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, et al.,

Defendants.

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THIS MATTER is before the Court upon Defendants Andrew Perfilio, M.D., Maurice Waldman, M.D., Elma McKenzie, L.P.N., and EMSA Correctional Care, Inc.'s Motion To Limit Damages (DE 358) and Defendants Kenneth C. Jenne, II, Joseph D'Elia and George Williams' Motion To Apply Damages Provisions Of The Florida Wrongful Death Act (DE 359). The Court has carefully reviewed said Motions and the entire court file and is otherwise fully advised in the premises.

I. Background

The above-styled cause arises from the death of Peter Anthony Cottone, Jr. (hereinafter "Cottone") while he was being held as a pre-trial detainee at the North Broward Detention Center on April 7, 1999. Cottone died after being choked with shoelaces by fellow inmate, Widnel Charles. At the time of his death, Cottone was 49 years old, had never married, and had no children. See DE 358, Ex. A, pp. 9, 15. This action was initiated by Cottone's father, Peter Cottone, Sr., and Richard Cottone as the representative of Cottone's estate. See DE 83, ¶¶ 7-9. The currently operative Complaint is Plaintiffs' Amended Complaint (DE 83) wherein Plaintiffs state causes of action against

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multiple Defendants pursuant to 42 U.S.C. § 1983 and the Fourth, Fifth, Eighth, and Fourteenth Amendments of the United States Constitution. Plaintiffs allege, in essence, that each Defendant acted with deliberate indifference to a known substantial risk of harm to Cottone while he was incarcerated.

On February 18, 2002, Peter Cottone, Sr. died, and the Cottone family subsequently had Richard Cottone named as representative of his estate. By prior Order (DE 122), the Court substituted Richard Cottone, as Executor of the estate of Peter Cottone, Sr., for Peter Cottone, Sr. as a Plaintiff in the above-styled cause.

In the instant Motions (DE Nos. 358 and 359), Defendants aver that the Florida Wrongful Death Act, Florida Statutes §§ 768.16-768.26 (2005) (hereinafter the "Wrongful Death Act" or the "Act") should constitute the sole measure of damages available in the above-styled cause. Defendants argue, in essence, that federal law does not provide a sufficient mechanism for determining available damages, and that the Act should therefore provide the sole measure of damages because its terms are not inconsistent with the purpose and meaning of federal statutory and Constitutional law. Plaintiffs oppose using the Wrongful Death Act as the measure of damages. In support of this opposition, they state that they are seeking compensatory damages for pain and suffering and the loss of life of Cottone, and the pain and suffering of Peter Cottone, Sr. arising from the death of his son. They argue that the law of the United States Court of Appeals for the Eleventh Circuit mandates that these damages be made available in § 1983 cases like the above-styled cause. Plaintiffs further aver that because the Act does not allow for the aforementioned damages in the circumstances that currently

make up this case, federal common law must be considered as a source for the measure of damages available.

II. Analysis

The Court notes that its jurisdiction over an action brought pursuant to 42 U.S.C. § 1983

> . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

42 U.S.C. § 1988 (2003). The above-stated statutory test for determining the appropriate law governing various aspects of § 1983 actions has been succinctly stated as follows:

> First it must be decided whether the federal civil rights framework is deficient in furnishing the appropriate rule. If that question is answered affirmatively, the courts must then look to the pertinent state law to fill the vacuum. Finally, the state law must be disregarded in favor of federal common law if the state law is inconsistent with the meaning and purpose of the federal statutory and constitutional law.

Heath v. City of Hialeah, 560 F. Supp. 840, 841 (S.D. Fla. 1983).

The Court first notes that it is axiomatic that "one specific area not covered by federal law is that relating to 'the survival of civil rights actions under § 1983 upon the death of either the plaintiff or defendant.'" Robertson v. Wegmann, 436 U.S. 584, 589 (1978) (quoting Moor v. County of Alameda, 411 U.S. 693, 702 (1973)); see also Heath 560 F. Supp. at 842 ("The cases uniformly agree that the civil rights laws are facially deficient in

providing rules of survivorship."). The rules of survivorship are implicated in the above-styled cause because the action is presently maintained only by Richard Cottone as the personal representative of the party who suffered the Constitutional violation, namely Cottone, and as the personal representative of the estate of his father, Peter Cottone, Sr., who was himself originally a Plaintiff in the above-styled cause. Based on the deficiency in federal law regarding survival of § 1983 claims, the Court finds that the exercise of its jurisdiction over Plaintiffs' claims shall take place within the analytical framework of § 1988, and that it is appropriate to look to Florida law to cure this deficiency.

