

## Feature Article

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# *Zayed v. Clark Manor:* Is The First District ‘Split’ Really A Split?

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Recently, the Illinois Appellate Court First District Fourth Division published an opinion that explicitly disagreed with the rationale used one year earlier by the First District First Division in a “similar” case. *Compare Zayed v. Clark Manor Convalescent Ctr., Inc.*, 2019 IL App (1st) 181552, with *Giles v. Parks*, 2018 IL App (1st) 163152. In *Zayed*, the First District Fourth Division reversed a trial court order granting a motion to dismiss based on the statute of limitations when the plaintiff’s decedent was under a legal disability at the time the incident that gave rise to the lawsuit occurred. *Zayed*, 2019 IL App (1st) 181552, ¶ 32. In *Giles*, the First District First Division affirmed a trial court order denying a petition for relief from final judgment because the original lawsuit was not timely filed and thus was not “meritorious.” *Giles*, 2018 IL App (1st) 163152, ¶ 26. Both decisions were unanimous.

This update will explain the rationale behind both decisions and why the holdings may create an issue appropriate for the Illinois Supreme Court to consider. As will be explained below, the whole issue boils down to when exactly a cause of action accrues.

### Facts of *Giles*

On December 22, 2012, Morris Giles was walking through a crosswalk when he was struck by a tow truck. *Id.* ¶ 3. He was found unresponsive and unconscious and remained unconscious until he died the next day. *Id.* His brother, Roscoe, retained an attorney to file suit. *Id.* ¶ 4. The single count complaint was filed on December 23, 2014 and was characterized as a Survival Act claim. *Id.*

Before the statute of limitations issue could be raised, the lawsuit was dismissed for want of prosecution. *Id.* ¶ 5. Later, after hiring new counsel, the plaintiff filed a section 2-1401 petition for relief from final judgment. *Id.* The plaintiff asserted that the original attorney had a minor stroke and was no longer authorized to practice law—which led to the dismissal for want of prosecution—but the original lawsuit was proper and should therefore proceed. *Id.* ¶ 6.

The parties focused their arguments in the section 2-1401 hearing on whether the plaintiff acted with diligence in the original claim by filing the lawsuit two years and one day after the accident. *Id.* The defendant argued that the lawsuit was filed a day late and was therefore untimely. *Id.* ¶ 7. The plaintiff argued that Morris was under a legal disability from the time of the accident until his death, and thus, the lawsuit was timely filed because it was filed exactly two years after his legal disability was removed by his death. *Id.* The trial court sided with the defendant and denied the petition for relief from final judgment. *Id.* ¶ 8.

In affirming the trial court, the First District First Division did not accept the plaintiff’s tolling argument. *Id.* ¶ 16. It relied on the Illinois Supreme Court’s opinion in *Golla v. General Motors Corp.* for the proposition that a “sudden traumatic event” causes the statute of limitations to start running on the day the injury occurs because the cause of action

accrues immediately. *Id.* ¶ 11 (citing *Golla v. Gen. Motors Corp.*, 167 Ill. 2d 353, 362 (1995)). The court also drew a distinction between claims filed by individuals and claims filed by representatives of individuals. *Id.* ¶ 16. It reasoned that section 13-211 applies to only “the person entitled to bring an action.” *Id.* Because the lawsuit was brought by a representative of Morris Giles, the appellate court assessed that section 13-211 was inapplicable. *Id.*

### Facts of *Zayed*

Said Mohammad *Zayed* was 62 years old when he became a resident of the Clark Manor Convalescent Center, a nursing home in northern Chicago. *Zayed*, 2019 IL App (1st) 181552, ¶ 5. He fell and suffered a hip fracture in March of 2014 and died approximately 18 months later. *Id.*

His personal representative filed a lawsuit three years and four months after Said’s fracture and 20 months after his death. *Id.* ¶ 6. The complaint alleged causes of action under both the Wrongful Death and Survival Act. *Id.* It alleged that Said’s fall caused or contributed to cause his death. *Id.* ¶ 1. The complaint also alleged that Said was under a legal disability prior to his admission to the nursing home, that he was incapable of managing his person or property, and that he could not comprehend his legal rights. *Id.* ¶ 5.

