No. 13-___

IN THE

Supreme Court of the United States

RITA HOAGLAND,

Petitioner,

v.

ADA COUNTY, *et al.*

Respondent.

On Petition for a Writ of Certiorari
to the Idaho Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Darwin Overson
LAW OFFICE OF
DARWIN OVERSON
1366 Murray Holladay
Road
Salt Lake City, UT 84117

Kevin K. Russell
GOLDSTEIN &
RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20036

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
STANFORD LAW SCHOOL
SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
pkarlan@stanford.edu

Eric B. Swartz
Joy M. Vega
JONES & SWARTZ PLLC
1673 West Shoreline Dr.,
Ste 200
Boise, ID 83702

QUESTION PRESENTED

In *Robertson v. Wegmann*, 436 U.S. 584 (1978), this Court held that 42 U.S.C. § 1988(a) requires applying state survivorship rules to Section 1983 actions unless those provisions are "inconsistent with the Constitution and laws of the United States." It specifically reserved the question whether "abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." Should this Court grant certiorari to resolve the conflict among the lower courts on the following Question Presented:

When the violation of an individual's constitutional rights causes that person's death, can a Section 1983 claim arising from that violation be maintained despite contrary state abatement rules?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

Rita Hoagland, individually and in her capacity as personal representative of the estate of Bradley Munroe

Ada County, Idaho

Ada County Sheriff Gary Raney, in his individual and official capacity

Linda Scown, in her individual and official capacity

Kate Pape, in her individual and official capacity

Steven Garrett, in his individual and official capacity

Michael E. Estess, in his individual and official capacity

Ricky Lee Steinberg, in his individual and official capacity

Karen Barrett, in her individual and official capacity

James Johnson, in his individual and official capacity

Jeremy Wroblewski, in his individual and official capacity

David Weich, in his individual and official capacity

Lisa Farmer, in her individual and official capacity

Jamie Roach, in her individual and official capacity

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Rita Hoagland respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Idaho.

OPINIONS BELOW

The opinion of the Supreme Court of Idaho (Pet. App. 2a-35a) is published at 303 P.3d 587. Three unpublished decisions of the Idaho District Court of the Fourth Judicial District are relevant here: the March 28, 2011, Order (Pet. App. 38a-60a); the January 20, 2011, Memorandum Decision and Order (Pet. App. 61a-110a); and November 2, 2010, Memorandum and Order (Pet. App. 111a-122a).

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on May 16, 2013. Pet. App. 2a. A timely petition for rehearing was denied on July 8, 2013. *Id.* 1a. On September 4, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 21, 2013. No. 13A227. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

RELEVANT STATUTORY PROVISIONS

The Appendix to this petition reproduces the relevant provisions of 42 U.S.C. §§ 1983 and 1988 and Idaho Code Ann. §§ 5-311, 73-116 at Pet. App. 123a-128a.

STATEMENT OF THE CASE

In *Robertson v. Wegmann*, 436 U.S. 584 (1978), this Court held that Louisiana's survivorship statute could abate a malicious prosecution claim brought under 42 U.S.C § 1983 when the plaintiff had died of causes unrelated to his Section 1983 claim. This Court specifically reserved the question whether state abatement law can extinguish a claim where an alleged constitutional violation caused the decedent's death. *See Robertson*, 436 U.S. at 594. It later granted certiorari to decide that question in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), but was unable to do so because of a jurisdictional defect.

This case presents the question reserved in *Robertson* and left unanswered in *Jefferson*. Petitioner Rita Hoagland's son, Bradley Munroe, committed suicide while being held in respondent Ada County's jail. She brought suit under Section 1983, alleging deliberate indifference to Munroe's constitutional right to adequate medical care on the part of the county and several county employees. The Idaho Supreme Court held that precisely because Munroe had died, Idaho's state abatement rules extinguished all Section 1983 claims arising out of his death.

1. On September 29, 2008, nineteen year-old Bradley Munroe hanged himself in his cell at the Ada County Jail. Pet. App. 5a.

"This incarceration was not Munroe's first incarceration at the ACJ." Pet. App. 76a. Munroe had been in and out of the County Jail throughout the summer. *Id.* 3a. During his previous detentions, jail officials had recognized that he was mentally ill

and posed a high risk of suicide. *See id.* 77a. The jail intake form from August 2008, for example, recorded that Munroe had scars from self-inflicted injuries; that he was delusional; that he was depressed and confused; and that he had contemplated and attempted suicide in the past. R. 1480-81, ¶ 117.[1] As a result, respondent classified Munroe as "High Risk" and gave him a "SUIHIST [suicide history]" code. Pet. App. 77a. The jail's medical records reflect that while Munroe was in jail, respondent's medical staff administered the antipsychotic and depression medications prescribed by his physician. *Id.*

Munroe was released from the jail on September 26. Pet. App. 77a. Despite guidelines requiring that inmates being released receive two weeks' worth of medication, it is "unclear" whether respondents followed that guideline. *Id.* 77a-78a.

