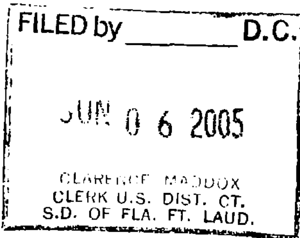

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-7545-CIV-ZLOCH

RICHARD COTTONE, as Personal Representative of the Estate of PETER ANTHONY COTTONE, JR., and PETER COTTONE, SR.,

Plaintiffs,

vs.

O R D E R

KENNETH C. JENNE, II, individually and in his official capacity as Sheriff of Broward County, Florida, et al.,

Defendants.
_______________________________/

THIS MATTER is before the Court upon Defendant Broward County Board of County Commissioners' Motion For Summary Final Judgment (DE 159) and Defendants Andrew Perfilio, M.D., Maurice Waldman, M.D., Elma McKenzie, L.P.N., and EMSA Correctional Care, Inc.'s Motion For Summary Judgment (DE 169). The Court has carefully reviewed said Motions and the entire court file and is otherwise fully advised in the premises.

I. Summary Judgment Standard

The Court notes that under Rule 56(c), summary judgment is proper

> . . . if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine

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> issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c). The party seeking summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Indeed, "the moving party bears the initial burden to show the district court, by reference to materials on file, that there are no genuine issues of material fact that should be decided at trial. Only when that burden has been met does the burden shift to the non-moving party to demonstrate that there is indeed a material issue of fact that precludes summary judgment." Clark v. Coats & Clark, Inc., 929 F.2d 604, 608 (11th Cir. 1991).

The moving party is entitled to "judgment as a matter of law" when the non-moving party fails to make a sufficient showing on an essential element of the case to which the non-moving party has the burden of proof. Celotex Corp., 477 U.S. at 322; Everett v. Napper, 833 F.2d 1507, 1510 (11th Cir. 1987). In other words, the standard for granting summary judgment is the same as the

standard for granting a directed verdict. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The appellate courts generally, therefore, will affirm the granting of summary judgment if on any part of the prima facie case there would be insufficient evidence to require submission of the case to a jury. Id. at 252-256; Barnes v. Southwest Forest Industries, Inc., 814 F.2d 607, 609 (11th Cir. 1987). The evidence of the non-movant is to be believed, however, and all justifiable inferences are to be drawn in his or her favor. Anderson, 477 U.S. at 255; Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970); Barnes, 814 F.2d at 609; Borg-Warner Acceptance Corp. v. Davis, 804 F.2d 1580, 1582 (11th Cir. 1986). Where the moving party properly supports its motion for summary judgment, "the nonmoving party may not rest upon the mere allegations or denials of its pleadings, but must, through affidavits or as otherwise provided in Federal Rule of Civil Procedure 56, designate specific facts showing that there is a genuine issue for trial." L.S.T., Inc. v. Crow, 49 F.3d 679, 684 (11th Cir. 1995) (internal quotations and citations omitted). If the non-movant fails to respond to a summary judgment motion, however, summary judgment will be entered against that party only "if appropriate." FED. R. CIV. P. 56(e); see also Kinder v. Carson, 127 F.R.D. 543, 545 (S.D.Fla. 1989) (clear implication of "if appropriate" is that

summary judgment may not be appropriate even if non-movant fails to respond). For summary judgment to be appropriate when the non-movant fails to respond, "the record *must* support summary judgment as a matter of law, irrespective of whether the non-movant has filed an opposing memorandum. Kinder, 127 F.R.D. at 545.

