



Construction Law

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Statute of Repose and Tort Immunity Statute Function to Bar Claims Against Municipalities

In *DiFoggio v. County of Will Division of Transportation*, summary judgment was upheld for the governmental defendants because the plaintiff's claim for negligent design and construction was barred by a ten-year statute of repose. 2024 IL App (3d) 230261. Although the plaintiff-appellant argued that the subject bridge was defectively designed in that a guardrail or abutment was purportedly missing from the design and construction of the bridge, defendants-appellees were able to prove that the applicable statute of repose applied to bar plaintiff's claims because construction of the bridge was completed more than ten years prior to the filing of the claim. Furthermore, the Illinois Tort Immunity Statute applied to the governmental defendants in this case. The statutes had applicable sections relating to maintenance of roadways and installation of traffic control devices, which also functioned to bar the claims regarding the missing guard rail.

As noted above, this lawsuit stems from a single vehicle accident on a bridge in Will County. On February 17, 2018, plaintiff Dominic DiFoggio was in his vehicle crossing a bridge over a creek in the village of New Lenox, Illinois. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 3. His vehicle slid on ice and snow and collided with a concrete abutment on the southwest corner of the bridge. *Id.* The southwest corner of the bridge was the only corner of the bridge without a guardrail. *Id.* ¶ 7. That is, all other corners of the bridge had guardrails that would have prevented collision with the concrete abutment in question. *Id.*

On February 11, 2019, plaintiff filed suit against Will County, the Will County Division of Transportation, two contractors, New Lennox Township, the Illinois Department of Transportation ("IDOT"), and the State of Illinois. Shortly after filing suit, New Lennox Township, IDOT, and the State of Illinois were dismissed as defendants. *Id.* ¶ 4. After a ruling following motions to dismiss determined that plaintiff could not assert a cause of action for failure to remove snow and ice but could assert a cause of action for negligent design and maintenance, plaintiff filed an amended complaint on December 22, 2020 against Will County, Will County Division of Transportation, and two private contractors. *Id.* ¶¶ 5-6.

Brian Gieske, Will County's Assistant Engineer, testified in his deposition that his duties included constructing bridges but not inspecting or maintaining them. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 8. Furthermore, a private engineering company inspects bridges in Will County, and the Will County Division of Transportation is responsible for maintaining the bridges. *Id.* There was no guardrail on the southwest corner of this particular bridge because there was a junction between the bridge and a railroad access road at that location. *Id.* ¶ 8. Mr. Gieske was not aware of any attenuating device or barrier that could be added that would still allow access to the access road but protect the concrete abutment. *Id.* Additionally, installation of an attenuating device or barrier on the bridge would be a "maintenance issue." *Id.*

John Cairns, the Maintenance Director for the Will County Division of Transportation, testified that repairs and installation of guardrails would be performed by an outside contractor. *Id.* ¶ 9. He had no knowledge of anyone in his

department ever being called to correct a safety problem on a bridge in Will County. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 9. Furthermore, he testified that Mr. Gieske has no maintenance duties. *Id.*

After enumerating the standard for summary judgment under 735 ILCS 5/2-1005, the appellate court noted that for purposes of economy to the parties and the courts, the appellate court can affirm a trial court's summary judgment ruling on any basis appearing in the record, even if the trial court did not rely on that particular basis in reaching its decision. *Id.* ¶ 13; *Tuna v. Wisner*, 2023 IL App (1st) 211327, ¶ 55.

If a plaintiff cannot establish an element of their cause of action, summary judgment for the defendant is proper. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 14; *Ross Advertising, Inc. v. Hartland Bank & Trust Co.*, 2012 IL App (3d) 110200, ¶ 28. The question of duty is one of law, and a motion for summary judgment can be determined by the court and in favor of the defendant based on the issue of duty. *In re Estate of Elfayer*, 325 Ill. App. 3d 1076, 1080 (1st Dist. 2001). Additionally, summary judgment is routinely granted specifically in the context of the Tort Immunity Act. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 15; *Gresham v. Kirby*, 229 Ill. App. 3d 952, 957-58 (4th Dist. 1992).