The Wrongful Death Act fits squarely in the gap existent in federal law regarding survival of § 1983 claims. Florida passed the Act "to shift the losses resulting when wrongful death occurs from the survivors of the decedent to the wrong doer." FLA. STAT. § 768.17 (2005). The Act, therefore, is an example of a survival statute of the type discussed in Robertson "intended to modify the simple, if harsh, 19th-century common-law rule: '[A]n injured party's personal claim was [always] extinguished . . . upon the death of either the injured party himself or the alleged wrongdoer.'" Robertson, 436 U.S. at 589 (quoting Moor, 411 U.S. at 702 n. 14). The Act assures this remedy to survivors by providing that

> [w]hen the death of a person is caused by the wrongful act [or] negligence . . . of any person, . . . and the event would have entitled the person injured to maintain an action and recover damages if death had not ensued, the person . . . that would have been liable in damages if death had not ensued shall be liable for damages as

> specified in this act notwithstanding the death of the person injured.

FLA. STAT. § 768.19 (2005). The "survivors" who may hold those persons liable are defined as "the decedent's spouse, children, parents, and when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters." FLA. STAT. § 768.19 (2005).

The Act, in pertinent part, provides that the following damages may be awarded to survivors of a decedent:

> (1) Each survivor may recover the value of lost support and services from the date of the decedent's injury to her or his death, with interest, and future loss of support and services from the date of death and reduced to present value. . . .
>
> (2) The surviving spouse may also recover for loss of the decedent's companionship and protection and for mental pain and suffering from the date of injury.
>
> (3) Minor children of the decedent, and all children of the decedent if there is no surviving spouse, may also recover for lost parental companionship, instruction, and guidance and for mental pain and suffering from the date of injury. . . .
>
> (4) Each parent of a deceased minor child may also recover for mental pain and suffering from the date of injury. Each parent of an adult child may also recover for mental pain and suffering if there are no other survivors.[1]
>
> (5) Medical or funeral expenses due to the decedent's injury or death may be recovered by a survivor who has paid them.
>
> (6) The decedent's personal representative may recover for the decedent's estate the following:
> (a) Loss of earnings of the deceased from the date of injury to the date of death . . .

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1 This subsection was amended on October 1, 1990 to allow for recovery by parents of adult children. Prior to that amendment, the Act only allowed for recovery for mental pain and suffering by parents of minor children.

> (b) Medical or funeral expenses due to the decedent's injury or death that have become a charge against her or his estate or that were paid by or on behalf of decedent, excluding amounts recoverable under subsection (5).

FLA. STAT. § 768.21 (2005). Finally, a survivor's death before final judgment limits the survivor's recovery to lost support and services to the date of his death. See FLA. STAT. § 768.24 (2005).

Summing up the damages provisions of the Act, the Court notes that liability for a decedent's death carries on after his death, and that causes of action may be brought by a personal representative of the decedent's estate, and the decedent's spouse, children, and/or parents. The Court further notes that a decedent's survivors may recover for past and future lost support and services, loss of the decedent's companionship and protection, lost parental companionship, instruction, and guidance, mental pain and suffering, and medical or funeral expenses. Additionally, the decedent's estate may recover loss of earnings and medical or funeral expenses. Accordingly, because Florida law covers the aforementioned deficiencies in federal law regarding the survival of claims and award of damages, § 1988 mandates that the Court apply the Act in considering Plaintiff's claims as long as such application "is not inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988 (2003).

When considering the issue of inconsistency, "courts must look not only at particular federal statutes and constitutional provisions, but also at 'the policies expressed in [them].'" Robertson, 436 U.S. at 590 (quoting Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 240 (1969)). The policies expressed in § 1983 are well established and "include compensation of persons

injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." Id. at 591. The Court notes that between these two policy concerns, compensation for injuries enjoys an articulated primacy. See Cary v. Piphus, 435 U.S. 247, 256 (1978) ("To the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.") (citing Imbler v. Pachtman, 424 U.S. 409, 442 (1976) (emphasis added)).

