PLUNKETT COONEY

Michigan Legislature Amends Governmental Immunity Law to Patch up Sidewalk

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Sidewalks have become safer—for municipalities—now that the Michigan Legislature has restored the ability of local governments to rely upon a presumption that a sidewalk has been adequately maintained if the defect causing the injury is less than two inches in size.

This presumption, known as the "two inch rule," existed first as a bright-line, common law rule, then as a rebuttable inference in statutory law. Municipalities would use this statutory inference in litigation concerning sidewalks that were adjacent to any highway, until the Michigan Supreme Court ruled in *Robinson v City of Lansing* that the statutory inference of reasonable repair applied only to those sidewalks that were adjacent to county highways, not state or local public roads. Following the *Robinson* decision in April 2010, municipalities dealing with claims concerning sidewalks adjacent to non-county highways were compelled to litigate the question of whether the sidewalk was in "reasonable repair" without the benefit of any inference.

In response, the Legislature amended the Governmental Immunity Act. The statutory inference has been changed to a statutory presumption, with the intention of requiring a greater burden of proof from a party seeking to avoid governmental immunity. It has also been broadened to include sidewalks adjacent to municipal and state highways in addition to county highways. The changes were given immediate effect and signed into law on March 13.

Not only does the amendment restore and strengthen the inference (now a presumption) for all sidewalks regardless of whether they are adjacent to a municipal, county or state highway, it also clarifies its application. Previously, it was disputed whether the two-inch measurement should be made horizontally, vertically or both. Under the revised statute, the presumption may only be rebutted by evidence showing that an injury was proximately caused by a *vertical* discontinuity of at least two inches or by a particularly dangerous condition existing in the sidewalk. Whether or not the

presumption has been rebutted was also made a question of law for the courts, rather than a question of fact for the jury.

The duty to maintain trailways and cross-walks located outside of an improved portion of a highway for vehicular travel, which existed under the prior statute, appears to have been written out of the amended statute. Section 2 previously relieved the state and county of this burden, but not other municipalities. All municipalities are now exempted under Section 2 from maintaining such trailways, sidewalks and crosswalks, subject to Section 2a.

While the prior version of Section 2a included an exception to governmental immunity for sidewalks, trailways and cross-walks with defects greater than two inches, the revised Section 2a now only relates to “sidewalks” and the duty owed for sidewalks. Therefore, trailways and cross-walks outside of an improved highway appear to be excluded from the municipal duty to maintain under these statutes. Whether this exclusion was intentional or not remains to be seen.

Meanwhile, municipalities can take refuge in the newer, stronger presumption of adequate maintenance of their sidewalks, easing the costs of litigation on already strapped budgets.

If you have any questions regarding the "Two Inch Rule," contact one of the authors of this Rapid Report or any member of Plunkett Cooney’s Governmental Law Practice Group.