



## Medical Malpractice Update

Tammera E. Banasek and Matthew H. Brandabur  
HeplerBroom LLC, Chicago

### Until Death Do Us Part... The Impact of a Plaintiff's Death During Litigation

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Practitioners usually face cases where they reasonably expect the health of a party to remain the same throughout the pendency of a lawsuit. An important, and sometimes overlooked, aspect of a litigation strategy is the long-term health of a party, or a key witness, which is a significant factor when considering both discovery and trial strategies.

The first strategic aspect to consider is the type of claim filed and how it may change moving forward, as it may affect the applicable statute of limitations or the damages available. A cause of action that begins as a claim for medical malpractice by the patient can evolve into a survival action or a claim for wrongful death. *See* 755 ILCS 5/27-6; *see also* 740 ILCS 180/1. In the event a plaintiff dies in the course of litigation, the decedent's estate may step in and continue the suit on behalf of the decedent under the Illinois Survival Act (Survival Act). 755 ILCS 5/27-6. Actions for negligence generally survive death, including actions for medical malpractice. *Fountas v. Breed*, 118 Ill. App. 3d 669 (1st Dist. 1983). The Survival Act does not create a cause of action, but rather allows a representative of the decedent to continue an existing cause of action after the decedent's death. *Wyness v. Armstrong World Industries, Inc.*, 131 Ill. 2d 403, 410-11 (1989). Damages available include medical expenses, lost earnings, and pain and suffering. *See* *Murphy v. Martin Oil Co.*, 56 Ill. 2d 423 (1974); *Varelis v. Northwestern Memorial Hosp.*, 167 Ill. 2d 449 (1995). Importantly, however, damages for pain and suffering are only available through the date of death. *See, Murphy*, 56 Ill. 2d at 431. The estate receives any damages recovered directly and distributes the funds as necessary, including to potential creditors. *Nat'l Bank of Bloomington v. Norfolk & W. Ry. Co.*, 73 Ill. 2d 160, 182 (1978). The Survival Act does not compensate heirs or the estate for damages suffered by those other than the decedent. *Compare* *Murphy*, 56 Ill. 2d 423, *with In re Estate of Finley*, 151 Ill. 2d 95, 101 (1992) (illustrating the distinction between damages available under the Survival Act and the Wrongful Death Act).

If a plaintiff dies, whether before or after commencement of litigation and the cause of death was the defendant's alleged underlying negligence, heirs and the estate may sue for damages they suffer through an action under the Illinois Wrongful Death Act (Wrongful Death Act). 740 ILCS 180/1. The damages available vastly differ from those under the Survival Act and include pecuniary injuries, often including the loss of economic support, services, and grief, sorrow and/or mental suffering. *In re Estate of Finley*, 151 Ill. 2d at 101.

Second, practitioners should consider the impact of the death of any party or key witness on discovery strategy. Counsel must consider the competence and availability of potential witnesses and adjust the discovery schedule and its level of importance appropriately. Evidence depositions should be considered if the health of a key defense witness is at issue. Further, if a death occurs, counsel must assess how it may affect the case value and trial strategy, including trial testimony. For example, an assessment of whether the Dead-Man's Act and any exceptions apply can be critical, as it can force parties to search for additional witnesses without a direct interest in the case to provide crucial corroborating testimony as to events that occurred in a decedent's presence. 735 ILCS 5/8-201. In the event you represent a decedent

and may invoke the Dead-Man’s Act, you must carefully consider whether you may elicit testimony that opens the door to unfavorable testimony.

