



# Joint Civil Law and Local Government Sections MCLE Program Webinar May 5, 2021

## **Welcome/Announcements and Introduction**

Andrea Collins – Civil Law and Practice Section Chair  
Christopher Holland - Local Government Section Chair

**12:00 PM – 1:00 PM**

## **Program**

### **Dispositive Motions & the Tort Immunity Act**

Tony Fioretti and Rachel Legoretta, John J. Malm and Associates, P.C.

## **Presentation Summary**

This presentation will cover dispositive motion strategy in tort immunity cases. The presenters will outline the Tort Immunity Act and the types of motions used to dispose of cases under the Tort Immunity Act. The presenters will also discuss the pleading standards used to combat dispositive motions under the Tort Immunity Act.

## **Link to Evaluation**

The evaluation must be completed in order to receive CLE credit.  
<https://www.surveymonkey.com/r/CivilLocal05052021>

## **Next CLE Program**

Civil Law - June 2, 2021 – Motions in Limine in Civil/PI Cases - Andrea Collins, SpyratosDavis LLC and Mario Palermo, Palermo Law Group

Local Government - June 24, 2021

## **DCBA Events**

May 22<sup>nd</sup> - [2021 Presidents Ball](#) - Abbington Banquets, Glen Ellyn



## **COVID Relief Fund**

The DCBA and the DuPage Bar Foundation have established an assistance fund for lawyers facing personal hardship due to the downturn in work caused by the COVID-19 pandemic. Please help us promote the availability of this fund, and, if you are in need, please submit a confidential application at [www.dcba.org/reliefapply](http://www.dcba.org/reliefapply). Donations to the fund are also welcome at [www.dcba.org/reliefdonate](http://www.dcba.org/reliefdonate).”

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## **Tony Fioretti**

Tony Fioretti is a local government defense attorney. His practice focuses on the defense of local government in litigation, at administrative hearings, and worker's compensation claims. He is formerly a senior litigation associate at Hervas, Condon, and Bersani, P.C. While at HC&B, he represented a number of municipalities and local government clients, focusing on the areas of civil rights and local government litigation, §1983 claims, and municipal law. He also served as a civil and criminal Assistant State's Attorney in Boone County, Illinois from 2013 to 2015. He graduated from The John Marshall Law School in 2012 and from the University of Illinois at Urbana-Champaign in 2009.

## **Rachel Legorreta**

Rachel is an associate with the law firm of John J. Malm & Associates, P.C., where she focuses her practice on personal injury litigation. She received her undergraduate degree from Northern Illinois University, where she obtained her bachelor's degree in Political Science, with double minors in Philosophy and History. She graduated *magna cum laude* from Northern Illinois University College of Law in 2017.



# DISPOSITIVE MOTIONS & THE TORT IMMUNITY ACT

NAVIGATING SUITS AGAINST THE GOVERNMENT AT THE COMPLAINT STAGE

Presenters:

Tony Fioretti, Vice Chair, DCBA Local Gov't Section

Rachel Legorretta, John J. Malm & Associates

## DISPOSITIVE MOTIONS OVERVIEW

- Yes, But ... 735 ILCS 5/2-619
- So What? 735 ILCS 5/2-615
- Combined Motions 735 ILCS 5/2-619.1
- Summary Judgment 735 ILCS 5/2-1005(b)
  
- *Winters v. Wangler*, 386 Ill.App. 3d 788, 792 (4<sup>th</sup> Dist. 2008) (explaining the “Yes, but; So what?” structure)

# YES, BUT...

## TWO COMMON § 2-619 MOTIONS IN TORT IMMUNITY CASES

- Section 2-619(a)(5) – Statute of Limitations
  - Set out in 745 ILCS 10/8-101 *et seq.*
- Section 2-619(a)(9) – Affirmative Matter
  - Absolute Immunities