On appeal, plaintiff argued that the bridge in Will County was negligently designed and constructed without a guardrail on its southwest corner. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 17. The defendants countered this argument by pointing to the statute of repose, as the bridge was designed and built more than ten years before plaintiff filed his complaint. *Id.* That is, a negligent design and construction claim would be superseded by the statute of repose such that the claim is defeated. *Id.*

Illinois has various statutes of repose for various actions. Construction cases are governed by a ten-year statute of repose. 735 ILCS 5/13-214(b). Legal malpractice cases must be brought within six years. 735 ILCS 5/13-214.3. Products liability cases are ruled by a twelve-year statute of repose from the first date of sale of the product. 735 ILCS 5/13-213(b). Medical malpractice cases must be brought within four years of the purported malpractice. 735 ILCS 5/13-212(a). Accountant malpractice cases are governed by a five-year statute of repose. 735 ILCS 5/13-214.2.

Under the applicable construction statute of repose in the *DiFoggio* case, “no action . . . may be brought against any person for an act . . . in the design . . . or a construction of an improvement to real property after ten years have elapsed from the time of such act or omission.” 735 ILCS 5/13-214(b); *DiFoggio*, 2024 IL App (3d) 230261, ¶ 18. The statute specifically applies to local governments engaged in construction in roadway activities. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 18; *O'Brien v. City of Chicago*, 285 Ill. App. 3d 864, 869 (1996). The public policy purpose behind the statute is to insulate those in the construction industry from defending against stale claims. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 18; *Wright v. Board of Education of Chicago*, 355 Ill. App. 3d 948, 955 (2002).

The contemplated construction statute of repose will apply to both explicit and implicit design defect claims. On the face of the statute, the ten-year limitation is in effect for construction cases involving overt claims of design defects. 735 ILCS 5/13-214(b). That said, a plaintiff who attempts to avoid a closed-door application of the statute by indirectly alleging a design defect claim will be rebuffed. Even if the plaintiff avoids using the term “design defect” in the pleadings but alleges the gist of a design defect claim, the statute applies. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 19; *O'Brien*, 285 Ill. App. 3d at 870. When a plaintiff's claim is that a dangerous condition existed on completion or construction and it has remained unchanged, it is a claim for defective design, and the statute of repose applies. *Id.*; *Wright*, 355 Ill. App. 3d at 957-958; *DiFoggio*, 2024 IL App (3d) 230261, ¶ 19.

In the *DiFoggio* case, the plaintiff attempted to couch his complaint in terms of negligent maintenance of the bridge and roadway, when it is really a claim for design defect. 2024 IL App (3d) 230261, ¶ 20. Because the bridge was completed in 2007, the plaintiff had until 2017 to bring his claim. *Id.* Plaintiff did not file his complaint until 2019, and therefore, his complaint was time barred. *Id.*

With regard to his next argument, negligent maintenance, plaintiff argued that Will County was required to install the absent guardrail. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 22. In responding to this argument, the appellate court reviewed the applicable section of the Illinois Tort Immunity Act. *Id.* ¶¶ 23-24. Under Section 3-102(a) of the Tort Immunity Act, “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 a reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition.” 745 ILCS 10/3-102(a).

The statute functions to hold that although a governmental entity can be responsible for negligent construction, it has no duty to undertake such improvements initially. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 24; *Ross v. City of Chicago*, 168 Ill. App. 3d 83, 87 (1988). Furthermore, liability only arises when the governmental entity undertakes an improvement and the improvement itself creates an unreasonably dangerous condition. *Id.*; *DiFoggio*, 2024 IL App (3d) 230261, ¶ 24. This is in line with the idea that “a municipality is not considered to be an insurer against all accidents occurring on the public way; rather, a municipality is required to maintain its streets in a reasonably safe condition for the amount and kind of travel which may fairly be expected on them.” *Ross*, 168 Ill. App. 3d at 87; *Warchol v. City of Chicago*, 75 Ill. App. 3d 289, 290 (1st Dist. 1979).