A common scenario entails a claim filed under the Survival Act following the death of a litigant during discovery or trial. The Illinois Appellate Court, First District, recently encountered a similar scenario involving the impact of the death of a plaintiff at trial in the *Estate of Turner v. Mercy Hospital & Medical Center*, 2018 IL App (1st) 162219. The *Turner* opinion details the significance of the timing of the death of a party and its impact on the available damages. In *Turner*, plaintiff filed a medical negligence action against Mercy Hospital and alleged its nurses and physicians failed to diagnose an occluded tracheostomy tube, which caused respiratory arrest and permanent brain damage. *Turner*, 2018 IL App (1st) 162219, ¶ 1. Two days before closing arguments, counsel for plaintiff advised the court that his client fell and sustained an injury that required brain surgery. *Id.* ¶ 28. Plaintiff’s counsel moved to have a guardian appointed, and the jury was not advised about the fall or subsequent injuries. *Id.*

Following closing arguments and submission of the case to the jury, plaintiff passed away. *Id.* The hospital-defendant’s motion for mistrial was denied and plaintiff’s counsel spread Ms. Turner’s death of record and appointed her daughter administrator of the estate. *Id.* Thereafter, the jury returned its verdict in favor of plaintiff for \$22,185,598.90. The verdict included \$15,007,965.68 in future damages. *Id.* The hospital defendant proceeded to file a post-trial motion to vacate the future damages award. *Id.* ¶ 29. The trial court denied the motion and the hospital-defendant appealed. *Id.*

On appeal, defendant argued that the case became an action under the Survival Act once an administrator was named, which limited the relief a jury could award. *Id.* ¶ 49. Specifically, the hospital-defendant argued that plaintiff was not entitled to future damages because Ms. Turner died before the jury reached its verdict. *Id.* ¶ 47. At the outset, the court dismissed plaintiff’s argument that the hospital-defendant failed to preserve any error related to the issue of future damages. *Id.* ¶ 48. The appellate court found the hospital could only challenge the future damage award in a post-trial motion after the jury rendered its verdict, not sooner. *Id.* The plaintiff did not dispute the available damages under the Survival Act, but countered that since the case was submitted to the jury when she died, it was not a survival action and post-submission events should not alter the judgment. *Id.* ¶ 50.

The appellate court addressed the timing of plaintiff’s death, finding that future damages are only available up to the date of death. *Id.* ¶¶ 49, 52-54. The court found support in its decision from general tort damages principles, that “compensatory damages are intended to compensate plaintiffs, not to punish defendants.” *Id.* ¶ 54 (*citing Wills v. Foster*, 229 Ill. 2d 393, 401 (2008)). The court held it would “run afoul of this principle if [it] allowed [Ms. Turner’s] estate to collect an award for injuries [Ms. Turner] will no longer suffer. *Turner*, 2018 IL App (1st) 162219, ¶ 54. The court vacated the entire future damages award in the amount \$15,007,965.68. *Id.* ¶ 61. However, the court further held that the hospital-defendant was not entitled to vacate the \$2.5 million verdict for disfigurement damages because the defendant objected to the verdict form plaintiff tendered at trial, which delineated past and future disfigurement. *Id.* ¶ 55.

Notably, the court held that if plaintiff “died even one minute after the jury returned a verdict, Mercy would have been liable for the full amount of future damages.” *Id.* ¶ 53.

### Practical Considerations

The *Turner* case, albeit an uncommon scenario, illustrates the immense impact the death of a party may have in the litigation process. The risk of the death of a party to litigation is always present, though practitioners can often assess when the risk may be greater due to the health of a party or the potential length of the litigation process. The *Turner*



decision reinforces the need for a comprehensive litigation plan from initial pleadings through trial. An evaluation of the impact of the death of a litigant at each stage of litigation is critical. In light of these risks, counsel may consider several practical considerations, including:

- Timing of party depositions and the impact of death before or after deposition of the party;
- Consideration of the need for evidence depositions to preserve the testimony of key defense witnesses;
- The application of the Dead-Man's Act, including any exceptions; and
- Adjustments to damages and trial strategy, including future damage claims and jury instructions in light of *Turner* and the Survival Act.

### About the Authors

**Tammera E. Banasek** is a senior associate in the Chicago office of *HeplerBroom LLC*. Her practice focuses on the defense of medical /dental malpractice and other healthcare related litigation. She is a 1993 *cum laude* graduate of The John Marshall Law School.

**Matthew H. Brandabur** is an associate at *Hepler-Broom LLC*. Mr. Brandabur is a 2010 graduate of the University of Illinois at Urbana-Champaign and a 2013 graduate of the Valparaiso University School of Law. He focuses his practice on the defense of professional liability actions.

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