The defendants filed a motion to dismiss, arguing that the *Zayed* lawsuit was barred by the statute of limitations because it was filed more than two years after the fall and more than one year after Said’s death. *See id.* ¶ 7. The plaintiff’s attorneys argued to the trial court that the limitations period was extended because Said suffered from dementia, Parkinson’s disease, and Alzheimer’s disease when he became a resident at Clark Manor. *Id.* ¶ 4. They did not include these specific facts in the complaint. *Id.*

Illinois law has two statutes of limitations that are implicated in this situation: (1) section 13-211, addressing minors and persons under a legal disability; and (2) section 13-209, addressing death of a party.

Section 13-209 states that:

(a) If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives:

(1) 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 the later.

735 ILCS 5/13-209(a)(1).

Section 13-211 states that:

(a) If the person entitled to bring an action . . . at the time the cause of action accrued, is under the age of 18 years or is under a legal disability, then he or she may bring the action within 2 years after the person attains the age of 18 years, or the disability is removed.

(b) If the person entitled to bring an action . . . is not under a legal disability at the time the cause of action accrues, but becomes under a legal disability before the period of limitations otherwise runs, the period of limitations is stayed until the disability is removed . . . .

735 ILCS 5/13-211.

The trial court sided with the defendant’s argument. *Zayed*, 2019 IL App (1st) 181552, ¶ 2. It concluded that the statute of limitations barred the lawsuit because the limitations period began to run when Said fell in 2014. *Id.* The trial court specifically relied on *Giles* to support its decision. *Id.*

The appellate court in *Zayed* specifically disagreed with the rationale of *Giles*. *Id.* ¶ 19. It explained that section 13-211 preserves the full two-year statute of limitations during a disabled person’s lifetime and that section 13-209 extends that period for two years after a disabled person’s death. *Id.* ¶ 21.

In support of this construction, it relied on other state appellate court opinions from New York, Wisconsin, and West Virginia that each held that the statute of limitations period is tolled during a disabled individual’s life. *See id.* ¶¶ 22-25. It explained that this rationale is supported by public policy because the statutes at issue are intended to extend the limitations period for individuals who are legally disabled. *Id.* ¶ 21.

Accordingly, the appellate court held that the *Zayed* complaint was timely filed because the statute of limitations was tolled from the time of Said’s fall until his death. *See id.* ¶ 18. Because Said’s death ended his legal disability, section 13-211 provided a two-year period for the complaint to be filed on his behalf. *Id.* ¶ 30. The appellate court reversed the trial court’s granting of the motion to dismiss and remanded the case for further proceedings. *Id.* ¶ 32.

But the appellate court went further in its opinion. It concluded that the *Giles* lawsuit was timely filed and that the result in *Giles* was “harsh and unfair under case law that is not settled in Illinois.” *Id.* ¶ 19. The court also criticized the *Giles* court’s “erroneous view” that the lawsuit was filed for the personal representative’s own benefit, when in fact a survival action asserts a claim for the benefit of a decedent through his or her estate. *Id.* ¶ 18; *see Will v. Northwestern Univ.*, 378 Ill. App. 3d 280, 289 (1st Dist. 2007).

The court relied on legislative history to bolster its criticism. *See id.* ¶ 21. It referred to a proposed bill in the Illinois House of Representatives that added the words “or his or her legal representative” to section 13-211 in 2019 as evidence that the legislature was attempting to “correct a miscarriage of justice caused by the courts.” *Id.* ¶ 21. The First District Fourth Division made clear in *Zayed* that it would have found a different outcome had it heard *Giles* rather than the First Division. *Id.* ¶ 19.

### Analysis

This intra-district, inter-division split is not as clear cut as the *Zayed* opinion makes it out to be. *Zayed* obviously disagrees with the rationale in *Giles*, but the fact pattern present in *Giles* allows the savvy defense practitioner to argue a crucial distinction exists between the two cases.

