STATE OF MICHIGAN

IN MICHIGAN SUPREME COURT

On Appeal from the Court of Appeals
Hon. Peter D. O'Connell, Hon. Michael R. Smolenski, and Hon. Elizabeth L. Gleicher

DIANE GADIGIAN,

Plaintiff/Appellee,

v

Supreme Court Case No. 138323

Court of Appeals Docket No. 279540
Wayne County Circuit No. 06-621978-NO

CITY OF TAYLOR,

Defendant/Appellant**.**

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BRIEF *AMICUS CURIAE* OF
MICHIGAN MUNICIPAL LEAGUE, MICHIGAN TOWNSHIPS ASSOCIATION, STATE BAR PUBLIC CORPORATION LAW SECTION AND MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL
IN SUPPORT OF DEFENDANT-APPELLANT CITY OF TAYLOR

Dated: March 8, 2010

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES **PAGE(S)**

Michigan

Unpublished Cases

COURT RULES

STATUTES

OTHER

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT AND GROUNDS FOR APPEAL

Amici accept the statements presented by Defendant-Appellant in its Application for leave to appeal.

STATEMENTS OF AMICUS CURIAE

State Bar Public Corporation Law Section

The State Bar Public Corporation Law Section is a standing section of the State Bar of Michigan consisting primarily of attorneys that represent clients that are public corporations, including those who have a direct interest in the significant matters at issue in this case. There are several sections and committees of the State Bar, and Statements made in this Brief on behalf of the Public Corporation Law Section are not represented as necessarily reflecting the views of other sections and committees or of the State Bar of Michigan as a whole.

Michigan Municipal League

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative efforts, and whose membership is comprised of some 521 Michigan cities and villages. Among its members are more than 450 cities and villages, who are also members of the Michigan Municipal League Legal Defense Fund. The Michigan Municipal League operates the Legal Defense Fund through a Board of Directors. The

purpose of the Legal Defense Fund is to represent the member local governments in litigation of statewide significance. The accompanying brief amicus curiae is authorized by the Legal Defense fund's Board of Directors whose membership includes: the president and executive director of the Michigan Municipal League, and the officers and directors of the Michigan Association of Municipal Attorneys: Stephen K. Postema, city attorney, Ann Arbor; Randall L. Brown, city attorney, Portage; Lori Grigg Bluhm, city attorney, Troy; Eric D. Williams, city attorney, Big Rapids; Clyde J. Robinson, city attorney, Kalamazoo;; James O. Branson, III, city attorney, Midland; James J. Murray, city attorney, City of Boyne City and Petoskey; Robert J. Jamo, City of Menomenee; John C. Shrier, City of Muskegon; Andrew J. Mulder, city attorney, City of Holland; and William C. Mathewson, general counsel, Michigan Municipal League.

Michigan Townships Association

The Michigan Townships Association was incorporated in 1953 for the purpose of assisting and education Michigan township officials in the performance of their statutory obligations, to improve their knowledge of statutes and case law pertinent to township government, and to provide amicus curiae support in pending litigation which the Board of Directors of the Michigan Townships Association believes are of statewide importance to both the operation of township government and the interests of the citizens represented by township boards of trustees. The membership of the Michigan Townships Association consists of in excess of 1,235 Michigan townships out of a potential of 1,245 townships within the State of Michigan. As provided in MCL 7.306, the Michigan Townships Association is "an association representing a political subdivision," and is

accordingly authorized to file the accompanying amicus curiae brief in support of the City of Taylor.

Michigan Municipal League Liability and Property Pool

The Michigan Municipal League Liability and Property Pool (Pool) is sponsored by the Michigan Municipal League. Only those municipalities that are members of the League may purchase Pool insurance. The Pool exists to serve municipalities only, pursuant to a statutorily authorized intergovernmental contract for a municipal group self-insurance pool. MCL 124.5.

STATEMENT OF QUESTIONS PRESENTED

I. **WHETHER THE COURT OF APPEALS INCORRECTLY INTERPRETED MCL 691.1402a(2) BY FAILING TO RECOGNIZE THAT MICHIGAN HAS ENACTED LEGISLATION ESTABLISHING AN OVERARCHING PUBLIC POLICY GRANTING BROAD GOVERNMENTAL IMMUNITY, WITH NARROWLY-CONSTRUED EXCEPTIONS, AND UNDER THIS POLICY, THE REBUTTABLE INFERENCE PROVIDED IN MCL 691.1402a(2) RELATING TO ALLEGED SIDEWALK DEFECTS COMMANDS ENTRY OF SUMMARY DISPOSITION IF A PLAINTIFF FAILS TO REBUT THE INFERENCE OF REASONABLE MAINTENANCE BY PRESENTING SPECIFIC FACTS DEMONSTRATING *A PARTICULAR UNREASONABLY DANGEROUS CONDITION* THAT PROXIMATELY CAUSED PLAINTIFF'S INJURY.**

Appellant City of Taylor says "Yes."
Appellee Gadigian would say "No."
The lower courts would likely say "No."
Amici say "yes"
This Court should say "Yes."

II. **WHETHER IN ORDER TO REBUT THE STATUTORY INFERENCE IN MCL 691.1402a(1) AND (2), TAKING INTO CONSIDERATION MCR 2.116(G)(4), A PLAINTIFF CANNOT AVOID SUMMARY DISPOSITION BY PRESENTING AN AFFIDAVIT CONTAINING MERE CONCLUSIONS AND GENERALITIES, BUT MUST PRESENT EVIDENCE OF *SPECIFIC FACTS* DEMONSTRATING THAT, IN SPITE OF A DISCONTINUITY THAT WAS LESS THAN TWO INCHES, THERE WAS A DANGEROUS CONDITION OF A PARTICULAR CHARACTER IN A SPECIFIED LOCATION THAT WAS A PROXIMATE CAUSE OF INJURY.**

Appellant City of Taylor says "Yes."
Appellee Gadigian says "No."
The lower courts say "No."
Amici say "yes"
This Court should say "Yes."

STATEMENT OF FACTS AND MATERIAL PROCEEDINGS

Amici accept the Statement of Facts and Procedural History presented by Defendant-Appellant in its Application for leave to appeal.

INTRODUCTION

"Dr. Livingstone, I infer!" [1]

This case presents as a matter of first impression an interpretation of the Michigan Tort Liability Act as applied to sidewalks maintained by municipal corporations in cases in which sidewalk defects involve discontinuities of less than two inches. The need to resolve this issue is significant to municipalities throughout Michigan in light of the increasing number of miles of sidewalks in cities, villages, and townships. While these municipalities seek to protect non-motorized traffic from the risks associated with traveling on portions of roadways utilized by motor vehicles, there is a very real and practical dilemma relating to the sufficiency of resources that may be devoted to ongoing maintenance and repair of this ever-lengthening system of sidewalks? This case presents to the Court issues that bear directly on municipal liability relating to sidewalk maintenance, and the outcome of this matter will undoubtedly influence decisions on whether new sidewalks will be constructed, and in some instances whether it will be fiscally prudent to actually remove sidewalks which have already been installed.

A long and fairly consistent jurisprudence in Michigan has recognized that it is simply unrealistic to command perfection in terms of the condition of sidewalks. Given this understanding, the public policy involving the acceptable standard of maintenance

[1] This is obviously a play on the famous quote, "Dr. Livingstone, I presume?" uttered November 10, 1871 upon the occasion of Henry Stanley finding David Livingstone in Africa some seven years after the latter had ventured there to mount an expedition through the central portion of the continent with the objective of discovering the source of the Nile River. A more complete version of the story can be found at: http://www.eyewitnesstohistory.com/stanley.htm

short of perfection had to be addressed? In the formulation of this policy, it was necessary to recognize that governmental budgets have sharp limitations – perhaps more limitations today than in recent memory. Because sidewalks are not mandated facilities, setting the maintenance bar too close to perfection, which would require a devotion of proportionately more resources to this task – and thus restrict the allocation of resources to other tasks – would, by necessity, send a strong signal that municipal sidewalks may no longer be an affordable public expenditure.

Beginning as far back as 1895,[2] the Court ruled that perfection in sidewalk maintenance was not to be reasonably expected. Approximately three-quarters of a century later, in 1972, the Court retracted its ruling on this subject. This was followed by a legislatively promulgated rule that now establishes the public policy addressing governmental immunity in relation to sidewalk maintenance. Throughout this entire period,[3] a consistent policy has prevailed: ***municipal corporations should not be subjected to the general "reasonableness" standard for determining liability customarily applicable in negligence cases***. In spite of this consistent public policy***, a general reasonableness standard is exactly what the Court of Appeals[4] has imposed upon municipalities*** in this context. The impact of this liability posture would be immense if permitted to stand.

Recognizing the existence of thousands of miles of sidewalks throughout Michigan, this "sea change" in the standard for determining liability reflected in the Court of Appeals decision – essentially occasioning a jury question for nearly any claim

[2] *Weisse v Detroit,* 102 Mich 482, 63 N.W. 423 (1895).
[3] There was a brief gap in time between the rule retraction by the Court and the establishment of the new rule by the legislature.
[4] *Gadigian v City of Taylor*, 282 Mich App 179, 774 NW 2d 352 (2008).

involving a defect in the condition of a sidewalk – would have drastic consequences. With the "blessing" of extreme weather conditions in this state, and recognizing that foundations for sidewalks are not constructed below the frost line, sidewalk systems regularly and quickly develop discontinuity defects following initial construction. In other words, sidewalk systems in substantially all municipalities have defects. If municipalities were exposed to the defense of trials on the merits and potential judgments relative to each and every defect, immense fiscal ramifications would follow.

