STATE OF MICHIGAN

IN THE SUPREME COURT

BARBARA A. ROBINSON,

Plaintiff-Appellant,

v

CITY OF LANSING,

Defendant-Appellee.

______________________________/

Supreme Court
Case No. 138669

Court of Appeals
Case No. 282267

Ingham Circuit Court.
Case No. 07-000576-NO

BRIEF OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL

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STATEMENT OF INTEREST

The Michigan Municipal League is a non-profit Michigan corporation whose purpose is the improvement of municipal government and administration through cooperative effort. Its membership is comprised of 521 Michigan local governments of which 450 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 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 attorney, Menominee; John C. Schrier, city attorney, Muskegon; Andrew J. Mulder, city attorney, Holland; and William C. Mathewson, general counsel, Michigan Municipal League.

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; MSA 5.4085(6.5).

STATEMENT OF THE ISSUES PRESENTED

I. The clear and unambiguous language of MCL 691.1402a(2) speaks of "discontinuity defect[s]" of less than two inches in sidewalks outside of the improved portion of a "highway" and in no way narrows the scope of highways covered by the statute to "county highways". Does plaintiff's position to the contrary, i.e., that the two-inch rule applies only to sidewalks adjacent to county highways, compel a ruling denying plaintiff's requested relief?

II. On remand, the lower court has the power to take such action as law and justice may require so long as the action is consistent with the judgment of the appellate court. Does this rule allow for the circuit court on remand to decide defendant's motion for summary disposition on the basis of photographs and measurements already part of the record and to rule without any further discovery being conducted?

STATEMENT OF FACTS

Amici Curiae, the Michigan Municipal League and Michigan Municipal League Liability and Property Pool, rely on the Counter-Statement of Facts as set forth in the Brief of Defendant-Appellee City of Lansing in Opposition to Application for Leave to Appeal.

ARGUMENT

I. THE LEGISLATURE INTENDED THAT §1402a(2) APPLY TO DISCONTINUITIES IN SIDEWALKS THAT ARE ADJACENT TO STATE, COUNTY AND CITY ROADS

The issue before this Court on Plaintiff's Application for Leave to Appeal is a limited one, concerning the scope of a city's immunity under the Governmental Tort Liability Act, MCL 691.1401, *et seq*, for injuries allegedly sustained as a result of a discontinuity in a sidewalk adjacent to a public road that is maintained by the city and, concomitantly, the scope of the city's liability for this alleged defect. Plaintiff-Appellant, Barbara A. Robinson, seeks a reversal of the opinion of the Michigan Court of Appeals, contending that the "two-inch rule" set forth in §1402a(2) applies only to sidewalks which are adjacent to county highways and, accordingly, does not apply to the sidewalk which is the subject of this litigation, which was located adjacent to a state highway. §1402a(2) provides:

> (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.

Consideration of this language within the context of the GTLA confirms what a plain reading of this subsection also makes clear: It applies to all sidewalks, trailways, crosswalks, or other installations outside of the improved portion of the highway which are maintained by municipal corporations, and is not limited to only those installations which are adjacent to <u>county</u> highways. Yet, plaintiff contends that the subsection should be read so as to limit its application, pointing to a different subsection of §1402a which is

specifically so limited. As discussed below, legislative intent, as expressed in the statutory language itself, does not support this result.

The question that plaintiff seeks to bring to this Court results from the anomalous circumstance created by the terms of the GTLA and interpretative case law, whereby a municipal corporation has been given the governmental responsibility, but not the broad immunity granted in §1407(1), for sidewalks in its locale which are located adjacent to roadbeds over which the municipalities have no jurisdiction and no responsibility. §1401(e); §1402(1); *Listanski v Canton Township*, 452 Mich 678 (1996); *Jones v City of Ypsilanti*, 26 Mich App 574 (1971). Specifically, while the "highway exception," at §1402(1), states that "[e]xcept as otherwise provided in section 2a, each governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel," it also limits the duties owed by the state and county road commissions with regard to the "highways" over which they have jurisdiction: §1401(e) defines "highway" to include "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." Yet, §1402(1) states that "[t]he duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel." Thus,

neither the state nor county road commissions have a duty to maintain that portion of their highways that are located outside of the improved portion designed for vehicular travel.

