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STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

(Wilder, P.J., and Meter and Servitto, JJ.)

MOHAMED MAWRI,

Plaintiff-Appellant,

vs.

CITY OF DEARBORN,

Defendant-Appellee.

Supreme Court Docket No 139647

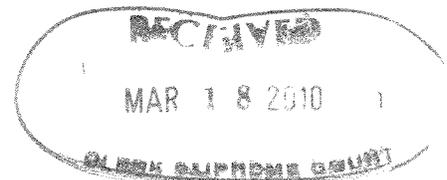
Court of Appeals No 283893

Wayne Cir Ct No 06-617502-NO

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BRIEF OF AMICUS CURIAE JOHN A. BRADEN

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Defendant-Appellee.

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**BRIEF OF AMICUS CURIAE JOHN A. BRADEN**

## TABLE OF CONTENTS

INDEX OF AUTHORITIES . . . . .	iv
STATEMENT OF QUESTIONS PRESENTED . . . . .	ix
STATEMENT OF FACTS . . . . .	1
DISCUSSION . . . . .	6
I. NOTICE OF CLAIM REQUIREMENTS ARE CONSTRUED AGAINST THE DEFENDANT. . . . .	6
A. GENERALLY . . . . .	6
B. DEROGATION OF COMMON LAW . . . . .	6
C. CONSTRUE IN LIGHT OF PURPOSES . . . . .	7
D. NARROW VERSUS REMEDIAL CONSTRUCTION . . . . .	10
E. DEPARTURE FROM STATUTORY LANGUAGE . . . . .	12
1. TO ACCORD WITH GENERAL PURPOSE . . . . .	13
2. TO AVOID CONSTITUTIONAL DOUBT . . . . .	14
3. APPLYING NOC REQUIREMENTS ABSENT PREJUDICE WOULD RENDER THEM UNCONSTITUTIONAL . . . . .	15
F. CONCLUSION . . . . .	17
II. THE NOTICE OF CLAIM WAS SUFFICIENTLY SPECIFIC . . . . .	17
A. EXTRINSIC INFORMATION IS RELEVANT . . . . .	17
B. THE LOCATION WAS SUFFICIENTLY STATED . . . . .	19
C. THE DEFECT WAS SUFFICIENTLY STATED . . . . .	21
D. ANY VARIANCE IS IMMATERIAL . . . . .	22
E. THE MODE OF SERVICE IS NOT CRITICAL . . . . .	24
F. DEFENDANT WAS NOT PREJUDICED . . . . .	25
1. GENERALLY . . . . .	25
2. EFFECT OF REPAIR . . . . .	26
III. THE NATURAL ACCUMULATION DEFENSE IS NOT AN IMPEDIMENT . . . . .	27
A. A FACTUAL ISSUE AS TO WHAT CAUSED THE FALL PRECLUDES SUMMARY DISPOSITION . . . . .	27
B. SCOPE OF NATURAL ACCUMULATION DEFENSE . . . . .	29
1. INTRODUCTION . . . . .	29
2. WHO CREATED THE CONDITION . . . . .	30

3. IMPOUNDED ACCUMULATIONS . . . . .	32
4. CAUSATION IN FACT . . . . .	33
5. PROXIMATE CAUSE . . . . .	35
6. EXISTENCE OF DEFECT . . . . .	36
7. PRACTICALITY . . . . .	38
C. CONCLUSION . . . . .	43
IV. THE TWO-INCH RULE IS NOT AN IMPEDIMENT . . . . .	43
A. INTRODUCTION . . . . .	43
B. DEFENDANT FAILED TO PROVE THAT THE INFERENCE APPLIES	44
1. GENERALLY . . . . .	44
2. ABUTTING COUNTY HIGHWAY . . . . .	45
3. DISCONTINUITY DEFINED . . . . .	46
4. MEASUREMENT OF DISCONTINUITY . . . . .	46
C. PLAINTIFF REBUTTED ANY INFERENCE . . . . .	47

## INDEX OF AUTHORITIES

### CASES<sup>1</sup>

<i>Abbott v Detroit</i> , 150 Mich 245 (1907) . . . . .	24
<i>Allgaier v Warren</i> , Ct App No 268102 (Aug. 22, 2006), lv den 477 Mich 993 (2007) . . . . .	50
<i>Andrews v Booth</i> , 148 Mich 333 (1907) . . . . .	33
<i>Appell v MDSH</i> , 398 Mich 110 (1976) . . . . .	8
<i>Attorney General v Detroit United Ry</i> , 210 Mich 227 (1919), app dism 247 US 609, 66 L Ed 395, 42 S Ct 46 (1921). . . . .	14
<i>Barribeau v Detroit</i> , 147 Mich 119 (1907) . . . . .	17, 19
<i>Bates v Addison</i> , Ct App No 253374 (Oct, 4, 2005) . . . . .	50
<i>Bludders v State Farm Mutual Ins Co</i> , 52 Mich App 714 (1974), mod 392 Mich 804 (1974) . . . . .	8
* <i>Botsford v Clinton Tp</i> , Ct App No 272513 (March 20, 2007) . . . . .	x, 19, 24
<i>Brown v Detroit</i> , 478 Mich 589 (2007) . . . . .	6, 43
<i>Brown v Jojo-Ab, Inc</i> , 191 Mich App 208 (1991) . . . . .	9
<i>Brown v Manistee CRC</i> , 452 Mich 354 (1996) . . . . .	8
<i>Buckner Estate v Lansing</i> , 480 Mich 1243 (2008) . . . . .	31
<i>Buckner Estate v Lansing</i> , 274 Mich App 672 (March 15, 2007), rev'd on other grds 480 Mich 1243 (2008) . . . . .	37
<i>Burise v Pontiac</i> , 282 Mich App 646 (2009), lv den __ Mich __ (Sept. 28, 2009) . . . . .	17
<i>Burton v Waterford Tp</i> , Ct App No 274332 (April 26, 2007) . . . . .	32, 43
<i>Calamita v St Clair</i> , Ct App No 236755 (March 9, 2004) . . . . .	31
<i>Carver v McKernan</i> , 390 Mich 96 (1973) . . . . .	8
* <i>Castellanos v Pontiac</i> , Ct App No 286865 (Dec. 29, 2009) . . . . .	xii, 49
<i>Caverly v HICS Corp</i> , Ct App No 256329 (Jan. 24, 2006) . . . . .	9
<i>Chambers v Midland Country Club</i> , 215 Mich App 573 (1996) . . . . .	9
<i>Chambers v Wayne Co Airport Auth</i> , Ct App No 277900 (June 5, 2008), lv den 483 Mich 1081 (2009) . . . . .	8
<i>Colangelo v Tau Kappa Epsilon</i> , 205 Mich App 129 (1994) . . . . .	39
<i>Curtis v Biermacher</i> , 30 Mich App 503 (1971) . . . . .	x, 25
<i>Davis v Farmers Ins Group</i> , 86 Mich App 45 (1978) . . . . .	9
<i>Davis v Thornton</i> , 384 Mich 138 (1970) . . . . .	35
<i>Dennis v Eastpointe</i> , Ct App No 237521 (Dec. 27, 2002) . . . . .	32, 43

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<sup>1</sup>

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<i>Detroit Base Coalition v MDSS</i> , 431 Mich 172 (1988) . . . . .	46
<i>Dozier v State Farm Mutual Auto Ins Co</i> , 95 Mich App 121 (1980), lv den 409 Mich 911 (1980) . . . . .	7
<i>Dykstra v MDOT</i> , Ct App No 192187 (Aug. 12, 1997) . . . . .	8
<i>Elam v Marine</i> , 116 Mich App 140, 142-143 (1982) . . . . .	31
<i>Elbgal v Dearborn</i> , Ct App No 285292 (Sept. 3, 2009) . . . . .	34
<i>Ells v Eaton CRC</i> , 480 Mich 902 (2006) . . . . .	9
<i>Fair Estate v State Vets Facility</i> , 55 Mich App 35 (1974) . . . . .	7-8, 24
<i>Finney v Detroit</i> , Ct App No 256697 (Jan. 19, 2006) . . . . .	31
<i>Force v Owosso</i> , Ct App No 245996 (April 15, 2004) . . . . .	44
<i>Foster v Watson</i> , 153 Mich 400 (1908) . . . . .	33
<i>Gable v Detroit</i> , 226 Mich 261 (1924) . . . . .	23
<i>Gadigian v Taylor</i> , 282 Mich App 179 (Nov. 20, 2008), lv gtd S Ct No 138323 .	xii, 49
<i>Gavett v Jackson</i> , 109 Mich 408 (1896) . . . . .	30, 31
<i>Geraldine v Miller</i> , 322 Mich 85 (1948) . . . . .	7
<i>Gerrie v Port Huron</i> , 226 Mich 630 (1924) . . . . .	31
<i>Griffin v Pontiac</i> , Ct App No 269988 (Oct. 26, 2006) . . . . .	7, 47
<i>Griffith v State Farm Mut Auto Ins Co</i> , 472 Mich 521 (2005). . . . .	13, 14, 45
<i>Gunther v Cheboygan CRC</i> , 225 Mich 619 (1925) . . . . .	11
<i>Gutierrez v Saginaw</i> , Ct App No 272619 (March 29, 2007) . . . . .	49
<i>Haliw v Sterling Heights</i> , 464 Mich 297 (2001). . . . .	2, 28-29, 32-38, 43
<i>Halloran v Bhan</i> , 470 Mich 572 (2004) . . . . .	46
* <i>Handey v Ann Arbor</i> , Ct App No 284135 (July 30, 2009), lv pdg S Ct No 140046 . . . . .	xi, xii, 49
<i>Hanger v State Hwy Dept</i> , 64 Mich App 572 (1975), lv den 399 Mich 812 (1977) . . .	8
<i>Harrington v Battle Creek</i> , 288 Mich 152 (1939) . . . . .	23
<i>Hayes v St Clair</i> , 173 Mich 631 (1913) . . . . .	ix, 7
<i>Hobbs v MSHD</i> , 398 Mich 90 (1976) . . . . .	8
<i>Hopson v Detroit</i> , 235 Mich 248, 251 (1926) . . . . .	32, 33, 36, 37, 43
<i>Horners Trucking Service v State Hwy Dept</i> , 64 Mich App 513 (1975), lv den 399 Mich 812 (1977) . . . . .	8
<i>Houston v Detroit/ Collier</i> , Ct App No 262627 (April 4, 2006) . . . . .	8
<i>Hummel v Grand Rapids</i> , 319 Mich 616 (1948) . . . . .	23
<i>Hussey v Muskegon Heights</i> , 36 Mich App 264 (1971) . . . . .	x, 7, 8, 19, 22, 25
<i>Hutchinson v Ypsilanti</i> , 103 Mich 12 (1894) . . . . .	30, 31
<i>Ignaszak v McRay Refridgerator Co</i> , 221 Mich 10 (1922) . . . . .	35
<i>Jefferson v Sault Ste Marie</i> , 166 Mich 340 (1911) . . . . .	31
<i>Johnson v Pontiac</i> , 276 Mich 103 (1936) . . . . .	33
<i>Jones v Flint</i> , Ct App No 263036 (Nov. 17, 2005) . . . . .	50

