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BILL ANALYSIS

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House Bill 4589 (Substitute S-1 as reported)
Sponsor: Representative Pat Somerville
House Committee: Judiciary
Senate Committee: Judiciary

Date Completed: 2-1-12

RATIONALE

Under the governmental immunity law, subject to various exceptions, a governmental agency is immune from civil liability if it is engaged in a governmental function. One of the exceptions imposes liability with respect to highways: All governmental agencies, including the State, counties, and municipalities, have a duty to maintain highways under their jurisdiction in reasonable repair. The duty of the State and counties is limited to "the improved portion of the highway designed for vehicular travel", and specifically does not include sidewalks. Although that limitation does not apply to municipalities, the law states that a municipality has no duty to maintain a portion of a county highway outside the improved portion of the highway, including a sidewalk, unless certain conditions are met. Also, if a "discontinuity defect" in a sidewalk is less than two inches, there is a rebuttable inference that the municipality maintained the sidewalk in reasonable repair. This "two-inch rule" was the subject of an April 2010 decision of the Michigan Supreme Court, which held that the rule applies only to sidewalks adjacent to *county* highways (*Robinson v City of Lansing*, discussed below). Many people disagree with this holding, and believe that legislation should revise the statutory language on which the Court based its decision.

CONTENT

The bill would amend provisions of the governmental immunity law that address the liability of a municipality for defects in a sidewalk, to create a

presumption that a municipality maintained a sidewalk it had a duty to maintain in reasonable repair; and allow the presumption to be rebutted only by evidence that a proximate cause of an injury was a vertical discontinuity defect of two inches or more or a dangerous condition in the sidewalk itself, or both.

Section 2 of the law imposes on all governmental agencies a duty to maintain highways under their jurisdiction in reasonable repair. ("Governmental agency" means the State or a political subdivision, e.g., a municipal corporation (city, village, or township), county, county road commission, or school district.) Section 2 specifies that the duty of the State and 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, or crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. Under the bill, this would apply to the duty and liability of a governmental agency (rather than the State and county road commissions), except as provided in Section 2a.

Under Section 2a, except as otherwise provided, a municipal corporation 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, Section 2a states that a discontinuity defect of less than two inches creates a rebuttable inference that the municipal corporation maintained the sidewalk, trailway, crosswalk, or other installation in reasonable repair.

The bill would rewrite Section 2a to state that a municipal corporation in which a sidewalk was installed adjacent to a municipal, county, or State highway, would have to maintain the sidewalk in reasonable repair. A municipal corporation would not be liable for breach of this duty unless the plaintiff proved that at least 30 days before the relevant injury, death, or damage occurred, the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of the defect in the sidewalk.

In a civil action, a municipal corporation that had a duty to maintain a sidewalk would be presumed to have maintained the sidewalk in reasonable repair. The presumption could be rebutted only by evidence of facts showing that a proximate cause of the injury was one or both 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 solely a vertical discontinuity.

Whether the presumption had been rebutted would be a question of law for the court.

The bill also would provide in Section 2 that, "A municipal corporation has no duty to repair or maintain, and is not liable for injuries or damages arising from, a portion of a county or state highway".

The law defines "highway" as a public highway, road, or street that is open for public travel. The term includes a bridge, sidewalk, trailway, crosswalk, or culvert on the highway, and does not include an alley, tree, or utility pole.

The bill would define "sidewalk", except as used in the definition of "highway", as a

paved public sidewalk intended for pedestrian use situated outside of and adjacent to the improved portion of a highway designed for vehicular travel.

MCL 691.1401 et al.

BACKGROUND

In *Robinson v City of Lansing*, the Michigan Supreme Court addressed the two-inch rule in Section 2a of the governmental immunity law (486 Mich 1). 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. The Court pointed out that other sections of the law require proof of proximate cause, and provide that a governmental agency is not liable for an injury caused by a defective highway unless the agency knew or should have known of the defect and had a reasonable opportunity to repair it. Since these 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."

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

The bill would help protect municipalities from liability for defects in sidewalks regardless of which governmental agency has jurisdiction over the highway adjacent to a sidewalk. Although the Supreme Court's decision in *Robinson* was unanimous, two justices stated in concurring opinions, "[T]o the extent that the majority opinion in this case has adopted an incorrect interpretation of this statute, I urge the Legislature to clarify its intent with regard to the 'two-inch rule' of the highway exception to governmental immunity." The bill would do just that.

While the bill would preserve the duty of municipalities to maintain sidewalks, it would create a presumption that a municipality maintained a sidewalk under its jurisdiction in reasonable repair. An injured party could rebut the presumption by showing that there was a defect in the sidewalk of two inches or more, or a particularly dangerous condition in the sidewalk itself. As currently required, the plaintiff also would have to show that the defect was a proximate cause of the injury.

In addition, the bill would provide clarity by requiring sidewalk defects to be measured vertically. Evidently, cases have disputed whether defects should be measured vertically, horizontally, or both.

Supporting Argument

Under the bill, if a sidewalk defect were less than two inches high or deep, there would be a "rebuttable presumption", rather than a "rebuttable inference", that the municipality maintained the sidewalk in reasonable repair. In a 2008 opinion, the Michigan Court of Appeals distinguished between a presumption and an inference (*Gadigian v City of Taylor*, 282 Mich 179). According to the Court, an inference allows the trier of fact (the judge or jury) to draw a conclusion from the evidence, but the trier of fact is free to accept or reject the inference. In the case of a presumption, however, the party against whom the presumption is directed has the burden of going forward with evidence to rebut the presumption, and the trier of fact is compelled to take into account the presumed fact when assessing the other evidence. Although the Michigan Supreme Court vacated the *Gadigian* opinion (but affirmed the result), the bill would ensure that future courts treated the two-inch rule as a presumption that the judge or jury would have to accept unless the plaintiff were able to rebut it. The bill also would clarify the type of evidence required to overcome the presumption.

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

The bill would result in indeterminate savings to local units of government related to future liability claims.

Fiscal Analyst: David Zin

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.