Of course, statutory language mandating that the state and county road commissions have no duty, and may not be held liable for injuries that occur on sidewalks adjacent to their roads, does not necessarily dictate that the city within which the road is found will necessarily have such duties, or that it could be held liable for their breach, under the provisions of the GTLA. The source of this responsibility was set forth in *Listanski, supra*, and *Jones, supra*, which held that cities and townships are "liable for injuries occurring on sidewalks that abut state or country roads as a result of their negligent failure to maintain their sidewalks in reasonable repair," stating that "the Legislature intended municipalities to retain reasonable control over sidewalks within their boundaries." *Listanski, supra*, 452 Mich, 690. In other words, the highway exception has been construed to apply to avoid the broad immunity of municipal corporations even when they have no jurisdiction over the highway itself.

Thus, the City of Lansing, and other municipal corporations, have jurisdiction over, and responsibility for, the sidewalks outside of the improved portion of the highway designed for vehicular travel, regardless of whether these sidewalks are adjacent to a state, county or city road. The question this Court is now considering is whether, given the liability of municipal corporations for defects in sidewalks adjacent to state, county and city roads, the "two-inch" rule set forth in §1402a(2) was intended by the legislature

to constitute a defense to municipal corporations only where the sidewalk is adjacent to a county highway, but not when it is adjacent to either a state or city road.

In order to answer that question and effectuate the legislative intent evident in the language of the statute, consideration may be given to the history of governmental immunity in this state, as well as the history of the "two-inch" rule, both of which doctrines were first enunciated by the judiciary and, having then been abrogated by the courts, were preserved or re-created by the legislature.

As recently discussed by this Court in *Odom v Wayne County*, 482 Mich 459, 467-469 (2008), the existence and scope of governmental immunity was solely a creation of the courts until 1964 when the legislature passed 1964 PA 170 in an attempt to statutorily preserve governmental immunity in response to the Supreme Court's opinion in *Williams v City of Detroit*, 364 Mich 231 (1961) which abolished the judicial doctrine of governmental immunity as it had been applied to municipalities, and threatened the abrogation of the doctrine in its entirety. See also, *Thomas v Department of State*, 398 Mich 1, 10 (1976). Although *Maki v East Tawas*, 385 Mich 151 (1971) held that 1964 PA 170 was void from its inception because the Act exceeded the scope of its title, the legislature cured that defect in 1970 PA 155. Statutory governmental immunity exists today as MCL 691.1401, *et seq*. Thereafter, in this Court's seminal opinion in *Ross v Consumers Power (On Rehearing)*, 420 Mich 567 (1984), the judiciary provided a critical definition of "governmental function" and, continuing the historical interplay between the judiciary and the legislature in this area, this definition was subsequently largely adopted

by the Legislature in 1986 when it adopted amendments to the immunity statute and added a definition of that key term.

As the doctrine of governmental immunity evolved from a common law doctrine to one that was exclusively the creation of the Legislature, so too did the "two-inch" rule evolve, at times treated as a matter of statutory interpretation, and at times treated as if it were a common law doctrine. This rule was discussed by the Michigan Supreme Court in *Weisse v City of Detroit*, 105 Mich 482 (1895), when the statutory liability of a municipality for the maintenance of its walks and roads required them "to keep in reasonable repair so that they will be reasonably safe and convenient for public travel all public highways, cross walks and culverts that are within the jurisdiction and under their care and control and which are open to public travel." (105 Mich, 483) The *Weisse* Court held that this duty was not breached by a discontinuity of less than two inches. (105 Mich, 486) This rule was followed in *Harris v City of Detroit*, 367 Mich 526 (1962), but overruled in 1972 in *Rule v City of Bay City*, 387 Mich 281, 283 (1972), wherein the bench and bar were advised by the Court "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." In 1998 the Court rejected an invitation to interpret either §1402(1) or §1407(1) of the GTLA as a legislative reinstatement of the two-inch rule, holding that the arguments in favor of such a rule were better directed to the legislature. *Glancy v City of Roseville*, 457 Mich 580, 582 (1998). As noted in *Gadigan v City of Taylor*, 282 Mich App 179, 183 (2009), "[i]n

