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IN THE
COURT OF APPEALS OF INDIANA

6232 Harrison Ave. LLC, 4734 Johnson Ave. LLC, 1523 175th St LLC, 4411 Baltimore Ave LLC, 4840 Oak Ave LLC, 6629 McCook Ave LLC, and 6845 Colorado Ave LLC,

Appellant-Plaintiffs,

v.

City of Hammond, Indiana,

Appellee-Defendant.

December 6, 2021

Court of Appeals Case No. 21A-PL-499

Appeal from the Lake Superior Court

The Honorable Calvin D. Hawkins, Judge

Trial Court Cause No. 45D02-1610-PL-65

Mathias, Judge.

[1] 6232 Harrison Ave. LLC and other corporate property owners (collectively, "the Landlords") appeal the trial court's dismissal of their amended complaint against the City of Hammond. The Landlords raise a single issue for our review, namely, whether they timely filed their notices of tort claims with the

City under the Indiana Tort Claims Act, Ind. Code §§ 34-13-3-0.1 to -25 (2021) ("the ITCA"). Specifically, the Landlords contend that the City's annual $80 rental-registration fee is contrary to Indiana Code section 36-1-20-5, which restricts such fees to $5. Thus, the Landlords alleged in their complaint that they are entitled to refunds from the City on their overpayments on those fees.

[2] There is no dispute that the Landlords filed their notices with the City within 180 days of their alleged overpayments. However, the City contends that the Landlords knew on January 1, 2015, that the registration fees would be due by April 15 of that year. Therefore, the City contends, the Landlords needed to file their notices with the City within 180 days of January 1 in order to have timely filed those notices under the ITCA.

[3] A "loss" under the ITCA requires an injury to have been sustained by the claimant. The Landlords' alleged loss here, their overpayments, could not have been sustained until the Landlords either made those payments or the April 15 deadline for timely making those payments passed, whichever happened first. Knowledge of the date an allegedly illegal assessment is due is not knowledge of an injury that has been sustained—it is knowledge of an injury that is only likely to be sustained but by no measure has in fact yet been sustained, which is not an injury that is ripe for a tort claim for damages. Therefore, we reverse the trial court's dismissal of the Landlords' complaint and remand for further proceedings.

Facts and Procedural History

[4] The facts relevant to the Landlords' complaint against the City were recently discussed by the Indiana Supreme Court:

> To protect the public health, safety, and general welfare of the city, [the City of] Hammond created two programs—an inspection program and a rental-registration program. Both programs charge fees for rental units.
>
> The inspection program was created in 1961. It authorized city officials to inspect all dwelling units—both owner-occupied and rented. And it specifically required a $5 annual inspection fee for hotels and rooming houses.
>
> Decades later, in 2001, [the City] created its rental-registration program. That program required owners of rental housing to register their units with the [C]ity and to pay a per-unit $5 annual registration fee. The [C]ity then increased the fee twice over the next ten years—to $10 in 2004, and to $80 in 2010.
>
> The eight-fold increase was [the City's] response to the 2010 state constitutional amendment placing caps on property taxes, including a 2% cap on rental properties. That amendment led to substantial savings for landlords but also significantly strained many municipal budgets—especially for municipalities, like [the City], whose tax bases were shrinking.

City of Hammond v. Herman & Kittle Props., Inc., 119 N.E.3d 70, 74–75 (Ind. 2019).

[5] The City was not the only political subdivision that raised its rental-registration fees, and, in response, "[a] flurry of legislative activity to regulate these programs" occurred between 2011 and 2015. *Id.* at 74. That legislative activity

> eventually culminated in the [2015] version of Indiana Code section 36-1-20-5. Two provisions of that statute operate in concert to restrict all municipalities from charging more than a $5 rental-registration fee [(the "Fee Restriction")]—all except Bloomington and West Lafayette [(the "Fee Exemption")].
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> * * *
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> While [the City's] lawsuit [seeking declaratory relief that it could continue charging its $80 per-rental fee under the language of a prior Fee Exemption] was pending, [in 2015] the General Assembly introduced House Bill 1165, proposing two notable changes to Chapter 36-1-20: narrowing the Fee Exemption and supplying certain new definitions.
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> * * *
>
> The final bill . . . adopted definitions that excluded [the City's] program—but not Bloomington's or West Lafayette's—from the Fee Exemption. Here's how: The enacted act defined a "rental registration or inspection program" as "a program authorizing the registration or inspection of only rental housing. The term does not include a general housing registration or inspection program or a registration or inspection program that applies only to rooming houses and hotels." P.L. 65-2015, § 1 (codified at Ind. Code § 36-1-20-1.2 (Supp. 2015)).
>
> This excluded [the City] from the Fee Exemption on two fronts: (1) because it had a general inspection program that permitted

