YOUNG, GRAHAM, ELSENHEIMER & WENDLING, P.C.

Attorneys at Law
104 E. Forest Home, P.O. Box 398
Bellaire, Michigan 49615
(231) 533-8635
Facsimile (231) 533-6225
www.upnorthlaw.com

Bryan E. Graham
Kevin A. Elsenheimer
Peter R. Wendling

James G. Young, *Of Counsel*
Lori A. Luckett, *Of Counsel*

+ Charlevoix Office
---
203 Mason Street
Charlevoix, Michigan 49720
(231) 547-0099
Facsimile: (231) 547-6399

+ Harry K. Golski
+ Eugene W. Smith, *Of Counsel*

M E M O R A N D U M

TO: Marlene Golovich, Clerk
Hayes Township

VIA EMAIL

FROM: Bryan E. Graham BEG

DATE: December 29, 2009

SUBJECT: Whether the township can be held liable for personal injuries that occur on a non-motorized trail[1] located within the right-of-way of a highway in the township

You have requested an opinion concerning whether the township can be held liable for personal injuries that occur on a non-motorized trail located within the right-of-way of a highway in the township. The preliminary information you obtained from the Michigan Township Association concluded that the township could be liable for those personal injuries, consistent with current case law on township liability for sidewalks. While the analysis concerning sidewalks is not applicable to a non-motorized trail, for the reasons outlined in this memo, it is my opinion that the township can be held liable for personal injuries which occur on a non-motorized trail under certain circumstances.

As a general rule, municipalities (including townships) are immune from tort liability. This immunity, however, is subject to limited exceptions. One of these exceptions is known as the "highway exception." Section 2 of the governmental immunity statute, MCL 691.1402, specifies the highway exception in the following terms:

> Except as otherwise provided in section 2a, each **governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel.** A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road

[1] For purposes of my analysis I am assuming that the non-motorized trail is dedicated for such uses as bicycles, rollerblades, skateboards, pedestrian travel, and other non-motorized uses.

> commission shall be as provided in section 21 of chapter IV of 1909 PA 283, MCL 224.21. The duty of the state and the 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, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel. A judgment against the state based on a claim arising under this section from acts or omissions of the state transportation department is payable only from restricted funds appropriated to the state transportation department or funds provided by its insurer. (Emphasis added.)

Section 1(e) of the governmental immunity statute, MCL 691.1401(e), defines "highway" as follows:

> "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, **trailways**, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles. (Emphasis added.)

The term "trailways" was added to the definition of "highway" in a 1999 amendment, effective December 21, 1999. Prior to this 1999 amendment the Michigan Supreme Court ruled in *Hatch v Grand Haven Twp*, 461 Mich. 457, 462 (2000),[2] that a bicycle path located within the right-of-way of a public street was not a sidewalk and therefore the highway exception did not apply (which meant that the township was immune from liability). The Michigan Court of Appeals in an unpublished opinion, *Palmer v Charter Township of Orion*, COA No. 220992, September 14, 2001,[3] followed the *Hatch* decision and ruled that a trail approximately 10.5 miles long, surfaced with crushed limestone, and used for public recreational purposes, such as bicycle riding, horseback riding, running, and walking did not fall within the term "sidewalk." As a result, the court ruled the highway exception did not apply and the township was immune from liability. Therefore, prior to the 1999 amendment a township would not be liable for personal injuries that occurred on a recreational trailway located within a highway right-of-way, since the recreational trailway did not constitute a sidewalk under the highway exception statute.

In addition to adding the word "trailway" to the definition of a "highway," the 1999 amendment added Section 2a to the governmental immunity statute. This new section, MCL 691.1402a, provides:

> (1) Except as otherwise provided by this section, a municipal corporation has no duty to repair or maintain, and is not liable for injuries arising from, 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 subsection does not prevent or limit a municipal corporation's liability if both of the following are true:**

---

[2]Although the case was decided in 2000, the injury occurred in 1995. Therefore, the 1999 amendment did not apply to the case.

[3]Again, the injuries occurred in 1997, so the 1999 amendment did not apply.

> **(a) 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 a defect in a sidewalk, trailway, crosswalk, or other installation outside of the improved portion of the highway designed for vehicular travel.**
>
> **(b) The defect described in subdivision (a) is a proximate cause of the injury, death, or damage.**
>
> (2) A discontinuity defect of less than 2 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 designed for vehicular travel in reasonable repair.
>
> (3) A municipal corporation's liability under subsection (1) is limited by section 81131 of the natural resources and environmental protection act, 1994 PA 451, MCL 324.81131. [This reference is applicable to ORV ordinances.]

Section 2a of the statute imposes liability on a municipal corporation (including a township) for injuries occurring on a trailway if (1) the township had at least thirty (30) days notice of the defect in the trailway and (2) the defect was a proximate cause of the injury.

Therefore, to avoid this potential liability, the township should implement a program of reasonable inspections on the trailway and repair any defects encountered. As you will note from subsection (2), if there is less than a 2 inch difference in the surface of the trailway (for example, an upheaval in the ground surface), there is a rebuttable inference that the trailway is maintained in reasonable repair.

If you or other members of the township board have further questions concerning this matter, please do not hesitate to contact me.

BEG