While the parties agree that the policy considerations underlying § 1983 must be considered by the Court, they disagree as to the resultant outcome of that consideration, and they do so by relying largely on two lines of cases. Plaintiffs rely heavily on Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961),[2] wherein a surviving widow, suing in her individual capacity and as the administratrix of her husband's estate, sued certain police officers for their roles in the beating death of her husband. Upon finding that § 1983 "'d[id] not expressly refer to actions for death or the survival of claims arising from civil rights violations,' th[e] Court determined, in contravention of the common law rule, that the decedent's constitutional claims did not terminate upon his death." Carringer v. Rodgers, 331 F.3d 844, 848 (11th Cir. 2003) (quoting and discussing Brazier, 293 F.2d at 403-

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2 In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

04). In holding that the decedent's constitutional claims must survive his death if the remedies provided for in § 1983 were to be effectuated, the Court stated that "it defies history to conclude that Congress purposely meant to assure to the living freedom from such unconstitutional deprivations, but that, with like precision, it meant to withdraw the protection of civil rights statutes against the peril of death." Brazier, 293 F.2d at 404.

In curing the deficiency in federal law, the Court in Brazier applied Georgia's survival statute and its wrongful death statute. See id. at 407 n. 15. The first statute provided that where there had been a homicide or injury to person, causes of action for the same did not abate upon the death of the decedent; rather, they could be asserted by a survivor or the personal representative of the decedent's estate. The second statute provided a cause of action to the widow, or if there was none, to the children of the decedent allowing recovery for the full value of the life of the decedent. The Court stated,

> Since Georgia now provides both for survival of the claim which the decedent had for damages sustained during his lifetime as well as a right of recovery to his surviving widow and others for homicide . . . , we need not differentiate between the two types of actions. . . . To make the policy of the Civil Rights Statutes fully effectual, regard has to be taken of both classes of victims.

Id. at 409. Plaintiffs argue that Brazier sets a threshold requirement of the damages that must be afforded to comport with § 1983, and that since, unlike the aforementioned Georgia law, the Act does not allow for the survival of claims for personal injury, the same may not be the sole measure of damages in the above-styled cause. Plaintiffs further argue that if state law does not provide

for the survival of the full measure of damages that was available to a decedent before his death and those in relationship with him, it must be disregarded in favor of employment of federal common law. See DE 361, p. 10. Accordingly, since the Act does not allow recovery for the value of decedent's life and his pain and suffering, and prohibits recovery for pain and suffering by a parent's estate after his death, Plaintiffs argue that its application as the sole measure of damages would be inconsistent with § 1983 actions.

The Court finds that Plaintiffs read Brazier too broadly. The Court in Brazier was not attempting to define a threshold test for state law inconsistency with federal law, but rather, it concentrated on justifying the use of state law at all to cover the federal deficiencies regarding the survival of claims. See id. at 407 (noting that "there is nothing unusual about Congress adopting state law" and considering other statutes that direct the adoption of state law) and 409 (noting that such adoption does not depend on whether the state law is substantive or procedural). While Brazier never made an express finding regarding the fact, it can be gleaned from the overwhelmingly positive treatment that is given to the Georgia statutes that the Eleventh Circuit found them not inconsistent with federal statutory and constitutional law. This holding, therefore, established the rule for considering whether the Georgia statutes in question comport with the policies underlying § 1983, but the Court therein never held that all statutes must comport with the Georgia statutes to pass § 1988 muster. See Carringer, 331 F.3d at 848 (noting that its

consideration of Georgia statutes similar to those considered in Brazier was to be done in accord with the binding precedent of that case). This Court must therefore engage in the same inquiry undertaken in Brazier and its progeny, and in accord with the same principles, but in consideration of a different statute, i.e., the Wrongful Death Act.[3]

To conduct this inquiry, the Court turns to the Supreme Court's decision in Robertson, which is the case primarily relied upon by Defendants. In that case, a plaintiff brought an action pursuant to § 1983, but died before the case reached trial. Because he was survived by no spouse, children, parents, or siblings, the executor of his estate moved the district court therein to be substituted as plaintiff, which relief the Court granted. The defendants then moved to dismiss the case arguing that the action abated upon the original plaintiff's death. The district court denied that motion and held that the state law, through correctly characterized by the defendants, was nevertheless inconsistent with federal law. The Fifth Circuit subsequently affirmed the district court's decision.

Upon review of the case, the Supreme Court reversed the decision of the lower courts. Robertson, 436 U.S. at 588. The

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3 Defendants rely heavily on an Order entered by United States District Judge Donald M. Middlebrooks in the action of Fernandez v. City of Cooper, et al., 01-7059-CIV-MIDDLEBROOKS wherein, under circumstances almost identical to those of the above-styled cause, the Court limited available damages to those provided for in the Act. See 01-7059-CIV-MIDDLEBROOKS, DE 47. While Plaintiffs point out the limited consideration given Brazier by Judge Middlebrooks, see DE 361, p. 8, this Court notes that the lack of applicability of Brazier when considering the survival of claims under the Florida Act may account for the scant attention it was given.