> the inspection of non-rental housing, and (2) because it required the inspection only of rooming houses and hotels. However, the amended language no longer excluded Bloomington because its program applied only to rental housing. So under the final bill, both Bloomington and West Lafayette qualified for the Fee Exemption, while all other political subdivisions were subject to the Fee Restriction—meaning only Bloomington and West Lafayette could charge a higher-than-$5 annual rental-registration fee.

Id. at 74–76.

[6] In response to the 2015 amendments, the City argued that the Fee Exemption was unconstitutional special legislation. The City further argued that the Fee Exemption and the Fee Restriction were not severable and, thus, striking down the Fee Exemption also required striking down the Fee Restriction. In 2019, our supreme court agreed that the 2015 amendment to the Fee Exemption was unconstitutional special legislation. *Id.* at 85–87. However, the court further held that the Fee Exemption was severable from the remainder of the law, which meant that the $5 Fee Restriction now operated statewide. *Id.* at 87–89.

[7] Meanwhile, the Landlords filed their proposed class action complaint on December 19, 2016, which they subsequently amended following our supreme court's opinion in *Herman & Kittle*. According to that complaint:

> 1) [The Landlords] are owners or landlords of rental units in the City of Hammond, Indiana.

* * *

3) Hammond Ordinance §[]96.152 states, in part, as follows:

> (C) There shall be an $80 annual fee assessed for each apartment, rental dwelling or rental unit, due with the registration form which must be completed each year.
>
> * * *

5) As a result of [the City's] enforcement of Hammond Ordinance §[]96.152, [the Landlords] paid to [the City] annual fees in the amount of $80 for each apartment, rental dwelling or rental unit over several years . . . .

6) Indiana Code [§] 36-1-20-5(c) states[:] "A political subdivision may impose on an owner or landlord of a rental unit an annual registration fee of not more than five dollars ($5)."

7) On March 15, 2019, the Indiana Supreme Court in [*Herman & Kittle*] upheld the fee restriction . . . .

8) As a result . . . , [the City] owes to each plaintiff for each owned rental unit a refund of no less than $75 per rental unit for . . . 2015 (hereinafter "overpayments").

9) [The Landlords] made timely demands upon [the City] pursuant to [the ITCA] and otherwise, but [the City] refused to return the overpayments . . . .

Appellants' App. Vol. 2 pp. 80–81.[1]

[8] The Landlords attached to their complaint their ITCA-required notices to the City. Those notices included each Landlord's completion of its required 2015 rental registration form. Each form stated: "$80 per rental unit due by April 15th"; "$500 late fee will be assessed per unit after April 15th"; and "this fee is due yearly, between Jan. 1 and April 15th." *E.g.*, *id.* at 89. Similarly, the City's ordinance stated that the annual registration form and fee were due "by April 15[] of each year" and that "[t]here shall be a $500 per unit late fee assessed for each dwelling or rental unit/apartment not registered by April 15[] of every year." Hammond, Ind., Code § 96.152(A), (F) (2021), *available at* https://codelibrary.amlegal.com/codes/hammond/latest/hammond_in/0-0-0-5980 (last visited on Nov. 16, 2021). The Landlords' notices further demonstrated that the Landlords had paid their 2015 registration fees on March 9, 2015.[2] The Landlords served the ITCA notices on the City 149 days later, on August 5, 2015.

[9] The City moved to dismiss the Landlords' complaint under Indiana Trial Rule 12(B)(6). In its motion, the City asserted that the Landlords' demand for refunds of the alleged 2015 overpayments must "fail because [the Landlords]

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[1] The Landlords' amended complaint also demanded refunds for alleged overpayments in 2014, but the Landlords later withdrew any claims based on the 2014 payments. *See* Tr. p. 9.