# YES, BUT...

## EXPIRATION OF STATUTE OF LIMITATIONS

- Tort Immunity Act sets out a **one-year** limitations period on suits against local public entities or a public employee.
  - 745 ILCS 10/8-101(a)
- Unless ... it arises out of patient care. Then the statute of limitations is **two years**, but the “discovery rule” is limited to four years.
  - 745 ILCS 10/8-101(b)
- “[T]he purpose of the limitation period contained in section 8–101 ‘is to encourage early investigation into the claim asserted against the local government. Such an investigation permits prompt settlement of meritorious claims and allows governmental entities to plan their budgets in light of potential liabilities.’ *Greb v. Forest Pres. Dist. of Cook Cty.*, 323 Ill.App. 3d 461, 464 (1<sup>st</sup> Dist. 2001) (internal citations omitted)

## YES, BUT ... AFFIRMATIVE MATTERS

- 735 ILCS 5/2-619(a)(9) “affirmative matter” that defeats the claim.
- Yes, the complaint states a claim, but Plaintiff’s claim is nonetheless barred by X (absolute immunity.)

## YES, BUT... ABSOLUTE IMMUNITY

- While some provisions of the Tort Immunity Act contain exceptions for willful and wanton conduct, other provisions of the Tort Immunity Act contain *no exceptions* and therefore confer absolute immunity.
- The Illinois Supreme Court has repeatedly held that where there are no exceptions listed in the text of the statutory provision, the Court cannot read one in. *Jane Doe-3 v. McLean Cty. Unit Dist. No. 5 Bd. Of Directors*, 2012 IL 112479, ¶ 44 (Ill. 2012) (“we reiterate that, where a provision of the Tort Immunity Act contains no exception for willful and wanton conduct, we will not read one in.”)

# YES, BUT...

## COMMON ABSOLUTE IMMUNITIES

- Failure to inspect (or inadequate inspection) §§ 2-107 (entity immunity); 2-207 (employee immunity)
  - Improper issuance (or denial) of permits §§ 2-104 (entity immunity); 2-206 (employee immunity)
  - Failure to enforce ordinances §§ 2-103 (entity immunity); 2-205 (employee immunity)
  - Failure to detect or prevent crime § 4-102
  - Failure to sufficiently supervise a Jail § 4-103
  - Failure to put out a fire § 5-102
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- Most common – inspection and enforcement of building codes
  - Porch collapse - *Ware v. City of Chicago*, 375 Ill. App. 3d 574, 575–76 (1<sup>st</sup> Dist. 2007)
  - Jail Suicide – *Fraley v. City of Elgin*, 251 Ill. App. 3d 72 (Ill. App. 2 Dist. 1993)
  - Inmate on inmate violence - *Jefferson v. Sheahan*, 279 Ill. App. 3d 74 (1<sup>st</sup> Dist. 1996)

## YES, BUT...

# LESS COMMON ABSOLUTE IMMUNITIES

- Condition of roads (that are not streets) leading to hunting, fishing, or other recreation areas § 3-107
- Waterways, lakes, ponds, rivers, streams § 3-110
- Escaping Prisoner § 4-106(b)
- Escaped mental patient § 6-108
  
- Escaping Prisoner: *Ries v. City of Chicago*, 242 Ill. 2d 205, 224 (Ill. 2011)

## WHY NOT DISCRETIONARY IMMUNITY?

- Discretionary immunity under Section 2-201 is absolute, why isn't discretionary immunity included?
- Section 2-619 motions have a downside – the Plaintiff can claim they need discovery! Illinois Supreme Court Rule 191(b)
- The absolute immunities previously listed survive a Rule 191(b) challenge – no discovery would circumvent the immunity.
- This does not hold true for Section 2-201, where the Plaintiff can claim a ministerial vs. discretionary distinction and claim a need for discovery. 2-201 is better raised as an affirmative defense and argued on summary judgment.

# SO WHAT? FAILURE TO ADEQUATELY PLEAD

- 735 ILCS 5/2-615
- Motion denies the legal sufficiency of the claim, in effect saying
- So what? The facts the plaintiff has pleaded do not state a cause of action.

## SO WHAT? DOWNSIDES OF A 2-615 MOTION

- Teaching Plaintiff how to adequately plead their claim.
- Dismissal without prejudice.
- Repeat motion practice.

