37a - 39a).

On November 22, 2006, Mr. Steven Ziemba, an engineer and risk analysis expert, inspected the area and drafted a risk analysis report. (40a, 41a). In his report, Steven Ziemba states "...it is my opinion that the portion of the sidewalk where Mohamed Mawri fell was in a defective and/or unreasonably dangerous condition at the time of the fall and had been in that condition for over 30 days." (40a, para. 2). He continues to report that

[t]he unnatural tilt or upheaval of the slab was due to the continued growth of tree roots from the tree planted within 1 foot of the west edge of the sidewalk. The vertical movement increased with the infiltration of water between and under the separating slabs. This water would subsequently freeze as ground temperatures dropped causing the slab to rise even further.

(40a, para. 2). He clearly states, "[t]he height differential between the adjacent slabs posed a significant trip hazard to pedestrians and *was the proximate cause of this fall.*" (40a, para.. 2). He concludes that the city of Dearborn would have known about the consequences of frost penetration and the problems of trees planted adjacent to the sidewalks. (41a, para. 1). In fact, the city's own ordinance and regulations mandate that they maintain the sidewalks. (42a - 46a). State statute requires the same. MCL 691.1402.

Defendant repaired the sidewalk where Mr. Mawri fell more than three months (106 days) after he fell on May 24, 2006. (14a - 16a; 12a; 13a).

The specific location where the defect was present, where Plaintiff fell, where Defendant repaired, and where Mr. Ziemba inspected is the same location and is situated between the numerical addresses of 5026 Middlesex and 5034 Middlesex on the sidewalk near a lone tree. (47a - 49a; 50a; 51a - 54a; 55a - 56a; 12a; 13a). Mr. Ziemba and Mr. Mawri both identify the incident site as near a tree. (47a - 49a; 50a; 51a - 54a; 55a - 56a). The photographs show there were no other trees in the general vicinity. (12a; 13a). There is no confusion as to the actual incident site as it was near a tree between the addresses of 5026 and 5034 Middlesex.

Mr. Ziembra attests that the defect was greater than 2 inches in discontinuity and caused an unnatural accumulation of ice. (47a - 49a; 50a). He concludes that the proximate cause of Mr. Mawri's fall was the defect in the sidewalk which caused an unnatural accumulation of ice. (47a - 49a; 50a). Mr. Mawri attests that he fell because the sidewalk was defective allowing ice to accumulate and that the area was uneven and slippery. (51a - 54a; 55a - 56a). The defect was greater than 2 inches deep. Id.

In the lower court, the City of Dearborn filed a Motion for Summary Disposition which was heard on November 2, 2007. (3a; 4a). The lower court denied the City of Dearborn's Motion for Summary Disposition at hearing on its Motion on November 2, 2007. (1a - 4a).

Thereafter, the City of Dearborn filed an appeal with the Michigan Court of Appeals.

The Michigan Court of Appeals reversed the trial court ruling that the notice which Plaintiff sent to the Defendant was not adequate under the statutory requisites because it was not specific enough as to the location or as to the nature of the defect. (10a).

Mr. Mawri now files this appeal from the Michigan Court of Appeals to this Michigan Supreme Court.

## **STANDARD OF REVIEW**

Statutory interpretation and the applicability of a statute are questions of law that this Court reviews de novo. Oakland Co Bd of Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n, 456 Mich 590, 610 (1998); Alex v Wildfong, 460 Mich 10, 21 (1999). Findings of fact are reviewed using the clearly erroneous standard. Sands Appliance Services Inc. v Wilson, 463 Mich 231, 238 (2000); MCR 2.613.

When reviewing a decision on a motion for summary disposition this court should accept all well pled facts in a light most favorable to Appellant and where there remains any question of fact summary disposition should be denied. Radtke v Everett, 442 Mich 368 (1993). To overcome a Motion for Summary Disposition, the nonmoving party need only establish a question of fact upon which reasonable minds could disagree. Id., MCR 2.116(C)(10).

A motion pursuant to MCR 2.116(C)(7) tests whether a claim is barred because of immunity granted by law and requires consideration of all documentary evidence filed or submitted by the parties. McDowell v City of Detroit, 264 Mich App 337, 346 (2004).

## ARGUMENT

### **I. THE LOCATION AND NATURE OF THE DEFECT PROVIDED IN THE PRE-LAWSUIT NOTICE IN THIS MATTER EITHER STRICTLY COMPLIED OR AT THE LEAST SUBSTANTIALLY COMPLIED WITH STATUTORY NOTICE REQUIREMENTS**

The City of Dearborn claims notice in this matter was defective for three reasons: 1.) notice was sent by regular first class mail instead of personal service, 2.) the address referenced in the notice was not specific enough as to the location of the defect, and 3.) the notice did not provide the exact nature of the defect.

The Michigan Court of Appeals ruled that the manner in which notice was served was proper. (9a, para. 6, line 1). The Court of Appeal's opinion states, "In this case, plaintiff served the city attorney, so proper service was given." (9a, para. 6, line 1).

Furthermore, neither the statute nor the court rule requires personal service. MCL 691.1404(1); MCR 2.105(G)(1) and (C). Service of papers on an attorney for Defendant can be

by regular mail. MCR 2.105(G)(1) and (C); Gmelin v Gmelin, 324 Mich 590 (1949). The Court Rules make specific provision for the service of papers by mail on an attorney of record and further provides that in the event a party prosecutes or defends in person service may be made by mail in the same manner as made upon an attorney. Metzinger v Metzinger, 310 Mich 335, (1945), citing, MCR 8 and Section 4. Appellant served Appellee with written notice by a cover letter from his attorney dated May 26, 2006 which was served by regular mail addressed to Corporation Counsel. (33a). This satisfied service within the court rules allowing service on an attorney by regular mail. MCR 2.105.