<i>Jones v MDOT</i> , Ct App No 275076 (Oct. 25, 2007) . . . . .	9
<i>Jones v Ypsilanti</i> , 26 Mich App 574 (1970) . . . . .	x, 22
* <i>Joseph v VanBuren CRC</i> , Ct App No 190950 (Aug. 15, 1997) . . . . .	x, 27
<i>Jovanovic v Stasiak</i> , Ct App No 202152 (March 3, 1998) . . . . .	36-37, 43
<i>Kannenberg v Alpena</i> , 96 Mich 53 (1893) . . . . .	32, 39, 40, 43
<i>Kerkstra v MDSH</i> , 398 Mich 103 (1976) . . . . .	8
<i>Lautenheiser v Jolly Bar &amp; Grille</i> , 206 Mich App 67 (1994) . . . . .	9
<i>Lansing Gen'l Hosp v Gomez</i> , 114 Mich App 814 (1982), lv den 417 Mich 1044 (1983) . . . . .	7, 17, 25
<i>Lawson v Niles</i> , Ct App No 280797 (Jan. 8, 2009) . . . . .	17
<i>Ledbetter v Warren</i> , Ct App No 269758 (Oct. 31, 2006) . . . . .	50
<i>Leech v Kramer</i> , 479 Mich 858 (2007) . . . . .	9
* <i>Leech v Kramer</i> , Ct App No 253827 (Oct. 11, 2005), rev'd on other grds 479 Mich 858 (2007) . . . . .	x, 32
<i>Lictawa v Farm Bureau Ins Co</i> , Ct App No 245026 (March 23, 2004), lv den 471 Mich 885 (2004) . . . . .	25
<i>Lynch v Overholser</i> , 369 US 705; 8 L Ed 2d 211; 82 S Ct 1063 (1962) . . . . .	15
<i>MacLachlan v CATA</i> , 474 Mich 1059 (2006). . . . .	36, 37, 43
<i>Major v Detroit</i> , Ct App No 261583 (Sept. 15, 2005) . . . . .	32, 35, 37, 43
<i>Mason v Cass CRC</i> , 221 Mich App 1 (1997), lv den 457 Mich 855 (1998) . . . . .	8
* <i>Mauer v Topping</i> , Ct App No 250858 (April 7, 2005), mod 480 Mich 912 (2007) . . . . .	x, 21, 32
<i>May v DNR</i> , 140 Mich App 730 (1985) . . . . .	8
<i>Mayberry v Gen'l Orthopedics</i> , 474 Mich 1 (2005). . . . .	28
<i>Mayo v Baraga</i> , 178 Mich 171 (1913) . . . . .	30
<i>McKellar v Detroit</i> , 57 Mich 158 (1885) . . . . .	30, 31, 38, 39
<i>Meredith v Melvindale</i> , 381 Mich 572 (1969) . . . . .	7
<i>Middleton v Marquette Co</i> , Ct App No 251855 (April 19, 2005), app disp 711 NW2d 581 (April 7, 2006) . . . . .	8
<i>Miller v Miller</i> , 373 Mich 519 (1964) . . . . .	42
<i>Moning v Alfono</i> , 400 Mich 425 (1977) . . . . .	35, 39, 42
<i>Morrison v Ironwood</i> , 189 Mich 117 (1915) . . . . .	xi, 35
<i>Mullas v Sec'y of State</i> , 32 Mich App 693 (1971) . . . . .	8
<i>Navarra v UM Regents</i> , 393 Mich 773 (1974) . . . . .	8
<i>Navarre v Benton Harbor</i> , 126 Mich 618 (1901) . . . . .	x, 32, 33, 37, 43
<i>Nuculovic v Hill</i> , ____ Mich App ____ (2010), lv pdg S Ct No 140578 . . . . .	x, 25
<i>Oesterreich v Detroit</i> , 137 Mich 415 (1904) . . . . .	ix, 6
<i>Overton v Detroit</i> , 339 Mich 650 (1954) . . . . .	23
<i>Pappas v Bay City</i> , 17 Mich App 745 (1969), lv den 382 Mich 779 (1969) . . . . .	x, 32

<i>Pearll v Bay City</i> , 174 Mich 643 (1913) . . . . .	x, 7, 19
<i>People v Emmons</i> , 178 Mich 126 (1913) . . . . .	48
<i>People v Hardiman</i> , 466 Mich 417 (2002) . . . . .	48
<i>Peters v MDSH</i> , 400 Mich 50 (1977) . . . . .	x, 32, 37
<i>Phelps v MDSH</i> , 75 Mich App 442 (1977) . . . . .	8
<i>Plunkett v MDOT</i> , ___ Mich App ___ (2009), lv pdg S Ct No 140193 . . . . .	ix-xi, 7, 17, 32, 35, 43
<i>Reich v State Highway Dept</i> , 386 Mich 617 (1972) . . . . .	49
<i>Republic Franklin Ins Co v Walker</i> , 17 Mich App 92 (1969) . . . . .	20
<i>Rex v Lochmoor</i> , 268 Mich 159 (1934) . . . . .	32, 37
<i>Reynolds v Clare CRC</i> , 34 Mich App 460 (1971) . . . . .	24
<i>Ridgeway v Escanaba</i> , 154 Mich 68 (1908) . . . . .	7
<i>Rolf v Greenville</i> , 102 Mich 544 (1894) . . . . .	30
<i>Ross v Consumers Power Co</i> , 420 Mich 567 (1984) . . . . .	10, 11
<i>Rottschafer v East Grand Rapids</i> , 342 Mich 43 (1955) . . . . .	23
<i>Rowland v Washtenaw CRC</i> , 477 Mich 197 (2007) . . . . .	9, 14, 16
<i>Rule v Bay City</i> , 12 Mich App 503 (1968), lv den 381 Mich 782 (1968) . . . . .	19
* <i>Semon v St Clair Shores</i> , Ct App No 274777 (Oct. 30, 2007), lv den 481 Mich 851 (2008) . . . . .	xi, 47
<i>Shannon v People</i> , 5 Mich 36 (1858) . . . . .	12
<i>Southwell v Detroit</i> , 74 Mich 438 (1889) . . . . .	42
<i>Spitzner v Kalamazoo Co</i> , Ct App No 110967 (June 6, 1990), rem'd on other grds 440 Mich 911 (1992) . . . . .	8
<i>Stacey v Sankovich</i> , 19 Mich App 688 (1969) . . . . .	8, 24
<i>Stord v MDOT</i> , 186 Mich App 693 (1991), lv den 439 Mich 863 (1991) . . . . .	31
<i>Tattan v Detroit</i> , 128 Mich 650 (1901) . . . . .	x, 19, 22
<i>Teufel v Watkins</i> , 267 Mich App 425 (2005) . . . . .	36
<i>Trent v SMART</i> , 252 Mich App 247 (2002) . . . . .	8
<i>United States v Jin Fuey Moy</i> , 241 US 394; 60 L Ed 1061; 36 S Ct 658 (1916) . . . . .	14
<i>Walden v Auto-Owners Ins Co</i> , 105 Mich App 528 (1981) . . . . .	24-25
<i>Ward v ConRail</i> , 472 Mich 77 (2005) . . . . .	44
<i>Weiss v Eaton CRC</i> , Ct App No 210105 (Nov. 19, 1999) . . . . .	8
<i>Wesley v Detroit</i> , 117 Mich 658 (1898) . . . . .	30
<i>Wheeler v Detroit</i> , 127 Mich 329 (1901) . . . . .	19
<i>Whinnen v 231 Corp</i> , 49 Mich App 371 (1973), lv den 391 Mich 878 (1974) . . . . .	34
<i>Widmayer v Leonard</i> , 422 Mich 280 (1985) . . . . .	47
<i>Williams v Lansing</i> , 152 Mich 169 (1908) . . . . .	x, 23
<i>Williams v MDOT</i> , 206 Mich App 71 (1994) . . . . .	39
<i>Wilmarth v Mich United Traction Co</i> , 198 Mich 428 (1917) . . . . .	35

<i>Woodworth v Brenner</i> , 69 Mich App 277 (1976) . . . . .	31
<i>Workman v DAIIE</i> , 404 Mich 477 (1979) . . . . .	15
<i>Wright v Bradley</i> , Ct App No 176846 (April 26, 1996) . . . . .	32, 35, 43

STATUTES AND COURT RULES

MCL 8.3a . . . . .	11
MCL 500.3116 . . . . .	15
MCL 691.1401(e) . . . . .	6
MCL 691.1404(2) . . . . .	24
MCL 691.1402a . . . . .	43-44
MCL 691.1402a(1) . . . . .	45
MCL 691.1402a(2) . . . . .	44, 45, 47
MCL 691.1404(1) . . . . .	6
MCR 2.116(I)(2) . . . . .	43
MRE 407 . . . . .	41

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<i>Webster's New Collegiate Dictionary</i> (Springfield, Mass.: G.& C. Merriam Co 1975)	46
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## STATEMENT OF QUESTIONS PRESENTED

### I. WAS THE NOTICE OF CLAIM FATALLY DEFECTIVE?

The trial court said “no.”

The Court of Appeals said “yes.”

Amicus John Braden says “no.”

### II. DOES THE NATURAL ACCUMULATION DEFENSE ENTITLE DEFENDANT TO SUMMARY DISPOSITION?

The trial court implicitly said “no.”

The Court of Appeals did not address the issue.

Amicus John Braden says “no.”

### III. DOES THE TWO-INCH RULE ENTITLE DEFENDANT TO SUMMARY DISPOSITION?

The trial court implicitly said “no.”

The Court of Appeals did not address the issue.

Amicus John Braden says “no.”

The foregoing issues present a number of sub-issues:

#### I.A. ARE AMBIGUITIES IN NOTICE OF CLAIM (NOC) REQUIREMENTS RESOLVED IN FAVOR OF THE DEFENDANT?

Amicus John Braden, *Oesterreich v Detroit*, 137 Mich 415 (1904) and *Hayes v St Clair*, 173 Mich 631, 637 (1913) say “no.”

#### I.B. IN EVALUATING THE SUFFICIENCY OF AN NOC, IS ONE LIMITED TO ITS FOUR CORNERS?

Amicus John Braden and *Plunkett v MDOT*, \_\_\_ Mich App \_\_\_ (2009), lv pdg S Ct No 140193 say “no.”

I.C. IS AN NOC THAT ENABLES THE DEFENDANT TO FIND AND IDENTIFY THE DEFECT SUFFICIENTLY SPECIFIC?

Amicus John Braden, *Tattan v Detroit*, 128 Mich 650, 651 (1901), *Pearll v Bay City*, 174 Mich 643 (1913), *Jones v Ypsilanti*, 26 Mich App 574 (1970), *Hussey v Muskegon Heights*, 36 Mich App 264 (1971) and *Botsford v Clinton Tp*, Ct App No 272513 (March 20, 2007) say “yes.”

I.D. IS THERE A FATAL VARIANCE BETWEEN THE NOC AND THE EVIDENCE?

Amicus John Braden and *Williams v Lansing*, 152 Mich 169 (1908) say “no.”

I.E. DOES SERVING THE NOC BY ORDINARY MAIL RENDER IT INEFFECTIVE?

Amicus John Braden, *Curtis v Biermacher*, 30 Mich App 503 (1971) and *Hussey v Muskegon Heights*, *supra* say “no.”

Leave is pending on a contrary case. *Nuculovic v Hill*, \_\_\_\_\_ Mich App \_\_\_\_\_ (2010), lv pdg S Ct No 140578.

I.F. DOES GIVING AN NOC AFTER A REPAIR BUT BEFORE THE STATUTORY DEADLINE RENDER THE NOTICE INEFFECTIVE?

Amicus John Braden and *Joseph v VanBuren CRC*, Ct App No 190950 (Aug. 15, 1997) say “no.”

II.A. DOES A FACTUAL ISSUE AS TO WHAT CAUSED PLAINTIFF’S FALL PRECLUDE SUMMARY DISPOSITION?

Amicus John Braden says “yes.”

II.B. IS A FALL DUE TO IMPOUNDED WATER DUE ENTIRELY TO A NATURAL ACCUMULATION?

Amicus John Braden, *Peters v MDSH*, 400 Mich 50, 58 (1977), *Navarre v Benton Harbor*, 126 Mich 618 (1901), *Pappas v Bay City*, 17 Mich App 745 (1969), lv den 382 Mich 779 (1969), *Mauer v Topping*, Ct App No 250858 (April 7, 2005), lv den (on this issue) 480 Mich 912 (2007) and *Leech v Kramer*, Ct App No 253827 (Oct. 11, 2005), rev’d on other grds 479 Mich 858 (2007) say “no.”

Leave is pending in a contrary case. *Plunkett v MDOT*, *supra*.

II.C. WAS A DEFECT A CAUSE IN FACT OF PLAINTIFF'S FALL?

Amicus John Braden says "yes."

II.D. WAS THE IMPOUNDED WATER A SUPERSEDING CAUSE OF PLAINTIFF'S FALL?

Amicus John Braden and *Morrison v Ironwood*, 189 Mich 117, 121-122 (1915) say "no."

Leave is pending in a contrary case. *Plunkett v MDOT, supra*.

II.E. NEED A CONDITION BE DANGEROUS AT ALL TIMES TO CONSTITUTE A DEFECT?

Amicus John Braden says "no."

III.A. IS THE TWO-INCH RULE LIMITED TO SIDEWALKS ALONG COUNTY HIGHWAYS?

Amicus John Braden says "yes."

III.B. IS A HEAVED SIDEWALK SLAB THAT REMAINS IN CONTACT WITH THE NEIGHBORING SLAB A "DISCONTINUITY"?

Amicus John Braden says "no."

III.C. IS A DEFECT THAT IS OVER TWO INCHES WIDE SUBJECT TO THE TWO-INCH RULE?

Amicus John Braden and *Semon v St Clair Shores*, Ct App No 274777 (Oct. 30, 2007), lv den 481 Mich 851 (2008) say "no."

III.D. IS A DEFECT THAT IS HIDDEN BY SNOW SUBJECT TO THE TWO-INCH RULE?

