

Court of Appeals Disagrees over Availability Attorney Fees under Adult Wrongful Death Statute

8.18.2010

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Less than a month ago, we brought you this report about *McCabe v. Commissioner, Ind. Dept. of Insurance*, a split-decision by the Indiana Court of Appeals, which held that attorney's fees were not authorized under the Adult Wrongful Death Statute ("AWDS"), Indiana Code § 34-23-1-2. As we described in our prior post, *McCabe* recognized that it expressly disagreed on this issue with the decision in *Hillebrand v. Supervised Estate of Large*, 914 N.E.2d 846, 848 (Ind. Ct. App. 2009), a decision penned by the dissenting judge in *McCabe*. Today, a separate panel of the Indiana Court of Appeals reached precisely the opposite conclusion in *Hematology-Oncology of Indiana, P.C. v. Fruits*, Case No. 49A05-0910-CV-556.

This panel recognized that the Wrongful Death Statute ("WDS"), Indiana Code § 34-23-1-1, allows for attorney's fees and that the ADWS does not prohibit attorney's fees.

The WDA and the AWDA are not in conflict, and they can easily be read in harmony. Both statutes explicitly apply to actions for the wrongful death of adult persons who have no dependents when they die. The WDA explicitly permits recovery of attorney's fees; the AWDA explicitly prohibits only two categories of damages, damages for grief and punitive damages, We hold the legislature did not intend that the AWDA implicitly take away a category of damages explicitly permitted in the WDA.

The Court referred to and relied upon the decision in *Hillebrand* and, in a footnote, stated that it disagreed with the decision in *McCabe*.

We don't have much analysis that we can provide at this point. This is an issue which the Indiana Supreme Court will surely deal with soon. Until then, litigants should be aware of each of these decisions and, when necessary, describe why a trial court should rely on one, instead of the other.



Lessons:

1. There is no clear appellate authority on the issue of whether attorney's fees should be awarded under the Adult Wrongful Death Statute. Expect the Indiana Supreme Court to grant transfer to address this issue soon.



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