AIRPORT DEFENDER

BY ALAN B. HAVIS, ESQ.

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IS YOUR AIRPORT IMMUNE FROM LIABILITY FOR INJURIES ARISING OUT OF YOUR BUILDINGS?

Like any good lawyer will tell you, the answer is "it depends". Hopefully by the end of this newsletter you will have an understanding of what it depends on.

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

But as discussed briefly in the preceding issue, there is a public building exception to immunity. While that's correct, the exception (like all other exceptions) by law must be strictly construed and is subject to many limitations.

First, lets start with the exception. MCL 691.1406 states:

> Governmental agencies have the obligation to repair and maintain public buildings under their control when open for use by members of the public. Governmental agencies are liable for bodily injury and property damage resulting from a dangerous or defective condition of a public building if a governmental agency had actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. . .

Right off the bat there are two limitations to the exception that are evident; the building must be open to the public and the building (or the area of the defect) must be under the control of the airport operator/owner.

At one time the law was that only public areas of public buildings fell within the exception. This is no longer the case. However if the building is not open to the public (like a storage building for snow and lawn equipment), the public building exception to immunity would not apply and the airport operator would be immune from liability even if there was a defect in that building that caused an injury.

The "control" limitation of the exception makes the exception even more limited. Although the airport operator operates the facility, the buildings, the air-

field, etc., many areas of airport buildings are leased to tenants. To the extent that the area where the defect is located and the injury occurred is an area leased and possessed by a tenant, the airport operator may not "control" the area which makes the public building exception inapplicable and the airport immune.

The next limiting factor to the exception is a little less obvious but still packs a big punch. The statutory exception provides for liability "resulting from a dangerous or defective condition **of** a public building". The point of distinction is the legislature's use of the word "of" and not "in". Thus for the exception to apply, the defect that caused the injury must be of the building itself (and fixtures permanently attached to the building) . . . nothing more. The exception does not apply to injuries that occur simply in a public building or because of things in a building.

If a man trips on a mat as he's walking into the building because the mat has a raised edge, if the mat is not permanently affixed to the building the exception does not apply.

Likewise, injuries resulting from activities in a public building do not fall within the exception. Thus, a person who trips over another's suitcase would not fall within the exception.

Transient conditions in public buildings also do not fall within the exception. Therefore, slush on the floor tracked in on a snowy day that causes someone to slip would not fall within the exception.

In my previous newsletter I left you with the following query: A visitor slips and falls inside your terminal due to water on the floor and injures herself. Does the exception apply? While I'm sure many of you would say absolutely not because it's a transient condition my answer would still be an "it depends". If the source of the water was a spilled drink, then the exception does not apply and the airport operator is immune. However, if the source of the water was a leaky water fountain in the hallway that had been leaking for a month and nothing had been done about it, I'd say that there is a good chance the court will find that the exception to immunity does apply.

Another point to be made is that there needs to be a defect, not just an injury. Many times we find that people hurt themselves due to their own inattentiveness. Typically many, many, people have walked in that very same area without injury. Thus, is the cause of the accident a defect or the actions of injured person?

PREPARED BY:
THE LAW OFFICE OF ALAN B. HAVIS, ESQ.
25505 W. 12 MILE ROAD, SUITE 1000
SOUTHFIELD, MI 48034
(248) 353-3690
FAX (248) 948-6677
E-MAIL: AHAVIS@AIRPORTDEFENDER.COM

If there is a defect of the building that in fact causes injury the exception still requires more before becoming applicable. The exception requires that the airport operator have knowledge of the defect and that it do nothing in spite of the knowledge. Thus, defects that the airport operator is unaware of do not give rise to the exception. An example of this is an injury caused by a malfunctioning escalator or automatic door that had been functioning properly only moments before. Even though a defect, because the airport operator had no knowledge of it, the exception is inapplicable.[1]

And once the airport operator acquires knowledge of the defect, so long as he takes reasonable steps within a reasonable time to remedy the defect, the exception would be inapplicable for injuries occurring within that time frame.

Another limitation to the exception recently confirmed by the Michigan Supreme Court is that it only applies to defects caused by a failure to maintain ("Governmental agencies have the obligation to repair and maintain . . ."). Thus, defects in design no longer fall within the public building exception to immunity.

The next limitation to the exception is a huge one. The language of the public building exception statute further provides that:

> As a condition to any recovery for injuries sustained by reason of any dangerous or defective public building, the injured person, within 120 days from the time the injury occurred, shall serve a notice on the responsible governmental agency of the occurrence of the injury and the defect. The notice shall specify the exact location and nature of the defect, the injury sustained, and the names of the witnesses known at the time by the claimant.

In the past this provision was of little importance since the courts held that a violation of the notice provision would only result in the exception being barred if the governmental agency could prove that it was prejudiced by the claimant's failure to timely notify. Thus it was up to the governmental entity to prove that some time following the 120 days but prior to actually receiving notice, the "defect" had changed so that the governmental agency would be unable to piece the issue together like they could if they had acquired timely notice. Such circumstances were very few and far between.

In 2007, the Michigan Supreme Court[2] stepped in and reversed prior case law and held that the courts should apply statutory language as written and not create additional conditions (like prejudice) not set forth by statute.

PREPARED BY:
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25505 W. 12 MILE ROAD, SUITE 1000
SOUTHFIELD, MI 48034
(248) 353-3690
FAX (248) 948-6677
E-MAIL: AHAVIS@AIRPORTDEFENDER.COM

The court further ruled that its decision requiring strict compliance with the notice of injury provisions not only applied to cased filed in the future, but also to all cased presently in the courts.

In my 23 years of practicing in the area of governmental immunity, I can think of only a handful of notices from claimants/plaintiffs that complied with the notice requirement. Most plaintiff lawyers rarely, if ever, sue governmental entities and are therefore unfamiliar with this short notice requirement. Of the few who are, many think that anything served within 120 days is compliant. But the Michigan Supreme Court has made it clear that all the statutory notice provisions must be complied with, including the requirements that the notice provide the exact location of the defect, the exact nature of the defect, the nature of the injuries sustained, and the identity of all known witnesses.

Thus, a notice sent within 120 days that says claimant tripped and fell on a nail sticking up out of the floor at the airport and injured his back would be insufficient to comply with the statute's notice of injury provisions since although it was sent within 120 days and did set forth the nature of the defect (a nail sticking up) and nature of the injury (back), it did not set forth the "exact location of the incident" nor did it set forth the names of all known witnesses. The Michigan Supreme Court made clear that all requirements of the notice provision must be met in order to comply with the statute. If not, an otherwise viable claim under the limited public building exception will not be allowed to proceed.

As can be seen, while there is a public building exception to governmental immunity, just because someone is injured within your airport building does not mean that the airport is not immune!

[1] This does not mean that an airport operator can simply stick his head in the sand and say that it didn't know of the defect. There is a duty owed by all premise owners, including public airports, to inspect their premises for their business guests. Thus, if a plaintiff could show that the defect did in fact exist for some time, the fact that the airport operator denies knowledge of it becomes irrelevant if the airport operator never inspected the area and the plaintiff could show that had the airport been inspected the defect would have been found.

[2] *Rowland v. Washtenaw County Road Commission.*

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** We've moved. Please note my new address, phone numbers and e-mail address.

** The webpage is finally up! Come visit.

TEASER: A man slips on ice in a roadway at your airport and is injured. Immune or not? Find out in the next edition of the AIRPORT DEFENDER.

ALAN B. HAVIS, ESQ.

COMING SOON:

- NEXT ISSUE: PUBLIC HIGHWAY EXCEPTION TO AIRPORT IMMUNITY