

## Municipal Law

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As a part of tort reform legislation in 1986, the Illinois Tort Immunity Act was amended to reduce the statute of limitations for lawsuits against government entities and officials from two years to one, and a six month notice provision in the Act was revoked. Plaintiffs lawyers were happy to trade away the fastidious notice requirement, but the shorter one year period led to blown statutes, and creative arguments on ways to bring their cases within some longer limitations period.

For example, in *Herriott v. Powers*, 236 Ill. App. 3d 151, 603 N.E.2d 654 (1<sup>st</sup> Dist. 1992), the plaintiff sued a village public works employee who, while driving a village vehicle, crashed into the plaintiff's car. The plaintiff missed the one year deadline, but tried to save the case by arguing that the longer two year personal injury limitations period of 13-202 of the Code of Civil Procedure applied because the suit was filed against the employee in his individual rather than official capacity. The appellate court thought it was a nice try, but logically concluded that when a public employee is sued for some act that falls within the scope of employment, the one year limitations period applies.

Another argument to avoid the shorter Tort Immunity Act limitation period focuses on the cause of action, arguing that a longer limitations period applicable to that type of claim trumps the Tort Immunity Act time limit. Those arguments have generally been unsuccessful. *See, e.g., Tosado v. Miller*, 188 Ill. 2d 186, 720 N.E.2d 1075 (1999) (one year statute of limitations under Tort Immunity Act governs over two year statute for medical malpractice actions); *Ferguson v. McKenzie*, 202 Ill. 2d 304, 780 N.E.2d 660 (2001) (statute of limitations for claim against public entity by minor after reaching 18 is one year under the Tort Immunity Act).

One might think that on the 20<sup>th</sup> anniversary of the 1986 tort reform legislation most questions regarding application of the one year statute would have been answered. The last year or two, however, has brought a flurry of judicial debate about various issues regarding the statute of limitations against government entities.

### Individual Capacity Lawsuits

In *Sperandeo v. Zavitz*, 365 Ill. App. 3d 691, 850 N.E.2d 394 (2<sup>nd</sup> Dist. 2006), the court was asked to revisit the *Herriott* situation. The plaintiff there filed a lawsuit against a Kane County animal warden who was involved in a car accident with the plaintiff while bringing a stray dog to an animal control facility. The plaintiff filed suit more than one year but earlier than two years after the accident, and argued that the two year general personal injury limitations period applied because the lawsuit was filed not against the defendant in his official capacity, but as an individual. In upholding the *Herriott* rule, the court could have, but didn't, address the threshold question of what it means to sue a public employee in an individual capacity. In federal civil rights litigation, the distinction between official and individual capacity lawsuits is significant – suing an individual in an official capacity is a completely different claim, having different elements and different proof requirements. It is essentially

a lawsuit against the public entity, not the individual. State tort law, on the other hand, offers no meaningful distinction between an individual and official capacity lawsuit.

Certainly, a plaintiff can sue a public employee for tortious acts performed within the course of his or her employment, assuming the employee owed a duty to the plaintiff. However, the plaintiffs in *Sperandeo* and *Herriott* tried to sue the individual in a way that would take the case outside of the Tort Immunity Act statute of limitations. A plaintiff cannot effect that result in the complaint. If the governmental defendant is acting within the scope of his or her employment when the tortious act occurs, the Tort Immunity Act's one year statute of limitations applies, despite how the plaintiff tries to frame the complaint.

### **Which Statute of Limitations Holds the Trump Card?**

When a conflict exists between two potentially applicable statutes of limitations, courts will recite the rule that the narrower statute governs over the broader one. But what makes one statute narrower than another? In *Tosado v. Miller*, 188 Ill. 2d 186, 720 N.E.2d 1075 (1999), a plurality of the Supreme Court suggested that the narrower statute is the one that specifically defines a class of defendants. The dissenters argued that the narrower statute is the one that defines a specific cause of action subject to the statute's limitations period. In *Ferguson v. McKenzie*, 202 Ill. 2d 304, 780 N.E.2d 660 (2001), the Court relied on the *Tosado* plurality approach, and concluded that the legislature intended that the one year Tort Immunity Act limitations period should apply "broadly to any possible claim against a local government entity and its employees." *Ferguson* was not without dissent.

In *Paskowski v. Metropolitan Water Reclamation District*, 213 Ill.2d, 820 N.E.2d 401 (2004), the Court followed the sweeping *Ferguson* conclusion giving the trumping effect to the Tort Immunity Act over a longer statute for construction related claims. For years there had been a split among appellate districts on whether the one year period applied to claims arising out of the "design, planning, supervision, observation or management of construction" of an improvement to real property, based on §13-214(a) of the Code of Civil Procedure. That provision created a four year statute of limitations for such claims against any "person," then defined "person" as "any body politic." Appellate courts disagreed on which provision won. See, e.g. *Greb v. Forest Preserve District*, 323 Ill. App. 3d 461, 752 N.E.2d 519 (1<sup>st</sup> Dist. 2001) (one year period applies); *Zimmer v. Village of Willowbrook*, 242 Ill. App. 3d 437, 610 N.E.2d 709, 182 Ill. Dec. 840 (2<sup>nd</sup> Dist. 1993) (four year period applies). In *Paskowski*, the Court resolved the dispute relying on the *Ferguson* rationale that the one year statute in the Tort Immunity Act will govern over any other limitations period as to government entities. Three judges dissented, however, arguing that the majority read *Ferguson* too broadly.