Within two days, Munroe was arrested again – this time for robbing a convenience store. Pet. App. 3a. He was shirtless and had attempted to flee on a bicycle. R. 1486, ¶ 167. "His behavior was so odd" that police took him to the local hospital. Pet. App. 71a-72a. Munroe announced an intention to commit suicide, but after he disclaimed any plan to do so "that night," he was cleared to return to the county jail. *Id.* 4a, 72a.

Munroe's "bizarre behavior" continued back at the jail. Pet. App. 4a. Jail personnel could not complete the booking process because Munroe was

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[1] References to the certified record on appeal to the Supreme Court of Idaho are cited "R. [page number]."

"not making sense" and "took a string and wrapped it around his neck." *Id.* His behavior led prison officials to strip him to his underwear and place him in a special holding cell with a suicide-resistant bed. *Id.*; *see* R. 1489, ¶¶ 181, 188. Nevertheless, Munroe attempted to strangle himself with strips of his own boxer shorts. *Id.* ¶ 185. Jail personnel then left him naked to sleep the night with only a "safe blanket." *Id.* ¶ 187. Munroe's actions also prompted jail officials to notify the Health Services Unit about the situation as per the jail's policies. Pet. App. 4a.

The next morning, jail officials attempted to resume the booking process. Respondent Jeremy Wroblewski, a trainee, was the officer assigned to handle the booking, which included administering the jail's suicide risk questionnaire. Pet. App. 4a. Before Wroblewski could carry out this responsibility, respondent James Johnson, a psychiatric social worker, spent four minutes in the booking area with Munroe. *Id.* 4a-5a. Johnson then concluded that Munroe's "risk level was not sufficient to warrant" any suicide prevention measures available at the jail for inmates found to be at risk. *Id.* 5a.

Some time after Johnson had left the booking area, Wroblewski administered the standard questionnaire. Munroe answered "Yes" to each of the following questions:

- "Have you ever been in a mental institution or had psychiatric care?"
- "Have you ever contemplated suicide?"
- "Are you now contemplating suicide?"

Pet. App. 74a. Based on the interview, Wroblewski answered "Yes" on the assessment form to the

question whether Munroe's behavior "suggest[ed] a risk of suicide." *Id.* Despite recording positive answers to the suicide risk questions, Wroblewski failed to notify the Health Services Unit that Munroe met the jail's criteria for being at risk for suicide. *Id.*

Around the same time that Wroblewski was administering the questionnaire, Munroe's mother, petitioner Rita Hoagland, telephoned the jail. Pet. App. 75a. She informed an administrative assistant in the Health Services Unit of Munroe's past suicide attempts and expressed concern that he might now be suicidal and off his medications. *Id.* 75a; *see* R. 1498, ¶ 245; 1644, ¶ 245. After informing Johnson of the call and the information, the assistant told Hoagland that "her concerns had been conveyed and Munroe was being taken care of." Pet. App. 75a-76a.

Rather than being returned to the safe cell or sent to the hospital for observation, Munroe was placed in a "side chute cell," visible to jail officials only during well-being checks. Pet. App. 75a; *see* R. 1497, ¶ 238. Checks in this area of the jail occurred every thirty minutes rather than every fifteen minutes, as was true for "safe" cells. Pet. App. 75a. That night, at 8:35 p.m., a deputy found Munroe hanging by a jail-issued bed sheet from the top bunk of his jail cell bed. *Id.* 5a. Munroe could not be revived and was pronounced dead later that evening. *Id.* 76a.

2. Munroe's mother, petitioner Rita Hoagland, filed suit in Idaho state court against Ada County and various county officials and employees. Pet. App.

112a. The third amended complaint raised claims only under Section 1983.[2] *Id.* 112a-113a. Count I was brought by Hoagland as the personal representative and heir of Munroe's estate.[3] *Id.* It alleged that respondents had violated Munroe's Eighth and Fourteenth Amendment rights when they failed to provide him with constitutionally adequate medical care and safety. *Id.* 113a. Count II was brought by Hoagland in her personal capacity. *Id.* It alleged that respondents had injured her by depriving her of the society and companionship of her son. *Id.*

The district court resolved the case in a series of three opinions. Its first opinion addressed the question whether Munroe's death extinguished any Section 1983 claims. The district court recognized that this Court in *Robertson v. Wegmann*, 436 U.S. 584 (1978), had "specifically stated that it was not addressing 'whether abatement [of survivorship claims] based on state law'" should apply in cases where "deprivation of federal rights caused death." *Id.* 115a (quoting *Robertson*, 436 U.S. at 594). The court further recognized that in answering that question, "a court should evaluate whether the state's law is generally hospitable to the survival of § 1983

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[2] The third amended complaint dropped the state law claims for wrongful death and intentional infliction of emotional distress raised in earlier complaints. *See infra* p. 34.

