

AIRPORT DEFENDER

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PUBLIC HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY

Okay, okay, I threw you a curveball with the last teaser question. Before I tell you why, let's look at the question again. A man slips on ice in a roadway at your airport and is injured. Immune or not?

The question suggests that ice on a roadway may fall within the public highway exception to immunity since it's on the roadway. However, as will be discussed further, the highway exception like all exceptions to immunity are narrowly written and must be narrowly construed and thus ice on the road is simply not the road and the highway exception to immunity addresses roads only. Which brings us back to the beginning with immunity. As always, any discussion regarding injuries at Michigan public airports must begin with rule number one discussed in Issue 1 of the AIRPORT DEFENDER: **Unless the incident clearly falls within an ex-**

ception to governmental immunity the public airport operator is governmentally immune . . . period!

Now let's get to the specifics of the exception. The Public Highway Exception to immunity (MCL 691.1402) states:

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. . . . 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, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

A municipal corporation has no duty to repair or maintain a portion of the county highway outside the improved portion of the highway designed for vehicular travel [unless]:

At least 30 days before the occurrence of the relevant injury . . . the municipal corporation knew or, in the exercise of reasonable diligence, should have known of the existence of a defect, . . . [and]

The defect is a proximate cause of the injury . . .

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 the improved portion of the highway designed for vehicular travel in reasonable repair.

What does all this mean for public airports? The answer, as usual, is it depends.

Looking at the statute, the first thing to note is that it applies to “highways”, which by statutory definition means “a public highway, road, or street”. Thus, the public highway exception does not apply to driveways, or in this writer’s opinion, drives. If one believes that a “highway, road, or street” is essentially a surface in which vehicles can transverse from one property to another, then roads completely within one’s property would be more akin to a driveway or drive. Thus as applied to Michigan public airports, if the drive in question simply enters the airport and exits the airport without continuing onto adjacent properties then an argument can be made that the drive is not a street pursuant to the highway exception to immunity.¹

Not only must the area in question be a “roadway”; for the roadway to fall within the public highway exception to immunity it must be a roadway open “for public travel”. As applied to Michigan public airports, this requirement would exclude two significant areas; (1) zipper roads on the ramp areas and (2) roadways closed to the public for construction or repair. Since neither zipper roads or closed roads are open to the public, neither falls within the public highways ex-

ception to immunity.

The public highway exception to immunity makes a significant distinction between the public highways under the jurisdiction of either the state or counties and those under the jurisdiction of cities, villages, or other more localized governmental entities. While the operation of Michigan public airports by counties, the state, or cities has little if any distinction, the application of the public highway exception to the two groups is significant.

As to the state and counties, the statute limits the exposure to “the improved portion of the highway designed for vehicular travel”. Thus, as to state and counties, areas outside of the portion of the highway designed for vehicular travel, like sidewalks, trailways, etc. are not within the exception to immunity.

As applicable to Michigan public airports, those that are owned by the state or counties would be immune from the many trip and falls experienced by passengers using airport sidewalks.

Public airports owned and operated by cities, villages, or other localized governmental entities on the other hand may potentially be liable for injuries occurring on their sidewalks. Why the distinction?

Because although airports may be similar regardless of ownership, the legislature wasn't looking at the similarity of airports when it drafted the public highway exception to immunity; rather it was looking at differences between counties (and the state) and their roadways compared to roads of smaller, more localized, governmental entities. In the former, the roadways typically transverse communities and run for long stretches whereas the latter roadways fall within municipal boundaries. It's because of this difference that the law holds counties and the state liable for defects in its roadways only, while cities and villages, etc., are responsible and potentially liable for their adjacent sidewalks (even when they run along county roads).

As to the roadway portion of the exception that both the county and state group and the city and village group may be responsible for, the exception refers to roadway maintenance, nothing more. Thus, even if an injury occurs on public highway, the exception does not apply to issues of defective design or original construction. The days of you coulda had another sign or you shoulda put a signal there are long gone.

The Michigan Supreme Court has also

made it clear that the narrowly construed public highway exception only applies to maintenance of the roadbed surface. Thus, issues regarding guardrails, street lighting, signals, berms, etc. do not fall within the exception.

The old rule that anything a vehicle can come in contact with while still having one tire on the roadway falls within the public highway exception is no longer the case. Thus, since shoulders are not meant for "vehicular travel" they do not fall within the exception.

While the public highway exception to immunity for state or county owned airports stops there, as noted previously the exposure for public airports owned by a city, village or other localized governmental entity extends to sidewalks and other installations outside of the improved portion of the highway designed for vehicular travel.

However, in an acknowledgement that no sidewalk surface can be perfectly smooth and that not every deviation would rise to the level of being a defect, the legislature enacted the portion of the statute that states:

A discontinuity of less than 2 inches creates a rebuttable inference that the municipal corporation maintained the sidewalk . . . in reasonable repair.

Thus, while city owned public airports may not be governmentally immune from accidents on its sidewalks, under the public high-

way exception to immunity, a discontinuity defect in the sidewalk must be more than 2 inches for the immunity exception to apply.

As particularly applicable to Michigan public airports, it also should be pointed out that other installations that vehicles use beyond roadways do not fall within the statutory exception. Two examples that come into play at airports are parking lots and alleys. Since neither are a “public highway, road, or street”, they are excluded from the exception.

As discussed in the previous edition of the AIRPORT DEFENDER with regard to the public building exception to immunity, even if an accident does fall within the limited parameters of the statutory exception, the plaintiff must still strictly comply with the statutory notice of claim provisions or his lawsuit will be dismissed. This calls for a Notice of Claim being to be served on the governmental entity within 120 days of the accident that sets forth (1) the exact location of the defect, (2) the exact nature of the defect, (3) the nature of the injury incurred, and (4) the names of all known witnesses.

TEASER: An airport shuttle bus gets into an accident with a vehicle. Can the owner of the vehicle sue the airport? . . . The governmental employee driver?

Failure to strictly comply with each and every requirement of the notice of claim provision will result a dismissal of an otherwise legitimate cause of action within the public highway exception to immunity.

Another requirement of the exception is that the governmental entity have prior knowledge of the highway defect. Should a defect arise suddenly, like a pothole immediately following a freeze/thaw, and the entity is without knowledge of it, the public highway exception does not apply.

Thus, while there is a public highway exception to immunity, its reach is very limited and just because someone is injured on a roadway or sidewalk doesn't automatically mean the airport operator is not immune.

¹ There is very little precedent on this particular issue. In a case involving a drive leading into and out of a school (*Richardson v. Warren Consolidated Schools*), the court of appeals has ruled that the drive is not a roadway. In an unpublished opinion involving Detroit Metropolitan Wayne County Airport, the court ruled that the roadway going in and out of the airport, which handles thousands of vehicles, is a highway within the exception to immunity (*Yeomans v. Wayne County*). In *Yeomans*, I represented the County, and I continue to believe that the Court made the wrong decision!

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COMING SOON:

- NEXT ISSUE: VEHICLE EXCEPTION TO AIRPORT IMMUNITY/ INDIVIDUAL IMMUNITY