

community watch

MONITORING LEGAL ISSUES THAT AFFECT MICHIGAN MUNICIPALITIES

01.13.10

Two-Inch Sidewalk Defect Rule Is Sidestepped Again

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Following its recent ruling in *Gadigian v City of Taylor*, issued November 19, 2009, the Michigan Court of Appeals ruled against the City of Pontiac in another case involving the two-inch sidewalk rule, in *Castellanos v City of Pontiac*, issued December 29, 2009.

As reported in the December 1, 2009, issue of the Secret Wardle *Community Watch*, the *Gadigian* decision involved a plaintiff who tripped and fell on a public sidewalk in the City of Taylor alleging injuries as a result. The alleged sidewalk defect in that case consisted of a raised sidewalk slab with a discontinuity defect of less than two inches. Plaintiff provided the court with an affidavit from a safety engineer stating that despite the fact that the discontinuity was less than two inches, the sidewalk was a “trip hazard” given the height difference between the two slabs.” The Court of Appeals affirmed the trial court’s finding that the engineer’s affidavit rebutted the statutory inference that the sidewalk was maintained in reasonable repair despite the fact that the discontinuity was less than two inches. The Court reasoned that because the two inch rule was a statutory “inference” rather than a “presumption” the trier of fact was not *compelled* to conclude that the sidewalk was maintained in reasonable repair even if the discontinuity defect was less than two inches.

SECRET WARDLE NOTES:

The plaintiff in this case was injured when she tripped and fell on a public sidewalk located in the City. The City claimed that it had reasonably maintained the sidewalk based upon a long-standing statutory provision stating that a discontinuity defect of less than two inches creates a rebuttable inference of reasonable repair. The Court examined an expert engineer’s affidavit stating that, despite the two-inch rule, the sidewalk was not maintained in reasonable repair based on multiple defects in the sidewalk. The Court affirmed the trial court’s ruling that sufficient evidence had been provided to rebut the inference of reasonable maintenance and allow the case to proceed to trial allowing plaintiff to overcome the statutory governmental immunity “two-inch sidewalk rule.”

In the *Castellanos* case, the plaintiff tripped and fell on a public sidewalk in the City of Pontiac alleging injuries. As in *Gadigian*, the plaintiff provided the affidavit of a safety engineer that the sidewalk was not in reasonable repair due to multiple defects, despite the fact that the height discontinuity was less than two inches. The majority of the Court of Appeals in *Castellanos* declined to address whether the two inch rule applied to

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discontinuity in *width* in addition to discontinuity in *height*. Instead, the majority found that the affidavit of the safety engineer was enough to create a question of fact for a jury whether the sidewalk was maintained in reasonable repair. The majority reasoned that *Gadigian* suggests that the evidentiary burden for a plaintiff to survive summary disposition in the face of an inference, standing alone, is fairly minimal. The majority also stated that even if an inference arose, the jury would be permitted to ignore the inference if it chose to do so. The Court held that the affidavit created a question of fact for the jury, especially when considered in conjunction with the plaintiff's testimony regarding the fall.

The dissenting opinion asserts that the "two inch rule" should have applied in this case because the height discontinuity was less than two inches and the affidavit of the safety engineer did not rebut the inference of reasonable repair because it was merely conclusion oriented and related to a width defect exceeding two inches.

Additionally, it should be noted that the Court of Appeals' earlier *Gadigian* decision has been appealed to the Michigan Supreme Court and remains pending at this time. The *Community Watch* will keep an eye on further developments regarding the fate of Michigan's "two-inch rule."

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