Legislative Analysis

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GOVERNMENTAL IMMUNITY: TWO-INCH RULE

House Bill 4589 (Substitute H-2)
Sponsor: Rep. Pat Somerville
Committee: Judiciary

Complete to 6-22-11

A SUMMARY OF HOUSE BILL 4589 AS REPORTED BY COMMITTEE 6-16-11

The bill would amend provisions of the governmental immunity law that address the liability of a city, village, or township for defects in a sidewalk to apply the two-inch rule to sidewalks adjacent to municipal and state highways, in addition to sidewalks adjacent to county highways.

Under Section 2a of the governmental immunity law, except as otherwise provided, a municipal corporation (a city, village, or township) does not have a duty to repair or maintain a portion of a county highway outside of the improved portion of the highway designed for vehicular travel, including a sidewalk, trailway, crosswalk, or other installation. This does not limit liability if the municipality knew or should have known of a defect at least 30 days before the relevant injury, death, or damage, and the defect was a proximate cause of the injury, death, or damage. In addition, a discontinuity defect of less than two inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway, in reasonable repair.

House Bill 4589 would amend Section 2(a) of Public Act 170 of 1964, the governmental immunity law, to instead require that a municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or state highway maintain the sidewalk in reasonable repair. A municipal corporation would not be liable for breach of duty to maintain a sidewalk unless the plaintiff proved that at least 30 days before the occurrence of the relevant injury, death, or damage, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.

"Sidewalk," except for how the term is used in the definition of "highway," would mean a paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel.

In a civil action, a municipal corporation having a duty to maintain a sidewalk as described above would be presumed to have maintained the sidewalk in reasonable repair. This presumption could only be rebutted by evidence of facts showing that a proximate cause of the injury was one of the following:

- A vertical discontinuity defect of two inches or more in the sidewalk.

- A dangerous condition in the sidewalk itself of a particular character other than a vertical discontinuity.

Whether a presumption under the above has been rebutted would be a question of law for the court.

In addition, Section 2(1) provides that the duty of "the state and county road commissions" to repair and maintain highways 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. The bill would replace the language in quotations with "a governmental agency." "Governmental agency" is defined in the act as the state or a political subdivision.

The bill would also specify that a municipal corporation would have no duty to repair or maintain, and would not be liable for injuries or damages arising from, a portion of a county or state highway.

FISCAL IMPACT:

House Bill 4589 would result in an indeterminate amount of savings to local units of government as a result of mitigated future liability claims.

BACKGROUND INFORMATION:

The bill seeks to address the issue referred to as the "two-inch rule." In short, based on a 2009 Michigan Supreme Court interpretation of the provisions of the governmental immunity law relating to sidewalks, a municipality could not use the "two-inch rule" as a defense if a sidewalk is adjacent to a state highway. The "two-inch rule" basically creates a rebuttable inference that the municipality maintained the sidewalk in question if a discontinuity defect in the sidewalk is less than two inches. Thus, a sidewalk could be deemed defective if the discontinuity defect was two inches or greater, and, if certain conditions were met, the municipality could be liable for injuries or damages. According to testimony presented before the House Judiciary Committee, without the protection of the two-inch rule, some plaintiffs have attempted to sue municipalities for defects as small as 1/10 of an inch.

Though the bill as reported by the committee represents a compromise between stakeholders (i.e., municipalities and plaintiff's attorneys), some concerns have been raised. For instance, some feel that the current wording of the bill would limit liability for a vertical discontinuity in a sidewalk only in cases in which the defect was two inches or more. However, a vertical discontinuity of, say, 1 3/4 inches could be particularly dangerous if it were in a highly trafficked area or if the smaller defect were not easily visible in time to avoid; for example if it was just around a corner where it was obscured by a building or other object. The emphasis should be more on establishing liability when a sidewalk is unsafe rather than a measurement on a ruler.

The bill is similar to Senate Bill 1475 of the 2009-2010 legislative session. That bill was passed by the Senate but failed to see House action. The background information that follows was provided by the Senate Fiscal Agency in its analysis of SB 1475 dated 11-22-10:

In *Robinson* v *City of Lansing*, the Michigan Supreme Court addressed the two-inch rule in the governmental immunity law (486 Mich 1, (2009)). The plaintiff in that case was injured when walking along a sidewalk adjacent to Michigan Avenue in Lansing. Michigan Avenue is a State highway maintained by the City of Lansing. The injury involved a depressed area of the sidewalk that was less than two inches.

The defendant raised the two-inch rule as an affirmative defense and claimed that the plaintiff had not rebutted the inference that the city had maintained the sidewalk in reasonable repair. The plaintiff claimed that the rule applied only to sidewalks adjacent to county highways. The trial court agreed with the plaintiff and denied the defendant's motion for summary disposition. The Michigan Court of Appeals reversed, but the Michigan Supreme Court agreed with the trial court.

According to the Supreme Court, the two-inch rule originally was a common law rule, and had been described by the Court in 1962 as meaning 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." That is, defects of two inches or less constituted "reasonable repair" as a matter of law. The Court abolished the rule in 1972 but the Legislature codified it in 1999 when Section 2a was enacted.

The Court in *Robinson* analyzed the language of Section 2a, which begins by providing that a municipality is not liable for a portion of a county highway, including a sidewalk, unless certain criteria are met. The Court found that subsequent references to "the" highway in that section mean a county highway. The Court reached this conclusion for several reasons.

In addition to examining the language of Section 2a itself, the Court analyzed the rule and Section 2a in the context of the governmental immunity law as a whole. Since Section 2(1) already imposes a duty on municipalities to maintain sidewalks in reasonable repair, the court found that Section 2a "was plainly not enacted to introduce such liability on municipalities. Instead, it was enacted to limit this liability." Also, under Section 3, a governmental agency is not liable for injuries or damages caused by a defective highway unless the governmental agency knew or should have known of a defect, and had a reasonable opportunity to repair it, at least 30 days before an injury occurred. Section 2 imposes liability if a person sustains injury or damage "by reason of failure" of a governmental agency to maintain a highway in reasonable repair, and the Court previously held that proof of causation requires proof of proximate cause. Since those provisions existed before Section 2a was enacted and apply to all highways, the Court found that the significance of Section 2a is its limitation to county highways.

The Court concluded, "[T]he two-inch rule...does not apply to sidewalks adjacent to state highways; it only applies to sidewalks adjacent to county highways."

POSITIONS:

A representative of the Michigan Municipal League testified in support of the bill. (6-16-11)

Representatives of the City of Ann Arbor testified in support of the bill. (6-16-11)

The Michigan Townships Association indicated support for the bill. (6-16-11)

A representative of the Michigan Association for Justice testified in opposition to the bill. (6-16-11)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.