

# AIRPORT DEFENDER

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## PUBLIC VEHICLE EXCEPTION AND GOVERNMENTAL EMPLOYEE IMMUNITY

Thus far, in the preceding three issues of the AIRPORT DEFENDER we've covered the broad grant of governmental immunity provided Michigan Public Airports, the two limited and narrow location specific exceptions applied to public buildings and public highways, and the limited proprietary function exception. This issue of the AIRPORT DEFENDER will cover the remaining two narrow exceptions potentially applicable public airports, the public vehicle exception and the exception applicable to governmental employees.

As discussed in each issue of the AIRPORT DEFENDER, we must begin our analysis with the proposition that **the airport is immune** unless a narrow exception clearly applies. To help us understand the public vehicle and public employee exceptions to immunity, let's go back to the teaser of the last issue: An

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

For purposes of this discussion, we'll put aside issues of Michigan No Fault law and presume that the other driver's injuries are sufficient to allow a lawsuit against a third party. With that in mind, the public vehicle exception provides that governmental agencies shall be liable for injuries and damage resulting from the negligent operation by any officer, agent, or employee of a governmental agency of a motor vehicle owned by the governmental entity.

Thus, for the exception to immunity to be applicable, you need two very important things; a governmentally owned vehicle and a governmental employee. If you have one and not the other, then the exception is not applicable. Thus, for instance, the exception does not apply to a governmental employee who negligently operates a privately owned vehicle, even if being operated during the course of his employment with the government.

Further, as applied to Michigan airports in particular, the governmental vehicle must actually be a motor vehicle and

not a piece of airfield equipment like a tug or fuel tender. In addition, at the time of the accident, the governmental vehicle must have been operated as a motor vehicle.

So lets assume that the bus in our example is owned by the public airport and the driver is an airport employee. Lets further assume that the bus was being operated at the time as a vehicle (rather than loading and unloading), and that the driver was negligent. Who can get sued?

The answer in this limited circumstance is the public airport. However, this limited exception is an exception to the airport's broad immunity only.

What about the negligent driver? The exception to immunity for public employees such that the employee himself can get sued requires more than simply negligence. Public employees are governmentally immune from liability even when they are negligent.

This point cannot be overstated. . . **Public employees are governmentally immune even when they are negligent.** From there, the next rule is that the highest elected or appointed official of a level of government, including an airport, are immune from all torts so long

as he is acting within his scope of authority.

As for all other governmental employees the test is as follows:

All employees are governmentally immune if: (1) they reasonably believe they are acting within the scope of their authority; (2) the governmental entity is engaged in a governmental function; and (3) the employee's conduct does not amount to gross negligence that is the proximate cause of the injury. Gross negligence is defined by statute to be "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results".

Of the three requirements, the second one is satisfied when it comes to Michigan public airports and their operations. By statute, they are governmental functions.

So the inquiry is left to whether the employee believes he is acting within the scope of his authority and whether the employee was grossly negligent.

In most cases, plaintiffs will try to make out a case of gross negligence since most governmental employees are acting within their scope of authority at the time of the accident giving rise to injury. However, the gross negligence threshold is quite high . . . it requires a showing that the employee's actions demonstrated a lack of

concern for whether another person would be injured. That is equivalent to a showing that the employee knew that injury was likely to result but just didn't care.

Even with this high threshold, plaintiffs continued to at least attempt to allege gross negligence and hope to get to a jury and avoid immunity.

The Michigan Supreme Court weighed in though, and focused on the words "the proximate cause" as a prerequisite for the application of gross negligence. In other words, the Supreme Court in *Robinson v. City of Detroit* held that gross negligence can only be an exception to governmental immunity when it is the "sole" proximate cause of the injury. According to the Supreme Court, the legislature would have used the word "a" instead of "the" proximate cause if it had desired that a governmental employee be liable for his gross negligence when others may be negligent as well.

With this ruling, the bar was raised even higher than the requirement that a plaintiff prove gross negligence. Now the plaintiff must show both gross negligence on the one hand and the absence of any negligence by anybody else on the other

hand. This is a huge hurdle for plaintiffs. In almost every situation there are multiple causes for an injury, and typically more than one defendant. If there is more than one defendant then automatically the governmental employee cannot as a matter of law be even alleged to have been the "sole" proximate cause of the injury. And even if the governmental employee is the only defendant, then his gross negligence is immaterial if the plaintiff herself is at least partly responsible for her accident.

Should you happen to be an employee of a Michigan Airport Authority (the Wayne County Airport Authority), it is even tougher for a plaintiff to get past immunity due to an additional immunity provided in the Michigan Aeronautics Code. There, immunity is applicable regardless of whether the employee is negligent or even grossly negligent so long as he's acting within the scope of her authority.

So does the narrow interpretation and application of this exception apply only to employees? How about board members or volunteers? Pursuant to statute, the immunity provided applies to each officer and employee of a governmental agency, each volunteer acting on behalf of a governmental agency, and each member of a board, counsel, commission or statutorily created

task force. Independent contractors of a governmental agency are not entitled to the defense of governmental immunity.

We've now discussed negligence and gross negligence of governmental employees. But what about intentional conduct? Is a governmental employee immune from punching someone else in the nose? The answer to that question can be found in the first of the three requirements for individual immunity, namely that for immunity to apply, the governmental employee must be acting within the scope of his authority. Clearly, no one has authority to punch someone else in the nose, and therefore the employee would not be protected by governmental immunity.

To go back to our scenario with the airport bus being driven by an airport employee and an ensuing accident, the accident will be treated like any other automobile accident among private citizens. The airport could be sued, but their liability would be subject to the

Michigan No Fault statute like any other vehicle accident which has its own high threshold in order to find third party liability.

The bus driver could not be held liable unless a plaintiff could show that essentially the bus driver acted with disregard for whether an injury would result and the other driver was completely free of fault.

The last question to be asked is can a governmental entity be sued as a result of the negligence or gross negligence of one of its employees? The legal term for this issue is called *respondeat superior*. The answer is no. The only way for an injured party to penetrate the governmental immunity afforded governmental entities is for the incident to fall within one of the limited statutory exceptions discussed in this and previous issues of the AIRPORT DEFENDER; namely the location specific public building exception and public highway exception, the public vehicle exception or the proprietary function exception. Absent one of these exceptions, an airport is governmentally immune.

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**TEASER:** Know anything about contractual indemnification? It can change your world. Find out more at my presentation at the Michigan Association of Airport Executives Annual Meeting, September 16, 2008.

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- NEXT ISSUE: INDEMNIFICATION