

AIRPORT DEFENDER

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IT'S ABOUT TIME . . .

It's been over 20 years since I first began defending Michigan Public Airports and their insurers. Over these years I've had the opportunity to have a hand in virtually all of the significant injury and damage lawsuits affecting Michigan airports, including the biggest aviation catastrophe in Michigan history, the NWA Flight #255 crash (on behalf of Metro Airport). Unquestionably, I have also handled more Michigan airport litigation than any other Michigan attorney.

Over these years, I've developed an expertise in all the various legal issues that come into play in damage and injury litigation including the vast net of governmental immunity, contractual issues (including indemnification and insurance), and federal issues (including Advisory Circular adherence and federal preemption).

While there is no end to the num-

ber of groups and associations affiliated with airports, I am unaware of any publication directed specifically to Michigan airport operators and insurers that addresses general liability issues. **It's time that all Michigan public airports, not only the biggest, coordinate, share information, and be kept abreast of the legal climate in which you all operate.**

The AIRPORT DEFENDER is designed to fill that void. It will come out quarterly and will provide a concise review of various legal issues that affect each of you and that are important for you to understand and keep in mind as you work through your day. It is my hope and desire that the expertise that I've gained over these many years is now spread freely throughout the public airport/insurer community. I hope you find the information in this and future editions of the AIRPORT DEFENDER useful and beneficial.

GOVERNMENTAL IMMUNITY

The first and perhaps the most important topic to be wrestled with in the

context of Michigan public airports is governmental immunity. Pursuant to statute there is a broad grant of immunity for public airport operators, however there are also numerous exceptions to immunity and even more exceptions to the exceptions. Through a basic understand of the framework however, the details will tend to fall in place.

Any discussion of governmental immunity must begin with an understanding of the premise that Michigan public airports, like all other public entities, are governmentally immune from damage and injury lawsuits, unless the matter falls within an exception. Stated another way, *unless the matter clearly and definitely falls within an exception to immunity, a Michigan public airport is immune from liability for damage and injuries occurring on its premises.*

It must be kept in mind that this broad grant of immunity applies only to tort law (negligence) however, and is not applicable to, for example, breach of contract matters. Thus, a lawsuit filed against a Michigan public airport based upon a breach of contract does not undergo governmental immunity scrutiny. The matter proceeds as it would between any other

contracting parties. However, few lawsuits that involve damages or physical injury are based upon a breach of contract and plaintiffs' attempts to couch their injury claims in terms of breach of contract in order to avoid immunity have largely been rejected by the courts.¹

Thus, rule number one is that if there's an injury lawsuit against a public airport, legal analysis begins with the initial premise that the airport is governmentally immunity. That means that even though there may have been an unmistakable defect at the airport that caused a significant injury, the airport will be found free of liability based on governmental immunity and owe nothing.

From this beginning, public airports must next look to see if their particular matter falls within one of the potentially significant exceptions to the general rule. While the number of exceptions to immunity have expanded over the years, the ones facing public airports can generally be summed up into five. Of those five, three are location specific and easy to remember . . . public roads, public buildings, and public vehicles. The other two are the proprietary function exception and the exception facing public employees. If the matter doesn't fall

within one of the location specific categories of exceptions, plaintiffs will try and make one of the two non-location specific exceptions applicable.

THE PROPRIETARY FUNCTION EXCEPTION

In the next five AIRPORT DEFENDER quarterly issues, I'll go through and examine each of the governmental immunity exceptions separately and in more depth. At present, we'll tackle perhaps the easiest exception to understand and the one with the longest name, the proprietary function exception to immunity. While this exception has a big name, it is an exception that makes sense; if a public airport operates financially like a private enterprise, the law will treat it like a private enterprise and let it be sued just like anybody else. It's a bit trickier than that, but if you use that as your guide, you won't go too far off base.

So what does it mean to operate like a private enterprise? That means that if the operation of the airport is designed to make a profit, it operates like a private enterprise. That's true whether or not the

airport actually makes money or not. As any accountant will tell you, profit can be manipulated, so what does "designed to make a profit" mean? The Michigan courts have responded by saying . . . *follow the money*. If the money is used for other activities, like going to a general fund to be used to finance other unrelated governmental activities, then its purpose is to make a profit. If the money is used for airport activities only, including future airport maintenance and improvement, then the airport is not a profit making institution. Rule of thumb: if the revenues of your public airport are used for unrelated activities, you may lose your broad governmental immunity status.

The second test that the courts employ to determine whether the operation of a public airport is a proprietary function is whether the airport is "normally supported by taxes or fees". In the two court of appeals opinions on this issue (*Codd v. Wayne County* and *General Aviation v. Capital City Airport*), the courts have found that regardless of whether an airport is set up to make a profit or not, since they are normally supported by taxes (federal grant money, fuel taxes) and fees (landing fees, concession fees), public airports cannot fall

within the proprietary function exception to immunity.²

Thus, at the end of the day, although plaintiffs may try to employ the proprietary function exception to immunity in their damage or injury lawsuits when their case doesn't fall into a location specific exception, the result is a loss to the plaintiff. This proprietary function exception is generally inapplicable to airports.

Hopefully you've enjoyed the first installment of the AIRPORT DEFENDER and have gleaned some useful information from it. Should you have any questions regarding this subject or any others affecting your public airport, please feel free to call my office anytime. All initial telephone conferences are conducted free of charge.

Should the person receiving this issue of the AIRPORT DEFENDER not be the person identified on the address label, please phone or e-mail and we'll update our records. Should the person receiving this issue desire it to be forwarded to others, please likewise phone or e-mail with their information and we'll be happy to forward them present and future editions.

TEASER: A visitor slips and falls inside your terminal due to water on the floor and injures herself. Does the public building exception to immunity apply? Is the Airport on the hook? Find out in the next issue of the AIRPORT DEFENDER.

¹ Thus was the case in the 1999 class action lawsuit I defended on behalf of Metro Airport brought by the 8000 people stranded on the runways and taxiways of Metro Airport for 4 to 10 hours during a significant snow storm. In *Koczara v. Wayne County*, the plaintiffs alleged that Wayne County breached its contract with Northwest Airlines to provide snow removal and a safe landing area and that the passengers were third party beneficiaries of the WC/NWA contract. The court rejected this claim finding that the plaintiffs were not intended beneficiaries and that their claims were in fact tort based to which Wayne County was governmentally immune.

² In the Northwest Flight #255 litigation against Metro Airport that I defended, NWA co-pilot Dodds (*Dodds v. Wayne County*) argued that Metro Airport is funded by numerous contracts with concessionaires, tenants, and air carriers and that these contracts are revenue producing and therefore the airport produces profit and is a proprietary function. I argued on behalf of the airport that the exceptions would gobble up the rule if it required dissection of a governmental activity (operating an airport) contract by contract. Rather, the activity, and its financial picture must be looked at as a whole. In the case of public airports, by federal regulation (capital improvement grants), they pledge not to undertake any revenue diversion to unrelated activities and all funds must be and are used either in present operations or future maintenance and improvement. The court accepted Metro Airport's argument and ruled that Metro Airport is not a proprietary function and is governmentally immune.

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COMING SOON:

- AIRPORT DEFENDER WEBSITE
- NEXT ISSUE: PUBLIC BUILDING EXCEPTION TO AIRPORT IMMUNITY