Appreciating this circumstance, and with the intent of avoiding application of the broader reasonableness standard for testing when such defects need to be repaired in order to avoid liability, the standard established by the legislature is a "rebuttable inference"of reasonable repair where there is a discontinuity of less than two inches between sidewalk slabs. The Court of Appeals' decision essentially negates what the legislature intended, with the result that the door to the expense of and exposure to trial on the basis of the customary "reasonableness" standard is open to nearly any claim for recovery.

What interpretation conforms to the legislature's intent? The answer is found by examining the following in light of the rules of statutory construction as well as the context of the broader Michigan immunity policy established by the Court:

1. The language of MCL 691.1402a(2), that provides the statutory *"**rebuttable inference**"* of reasonable repair.
2. The language of MCL 691.1402a(1)(b), that requires a demonstration by a plaintiff that an alleged defect was the ***proximate cause*** of plaintiff's injury.

3. The court rule that provides the minimum requirement for a party seeking to avoid summary disposition, specifying the obligation to ***set forth specific facts showing that there is a genuine issue for trial***. MCR 2.116(G)(4).

4. The minimum content of **affidavits** required by the Court as a threshold for a plaintiff to avoid summary disposition in connection with sidewalk immunity.

An examination of these considerations as a whole leads inexorably to the conclusion that where (as in this case) a discontinuity of less than two inches exists on a sidewalk, a plaintiff offering an affidavit seeking to avoid summary disposition must present more than mere conclusions and generalities; rather, in order to ***rebut the inference of reasonable repair,*** a plaintiff must set forth ***specific facts that disclose a particular unreasonably dangerous condition***. Moreover, *Amici* urge that, in reviewing an affidavit of facts seeking to avoid summary disposition, it is necessary to consider three critical factors: (1) the legislature's intent that municipalities not be exposed to a broad "reasonableness" standard within this context; (2) the strong policy of immunity in Michigan; and (3) the fact that the plaintiff has the burden of pleading and proving the avoidance of governmental immunity.

ARGUMENT [5]

I.

THE COURT OF APPEALS INCORRECTLY INTERPRETED MCL 691.1402a(2) BY FAILING TO RECOGNIZE THAT MICHIGAN HAS ENACTED LEGISLATION ESTABLISHING AN OVERARCHING PUBLIC POLICY GRANTING BROAD GOVERNMENTAL IMMUNITY, WITH NARROWLY-CONSTRUED EXCEPTIONS, AND UNDER THIS POLICY, THE REBUTTABLE INFERENCE PROVIDED IN MCL 691.1402a(2) RELATING TO ALLEGED SIDEWALK DEFECTS COMMANDS ENTRY OF SUMMARY DISPOSITION IF A PLAINTIFF FAILS TO REBUT THE INFERENCE OF REASONABLE MAINTENANCE BY PRESENTING SPECIFIC FACTS DEMONSTRATING *A PARTICULAR UNREASONABLY DANGEROUS CONDITION* THAT PROXIMATELY CAUSED PLAINTIFF'S INJURY.

Establishing a clear standard for the interpretation and application of MCL 691.1402a(2) is critical for the public interest, including the interests of private individuals and municipal corporations alike. Private individuals need to know the degree of their personal responsibility in the use of sidewalks, as well as the circumstances in which good faith litigation may be initiated. From the municipal standpoint, government officials and employees have a need to know for budgetary considerations and everyday decision making how frequently, and at what juncture a defect must be cured. Plaintiff suggests that the Court of Appeals opinion in this case has provided the final word on the needed rule of law.[6] However, a realistic analysis discloses that a workable rule is yet to be developed.

The critical starting point in the formulation of a rule, as recognized by the Court in its order granting leave to appeal, is the express language of MCL 691.1402a(2). Examining the statute, there would appear to be no room for disagreement on the point

[5] Amici adopt the applicable standard of review as stated in Appellee's Brief, p 10.
[6] See Plaintiff's Brief, pp 21-25.

that this statute, specifying a rebuttable inference of reasonable repair, was intended to provide greater decision-making structure and establish a higher burden of proof than mere "reasonableness." In other words, a plaintiff does not present a question for jury consideration on whether maintenance has been reasonable merely by identifying *some defect* and alleging a failure to maintain. Under the statute, where the alleged defect is a discontinuity of less than 2 inches, there is a heightened burden of proof upon a plaintiff as a condition to getting to a jury. In addition, as discussed further below, it is simply unquestionable that the legislative insertion of the word "rebuttable" in the statute must be attributed meaning as a defining clarification of intent. The word "inference" cannot be interpreted without regard to this clarification.

A. **The public policy established by the legislature in MCL 691.1402a strongly supports the *general rule* that the government should be insulated from negligence liability. The legislature has defined the *exception* to such insulation from liability, with the view that such exception is to be *strictly construed*.**

In broad terms, the duty to repair public sidewalks is a matter within the purview of Michigan's Government Tort Liability Act,[7] which establishes a general immunity from liability for municipalities, with certain exceptions. A sidewalk is deemed to be part of a "highway, [8]" and maintenance of a sidewalk is deemed a governmental function within this context.[9]

The interpretation of any statutory scheme must rely on basic rules of statutory construction. The rules relevant to the present analysis have been frequently enumerated, and are reiterated in the unanimous decision of the Court in *Herman v County of*

[7] MCL 691.1401, *et seq.*
[8] The definition of "highway" includes "sidewalks." MCL 691.1401(e).
[9] *Haliw v City of Sterling Heights*, 464 Mich 297, 303-304, 627 N.W.2d 581 (2001).

Berrien,[10] along with the broadly-supported decision in *Franks v White Pine Copper Division*.[11] Reading these cases together, the following time-honored principles applicable to the construction of the broad scheme and policy of the Michigan government tort liability act can be gleaned:

- **The primary goal of statutory interpretation, to which all other rules are subservient, is to discern and give effect to the intent of the legislature.**
- **The clear language of a statute governs. However, further interpretation of the statute is permitted in order to ascertain the intent of the legislature "where [the language of the statute] is ambiguous or where two or more constructions can be placed upon it . . ."**
- **No word or phrase in the statute should be treated as surplusage, and no interpretation should be made to render a word or phrase nugatory or superfluous.**

In the employment of these rules of construction, a key focus in this case is the interpretation to be given to the phrase "rebuttable inference," as used in MCL 691.1402a(2), which reads in relevant part:

> "A discontinuity defect of less than 2 inches creates a ***rebuttable inference*** that the municipal corporation maintained the sidewalk . . . in reasonable repair." (Emphasis supplied).

[10] 481 Mich 352, 366-367, 750 N.W.2d 570 (2008).
[11] 422 Mich 636, 670, 375 N.W.2d 715 (1985).

Reading as a whole the larger statutory context in which MCL 691.1402a(2) appears is appropriate in order to achieve the proper construction of this phrase.[12] This context is quite revealing in terms of how the particular section of the statute should be interpreted in light of the underlying policy of governmental immunity in Michigan. The starting point of the analysis is the overarching policy of this state to ***broadly interpret the position that favors the grant of immunity*** and to ***narrowly interpret the position favoring an exception to immunity***. The cases on this point are quite clear.

In the interpretation of immunity in connection with highway maintenance, *Nawrocki v Macomb County Road Commission,*[13] pronounced that:

> "Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons . . . Only public entities are required to build and maintain thousands of miles of streets, sidewalks highways . . . Because immunity necessarily implies that a "wrong" has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied . . .
>
> There is one basic principle that must guide our decision today: the ***immunity conferred upon government agencies is broad, and the statutory exceptions thereto are to be narrowly construed.***

More recently, in *Lash v City of Traverse City,*[14] the Court cited the metaphorical language used in *Mack v Detroit* [15] to confirm that a governmental entity is immune from tort liability "unless the Legislature has pulled back the veil of immunity and allowed suit

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[12] *Herman, supra*; *Odom v Wayne County,* 482 Mich 459, 467-472, 760 N.W.2d 217 (2008).

[13] 463 Mich 143, 156-158, 615 N.W.2d 702 (2000) (Emphasis supplied). Footnote 16 in *Nawrocki* goes on to clarify as follows: "The Legislature codified the definitional determinations of *Ross, supra,* when it enacted 1986 PA 175. In doing so, the Legislature put its imprimatur on this Court's giving the exceptions to governmental immunity a narrow reading."

[14] 479 Mich 180, 195, 735 N.W.2d 628 (2007).

[15] 467 Mich 186, 195, 649 N.W.2d 47 (2002).

by citizens against the government." By separate opinion in *Lash*,[16] also citing *Mack*, Justice Kelly interpreted this interplay between immunity and exceptions by characterizing the position supporting immunity as the "***presumption***," further elaborating that "a government agency is immune and can only be subject to suit if a plaintiff's case falls within a statutory exception."