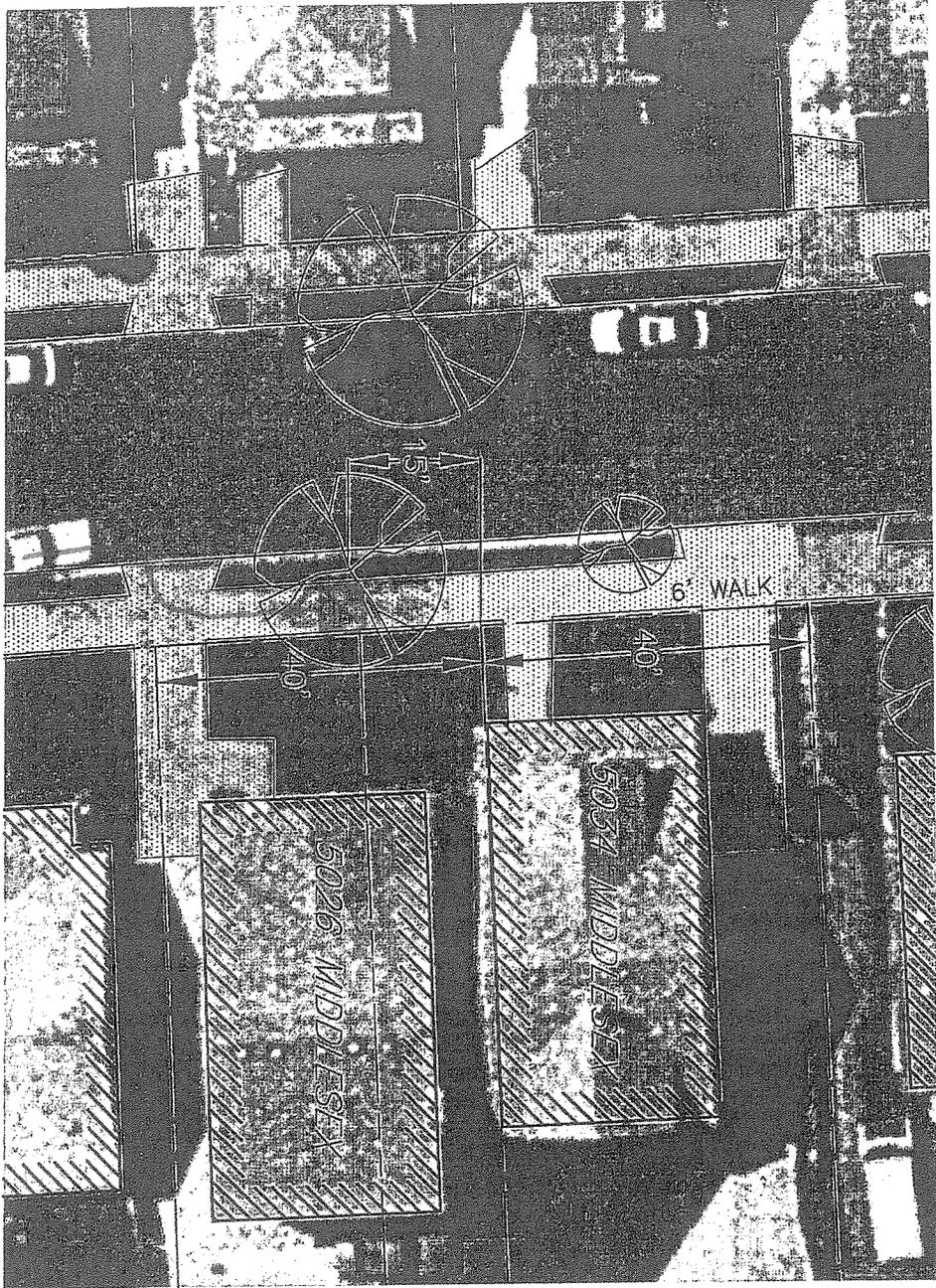
Amicus John Braden and *Handey v Ann Arbor*, Ct App No 284135 (July 30, 2009), lv pdg S Ct No 140046 say "no."

III.E. IS A DEFECT INCLUDING A TILTED TRAVEL SURFACE SUBJECT TO THE TWO-INCH RULE?

Amicus John Braden, *Handey, supra, Gadigian v Taylor*, 282 Mich App 179 (Nov. 20, 2008), lv gtd S Ct No 138323 and *Castellanos v Pontiac*, Ct App No 286865 (Dec. 29, 2009) say “no.”

III.F. IS A DEFECT THAT IMPOUNDS WATER SUBJECT TO THE TWO-INCH RULE?

Amicus John Braden says “no.”



MIDDLESEX AVE.  
50' R.O.W.

5034-5026 MIDDLESEX AVE.  
→ = Plaintiff's route  
☒ = Offending slab  
(Red added by Amicus)

DEPARTMENT OF PUBLIC WORKS  
DIVISION OF ENGINEERING  
CITY OF DEARBORN, MICHIGAN

APPROVED _____	CITY ENGINEER	APPROVED _____	ASST. CITY ENGINEER
DRAWN J.C.S.	FILENAME	S:\MSCHUEHR\Comp_188-Outer_Dr.-Legal.dwg	
SCALE 1"=20'	DATE	11/5/2007	
	SHEET	1 OF 1	

## STATEMENT OF FACTS

### A. BACKGROUND

Middlesex is a north-south street in Dearborn. From the street surface toward the houses, it is arranged like a typical city street: curb, grassy berm, sidewalk, then front lawns (see aerial view, attached<sup>2</sup>). House number 5026 is on the east side of Middlesex (*Id.*)

On the berm next to the sidewalk in front of 5026 Middlesex is a tree, whose trunk is visible in Mawri dep ex. 9 (12a). A sidewalk slab or “flag” next to that tree had tilted, such that the west end was raised slightly *above* the neighboring slab, while the east end was *below* the level of the neighboring slab, and below the level of the adjoining lawn as well (12a, DxB). This created an area in which water could pool, as well as a ledge between the neighboring slabs (12a). The Plaintiff’s expert opined that the tilting/subsidence was caused by the tree roots (40a).

On February 7, 2006, Defendant surveyed the walk in front of 5034 Middlesex, and found a “broken” walk and a “hazard” on the apron (16a).<sup>3</sup>

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2

Pre-modification, this was an exhibit attached to Defendant’s trial-level motion for rehearing, and is not in Plaintiff-Appellant’s appendix.

3

There is some doubt as to whether this survey relates to the defect that injured Plaintiff:

- It says “broken,” whereas the slab in question merely tilted.
- it says a vehicle drove over the curb and broke it, whereas the relevant defect was caused by tree roots.
- It notes a hazard on an “apron,” whereas this is not an apron.

## B. INCIDENT AND INVESTIGATION

On March 1, 2006, Plaintiff Mohamed Mawri began living in a rented house at 5034 Middlesex (M 9-10<sup>4</sup>), which neighbors 5026 Middlesex on the north (aerial view).

Around 9:20 p.m. on the evening of March 2, 2006 (police report, DxA, 11a), Plaintiff parked his vehicle on the east side of Middlesex, further south than 5026 Middlesex (M 13). He walked north up the street, turned east on the driveway apron of 5026 Middlesex, then turned north again to proceed up the sidewalk (M 14).

When Plaintiff reached the place where the slab had subsided, he tripped (M 14) or slipped (police report, DxA, 11a) and fell.<sup>5</sup> He confirmed that the spot was next to the

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- The boxes that would seem to apply to this defect (“low grade,” “water stands”) were not checked.
  - This survey says the defect was flagged on April 12, whereas Defendant claims the defect on which plaintiff fell was flagged on April 18.
  - The house number on the survey is 5034, whereas the defect that injured Plaintiff was opposite 5026.

Nevertheless, this work order is evidently the one Defendant considered relevant, since it was attached to its motion for summary disposition as Dx F.

4

M= excerpts from Mawri dep, which accompanied Defendant’s summary disposition motion as Dx C. The portions contained in Plaintiff’s Appendix (55a-56a) are less complete.

5

The two are not mutually exclusive: Plaintiff’s foot may have slipped on the ice patch, then contacted the edge of the next concrete pad, causing a trip. Cf the hypothetical in *Haliw v Sterling Heights*, 464 Mich 297, 311 (2001).

The existence of the trip at least shows that the depression was not *completely* filled with ice since, if it had been, the edge of the next slab would not have protruded enough to cause a trip.

tree (M 12), opposite the neighbor's house (M 11, 12).

Before Plaintiff was taken to the hospital, Dearborn police went to the scene (DxA, 11a) and took several photographs (DxB) which, despite the darkness, are enlightening. The first photo shows the defect covered in snow. The police then scraped off the snow and took another picture. The second picture shows the northeast corner of the slab covered in ice, where the slab had subsided.

Plaintiff was taken to the hospital, where he reported "falling on ice" (DxG, 21a). Plaintiff was diagnosed with a fractured right femur (17a) which required an open reduction, internal fixation (operative report, 19a).

A police report filed the next day incorrectly listed the location of the incident as 5034 Middlesex (DxA, 11a). However, according to the narrative portion of the report, Plaintiff said the fall occurred at 5026 Middlesex (*Id.*).

After the weather cleared, someone on Plaintiff's behalf took photos of the area (12a).

On April 5, 2006, Plaintiff told Dr. Lerner that he suffered a "trip and fell" (27a).

### **C. REPAIR AND NOTICE**

On April 18, 2006, Defendant marked the defect and on May 24 poured a new flag to replace the subsided one (work order, DxG; photo of repaired flag, 13a).

On May 26, Plaintiff's attorney mailed the following notice to Defendant's "corporation counsel:

Please be advised that I represent Mohamed Mawri for injuries he sustained when he fell on a defective side-walk on March 2<sup>nd</sup>, 2006 in the area of 5034 Middlesex,<sup>6</sup> 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 side-walk, fracturing his right hip, necessitating surgery. Please consider this statutory notice. If you need any further information please do not hesitate to contact me (DxE, 33a).

The 120-day statutory notice deadline ran on June 30, 2006.

Plaintiff filed suit against Defendant, completing service on July 23, 2006 (38a).

#### **D. PROCEEDINGS**

In October, 2007, Defendant filed a motion for summary disposition, arguing insufficient notice of claim, natural accumulation defense, and the “two-inch rule” of MCL 691.1402a.

In the wake of the motion, Plaintiff filed affidavits claiming that the defect was “between” 5034 and 5026 Middlesex (48a, 52a).<sup>7</sup>

The following transpired at the hearing on the motion:

THE COURT: ... the matter was investigated by the police department, wasn't it?

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6

Given Plaintiff's clear testimony that the incident occurred in front of 5026 Middlesex, it is not apparent why the 5034 house number was used in the notice. Plaintiff's counsel might have been misled by the police report, which mentioned both addresses.

7

This can be dismissed as testimonial backfilling, since it is clear that the tree and adjoining tilted slab were directly in front of the house at 5026 Middlesex.

Moreover, Mawri's affidavit is incompetent if (as appears from 51a to 54a) it was never properly attested.

MR. IRVING: Yes.

THE COURT: And they took pictures.

MR. IRVING: Yes.

THE COURT: That's your agent, isn't it?

MR. IRVING: Yes...

THE COURT: Motion's denied ...

The notice is sufficient - the notice coupled with the information that you already had certainly is sufficient... what's he to do?... Put a big X on the street?... What more or better notice can you have than your agent coming out and taking the pictures?... The whole concept of this is to give the city notice to defend and to prepare a defense to the case. Number one they got a police report; they got a police officer that took pictures of the defect... prior to the fall your people had notice of the defect, and went out and tagged the sidewalk (Hearing transcript 5-7, the last two pages of which are 5a-6a).<sup>8</sup>

Defendant filed a motion for rehearing, attaching additional evidence (including the aforementioned aerial view). The motion was denied.

The Court of Appeals reversed, holding that the notice of claim was insufficient. Ct App No 283893 (August 6, 2009).

The Supreme Court granted leave on December 18, 2009.

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It is not apparent why the trial court did not address the other two defenses raised by Defendant.

## DISCUSSION

### I. NOTICE OF CLAIM REQUIREMENTS ARE CONSTRUED AGAINST THE DEFENDANT

*STANDARD OF REVIEW:* Construction of a statute is a legal question, reviewable de novo. *Brown v Detroit*, 478 Mich 589, 593 (2007).

#### A. GENERALLY

The notice of claim requirement for city streets and highways is contained in MCL 691.1404(1):

As a condition to any recovery for injuries sustained by reason of any defective highway,<sup>9</sup> the injured person, within 120 days from the time the injury occurred...shall serve a notice on the governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained and the names of the witnesses known at the time by the claimant.