Moreover, where notice is actually received the manner in which notice is served is proper. Pi Con Inc. v A J Anderson Construction Company, 435 Mich 375 (7/30/90); Fleisher Engineering v U.S. ex rel Hallenbeck, 311 U S 15 (1940); City of Detroit v John Blake Realty, 144 Mich App 432 (1984), *citing*, Mennonite Bod of Missions v Adams, \_\_\_ U S \_\_\_; 103 S Ct 2706 (1983); Republic Bank v Genesee County Treasurer, 471 Mich 732 (2005); Smith v Cliffs on the Bay, 463 Mich 420 (2000). Here, on the facts of this case, notice was actually received. (34a, 35a).

Therefore, the manner of service of the notice was proper because it was sent to corporate counsel and because it was actually received.

Second, the address referenced in the notice was specific enough as to the location of the defect. Any description which allows the defect to be found is specific enough. Barribeau v Detroit, 147 Mich 119 (1907); Tattan v Detroit, 128 Mich 650, *dictum at 651*, (1901); Wheeler v Detroit, 127 Mich 329, 331 (1901); Hussey v Muskegon Heights, 36 Mich App 264, 268 (1971)(on Peck Street at Johnson Drugstore and Vi and Herm's Cafe, 2042 Peck Street); Republic Franklin Ins Co v Walker, 17 Mich App 92, 100 (1969)(City of Walker, 4243 Remembrance Road, Walker, Michigan); Rule v Bay City, 12 Mich App 503 (1968), *lv den* 381

Mich 782 (1968)(on the 100 block on South Farragut St); Botsford v Clinton Twp, Unpublished COA No. 272513 (March 20, 2007)(tripped and fell on the entrance stairs of the building). In all those cases, the Court held that the language used to identify the location of the defect was specific enough. In fact, giving less information is specific enough. Only giving the street name has been ruled specific enough. Mauer v Topping, Unpublished Court of Appeals No. 250858 (4/7/05), *rev'd in part*, 480 Mich 912 (2007). Mauer ruled that only identifying the street name was adequate enough notice because the intent of the notice is to allow the government the opportunity to investigate. Id. To be able to investigate, the court in Mauer determined the area of the incident need only be stated in “general” terms. Id., *citing*, Blohm v Emmet Co Rd Com, 223 Mich App 383, 388 (1991) and Random House Webster’s College Dictionary. Nothing in the Act or case law indicates that to meet the notice requirement an address must be given.

Applying all those cases to this case now before this Court now, the location of the defect was specific enough.

Here, Appellant did more than the Act requires in giving not only the street name but the closest address as well and by explaining that the defect is the one that the City recently repaired. (33a). Plaintiff’s notice in the form of a cover letter stated the closest address nearest the site where Plaintiff fell which was 5034 Middlesex, Dearborn, Michigan and that the City recently repaired it. (33a). This letter specifically explains the location is “in the area of 5034 Middlesex”. (33a). It stated,

Please be advised that I represent Mohamed Mawri for injuries he sustained when he fell on a defective side walk on March 2, 2006 in the area of 5034 Middlesex, Dearborn, Michigan. It is my understanding that since this fall, the City has repaired the area. As indicated, my client fell due to the defective sidewalk, fracturing his hip, necessitating surgery. Please consider this statutory notice. If you need further information please do not hesitate to contact me.

(33a). This cover letter referenced that the defect was recently repaired. (33a). The cover letter is dated May 26, 2006 and the repair date to the sidewalk was May 24, 2006. (33a; 16a, see “Poured Date” right side). On the survey form that city workers completed they wrote the date that cement was poured on the area of the sidewalk on the right side of the form where it states “Poured Date”. (16a, see “Poured Date” right side). That date is May 24, 2006. (16a, see “Poured Date” right side). Additionally, on this city survey/repair form at the top is the address “5034 Middlesex”. (16a, see top right of form). Given all of this, the details outlined as to the location of the defect and that it was an area recently repaired in Ernest Friedman’s cover letter of May 26, 2006 to Corporate Counsel more than provided Defendant with enough specifics as to the location of the defect to meet statutory requirements.

Add to that, the incident report taken by the Dearborn Police Department identifies 5034 Middlesex as the accident site as well. (11a). Near the center of the report to the left where “Location” is listed the address 5034 Middlesex is typed. (11a). An incident report has been ruled to be considered sufficient pre lawsuit notice. Chambers v Wayne Co Airport Auth., Unpublished COA No. 277900 (June 5, 2008), *lv den* 483 Mich 1081 (2009)(plaintiff fell in a puddle of water at a terminal of defendant’s airport and its security officer was called to the scene and performed an investigation and incident report).

Even the Dearborn Police incident report noted the same address as Appellant did in his notice cover letter of May 26, 2006. (11a, “Location”). Further, Appellee’s agent (the Dearborn police) had actual knowledge (which should be imputed to Appellee) of the defect when they investigated the scene, took pictures, and made a report as the trial judge highlighted. (4a, 5a; 11a). Additionally, city workers had already surveyed and tagged the area 23 days before the injury date as the trial judge highlighted. (6a, line 19 - 24). The incident report and investigation conducted by Defendant’s police on March 2, 2006 and survey and investigation conducted by

Defendant's city workers on February 7, 2006 put Defendant on actual or at the least constructive notice. Chambers v Wayne Co Airport Auth., Unpublished COA No. 277900 (June 5, 2008), *lv den* 483 Mich 1081 (2009).

Here on the facts of this case now before this Court now the description of the location of the defect was more than adequate. The Court of Appeals should be reversed and the trial court should be affirmed.

