

# Trial Law TIPS

Roy D. Wasson's  
TIP #37

**ROY D. WASSON** is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

## The Plaintiff Dies Before Trial—Now What?

### Introduction

The telephone call comes from the husband or wife of your personal injury client whose trial has been set and discovery is ongoing. “No,” he or she explains, this is not another call asking about the status of the case. Instead, it is the heartbreaking news that your client has died.

Of course you feel like you have lost a relative because, over the last several months, you have gotten to know your client and his or her family as well as you know some of your own relatives, if not better.

After the initial shock and grief have subsided somewhat, final arrangements have been made, and you have paid your respects, the question arises (whether coming from the family or

within your own thinking) of “what does this do to the ‘the case’?” The answer usually depends upon the cause of your client’s death.

### **Cause of Death Unrelated to Defendant’s Negligence**

Under the common law, a cause of action for personal injury was extinguished upon the death of the Plaintiff and could not be prosecuted by the Plaintiff’s personal representative or survivors. *See, e.g., Taylor v. Orlando Clinic*, 555 So. 2d 876 (Fla. 5<sup>th</sup> DCA 1989). However, that common law doctrine has been overridden by § 46.021 Fla. Stat. (2002), which states: “No cause of action dies with the person. All causes of action survive and maybe commenced, prosecuted, and defended in the name of the person prescribed by law.”

That survival statute permits continuation of the original personal injury action, however, only in the situation where the death was caused by something other than the negligence of the Defendant in the personal injury action. *See, e.g., Niemi v. Brown & Williamson Tobacco Corp.*, No. 2d 03-2600, 2003 Fla. App. LEXIS 14352 (Fla. 2d DCA 9/24/03). Your task in ascertaining whether there was a causal connection is more than a medical issue.

Of course, compounding the tragedy to the Plaintiff’s survivors, the death of the Plaintiff from causes unrelated to the Defendant’s negligence will cut off future damages and greatly decrease the value of the personal injury cases that are measured by settlement value or anticipated verdict. If there had been an existing claim for punitive damages against the Defendant, that claim survives your client’s death because the purpose of punitive damages is to punish the tortfeasor. *See Atlas Properties, Inc. v. Didich*, 226 so. 2d 684 (Fla. 1969). But the measure of compensatory damages is reduced.

### **Procedure for Substitution of Parties**

After the death of your client from causes unrelated to the Defendant’s negligence, you should substitute the personal representative to litigate the surviving personal injury claim. Fla. R. Civ. P. 1.260(a)(1) provides: “If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties.” Use caution in calendaring deadlines to substitute the

personal representative. “Failure to react in a timely fashion to a litigant’s death may lead to the lawyer becoming the next target.” Raymond T. Elligett, Jr. and Amy S. Fariior, *Trial Lawyers Forum: Time Waits for No One: The Death of a Litigant*, 76 Fla. Bar. J. 55 (Nov. 2002)(hereinafter “Time Waits for No One”).

While there is not a time deadline for the Defendant or for you to inform the trial court that your client has died, once the fact of death has been established of record, there is a firm deadline for substituting the personal representative. “Unless the motion for substitution is made within 90 days after the death is suggested upon record by service of a statement of the fact of death in the manner provided for the service of the motion, the action **shall be dismissed** as to the deceased party.” Fla. R. Civ. P. 1.260 (a)(1)(emphasis added).

That time deadline runs from the date of filing of the Suggestion of Death, and not from the date of service of the Suggestion. *See Wilson v. Clark*, 414 So. 2d 526, 530 (Fla. 1<sup>st</sup> DCA 1982). That distinction may be critical, because the Plaintiff does not enjoy the additional five-day period for taking action following receipt of a Suggestion of Death which is served by mail.

If difficulties arise appointing a PR, move for an extension of time. “If a party is unable to procure substitution of the parties within the 90 days, that party may move for an enlargement of time pursuant to Fla. R. Civ. P. 1.090(b), or it may seek relief based on a showing of excusable neglect pursuant to Fla. R. Civ. P. 1.540(b).” *Time Waits for No One, supra* at 55 (citing *Kash n’ Karry Food Stores, Inc. v. Smart*, 814 So. 2d 530 (Fla. 2d DCA 2002) and other authorities).

## Deaths Resulting from the Defendant’s Negligence

When your client’s death resulted from the negligence which is the subject of your pending lawsuit against the Defendant, the situation is controlled by § 768.20 Fla. Stat. (2002), which provides that “when a personal injury to the decedent results in death, no action for the personal injury shall survive, and any such action pending at the time of death shall abate.” Instead you should identify the statutory survivors who may support a claim for

wrongful death. “Thus, when death is the result of a personal injury, the law of Florida essentially substitutes a statutory wrongful death action for the personal injury action that would otherwise survive under Section 46.021.” *Niemi, supra* at \*4.