Therefore, the language of an exception carved out from the general rule of immunity is to be ***strictly construed***. Thus, any doubt in interpreting the phrase "rebuttable inference" should be resolved in a manner that favors the presumed immunity rather than the imposition of liability.

B. Common law and legislative history involving the duty to repair sidewalks crystallizes the point that municipal corporations are not intended to be subjected to a broad "reasonableness" standard in determining whether there has been a breach of the duty to repair.

The history of the law leading up to the enactment of MCL 691.1402a(2) is documented in *Glancy v City of Roseville.*[17]

In 1962, the status of the long-discussed issue of sidewalk liability was reported in *Harris v City of Detroit.*[18] The *Harris* Court confirmed the existence of a so-called "two inch rule"

> Plaintiff, both in her brief and in oral argument, admits that the rule in Michigan, supported by a long list of cases . . . is that a depression in a walk which does not exceed 2 inches in depth will not render a municipality liable for damages incident to an accident caused by such depression. It is to be noted that most of these cases are unanimous opinions of this Court. Plaintiff would have us abolish this long-established rule of law without citing any reason or authority for the change in position. We find no reason for doing so.

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[16] *Supra*, at 199. (Emphasis supplied).
[17] 457 Mich 580, 577 N.W.2d 897 (1998).
[18] 367 Mich 526, 528, 117 N.W.2d 32 (1962).

Approximately a decade later, the Court abandoned the two-inch rule in *Rule v Bay City.*[19] The Court simply pronounced that "we take this opportunity to advise the bench and bar that hereafter we will no longer hold as a matter of law that a depression or obstruction of two inches or less in a sidewalk may not be the basis for a municipality's liability for negligence."

The Government Tort Liability Act, as amended in 1986, clarified that it was the intent of the legislature to affirm governmental immunity law as it existed prior to July 1, 1965 (i.e., a point in time after *Harris,* but before *Rule*). This led to the question whether the two-inch rule confirmed in the *Harris* case in 1962 was effectively reinstated by the 1986 amendment. Finding that the two-inch rule had been established under the banner of negligence law, and not governmental immunity law, *Glancy, supra,* held in 1998 that the 1986 act did not affirm or reinstate the two inch rule. Nor did the Court accept an invitation made in that case to judicially re-adopt the two inch rule.

In the face of this void, the Michigan legislature quickly acted, but not simply by codifying the so-called two-inch rule as it had existed under *Harris.* Rather, in Act 205 of the Public Acts of 1999, and specifically in MCL 691.1402a(2), the legislature inserted the language at issue in this case, providing for a "rebuttable inference" of reasonable repair where a discontinuity defect of less than two inches exists.

C. In MCL 691.1402a(2), the legislature chose *not* to expose municipalities to the general standard of "reasonableness" with regard to sidewalk maintenance.

Tracing the history relating to the sidewalk maintenance standard is invaluable in demonstrating that the legislature did not find it to be in the public interest to expose

[19] 381 Mich 281, 195 N.W.2d 849 (1972).

municipal corporations to liability for sidewalk defects based upon a general "reasonableness" yardstick. The broad reasonableness standard would have exposed municipal corporations to trials on the merits in nearly all cases in which any type of defect is alleged. Such exposure can best be understood by examining how the general reasonableness standard has been interpreted within the context of determining whether summary disposition should be granted in a case. For this purpose, reference is made to *Durant v Stahlin*,[20] citing the treatise *Honigman and Hawkins:*

> "The authors of 1 Honigman and Hawkins, Michigan Court Rules Annotated (2d ed., 1962), at page 360, considered the same subject matter and concluded as follows:
>
> '* * * [S]ummary judgment should be considered applicable in any type of action where one of the grounds prescribed in sub-rule 117.2 is present. Grounds (1) and (2), relating to the legal validity of a claim or defense, are likely to arise in any type of case without particular reference to subject matter of form of action. As to ground (3), the traditional area for summary judgment, contract cases will continue to preponderate, *but only for the functional reason that disputed factual issues are more likely to be missing in such cases than in tort cases, for example*.
>
> '***In negligence cases***, even though there may be no dispute as to the quantitative or physical facts, ***summary judgment will almost always be inappropriate*** *because the qualitative issue of* ***whether defendant exercised reasonable care*** *will be in dispute and must be left for the jury*, unless on the undisputed physical facts a judge would say that a directed verdict would be required-which is to say that there really is no negligence issue for the jury. In such cases summary judgment has been allowed in negligence cases and should be. * * *' (Emphasis added.)"

Thus, in the enactment of MCL 691.1402a(2), the legislature rejected the general reasonableness standard, and provided guidance to municipalities and litigants by establishing a standard in the form of a rebuttable inference that recognized the realities

[20] 375 Mich 628, 652, 135 N.W.2d 392 (1965). (Emphasis supplied with respect to text in bold).

of Michigan weather and its heaving effect on surface improvements not having foundations. Michigan sidewalk systems, within a short period of time following construction, will have widespread discontinuities. This recognition, in turn, forms a basis for the policy that is a practical necessity if sidewalks are to remain in Michigan: municipal corporations should not be exposed to the expenditures relating to trials on the merits due to injuries from any and all sidewalk defects. Specifically, if a discontinuity is less than two inches, there is a rebuttable inference of reasonable repair. The balance in this policy is preserved by leaving the door open to the possibility that, even if a discontinuity is less than two inches, ***a plaintiff may rebut the inference by presenting evidence of an unreasonably dangerous condition in a particular location of the sidewalk that proximately caused the plaintiff's injury.***

The issue now presented to the Court is: what is the threshold that must be met by a plaintiff in order to successfully rebut the inference of reasonable repair in the face of a discontinuity of less than two inches.

D. Reading MCL 691.1402a(2) in light of the state's governmental immunity policy, the *word "rebuttable" may not be rendered nugatory or surplusage*, and giving this defining word its due meaning requires a plaintiff seeking to avoid summary disposition to present *specific facts* showing that there is a genuine issue for trial. Pleading conclusions and generalities is insufficient.

A plaintiff must plead and prove qualification for an exception to governmental immunity with regard to maintaining a sidewalk in reasonable repair. *Buckner v City of Lansing.*[21] Framing the issue, the legislature in MCL 691.1402a started with the broad statement of immunity, to the effect that a municipal corporation *has no duty to repair or maintain* sidewalks except as provided in this section of the statute.

[21] 480 Mich 1243, 747 N.W.2d 231 (2008).

The contours of an exception to such immunity are defined in two parts. First, there are two limitations set forth in MCL 691.1402a(1), which specifies that the exception applicable to the grant of immunity applies only where the municipal corporation knew or should have known of the defect at least 30 days before the occurrence ***and*** where the defect in the sidewalk is a ***proximate cause*** of the injury, death, or damage. Second, the exception is further limited in MCL 691.1402a(2), which specifies that a ***discontinuity defect of less than two inches creates a rebuttable inference that the municipal corporation maintained the sidewalk in reasonable repair***.

In the interpretation of the "rebuttable inference" phrase employed by the legislature in subsection (2), the Court of Appeals committed two important errors: First, the court appeared to ignore the general Michigan policy that recognizes a broad rule of immunity and a strict construction of exceptions to immunity.

The court's second error of interpretation occurred when it isolated the term "inference," and then allocated disproportionate attention to this word without considering its context. That is, in attempting to ascertain the meaning of the word "inference," insufficient attention was devoted to the fact that the legislature accompanied the word "inference" with the defining adjective, "rebuttable." Clearly, the statute may not be interpreted in a manner that renders the word "rebuttable" nugatory or superfluous. *Herman v County of Berrien, supra, Franks v White Pine Copper Division, supra.* Thus, the use of the word "rebuttable" informs the meaning of "inference."

The American Heritage Dictionary (4th ed. 2004) defines "rebut" as meaning "to refute by offering opposing evidence or arguments." If the legislature had not included the word "rebuttable" in MCL 691.1402a(2), the isolated focus of the Court of Appeals

on the legislature's choice of the word "inference" might have greater credibility. However, considering the meaning of both words utilized by the legislature – inference *and* rebuttable – when a plaintiff proposes to challenge the conclusion implicated by the inference, i.e., reasonable repair, there can be no question of legislative intent: ***the inferred conclusion of reasonable repair must be rebutted by the offer of evidence***. To conclude otherwise would most certainly render the word "rebuttable" superfluous, a result clearly prohibited by the well-recognized rules of statutory construction.[22]

E. The standard for determining whether a plaintiff has rebutted the inference

Where a discontinuity is less than two inches, what standard is to be applied for determining whether a plaintiff in a given case has rebutted the inference of reasonable repair so as to avoid summary disposition? The answer to this question may be approached from both procedural and substantive standpoints.

From a ***procedural*** standpoint, the answer is straightforward: we look to the appropriate court rule, MCR 2.116(G)(4), which provides, in relevant part that, in opposing a motion for summary disposition under subrule (C)(10),

> "an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, ***set forth specific facts showing that there is a genuine issue for trial***. If the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." (Emphasis supplied).