This Court's decision in Rowland v Washtenaw Co Rd Comm, 477 Mich 197 (2007) is distinct because in Rowland the plaintiff did not even give the street name or address where she fell but, instead, provided a very broad description of the intersection of two different street names which the Court held was too broad. Rowland v Washtenaw Co Rd Comm, 477 Mich 197 (2007); (57a, 58a). Here, Appellant gave the exact street name and the closest address. (33a). Appellee's agents (the City of Dearborn Police Department) investigated the scene on the date of the incident. (11a). City of Dearborn workers investigated the area 23 days before Mr. Mawri fell. Therefore, given the description in Appellant's written cover letter to Appellee and given the pre and post injury date investigations conducted by Appellee the notice Appellant provided in this case now before this Court is far more detailed and specific as to the exact location of the defect even within the strictures of Rowland. The written notice is not as broad or general as Rowland and the circumstances surrounding the facts of this case are distinct as well.

Moreover, where a reasonable interpretation of the notice is that the notice is in "substantial compliance" with the statute then notice should be held to be adequate. Hayes v St. Clair, 173 Mich 631, 637 (1913); Chambers v Wayne Co Airport Auth., Unpublished COA No. 277900 (June 5, 2008), *lv den* 483 Mich 1081 (2009). Notice need only be understandable and bring important facts to the defendant's attention. Brown v City of Owosso, 126 Mich 91, 94-95 (1901). Notice requirements should not be so strict that an average lay person could not draft it.

Meredith v Melvindale, 381 Mich 572, 579 (1969). Instead, notice should be strictly construed against the City. Oesterreich v Detroit, 137 Mich 415 (1904).

Applying all the above cited cases to this case now before this Court the notice should be held to have been adequate within the statutory requisites or at the least in substantial compliance with the statutory requisites.

Third, the nature of the defect was identified in the notice as it referenced the sidewalk. (33a). Merely stating “a sidewalk defect” is sufficient enough. Hussey v Muskegon Heights, 36 Mich App 264 (1971)(my information is that there appeared to be a defect in the sidewalk at this location); Jones v Ypsilanti, 26 Mich App 574 (1970)(defective sidewalk immediately east of 5 West Michigan Avenue which is located on the south side of Michigan Avenue); Tattan v Detroit, 128 Mich 650, dictum at 651 (1901). Mr. Mawri’s notice stated “... my client fell due to the defective sidewalk...” and “[it] is my understanding that since this fall, the City has repaired the area”. (33a). Applying the holding in those cases to this case now before this Court, the nature of the defect was sufficiently described. The cover letter clearly indicates that the defect would be in the structural aspect of the sidewalk and not because of some other reason such as some fixture on top of it like a pipe protruding out of it or a tree trunk exposed on it. It was a defect to the structural nature of the cement in the sidewalk. Reading the plain language of the cover letter the City of Dearborn should have known this. Further, Appellee knew more about this defect than Appellant as they had it surveyed on February 7, 2006 which was before Mr. Mawri fell on March 2, 2006 and they repaired it on May 24, 2006. (14a - 16a). Once again, this case is distinct from the Rowland opinion upon which Appellee relies because in Rowland the Plaintiff did not even give any reference as to the defect and only indicated the date of the

incident, the name of the Plaintiff, and the intersection where she fell. (57a - 58a). Here, Mr. Mawri provided much more detail about the defect which Appellee knew about even before Mr. Mawri fell as they surveyed the entire area on February 7, 2006 (23 days before his fall). (14a - 16a; 33a). The City of Dearborn should not be allowed now to claim they did not have an opportunity to investigate or knew nothing about the nature of the defect when they in fact surveyed the area prior to the fall. Knowledge of the defect's nature is imputed the City by its own act of surveying the area. (14a - 16a). This knowledge combined with Attorney Ernest Friedman's cover letter more than provided Appellee specificity as to the nature of the "defective sidewalk" as stated in Ernest Friedman's letter to Appellee.

Thus, the notice met all statutory requirements.

Moreover, where a defect is present for more than 30 days, a municipality is presumed to have knowledge of the defect; knowledge is imputed to them. MCL 691.1403. The statute reads,

*No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.*

MCL 691.1403. Although this portion of the statute specifically states "highway" that term has been defined to include "sidewalks". MCL 691.1401(e). Here, the defect was present for more than 30 days before the injury date. (14a - 16a; 40a). Therefore, Defendant had knowledge of the defect and where the Defendant has actual knowledge of the defect a strict pre-lawsuit notice requirement is unreasonable and unfair because the purpose of the pre-lawsuit notice is to give Defendant the opportunity to investigate the defect before evidence is lost. Meredith v Melvindale, 381 Mich 572, 579 (1969). Defendant having knowledge more than 30 days before the injury date had more than enough opportunity to investigate the defect. Here, Defendant did

in fact investigate the defect 23 days before Mr. Mawri fell as well as investigated it on the date that he fell and then repaired it two months later. (16a see “Survey Date” left side; 11a; 16a, see “Date Poured” right side).