#### B. DEROGATION OF COMMON LAW

Where a statute is ambiguous, rules of statutory construction decide the issue. One of the first constructional rules applied to notice of claim requirements is that, because the common law contained no such requirements, NOCs are in derogation of the common law and therefore must be strictly construed against the defendant. *Oesterreich v Detroit*, 137 Mich 415 (1904). This translates into a liberal construction in favor of the plaintiff:

We have been inclined to favor a liberal construction of

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<sup>9</sup>

Defined to include sidewalks. MCL 691.1401(e).

statutes requiring notices of claims, and have not denied relief whereby any reasonable interpretation the notice could be said to be in substantial compliance with the statute.

*Hayes v St Clair*, 173 Mich 631, 637 (1913). Accord *Plunkett v MDOT*, \_\_\_ Mich App \_\_\_ (2009), lv pdg S Ct No 140193.

### C. CONSTRUE IN LIGHT OF PURPOSES

More importantly, statutes must be construed in light of their purposes. *Geraldine v Miller*, 322 Mich 85, 96 (1948); *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521 (2005). As Defendant admits, the purpose of an NOC is to give the defendant sufficient information to pursue an investigation while the investigative trail is still fresh. *Hussey v Muskegon Heights*, 36 Mich App 264, 267-268 (1971); *Plunkett v MDOT*, *supra*. If an NOC is sufficient to achieve that purpose, then the Legislative purpose has been served, and the notice is presumptively adequate. *Meredith v Melvindale*, 381 Mich 572, 580-581 (1969).

Indeed, even if a notice is technically or formally defective, so long as it is sufficient to put the defendant on the investigative trail, it serves the Legislature's purpose and so is adequate *in substance*. In short, *substantial* compliance with a NOC requirement serves the Legislature's purpose, and so is sufficient.<sup>10</sup>

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*Pearll v Bay City*, 174 Mich 643 (1913); *Hayes v St Clair*, *supra* at 173 Mich 637; *Ridgeway v Escanaba*, 154 Mich 68 (1908); *Lansing Gen'l Hosp v Gomez*, 114 Mich App 814, 823 (1982), lv den 417 Mich 1044 (1983); *Dozier v State Farm Mutual Auto Ins Co*, 95 Mich App 121, 128 (1980), lv den 409 Mich 911 (1980); *Fair Estate v State Vets*

Legislative purpose is also the basis of cases holding that “prejudice” is required before noncompliance with an NOC will compel dismissal.<sup>11</sup> Saying that a defendant has *not been prejudiced* by any defect in the notice is another way of saying that the defendant *has received enough information* to follow the investigative trail. Since receiving enough information to follow the investigative trail also serves the legislative purpose behind NOC requirements, it follows that overlooking nonprejudicial defects (i.e., those that do not preclude following the investigative trail) does not contradict the legislative purpose behind NOC requirements.

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*Facility*, 55 Mich App 35, 40 (1974); *Hussey v Muskegon Heights*, *supra* at 36 Mich App 269; *Stacey v Sankovich*, 19 Mich App 688 (1969).

11

*Brown v Manistee CRC*, 452 Mich 354 (1996); *Hobbs v MSHD*, 398 Mich 90, 96 (1976); *Appell v MDSH*, 398 Mich 110 (1976); *Kerkstra v MDSH*, 398 Mich 103 (1976); *Navarra v UM Regents*, 393 Mich 773 (1974); *Carver v McKernan*, 390 Mich 96, 100 (1973); *Trent v SMART*, 252 Mich App 247, 253 (2002); *Mason v Cass CRC*, 221 Mich App 1 (1997), lv den 457 Mich 855 (1998); *May v DNR*, 140 Mich App 730, 732 (1985); *Phelps v MDSH*, 75 Mich App 442, 445 (1977); *Hanger v State Hwy Dept*, 64 Mich App 572, 583 (1975), lv den 399 Mich 812 (1977); *Horners Trucking Service v State Hwy Dept*, 64 Mich App 513 (1975), lv den 399 Mich 812 (1977); *Fair Estate v State Vets Facility*, *supra*; *Bludders v State Farm Mutual Ins Co*, 52 Mich App 714, 717 (1974), mod 392 Mich 804 (1974); *Hussey v Muskegon Heights*, *supra* at 36 Mich App 270; *Mullas v Sec’y of State*, 32 Mich App 693 (1971); *Stacey v Sankovich*, *supra*; *Dykstra v MDOT*, Ct App No 192187 (Aug. 12, 1997); *Weiss v Eaton CRC*, Ct App No 210105 (Nov. 19, 1999); *Spitzner v Kalamazoo Co*, Ct App No 110967 (June 6, 1990), rem’d on other grds 440 Mich 911 (1992) (defendant already knew of defect); *Middleton v Marquette Co*, Ct App No 251855 (April 19, 2005), app dism 711 NW2d 581 (April 7, 2006); *Chambers v Wayne Co Airport Auth*, Ct App No 277900 (June 5, 2008), lv den 483 Mich 1081 (2009) (no bar where defendant got actual notice); *Houston v Detroit/ Collier*, Ct App No 262627 (April 4, 2006).

But this puts it too mildly. Rather than merely not contradicting legislative purpose, requiring prejudice and permitting substantial compliance are essential to prevent the Legislature's will from being thwarted. In passing the defective highway statute, the Legislature evinced an intent that government agencies be held liable for defective highways. That intent is limited, in that the Legislature did not intend liability where inadequate notice interferes with investigation of the claim. However, where that intent is not traversed (because the defendant had sufficient information to investigate the claim), the only intent left standing is the general intent to create liability. Denying liability even where the purpose behind the NOC limitation has been satisfied would thus contradict the Legislature's intent in enacting defective highway liability.

In short, cases that reject the substantial compliance/ prejudice required limitations, and dismiss for noncompliance with an NOC requirement even when the defendant has sufficient information,<sup>12</sup> not only fail to serve the purpose behind NOC requirements, but also contradict the purpose the Legislature had in mind in creating defective highway liability.

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*Rowland v Washtenaw CRC*, 477 Mich 197 (2007); *Leech v Kramer*, 479 Mich 858 (2007); *Ells v Eaton CRC*, 480 Mich 902 (2006); *Chambers v Midland Country Club*, 215 Mich App 573, 578 (1996); *Lautenheiser v Jolly Bar & Grille*, 206 Mich App 67 (1994); *Brown v Jojo-Ab, Inc*, 191 Mich App 208, 212 (1991); *Davis v Farmers Ins Group*, 86 Mich App 45 (1978); *Caverly v HICS Corp*, Ct App No 256329 (Jan. 24, 2006); *Jones v MDOT*, Ct App No 275076 (Oct. 25, 2007).

#### D. NARROW VERSUS REMEDIAL CONSTRUCTION

Expanding the NOC requirements has the effect of narrowing defective highway liability. It might be argued that that result is proper, since defective highway liability, being an exception to immunity, should be narrowly construed.

The notion that exceptions to governmental immunity are narrowly construed got its start in *Ross v Consumers Power Co*, 420 Mich 567 (1984). The Court there stated that, because governmental function immunity is broadly construed, exceptions to immunity are “narrowly drawn.” An analysis of that statement shows it is not entitled to the weight that subsequent cases have attached to it.

1. *Ross*'s statement was *dictum*: since no exception was before the court in *Ross*, the court had no reason to address how the exceptions are construed.

2. Saying the exceptions are narrowly *drawn* is not the same as saying that the exceptions are narrowly *construed*.

3. *Ross* assumed that, because the Governmental Liability Act was intended to expand immunity, an expansive definition of governmental function was appropriate to further that purpose. The first proposition in this syllogism is incorrect. It is simply untrue that the GLA was intended to expand immunity. First, in contrast to common-law sovereign immunity (which had completely immunized the state and its agencies), the GLA reduced the immunity of the state and agencies to the level of municipalities (immune only when engaged in a governmental function). Second, the GLA extended some exceptions

to governmental immunity (e.g., highway liability) to the state. Third, the GLA created some entirely new exceptions to immunity (e.g., public buildings).

4. *Ross's* syllogism also overlooked MCL 8.3a, which requires construing phrases in accordance with meanings established at common law. At common law, “governmental function” was a term of art, meaning activities benefitting the general public (as opposed to local inhabitants). *Gunther v Cheboygan CRC*, 225 Mich 619, 621 (1925).

5. *Ross's dictum* assumes that, since the main purpose of the Governmental Liability Act is immunity, all its provisions must bend to that purpose. But the Legislature had to start with something: it had to either say that government is liable, and list exceptions to liability; or say that government is immune, and list exceptions to immunity. Citing the latter choice as evidence that the Legislature prefers immunity makes about as much sense as assuming that we should always call heads, merely because the Legislature called heads when it flipped this coin.

6. Last but not least, *Ross's dictum* is a non sequitur. A broad construction of governmental function immunity does not logically nor necessarily mandate a narrow construction of exceptions thereto. On the contrary, the mere fact that exceptions were thought necessary shows that the Legislature realized the injustice of blanket immunity, and intended to remedy that injustice, not by a ray of sunshine here and there, but by laying whole swaths of government activity open to tort liability: government buildings, highways, automobile use and, later, health care. A niggardly construction of the

exceptions would defeat that remedial purpose.

Note also the nature of the areas where immunity is withdrawn. They generally involve ministerial activities capable of producing bodily injuries, as opposed to the regulatory, discretionary activities for which immunity is retained. This bespeaks a legislative intent to immunize the latter activities, while preserving liability for the former. Narrow construction of the exceptions thwarts that purpose, by moving the fence so as to pen some ministerial, bodily-injury producing activities in with the discretionary, regulatory activities the Legislature intended to immunize.

Whether the overall purpose of the GLA was to expand or reduce liability, it is at least clear that the purpose of the *exceptions* to immunity was to create a remedy. That is a remedial purpose. In order to effectuate their remedial purpose, remedial statutes are broadly construed. *Shannon v People*, 5 Mich 36, 48 (1858). Cases saying that the defective highway exception is narrowly construed contradict that rule, and rest on a foundation of sand. They should be overruled.

#### **E. DEPARTURE FROM STATUTORY LANGUAGE**

What has been said so far would justify resolving any ambiguities in an NOC in favor of the claimant. But the rule that the Legislature's intent must be served does not merely justify construing *ambiguous* language a certain way. Serving Legislative intent may also justify *refusing to apply* even *unambiguous* language.

## 1. TO ACCORD WITH GENERAL PURPOSE

Thus, in *Griffith v State Farm Mut Auto Ins Co, supra*, the question for the Court was whether groceries purchased by a no-fault auto insured are covered by statutory no-fault insurance. The majority conceded that the plain language of the statute (which refers to “care”) would include food. Nevertheless, the majority noted that applying that literal language would transform the No-Fault Act into a general welfare statute, contrary to the presumed legislative intent to cover only auto-accident related losses. In short, the majority held, the *general intent* of the statute should trump even the *literal language* of the statute.

Similarly, a literal construction of NOC requirements transforms a statute having a limited purpose (to permit investigation of an injury while the trail is still fresh) into a broad case killer. Just as *Griffith* ignored the literal language of the NFA to limit coverage to auto-related losses, so also have the courts ignored the literal language of NOCs in order to limit them to the manifest legislative purpose to protect a defendant’s ability to investigate. Just as *Griffith* refused to apply the literal language of the NFA where it would serve a purpose not contemplated by the Legislature (proving general welfare to no-fault insureds), so also have cases refused to apply the literal language of NOCs to prevent a result not intended by the Legislature (i.e, to eliminate claims even where the defendant

has adequate notice of same).<sup>13</sup>

## 2. TO AVOID CONSTITUTIONAL DOUBTS

Another instance in which literal language may be departed from is where failure to do so would raise not insubstantial doubts about a statute's constitutionality. It is presumed that, above all, the Legislature intends its enactments to be effective. That intent is traversed when a court construes a statute in a way that brings into doubt the statute's validity. Thus, where a literal construction would raise substantial doubts about the statute's constitutionality, the literal construction may be departed from. *Attorney General v Detroit United Ry*, 210 Mich 227, 259 (1919), app dism 247 US 609, 66 L Ed 395, 42 S Ct 46 (1921).

In *United States v Jin Fuey Moy*, 241 US 394; 60 L Ed 1061; 36 S Ct 658 (1916), defendant was indicted for violation of a statute prohibiting opium possession by an unregistered person. Although defendant came within the literal language of the prohibition, the court quashed the indictment because the defendant was not required to be registered in the first place. In essence, the court rewrote the statute to limit prosecutions to those required to be registered. The court justified this amendment by citing the rule that "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that

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*Rowland v Washtenaw CRC, supra*, is defective in that it failed to consider *Griffith's* reaffirmation of the principle that a court may depart from literal language of a statute to effectuate the general purpose of a statute.

it is unconstitutional, but also grave doubts upon that score.”