1999, the Legislature responded by enacting MCL 691.1402a, which specifically addresses municipal liability for sidewalk-related injuries," noting that the legislature had not adopted "the former common-law rule, which flatly prohibited claims involving discontinuity defects of less than two inches." Rather, the legislature chose its terms carefully and created "a rebuttable inference" (which the *Gadigan* court distinguished from a rebuttable "presumption") of reasonable repair arising from a discontinuity defect of less than two inches. *Gadigan, supra.* In this respect, the Legislature chose to make the statutory two-inch rule more restrictive than its common law predecessor and chose its language carefully.

Notwithstanding the care that obviously went into crafting the language of §1402a(2), plaintiff asks that this Court grant leave to read terms and restrictions into the subsection that were not chosen by the legislature. Amici, the Michigan Municipal League and Michigan Municipal League Liability and Property Pool, respectfully suggest that leave to appeal should be denied in this matter, noting specifically the following considerations that, *inter alia*, support the ruling of the Michigan Court of Appeals.

A. The immunity available to governmental entities is broad and the exceptions to that immunity are to be narrowly construed.

Section 1407(1) sets forth the general parameters of the governmental immunity available to governmental agencies, including municipal corporations. It provides that "a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function." Case law mandates that the

grant of immunity be read broadly, while the statutory exceptions are to be read narrowly. See, *e.g., Ross, supra*, 420 Mich, 616; *Glancy v City of Roseville*, 457 Mich 580, 584 (1998); *Hatch v Grand Haven Charter Township*, 461 Mich 457, 464 (2000).

There is no dispute that the maintenance of sidewalks is a governmental function, as defined in §1401(f) and, thus, municipal corporations are entitled to the broad immunity provided in §1407(1) with regard to that governmental function unless the activity falls within a statutory exception. The issue in this case is whether the conduct at issue falls within the highway exception, or whether the two-inch rule enunciated in §1402a potentially removes the alleged conduct from the parameters of this "exception" to the "highway exception". As part of the legislative immunity scheme set forth in the GTLA, §§1402 and 1402a define both the scope of the immunity available to municipal corporations and the parameters of their liability for conduct which falls outside of that immunity. Although issues of immunity and liability should never be confused, case precedent teaches that these sections define both immunity and liability. See, e.g., *Glancy v City of Roseville*, 457 Mich 580, 586-588 (1998) and *Carr v City of Lansing*, 259 Mich App 376, 379-381 (2004). In this regard, it may be noted that the GTLA has incorporated the scope of the duty of governmental agencies with regard to their maintenance of highways within the GTLA itself, thus expressing both the duty of these governmental entities as well as the immunity available for their breach. §1402, which sets forth the duties, is referred to as the "highway exception" and by its terms incorporates the terms of §1402a, thereby creating exceptions to the highway exception. See *Carr, supra*, at 380-

381. Thus, §1402a(2) must be read broadly, while §1402 is read narrowly. Yet, the interpretation of §1402a advanced by plaintiff constitutes a broad reading of the highway exception, rather than a narrow one.

B. The plain language of §1402a(2) compels the conclusion that the Court of Appeals properly construed that subsection to apply to sidewalks adjacent to state, county, and city highways.

The role of the judiciary in interpreting and applying legislative enactments is to give effect to the intent of the legislature, and the principal tool available for determining this intent is the language chosen by the legislature. In this case, that is the only tool that is necessary because the language of §1402a(2) is clear: "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." Standing alone, there is no interpretation of this language which would restrict its application to sidewalks which are adjacent to county highways.

Rather, plaintiff argues that when placed in the context of the entirety of §1402a, one must read the restriction into the language because §1402a(1) is limited to installations adjacent to county highways. However, as ably argued by the City of Lansing in its Brief in Opposition to the Plaintiff's Application for Leave to Appeal, had the legislature intended to similarly restrict §1402a(2), it knew how to do so, as it did in §1402a(3). Not only is the restrictive language missing from §1402a(2), but the reference to §1402a(1) [present in §1402a(3)] is also missing. Moreover, had the legislature

intended to restrict the two-inch rule as plaintiff contends, it would have demonstrated that intent by including it within §1402a(1), perhaps as §1402a(1)(c), rather than setting it forth in its own subsection without reference to any other.