The City of Dearborn extrapolates too much from a one sentence court *order* in Ells v Eaton, 480 Mich 902 (2007). Ells is distinct as there the site was only investigated *AFTER* the accident while here it was investigated *BEFORE* and *AFTER*. Ells v Eaton, Unpublished COA No. 264635; *rev'd*, 480 Mich 902 (2007). (14a - 16a). This before and after investigation gave the Defendant more than enough notice and opportunity to gather and preserve evidence and it did. It took photographs. (11a). Further, this Court should adopt the ruling of the Court of Appeals in Ells and hold that since Defendant’s agents investigated the scene on the date of the injury as it was done in Ells the purpose of a pre lawsuit notice has been met because Defendant had the opportunity to “quickly preserve evidence necessary for its defense”. Ells v Eaton, Unpublished COA No. 264635; *rev'd*, 480 Mich 902 (2007). The City of Dearborn surveyed and tagged the sidewalk on February 7, 2006 which was 23 days before Mr. Mawri fell. (16a). The City of Dearborn Police investigated the defective sidewalk on the date of the injury and took photographs. (11a). The trial court emphasized this. (6a). That corporate counsel may not have received this February 7, 2006 survey does not effect that the City of Dearborn did in fact receive it because pre-lawsuit notice is intended to give the government agency and not its attorneys a chance to learn more about the defect itself before evidence is lost. Meredith v Melvindale, 381 Mich 572, 579 (1969). The City of Dearborn knew about the defect because they investigated it 23 days before Mr. Mawri fell. (14a - 16a). This coupled with the cover letter Ernest Friedman sent to the Defendant on May 26, 2006 strictly or at the least substantially complied with the pre lawsuit statutory notice requirements. Hayes v St. Clair, 173 Mich 631, 637 (1913); Chambers v Wayne Co Airport Auth., COA No. 277900 (June 5, 2008), *lv den* 483 Mich 1081 (2009).

This Court should affirm the trial court's denial of summary disposition and reverse the Court of Appeals.

- A. Pre lawsuit notice requirements should be construed more liberally where the sidewalk defect was present for at least 30 days before the injury date and where the city's police department investigated the defect on the date of the injury and city workers investigated the defect 23 days before the injury date**

It is one thing for the Defendant to be caught off guard and prejudiced by it. It is another thing to make a pre lawsuit statutory notice requirement so strict that nobody can sue the government. Such a strong barrier insulating the government from liability will do more harm to the public good than it will to protect the public purse.

Such a strong barrier creates an unfair process.

The facts of this case are unique to this area of law because here the City surveyed the area where Plaintiff's incident occurred *before* the injury date. On February 7, 2006, city workers went out to the area of the sidewalk where Mr. Mawri fell and conducted a survey of the area. (16a). Mr. Mawri fell 23 days later on March 2, 2006. (11a). The City of Dearborn repaired the sidewalk 106 days after they originally surveyed it on May 24, 2006. (11a, see "Poured Date" right side). The City of Dearborn Police Department investigated the defect on the date of the incident. (11a). Attorney Ernest Friedman sent pre lawsuit notice to the City of Dearborn on May 26, 2006 by cover letter addressed to Corporate Counsel. (33a). That letter identified the area and nature of the defect. It stated,

Please be advised that I represent Mohamed Mawri for injuries he sustained when he fell on a defective side walk on March 2, 2006 in the area of 5034 Middlesex, Dearborn, Michigan. It is my understanding that since this fall, the City has repaired the area. As indicated, my client fell due to the defective

sidewalk, fracturing his hip, necessitating surgery. Please consider this statutory notice. If you need further information please do not hesitate to contact me.

(33a). This cover letter referenced that the defect was recently repaired. (33a). The cover letter is dated May 26, 2006 and the repair date to the sidewalk was May 24, 2006. (33a; 16a, see “Poured Date” right side). On the survey form that city works completed they wrote the date that cement was poured on the area of the sidewalk on the right side of the form where it states “Poured Date”. (16a, see “Poured Date” right side). That date is May 24, 2006. (16a, see “Poured Date” right side). Additionally, on this city survey/repair form at the top is the address “5034 Middlesex”. (16a, see top right of form). Given all of this, the details outlined as to the location of the defect and that it was an area recently repaired in Ernest Friedman’s cover letter of May 26, 2006 to Corporate Counsel more than provided Defendant with enough specifics as to the location and nature of the defect to meet statutory requirements.

Add to this, the Defendant’s own police department’s incident report has the same address “5034 Middlesex” typed on it under the heading “Location” as the location of the incident where Mr. Mawri fell. (11a).

Further add to this that the defect was present for more than 30 days as Steven Ziembra states in his expert report, “...it is my opinion that the portion of the sidewalk where Mohamed Mawri fell was in a defective and/or unreasonably dangerous condition at the time of the fall and had been in that condition for over 30 days.” (40a, para. 2).

Defendant should not be allowed to claim it was caught off guard, did not receive adequate notice, did not have ample opportunity to investigate, or were prejudiced.

This Court should affirm the trial court’s denial of summary disposition and reverse the Court of Appeals.

**II. GOVERNMENT IMMUNITY DOES NOT APPLY TO MICHIGAN MUNICIPALITIES FOR FAILING TO REPAIR OR MAINTAIN ITS SIDEWALKS WHERE THE SIDEWALK DEFECT WAS PRESENT FOR AT LEAST 30 DAYS BEFORE THE INJURY DATE AND WHERE THE DEFECT IS A PROXIMATE CAUSE OF THE INJURY**

The City of Dearborn is liable in tort for the negligent maintenance of its property and for failing to inspect and warn Mr. Mawri of hidden dangers. The City had a statutory duty to maintain their premises in a safe and careful manner as promulgated by their own codes of regulation and Michigan Statute, MCL 691.1402. (42a - 46a; 40a - 41a). According to Risk Analysis Expert Steven Ziemba, the City of Dearborn would have known about the risk present in this matter (trees so close to the sidewalk) because trees within a foot of the sidewalk is known to cause structural damage. Mr. Ziemba surveyed the area of the sidewalk where Plaintiff fell. (40a - 41a). According to him, the defect was caused by tree roots shifting and causing the slabs in the cement sidewalk to shift and ice accumulating under the slabs causing the cement to rise even more. (40a - 41a). It is his opinion that the defect was present for more than 30 days. (40a).

According to Michigan Statute, a *municipality* only has a *limited* immunity with regard to *defective sidewalks*. MCL 691.1402a. The statute provides:

(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 a sidewalk, trailway, crosswalk, or other installation 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 2 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.

MCL 691.1402a(1)(a) and (b). (History: Add. 1999, Act 205, Imd. Eff. Dec. 21, 1999).