Accordingly, while the comparison of the words "presumption" and "inference" has received a great deal of attention in these proceedings, the legislature has in all events made it clear that, where a discontinuity of less than two inches exists, a plaintiff must

[22] *Herman v County of Berrien, supra,* and *Franks v White Pine Copper Division, supra.*

rebut by presenting affidavits or as otherwise permitted in the court rule, showing ***specific facts*** of an unreasonably dangerous condition.

From a ***substantive*** standpoint, reading MCL 691.1402a(1) and (2), along with MCR 2.116(G)(4), in order to avoid immunity in the present context, a plaintiff does not qualify for an immunity exception unless such party "rebuts" the inference of reasonable repair established based upon a discontinuity of less than two inches. This, in turn, requires a plaintiff to ***offer specific facts*** that demonstrate that there was a ***particular unreasonable defect*** in the sidewalk that was a proximate cause of injury. Absent such a showing, judgment shall be entered against him or her. MCR 2.116(G)(4).

Moreover, in measuring or "filtering" the evidence provided by a plaintiff attempting to avoid immunity in this context, Michigan policy directs the application of a narrow construction to an alleged exception to immunity. Accordingly, in order to avoid immunity in a case governed by MCL 691.1402a(1) and (2), a claimant must prove either that (1) a sidewalk discontinuity of two inches or greater was a defect due to unreasonable repair and amounted to a proximate cause of injury; or (2) ***specific facts*** demonstrate that, in spite of a discontinuity that was less than two inches, there was a dangerous condition of a particular character, in a specified location, that was a proximate cause of injury. The advocacy for an exception to immunity in this context must be strictly construed against its application.

In its review of Defendant's motion for summary disposition in this case, the Court of Appeals incorrectly interpreted MCL 691.1402a(2). The Court of Appeals failed to read this statutory provision as an integral part of the statute as a whole, omitting from its analysis the broad intent to grant immunity – which is the presumption – and

failed to give a correspondingly narrow construction to the alleged exception to that immunity. Rather than affording a strict construction to Plaintiff's claim for the application of an exception to governmental immunity, the Court of Appeals imposed a strict construction on "rebuttable inference" in a manner that ***effectively favored the grant of the exception to immunity***.

The analysis in the next section of this brief will reveal that, consistent with its narrow interpretation of the statute in terms of granting immunity, and its broad interpretation of the exception to immunity, the Court of Appeals erred in accepting Plaintiff's offer of conclusions and generalities as an evidentiary basis for overcoming the rebuttable inference of MCL 691.1402a(2).

II.

IN ORDER TO REBUT THE STATUTORY INFERENCE IN MCL 691.1402a(1) AND (2), TAKING INTO CONSIDERATION MCR 2.116(G)(4), A PLAINTIFF CANNOT AVOID SUMMARY DISPOSITION BY PRESENTING AN AFFIDAVIT CONTAINING MERE CONCLUSIONS AND GENERALITIES, BUT MUST PRESENT EVIDENCE OF *SPECIFIC FACTS* DEMONSTRATING THAT, IN SPITE OF A DISCONTINUITY THAT WAS LESS THAN TWO INCHES, THERE WAS A DANGEROUS CONDITION OF A PARTICULAR CHARACTER IN A SPECIFIED LOCATION THAT WAS A PROXIMATE CAUSE OF INJURY.

The relevant section of the Government Tort Liability Act, MCL 691.1402a(2), creates a rebuttable inference that a sidewalk was in reasonable repair in cases where a discontinuity is less than two inches. Within the summary disposition context, MCR 2.116(G)(4) specifies minimum requirements for responding to a (C)(10) motion. Reading the statute and court rule together, in order to rebut the inference of reasonable repair, a plaintiff must present "specific facts showing a genuine issue for trial." These propositions lead to the inescapable conclusion that: **the requirement to present specific facts in order to accomplish the rebuttal requirement is not met merely by having an expert recite *conclusions of law* and *generalized facts***. If conclusions and generalizations were the full extent of the obligation in order to avoid summary disposition, the rebuttable inference of immunity would be overcome in any and all cases. It would be rendered a nullity. This is exactly what occurred when the Court of Appeals held that the affidavit of Plaintiff's expert – starved of specific relevant facts – was adequate to defeat summary disposition.

In order to accept such affidavit, the Court of Appeals had to read out of the statute any functional application of the rebuttable inference of reasonable repair, and thus negated legislatively intended immunity. By this ruling, the standard of care

provided to municipalities by the legislature for sidewalk repair was vitiated. This is extremely significant considering the existence of the thousands of miles of sidewalks throughout the state. By effectively ignoring the expressly provided rebuttable inference standard, the published opinion of the Court of Appeals has left municipal corporations with the obligation to respond to nearly all sidewalk defect claims based on the general "reasonableness" standard for negligence.

In light of the history of the legislative enactment of the rebuttable inference in MCL 691.1402a(2) immediately following the *Glancy* decision, as discussed above, there can be no question that the immunity policy in Michigan does not intend municipal corporations to be subjected to a broad "reasonableness" standard in connection with disputes involving liability for the failure to repair sidewalks The Court of Appeals' decision in this case unquestionably results in wide exposure of municipal corporations to this very burden. The ruling is contrary to Michigan policy and, if allowed to stand, would have staggering budgetary implications.[23] It would ultimately deter the construction and continued use of sidewalks throughout Michigan.

A. Affidavits such as that presented by Plaintiff fail to serve as a basis for avoiding immunity.

In order to avoid immunity in the summary disposition context, a plaintiff does not qualify for an immunity exception unless such party shows proximate cause ***and*** "rebuts" the inference of reasonable repair established based upon a discontinuity of less than two inches. MCL 691.1402a(1)(b) and (2). Rebutting the inference requires a plaintiff to present ***specific facts*** demonstrating that, in spite of a discontinuity that was

[23] The relevance of such budgetary considerations within this context has been recognized by the Court in *Mack, supra.,* at 203, n 18.

less than two inches, there was a dangerous condition of a particular character in a specified location that was a proximate cause of injury. 691.1402a(1) and (2), MCR 2.116(G)(4). The advocacy for an exception in this context must be strictly construed.

An affidavit of a Mr. Dziurman[24] was offered by Plaintiff in this case in an effort to overcome the rebuttable inference provided in MCL 691.1402a(2). Examination of the Dziurman affidavit reveals that his statements represent nothing more than **bare conclusions and generalities,** failing to identify a particular dangerous condition that would rebut the inference of reasonable repair. The further failing of the affidavit is that it omits a showing that the defects alleged were the **proximate cause** of Plaintiff's injury. An analysis of the relevant portions of the affidavit follows.

1. **"In my professional opinion, the specific City of Taylor sidewalk maintenance standards listed take precedence over the general statewide standard."** p 2, end of ¶ 6.

This states a legal conclusion on the governing law of the case. Determinations of law are within the province of the court. *Charles Reinhart Co. v Winiemko.*[25] It is also not a statement of fact, as required to avoid summary disposition under MCR 2.116(G)(4). Not unimportantly, it also happens to be an incorrect statement of law. The Taylor ordinance, which sets standards for maintenance by persons other than the City, does not (and cannot) constitute a waiver of statutory immunity. The "law" on immunity is the Government Tort Liability Act, not the Taylor sidewalk ordinance.

2. **Mr. Dziurman makes reference to a "combined 'discontinuity'" when various parts of the sidewalk slab are measured, and then all measurements of discontinuity are added together**. p 2, ¶ 7.

[24] Set forth in its entirety in Appellant's Appendix, 285a.
[25] 444 Mich 579, 592, 513 N.W.2d 773 (1994).

There are two fatal flaws with this Dziurman statement. First, the immunity statute does not expressly or impliedly refer to "combined discontinuity." Second, absent extraordinary circumstances not present in this case, defects in more than one location will not be probative in relation to a single injury. Thus, stating that there was a discontinuity of less than two inches going in one direction, and a discontinuity of less than two inches going in the opposite direction would be irrelevant to a rebuttal of the inference. The photographs depicting the subject sidewalk do not show more than one discontinuity that could have been encountered while traveling in a single direction.[26]

Dzuirman attempted to manufacture a rebuttal by simply adding the two opposite-facing discontinuities. In this respect, the affiant was effectively offering to amend the statute by reading an entirely new concept into it, with the objective of producing a nonexistent statutory basis for an immunity exception. There is simply no relation between the statutory language and this proposed measurement procedure. Moreover, there is no rational basis for including the measurement of discontinuity in an area of the sidewalk that was not the "exact location where [Plaintiff] fell,"[27] and thus, not the proximate cause of injury -- the probative issue established by MCL 691.1402a(1)(b). A pedestrian can only travel in one direction at any given time. The affidavit offers no fact-based explanation why a discontinuity in an area of the sidewalk ***somewhere other than*** where the pedestrian tripped could have somehow caused that trip. This paragraph of the affidavit wholly fails to address the actual issue in the case: the discontinuity in the "exact location where [Plaintiff] fell."[28]

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[26] Appellant's Appendix, 227a-232a.
[27] *Nawrocki, supra.,* p165.
[28] *Id.*, p 165.

3. **"the . . . sidewalk slab . . . was a trip hazard in violation of . . . Taylor's code of ordinances . . . and thus . . . not reasonably safe and convenient."** p 2, ¶ 8.