[2] In its brief, the City asserts that the Landlords made their payments on March 6, 2015. The three-day discrepancy is not relevant to our disposition of this appeal. *See* Appellee's Br. p. 11.

did not provide timely notice [to the City] under the ITCA." Appellants' App. Vol. 2 p. 116. In particular, the City argued that the Landlords knew that they owed the fees on January 1 and, thus, that the August 5, 2015, filing of the notices, 216 days later, was untimely under the ITCA's 180-day filing requirement. After a hearing at which the parties presented oral argument, the trial court granted the City's motion and dismissed the Landlords' complaint. This appeal ensued.

Standard of Review

[10] The Landlords appeal the trial court's dismissal of their complaint for failure to state a claim upon which relief can be granted under Trial Rule 12(B)(6). Because the City's motion under Trial Rule 12(B)(6) challenged only the legal sufficiency of the Landlords' complaint, we review the trial court's judgment on that motion *de novo*. *Robertson v. State*, 141 N.E.3d 1224, 1227 (Ind. 2020). In reviewing the trial court's judgment, we must view the pleadings in the light most favorable to the nonmoving party, with every reasonable inference construed in the nonmoving party's favor. *Id.* Further, as the trial court here reached its decision based on its review of a paper-only record, "we are in just as good of a position as the trial court was to resolve the case, and thus need not defer to its ruling." *Andy Mohr West v. Off. of Ind. Sec'y of State*, 54 N.E.3d 349, 352 (Ind. 2016).

[11] We also review questions of law *de novo*. *See, e.g.*, *Robertson*, 141 N.E.3d at 1227. Here, the arguments on appeal are centered on the proper interpretation of the

ITCA's notice requirements. The ITCA "governs lawsuits against political subdivisions and their employees." *Burton v. Benner*, 140 N.E.3d 848, 852 (Ind. 2020) (quoting *Bushong v. Williamson*, 790 N.E.2d 467, 472 (Ind. 2003)). Further:

> In interpreting statutes, such as the ITCA, we seek to give effect to the intent of the legislature. We thus look first to the statutory language and presume that the words of an enactment were selected and employed to express their common and ordinary meanings. Where the statute is unambiguous, the Court will read each word and phrase in this plain, ordinary, and usual sense, without having to resort to rules of construction to decipher meanings. Because the ITCA is in derogation of the common law, we construe it narrowly against the grant of immunity.

F.D. v. Ind. Dep't of Child Servs., 1 N.E.3d 131, 136 (Ind. 2013) (citations and quotation marks omitted).

The ITCA's 180-Day Notice Requirement

[12] We initially note that the Landlords do not dispute that the ITCA applies to their claims against the City. The ITCA "applies only to a claim or suit in tort." I.C. § 34-13-3-1. A claim for a refund following an alleged overpayment of a government assessment "sounds in tort" and, thus, must be claimed following the procedures of the ITCA. *Irwin Mortg. Corp. v. Marion Cnty. Treasurer*, 816 N.E.2d 439, 446 (Ind. Ct. App. 2004) (claim for a refund from an allegedly illegal penalty); *see also City of Indianapolis v. Cox*, 20 N.E.3d 201, 207–08 (Ind. Ct. App 2014) (claim for a refund following government forgiveness to third parties of an outstanding debt), *trans. denied*.

[13] The ITCA provides that "a tort claim against a government entity is barred unless the claimant provides the entity with timely notice of the claim." *Murphy v. Ind. State Univ.*, 153 N.E.3d 311, 317 (Ind. Ct. App. 2020). In relevant part, Indiana Code section 34-13-3-8 states that a claim against a political subdivision[3] "is barred unless notice is filed with . . . the governing body of that political subdivision . . . *within one hundred eighty (180) days after the loss occurs* . . . ." (Emphasis added.)

