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Indiana Supreme Court: Fraudulent Concealment Tolls Wrongful Death Act Statute of Limitations Period

For those of you who read yesterday's post—Indiana Court of Appeals: When Can a Trial Court Change Its Mind?—you will recognize that the post promised a double-dip. I had planned to get two posts up yesterday, but the day managed to get away from me. Nevertheless, not to leave our loyal readers in the lurch, I have devoted my Saturday morning to bringing this installment to you. Let us now turn to today's discussion of the Indiana Supreme Court's decision in *Allredge v. Good Samaritan Home, Inc.*

In a prior installment of the Hoosier Litigation Blog—Wrongful Death Act and Fraudulent Concealment—we examined the decision in this case from the intermediary appellate court. The losing party on appeal, dissatisfied with the court of appeals decision, sought and received transfer of the case to the Indiana Supreme Court. Because the Indiana Supreme Court granted transfer and has subsequently decided the case—as opposed to revoking the grant of transfer and reinstating the appellate decision—the court of appeals decision is no longer good law. This is a function of Indiana Appellate Rule 58(A).

Regular readers will recognize that there are two jurists who garner a great deal of attention on the HLB. The primary reason for this is simply that your

author is a fan of the writing style and approach to examining the issues taken by Seventh Circuit Judge Richard A. Posner and Indiana Supreme Court Justice Mark S. Massa. The *Alldredge* opinion is another fine opinion from Justice Massa with the aid of his highly capable clerks.

The facts and procedural background of the case are necessary to understanding the case. So, even though we tend to avoid delving into the facts whenever possible, we shall take a brief look at how the case made its way to the court of appeals in the first place.

The case begins in November 2006 with an elderly woman—Venita Hargis—who resided at The Good Samaritan Home. The elderly Hargis was prone to falls. Thus, it did not come as a particular surprise when “on November 17, a nurse called one of Hargis's daughters . . . and told her Hargis had suffered a fall, started vomiting a few hours later, and was being transported to the hospital. On November 26, Hargis died as a result of the head injury she sustained in this alleged fall.” If the story stopped there it would be just another tragic loss of a beloved family member. However, three years later in November 2009 a former employee at Good Samaritan told another of Hargis’s daughters that her mother’s head injury was not the result of a fall, but rather the result of an attack by another resident. In December of the following year, an estate was opened for Hargis. Finally, on October 27, 2011, the estate filed a claim against Good Samaritan for the wrongful death of Hargis. Good Samaritan sought dismissal of the case as untimely.

The basic argument was simple: Indiana’s Wrongful Death Act sets a two-year statute of limitations and the case was filed beyond that period. In response, the estate argued that Good Samaritan fraudulently concealed the facts of Hargis’s fatal injuries. Good Samaritan responded that fraudulent concealment was not a basis to extend or toll the statutory period. The trial court, relying on a 1998 court of appeals case—*Southerland v. Hammond*—stating “the fraudulent concealment exception does not establish a new date for the commencement of the statute of limitations, but rather creates an equitable exception’ under which a ‘plaintiff must institute an action within a reasonable time after he discovers information which would lead to discovery of the cause of action,’” found that Hargis’s estate did not have a full two-year period to bring suit after learning of the alleged cause of the injuries, but rather only a reasonable time. Concluding that 23 months exceeded a “reasonable time,” the trial court granted summary judgment in favor of Good Samaritan. Hargis’s estate appealed.

The supreme court succinctly summarized the appellate decision:

The plaintiffs appealed, and the Court of Appeals reversed in part, holding the plaintiffs had two years from the discovery date to file their complaint. The panel concluded the Fraudulent Concealment Statute could not apply to toll the two-year filing period because it was enacted before the Wrongful Death Act, but that common-law fraud could apply. Accordingly, the panel extended our holding in *Van Dusen* (providing a plaintiff who doesn't discover his illness or injury until after the two-year MMA statute of limitation has run has two years from the discovery date to file his claim) to the wrongful death context. Thus, the panel reversed the trial court's grant of summary judgment to Good Samaritan and remanded the case to give the plaintiffs an opportunity to prove common-law fraud.