This statement is a bare legal conclusion without even a semblance of factual clothing – and (as noted above) the statement is an incorrect one at that. The sole issue is not whether the sidewalk violated ***Taylor's*** ordinance standard; but whether, even if less than two inches, it was unsafe. No facts specific to that assertion are included in this statement. Again, this commentary fails to meet the requirement of MCR 2.116(G)(4) for the avoidance of summary disposition.

4. **"The sidewalk slab . . . is a safety hazard due to the height difference between adjoining slabs."** p 3, ¶ 9(a).

This statement, again, offers an amendment to the statute. Yes, there is a height difference between sidewalk slabs. It is less than two inches. This statement in no way helps to establish why the rebuttable inference of reasonable repair should not be dispositive considering that the height differential on the subject sidewalk was less than two inches. The affiant's conclusory statement does not raise an issue of fact and is therefore entirely insufficient to meet the requirement of MCR 2.116(G)(4) for the avoidance of summary disposition.

5. **"Water will pond."** p 3, ¶ 9(b).

A generalized statement making reference to the ponding of water on the sidewalk is totally detached from the relevant issue. There is no assertion anywhere that such ponding existed at the time of Plaintiff's encounter. Whether or not water "will" pond on the sidewalk is a generalized hypothetical consideration that has no connection with the proximate cause of the injury at issue. MCL 691.1402a(1)(b)].

6. **A "'teeter-tauter' effect of the slabs of the sidewalk adjacent to one another caused a trip hazard for traffic walking in either direction."** p 3, ¶ 9(d).

Plaintiff has clarified that this reference to "teeter-tauter" does ***not*** suggest that the sidewalk slabs moved (like a traditional "teeter-tauter"). Rather, ***reference here is to the point that the discontinuity was high on one end of the slab and lower on the other end***.[29] While affiant also suggests that this condition caused a ponding of water, there is no factual explanation how a ponding condition was actually a proximate cause of injury to Plaintiff. MCL 691.1402a(1)(b). Nor could the affidavit remove the physical reality that a discontinuity would routinely be higher at one point and lower at another.[30] Likewise, the affidavit could not assume (and does not state) that both sides of the "teeter-tauter" sidewalk were somehow involved in Plaintiff's fall. Again this statement does nothing to "rebut" the inference of reasonable repair.

7. **"this sidewalk is even more dangerous . . . than a sidewalk that is raised only on one side at two inches or more (but consistently across) . . . because if a sidewalk was raised only on one side at two inches or more, it would be readily visible and would create a trip hazard to traffic walking only in one direction."** p 3, ¶ 9(e).

This statement curiously ***suggests that a greater discontinuity is safer*** because it is more visible, and that, where the discontinuity is all one way (e.g., uniformly higher in relation to the adjacent slab,) it creates a danger solely for walkers traveling in one direction. Not only does this analysis break with logic, the suggestion that a greater discontinuity would be safer directly contradicts the legislatively established standard

[29] Plaintiff/Appellee's Response Brief, p 23.
[30] The probability of a perfectly uniform discontinuity over the entire width of a sidewalk would be low indeed.

implicit in the statutory specification that there is a rebuttable inference that a sidewalk is in reasonable repair if a discontinuity is *less* than two inches. MCL 691.1402a(2). In addition, this entire statement is merely hypothetical, and is not directed toward a proximate cause of injury to Plaintiff. MCL 691.1402a(1)(b). This statement really boils down to the point that the affiant simply disagrees with the Michigan legislature, and advocates that a height discontinuity of ***more*** than two inches is actually safer than one of less than two inches. Aside from its illogical premise, it is not for an affiant, expert or otherwise, to simply brush aside the legislatively-established standard implicit in the two-inch statutory specification in MCL 691.1402a(2). In sum, this paragraph of the affidavit does not create a factual issue; it argues that the legislative standard is wrong. That is not for this affiant to decide.

Taken as a whole, and examined in its constituent parts, Plaintiff's affidavit is analogous to the *Emperor's New Clothes.* Its statements cover nothing relevant. Nor does it have any probative value. In some instances, the affidavit presents bare *conclusions* of hazard, rather than providing *specific facts* as required. In other instances, the affidavit speaks in terms of whether water would pond on the sidewalk-- a matter entirely off the track of proximate cause in this case, as required. The affidavit also urges that there was a lack of safety because the discontinuity was *not high enough*, a hypothetical concept that not only contradicts the legislative intent embodied in the two-inch standard contained in MCL 691.1402a(2), but is also inconsistent with some seventy five years of judicial holdings on the subject.[31] The affidavit also relies for its "trip hazard" conclusion on a so-called "teeter-tauter" effect. In order for this rather common

[31] *Weisse, supra* (1895) through *Harris, supra* (1962) and *Rule, supra* (1972).

condition of a sidewalk (involving a discontinuity that is high on one end of the slab and lower on the other end) to have any meaning, a pedestrian would at once have to be traveling in two directions, or tripping in two locations. Such an extraordinary event is not alleged to have occurred here. The only relevant consideration is a defect in the "exact location" where plaintiff fell.

The affidavit entirely fails to rebut the inference of reasonable repair, presenting no *specific factual basis* relating to the "exact location where [Plaintiff] fell,"[32] Nor does the affidavit demonstrate that, in spite of a discontinuity that was less than two inches, there was a dangerous condition of a particular character that was a proximate cause of injury. MCR 2.116(G)(4). This failure to present a sufficient factual basis is particularly inescapable when the affidavit is scrutinized based upon the required strict construction standard applicable to advocacy for exceptions to immunity.

B. The Court's consistent interpretation that the overarching intent of the Legislature is to broadly afford immunity and strictly construe exceptions to immunity was emasculated by the Court of Appeal's liberal construction.

An immunity defense is only relevant where a defect exists and an injury has occurred. Thus, it can be assumed for purposes of analyzing this immunity issue that some "defect" existed in the sidewalk, and that a harm resulted. Indeed, the statute at issue[33] creates the rebuttable inference of reasonable repair with regard to a "[a] discontinuity ***defect*** of less than 2 inches." (Emphasis supplied). Moreover, immunity necessarily implies that a harm has occurred.[34] But, for immunity purposes, the fact that

[32] *Nawrocki, supra.,* p165.
[33] MCL 691.1402a(2). (Emphasis supplied).
[34] *Mack, supra.,* at 156-158.

a defect existed, or that a harm occurred does not resolve the liability issue;[35] rather, this is where the analysis begins. The fundamental question is whether the nature of the defect that existed in the public improvement at a specified location, considered along with the surrounding circumstances, has been demonstrated by the plaintiff to qualify under the terms of immunity law as one of the exceptional circumstances in which a person who has been harmed by a defect can sue the public.

Initial reactions might include the thinking that, as in the private sector, the defendant members of the public, i.e., municipal corporations, can merely insure for such risks. But, there are thousands of miles of sidewalks in the state. The number of claims that will be spawned from the ruling of the Court of Appeals in this case simply cannot be overestimated. As a matter of economics, insurance providers can not absorb the cost of a vastly increased risk that cases will have to be defended, and that recoveries will be made. Rather, increased risk will translate into increased insurance rates, roughly in proportion to the increased risk. When these rates are no longer affordable, there will ultimately be self-insurance.

This budgetary problem is at the heart of the scheme of governmental immunity,[36] and if the Court of Appeals ruling stands, it is the public that will suffer the inevitable fate of ***less sidewalk service***. Perhaps the most likely short-term reaction will be a ***reduction*** in the number of new sidewalks constructed. However, in the long-term, it may be less costly to ***remove*** sidewalks than to face high volumes of ongoing claims. These eventualities would expose adults and children to the dangers of traveling on foot

[35] In the development of the law over many years, there has been an important recognition, as identified in *Nawrocki,* that the test in interpreting an exemption from governmental immunity is not whether a "wrong" has occurred. *Supra,* at 157.
[36] *Mack, supra.,* at 203, n 18.

and bicycle in unsafe thoroughfares, and to a lack of health and welfare opportunities promoted by sidewalks.

With considerations such as the foregoing in mind, the Court has clarified the legislative intent that,[37]

> "Government cannot merely be liable as private persons are for public entities are fundamentally different from private persons . . . Only public entities are required to build and maintain thousands of miles of streets, sidewalks highways . . . Because immunity necessarily implies that a "wrong" has occurred, we are cognizant that some tort claims, against a governmental agency, will inevitably go unremedied . . ."

Did the Plaintiff in this case make the requisite demonstration under the statutory standard provided? It is the view of *Amici* that the analysis above sufficiently establishes that Plaintiff *clearly failed* to make the requisite demonstration. Under careful examination, it would not even appear to be a close question.

In evaluating whether Plaintiff met the necessary burden to avoid the application of immunity, the Court of Appeals, in essence, neglected to perform a meaningful analysis of MCL 691.1402a(1) and (2), MCR 2.116(G)(4) in the manner required under the rules of construction.