II. Broward County Board of County Commissioners' Motion

Upon review of the instant Motion For Summary Final Judgment (DE 159) and the entire court file herein, the Court finds that there exist genuine issues of material fact which preclude entry of judgment as a matter of law. For example, the Court notes that it is clear that municipal liability pursuant to 42 U.S.C. § 1983 may not be based on a theory of respondeat superior, City of Canton v. Harris, 489 U.S. 378, 385 (1989), and that a county is "liable under section 1983 only for acts which [the county] is actually responsible." Marsh v. Butler County, 268 F.3d 1014, 1027 (11th Cir. 2001). To establish that a county is actually responsible, a plaintiff must identify either "(1) an officially promulgated county policy or (2) an official custom or practice of the county shown through repeated acts of a final policymaker for the county." Grech v. Clayton County, Georgia, 335 F.3d 1326, 1329 (11th Cir. 2003) (citation omitted). Whichever avenue

the plaintiff chooses, he "(1) must show that the local governmental entity, here the county, has authority and responsibility over the governmental function and (2) must identify those officials who speak with final policymaking authority for that local governmental entity concerning the act alleged to have caused the particular constitutional violation in issue." Id. at 1330.

The Court notes that during his deposition (DE 207, Ex. C), County Commissioner John Rodstrom stated that "the County Commission and the taxpayers will always be responsible ultimately for anything that happens with the jail, financially and otherwise." DE 207, Ex. C, p. 18. He also repeatedly stated that he was unaware of any complaints or official reports calling into question the practices of running the jails. Id. pp. 20, 21, and 22. Plaintiffs allege, however, that there were numerous reports filed that could have had the effect of making the Broward County Board of County Commissioners aware of Constitutionally violative conduct, and possibly triggered the Board's duty under Florida Statutes chapter 951.06 to take adverse action against the official selected by the Board to oversee the County's prisons. See DE 183, pp. 7-8; see also DE 180, Exs. H, I, J, K, L, M. In other words, what the Board was

aware of regarding possible unconstitutional practices in the jails, and when they were aware if it, create an issue of material fact.

III. The EMSA Defendants' Motion

Upon review of the instant Motion For Summary Judgment (DE 169) and the entire court file herein, the Court again finds that there exist genuine issues of material fact which preclude entry of judgment as a matter of law. For example, the Court notes that in the instant Motion (DE 169), the EMSA Defendants characterize Widnel Charles' behavior in the days before the murder of Peter Cottone as seemingly "under control" thereby arguing that Andrew Perfilio, M.D., Maurice Waldman, M.D., Elma McKenzie, L.P.N. were not the cause of a deprivation of Peter Cottone's Constitutional rights because they did not disregard any known risk to him. DE 169, p. 6. This type of factual characterization however, is the type that the Court may not make at the summary judgment stage, particularly when that characterization is contradicted by the non-moving party. See DE 183, pp. 1-3, 14-21; see also DE 180, Exs. CC, FF, GG, and HH.

In sum, considering these factors in light of the evidence presented, or lack thereof, leads the Court to conclude that genuine issues of material fact exist and that the record at this

time does not support the granting of summary judgment as a matter of law. See Kinder, 127 F.R.D. at 545 (record must support granting of summary judgment); see also FED. R. CIV. P. 56(e) advisory committee's notes ("Where the evidentiary matter in support of the motion does not establish the absence of a genuine issue, summary judgment must be denied even if no opposing evidentiary matter is presented.").

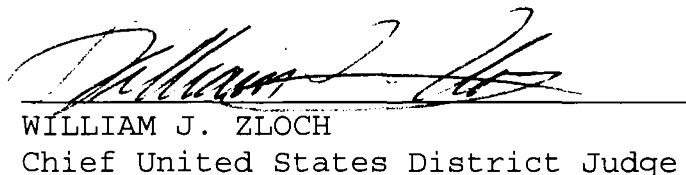
Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Defendant Broward County Board of County Commissioners' Motion For Summary Final Judgment (DE 159) be and the same is hereby **DENIED**; and

2. Defendants Andrew Perfilio, M.D., Maurice Waldman, M.D., Elma McKenzie, L.P.N., and EMSA Correctional Care, Inc.'s Motion For Summary Judgment (DE 169) be and the same is hereby **DENIED.**

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this 6th day of June, 2005.



WILLIAM J. ZLOCH
Chief United States District Judge

Copies furnished:

All counsel of record