Additionally, where a defect is present for more than 30 days, the municipality is presumed to have knowledge of the defect; knowledge is imputed to them. MCL 691.1403. The statute reads,

No governmental agency is liable for injuries or damages caused by defective highways unless the governmental agency knew, or in the exercise of reasonable diligence should have known, of the existence of the defect and had a reasonable time to repair the defect before the injury took place. *Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed so as to be readily apparent to an ordinarily observant person for a period of 30 days or longer before the injury took place.*

MCL 691.1403.

Applying these two provisions of the Michigan Statute to the facts of this case, Mr. Mawri alleges that the defective sidewalk was the proximate cause of his injuries. Expert Steven Ziemba agrees with this. (40a, para. 2). He clearly states, “[t]he height differential between the adjacent slabs posed a significant trip hazard to pedestrians and ***was the proximate cause of this fall.***” (40a, para. 2).

Mr. Mawri further alleges that the defect had been present for more than 30 days and that in the exercise of reasonable diligence the City of Dearborn should have known about the defect in the sidewalk. (40a - 41a). Expert Steven Ziemba agrees with this as well. He states,

it is my opinion that the portion of the sidewalk where Mohamed Mawri fell was in a defective and/or unreasonably dangerous condition at the time of the fall and ***had been in that condition for over 30 days.***

The consequences of this frost penetration should be well known to the city of Dearborn as well as the problems associated with trees planted adjacent to sidewalks.

(40a, para. 2 and 41a, para. 1). Furthermore, in answers to Mr. Mawri's Request for Production of documents, the City of Dearborn admitted to having surveyed the area on February 7, 2006 in a document it produced. (14a - 16a). The survey date is listed as February 7, 2006 on the lower left side of the document. (16a). This, by the City's own admission, proves that at least 23 days prior to the incident date the defect was present on the sidewalk and the City of Dearborn had actual knowledge of the defect. It is an easy conclusion that in the exercise of reasonable diligence the City should have known about the defect 30 days prior to the incident date. MCL 691.1402a(1)(a). More importantly, by operation of law the City is imputed with knowledge of the defect because it was present for more than 30 days. MCL 691.1403.

Therefore, immunity is not a bar to Mr. Mawri's claim because the City of Dearborn knew about the defect and the defect was a proximate cause of the injury. MCL 691.1402a.; 691.1403; (40a, para. 2 and 41a, para. 1; 14a - 16a). Governmental immunity does not apply where 30 days prior to the injury date *a.) the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect in a sidewalk and b.) the defect is a proximate cause of the injury.* MCL 691.1402a(1)(a) and (b). *Knowledge of the defect and time to repair the same shall be conclusively presumed when the defect existed for a period of 30 days or longer before the injury took place.* MCL 691.1403. Both of these two statutory requirements, (knowledge of the defect and proximate cause) are present on the facts of this case. According to recent case law,

...the Legislature has relieved municipal corporations of liability for sidewalk-related injuries unless (1) the municipal corporation had notice of the defect at least 30 days before the injury and (2) the defect proximately caused the injury.

Gadigian v City of Taylor, 282 Mich App 179 (2000), *citing*, MCL 691.1402a(1)(a) and (b).

Where these two statutory provisions are met (MCL 691.1402a(1)(a) and (b) and MCL 691.1403) then the intent of the pre lawsuit notice provision is also met. Alternatively, where

these two statutory provisions are met then the government should be treated as a private party would be treated and no pre lawsuit statutory provision should be required because the language of MCL 691.1402a(1)(a) and (b) removes the shield of liability and makes the government susceptible to liability as a private entity would be. Gadigian v City of Taylor, 282 Mich App 179 (2000), *citing*, MCL 691.1402a(1)(a) and (b).

Therefore, the City of Dearborn is not shielded by governmental immunity and the trial court should be affirmed and the Michigan Court of Appeals should be reversed.

**III. A QUESTION OF FACT IS PRESENT THAT THE DEFECT WAS GREATER THAN TWO INCHES AND IN THE ALTERNATIVE ANY INFERENCE THAT THE SIDEWALK WAS IN REASONABLE REPAIR IS REBUTTED BASED ON PHOTOGRAPHS AND THE EXPERT REPORT OF STEVEN ZIEMBA**

Appellant claims the defect was less than two inches and the only support it has are photographs it attached to its brief which actually show a defect greater than two inches. (see Exhibit P to Defendant's Motion for Summary Disposition). Where Plaintiff tripped on a nail protruding 2 inches above the cement summary disposition was denied. Howard v City of Melvindale, 27 Mich App 227 (1970). Affidavits attached hereto attest that the defect was greater than two inches in depth and in discontinuity. (47a - 49a; 51a - 54a). The photographs themselves together with the affidavits create a question of fact so that summary disposition should be denied.

In a case similar to this one where Defendant removed a stop sign and left a big hole in the sidewalk where Plaintiff fell the Court held Defendant's knowledge of the defect is conclusively presumed and a genuine issue of fact existed as to whether defendant undertook the necessary repair work to maintain the sidewalk in a reasonably safe condition for public travel. Adriene Stone v City of Royal Oak, Unpublished Court of Appeals No. 247779 (11/2/04), *citing*,

Jones v Enertel, at 268; see also, Jones v Enertel, 467 Mich 266, 268 (2002). The facts of Stone and this case mirror each other. There, the defect resulted from a hole in the sidewalk and likewise, here, the defect is from what was a large indentation in the sidewalk which Appellant surveyed and knew about 23 days prior to the incident date on February 7, 2006. (14a - 16a). The Court in Stone said by this fact alone, that the defect was a hole from the remains of a stop sign, a genuine issue of fact arose as to whether Defendant kept the sidewalk reasonably safe. Stones, Id. Likewise, by the fact Defendant surveyed the property before the date of harm and waited over 3 months to repair the area there is a genuine issue of fact whether they kept the area reasonably safe for public travel. Expert Steven Ziemba clearly concludes Defendant did not keep the area reasonably safe for public travel. (40a - 41a).<sup>1</sup>

While the Court of Appeals did not speak on the issue of the 2 inch rule the trial court denied Defendant's motion in its entirety and, therefore, the trial court should be affirmed.