1. **Proximate Cause**: The Court of Appeals "acknowledge(d) that the Legislature has relieved municipal corporations of liability for sidewalk-related injuries unless . . . (2) **the defect** proximately caused the injury." 691.1402a(1)(b). (Emphasis supplied). On this requirement, however, the Court of Appeals merely held that

[37] *Supra.,* at 156-158.

proximate cause "undisputedly exist(s) in this case."[38] Indeed! In ascertaining whether a plaintiff has presented pleadings and proofs in avoidance of governmental immunity, the question is not whether *some* defect exists in connection with the sidewalk,[39] but whether the Plaintiff has demonstrated the existence of the ***proximate cause*** element with regard to a ***particular defect in a specified location*** of the sidewalk in order to meet the statutory requirement for entitlement to an immunity exception. In other words, the inquiry must be whether the affidavit links a particular defect in a specified location of the sidewalk to plaintiff's injury. Undertaking this inquiry in the present case results in the conclusion that no such link has been established. Apparently, however, this mandatory condition to applying the sidewalk immunity exception was merely presumed by the Court of Appeals.[40]

2. **Rebutting the Inference:** The Court of Appeals held that the "Dziurman affidavit set forth specific facts and drew reasonable expert conclusions based on those particular facts." More specifically, the Court of Appeals stated that "Plaintiff presented evidence that ***the longstanding sidewalk defect*** was known to defendant, that it created a ***'teeter-tauter'*** effect, and that its ***unique physical properties*** made it difficult to observe." (Emphasis supplied).

a. **What is *the* "longstanding sidewalk defect?"**

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[38] There is no suggestion that the City ever made an admission of this conclusion of law. To the contrary, *see*, Defendant's Court of Appeals Brief, pp 11, 18, and Reply Brief, pp 2, 9.

[39] The very statute creating the particular immunity standard at issue in this case makes the assumption that a defect exists, stating that "[a] discontinuity **defect** of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair." (Emphasis supplied).

[40] If the Court of Appeals relied on evidence of proximate cause having a source other than the affidavit, a reference on this point could have been made.

> The first question is: in view of the fact that the discontinuity on this sidewalk was less than two inches, ***what is the particular inference-rebutting defect*** to which the Court of Appeals refers in coming to this conclusion? As discussed above, we can assume that *some* defect existed, and "[b]ecause immunity necessarily implies that a 'wrong' has occurred, we are cognizant that some tort claims against a governmental agency will inevitably go unremedied . . ."[41] However, some ***particular circumstance or characteristic relating to this sidewalk*** must be shown to have been the basis for rebutting the inference of reasonable repair. The only particular quality referred to by the court in this context is the "teeter-tauter" effect. In this regard, the Court's attention is invited to the fact that Plaintiff has conceded that this "teeter-tauter" characterization does not suggest that the sidewalk slabs moved (like a traditional "teeter-tauter"). Plaintiff's suggestion here is merely that the discontinuity was high on one end of the slab and lower on the other end.[42] This condition certainly does not involve an *inherent* danger or "unique physical property" that needs no further explanation. Yet, no factual explanation was provided. In addition, no specific factual basis was provided by Plaintiff for concluding that this condition had anything to do with Plaintiff's injury. The affidavit merely refers to, and the Court of Appeals

[41] *Mack, supra.,* at 156-158.
[42] Plaintiff/Appellee's Response Brief, p 23.

accepted, this condition as an abstract generality, with no particular relationship to the present case.

b. **Plaintiff's expert offers, and the Court of Appeals applies, a re-write of the statute.**

The statute imposes no restriction that the inferred reasonable repair arises only in cases where a discontinuity is uniform across the entire sidewalk slab. In the examination of affidavits such as this, sight may not be lost of the crucial point that the statute must be strictly construed in favor of immunity, and that the objective is to ascertain and give effect to the intent of the legislature. Therefore, merely asserting a "teeter-tauter" effect with a discontinuity of less than two inches on a sidewalk is insufficient to rebut the inference broadly stated by the legislature to apply where a discontinuity of less than two inches exists.[43] The Court of Appeals characterizes this "teeter-tauter" effect as being a unique physical property that is more difficult to observe. A "teeter-tauter" exception cannot be found in the statute, and there is no question that this condition is quite common. Particularly in light of the obligation to strictly construe the statute, the conclusion reached by the Court of Appeals effectively re-writes the statute. The legislature has specified that a discontinuity of less than two inches must be rebuttably inferred to be in reasonable

[43] The statute does not limit the inference where the discontinuity is on one side or both sides of the sidewalk.

> repair; yet, without further explanation, the affidavit suggests, and the Court of Appeals concludes, that a discontinuity of less than two inches, simply because it is located in two parts of the sidewalk (although one trips only in a single location) is difficult to observe and thus sufficient to rebut the inference of reasonable repair. This, of course, flies in the face of the entire rebuttable inference that a discontinuity of less than two inches is the *preferred* condition.

Because it is the burden of a plaintiff to plead and prove the avoidance of governmental immunity,[44] *Amici* contend that whether the requisite demonstration was made to avoid summary disposition must be considered within the context of a strong public policy that favors immunity, and that such policy is not overcome merely by presenting conclusions and generalities. This subject has very serious consequences to each and every municipal corporation in this state that maintains sidewalks. Courts are "compelled to strictly abide by these statutory conditions and restrictions."[45]

An affidavit seeking to avoid summary disposition must be considered in light of: the legislative intent to avoid application of a broad "reasonableness" standard to municipalities within this context; the strong policy of immunity in Michigan; and, the point that a plaintiff has the burden to plead and prove an exception to immunity.

The immunity conferred upon government agencies is broad, and the statutory exceptions are to be construed narrowly.[46] Viewed in this light, the Court of Appeals

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[44] *Buckner, supra.*
[45] *Nawrocki, supra.,* at 159.
[46] *Supra.*

reversibly erred both in concluding that Plaintiff sufficiently rebutted the statutory inference of reasonable repair as well as in concluding that the obligation to show proximate cause had been met.

The two-inch rebuttable inference was enacted by the legislature with the intent of providing a "rudder" on the ship of sidewalk repair liability. The Court of Appeals decision renders the ship rudderless.[47]

CONCLUSION AND REQUEST FOR RELIEF

From a broad policy point of view, the prospect of injury is presented if sidewalks are not maintained in a condition of reasonable repair. Likewise, the prospect of injury exists if sidewalks are not provided at all due to an unreasonable standard of maintenance. Clearly willing to grant immunity with regard to sidewalks that are not in perfect condition, the legislature has established a compromise that recognizes that all defects that could cause accidents are not actionable, and that up to a certain point, there is a personal responsibility on the part of individuals to avoid injury.

[47] The present case does not stand alone as an exemplar of the need for a clear rule for interpreting MCL 691.1402a(2). Two recent cases decided in the Court of Appeals are enlightening in this regard. See, *Castellanos v City of Pontiac*, Court of Appeals Docket No. 286865, decided December 29, 2009, attached as Exhibit 1 ("*Gadigian* suggests that the evidentiary burden for a plaintiff to survive summary disposition in the face of an inference, standing alone, is ***fairly minimal,*** given that a jury would be permitted to ***completely ignore*** the inference if it chose to do so) (Emphasis supplied); and *Handley v City of Ann Arbor*, Court of Appeals Docket No. 284135, decided July 30, 2009, attached as Exhibit 2 (sidewalk discontinuity of approximately 1 and 1/8 inches at the location struck by plaintiff's bicycle wheel [fn 2], with rebuttable inference overcome based on "proffered evidence" of the existence of vegetation and debris, and slab that was not level).

The compromise of the legislature expresses that "[a] discontinuity defect of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair." MCL 691.1402a(2).

In facing summary disposition motions based on the rebuttable inference, plaintiffs in cases such as this may file an affidavit seeking to "lift the veil of immunity." By application of MCR 2.116(G)(4), an affidavit containing only conclusions and generalities is insufficient. An affidavit must present *specific facts* showing a particular defect exactly where plaintiff fell, and that such defect proximately caused plaintiff's injury.

In this case, Plaintiff filed an affidavit presenting only conclusions and generalities. The affidavit fails to articulate specific facts demonstrating that, ***in spite of a discontinuity that was less than two inches***, there was a dangerous condition of a particular character in a specified location that was a proximate cause of injury. If such an affidavit were deemed sufficient in order to establish a basis for avoiding summary disposition, municipal corporations throughout the state would be required to go to trial based upon nearly any fact situation alleging a sidewalk defect.

Essentially, the Court of Appeals, in a published decision, simply glossed over the overarching principle that immunity conferred upon government agencies is broad, and that statutory exceptions are to be narrowly construed. Likewise, the Court of Appeals neglected to require a presentation of specific facts identifying a particular defect in a specified location that was the proximate cause of Plaintiff's injury, the showing required in order to rebut the inference of reasonable repair. The decision subjects municipalities to trials on the merits based upon the general reasonableness standard with regard to

substantially all sidewalk defects. This is contrary to the fundamental intent of Michigan law and contrary to the underlying public policy established in the Michigan Government Tort Liability Act.

For all of the reasons set forth in this Brief, *Amici* request the Court to reverse the decision of the Court of Appeals and establish a standard for the interpretation and application of MCL 691.1402a(2) that duly respects the intent of the legislature. Specifically, in cases involving a sidewalk discontinuity defect of less than two inches, the Court should require a plaintiff seeking to rebut the inference of reasonable repair to present specific facts evidencing a particular unreasonably dangerous condition in the exact location that proximately caused plaintiff's injury.

