

## Recent Decisions

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### For Whom the Statute Tolls: The Legally Disabled Not Their Representatives

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In *Giles v. Parks*, 2018 IL App (1st) 163152, the Illinois Appellate Court, First District, held that Illinois' tolling statute for a legally disabled person's claims does not apply to claims brought by the personal representative. While this seems like a straightforward proposition, a firm pronouncement had been lacking. Rather, practitioners defending claims brought by a personal representative of a decedent who had been legally disabled for some time prior to their death have had to grapple with establishing a statute of limitations. *Giles* clarifies what had been a murky analysis and is an important case for defense practitioners.

The facts are straightforward. Morris Giles (Morris) was hit by a truck driven by the defendant on December 22, 2012. *Giles v. Parks*, 2018 IL App (1st) 163152, ¶ 3. Morris never regained consciousness after the accident and died on December 23, 2012. *Giles*, 2018 IL App (1st) 163152, ¶ 3. Exactly two years from the date of his death, Morris' brother sued the defendant. *Id.* ¶ 4. This is important – the plaintiff sued two years and one day after the accident. *Id.* That suit was dismissed for want of prosecution. *Id.* ¶ 5. Later, the plaintiff obtained new counsel and sought a relief from the judgment. *Id.* During this briefing, the timeliness of the plaintiff's initial suit was brought to the fore. *Id.* ¶ 6.

The defendant argued that the plaintiff's lawsuit was not timely because it was filed more than two years after the accident. *Id.* ¶ 7. The plaintiff, argued that his claim was timely because Morris, who never regained consciousness, "was under a legal disability from the time he was struck until he died the next day, so the statute of limitations was tolled for a day and the claim was . . . timely." *Id.* The plaintiff also sought to add a wrongful death claim, which accrues at the time of death, and argued that the wrongful death claim should relate back to the date his complaint was filed. *Id.* For those keeping score at home, the wrongful death claim would have been timely at the time the plaintiff filed his suit because it was filed two years from the date Morris died. However, the trial court rejected both of the plaintiff's claims. It found that Morris' legal disability did not toll the statute of limitations for the plaintiff's claims thus the initial suit was time-barred. *Id.* ¶ 8. The court also rejected the plaintiff's attempt to amend his complaint to add the wrongful death claim finding it "could not relate back to an untimely filed original pleading." *Id.* The plaintiff appealed.

On appeal, there was no dispute that the plaintiff's initial suit was untimely unless the limitations period was tolled. *Id.* ¶ 12. Plaintiff filed suit more than two years after the collision and injuries to his brother occurred. The plaintiff argued that 735 ILCS 5/13-211 and 735 ILCS 5/13-209 operated to toll the two year statute of limitations. *Id.*

Section 13-211 tolls the statute of limitations for minors and those with legal disabilities. *Id.* It states that "if the person entitled to bring an action is under a legal disability at the time the cause of action accrues, then he or she may bring the action within two years after the disability is removed." *Id.* ¶ 13. Section 13-209 provides that "if the person entitled to bring an action dies before the expiration of the time that the action must be filed and the cause of action survives the death, an action may be commenced by his or her representative before the expiration of that time or within one year from his or her death, whichever date is later." *Id.* The plaintiff argued that section 13-209 transferred the same

rights his brother had under section 13-211 to him. He argued that if Morris had survived the accident he could have brought his claim up to and including December 23, 2014, which would have been two years after the legal disability was removed. *Id.* ¶ 14.

The appellate court disagreed. First, it examined the language of section 13-211 and found it applies only “to the person suffering from the disability.” *Id.* ¶ 15. The court highlighted the specific language of the statute. The statute provides that “‘if the *person* entitled to bring an action’ is under a legal disability, ‘*he or she* may bring the action within 2 years after’” the legal disability is removed. *Id.* The court found that this language assumes that a legal disability will be removed “and that the *injured party*” is therefore able to assert a claim that may otherwise be time barred. *Id.* The statute, however, does not “contemplate a representative bringing any action at all, let alone an action two years after the disability is removed.” *Id.*

Moreover, the court quoted *Fess v. Parke, Davis & Co.*, 113 Ill. App. 3d 133, 135 (1st Dist. 1983), that “the reason for tolling the statute of limitations for a person that is legally disabled is that enforcement of *that person’s right* should not be left to the mercy of someone else.” *Giles*, 2018 IL App (1st) 163152, ¶ 16. Section 13-211 protects the injured party and ensures he or she has their day in court when they are able. *Id.* However, an injured party’s representative “who is not under any legal disability, is quite capable of bringing suit within the two years of the injured person’s injury.” *Id.*

The court therefore held that the “plaintiff cannot invoke section 13-211 as a mechanism to toll the statute of limitations.” *Id.* Instead, pursuant to section 13-209, plaintiff had the later of two years from the date of the injury or one year from the plaintiff’s death to bring a claim. Plaintiff’s initial suit, filed two years and one day after the injury, was therefore untimely and the claims barred. *Id.* ¶ 17.

The appellate court also rejected the plaintiff’s efforts to amend his complaint to add a wrongful death count, which would have been timely if he had brought it along with his original claims. *Id.* ¶ 23. The court found that because the original filing was not timely that “no subsequent pleading can relate back to it.” *Id.* Indeed, a party “cannot use the relation-back doctrine to assert a new claim that would have been timely had it been filed originally in order to remedy an untimely filing.” *Id.*

The appellate court’s analysis in *Giles* is a straightforward interpretation of the language of the statute and its underlying purpose. It is a clear statement that the legal disability tolling provision does not apply to an injured party’s representative. However, depending on the facts of the case, defense practitioners may have to work to obtain a dismissal on statute of limitations rounds. In *Giles*, the date of injury was very clear—Morris was hit by a truck. The more difficult issues will arise when the date of injury is unclear and the discovery rule applies. Recall that when the injured party dies section 13-209 allows the representative to assert claims by the **later** of the expiration of the limitations period or one year from the date of death. *See Id.* ¶ 13. In cases that the date of the injury is less clear, defense counsel must pay careful attention to the specific facts, records, and build the evidence of when an injured party (if not under legal disability) or the representatives would have reasonably known of an injury to develop a statute of limitations defense.

## About the Author

**Tara Kuchar** is a litigation attorney with *HeplerBroom LLC*. Ms. Kuchar’s practice focuses on defending healthcare providers in medical malpractice and nursing home liability cases. Ms. Kuchar practices in Missouri and Illinois state courts, as well as the U.S. District Court for the Eastern District of Missouri.



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