[14] "Compliance with the notice provisions of ITCA is a procedural precedent which the plaintiff must prove and the trial court must determine prior to trial." *Chariton v. City of Hammond*, 146 N.E.3d 927, 931 (Ind. Ct. App. 2020) (quotation marks omitted), *trans. denied*. The 180-day requirement "is intended to ensure that government entities have the opportunity to investigate the incident giving rise to the claim and prepare a defense." *Schoettmer v. Wright*, 992 N.E.2d 702, 706 (Ind. 2013). However, "so long as its essential purpose has been satisfied," that requirement "should not function as 'a trap for the unwary.'" *Id.* (quoting *Galbreath v. City of Indianapolis*, 253 Ind. 472, 480, 255 N.E.2d 225, 229 (1970)).

[15] Here, the only dispute on appeal is whether the Landlords provided the City with their notices within 180 days "after the loss." The Landlords assert that their loss did not occur until they paid their alleged overpayments on March 9,

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[3] There is no dispute in this appeal regarding the content of the Landlords' notices to the City or the Landlords' service of those notices on the City. *See* I.C. §§ 34-13-3-10, -12.

2015, which was within 180 days of the date they provided the City with their notices.[4] The City responds that the Landlords knew at least by January 1, 2015,[5] that they were required to make the allegedly illegal payments and, thus, that January 1 should control as the date that began the 180-day clock. We agree with the Landlords and hold that their tort claims were not ripe until they had sustained some injury, which first occurred on March 9, 2015.

A Loss Under the ITCA Requires Some Injury to Have Been Sustained Before the 180-Day Clock Can Begin to Run

[16] Indiana's case law is clear that the ITCA's 180-day clock begins to run only once some injury is ascertainable by the claimant and also after that injury has been sustained by the claimant. The City's arguments in support of its motion to dismiss focus exclusively on the requirement that an injury be ascertainable. The City's arguments disregard the requirement that an injury has been sustained.

[17] As we have stated:

> Loss is defined as "injury to or death of a person or damage to property." Ind. Code § 34-6-2-75(a). A loss occurs for purposes of ITCA "'when the plaintiff knew or, in the exercise of ordinary

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[4] The Landlords also assert that their requests for equitable relief prohibit the City from relying on the ITCA's 180-day notice requirement. Our court has repeatedly rejected the argument that a request for equitable relief precludes the application of the ITCA's notice requirement. *See Chariton*, 146 N.E.3d at 933–34; *Ind. Dep't of Transp. v. Shelly & Sands, Inc.*, 756 N.E.2d 1063, 1078–79 (Ind. Ct. App 2001), *trans. denied*. We will not reconsider those holdings.

[5] The City also asserts that the Landlords knew of the requirement to pay the $80 registration fee before January 1, but we need not consider that argument in light of our resolution of this appeal.

> diligence, could have discovered that an injury *had been sustained* as a result of the tortious act of another.'" *Reed v. City of Evansville*, 956 N.E.2d 684, 691 (Ind. Ct. App. 2011) (quoting *Wehling v. Citizens Nat'l Bank*, 586 N.E.2d 840, 843 (Ind. 1992)), *trans. denied*. . . .
>
> A "cause of action of a tort claim accrues and the statute of limitations begins to run when the plaintiff knew or, in the exercise of ordinary diligence, could have discovered that *an injury had been sustained* as a result of the tortious act of another." *Wehling*, 586 N.E.2d at 843. The determination of when a cause of action accrues is generally a question of law. *Cooper Indus., LLC v. City of S. Bend*, 899 N.E.2d 1274, 1280 (Ind. 2009). For an action to accrue, it is not necessary that the full extent of the damage be known or even ascertainable, but that only *some ascertainable damage has occurred*. *Id.*

Ind. Dep't of Child Servs. v. Morgan, 148 N.E.3d 1030, 1032–33 (Ind. Ct. App. 2020) (emphases added), *trans. denied*.

[18] The requirement that some injury have been sustained by the claimant before a cause of action accrues is fundamental to tort law. As our supreme court has made clear:

> In the American legal system, demonstrated harm is an indispensable element of virtually every type of civil claim. *In cases ranging from contract to tort to medical malpractice, a claimant cannot recover a monetary judgment unless he has suffered actual damage. The law does not usually permit monetary recovery for claims solely involving future damages; rather, some damage must have already begun to occur*. This notion that the statute of limitation begins to run when all the elements of a cause of action can be shown (including whether some damages have been felt) is part of how we determine when a cause "accrues."