The first issue for the supreme court was to decide whether fraudulent concealment tolls the wrongful death statute of limitations. If it does then the estate would have the full two-year period to bring suit and there would be no problem; the case could go forward. Good Samaritan argued that the two-year period of the Wrongful Death Act is not a statute of limitations, but rather a condition precedent to filing—that is, a complaint must be filed within two years or the Wrongful Death Act ceases to preserve the claim. An important fact to this argument is that historically, a dead person's claims died with him/her. The only reason that some claims can be brought *post mortem* is because of the Wrongful Death Act and the similar but distinct survivor statutes. There are certainly other statutes that have time limitations that are not statutes of limitations, but rather conditions precedent. For example: the medical malpractice requirement of filing a proposed complaint with the Indiana Department of Insurance, the filing of a tort claims notice prior to suing a governmental entity, and filing a claim with the department of labor prior to filing a case under the wage payment statute. Consequently, if the two-year period really is just a condition precedent then the fraudulent concealment would not toll the statute.

For a moment, let us consider the ramifications of Good Samaritan's argument if it had won the day—spoiler, it did not. Good Samaritan actually argues here that it is permitted to hide the details of an elderly woman's death from her family and so long as Good Samaritan keeps its mouth shut for two years, there is no repercussions for its actions. I completely understand that Good Samaritan and its lawyers need to make the arguments that best suit them on a given day, but when you dig down to the core of the argument you are left with an extremely disturbing realization of what was actually being argued. Then again, the Indiana Supreme Court fairly recently held that an advertisement stating "Sporty Car at a Great Value Price" does not imply that the car is safe to drive. So it is certainly not

out of the question that a business could utilize legal argument to trump common decency.

Returning to the case, the first important step in answering the fraudulent concealment issue was to look at the history of the Wrongful Death Act. As noted above, historically claims died with the person. The change is amazingly well described in the opinion by quoting a law review article from the 1960s:

In a sense it is a novel of the nineteenth century, a story of the new swarming into crowded cities, the travail of the factory and, above all, of the first hurtling of men and goods across the continent on steel rails. Up until this time unnatural death meant largely death by violence in the popular sense of the word. It was the work of the robber, the burglar, or the hot-blooded man. Usually the culprit was executed or confined behind bars. Even if he were left free in society he was usually without any means to compensate the bereaved family of the victim. In this setting, wrongful death was a matter of little concern to the civil law, and lawmen developed no tools for the handling of it. Then, suddenly at mid-century society faced up in panic to a virtually new phenomenon—accidental death through corporate enterprise. Tragedy as a result of indifference and neglect was suddenly upon us in the factory, on the city streets, and on the rails. Nor was the principal villain of the piece any longer the impecunious felon. In his place stood the prospering corporation with abundant assets to meet the needs of widows and orphans.

Indiana created its first iteration of the Wrongful Death Act in 1852. Its most recent form was set in 1998 and now states, “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 two (2) years.” The court of appeals has described this provision as “not a statute of limitations but a condition precedent to the existence of the claim[.]” The task for the Indiana Supreme Court now was to decide whether that was correct.

The next step was to look at the history of the fraudulent concealment doctrine at both common law and in statutes. The court recognized: “For centuries, our justice system has operated under the principle that a person who commits fraud should not be permitted to gain thereby.” Applying this principle to statutes of limitations means that ordinarily the statute is tolled until the wrong is discovered. Then, “the plaintiff has ‘a reasonable amount of time’ to bring his claim.” The concept was incorporated into statutes in the 1840s. Shortly thereafter, “in 1852–

the same year the Wrongful Death Act was enacted—the General Assembly revised the limitation [portion]. . . . [C]ritically, the Fraudulent Concealment Statute was amended to provide: ‘If any person liable to an action shall conceal the fact from the knowledge of the person entitled thereto, the action may be commenced at any time within the period of limitation, after the discovery of the cause of action.’” The amendment expanded the application to all civil actions from a previously defined narrow list of actions.

