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## Does Indiana's General Wrongful Death Statute Permit Recovery of Attorney Fees? Court Says, 'Yes'

In this week's installment of the Hoosier Litigation Blog, we return to a statute that we've discussed before—the Indiana General Wrongful Death Statute—but look at it in a much different light. Today we focus on whether a successful litigant can also recover her attorney fees and, if so, how those fees ought to be calculated. We do this through the lens of a case out of the Indiana Court of Appeals this week: *SCI Propane, LLC v. Frederick*. There, the defendants argued that Indiana's General Wrongful Death Statute (the GWDS) provides two distinct types of cases: one that allows attorney fees and one that does not. Perhaps more important is what the court decides is the proper mechanism for calculating reasonable attorney fees.

The case stems from the tragic death and injuries to numerous persons after a gas explosion. After settling claims against one of the defendants, the injured persons and the estate of the deceased individual received a jury verdict in excess of \$27 million. There remained an issue of whether the defendants were liable for the plaintiffs' attorney fees. The trial court ordered that the available attorney fees were not to be calculated by the contingency fee agreement between the plaintiffs and their counsel; rather, the fees were to be calculated based on a reasonable-hourly-rate standard. Another important note is that because only the deceased person's estate could bring an action that even arguably included recoverable

attorney fees, the court reduced the total fees from plaintiffs' attorneys to just the portion attributable to the estate. Further, because the non-settling defendants were only found to be 65% at fault, it was found to only be liable for 65% of the estate's attorney fees.

On appeal, the defendants argued first that the GWDS does not permit recovery of attorney fees in this case and, second, that even if it did, the trial court was wrong to calculate the fees based on a reasonable hourly rate and not on the terms of the contingency agreement between the estate and its attorneys.

The court of appeals began its analysis by discussing the different categories of wrongful death claims in Indiana.

[T]he INDIANA CODE provides a cause of action for a wrongful death. Chapter One of Article 23 is titled "Wrongful Death Generally" and applies to adult decedents. Chapter Two is entitled "Wrongful Death or Injury of a Child" and applies to decedents under the age of twenty [or 23 under certain circumstances]. Chapter One, then, is further divided into two sections. The first section of Chapter One is the GWDS, and the second section is the Adult Wrongful Death Statute ("AWDS"), which applies solely to decedents without dependents. The GWDS, which is at issue in this case, provides as follows:

When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she, as the case may be, lived, against the latter for an injury for the same act or omission. When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within the two (2) years, and the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral, or burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission. That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this article, inure to the exclusive benefit of the widow or widower, as the case may be,

and to the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. *If such decedent depart this life leaving no such widow or widower, or dependent children or dependent next of kin, surviving her or him, the damages inure to the exclusive benefit of the person or persons furnishing necessary and reasonable hospitalization or hospital services in connection with the last illness or injury of the decedent, performing necessary and reasonable medical or surgical services in connection with the last illness or injury of the decedent, to a funeral director or funeral home for the necessary and reasonable funeral and burial expenses, and to the personal representative, as such, for the necessary and reasonable costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, and in case of a death under such circumstances, and when such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees.*

Reading the plain text of the GWDS, defendants argued that it does not allow for attorney fees when the decedent did not leave behind any dependents. The basic argument for the defendants was that the GWDS included two different categories: the non-italicized portion—applying to decedents who are survived by a widow, widower, dependent children, or dependent next of kin—and the italicized portion—applying to decedents without dependents. The Court of Appeals disagreed with defendants' argument “because it ignores the omnibus provision of the first part of the GWDS relating to decedents with dependents.” The “omnibus provision” identified by the court is the portion that states “that the court may award damages ‘including, but not limited to’ damages of the type explicitly delineated.”

In looking to apply the “omnibus provision,” the Court of Appeals looked to the recent *McCabe v. Commissioner Indiana Department of Insurance* from the Indiana Supreme Court. In *McCabe*, the court interpreted a similar provision in the Adult Wrongful Death Statute was ambiguous and, therefore, “subject to statutory construction.” Applying the same reasoning, the court of appeals determined that statutory construction must be conducted on the GWDS as well. Despite citation to numerous prior cases in which attorney fees were awarded under either the GWDS

or the Adult Wrongful Death Statute, the court found that none of the cases were binding and that the issue was open for interpretation because those cases did not specifically address the argument made by the defendants here. Nevertheless, the court found that the GWDS permits attorney fees for both decedents with dependents and decedents without dependents for three reasons: “(1) attorney fees are the ‘type’ of damages contemplated by the statute; (2) such a conclusion comports with our principles of statutory construction; and (3) the Legislature has ‘acquiesced’ to the recoverability of attorney fees.” The court provided discussion for each of these three bases, but for our purposes, we need not go into the details. The important fact is that the court of appeals determined that all successful plaintiffs under the GWDS may recover attorney fees.

This brings us to the defendants’ second argument: whether the calculation of attorney fees must be based on the contingency agreement or a reasonable hourly rate. The text of the GWDS specifically permits for a “*reasonable* attorney’s fee.” So the question then is what constitutes a “reasonable” fee. The defendants argued that the reasonable fee is the amount that was actually paid. Thus, because the estate had agreed to a contingency fee arrangement in which its counsel would advance fees in exchange for recovery of costs and a portion of the recovery made, the estate was limited to recover this amount. The basic reasoning is that attorney fees are to be compensatory in nature and therefore should not place a plaintiff in a better position.

It will be very interesting in the future to see how defendants argue this case. There are certainly instances in which the contingency fee arrangement results in more money to plaintiff’s attorney than an hourly rate would have supplied. This opinion now seems to indicate that whatever the plaintiff must actually pay her lawyer is what she can recover for attorney fees. This will unquestionably be argued by defendants in the future, because a rational defendant will always want to pay the least amount possible.

Join us again next time for further discussion of developments in the law.

### Sources

- *SCI Propane, LLC v. Frederick*, --- N.E.3d ---, No. 55A04-1211-PL-586, 2014 WL 3953303 (Ind. Ct. App. Aug. 13, 2014) (Pyle, J.).
- *McCabe v. Comm’r, Indiana Dep’t of Ins.*, 949 N.E.2d 816 (Ind. 2011) (Dickson, J.).

- Indiana General Wrongful Death Statute, codified at Ind. Code § 34-23-1-1.
- Colin E. Flora, *Indiana Supreme Court: Fraudulent Concealment Tolls Wrongful Death Act Statute of Limitations Period*, HOOSIER LITIG. BLOG (June 7, 2014).

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