Pflanz v. Foster, 888 N.E.2d 756, 758–59 (Ind. 2008) (emphasis added; citation omitted). For example:

> In contribution or indemnification cases, the damage that occurs is the incurrence of a monetary obligation that is attributable to the actions of another party. That is why, generally, parties bringing contribution and indemnification claims must wait until after the obligation to pay is incurred, for otherwise the claim would lack the essential damage element. *See [Comm'r, Ind. Dep't of Envtl. Mgmt. v.] Bourbon Mini-Mart*, 741 N.E.2d [361,] 372 n.9 [(Ind. Ct. App. 2000)] ("an obligation to indemnify or for contribution does not arise until the party seeking such remedy suffers loss of damages, i.e., at the time of payment of the underlying claim")[, *summarily aff'd by* 783 N.E.2d 253 (Ind. 2003)]; *TLB Plastics Corp., Inc. v. Procter & Gamble Paper Products Co.*, 542 N.E.2d 1373, 1376 (Ind. Ct. App. 1989) (obligation to indemnify arises only after one seeking indemnity suffers loss or damages even if indemnity and injured party's claim are litigated contemporaneously); *Estate of Leinbach v. Leinbach*, 486 N.E.2d 2, 5 (Ind. Ct. App. 1985) ("to be entitled to contribution, the [claimant] must have first paid the debt"); *McLochlin v. Miller*, 139 Ind. App. 443, 448, 217 N.E.2d 50, 53 (Ind. Ct. App. 1966) ("payment must be made under compulsion to entitle payor to contribution").

Id. at 759. Absent some sustained loss, "[a] claim for . . . damages cannot ripen . . . ." *Id.*

[19] The Indiana Supreme Court has never held that a loss under the ITCA exists where no damage has yet been sustained by the claimant. To the contrary, in *City of Lake Station v. State ex rel. Moore Real Estate, Inc.*, the court considered when a loss occurs under the ITCA and made clear that the 180-day clock does

not begin to run when the political subdivision has not clearly acted against the claimant's property. 558 N.E.2d 824, 825 (Ind. 1990). There, the claimant applied for a building permit with a local building commission. The commission met to discuss the application two days later, decided it needed more information, and then held a second meeting one month later, on April 11. At the second meeting, the commission expressed uncertainty over the minimum required square footage for the proposed project. Over the claimant's assertions that all requirements were met, the commission concluded that it would "table[] any decision" and seek "legal advice from our city attorney." *Id.* at 826.

[20] Over the next six months, the claimant repeatedly contacted the city's attorney about its application. The claimant eventually filed its notice of tort claim, some seven months after it had originally filed its application, after the city attorney had "finally" informed the claimant that his advice to the commission was going to be that the application did not meet legal square-footage requirements. *Id.* The commission "neither granted [the permit], denied it, nor expressly decided not to decide." *Id.* Indeed, when the trial court heard the motion to dismiss the complaint nearly a year after the application had been filed with the commission, the application was still "pending." *Id.*

[21] The trial court dismissed the claimant's complaint for not having complied with the ITCA's 180-day requirement, which the municipality asserted had begun to run following the April 11 meeting. Our supreme court reversed:

> This case is not like those involving malicious prosecution, *Livingston v. Consolidated City of Indianapolis* (1979), Ind. App., 398 N.E.2d 1302, or slander, *Hedges v. Rawley* (1981), Ind. App., 419 N.E.2d 224, where the occurrence of loss is a more definite date and more easily determined. In this case, *the date of loss is by no means definite* or easily determined.
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> Recognizing the commission's decision on April 11 to table the application and research the legal sufficiency of it as the date of loss would distort the statutory term "loss" far beyond the legislature's intent . . . . When the building commission passed those motions on April 11, 1985, it was certainly the beginning of the building commission's nearly six months of non-decision on the request for a single dwelling building permit, yet it was surely not a date upon which a "loss occurred" so as to set running the 180-day period for filing a tort claim notice. Simply, *there was no loss on April 11*; there was a seemingly prudent delay for further investigation. [The municipality] has asserted that any loss which [the claimant] suffered "occurred" first on April 11th. *Accepting [the municipality's] argument would permit government bodies to immunize themselves from tort claims simply by delaying a decision until the 180-day notice period expires. The notice provision is justified as a device providing a period for negotiation and possible settlement. It should not provide a method for evading responsibility through inaction.*