Similarly, in *Lynch v Overholser*, 369 US 705; 8 L Ed 2d 211; 82 S Ct 1063 (1962), concerned about the constitutionality of a D.C. Code provision that mandated commitment to a mental institution, the Court limited the provision to cases where the defendant had asserted an insanity defense. Along the way, the court said,

The decisions of this Court have repeatedly warned against the dangers of an approach to construction which confines itself to the bare words of a statute... for ‘literalness may strangle meaning’... A statute should be interpreted, if fairly possible, to free it of not insubstantial constitutional doubts.”  
At 369 US 710, 711

Finally, in *Workman v DAIIE*, 404 Mich 477, 507 (1979), although MCL 500.3116 gives no-fault carriers a lien on automobile tort recoveries, period, the Court departed from the literal language of the statute by creating a “like benefits” limitation on the no-fault carrier’s lien, in order to eliminate constitutional doubts.

### **3. APPLYING NOC REQUIREMENTS ABSENT PREJUDICE WOULD RENDER THEM UNCONSTITUTIONAL**

Statutes are constitutional to the extent that they rationally further a valid state purpose. It is a valid state purpose to assure that road authorities are not prejudiced by inadequate notices. Consequently, NOC requirements rationally further a valid state purpose, and are constitutional, to the extent that they bar actions due to defects that prejudice the defendant’s ability to investigate.

But suppose an NOC is construed to apply even when the defendant is not prejudiced (i.e, had enough information to investigate the claim). Dismissing the claim in such a case would not serve the valid purpose of assuring information adequate to investigate. On the contrary, dismissal despite no prejudice serves no purpose at all, much less a valid state purpose. Since serving a valid state purpose is essential to a statute's constitutionality, applying an NOC when it serves no such purpose would make the statute unconstitutional. To eliminate that problem, NOCs should be denied effect, except when noncompliance prejudices the defendant.<sup>14</sup>

## F. CONCLUSION

In short, the “substantial compliance” and “prejudice required” rules do not merely justify resolving ambiguities in favor of the claimant. Rather, such rules also mandate ignoring unambiguous NOC requirements in order to

a) prevent traversing the Legislature's general purpose (which is to create liability

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In *Rowland, supra*, it was argued that a 120-day NOC requirement was unconstitutionally short; and that, to avoid striking down the deadline as unconstitutional, the deadline should be applied only where there is prejudice. The *Rowland* majority refused to apply a prejudice limitation, because it disagreed with the premise that 120 days was unconstitutionally short.

However, the case at bar does not concern the length of time specified in the NOC requirement (it being undisputed that Plaintiff's NOC was timely). Instead, the contention is that it would be unconstitutional to require that the NOC be more specific where (as here) the defendant has enough information to investigate the claim. Since the latter basis of unconstitutionality was not involved in *Rowland*, *Rowland* says nothing about whether *that* basis of unconstitutionality requires a prejudice limitation in order to save the statute from unconstitutionality.

for defective highways, except where inadequate notice interferes with defendant's investigation) and

b) avoid having to strike down the statute as unconstitutional (as would be necessary if the NOC requirement were allowed to bar suits even where the requirement serves no purpose).

## II. THE NOTICE OF CLAIM WAS SUFFICIENTLY SPECIFIC

### A. EXTRINSIC INFORMATION IS RELEVANT

It has been held that extrinsic information can be considered when evaluating the adequacy of a notice. *Plunkett v MDOT, supra* (may consider police report); *Burise v Pontiac*, 282 Mich App 646 (2009), lv den \_\_ Mich \_\_ (Sept. 28, 2009) (may aggregate multiple notices); *Lansing Gen'l Hosp v Gomez*, supra at 114 Mich App 824 (*Id.*); *Lawson v Niles*, Ct App No 280797 (Jan. 8, 2009) (may consider photos).<sup>15</sup>

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There is a statement in *Barribeau v Detroit*, 147 Mich 119, 126 (1907), to the effect that an NOC is inadequate if parole evidence is needed to locate the defect. However, the statement was dictum, since *Barribeau* was not a case in which parole evidence remedied deficiencies in the NOC (the notice merely indicated an intersection, without stating which corner of same).

Moreover, other statements of *Barribeau* recognize that extrinsic evidence may supply deficiencies in an NOC:

Counsel for plaintiff are undoubtedly correct in saying that... a description of the most general character, when applied to the ground, may locate the place with utmost exactness, and in such a case the notice itself might seem to be defective when, aided by intelligent application of the facts stated by testimony... it would be found to be precise and definite.

In other words, an NOC that might seem too vague within its four corners may become

There are several justifications for this rule:

1. As noted, it would be unconstitutional to bar an action where the defendant had enough information to investigate, and therefore was not prejudiced. It cannot be determined whether the defendant had enough information to investigate (and therefore was not prejudiced) without looking at extrinsic evidence of what defendant knew.

2. Rejecting extrinsic evidence would result in absurd hair-splitting. If a police report stapled to an NOC provides the required information, why should that be any less adequate than an NOC that quotes the police report in the body of the notice? And if an NOC accompanied by a police report is adequate, why should it make a difference that the police report does not accompany the NOC because the defendant *already has* it? Or suppose a statement is mailed to the defendant, and then an NOC is mailed which refers to the previously submitted statement. Does thus incorporating other documents by reference entitle the defendant to dismissal?

3. A “four corners” rule would render practically every notice deficient. Take a notice that specifies a defect in front of a given house number. A defendant cannot know where that is without employing extrinsic information, such as maps showing street numbers or going out there and looking at numbers on houses. Does the need to thus resort to extrinsic evidence make a notice that specifies a given house number

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adequate when combined with extrinsic evidence, such as “the ground” or “facts stated by testimony.”

inadequate?<sup>16</sup>

If a notice combined with other information enables the defendant to identify the defect that needs investigation, the purpose of the NOC requirement has been served. By contrast, dismissing a case where any deficiencies in the NOC are supplied by other information the defendant has would not serve the legislative purpose behind NOC requirements, but would contradict legislative intent that road authorities be liable for defective highways.

#### **B. THE LOCATION WAS SUFFICIENTLY STATED**

As noted, the statute requires that the notice state “the exact location... of the defect.”

“Exact” is an ambiguous word. Is locating the defect within ten inches exact enough? Within ten feet? Within ten yards? Although any specific measurement rule would be arbitrary, construing the NOC requirement in light of its purposes provides a guide. Construing “exact” in a way that would throw out a claim, even where the defendant has not been prejudiced would contradict legislative purposes. Conversely, any description of the location specific enough to enable the defendant to find it would serve the purpose of the NOC requirement, and so is “exact” enough. *Barribeau v Detroit, supra* at 147 Mich 125; *Pearll v Bay City, supra*; *Botsford v Clinton Tp, Ct App No 272513*

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Such a result would contradict *Hussey v Muskegon Heights, supra* at 36 Mich App 268 (NOC giving house number sufficiently specific)

(March 20, 2007). *Wheeler v Detroit*, 127 Mich 329, 331 (1901); *Tattan v Detroit*, 128 Mich 650, 651 (1901).<sup>17</sup>

The notice in the case at bar stated, in relevant part,

Please be advised that I represent Mohamed Mawri for injuries he sustained when he fell on a defective side-walk on March 2<sup>nd</sup>, 2006 in the area of 5034 Middlesex, Dearborn, Michigan. It is my understanding that since this fall, the City has repaired the area.

Note that, by saying “in the area of 5034 Middlesex” rather than “at 5034 Middlesex,” the NOC includes both 5034 Middlesex and its vicinity. Although this is less specific than a single lot, the next sentence narrows the area further: “since this fall, the City has repaired the area.” This sentence rules out any sidewalk slabs at or near 5034 Middlesex that were not repaired between March 2 (the date of incident) and May 26, 2006 (the date of the NOC).<sup>18</sup> Indeed, from the post-repair photos (13a), it appears that this second sentence limited the claimed defect to a single slab. Requiring a description more specific than the actual slab that was heaved would be absurd.

Even if we assumed that the notice did not describe a particular slab, Defendant

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*Rule v Bay City*, 12 Mich App 503 (1968), lv den 381 Mich 782 (1968) (tripped on stub of street sign; only such defect in named block) contradicts those cases, and so is not good law.

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*Cf. Republic Franklin Ins Co v Walker*, 17 Mich App 92, 100 (1969) (notice stating officer involved and date thereof sufficiently specific notice of auto accident claim, given the unlikelihood of a given officer being involved in two auto accidents on the same day).

knew from the police investigation, report and police photos which was the offending slab, while the abutting tree trunk in the photo eliminated any doubt as to which slab was involved. Moreover, the police photos showed the *portion* of the slab that was at fault: the ice-covered northeast corner.

In short, the notice, plus information Defendant already had, told Defendant precisely where the defect was. Since the purpose of the NOC requirement was served, dismissal because location was not stated with more particularity would serve no purpose, but would call into question the constitutionality of the requirement.

### **C. THE DEFECT WAS SUFFICIENTLY STATED**

Per the statute, “The notice shall specify the exact location and nature of the defect...”

At the outset, there is an ambiguity as to whether “exact” modifies “location” only, or modifies both “location” and “nature of the defect.” In keeping with the fact that NOCs are in derogation of the common law, the construction that limits the scope of the requirement should be adopted. Thus, an NOC must state the “nature of the defect” and not the *exact* nature of the defect.

Note also that it is not the *defect* that must be stated, but rather the *nature* of the defect. Thus, an NOC that states the class to which the defect belongs is sufficient. *Mauer v Topping*, Ct App No 250858 (April 7, 2005), mod 480 Mich 912 (2007).

That raises the question of what “nature of the defect” means. It could mean the

particular type of defect (pothole, broken signpost, etc.), but that would make “defect” and “nature of the defect” synonymous. It is more in keeping with the limiting construction appropriate for statutes in derogation of the common law to define “nature of the defect” as merely requiring a statement of the class to which the defect belongs. Since “defective side-walk” is a class of defect, it is a sufficient statement of the “nature of the defect.”

Buttressing the latter conclusion is the rule that statutes should be construed consonant with the Legislature’s purpose. Any description that enables the defendant to identify the defect serves that purpose, and so is adequate. Consequently, merely stating “a sidewalk defect” is sufficient, so long as there is no confusion as to which defect is meant. *Tattan v Detroit*, supra at 128 Mich 651; *Jones v Ypsilanti*, 26 Mich App 574 (1970); *Hussey v Muskegon Heights*, supra.

In the case at bar, Defendant was well aware of the defect being claimed, having identified it before Plaintiff fell, photographed it the night of Plaintiff’s fall, and gone back to repair it. Since the purpose of the NOC requirement has been served, the description of the defect complied in substance, and should therefore be held adequate.

#### **D. ANY VARIANCE IS IMMATERIAL**

The notice in this case stated, in relevant part,

Please be advised that I represent Mohamed Mawri for injuries he sustained when he fell on a defective side-walk on March 2<sup>nd</sup>, 2006 *in the area of* 5034 Middlesex, Dearborn, Michigan (emphasis added).

Note that the notice does not claim that the defect was *at* 5034 Middlesex, but rather says that it was “in the area” of that address. Although “in the area of” could mean “within the boundaries of,” it could also mean in an area that includes, *but is not limited to*, 5034 Middlesex. Under the latter reasonable construction, a defect at 5026 Middlesex was “in the area of 5034 Middlesex,” since it was on a lot contiguous to 5034. In short, a jury could find that this notice was *in fact accurate* as to the place of injury.

But even if we assumed that the notice erroneously specified 5034 Middlesex as the location of the defect, that would not be fatal. A variance between an NOC and the actual facts of the case renders the NOC invalid only when the defendant has been misled into defending a case other than the one noticed in the NOC. So, for example, where the notice specifies a heaved sidewalk, whereas the testimony said a hole, such a significant variance means that no notice of the *actual* defect was given.<sup>19</sup>

Conversely, a variance between the NOC and the evidence is not fatal, where the defendant was not misled as to the defect it was being called on to defend. *Williams v Lansing*, 152 Mich 169 (1908) (NOC placed loose plank 32 feet off); *Gable v Detroit*, 226 Mich 261, 265 (1924) (NOC named wrong street but correct abutting building).

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*Hummel v Grand Rapids*, 319 Mich 616 (1948). See also *Overton v Detroit*, 339 Mich 650 (1954) (notice said slipped on glass plates in walk, whereas evidence showed a trip on a pole stub around the corner); *Rottschafer v East Grand Rapids*, 342 Mich 43 (1955) (notice said broken sidewalk; testimony said foot was trapped); *Harrington v Battle Creek*, 288 Mich 152 (1939) (variance not described).