With three straight wins for the Tort Immunity Act, one might think the issue was clearly established, but then came *Brooks v. Illinois Central Railroad Co.*, 364 Ill. App. 3d 120, 846 N.E.2d 931 (1<sup>st</sup> Dist. 2005). The General Assembly has established a specific statute of limitations for contribution claims brought under the Contribution Act, which requires that a defendant seeking contribution or indemnity must file the counterclaim or third-party complaint within two years after being served with process in the underlying action. 735 ILCS 5/13-204(b). In *Brooks*, the court decided that the Contribution Act statute applied over the one year Tort Immunity Act period for a contribution action against a government entity. The court was persuaded by language in the Contribution Act that its limitations period "shall preempt, as to contribution and indemnity actions only, all other statutes of limitations or repose."

The *Brooks* court was also persuaded by the appellate court's decision in *Moore v. Green*, 355 Ill. App. 3d 81, 822 N.E.2d 69 (1<sup>st</sup> Dist. 2004), which came a month after *Paskowski*. In *Moore*, the appellate court decided that a provision in the Illinois Domestic Violence Act creating liability for

police who fail to enforce its protections for abuse victims trumped a Tort Immunity Act provision immunizing police for the same malfeasance. (*Moore* was ultimately affirmed by the Supreme Court, 219 Ill. 2d 470 (2006)). Even though *Moore* had nothing to do with limitations, the court there applied some of the statutory balancing analysis of *Tosado*, *Ferguson* and *Paskowski*. *Moore* revealed to the *Brooks* court a chink in the *Ferguson* armor. So, despite what appeared to be a broad promulgation from the Supreme Court settling a long debate, *Brooks* showed that the General Assembly's intent is still open to interpretation, and creative efforts to invoke that intent can prevail.

### **Accrual**

Another approach to lengthening the time to sue is to delay the commencement of the one year period. In *Ferguson v. City of Chicago*, 213 Ill. 2d 94, 820 N.E.2d 455 (2004), the Supreme Court addressed the question of when a malicious prosecution action accrues for application of the statute of limitations. Criminal charges against the plaintiff there had been stricken off call with leave to reinstate, affectionately referred to in the criminal courts as an "SOL." An SOL'd case, unlike a *nolle prosequed* one, can be reinstated by the prosecutor until barred under the Illinois speedy trial act. Under the speedy trial statute, a criminal defendant not incarcerated awaiting trial must be brought to trial within 160 days, with any delays caused by the defendant excluded from the 160 day term. When a case is SOL, the prosecution has whatever time is left on the 160 day term after the SOL to reinstate the case.

In *Ferguson*, the plaintiff's malicious prosecution claim was dismissed as time-barred, because it was filed more than one year after the SOL, but less than one year after the speedy trial term expired. The Supreme Court found that the malicious prosecution claim did not accrue until the plaintiff was completely out of jeopardy from the criminal charges, which did not happen until the 160 day term was over.

In *Sims-Hearn v. Office of the Medical Examiner of Cook County*, 359 Ill. App. 3d 439, 834 N.E.2d 205 (1<sup>st</sup> Dist. 2005), the plaintiff sued the Cook County Medical Examiner, after disagreement with the Medical Examiner's conclusion that her son's death was the result of an accidental drug overdose. The plaintiff believed her son had been murdered, and filed a claim under the Crime Victim's Compensation Act to recover statutory benefits for the crime. The plaintiff asked the Medical Examiner to consider certain additional evidence which she believed supported her theory, and wanted the autopsy results revised. The Medical Examiner considered the additional evidence, but came to the same conclusion and issued a supplemental report stating so.

The plaintiff's Crime Victim's Compensation Act claim, based on the Medical Examiner's opinion, was denied. The plaintiff then sued the Medical Examiner, alleging a negligent performance of the autopsy. The court, after first concluding that the claim was barred by the common law public duty rule, found that the one year statute of limitations had expired. The plaintiff invoked the common law discovery rule, and argued that the statute of limitations did not begin to run until the Medical Examiner considered the additional evidence and rendered its second opinion. The court disagreed, holding that the discovery rule delays the statute of limitation until the plaintiff knows there has been an injury and that the injury was wrongfully caused. The court found the plaintiff had the operative knowledge after the initial autopsy report.

Although time has hardened the rules for application of the Tort Immunity Act's one year limitation period, recent decisions show continuing fluidity on that topic. Until the day when filing deadlines no longer get missed, one can expect a continuing supply of creative arguments for extension of the one year period.

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