Further, the statutory language of the two inch rule speaks nothing of "depth" and only states a "discontinuity of two inches" which can be a decline less than two inches in depth but more than two inches in space or width. MCL 691.1402a(2). Here, on the facts of this case there was a discontinuity far greater than two inches. Steven Ziemba in his expert report identifies that the entire slab of the sidewalk had tilt and upheaval to it. (40a, para. 2). Specifically, he states

...it is my opinion that the portion of the sidewalk where Mohamed Mawri fell was in a defective and/or unreasonably dangerous condition at the time of the fall and had been in that condition for over 30 days. The height differential between the adjacent slabs posed a significant trip hazard to pedestrians and was the proximate cause of this fall. The unnatural tilt or upheaval of the slab was due to the continued growth of tree roots from the tree planted within 1 foot of the west edge of the sidewalk. The vertical movement increased with the infiltration of

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<sup>1</sup>The Court of Appeals in another matter agreed to the same and has ruled against the City of Dearborn analyzing on similar facts that "A genuine issue of fact exists as to whether defendant undertook the necessary repair work to maintain the sidewalk in reasonably safe condition for public travel." Naji v City of Dearborn, Unpublished Court of Appeals Opinion, No. 264712, p. 3 (7/6/06).

water between and under the separating slabs. This water would subsequently freeze as ground temperatures dropped causing the slab to rise even further.

(40a, para. 2). An entire slab of sidewalk is more than two inches. The photographs and Defendant's answers to discovery demonstrate this as well. (12a, 13a, 14a - 16a). According to the document produced by Defendant in answering Plaintiff's request to produce, the area where the hazard was located was 5034 Middlesex and the measurements of the hazard were for a broken walk measuring 8 inches and an apron measuring 5 inches. (16a).

Therefore, there was more than a 2 inch discontinuity in the sidewalk.

The trial court should be affirmed.

Finally, the two inch rule is not an irrebuttable presumption but a rebuttable inference.

The statutory language specifies that

A discontinuity defect of less than 2 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.

MCL 691.1402a(2). This means should a Plaintiff come forward with evidence that the sidewalk was not in reasonable repair the inference is rebutted and there remains a question of fact for the jury to decide. The opinion of Steven Ziemba, an engineer and expert in sidewalk safety, more than rebuts any inference of reasonable repair. (40a - 41a). According to expert Steven Ziemba, Defendant was directly responsible and the proximate cause of Mr. Mawri's fall, on notice of the danger prior to his fall, and did not maintain the sidewalk in reasonable repair. (40a - 41a). He states in his report that,

These opinions are based upon the facts of the incident, photos of the sidewalk, and my inspection of the site on November 22, 2006.

...it is my opinion that the portion of the sidewalk where Mohamed Mawri fell was in a defective and/or unreasonably dangerous condition at the time of the fall and had been in that condition for over 30 days. The height differential between the adjacent slabs posed a significant trip hazard to pedestrians and *was the proximate cause of this fall*. The

unnatural tilt or upheaval of the slab was due to the continued growth of tree roots from the tree planted within 1 foot of the west edge of the sidewalk. The vertical movement increased with the infiltration of water between and under the separating slabs. This water would subsequently freeze as ground temperatures dropped causing the slab to rise even further.

The consequences of this frost penetration should be well known to the city of Dearborn as well as the problems associated with trees planted adjacent to sidewalks. The defendant is under a duty and obligation pursuant to MCLA 691.1402 to maintain and repair the public sidewalks. Tough economic times and tight budgets require cities to think “outside the box”, especially when they develop plans and procedures for inspecting, maintaining and repairing streets and sidewalks.

Every city employee who observes hazardous and potentially dangerous street or sidewalk conditions should be empowered and encouraged to report these conditions. When the city can choose where work is to be done or utility structures are to be located, pedestrian safety must be a consideration. And when the city becomes aware of hazardous situations, it must take reasonable steps to warn pedestrians and/or eliminate the hazard. A simple marking with a spray paint can along the raised edge would serve as a visual cue that would alert pedestrians to this type of hazard. The color yellow is recognized by the general public to denote height changes as many curbs are identified this way.

The defendant failed to identify and correct this defective sidewalk condition in a timely manner, thereby creating an unreasonable risk of harm.

(40a - 41a). This more than rebuts any inference that may be drawn from the two inch rule that the sidewalk was in reasonable repair.

The trial court should be affirmed.

**IV. THE SIDEWALK IN THIS MATTER HAD A PERSISTENT DEFECT MAKING IT UNSAFE FOR PUBLIC TRAVEL AT ALL TIMES AND WHICH COMBINED WITH THE UNNATURAL ACCUMULATION OF ICE CAUSED INJURIES TO MR. MAWRI**

The natural accumulation doctrine does not apply to the facts of this case because there was a persistent defect in the sidewalk which independent of the ice made the sidewalk unsafe for public travel. Expert engineer and safety analyst Steven Ziembra attests to this in his report.

(40a - 41a). He states that,

These opinions are based upon the facts of the incident, photos of the sidewalk, and my inspection of the site on November 22, 2006.