[3] Under Idaho law, all claims brought on behalf of a decedent belong to the personal representative and the heirs of the decedent, rather than (as in some other states) the decedent's estate. *See* Idaho Code Ann. § 15-3-703 (2013).

actions and has 'no independent adverse effect' on the § 1983 policies of compensation" and deterrence. *Id.* (quoting *Robertson*, 436 U.S. at 590-91).

Despite those acknowledgements, the court dismissed Count I of the complaint. Pet. App. 118a. In doing so, it relied on *Evans v. Twin Falls County*, 790 P.2d 87 (Idaho 1990). There, the Idaho Supreme Court had reiterated Idaho's retention of "the common law rule that if the victim of a tort died before she recovered a judgment, the victim's right to a cause of action also died." Pet. App. 117a. Because a Section 1983 claim is a "personal action," *id.* (quoting *Evans*, 790 P.2d at 94), the district court here held that Idaho law extinguished the Section 1983 claim that petitioner had brought as the personal representative of Munroe's estate, *id.* 118a.

The court recognized that "[s]tanding alone, such an outcome might be inconsistent with the policies underlying 42 U.S.C. § 1983." Pet. App. 118a. But it discounted that objection because it reasoned that Section 1983's purposes were satisfied by permitting petitioner to maintain a Section 1983 claim for damages she personally had suffered as a result of the unconstitutional treatment of her son. *Id.* 121a. In reaching this conclusion, the district court relied heavily upon the Fifth Circuit's decision in *Rhyne v. Henderson County*, 973 F.2d 386 (5th Cir. 1992), which had held that the mother of a pre-trial detainee who had committed suicide in a county jail could "recover under § 1983 for her own injuries resulting from the deprivation of her son's constitutional rights," *id.* at 391, which as a matter of state law included "the loss of society and companionship," *id.* at 390; Pet. App. 120a; *see also*

id. at 70a (explaining that the court was permitting petitioner to "bring claims for her own damage"). Thus, it denied respondents' motion to dismiss Count II of Petitioner's complaint. *Id.* 121a.

The district court's second opinion addressed respondents' motion for summary judgment on petitioner Hoagland's personal Section 1983 claims. The court granted that motion with respect to all respondents except for James Johnson. Pet. App. 110a. It found "genuine issues of material fact remain[ed]" as to whether Johnson "was subjectively aware of a serious medical need to which he failed to adequately respond." *Id.* 102a. Having found that the right of pre-trial detainees to adequate health care was "clearly established at the time of the alleged misconduct," *id.* 104a, the district court also denied him qualified immunity, *id.* 105a.

Finally, in its third opinion, the district court reversed course on the question of Johnson's qualified immunity. The court recognized its obligation to follow this Court's two-part framework for analyzing claims of qualified immunity. *See* Pet. App. 50a. With respect to the first part, the district court reaffirmed that "the facts as they are alleged by Ms. Hoagland make out a violation of a constitutional right" – the "Fourteenth Amendment right to adequate mental healthcare." *Id.* 53a. But this time, the court concluded that this violation was not one of "clearly established law" because a "hypothetical jail social worker" would not "have thought he was acting with deliberate indifference" by "clear[ing] Munroe from suicide watch." *Id.* 54a. Accordingly, the district court granted Johnson "the protection of Qualified Immunity," *id.* 54a-55a, and on May 25,

2011, entered judgment for the respondents on all claims, *id.* 37a.

3. On appeal, the Idaho Supreme Court affirmed. It held that all Section 1983 claims arising out of Munroe's death were foreclosed by that death, regardless of how petitioner framed the claims.

The court started with the proposition that in Idaho, "a victim's right of action for torts dies with the victim." Pet. App. 12a. Because the legislature had not modified Idaho's abatement rule, the court held "that Munroe's § 1983 claim abated with his death." *Id.* 13a. The Idaho court noted that this Court had rejected a categorical rule that state abatement laws "should invariably be ignored in favor of a rule of absolute survivorship" in Section 1983 actions. *Id.* 13a (quoting *Robertson*, 436 U.S. at 590). It then adopted the converse categorical rule of absolute abatement in all Section 1983 cases. The court disclaimed any legally relevant "distinction" between cases where death was "*caused* by the constitutional violation" and those where death was "not caused by the constitutional violation." *Id.* 13a-14a (emphasis in original). It insisted that its absolute abatement rule was "not inconsistent with the policies of § 1983" because there was a state-law cause of action "available outside of § 1983" for wrongful death. *Id.* 14a.