Court in Robertson detailed how under the Louisiana law considered therein, claims for the constitutional violation suffered by a decedent could be brought by various classes of survivors, and noted that "surely few persons are not survived by one of these close relatives." Id. at 591-92. The Court continued, "[t]he goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate." Id. at 592. Finally, the Court noted that "given that most Louisiana actions survive the plaintiff's death, the fact that a particular action might abate surely would not affect § 1983's role in preventing official illegality." Id. In fact, to hold otherwise, "one would have to make the rather farfetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons who would die before the conclusion of the § 1983 action . . . and who would not be survived by any close relatives." Id. at n. 10.

Likewise, under the Wrongful Death Act, state officials face continued liability for constitutional violations after the death of a decedent, and such liability can be enforced by the persons, and for the damages detailed above. The Court further notes that, under the Act, liability still attaches to defendants even in a case with circumstances as rare as the ones constituting the above-styled cause, namely that the decedent has only one close relative entitled to substantial redress under the Act, and that relative dies before final judgment is entered in the action. The estates of Cottone and Peter Cottone, Sr. are still entitled to recover

damages, albeit in an amount diminished from what was originally available. The unique circumstances that lead to this reduced damage amount are not ones that government officials would be likely to anticipate and take into account when deciding to violate the constitutional rights of citizens in their care. This lesser amount is the result of the none too frequently occurring familial situation of Plaintiffs, and the unfortunate circumstances surrounding their deaths. The Court finds that awarding damages in this diminished amount does not weaken the deterrent effect of § 1983, and at the same time, it compensates those to whom damage was actually done, thereby effectuating the policies underlying § 1983.[4] Accordingly, the Court finds that application of the Act as the measure of damages in the above-styled cause is not inconsistent with federal statutory and Constitutional law.

The Court notes that in Robertson, the Supreme Court stated that it was not passing on the situation where the constitutional violation was itself the cause of death. See Robertson, 436 U.S. at 594 ("We intimate no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death.") (citing Brazier v. Cherry, 293 F.2d 401 (5th Cir. 1961). Although Plaintiffs alleged that Constitutional violations by Defendants resulted in the death

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[4] Indeed, Plaintiffs appear to give some credence to the framework laid out in the Act because Richard Cottone is suing as the representative of the estates of his brother and father, the only parties who would be entitled to remedies under the Act. If Plaintiffs needed only to supply a next of kin to collect damages sustained by a principle of absolute survivorship, Richard Cottone could have been substituted under his own name to collect the damages sustained by his brother and father.

of Cottone, the Court finds that the reasoning contained in Robertson should guide this Court's consideration for a number of reasons. First, the Act does not allow Cottone or Peter Cottone Sr.'s claims to abate, as was anticipated in Robertson. Rather, the damages that have always been available to Cottone's estate are still available, and the damages available to Peter Cottone Sr.'s estate are merely reduced. Second, the Court finds that even if a defendant's constitutional violations caused the death of the decedent, the twin aims of compensation and deterrence are still achieved by awarding damages pursuant to the Act. Finally, the Court notes that neither § 1983 or § 1988, nor any of their accompanying provisions, direct the Court to adopt a different analysis than that set forth in § 1988 in the event that a decedent's death is caused by a defendant's constitutional violation. If application of the Act is not inconsistent with federal law and its underlying policies, § 1988 mandates that such application take place, and it is silent as to any further distinction to be made.

A final point should be made regarding application of federal common law in addition to the Act. Plaintiffs cite Heath for the proposition that the "federal remedy supplants the state remedy, and the latter need not be first sought and refused before the federal one is invoked. The independent vitality of 42 U.S.C. § 1983 has been reaffirmed many times by the Supreme Court. Carey v. Piphus, 435 U.S. 247 . . . (1978)." See DE 361, citing Heath, 560 F. Supp. at 844. The Court notes that prior to making the above-statement, the Court in Heath stated that "[s]ince Monroe v. Pape,