In any event, and as discussed *supra,* the language of §1402a(2) was carefully chosen and, had the legislature intended to restrict the two-inch rule beyond what the language of the subsection required, it would have done so.

C. The interpretation advanced by plaintiff would render the two-inch rule inapplicable to sidewalks adjacent to city highways and there is no indication of such legislative intent.

The road at issue in the pending litigation is a highway under state jurisdiction. Thus, the discussion regarding the scope of §1402a(2) has been in the context of applying the two-inch rule to sidewalks maintained by a city which are adjacent to a state highway. Plaintiff contends that this subsection should be restricted to sidewalks adjacent to county highways. In support of this strained interpretation of the statutory language, plaintiff has argued that the legislative history of §1402a supports her contention that this section was added to the GTLA in response to *Listanski, supra* and the lobbying of townships who sought legislation which would restrict their liability arising from sidewalks that are adjacent to county highways. (Application for Leave to Appeal, pp v-vi, 10-11) To whatever extent that this "history" is accurate, complete and/or relevant, it does not support the plaintiff's contention and certainly does not take precedence over the statutory language itself. That the legislature saw fit to provide more relief to townships than they had allegedly requested, or extended that relief to cities as well, the fact is that the

legislature chose the rule it wished to adopt. Further, as discussed *supra*, the legislature did not simply adopt the two-inch rule of *Rule, supra*, but adopted a limited version of that rule, evidencing legislative deliberation and policy choices discussed by this Court in *Glancy, supra*, when it deferred to the legislature on the question of the two-inch rule.

Moreover, significantly, and as previously noted, the interpretation advocated by the plaintiff would not simply affect the liability and immunity of cities arising from discontinuities in sidewalks which are adjacent to state roads, which plaintiff argues do not comprise a large percentage of their responsibility, but it would affect the liability of cities for discontinuities in sidewalks which are adjacent to city roads, which do comprise a significant percentage of their responsibility. The legislative history on which plaintiff relies provides absolutely no reason to speculate that the legislature intended to so restrict application of §1402a.

II. THE PROCEDURES ADOPTED ON REMAND SHOULD FACILITATE THE EARLY DETERMINATION OF THE CITY'S IMMUNITY, INCLUDING CONSIDERATION OF A RE-FILED MOTION FOR SUMMARY DISPOSITION

As a result of the ruling of the Michigan Court of Appeals, this matter is to be remanded to the circuit court for further proceedings. In her Application for Leave to Appeal, plaintiff has complained of the appellate direction regarding that remand: "Reversed and remanded for further proceedings so that the trial court may rule on the remaining issues in this case. The city may refile its motion for summary disposition. We do not retain jurisdiction." In its Answer to that Application, the City of Lansing has addressed the procedural posture of this case and the options available to the circuit court

on remand which should include consideration of any refiled motion for summary disposition. To this, amici would simply add that the immunity afforded by §1407(1) is immunity from suit, not merely immunity from liability. See, *e.g.*, *Mack v City of Detroit*, 467 Mich 186, 195 (2002). Thus, as with the qualified immunity afforded under 42 USC §1983, the issue of governmental immunity should be resolved at the earliest opportunity. See discussion in *Morden v Grand Traverse County*, 275 Mich App 325, 341 (2007), citing *Saucier v Katz*, 533 US 194 (2001). See also, *Pearson v Callahan*, ___ US ___; 129 S Ct 808, 815 (2009).

RELIEF REQUESTED

Amici Curiae, the Michigan Municipal League and the Michigan Municipal League Liability and Property Pool, respectfully request that this Court deny the Plaintiff's Application for Leave to Appeal.

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PROOF OF SERVICE

Proof of Service: I certify that a copy of **BRIEF OF AMICI CURIAE MICHIGAN MUNICIPAL LEAGUE AND MICHIGAN MUNICIPAL LEAGUE LIABILITY AND PROPERTY POOL** and this **PROOF OF SERVICE** were served on the following attorneys of record or pro per parties by ■ regular mail or ☐ personal service at the addresses shown below.

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