## SO WHAT?

# WILLFUL AND WANTON PLEADING STANDARD

- Most common failure to plead is going to fall under a failure to adequately plead willful and wanton conduct.
- “Willful and wanton conduct” is specifically defined in the Tort Immunity Act 745 ILCS 10/1-210
- “[A] course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.”

# SO WHAT?

## WHEN TO DISMISS UNDER 2-615

- “Willful and Wanton” exceptions include
  - Execution or enforcement of the law § 2-202
  - Conditions of recreational property § 3-106
  - Supervising use of or activities on recreational property § 3-108
  - Medical care in a correctional setting § 4-105
  - Conduct while fighting a fire § 5-103
  - Operation of a fire truck or emergency vehicle § 5-106

# SO WHAT?

## WILLFUL AND WANTON PLEADING STANDARD

- An example from a § 3-108 case:
- “[A] plaintiff must plead a “course of action” that proximately caused the plaintiff's injuries in order to maintain a successful cause of action against a public entity based on a willful and wanton failure to supervise. **Inadvertence, incompetence, or unskillfulness** does not constitute willful and wanton conduct. Rather, to establish willful and wanton conduct, the public entity **must be informed of a dangerous condition, know that others had been injured because of that condition, or intentionally remove a safety feature or device** from recreational property.”
- “[E]ven if there was prior knowledge of a similar injury, a plaintiff must plead facts establishing the similarities between the prior injury and the plaintiff's injury.”
- *Floyd ex rel. Floyd v. Rockford Park Dist.*, 355 Ill.App. 3d 695, 701-702 (Ill.App. 2 Dist. 2005)

# COMBINED MOTIONS

- Section 2-619.1 allows you to combine 2-615, 2-619, and 2-1005, so long as the you specify what each section applies to each “part” of the combined motion. 735 ILCS 2-619.1
- However, if you don’t comply with 2-619.1 and commingle your claim, a Court may strike the motion *sua sponte* and make you re-file or file separate motions. *Howle v. Aqua Illinois, Inc.*, 2012 IL App (4th) 120207, ¶ 73

# SUMMARY JUDGMENT “PUT UP OR SHUT UP”

- Summary Judgment standard:
- “[I]f the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.”
- 735 ILCS 5/2-1005(c)
- “[S]ummary judgment requires the responding party to come forward with the evidence that it has- **it is the put up or shut up moment in a lawsuit.**” *N. Cmty. Bank v. 17011 S. Park Ave., LLC*, 2015 IL App (1st) 133672, ¶ 15

# TORT IMMUNITY ISSUES BEST SUITED FOR SUMMARY JUDGMENT

- Section 3-102(a) – actual or constructive notice of a defective condition (NOT A TRADITIONAL IMMUNITY)
- Section 2-201 – discretionary immunity, OR
- a willful and wanton claim has survived a motion to dismiss.

# SUMMARY JUDGMENT ACTUAL OR CONSTRUCTIVE NOTICE

- Section 3-102(a) codifies the requirement that a local public entity must have actual or constructive notice to be liable for negligence. It's commonly referred to as an immunity, but it is not.
- “[A] local public entity . . . shall not be liable for injury unless it is proven that it has **actual or constructive notice** of the existence of such a condition that is not reasonably safe **in reasonably adequate time** prior to an injury to have taken measures to remedy or protect against such condition.”

# SUMMARY JUDGMENT DISCRETIONARY IMMUNITY

- Discretionary Immunity: 745 ILCS 10/2-201
- “Except as otherwise provided by Statute, a public employee **serving in a position involving the determination of policy or the exercise of discretion** is not liable for an injury resulting from his act or omission **in determining policy** when acting in the exercise of such discretion even though abused.”
- Discretion actually has to be exercised! *Monson v. City of Danville*, 2018 IL 122486, ¶ 38
- Discretionary v. Ministerial:
- “Discretionary acts are those which are **unique to a particular public office**, whereas ministerial acts are those which a person performs **on a given state of facts in a prescribed manner, in obedience to the mandate of legal authority**, and without reference to the official's discretion as to the propriety of the act.” *Richter v. Coll. of Du Page*, 2013 IL App (2d) 130095, ¶ 43 (internal quotations omitted)