Respectfully submitted,

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March 8, 2010

EXHIBIT 1

UNPUBLISHED

Court of Appeals of Michigan.

Rebecca CASTELLANOS, Plaintiff-Appellee,
v.
CITY OF PONTIAC, Defendant-Appellant.

Docket No. 286865.

Dec. 29, 2009.

West KeySummary

An expert affidavit stating that the city failed to reasonably maintain its sidewalk created a question of fact precluding summary disposition in a pedestrian's trip and fall case. The expert opined that the sidewalk involved multiple safety hazards resulting in an unreasonable danger to pedestrians. The expert's opinion tended to rebut the statutory presumption that the city maintained the sidewalk in reasonable repair. MCL 691.1402a(2).
Oakland Circuit Court; LC No.2007-082143-NO.

Before: MURPHY, C.J., and METER and BECKERING, JJ.

PER CURIAM.

*1 In this “defective sidewalk” case, defendant appeals as of right the trial court's order denying its motion for summary disposition based on governmental immunity. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In plaintiff's complaint, she alleged that on August 5, 2006, she was walking along a sidewalk within defendant's jurisdiction and control “when she was caused to fall as a result of various defects including concrete irregularities involving a slab of concrete that was uneven, unstable and/or damaged, thereby causing her to fall to the ground inflicting upon her person severe, serious, permanent, and/or disfiguring injuries[.]” Defendant filed a motion for summary disposition, arguing that it was entitled to an inference that the sidewalk was kept in reasonable repair under the “two-inch” rule found in MCL 691.1402a, where the discontinuity defect was less than two inches. Defendant contended that discontinuity defects are measured only on the basis of height or vertical differences between concrete sidewalk slabs. Plaintiff argued that issues of fact existed as to whether there was a height discontinuity defect of less than two inches and that, assuming such a defect, discontinuity defects under MCL 691.1402a are not limited to height or vertical differences, but also include length and width differences. And, according to plaintiff, there was no issue of fact that the discontinuity defect exceeded two inches when measured by length, as the discontinuity ran the entire length of the concrete sidewalk slabs relative to the sides of the slabs that come together. Plaintiff also argued that, assuming an inference arose, the inference is rebuttable, and she rebutted the inference by way of an expert affidavit opining that the sidewalk was not kept in reasonable repair. Therefore, summary disposition should not be granted in favor of defendant. The trial court agreed with plaintiff's argument regarding interpretation of discontinuity defects, finding that length and width, as well as height, could be considered, and no inference arose because the discontinuity between the slabs exceeded two inches in length. The trial court also ruled that, even if the inference arose, the affidavit from plaintiff's expert created a question of fact sufficient to rebut the inference that the sidewalk was in reasonable repair.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Kreiner v. Fischer*, 471 Mich. 109, 129, 683 N.W.2d 611 (2004). Also reviewed de novo are issues of statutory interpretation, *Feyz v. Mercy Mem. Hosp.*, 475 Mich. 663, 672, 719 N.W.2d 1 (2006), and governmental immunity, *Bennett v. Detroit Police Chief*, 274 Mich.App. 307, 310-311, 732 N.W.2d 164 (2007). Under MCR 2.116(C)(7), summary disposition in favor of a defendant is proper when the plaintiff's claim is “barred because of ... immunity granted by law.” See *Odom v. Wayne Co.*, 482 Mich. 459, 466, 760 N.W.2d 217 (2008). The moving party may submit affidavits, depositions, admissions, or other documentary evidence in support of the motion if substantively admissible. *Id.* The contents of the complaint must be accepted as true unless contradicted by the documentary evidence. *Id.*

*2 MCL 691.1402(1) imposes a duty of care on governmental agencies to maintain sidewalks under their control in reasonable repair so that the sidewalks are reasonably safe and convenient for public travel. *Gadigian v. City of Taylor*, 282 Mich.App. 179, 182, 774 N.W.2d 352 (2009), lv gtd --- Mich. ----, issued November 19, 2009 (Docket No. 138323); MCL 691.1401(e) (defining “highway” as including sidewalks). “A person

who sustains bodily injury ... by reason of failure of a governmental agency to keep a [sidewalk] under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency." MCL 691.1402(1). We note that the open and obvious danger doctrine is not applicable here because defendant has a statutory duty to maintain the sidewalks in reasonable repair. *Jones v. Enertel, Inc.*, 467 Mich. 266, 267, 650 N.W.2d 334 (2002).

MCL 691.1403 provides:

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

Additionally, as a condition of any recovery, the injured person must notify the governmental agency of the accident within 120 days, and he or she must "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." MCL 691.1404(1).

The "two-inch" rule, MCL 691.1402a(2), provides:

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.

In *Gadigian, supra* at 186, 774 N.W.2d 352, this Court addressed the "rebuttable inference" language in MCL 691.1402a(2), finding that the inference, when implicated and standing alone, "does not support summary disposition because the jury is still free to accept or reject the inference." The *Gadigian* panel stated that while the rebuttable inference allows the trier of fact to conclude that a municipality has properly maintained a sidewalk where there exists a discontinuity defect of less than two inches, "it does not compel the trier of fact to do so." *Id.* Inferences do not carry an obligation to find a certain fact. *Id.* A municipality may defend a negligence claim by simply relying on the statutory inference. *Id.* at 187-188, 774 N.W.2d 352. When a plaintiff submits contrary evidence, the trier of fact weighs all the evidence in reaching its verdict, and if the plaintiff fails to present contrary evidence, "the inference results in summary disposition or a directed verdict for the municipality." *Id.* at 188, 774 N.W.2d 352. In *Gadigian*, this Court held that the plaintiff "rebutted the inference ... by presenting an affidavit signed by ... an engineer, opining that the raised sidewalk slab 'was a trip hazard' given 'the height difference between adjoining slabs.' " *Id.* The Court noted that the expert's affidavit sufficed to rebut the statutory inference, setting forth specific facts and drawing reasonable expert conclusions based on those facts. *Id.* at 189, 774 N.W.2d 352. The *Gadigian* panel warned, "It is well settled that this Court may not assess credibility or weigh competing facts when reviewing a motion for summary disposition." *Id.* The Court concluded that, "[b]ecause the ... affidavit tended to rebut the statutory inference that

defendant maintained its sidewalk in reasonable repair, the affidavit created a jury-submissible question of fact." *Id.*

*3 The expert affidavit offered in *Gadigian* is very comparable to the affidavit offered by plaintiff's expert here. In the case at bar, plaintiff's expert, after referencing certain facts, averred and opined in part:

In the present case, it is my opinion, in part, that the sidewalk was not in reasonable repair for the reason that the height differential was significant (in this case, about two inches) and because the width discontinuity is also very significant (several feet across). The sidewalk height discontinuity is also nonuniform across the width of the sidewalk. One side is raised higher than the other side. Given the overall condition and nature of the sidewalk in this case, it is my professional opinion that the sidewalk was not in reasonable repair from a safety engineering standpoint. This sidewalk involves multiple hazards identified above, all of which, individually, and especially in combination with one another, result in an unreasonable danger to pedestrians.

Consistent with *Gadigian*, we may not assess the credibility of plaintiff's expert, nor may we weigh the evidence. *Gadigian* suggests that the evidentiary burden for a plaintiff to survive summary disposition in the face of an inference, standing alone, is fairly minimal, given that a jury would be permitted to completely ignore the inference if it chose to do so. We conclude that, because the affidavit from plaintiff's expert tended to rebut any presumed statutory inference that defendant maintained its sidewalk in reasonable repair, the affidavit created a jurysubmissible question of fact, especially when it is considered in conjunction with plaintiff's deposition testimony explaining the fall. Accordingly, the trial court properly denied defendant's motion for summary disposition. Defendant argues, in the alternative, that even if the two-inch rule is not considered or does not provide a basis for summary disposition, the documentary evidence in general supports a conclusion that no reasonable juror would find that the sidewalk was in a state of disrepair and unreasonably dangerous. We decline to address this issue because the arguments below focused on an analysis built around the two-inch rule, not apart from the rule, and thus the trial court did not address nor rule on the argument now being presented for the first time by defendant. Nothing in this opinion is to be read as barring defendant from raising the argument in the future should it desire.

In light of our holding, we see no need at the present time to address the question of whether a rebuttable inference arose in the first place, and we thus decline to construe MCL 691.1402a relative to whether it applies outside of height or vertical discontinuity defects. Assuming, without deciding, that an inference arose, defendant was still not entitled to summary disposition under *Gadigian*, given the expert affidavit submitted by plaintiff and plaintiff's deposition testimony.

Affirmed. We do not retain jurisdiction for purposes of any future issues that might arise in this case.

METER, J. (dissenting).

*4 Because I conclude that defendant was entitled to summary disposition in this case, I respectfully dissent.

First, I find that there existed a "rebuttable inference" that the sidewalk in question was maintained in reasonable repair. MCL 691.1402a(2) states:

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.