In the case at bar, had Defendant been misled into thinking that Plaintiff's claim involved a different defect on 5034 Middlesex, its variance objection would have some merit. In fact, however, Defendant knew from the very evening it occurred where this defect really was (having investigated the incident right after it happened, and taken photographs of the defect). Whatever errors it might contain, Plaintiff's NOC fairly covered the defect that all agreed and knew was involved. Consequently, there is no merit to its argument that Defendant is being called on to defend against a different defect.

#### **E. THE MODE OF SERVICE IS NOT CRITICAL**

MCL 691.1404(2) provides,

The notice may be served upon any individual, either personally, or by certified mail, return receipt requested, who may be lawfully served with civil process directed against the governmental agency...

In keeping with the substantial compliance construction, the courts apply a "no harm, no foul" rule to such formal requirements. *Stacey v Sankovich, supra* (though not on specified form, NOC gave same information the form would have provided). Thus, absent prejudice, *failure to verify* a NOC does not invalidate it. *Fair Estate v State Vets Facility, supra* at 55 Mich App 41; *Reynolds v Clare CRC*, 34 Mich App 460 (1971). Nor is service *on the wrong person* fatal, so long as it eventually reaches the right person. *Abbott v Detroit*, 150 Mich 245 (1907); *Botsford v Clinton Tp, supra*. Nor is an *oral* notice inadequate, so long as an intermediary reduces it to writing. *Walden v Auto-Owners*

*Ins Co*, 105 Mich App 528, 533 (1981) (agent's written report); *Lansing Gen'l Hosp v Gomez*, *supra* (*Id.*); *Lictawa v Farm Bureau Ins Co*, Ct App No 245026 (March 23, 2004), lv den 471 Mich 885 (2004) (agent reduced notice to writing). Finally (and most pertinently), service by mail is substantial compliance, even if the statute requires personal service. *Curtis v Biermacher*, 30 Mich App 503 (1971); *Hussey v Muskegon Heights*, *supra* at 36 Mich App 271.<sup>20</sup>

Dismissing based on failure to comply with a certified mailing requirement, in the absence of prejudice, would contravene the general purpose of the statute and raise severe doubt about the statute's constitutionality (since dismissal in the absence of prejudice does not serve any valid legislative purpose). In the case at bar, Defendant was not prejudiced by the notice going ordinary mail, since it is clear that Defendant actually received the notice (as acknowledged in Px10, 34a).

## **F. DEFENDANT WAS NOT PREJUDICED**

### **1. GENERALLY**

As shown in Part I.C, the requirement that prejudice be shown is merely a corollary (along with the sufficiency of substantial compliance) of the principle that all statutes, including statutory NOCs, should be construed to further rather than traverse

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Contra, *Nuculovic v Hill*, \_\_\_\_\_ Mich App \_\_\_\_\_ (2010), lv pdg S Ct No 140578 (that defendant had police reports and bus driver's report was not "service"). *Nuculovic* is aberrational, cannot be reconciled with the substantial compliance rule (much less the prejudice limitation), and so should be overruled.

legislative intent.

Defendant's argument that it was prejudiced by deficiencies in Plaintiff's notice is without merit. We have already shown that service by ordinary mail and mentioning 5034 Middlesex were not prejudicial.

Not stating the location and nature of the defect with more particularity were not prejudicial either. Defendant was not misled: it knew, from the police investigation the same night, exactly where the defect was and of what it consisted.

## **2. EFFECT OF REPAIR**

Defendant argued that, because it didn't receive the NOC until a repair intervened, it was unable to go back and examine the defect. While destroyed evidence can be prejudice, such an assertion coming from the one who destroyed the evidence is a bit like the parricidal child who sought mercy on grounds of his being an orphan.

But resolution of this issue need not turn on the equities. Assuming, for the sake of argument, that Defendant would indeed have gone out and reinvestigated, had it received the NOC before the repair,<sup>21</sup> that merely means that Plaintiff's not serving an NOC *within 82 days* prejudiced Defendant. But the statute does not require service of the notice within 82 days: it gives the plaintiff 120 days. Thus, the prejudice Defendant asserts resulted from Plaintiff's not doing something that the statute did not require in any

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We have only Defendant's self-serving assertion to that effect, which the jury is not bound to believe.

event; the behavior Defendant claims prejudiced it was not a violation of the NOC requirement. Since violation of the NOC requirement is a prerequisite to dismissal on account of the NOC requirement, an act which, while prejudicing the defendant, is not in fact a violation, cannot justify dismissal. *Joseph v VanBuren CRC*, Ct App No 190950 (Aug. 5, 1997).

On the other hand, the intervening repair does render moot the defects Defendant urges. Suppose the notice Plaintiff gave on May 26 had specified the nature of the defect in exhaustive detail, and located it within a fraction of an inch. Had Defendant gone out there, armed with that notice, it would have availed Defendant nothing: it would not have enabled Defendant to examine and measure the defect, because the defect was gone, destroyed by defendant's own action.

In short, the only way prejudice resulting from repair of the defect could have been avoided would be if Plaintiff had given notice within 82 days. However, since the statute does not require notice that early, any prejudice Defendant suffered was, as a matter of law, not caused by any dereliction on Plaintiff's part, but rather was Defendant's own doing.

### **III. THE NATURAL ACCUMULATION DEFENSE IS NOT AN IMPEDIMENT**

#### **A. A FACTUAL ISSUE AS TO WHAT CAUSED THE FALL PRECLUDES**

#### **SUMMARY DISPOSITION**

*STANDARD OF REVIEW:* Whether there is a genuine, material dispute of fact so as to

preclude summary disposition is a legal question, reviewable de novo. *Mayberry v Gen'l Orthopedics*, 474 Mich 1, 5 (2005).

At the outset, there is an ambiguity in the case at bar as to the exact mechanism of Plaintiff fall. Some sources say Plaintiff slipped, whereas others say he tripped. This creates three possibilities:

1. Discounting the “trip” evidence, the jury could find that Plaintiff fell entirely because of a slip. Although plainly implicating the accumulation in the fall, such a finding would not entitle Defendant to summary disposition, since it leaves the virtually undisputed evidence that a defect in the walk (the heaved sidewalk) concurred in causing the fall, by impounding water which froze. Although *Haliw v Sterling Heights*, *supra* suggests that the latter is not enough, Amicus will demonstrate that *Haliw* is bad law, and ought to be overruled.

2. But even if we assume that *Haliw* is valid, and would preclude liability if Plaintiff's fall was due entirely to a slip, the jury is not bound to blame Plaintiff's fall entirely on a slip. Rather, the jury could find that the “trip” evidence is also correct, and that Plaintiff fell because of a combination of a slip and trip. Such a fall would not be barred by the natural accumulation defense since, as *Haliw* recognized, an injury due in part to a natural accumulation and in part to a sidewalk defect is actionable. *Haliw* at 297 Mich 311. As an example of an actionable claim, *Haliw* described a pedestrian who tripped on the edge of a partially ice-filled hole, with the ice in the hole completing the

fall. If the jury finds both a trip and a slip, Plaintiff's case would be the converse of *Haliw*'s hypothetical: Plaintiff stepped on the ice and slipped, and his fall was completed when his foot hit the edge of the next sidewalk slab. Per *Haliw*, there is liability in such a case.

3. Just as the jury could entirely discount the evidence of tripping, so also could it entirely discount the evidence of slipping: the police may have recorded the information wrong, and the hospital record saying "fell on ice" is not the same as saying that ice caused the fall. If the jury so finds, natural accumulation would be immaterial, since it would not have contributed to the fall at all.

In short, Amicus considers all three scenarios to be actionable. But if one scenario is not actionable, then denial of summary disposition was still proper, since the jury will have to find which scenario actually occurred before it can be determined whether the natural accumulation defense bars the action.

What has been said so far is enough to justify denial of Defendant's motion. However, further analysis is justified because it will show that Plaintiff is entitled to summary disposition on the natural accumulation defense.

## **B. SCOPE OF NATURAL ACCUMULATION DEFENSE**

*STANDARD OF REVIEW:* The scope of a defense is a legal question, reviewable de novo.

### **1. INTRODUCTION**

The "natural accumulation" defense is somewhat of a misnomer, in that it got its

start in cases involving *unnatural* accumulations for which there was no liability because they were created by third parties.<sup>22</sup> Not until 1898 was the defense couched in terms of “natural accumulations.”<sup>23</sup>

Because the defense applies to some conditions that are anything but natural, it is less useful to try to classify the defect as “natural” or “unnatural” than it is to ask whether any of the rationales for applying the defense apply. There are a number of such rationales.

## 2. WHO CREATED THE CONDITION

The first prerequisite to liability in general (and for accumulations in particular) is that the condition be laid at the defendant’s door.

A controller of premises is not liable for a condition caused entirely by mother nature (a true natural accumulation), such as water flowing across a sidewalk<sup>24</sup> or a

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*McKellar v Detroit*, 57 Mich 158, 162 (1885) (no liability under municipal highway statute for ice ridge on a crosswalk created by pedestrians, since not practical to remove all such irregularities); *Rolf v Greenville*, 102 Mich 544 (1894) (following *McKellar*, without further discussion); *Hutchinson v Ypsilanti*, 103 Mich 12 (1894) (city not liable for snow ridges in street created by streetcar company’s removal of snow from the tracks); *Gavett v Jackson*, 109 Mich 408 (1896) (since walk itself was not defective, city not liable for abutter’s discharging water from downspout onto sidewalk, which froze; no opinion of court).

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*Wesley v Detroit*, 117 Mich 658, 659 (1898).

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*Mayo v Baraga*, 178 Mich 171, 175 (1913); *Gavett v Jackson*, *supra*.

normal travel surface that becomes slippery when covered with water, snow or ice.<sup>25</sup> Nor is a controller liable for even *unnatural* accumulations *created by third parties* not under its control.<sup>26</sup> An additional justification for this result is that, where the danger is caused exclusively by a substance overlying an otherwise normal travel surface, there is no “defect” in the way itself.<sup>27</sup>

This rationale is inapplicable to the case at bar, since we are not concerned with

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*Gerrie v Port Huron*, 226 Mich 630 (1924) (ice on approach to bridge); *Woodworth v Brenner*, 69 Mich App 277, 281 (1976) (ice and snow on sidewalk).

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*McKellar v Detroit*, *supra* (snow ridges created by pedestrians); *Elam v Marine*, 116 Mich App 140, 142-143 (1982) (patrons packed down snow); *Hutchinson v Ypsilanti*, *supra* (snow ridges in street created by streetcar company’s removal of snow from the tracks); *Gavett v Jackson*, *supra* (abutter discharged water from downspout onto sidewalk, which froze. Noting that the walk itself was not defective; no opinion of court); *Jefferson v Sault Ste Marie*, 166 Mich 340, 343-344 (1911) (water dripping from abutter’s eaves onto walk); *Stord v MDOT*, 186 Mich App 693, 694-695 (1991), lv den 439 Mich 863 (1991) (ice compressed by traffic).

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*Buckner Estate v Lansing*, 480 Mich 1243 (2008) (ice and snow on sidewalk); *Calamita v St Clair*, Ct App No 236755 (March 9, 2004) (mud deposited on walk by defendant); *Finney v Detroit*, Ct App No 256697 (Jan. 19, 2006) (slop left on street by sprung water line). Amicus does not consider these cases good law, both because they define defect in a ridiculously narrow manner (see Section 6, *infra*) and because they misconstrue the statute: construed liberally (as remedial statutes are supposed to be), a highway authority’s duty to “keep a highway...in a condition reasonably safe and fit for travel” is breached by allowing slippery substances to accumulate thereon.

However, the validity of these cases need not be addressed in the case at bar, because they are plainly distinguishable on their facts: the case at bar involves an accumulation on a *nonconforming* travel surface, not an accumulation on a *normal* travel surface.

an otherwise normal travel surface, but rather with a tilted sidewalk which impounded water. *Rex v Lochmoor*, 268 Mich 159 (1934) (road authority liable where inclined sidewalk, combined with natural accumulation of clay, precipitated child into river).

### 3. IMPOUNDED ACCUMULATIONS

Defects that have fractured Michigan law (no less than Michigan pedestrians) are holes or depressions that collect water. One line of cases (starting with *Navarre v Benton Harbor*) holds that there is liability in such cases, since the accumulation concurs with a travel surface defect.<sup>28</sup> Another line of cases (ending with *Haliw v Sterling Heights*) denies liability in such situations.<sup>29</sup> As we shall see, the rationales for the latter result do

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*Peters v MDSH*, 400 Mich 50, 58 (1977) (although negligence was conceded, the court observed that allowing water to pond on a poorly drained freeway was evidence of negligence); *Navarre v Benton Harbor*, 126 Mich 618 (1901); *Pappas v Bay City*, 17 Mich App 745 (1969), lv den 382 Mich 779 (1969); *Mauer v Topping, supra*, lv den (on this issue) 480 Mich 912 (2007) (complaint alleging that ice formed in channels or ruts in road stated a claim); *Leech v Kramer*, Ct App No 253827 (Oct. 11, 2005), rev'd on other grds 479 Mich 858 (2007) (channels worn in road caused hydroplaning).