The *Zayed* court hardly addressed the implications its rationale could have in a situation in which a decedent is not under a legal disability before a sudden traumatic event, but a sudden traumatic event renders the decedent unconscious for a period of time. It is well settled that the clock begins to tick on the statute of limitations when an individual is injured from a sudden traumatic event—like a car accident—because the cause of action accrues immediately. *See Golla*, 167 Ill. 2d at

362. When a sudden traumatic event occurs, other statute of limitations tolling provisions like the “discovery rule” do not apply. *See id.* at 365.

In *Zayed*, the decedent was alleged to be under a legal disability at the time he entered the nursing home, and thus remained under a legal disability at the time he fell. The facts of *Zayed* place the lawsuit squarely within the realm of section 13-211(a). Because Said *Zayed* was alleged to be under a legal disability at the time the cause of action accrued, he could bring a lawsuit for up to 2 years after his legal disability was removed. Since his legal disability was removed by his death, a survival action brought on his behalf was appropriate within 2 years of his death—not within 2 years of his fall.

Whereas in *Giles*, the decedent was struck by a tow truck while walking through a crosswalk; in other words, a sudden traumatic event occurred and rendered him unconscious. There was no allegation that Morris Giles was under a legal disability before being struck by the truck; the argument instead was that Morris Giles was unconscious and legally disabled because he was struck by the truck. This raises the still-unsettled question: what occurs when a cause of action and an alleged legal disability arise from the same sudden traumatic event? Is it the chicken, or the egg?

The *Zayed* opinion states that the *Giles* result is harsh and unfair. *See Zayed*, 2019 IL App (1st) 181552, ¶ 19. *Zayed* appears to stand for the position that Morris Giles’ unconsciousness tolled the statute of limitations after his sudden traumatic event until his death. *See id.* The *Giles* opinion obviously goes the other way. Curiously, neither opinion discusses the applicability of section 13-211(b).

Section 13-211(b) provides a statutory tolling period when an individual is not under a legal disability at the time the cause of action accrues, but “becomes under a legal disability before the period of limitations otherwise runs.” 735 ILCS 5/13-211(b). A court may conclude that section 13-211(b) controls when confronted with a scenario like *Giles*. It may conclude that a sudden traumatic event that renders an individual unconscious would toll the statute of limitations until that disability is removed. The problem with this approach is that it can create absurd results. If a plaintiff slips in and out of consciousness after suffering an injury giving rise to a cause of action, the statute of limitations should not begin to run or stop running due to that flickering consciousness.

A court may also conclude that the legislature—when drafting section 13-211—simply did not contemplate the scenario where a legally competent individual is arguably rendered legally disabled from a sudden traumatic event that simultaneously gives rise to a cause of action. In that scenario, it is possible the sudden traumatic event rule would control because of the lack of statutory authority on the issue. In this event, the *Giles* holding could control. Defense counsel should be prepared to argue the permutations of section 13-211 when a plaintiff’s alleged legal disability could play a role in determining whether the statute of limitations applies.

## Conclusion

Despite the *Zayed* court’s declaration that *Giles* was wrongly decided, it is unclear whether the *Zayed* rationale tolls the statute of limitations when an individual is injured—arguably causing legal disability—after a sudden traumatic event. It is possible that both holdings are consistent despite the conflicting rationales supporting them. Because of this confusion, this issue may be ripe for appeal and argument before the Illinois Supreme Court. The issue is also ripe for legislative amendment.

For now, though, the statute of limitations is tolled in cases with a fact situation like the one in *Zayed*—where an individual is legally disabled prior to the personal injury occurring. The statute of limitations is tolled until the legal disability is removed.



When confronted with a fact situation like the one in *Giles*—where an individual becomes unconscious at the same time the cause of action accrues—defense counsel should be aware of the arguments available concerning section 13-211 and the sudden traumatic event rule. *Zayed* does not address that scenario with appropriate specificity to be controlling. When the argument is available, defense counsel should assert that the statute of limitations begins to run and is not tolled when a sudden traumatic event occurs.

### About the Author

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