In this case, plaintiff argues that the defect at issue, although it involved a height difference of less than two inches,[FN1] nonetheless failed to fall within the parameters of MCL 691.1402a(2) because the height difference extended for about 30 inches, along the entire stretch of a sidewalk slab, and therefore involved a greater-than-two-inch *width* defect. Plaintiff's argument is utterly misguided because the "discontinuity defect" here was one involving a vertical drop and not varying widths (such as when a four-foot-wide sidewalk suddenly becomes a three-foot-wide sidewalk). There was no "discontinuity" relating to width. Accordingly, the

> FN1. I reject plaintiff's alternative argument that a question of fact existed regarding whether the height difference was less than two inches.

defect did indeed fall within the parameters of the statute, and a rebuttable inference of reasonable repair existed.

In contrast with the majority, I cannot conclude that the expert affidavit presented by plaintiff sufficiently rebutted the inference such that summary disposition was inappropriate. The expert offered nothing but general allegations and references to the height discontinuity. See *Jubenville v. West End Cartage, Inc.*, 163 Mich.App. 199, 207, 413 N.W.2d 705 (1987) (discussing a conclusion-oriented affidavit). Significantly, there was no "teeter-tauter [sic]" situation with the sidewalk like there was in *Gadigian*, 282 Mich.App. at 188-189, 774 N.W.2d 352.[FN2]

> FN2. Although the expert mentioned that the height discontinuity was "non-uniform," the situation nevertheless did not reach, in my opinion, the level of possible danger expressed by the expert in *Gadigian.*

"[M]unicipalities are not required to keep ... walks in perfectly safe condition. They are liable only when the walks are not reasonably safe." *Jackson v. Lansing*, 121 Mich. 279, 280, 80 N.W. 8 (1899). "In cities having many miles of walks it would be an utter impossibility to make these walks absolutely safe.... It would require an army of men ... to do this." *Weisse v. Detroit*, 105 Mich. 482, 484-485, 63 N.W. 423 (1895). In my opinion, there was insufficient evidence in this case to show that the sidewalk in question was not *reasonably* safe.

I would reverse and remand for entry of summary disposition in favor of defendant.

EXHIBIT 2

UNPUBLISHED

Court of Appeals of Michigan.

Bradley J. HANDLEY, next friend of Marie J. Handley, a minor, Plaintiff-Appellee,
v.
CITY OF ANN ARBOR, Defendant-Appellant.

Docket No. 284135.

July 30, 2009.

West KeySummary

Genuine issue of material fact existed as to whether sidewalk was kept in reasonable repair, precluding summary judgment in personal injury action. Evidence indicated that an uneven sidewalk caused biker to fall and injure herself, and that the sidewalk was broken into two pieces and shifting such that it was no longer level. Biker alleged that the sidewalk's raised edge was obscured by vegetation and other debris so that she could not see it. State claimed that there was a rebuttable presumption for sidewalk heights under two inches that would entitle them to summary judgment because biker failed to produce evidence that the uneven piece was greater than two inches. MCL 691.1402a(2); M.C.L.A. § 691.1402(1).
Washtenaw Circuit Court; LC No. 07-000244-NO.

Before: FORT HOOD, P.J., and CAVANAGH and K.F. KELLY, JJ.

PER CURIAM.

*1 In this personal injury action, defendant appeals as of right the trial court's order denying defendant's motion for summary disposition. We affirm.

I. Basic Facts and Procedural Background

This dispute arises from an accident that occurred on June 23, 2006. Plaintiff, then a 16-year-old girl,[FN1] was riding her bike on defendant's sidewalk. Plaintiff struck a raised slab of concrete obscured by vegetation, lost control of her bike, and hit a tree. As a result of this incident, plaintiff's hand "got smashed" between the handlebar and the tree and her hand was injured. Upon further inspection of the sidewalk, it was discovered that the slab was raised approximately 1 and 7/8ths of an inch at its greatest height, the height of which was hidden by grass and other vegetation. The slab, which was adjacent to a tree, was also broken into two pieces and was shifting such that it was no longer level.

FN1. Because this accident occurred when plaintiff was a minor, the trial court appointed plaintiff's father as "next friend" to represent her in this litigation. See MCR 2.201(E)(1)(b).

Plaintiff filed a two-count complaint against defendant, alleging that defendant was negligent and had maintained a defective sidewalk. Subsequently, defendant moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10) arguing that it was entitled to governmental immunity because the discontinuity in the sidewalk was less than two inches. See MCL 691.1407(1); MCL 691.1402(1); MCL 691 .1402a(2). The trial court denied the motion. It ruled that a material question of fact remained regarding whether plaintiff had successfully rebutted the inference in MCL 691.1402a(2) and, as a result, defendant was not entitled to governmental immunity.

II. Standard of Review

The trial court's denial of defendant's motion for summary disposition was based on the existence of a material factual dispute affecting the applicability of governmental immunity. See MCR 2.116(C)(7). Accordingly, we review the trial court's denial of summary disposition as based on MCR 2.116(C)(7). A trial court's determination under this subrule is reviewed de novo. *Roby v. Mount Clemens*, 274 Mich.App. 26, 28, 731 N.W.2d 494 (2007). "[U]nder MCR 2.116(C)(7), the plaintiff's well-pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless the movant contradicts such evidence with documentation." *Marilyn Froling Revocable Living Trust v. Bloomfield Hills Country Club*, --- Mich.App ----; --- NW2d ---- (2009) (footnote omitted). To survive a motion based on governmental immunity, "the plaintiff must allege facts warranting the application of an exception to governmental immunity." *Robinson v. City of Lansing*, 282 Mich.App. 610, 613, 765 N.W.2d 25 (2009).

III. Analysis

Defendant argues that plaintiff presented no supporting evidence to rebut the evidence that the sidewalk was maintained in reasonable repair. Therefore, in defendant's view, it

was entitled to immunity under MCL 691.1402a(2) and the trial court erred by denying summary disposition under MCR 2.116(C)(7). We disagree.

*2 It is generally true that government agencies are free from tort liability whenever they are engaged in the exercise or discharge of a government function. MCL 691.1407(1). There are certain exceptions to this general rule, including the highway exception to governmental immunity. Under this exception, a person who sustains bodily injury because of a governmental agency's failure to keep a highway, including a sidewalk, under its jurisdiction in "reasonable repair" and in a condition reasonably safe and fit for travel may recover damages from the governmental agency. MCL 691.1402(1). However, a "discontinuity defect of less than 2 inches creates a *rebuttable inference* that the municipal corporation maintained the sidewalk ... in reasonable repair," MCL 691.1402a(2), such that liability will not attach. In other words, if the defect is less than two inches, the plaintiff's claim will be barred by governmental immunity unless the plaintiff can come forward with some evidence to rebut the inference that the city maintained the roadway in reasonable repair. See *State Farm Fire & Cas. Co. v. Corby Energy Services*, 271 Mich.App. 480, 482, 722 N.W.2d 906 (2006).

In our opinion, plaintiff has met her burden. There is no dispute that the sidewalk in question was under defendant's jurisdiction and that the discontinuity defect was less than two inches.[FN2] Thus, the inference to be drawn under the statute is that defendant maintained the sidewalk in reasonable repair. MCL 691.1402a(2). However, after our review of the record, it is plain that plaintiff presented a sufficient modicum of evidence to rebut this inference as to avoid having her claim barred by governmental immunity. Specifically, plaintiff proffered evidence that the height of the walkway's raised edge was obscured by vegetation and other debris so that she could not see it as she approached on her bike. Additional evidence demonstrated that the slab was broken into two pieces and shifting such that it was no longer level. When viewed in the light most favorable to plaintiff, this evidence creates a genuine issue of material fact upon which reasonable minds could differ as to whether defendant had kept the sidewalk in reasonable repair, despite the fact that the discontinuity was less than two inches. The fact that defendant has provided a defense theory differing from plaintiff's version of events is irrelevant for the purposes of summary disposition as we must accept plaintiff's version of events as true. *Marilyn Froling Revocable Living Trust, supra.* Accordingly, the trial court did not err by denying defendant's motion for summary disposition.

> FN2. Although plaintiff asserts on appeal that defendant failed to produce any evidence that the defect is less than two inches, our review of the record reveals that plaintiff's own evidence failed to show that the defect was greater than two inches. Plaintiff's photographic evidence demonstrated that the defect was approximately 1 and 1/8ths inches where plaintiff's wheel struck the defect. For this reason, we do not consider there to be a genuine dispute regarding whether the discontinuity was less than two inches.

Affirmed.

STATE OF MICHIGAN

IN MICHIGAN SUPREME COURT

On Appeal from the Court of Appeals
Hon. Peter D. O'Connell, Hon. Michael R. Smolenski, and Hon. Elizabeth L. Gleicher

DIANE GADIGIAN,

Plaintiff/Appellee,

v

Supreme Court Case No. 138323

Court of Appeals Docket No. 279540
Wayne County Circuit No. 06-621978-NO

CITY OF TAYLOR,

Defendant/Appellant**.**

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PROOF OF SERVICE

Gerald A. Fisher, attorney for Amicus Curiae Michigan Municipal League, Michigan Townships Association, State Bar Public Corporation Section and Michigan

Municipal League Liability and Property Pool, states that on March 9, 2010, a copy of the Brief in Support of Defendant-Appellant City of Taylor was mailed to all parties of record, James J. Raftery and Marcelyn Stepanski, at their addresses as set forth above, with postage fully prepaid thereon.

I declare that the statement set for above is true to the best of my information, knowledge, and belief

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March 8, 2010