Id. at 827 (emphases added; footnote omitted).[6]

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[6] The court further stated:

> *If [the claimant] suffered a compensable loss, and we do not decide that question today*, it seems that the loss did not "occur" any earlier than the date in October 1985 when [the claimant's] attorney first learned that the city attorney would advise the building commission that the proposed dwelling did not meet the square footage requirements. After that conversation, it appeared likely that [the claimant's] application would be denied. [The claimant's] attorney acted to protect his client's interests in filing a tort claim notice shortly thereafter.

[22] Similarly, in *Wehling*, the court held that the 180-day clock began to run when the claimants "attempted to sell [their] property and learned that *it had already been sold.*" 586 N.E.2d at 843 (emphasis added). And, in a non-ITCA tort case on which the City relies on appeal, the court considered the limitations period for insureds who had been undersold insurance and then sustained damage to the insured property. *Filip v. Block*, 879 N.E.2d 1076 (Ind. 2008). The court held that the insureds "could have discovered that they were underinsured" upon the date of coverage by reading their policy, and, thus, the statute of limitations began to run from the date of coverage. *Id.* at 1084. In other words, contrary to the City's' reading of *Filip*, there the insureds' injury from the undercoverage had been sustained at the initiation of the inadequate policy. *See id.*

[23] Our court has likewise consistently required that, in order to start the ITCA's 180-day clock, an injury must not only be ascertainable but also must have been sustained. For example, in *City of Indianapolis v. Cox*, we considered the claimants' demand for a refund following a city's forgiveness of outstanding fees that were due from similarly situated neighbors of the claimants. We held

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> We conclude that [the claimant's] notice of tort claim was filed within 180 days after the "loss occurred" as required . . . .

City of Lake Station, 558 N.E.2d at 827–28 (emphasis added). The City asserts that that language states that the claimant was required to file the notice of tort claim within 180 days of learning that it was likely that the application would be denied. But the City misreads *City of Lake Station*. Contrary to the City's argument on appeal, our supreme court did not hold that, when the claimant had learned that the application was likely to be denied, the claimant had sustained a loss. Rather, the court simply acknowledged the claimant's diligence in filing its notice of tort claim within 180 days of learning that its application was likely to be denied. *Id.* Indeed, the court expressly clarified that it was not reaching the question of whether the claimant had in fact suffered a compensable loss at that time. *Id.* Thus, the City's reliance on *City of Lake Station* is misplaced.

that, when the claimants learned of the forgiveness, the 180-day clock began to run against them. *Cox*, 20 N.E.3d at 208. That is, the claimants had sustained an injury with their alleged overpayments; the claimants first learned of that injury when they learned that the municipality had forgiven the debt for similarly situated neighbors.

[24] The City relies on *Cox* for the proposition that knowledge of a future injury suffices as a loss under the ITCA. But *Cox* does not stand for that rule, which would be a dramatic shift in our case law. Rather, *Cox* demonstrates that an injury had already been sustained by the claimants, and the ITCA's 180-day clock began once the claimants could have ascertained that sustained injury.

[25] The City also substantially relies on our court's opinion in *Irwin Mortgage* for the argument that ascertainment of a likely, but not yet sustained, injury is enough to start the ITCA's 180-day clock. In *Irwin Mortgage*, an escrow agent missed a property tax payment deadline and made the required tax payment one day late, on May 13. As a matter of law, the agent's failure to make a timely payment subjected it to a 10% penalty, which was in excess of $300,000. *See Irwin Mortg. Corp.*, 816 N.E.2d at 441 (citing Ind. Code Ann. § 6-1.1-37-10(a) (West 2003)). Most notably, Indiana Code section 6-1.1-37-10(a) (2003) stated: "if an installment of property taxes is not completely paid on or before the due date, a penalty equal to ten percent (10%) of the amount of delinquent taxes *shall be added to the unpaid portion* in the year of the delinquency." (Emphasis added.) On July 8, the local treasurer determined the penalty to be $334,150.66, which the agent paid on July 14.