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*Kannenberg v Alpena*, 96 Mich 53 (1893) (raised grade of road, causing water to collect on sidewalk); *Hopson v Detroit*, 235 Mich 248, 251 (1926) (sidewalk depression); *Haliw v Sterling Heights, supra* at 464 Mich 311 (depression where two sidewalks met); *Plunkett v MDOT, supra* (ruts worn in pavement collected water); *Wright v Bradley*, Ct App No 176846 (April 26, 1996) (ice in dip in sidewalk); *Dennis v Eastpointe*, Ct App No 237521 (Dec. 27, 2002) (tilted sidewalk, trapping water against higher berm); *Burton v Waterford Tp*, Ct App No 274332 (April 26, 2007) (water and silt gathered on sidewalk that was lower than adjoining lawn, causing bicyclist who hit the accumulation to fall); *Major v Detroit*, Ct App No 261583 (Sept. 15, 2005) (blocked drain caused ice on entire street surface).

*Hopson* cited Michigan cases that did not involve depressions; relied on a foreign case that did; yet overlooked the controlling Michigan authority on liability for

not (unlike the defects they immunize) hold water.

#### 4. CAUSATION IN FACT

Determining whether a depression or hole is a cause in fact of an accumulation-related fall is not rocket science. To illustrate,

a) if there is ice in the bottom of a hole, but the pedestrian would have tripped had there been no ice, the sole cause of the fall is the hole, not the accumulation. Such a case is actionable without reference to the accumulation defense, since the accumulation is not a cause at all of the injury. In the case at bar, since the jury could credit evidence that Plaintiff tripped, and give no weight to evidence that Plaintiff slipped, it could find this to be the situation.

b) If ice *partially* fills a hole, and the pedestrian both slips on the ice and trips on the edge of the hole, the hole and the accumulation are concurrent causes of the fall. In keeping with the concurrent cause principle, there is liability in such a case, even though

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accumulations in depressions: *Navarre, supra*. Although *Hopson* had the authority to overrule *Navarre*, its simply overlooking *Navarre* deprives *Hopson* of authoritative effect, since a case overlooking an earlier case is defective, and not entitled to controlling effect under the principle of stare decisis. *Andrews v Booth*, 148 Mich 333, 335 (1907); *Foster v Watson*, 153 Mich 400, 406-407 (1908).

Similarly, *Haliw* relied on *Hopson*, but wholly overlooked *Navarre*. Failing to mention contrary authority deprives a decision of authoritative effect.

*Haliw* miscited *Johnson v Pontiac*, 276 Mich 103 (1936) for the proposition that water in a depression is not a defect. The actual basis for the decision in *Johnson* was plaintiff's contributory negligence in attempting to traverse the defect. *Johnson* is relevant to the natural accumulation defense only in that it contains *dictum* to the effect that a defect due entirely to a natural accumulation is not actionable.

an accumulation concurred in producing the fall. *Haliw v Sterling Heights, supra* at 464 Mich 311; *Whinnen v 231 Corp*, 49 Mich App 371, 378 (1973), lv den 391 Mich 878 (1974) (liable, where ice plus surface discontinuities combined to cause fall).<sup>30</sup> Here again, a jury could find this to be the situation in the case at bar, since there was evidence of both a slip and a trip.

c) If the ice fills the hole up to but not over the edge, that eliminates the trip hazard as a cause, but leaves the fact that, had there been no hole, there would have been no ice there on which to slip. Consequently, this too is a case of concurrent causation, for which there is liability. Claims to the contrary defy logic and common sense.

d) Finally, if the ice fully fills the hole, but *there is ice on level walking surfaces as well*, the situation is no different than if there were no hole. In such a case, the hole is not a cause in fact of the fall, and there is no liability (since the sole cause of the fall is a natural accumulation). *Haliw v Sterling Heights, supra* at 464 Mich 305, 311 (no liability where the accumulation is the sole cause of the injury).

In the case at bar, the only non-liability scenario (d) is one we know not to have existed, since the police photo shows ice not everywhere, but limited to the side of the slab that had subsided. Consequently, as a matter of law, the heaved sidewalk was a

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*Contra, Elbgal v Dearborn*, Ct App No 285292 (Sept. 3, 2009) (no liability where ½ inch ledge between sidewalk slabs and ice and snow concurred to cause fall). *Elbgal* contradicts *Haliw's* hypothetical.

cause in fact of Plaintiff's injury.

## 5. PROXIMATE CAUSE

It has been argued that a hole or depression that gathers water is not a *proximate* cause, since the *immediate* cause is the accumulation, not the hole or depression. *Haliw v Sterling Heights, supra* at 464 Mich 309, n. 9, 10; *Plunkett v MDOT, supra*; *Major v Detroit, supra*; *Wright v Bradley, supra*.

Such a narrow view might be justified if we were construing statutory language referring to "the" proximate cause. However, we are instead dealing with a case-made defense. Under the ordinary common-law definition of proximate cause, an *intervening* cause is not a *superseding* cause if it was *foreseeable*. *Davis v Thornton*, 384 Mich 138, 148 (1970) (car theft foreseeable result of leaving keys in car); *Moning v Alfonso*, 400 Mich 425, 441 (1977) (misuse of slingshot foreseeable result of selling same to minor). Natural forces such as weather and gravity (which causes water to pool in low spots) are highly foreseeable. *Morrison v Ironwood*, 189 Mich 117, 121-122 (1915) (foreseeable that snow would fill a ditch); *Wilmarth v Mich United Traction Co*, 198 Mich 428, 433 (1917) (lightning electrifying a fence is foreseeable); *Ignaszak v McRay Refrigerator Co*, 221 Mich 10, 14-15 (1922) (wind is a foreseeable intervening cause). Thus, where one creates or allows a depression to form, the intervening cause of water falling or flowing there and freezing is foreseeable and not a superseding cause. The original depression therefore remains a proximate cause of the injury.

Decisions to the contrary reflect a double standard. Under the open-and-obvious defense, there is no duty to abate dangers that could be reasonably foreseen by the plaintiff. In the context of Michigan winters, that means that pedestrians are required to anticipate the presence of ice and snow everywhere. *Teufel v Watkins*, 267 Mich App 425, 428 (2005) (no liability for ice beyond snowbank because, although not visible, it was foreseeable to the plaintiff). By contrast, cases denying that a depression is a proximate cause of an injury where water, ice and snow intervene essentially hold that the controller of a depression *cannot or need not foresee* that ice and snow may form in the depression. Thus, Michigan *plaintiffs* are required to be prescient at the same time that Michigan *landowners* are entitled to ignore that which is obvious to everyone else.

In short, decisions that treat accumulations in depressions as superseding causes contradict fundamental principles of causation, and are therefore bad law.

## **6. EXISTENCE OF DEFECT**

Some cases assert that a depression that would not endanger at all times (i.e., even in dry weather) is not defective. Based on that premise, a depression that would not trip a person in dry weather is not defective; so that, even if the depression concurs with an accumulation to cause an injury, there is no liability, because there was no defect to begin with. *Hopson v Detroit*, *supra* at 235 Mich 250; *Haliw v Sterling Heights*, *supra* at 464 Mich 312; *MacLachlan v CATA*, 474 Mich 1059 (2006); *Jovanovic v Stasiak*, Ct App No

202152 (March 3, 1998) (tilted driveway); *Major v Detroit, supra*.<sup>31</sup>

Such cases define “defect” in an illogically narrow way. One evaluates the defectiveness of a condition by how it was being used at the time of injury. If the use was foreseeable (thus not constituting a superseding cause), and the condition was not safe for that use, then the condition is defective.

It is highly foreseeable that sidewalks will be walked on, in fair weather and foul. If they are not safe for foul-weather use, they are not reasonably safe. Any other conclusion would mean that

- a leaky raincoat is not defective since, after all, it does not leak when the sun shines.
- Selling highly flammable baby sleepers is not negligence, since they become dangerous only when flame is applied.
- Selling automobiles with steering columns that skewer the driver in a front-end

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None of these cases are satisfactory authority:

- *Hopson* and *Haliw* both overlooked *Navarre, supra*, which renders them not binding under the doctrine of stare decisis;
- *Buckner Estate v Lansing*, 274 Mich App 672, 681, n 5 (March 15, 2007), rev’d on other grds 480 Mich 1243 (2008) pointed out that *MacLachlan* is not binding authority, since it did not provide a statement of facts as required by the Constitution.
- In addition to being unpublished, *Jovanovic* contradicts the Supreme Court case of *Rex v Lochmoor, supra*.
- In addition to being unpublished, *Major* contradicts the Supreme Court case of *Peters v MSDH, supra*.

collision is not negligent, since that danger arises only when there is a front-end collision.

- Selling real guns to children is not negligent, since the guns become dangerous only when bullets are loaded into the gun.
- Selling bullets to children is not negligent, since the bullets become dangerous only when loaded into a gun.

No less than a product, a sidewalk is not reasonably safe (i.e. is defective) unless it is safe for foreseeable uses. Since a sidewalk that is unsafe for walking when it foreseeably becomes wet is not fit for foreseeable uses, such a sidewalk is defective. Although there may be other reasons to deny liability in such cases,<sup>32</sup> nondefectiveness of the sidewalk is not one of them. Cases denying that a walk safe in dry weather can be defective when foreseeably cored with accumulations cannot be squared with the foregoing principles, and are therefore bad law.

## 7. PRACTICALITY

Defective highway statutes require that roads be kept in “reasonable” repair. Since it would not be “reasonable” to expect all ice and snow to be removed from all travel surfaces, the statute does not impose that duty.<sup>33</sup> Similarly, courts applying a natural

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As will be shown in the next part, in some (but not all) natural accumulation cases, it may be unreasonable to expect the sidewalk to be made safe.

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*McKellar v Detroit*, *supra* at 57 Mich 162; *Haliw v Sterling Heights*, *supra* at 464 Mich

accumulation defense have cited the impracticality of undoing the ubiquitous workings of mother nature and the public at large.<sup>34</sup>

While impracticality may justify denying liability for *some* natural accumulations, a blanket rule of immunity suffers from numerous defects.

*a) Incomplete Analysis*

To prevent the determination of reasonableness from turning on the personal predilections of the judge, the courts have enunciated a number of factors that must be taken into account in assessing a party's standard of care: the likelihood/ foreseeability of harm; the severity of potential harm; the number of people imperiled; benefits of not addressing the problem; the difficulty or expense of addressing the problem; deterrent effect of liability; and moral blame. *Colangelo v Tau Kappa Epsilon*, 205 Mich App 129, 133 (1994); *Moning v Alfono*, *supra* at 400 Mich 434, 450-453.

Most cases applying the natural accumulation defense seize on one of these factors, overlooking the others. For example, *Kannenberg v Alpena*, *supra* justified nonliability for water flowing from a raised street to the lower sidewalk by observing that if the water didn't gather on the sidewalk, it would have to gather on the street. However, since streets were used mainly for horses and vehicles (which are better able to negotiate

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305; *Williams v MDOT*, 206 Mich App 71, 73 (1994).

<sup>34</sup>

*McKellar v Detroit*, *supra* at 57 Mich 162 (not practical to remove all irregularities created by pedestrians passing over snow-covered ways).

water), whereas sidewalks are used mainly by pedestrians (who, with one exception, are unable to walk on water), water on a sidewalk presents a much greater risk of personal injury than water on a street in 1893.<sup>35</sup>

In short, *Kannenberg*'s analysis was defective because it looked at one factor (the impossibility of eliminating water altogether) to the exclusion of other relevant factors (such as the increased risk of harm resulting from the option selected by the city). Looking at *all* the relevant factors rather than a single factor, a jury could find that a sidewalk with a pool of water overlying it is not "reasonably safe and convenient for public travel."<sup>36</sup>

*b) Technology Affects What is Reasonable*

When sidewalks were wood planks, streets were muddy slurries, and motorized vehicles were limited to steam engines, it may have indeed been impractical to remove accumulations from travel surfaces. The same is not necessarily true in today's era of paved ways and motorized snow removal equipment.

Moreover, the consequences of nonremoval have worsened: the danger presented by an auto hitting a puddle at 60 miles per hour is considerably greater than that created

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Ironically, the converse may be true in 2010, where a puddle in a street may cause a fast-traveling motor vehicle to lose control and injure travelers on both the walk and the street.

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*Kannenberg* is also distinguishable in that its result could be justified by the rule that defective highway liability does not extend to discretionary design decisions.

by a horse-drawn buggy hitting the same puddle at ten miles per hour.