...it is my opinion that the portion of the sidewalk where Mohamed Mawri fell was in a defective and/or unreasonably dangerous condition at the time of the fall and had been in that condition for over 30 days. The height differential between the adjacent slabs posed a significant trip hazard to pedestrians and ***was the proximate cause of this fall.*** The unnatural tilt or upheaval of the slab was due to the continued growth of tree roots from the tree planted within 1 foot of the west edge of the sidewalk. The vertical movement increased with the infiltration of water between and under the separating slabs. This water would subsequently freeze as ground temperatures dropped causing the slab to rise even further.

The consequences of this frost penetration should be well known to the city of Dearborn as well as the problems associated with trees planted adjacent to sidewalks. The defendant is under a duty and obligation pursuant to MCLA 691.1402 to maintain and repair the public sidewalks. Tough economic times and tight budgets require cities to think “outside the box”, especially when they develop plans and procedures for inspecting, maintaining and repairing streets and sidewalks.

Every city employee who observes hazardous and potentially dangerous street or sidewalk conditions should be empowered and encouraged to report these conditions. When the city can choose where work is to be done or utility structures are to be located, pedestrian safety must be a consideration. And when the city becomes aware of hazardous situations, it must take reasonable steps to warn pedestrians and/or eliminate the hazard. A simple marking with a spray paint can along the raised edge would serve as a visual cue that would alert pedestrians to this type of hazard. The color yellow is recognized by the general public to denote height changes as many curbs are identified this way.

The defendant failed to identify and correct this defective sidewalk condition in a timely manner, thereby creating an unreasonable risk of harm.

(40a - 41a). The photographs of the sidewalk area shortly after Mr. Mawri fell demonstrates that there was an obvious defect in the walkway. (12a). Mr. Ziembra attributes that the defect was created by the placement of the tree so close to the sidewalk as it was only one foot away which caused the roots to spread into the foundation of the cement and to tilt the slabs of cement which then would fill with water and form into ice which caused the slabs of cement to rise even higher. (40a, para. 2). He clearly states, “[t]he height differential between the adjacent slabs posed a significant trip hazard to pedestrians and ***was the proximate cause of this fall.***” (40a, para. 2).

He further attests that the defect in the sidewalk caused *an unnatural accumulation* of ice and that too was a proximate cause of Mr. Mawri's fall. (40a - 41a). Mr. Mawri attests that he fell because the sidewalk was defective allowing ice to accumulate and that the area was uneven and slippery. (51a - 54a; 55a - 56a). He testified,

Q. And so you walked off the street up kind of the neighbor's driveway approach?

A. Yes.

Q. And then onto the sidewalk heading north?

A. Towards the house.

Q. Towards your house. Was there something wrong with the sidewalk?

A. *It was uneven and, like, it was, like, slippery.*

Q. Where was it uneven? Can you - - I know it's been repaired in the photo.

A. This is the spot right here. This one right here.

(indicating)

Q. If I gave you my pen, could you circle for me about where you're talking about.

A. (Complies) It was, like, the whole sidewalk was uneven, but this is the spot where

*I trip and fall.*

(56a, line 10 - 25). Proximate causes of Mr. Mawri's fall are the uneven portion of the entire slabs (flags) of the sidewalk where he tripped as he testified and the unnatural accumulation of ice in this uneven area where freezing rain was trapped by the uneven portion and settled. (RSD 40a - 41a; 47a - 49a; 51a - 54a; 55a - 56a; see also, 12a, 13a).

Appellant claims this case is like two appellate cases where the natural accumulation doctrine barred plaintiff's claim and cites to Haliw v Sterling Heights, 464 Mich 297 (2001) and Burton v Waterford Township, Unpublished COA No. 274332, 4/26/07. In both those cases, there was *no evidence of causation* (nothing supported the defect caused Plaintiff's injury).

Here, there *is* evidence that the defect in the sidewalk itself is the proximate cause of Mr. Mawri's injuries. Expert Steven Ziemba's opinion and analysis after viewing photographs of the incident site, surveying the site, and hearing how the accident happened attributes the cause of the injury in this matter to be directly related to the defective sidewalk. He clearly states, "[t]he height differential between the adjacent slabs posed a significant trip hazard to pedestrians and ***was the proximate cause of this fall.***" (40a, para. 2). Therefore, this case before this Court now is nothing like the two cases that Defendant cites in its brief (Burton and Haliw). Further, Burton is an unpublished opinion which has no binding effect on future cases.

This case is more akin to cases where the appellate courts have reversed the lower courts for barring Plaintiff's claim such as Navarre v City of Benton Harbor, 126 Mich 618 (1901); Hampton v Master Products, Inc., 84 Mich App 767 (1978); Pappas v City of Bay City, 17 Mich App 745 (1968). In Navarre, a depression in the sidewalk trapped water causing it to form into ice upon which Plaintiff had fallen. Navarre v City of Benton Harbor, 126 Mich 618 (1901). In Hampton, Defendant created an unnatural accumulation of snow by plowing it into a snowbank which was much higher than any snow surrounding it. Hampton v Master Products, Inc., 84 Mich App 767 (1978). In Pappas, the Plaintiff slipped on ice accumulating in a sunken portion of the sidewalk which the Court held was an "unnatural accumulation of ice". Pappas v City of Bay City, 17 Mich App 745 (1968).

The same is true here.

The ice that formed on the depressed portion of the sidewalk where Mr. Mawri fell was an "unnatural accumulation of ice". Had the sidewalk not been depressed the ice would not have formed as it did. Moreover, the defected slant in the sidewalk was the direct cause of the Plaintiff's injury. (40a, para. 2).

Therefore, the natural accumulation doctrine does not bar Mr. Mawri's case.

Summary disposition is not appropriate and the trial court should be affirmed.

Defendant attempts to confuse the facts as to the exact location where Mr. Mawri fell, where the defect was present on the sidewalk, and where the repairs to the sidewalk were done. Defendant claims all are not the same. Defendant is wrong.