The language of the 1852 amendment has substantively remained intact. Interpreting the language, the supreme court has found “that when a plaintiff can prove this statute applies, it effectively moves the date on which the statute of limitation begins to run forward from the date of the alleged tort to the discovery date.” Typically to be invoked, the defendant must have utilized “some trick or contrivance intended . . . to exclude suspicion and prevent inquiry.” This approach is altered when there is a fiduciary relationship between the parties in which the defendant has a duty to speak regardless of inquiry and fails to do so.

The third step was then to examine two prior cases that seemed on-point. The first is *Guy v. Schuldt*; holding the Fraudulent Concealment Statute in applicable to the Medical Malpractice Act but claim “could survive under the common-law fraudulent concealment doctrine.” Shortly thereafter, the Supreme Court of the United States decided *Glus v. Brooklyn Eastern District Terminal*. *Glus* was a claim under the Federal Employers’ Liability Act (FELA) seeking recovery for a disease contracted by a worker on the job. FELA, at that time, required the claim be brought within three years. Even though the claim was brought after that time, the employee argued that the employer could not argue the time-bar issue “because it incorrectly had told him he had seven years to sue.” The legendary Justice Hugo Black wrote, “To decide the case we need look no further than the maxim that no man may take advantage of his own wrong.” The court summarized the insight of these two cases:

Taken together, *Guy* and *Glus* make clear that neither an ordinary statute of limitation nor a temporal condition precedent will bar a plaintiff’s claim when the delay in filing was due to the tortfeasor’s fraud. *Guy* tells us that if the legislature intends to create a time limitation that will not be tolled by fraud, it must do so expressly. *Glus* adds that courts should presume fraud will toll any time period, be it statute of limitation or condition precedent, and the burden is on the tortfeasor to demonstrate contrary legislative intent.

The ultimate conclusion of the court: “Based upon our review of the historical and precedential records, we conclude that if a plaintiff makes the necessary factual showing, the Fraudulent Concealment Statute may apply to toll the Wrongful Death Act's two-year filing period.” Though the result is the same as the court of appeals’s decision, the decision isn’t. The court of appeals limited the basis for reversing the trial court to application of the common law doctrine of fraudulent concealment. The supreme court, however, found that there was no need to even get to the common law doctrine; the Fraudulent Concealment Statute was applicable.

The court further buttressed its conclusion by explaining the perils of an alternate result:

Public policy considerations further bolster our conclusion. Were we to hold otherwise, we would be incentivizing fraud and thus thwarting the obvious purpose of the Fraudulent Concealment Statute. And our decision today is consistent with that of courts in other jurisdictions, which have routinely found fraud may toll a statutory filing period even when it is a condition precedent to the existence of the claim rather than a statute of limitation.

A parting note. I think it necessary to recognize how well written this opinion was. Both Judge Posner and Justice Massa opinions stem from authors that are clearly well read. The opinions have a flow to them that is not bogged down by the typical dry and lifeless prose of judicial opinions. Instead, the opinion starts with an interesting opening paragraph:

Nearly two centuries ago, Justice Stephen C. Stevens observed: “the wisest of judges have had much trouble in wading through the labyrinth of difficulties, discriminations, technicalities and shades that have gathered around the statute of limitations.” *Raymond v. Simonson*. Although the case before us concerns the statutory filing period of a non-claim statute rather than a statute of limitation, we find Justice Stevens’s metaphor equally applicable here, where plaintiffs appeal the trial court's determination that their wrongful death claim was untimely filed. Ultimately, we navigate this labyrinth and conclude we must reverse the trial court.

The case also drops a footnote discussing the trials and tribulations of the life of Justice Stevens. Another fine example is that there is a section title that is masterfully titled “The Way Out of the Labyrinth.” One last example:

Just as time captures insects in amber, the General Assembly captured the common-law fraudulent concealment doctrine in statute[.]

In short, the author—likely a combination of the efforts of Justice Massa and his clerks—has produced an opinion that not only embodies good law and sound legal reasoning, but also is mindful of its reader. As compared to run-of-the-mill opinions, it is like a Pink Floyd album to Cheap Trick album. Both may be fine compilations, but *The Dark Side of the Moon* is going to take you on a journey, *Dream Police* is just a collection of songs. My hat's off to Justice Massa, his staff, and the Indiana Supreme Court for this one.

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

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