In short, what was reasonably safe or impracticable in 1885 is not necessarily reasonably safe or impracticable in 2010. Consequently, if the natural accumulation defense is grounded on what is reasonable and practicable, it ought to be immunize fewer dangers now than it did in 1885.

*c) All or Nothing*

Cases invoking the impracticality rationale presume that, because a city can't remedy *all* natural accumulations, it ought not have to remedy *any*. By that reasoning, a hospital that lets an ER patient bleed out should not be liable where another patient presented with a hangnail; there was insufficient staff to treat both; and so the hospital decided to treat neither. When one having a duty to act has limited resources, due care requires one to prioritize: simply throwing up one's hands is not due care.

So, where a municipality knows that ice tends to gather at a given point, reasonable care may require the city to address the problem, even if it is assumed to be impractical to remove ice and snow from every sidewalk. So also, in the case at bar, even if we assume that Dearborn could not have removed ice and snow from all its sidewalks, it certainly could have addressed "hot spots," such as places where heaved sidewalks impound water. We know the latter was practicable, since Defendant in fact fixed the problem (though too late to help Plaintiff). *Cf.* MRE 407 (subsequent repair admissible to show that it was feasible to address the problem).

Even when it is impossible to abate the danger, due care may require other measures, such as posting warnings (which would have been highly practicable in the case at bar) or, in extreme cases, closing the way. *Southwell v Detroit*, 74 Mich 438, 444 (1889) (duty to maintain streets means closing the street if it cannot otherwise be made safe).

In short, nonliability for natural accumulations makes sense when it is truly impossible to do anything about the danger: due care does not require the impossible. But due care does require an actor to do what he reasonably can do. Since prioritizing dangers, posting warnings, and closing ways can alleviate the danger from many natural accumulations, it makes no sense to say that inability to eliminate all natural accumulations makes it unreasonable to address natural accumulations at all.

*d) Who decides*

Last but not least, blanket immunity for natural accumulations invades the province of the jury. There may indeed be cases in which negligence may be determined as a matter of law: for instance, a snowstorm inundates city streets to the point that not even the snowplows can get out. However, except in such extreme cases, reasonable minds can differ on whether a given accumulation could and should have been addressed. And where reasonable minds can differ, the question of whether due care required that given action be taken is for the jury. *Miller v Miller*, 373 Mich 519, 525 (1964); *Moning v Alfonso*, *supra* at 400 Mich 434.

## C. CONCLUSION

A reasonably defined natural accumulation defense does not preclude liability where a hole or a depression in a walk concurs with the accumulation to produce the injury.<sup>37</sup> Since the undisputed facts show that to be the situation in the case at bar, summary disposition was not only properly denied: Plaintiff is entitled to summary disposition in his favor on that defense. MCR 2.116(I)(2).

## IV. THE TWO-INCH RULE IS NOT AN IMPEDIMENT

*STANDARD OF REVIEW:* Construction of a statute is a legal question, reviewable de novo. *Brown v Detroit, supra* at 478 Mich 593.

### A. INTRODUCTION

In 1999, the Legislature added MCL 691.1402a to the Governmental Liability Act:

(1) Except as otherwise provided *in 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

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Cases to the contrary are

- unpublished (*Burton, Dennis, Jovanovic, Major, Wright*),
- not a “decision” as defined in the Constitution (*MacLachlan*),
- overlooked the contrary case of *Navarre (Hopson, Haliw)*,
- employed an absurdly narrow view of proximate cause (*Haliw, Plunkett, Major, Wright*),
- employed an absurdly narrow definition of “defect” (*Hopson, Haliw, MacLachlan, Jovanovic, Major*) or
- employed an incomplete risk/benefit analysis (*Kannenberg*)

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 traffic.

(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. (emphasis added)

In the case at bar, Defendant invoked MCL 691.1402a(2), the "two-inch rule."

## **B. DEFENDANT FAILED TO PROVE THAT THE INFERENCE APPLIES**

### **1. GENERALLY**

By analogy to presumptions, the burden of establishing applicability of the inference is on the one seeking its benefit. *Ward v ConRail*, 472 Mich 77, 84 (2005). This means that Defendant has the burden of proving all of the following: that the defect a) is outside the traveled portion, b) abuts a county road, c) is a "discontinuity" defect and d) is under two inches.

If there is a genuine issue of fact as to any of these points, the case cannot be summarily decided. *Force v Owosso*, Ct App No 245996 (April 15, 2004) (factual dispute

as to depth of defect).

In the case at bar, although prerequisite a) is satisfied, the others are not

## **2. ABUTTING COUNTY HIGHWAY**

Note that the two-inch rule is sandwiched between subsections relating to liability for sidewalks, etc. abutting *county* highways. Moreover, that the two-inch rule was meant to be an exception to liability created by subsection (1) is buttressed by Subsection (1)'s introduction, "except as otherwise provided in this section." "This section" means section 1402a, and includes 1402a(2).<sup>38</sup> In short, in context the two-inch rule applies only to sidewalks, etc. abutting county highways.

Defendant's assumption to the contrary lifts Subsection (2) out of the context of the subsections it is sandwiched between. The Supreme Court held that that is not proper; that statutes must be construed in light of surrounding language. *Griffith v State Farm Mut Auto Ins Co, supra* at 472 Mich 533-534 (although dictionary definition of care includes "provision," hence food, in context the word is related to recovery and rehabilitation). That Subsection (2) contains no express limitation to county highways makes no difference since, as *Griffith* also held, context may change even the plain language of a statute.

In the case at bar, since Defendant did not show that the sidewalk abutted a county highway, Defendant failed to prove applicability of the two-inch rule.

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1402a(1) also distinguishes sections from subsections.

### **3. DISCONTINUITY DEFINED**

The Supreme Court has held that dictionary definitions control the meaning of statutory language. *Halloran v Bhan*, 470 Mich 572, 578 (2004). The dictionary defines “discontinuity” as “lack of continuity or cohesion...gap.” *Webster’s New Collegiate Dictionary* (Springfield, Mass.: G.& C. Merriam Co 1975). That dictionary goes on to define “continuity” as “uninterrupted connection, succession, or union” and “gap” as “a separation in space...a break in continuity.”

Under the dictionary definition, while a separation between pieces of a sidewalk would be a discontinuity, a sidewalk slab that shifts upward without breaking contact with its neighbor is not a discontinuity, since “cohesion,” “connection” and “union” is maintained, and there is no “separation in space” between the slabs.

Thus, by the plain, dictionary definition of the word, the case at bar did not involve a “discontinuity.” Even if we pretended the question were doubtful, any doubt would have to be resolved against application of the two-inch rule, since exceptions are narrowly construed. *Detroit Base Coalition v MDSS*, 431 Mich 172, 184-185 (1988).

### **4. MEASUREMENT OF DISCONTINUITY**

Finally, even if we assumed the defect in the case at bar is a discontinuity, Defendant failed to prove that it was under two inches.

Although there is a photograph showing that the sidewalk slab subsided in relation to its neighbor (12a), one cannot tell from the photograph alone how deep the subsidence

is.

More importantly, since “discontinuity” is not limited to *vertical* separations, a discontinuity that is at least two inches *wide* renders the inference inapplicable. *Semon v St Clair Shores*, Ct App No 274777 (Oct. 30, 2007), lv den 481 Mich 851 (2008).<sup>39</sup>

In the case at bar, we can determine the area of the subsided sidewalk slab from the ice it collected. The police photo shows that the slab collected water across its whole width. We know that width is six feet, from the work order (which referred to a “6x6” slab) (16a). Since six feet is more than two inches, the discontinuity in the case at bar is not subject to the statutory presumption.

### **C. PLAINTIFF REBUTTED ANY INFERENCE**

So far we have seen that Defendant failed to prove that the statutory inference applies. But if it did apply, what would be its effect?

If MCL 691.1402a(2) had created a *presumption*, that would shift the burden of producing evidence to the other party. If such rebuttal evidence were presented, a) the presumption would disappear entirely, b) the burden of persuasion would remain on the original party, and c) while the presumption would have no further force, any reasonable inference that might remain after the presumption was rebutted could be indulged. *Widmayer v Leonard*, 422 Mich 280 (1985). That would leave a fact issue, since it may

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The contrary ruling in *Griffin v Pontiac*, Ct App No 269988 (Oct. 26, 2006) improperly rewrote the statute to insert “vertical” before “discontinuity.”

be inferred that even a low discontinuity is unreasonably dangerous.<sup>40</sup>

By creating an *inference* rather than a *presumption*, the statute short-circuits the presumption analysis by cutting straight to the place where the presumption cuts out; and, moreover, establishes a reasonable inference as a matter of law (i.e., requires the trier of fact to infer that the smallness of the discontinuity did not by itself put the highway out of repair).

However, the statute does not purport to preclude drawing inferences from evidence *other than* the smallness of the discontinuity, nor prevent the trier of fact from deciding *how much weight* to accord to the additional inferences. *People v Emmons*, 178 Mich 126, 136 (1913) (for the trier of fact to decide how much weight to accord to an inference); *People v Hardiman*, 466 Mich 417, 428 (2002) (*Id.*). Thus, even where the statutory inference applies, if there is evidence from which the trier of fact could reasonably infer unreasonable danger in addition to the mere existence of a small discontinuity, the question of defectiveness is for the trier of fact, notwithstanding the statutory inference.

For example, suppose the discontinuity is under two inches, but is hidden by snow, grass or darkness. In such a case, while the statute precludes inferring defectiveness from the smallness of the discontinuity, the fact that the danger is enhanced by its being concealed means that a finding of defectiveness does not rest solely on the mere existence

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Since it is more easily overlooked, a low subsidence may be more dangerous than a larger, more obvious one.

of a small discontinuity. In other words, since there are reasonable inferences of defectiveness in addition to the statutorily ruled-out inference from the smallness of the defect, and the jury is entitled to give more weight to these other inferences than to the statutory inference of nondefectiveness, a case involving an obscured discontinuity is for the jury, even when the discontinuity is under two inches. *Handey v Ann Arbor*, Ct App No 284135 (July 30, 2009), lv pdg S Ct No 140046<sup>41</sup>.<sup>42</sup>

Similarly, if the travel surface is *tilted*, since that is a danger in addition to the mere fact that the defect measures less than two inches, the jury is entitled to find a defect notwithstanding the presumption that the discontinuity by itself is not defective. *Handey, supra*; *Gadigian v Taylor*, 282 Mich App 179 (Nov. 20, 2008), lv gtd; *Castellanos v Pontiac*, Ct App No 286865 (Dec. 29, 2009).

So also, if the defect is under two inches in *height*, but over two inches in *length or width*, the jury is entitled to rely on the length to find a defect, notwithstanding the opposing inference of nondefectiveness that arises from the height being under two inches. *Castellanos v Pontiac, supra*.

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The contrary case of *Gutierrez v Saginaw*, Ct App No 272619 (March 29, 2007) contradicts the cases and reasoning of the main text, and so is not good law.

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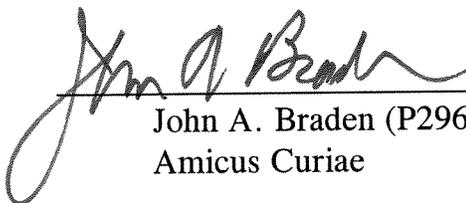
In addition, an irregularity under snow is the classic hidden trap case, for which landowners are liable if they do not warn licensees. Immunizing the government for such a defect would thus create equal protection problems. *Reich v State Highway Dept*, 386 Mich 617, 623 (1972) (may not discriminate in favor of governmental tortfeasors).

Finally, a defect that impounds water, by creating both a trip and slip hazard, is more dangerous than a defect that presents only a trip hazard. Consequently, that the discontinuity impounds water is an additional fact that entitles the jury to infer a defect, notwithstanding that the defect measures under two inches.

In the case at bar, we have a defect that a) was covered by snow, b) impounded water c) was over two inches in width and c) was tilted. Since these conditions enable a jury to infer a defect notwithstanding the contrary inference of nondefectiveness that arises from a discontinuity of less than two inches, Defendant was properly denied summary disposition.<sup>43</sup>

Respectfully submitted,

Dated: March 15, 2010

  
John A. Braden (P29654)  
Amicus Curiae

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Defendant cites a number of cases addressing what is necessary to rebut the inference of nondefectiveness. *Jones v Flint*, Ct App No 263036 (Nov. 17, 2005); *Allgaier v Warren*, Ct App No 268102 (Aug. 22, 2006), lv den 477 Mich 993 (2007); *Bates v Addison*, Ct App No 253374 (Oct, 4, 2005); *Ledbetter v Warren*, Ct App No 269758 (Oct. 31, 2006). None of these cases involved the additional factors present in the case at bar, and so are distinguishable.