365 U.S. 167 . . . (1961), it has been firmly established in the law that it is no answer that a State has a law which if enforced affords relief." Id. The Court notes, however, that in Monroe, the Supreme Court was reviewing a District Court's dismissal of an action brought pursuant to § 1983, and the government Respondents were arguing, inter alia, that dismissal was appropriate because state law provided a remedy. There was no statement therein regarding the compounding of state and federal remedies. Furthermore, no party to this action is arguing that the above-styled cause should be dismissed and Plaintiffs' forced to bring state law claims. Plaintiffs clearly have the right to bring the claims they have brought - the only issue is which of those claims have survived the aforementioned deaths, and what damages may be recovered. Since the Court has found that the Act is not inconsistent with federal statutory and constitutional law, the damages provided for therein shall be the full measure of damages because § 1988 ends this Court's inquiry at the point that such lack of inconsistency is found.

III. Certification of Issue for Interlocutory Appeal

The Court notes that 28 U.S.C. § 1292(b) provides that

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

28 U.S.C. § 1292(b) (1993). For a question to be a "controlling question of law," it must be "a question of the meaning of a statutory or constitutional provision, regulation, or common law doctrine," and "does not mean the application of settled law to fact." McFarlane v. Conseco Services, LLC, 381 F.3d 1251, 1258 (11th Cir. 2004) (quoting Ahrenholz v. Board of Trustees of the University of Illinois, 219 F.3d 674, 676 (7th Cir. 2000)). Regarding the "substantial ground for difference of opinion" requirement, the Eleventh Circuit has "held that a question of law as to which [it] [is] in 'complete and unequivocal' agreement with the district court is not one for § 1292(b) review." Id. (citation omitted). Finally, the resolution of a question will "materially advance the ultimate termination of the litigation" when such resolution "would serve to avoid a trial or otherwise substantially shorten the litigation." Id. at 1259.

The Court notes that the parties commenced with trial of the above-styled cause on June 6, 2005. See DE 350. Based on the trial memoranda submitted, and argument of counsel, it soon became clear to the Court that the parties had substantially diverging views on the proper measure of available damages in the above-styled cause. See DE 355, pp. 35-47. As the Court stated the following day, the parties were "floundering because . . . [they] can't even begin to discuss settlement . . . because [they] don't know the parameters." DE 356, p. 4. The Court further noted that Plaintiffs were in a particular predicament because they would have to go through a trial, following a determination on the proper

measure of damages by this Court, and then either file an appeal, or respond to an appeal by Defendants. Id.

Based on the foregoing, the Court finds that the parties would benefit substantially from a resolution of the question of whether application of the Florida Wrongful Death Act in the above-styled cause is inconsistent with the Constitution and laws of the United States, and whether it may be applied as the full measure of damages in the above-styled cause. The Court finds that this is a controlling question of law because its resolution requires consideration of the Wrongful Death Act in light of the decisions of the Eleventh Circuit, the United States Supreme Court, and federal statutory and Constitutional law. Second, regarding substantial grounds for difference of opinion, it will be the opinion of Plaintiffs, at least, that the findings of the Court articulated in this Order are in conflict with the law of the United States and this Circuit. Finally, it cannot be doubted that a determination of the appropriate measure of damages may eliminate the need for a trial in the above-styled cause, and will almost certainly shorten the litigation. See Allapattah Servs., Inc. v. Exxon Corp., 333 F.3d 1248, 1252-53 (11th Cir. 2003) (granting interlocutory review to consider, inter alia, whether the district court should have awarded aggregate damages); Tucker v. Fearn, 333 F.3d 1216, 1218 (11th Cir. 2003) (granting interlocutory review of whether a nondependent parent may recover certain damages for the wrongful death of his minor child).

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Defendants Andrew Perfilio, M.D., Maurice Waldman, M.D., Elma McKenzie, L.P.N., and EMSA Correctional Care, Inc.'s Motion To Limit Damages (DE 358) and Defendants Kenneth C. Jenne, II, Joseph D'Elia and George Williams' Motion To Apply Damages Provisions Of The Florida Wrongful Death Act (DE 359) be and the same are hereby **GRANTED;**

2. The Florida Wrongful Death Act, Florida Statutes §§ 768.16-768.26 (2005) shall provide the full measure of damages available to Plaintiffs in the above-styled cause; and

3. The Court hereby certifies this Order for interlocutory review pursuant to 28 U.S.C. § 1292(b) and renews the findings made above that the issues contained herein involve a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 13th day of January, 2006.

WILLIAM J. ZLOCH
Chief United States District Judge

Copies furnished:
All counsel of record