[26] On January 5 of the following year, the agent filed its notice of tort claim with the municipality and sought a refund of the penalty on the ground that the penalty was unconstitutionally excessive and disproportionate. The municipality moved to dismiss the ensuing complaint. In particular, the municipality argued that the agent had failed to comply with the ITCA's 180-day notice requirement. The trial court agreed and dismissed the complaint.

[27] On appeal, we first addressed whether the ITCA applied at all to penalties for late tax payments. *Id.* at 446. After holding that the ITCA did apply, we then addressed whether the agent had acted in substantial compliance with the ITCA's notice requirements. *Id.* at 446–47. We held that the agent had not substantially complied with the ITCA's notice requirements, and, thus, we affirmed the trial court's judgment. *Id.* at 447.

[28] In a footnote, we added:

> [The agent] asserts that the 180-day period should run from the date it paid the tax penalty in July 1997. We disagree. The affidavit from [the agent's] Senior Vice President . . . indicates [the agent] was advised on May 16, 1997, that the Treasurer would assess a penalty for the late payment of property taxes. [The agent] knew its delinquent tax payment was in excess of $3 million and that I.C. § 6-1.1-37-10 provided for the penalty to be 10% of that amount. Therefore, even if the amount of damages could not be precisely fixed on May 16, 1997, [the agent] knew it would be responsible for at least $300,000.00. . . . The 180-day period ran from the time [the agent] learned the penalty would be assessed.

Id. at 447 n.8.

[29] The City relies on the *Irwin Mortgage* footnote to assert that the date the claimant learns of an allegedly illegal assessment is the date the ITCA's 180-day clock begins to run. We cannot agree with the City's reading of *Irwin Mortgage* for two reasons. First, our ITCA-related holdings in *Irwin Mortgage* were with respect to whether the ITCA applied to a claim for a refund from a local government assessment and with respect to whether the facts of that case demonstrated substantial compliance with the ITCA's notice requirements. The footnote relied on by the City was not relevant to those holdings and is dicta.

[30] Second, and critically, contrary to the City's reading, the *Irwin Mortgage* footnote says nothing about ascertainment of future damages. That is, we did not say that the statutory penalty had not yet been sustained by the agent. Indeed, the plain text of the statutory language provided for the penalty to be "added to the unpaid portion" of the taxes that were already due and owing when the penalty was incurred. I.C. § 6-1.1-37-10(a) (2003). Thus, the late penalty at issue in *Irwin Mortgage* was an alleged injury that had already been sustained by the time the agent learned that "it would be responsible" for the penalty on May 16. *Id.* Thus, the City's argument that ascertainment of likely future damages is sufficient to start the ITCA's 180-day clock is unsupported by our case law.

[31] Not only is the City's argument unsupported by our case law, it is also unsupported by the purposes of the ITCA. As our supreme court has made clear, the 180-day requirement "is intended to ensure that government entities have the opportunity to investigate the incident giving rise to the claim and

prepare a defense." *Schoettmer*, 992 N.E.2d at 706. Nothing about the City's novel reading of the ITCA's definition of a loss furthers that purpose. And "so long as its essential purpose has been satisfied," the 180-day requirement "should not function as 'a trap for the unwary.'" *Id.* (quoting *Galbreath*, 253 Ind. at 480, 255 N.E.2d at 229). The City's reading, however, would turn the 180-day requirement into an opportunity for gamesmanship in that it "would permit government bodies to immunize themselves from tort claims" by simply saying on some arbitrary date that an assessment will be due at some future time, thereby starting the ITCA's 180-day clock and turning that requirement into a trap for the unwary. *See City of Lake Station*, 558 N.E.2d at 827. Further, the City's reading would turn the ITCA, which provides a mechanism to recover for tort damages, into a mechanism instead for only declaratory or injunctive relief.

[32] The Landlords did not sustain any damage until March 9, 2015, when they paid the City's registration fees. They filed their notices with the City within 180 days of those payments. Therefore, the trial court erred when it dismissed their complaint as untimely under the ITCA. We reverse the trial court's judgment and remand for further proceedings.

[33] Reversed and remanded.

Tavitas, J., and Weissmann, J., concur.