In considering plaintiff’s arguments as to maintenance and whether the failure to install a guardrail or other abutment constitutes maintenance, the appellate court then looked at the definition of maintenance as defined by Black’s Law Dictionary and controlling Illinois appellate case law. *DiFoggio*, 2024 IL App (3d) 230261, ¶¶ 25-26. Maintenance means “acts of repairs and other acts to prevent a decline, lapse, or cessation from existing state or condition . . . [to] keep in repair; keep up; preserve.” *DiFoggio*, 2024 IL App (3d) 230261, ¶ 25; Black’s Law Dictionary 859 (5th ed. 1979).

The court then noted the delineation between maintenance and new construction or new improvements. Maintenance does not require the undertaking of public improvements, such as the erection or extension of barriers or guardrails. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 26; *Harding v. Chicago Park District*, 34 Ill. App. 3d 424, 429 (1975). Furthermore, a local government’s duty to maintain does not apply to installation of improvements at a particular location simply because those improvements are present elsewhere. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 26; *Ross*, 168 Ill. App. 3d at 89.

In this case, Will County had no duty to erect a guardrail at the southwest corner of the bridge because the duty to maintain does not include the duty to erect an improvement. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 27. Even when that guardrail is installed at the three other corners of the bridge, there is no duty to install a guardrail at the fourth corner. *Id.*

Plaintiff attempted to argue that Mr. Gieske, Will County’s Assistant Engineer, testified that installation of the guardrail is a maintenance issue. *Id.* ¶ 28. The appellate court gave little weight to that testimony for several reasons. First of all, Mr. Gieske is the Assistant Engineer responsible for construction, not maintenance. *Id.* ¶ 29. Furthermore, Mr. Cairns, the Will County Division of Transportation’s maintenance supervisor, rebutted that testimony head-on. Mr. Cairns testified in deposition that he had direct knowledge as to maintenance and stated that a guardrail installation does not constitute maintenance. *Id.*

In its last section of analysis, the Court looked at an additional procedural rule that allows the appellate court to affirm summary judgment even when a particular basis is not raised by the parties. *Id.* ¶ 30; *Golden Rule Insurance Co. v. Widoff*, 291 Ill. App. 3d 112, 117 (1997). This is consistent with appellate procedure in Illinois. It is not the appellate court’s “burden nor obligation to provide argument in support of issues raised by an appellant.” *People v. Duckworth*, 2014 IL App (5th) 230911, ¶ 7. Furthermore, the appellate court cannot consider theories of recovery omitted in the trial court if contrary evidence may have also been offered to overcome the contemplated theory. *Sheldon v. Colonial Carbon Co.*, 116 Ill. App. 3d 797, 803 (1st Dist. 1983). Such was not a circumstance in the *DiFoggio* court, because no proof could be offered to show the invalidity of this section of the Tort Immunity Act.



The DiFoggio court noted that under a separate section of the Tort Immunity Act, neither “a local public entity nor a public employee is liable under this Act for an injury caused by the failure to initially provide . . . traffic separating or restraining devices or barriers.” 745 ILCS 10/3-104; DiFoggio, 2024 IL App (3d) 230261, ¶ 30. That section of the statute absolutely immunizes local governments for failure to erect traffic control devices or barriers on roadways and bridges. *Id.* ¶ 31; *Bernabei v. County of LaSalle*, 236 Ill. App. 3d 958, 963 (1992). In this case, pursuant to that section of the statute, Will County is immune from liability to plaintiff’s injury caused by absence of a guardrail. *DiFoggio*, 2024 IL App (3d) 230261, ¶ 31.

About the Author

Kevin H. Young is an associate attorney in Chicago office of *Cassiday Schade LLP*. Mr. Young focuses his practice on a wide range of civil litigation defense and has extensive experience handling transportation and construction matters. Prior to joining Cassiday Schade, Mr. Young worked as an attorney where he honed his litigation skills in the areas of premises and products liability. Mr. Young earned his J.D. from Loyola University School of Law and is a member of the Illinois bar.

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