Should it be apparent that your client’s death was caused by the Defendant’s negligence, the Defendant may file a motion to dismiss your personal injury case based on the argument that the cause of action for personal injury automatically abates upon death, and a new lawsuit needs to be filed for wrongful death. However, instead of dismissing your lawsuit in such a situation, the trial court should permit you to have a reasonable time to obtain appointment of a personal representative and to substitute the PR as the Plaintiff. “A pending lawsuit does not simply self-destruct like the secret message on a re-run of ‘Mission Impossible.’” *See Niemi, supra* at \*5.

### Uncertainty as to Cause of Death

Sometimes circumstances require an in-depth investigation into the cause of your client’s death. There may be situations in which it is arguable that the death was or was not caused by the Defendant’s negligence, and issues concerning recoverable damages—such as the existence or non-existence of statutory “survivors” in a wrongful death action—require circumspection about alleging one approach or the other. In such a case, you should amend your pleadings (after substitution of the personal representative) to plead in the alternative:

It is not uncommon for a plaintiff in a lawsuit to be uncertain whether the alleged personal injury resulted in death. . . . When this issue is unresolved, the law permits a plaintiff to allege alternative theories. *See Smith v. Lusk*, 356 So. 2d 1309 (Fla. 2d DCA 1978); *Poole v. Tallahassee Memorial Hosp.*, 520 So. 2d 627 (Fla. 1<sup>st</sup> DCA 1988).

*Niemi, supra* at \*5. The jury may ultimately have to decide which sort of claim the family has remaining. The possibility of alternative verdicts may keep the settlement value higher.

## Statutory Causes of Action

Where your claim for personal injuries was based upon a statutory cause of action, and not simply based upon a common law theory of negligence, the statute may permit you to recover statutory personal injury-type damages without being limited to the relief under the Wrongful Death Act, even in the circumstance where the Defendant's negligence did result in your client's death. In *Florida Convalescent Centers v. Somberg*, 840 So. 2d 998 (Fla. 2003), the Court held that the Florida Nursing Home Act permitted recovery for the decedent's pain and suffering and that the plaintiff was not limited to pursuing a wrongful death action. Applying the 1997 version of the Nursing Home Act,<sup>1</sup> the Court held as follows:

Notably, section 400.023(1) specifically states that a claimant will be entitled to recover actual and punitive damages for any violation of the rights of a nursing home resident. Moreover, as noted by the Fifth District in *Spilman*, the Legislature not only included broad provisions for damages in chapter 400, but expressly stated that ***these statutory damages were authorized in addition to any other remedies that already existed***. Furthermore, there is no reference in chapter 400 to the Wrongful Death Act or any other indication that the damages contemplated by or recoverable under section 400.023(1) are to be limited to those listed in the Wrongful Death Act. Thus, a cause of action brought under section 400.023(1) constitutes an independent cause of action with its own set of statutory damages.

If the Legislature had intended for the Wrongful Death Act to control damages available in a personal representative's action against a nursing home, it could have very easily provided for the application of the provisions of the Wrongful Death Act in chapter 400. See *St. Mary's Hospital, Inc. v. Phillipe*, 769 So. 2d 961, 973 (Fla. 2000) (stating that "if the Legislature intended for the Wrongful Death Act to control the elements of damages available in a medical malpractice arbitration" it could have

provided for the application of the Wrongful Death Act to the Medical Malpractice Act). Logically, if the Legislature had intended for the Nursing Home Act to be limited by the Wrongful Death Act, it would have said so, rather than broadly providing not only damages but also for a persona representative to claim those damages.

Accordingly, a plain reading of section 400.023(1) indicates that the damages provided for are not limited by the Wrongful Death Act. Thus, we hold that based on the plain language of section 400.023(1), the damages recoverable in a cause of action brought under that section are not limited by the Wrongful Death Act.

*Id.* at 1000-01 (emphasis added).

Thus, before substituting a wrongful death claim for your existing personal injury claim, take a look to see if there are any applicable statutory provisions permitting you to continue the personal injury claim.

## Conclusion

In addition to the pain and disruption to the lives of your client's family members "[d]eath creates a complexity for pending personal injury actions." *See Niemi, supra* \*4. Once you have assisted the family in making the transition to life without their father or mother or child, investigate the cause of death, take a look at the facts and law concerning measurable damages, and proceed appropriately to obtain just compensation for the survivors. Death is difficult, but we have to . . .

***Keep Tryin!***

***Roy***

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<sup>1</sup> The Supreme Court in *Somberg* noted that "In 2001, the Legislature substantially revised § 400.023(1)."