The specific location where the defect was present, where Plaintiff fell, where Defendant repaired, and where Mr. Ziembra inspected is the same location and is situated between the numerical addresses of 5026 Middlesex and 5034 Middlesex on the sidewalk near a lone tree. (47a - 49a; 51a - 54a; 55a - 56a; see also, 12a, 13a). Mr. Ziembra and Mr. Mawri both identify the incident site as near a tree. (47a - 49a; 51a - 54a; 55a - 56a) The photographs show there were no other trees in the general vicinity. (12a, 13a). There is no confusion as to the actual incident site as it was near a tree between the addresses of 5026 and 5034 Middlesex. Further, the survey report and police report both identify 5034 Middlesex and the police report identifies 5026 as well. (16a; 11a).

Defendant repaired the sidewalk where Mr. Mawri fell three months after he fell on May 24, 2006. (16a; 12a, 13a). It knew about the defect and waited for more than 3 months to repair it.

The lower court should be affirmed.

**V. PRE LAWSUIT NOTICE REQUIREMENTS SHOULD BE CONSTRUED MORE FAIRLY BY REQUIRING THAT DEFENDANT PROVE IT WAS PREJUDICED ON THE FACTS OF THE CASE AND THE CASE OF ROWLAND V WASHTENAW CO RD COMM, 477 MICH 197 (2007) SHOULD BE OVERRULED AND PRIOR 30 YEAR PRECEDENT REAFFIRMED OR IN THE ALTERNATIVE THIS COURT SHOULD HOLD THAT A PRE LAWSUIT NOTICE PROVISION IS OUT RIGHT UNCONSTITUTIONAL**

There is an old cliché that goes like this, “you can’t fight city hall”.

By eliminating the prejudice requirement from this area of law this Court has made it that “you can’t fight city hall”. Such a strict construction of the law has made the process unfair. While in other places in the globe it is unheard of to speak out against your government let as long sue it that is not the case here in this jurisdiction of the globe. We allow lawsuits against government agencies because it makes them better. Our founding fathers when they sat down to write our Constitution had one thing in mind - limit government power. They wanted that we could speak out against our government and to make changes in how governments are run. Suing the government is one way to speak out against it and make changes in how it is run. Here, on the facts of this case, the change in the course of events in how the government was run is that it should not have taken 106 days after Defendant knew about the defect to send workers out to the incident site to repair it. (16a, see “Date Poured”). Personal injury lawsuits like this one have an overriding good purpose. They change the way we do things. They raise the standard.

For over 30 years before this Court decided Rowland v Washtenaw Co Rd Comm, 477 Mich 197 (2007) the controlling authority in this area of law were the cases of Hobbs v Dep’t of State Hwys, 398 Mich 90 (1976) and Brown v Manistee Co Rd Comm, 452 Mich 354 (1996). From reading Justice Cavanagh’s dissent in Rowland, the crux of the progeny of cases leading up to both these two cases (Hobbs and Brown) was that although a pre lawsuit notice provision may be an unconstitutional violation of either equal protection or due process so long as there is a “prejudice” requirement present then the notice is not unconstitutional. Rowland, 477 Mich 197 (2007), *dissenting opinion*, Justice Cavanagh, *citing*, Carver v McKernan, 390 Mich 96, 100 (1973). Justice Cavanagh stated that “This Court subsequently held that notice requirements are not necessarily unconstitutional if there is a legitimate prpose and the period is not unreasonably short.” Id. Justice Cavanagh went on to state,

We noted that failure to give notice may result in prejudice to the government relating to the purpose served by the notice provision. Thus, the government is required to show prejudice before a claim can be dismissed on the basis of failure to meet the notice requirement.

Id. In her dissent in Rowland, Justice Kelly stated that the prejudice requirement should still be good case law but read the decisions of Hobbs and Brown more narrowly indicating prejudice only applies to the timeliness of the notice and not to the content of it. Rowland, 477 Mich 197 (2007), *dissenting opinion*, Justice Kelly. It appears that Justice Cavanagh would apply the prejudice requirement even where no notice is given at all given he states it is to apply “...before a claim can be dismissed on the basis of *failure* to meet the notice requirement”. Rowland, 477 Mich 197 (2007), *dissenting opinion*, Justice Cavanagh, citing, Carver v McKernan, 390 Mich 96, 100 (1973).

The dissenting opinion of Justice Cavanagh in Rowland should be this Court’s holding in this case now before this Court now.

Further, this Court’s decisions in Carver v McKernan, 390 Mich 96, 100 (1973), Hobbs v Dep’t of State Hwys, 398 Mich 90 (1976), and Brown v Manistee Co Rd Comm, 452 Mich 354 (1996) should be re-affirmed. Where there is no prejudice failure to give a pre lawsuit notice cannot be a basis for dismissing Plaintiff’s case. Id. In this case, Defendant did not suffer any prejudice because evidence was preserved when its city workers tagged the area on February 7, 2006 and evidence was preserved when its police department took photographs on the incident date, March 2, 2006. (6a; 11a; 16a).

In the alternative, this Court should hold that a pre lawsuit notice provision in Michigan Statute is an unconstitutional violation of due process and equal protection (treating victims of governmental negligence and victims of private negligence differently) pursuant to both the

federal and the Michigan Constitutions. U.S. Const. 14<sup>th</sup> Amend.; Mich Const., Art. I Sec. 17 and Art. I Sec. 2.

## **CONCLUSION AND RELIEF REQUESTED**

WHEREFORE, for all the reasons aforementioned, this Court should affirm the trial court, reverse the Michigan Court of Appeals, and allow this matter to proceed to a trial on its merits.

**Respectfully submitted,**

**LAW OFFICE OF ERNEST F. FRIEDMAN**

**BY:**



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