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BILL ANALYSIS

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Senate Bill 201 (Substitute S-4 as passed by the Senate)  
Sponsor: Senator Tonya Schuitmaker  
Committee: Judiciary

Date Completed: 8-16-11

### **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, a dangerous condition in the sidewalk itself, or both.**

Under Section 2a of the law, 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. (As indicated above, this two-inch rule applies only to sidewalks adjacent to *county* highways, according to the Michigan Supreme Court.)

The bill would rewrite Section 2a to state that, except as provided in this section, a municipal corporation would have no duty to repair or maintain a county or State highway. A municipal corporation in which a sidewalk is installed adjacent to a municipal, county, or State highway, would have to maintain the sidewalk in reasonable repair pursuant to this section and Section 2(1)

(the section imposing on all governmental agencies a duty to maintain highways under their jurisdiction in reasonable repair). In a civil action, a municipal corporation would be presumed to have maintained a sidewalk that it had a duty to maintain in reasonable repair. The presumption could be rebutted only by evidence 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 a vertical discontinuity.

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

Currently, "highway" means a public highway, road, or street that is open for public travel. The term includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway, and does not include alleys, trees, or utility poles. The bill would delete reference to trailways and culverts.

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 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. 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."

## **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.

### **Opposing Argument**

The bill's presumption of reasonable repair would be broader than the inference under current law. Specifically, the law creates a rebuttable inference that a municipality maintained a sidewalk in reasonable repair *only* if there is a discontinuity defect of less than two inches. Under the bill, however, the presumption that a municipality maintained a sidewalk in reasonable repair would apply to *all* sidewalks the municipality had a duty to maintain. This would put an injured party in the position of having to rebut the presumption in any case alleging that a municipality failed to maintain a sidewalk.

In addition, the presumption under the bill could be rebutted only by evidence of 1) a vertical discontinuity of two inches or more, and/or 2) a dangerous condition *other than* a vertical discontinuity. There may be situations, however, in which a vertical discontinuity smaller than two inches creates a dangerous condition in combination with other factors, such as a slope in the pavement or a slab that shifts.

To the extent that injured parties were not able to overcome the presumption and did not have insurance coverage, these changes could shift costs to the Medicaid system.

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.