Moreover, the Idaho Supreme Court held that the district court had erred in permitting Hoagland to bring a Section 1983 claim in her personal capacity for damages she suffered as a result of unconstitutional conduct against her son. *See* Pet. App. 14a-22a.

Having concluded that none of the Section 1983 claims survived Munroe's death, the court held that all of the other issues raised by petitioner's appeal were "rendered moot and [would] not be considered." Pet. App. 23a. Thus, the Idaho Supreme Court never addressed whether the district court properly dismissed the *Monell* claims against the county, properly granted summary judgment to various individuals, or properly conferred qualified immunity on respondent Johnson. *See id.*

4. The Idaho Supreme Court denied a timely petition for rehearing. Pet. App. 1a. This petition follows.

REASONS FOR GRANTING THE WRIT

In 1997, this Court granted certiorari in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), to resolve the question expressly reserved in *Robertson v. Wegmann*, 436 U.S. 584 (1978), and presented in this case: whether "abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." *Robertson*, 436 U.S. at 594. It was unable, however, to answer that question due to a jurisdictional defect. *See Jefferson*, 522 U.S. at 77.

Since that time, the split between federal courts of appeals and state supreme courts has deepened. In this case, the Idaho Supreme Court held that when a municipality and its officials cause the death of a jail inmate by failing to provide the medical care required by the Constitution, they not only extinguish his life, but they extinguish any possibility

of Section 1983 redress for the constitutional violations they have committed.

This cannot be right. Several often-litigated categories of Section 1983 claims involve situations where the victim has died as a result of a constitutional violation. Nothing in *Robertson* suggests that state law can categorically abate Section 1983 actions even when the constitutional violation caused the very gravest of injuries. And in *Carlson v. Green*, 446 U.S. 14 (1980), this Court rejected the argument that similar abatement laws could be applied to extinguish a constitutional claim against federal officials under *Bivens*.

It could hardly be otherwise. The decision here undermines both the deterrent and compensatory goals of Section 1983. Applying state abatement rules to Section 1983 claims where the constitutional violation caused the victim's death is therefore "inconsistent" within the meaning of Section 1988(a). This case presents an ideal opportunity to confirm "[t]he essentiality of the survival of civil rights claims for complete vindication of constitutional rights." *Carlson*, 446 U.S. at 24 (internal quotation marks omitted).

I. Federal And State Courts Are Divided On Whether State Abatement Laws Can Bar Section 1983 Claims Alleging A Constitutional Violation That Caused The Victim's Death.

When courts are called on to adjudicate Section 1983 claims, "existing federal law will not cover every issue that may arise." *Moor v. County of Alameda*,

411 U.S. 693, 702 (1973). Thus, 42 U.S.C. § 1988 directs courts "to look to principles of the common law, as altered by state law, so long as such principles are not inconsistent with the Constitution and laws of the United States." *Moor*, 411 U.S. at 703.

One constellation of relevant principles concerns what to do when a putative Section 1983 plaintiff has died. At common law, personal injury claims abated on the death of the injured party. *See* 1 Am. Jur. 2d *Abatement, Survival, and Revival* § 78. But every state has altered the common law rule to some extent by legislation. Some statutes provide for the survival of an injured party's claims even if that party has died ("survivorship" or "survival" laws); the decedent's personal representative or executor or administrator steps in to litigate the case. Other statutes confer a cause of action, triggered by the victim's death, on still-living individuals (such as spouses, parents, or children) who have been injured by that death ("wrongful death" laws). While these laws mitigate some of the "harsh" consequences of the common law, *Robertson v. Wegmann*, 436 U.S. 584, 589 (1978), many of them limit the type or amount of damages available. *See infra* pp. 33-35.

There is now a sharp conflict among the lower federal and state courts over whether these state limits apply to Section 1983 cases involving fatal constitutional violations. On one side of the conflict, four federal courts of appeals have held that Section 1988(a) does not permit state law to restrict the recovery that would otherwise be available in a Section 1983 case. And three additional courts of appeals have conditioned any borrowing of state

survival and wrongful death rules in Section 1983 cases involving fatal constitutional violations on the availability of full recovery. On the other side of the conflict, two state supreme courts have applied state abatement and survivorship rules to bar all recovery in Section 1983 lawsuits involving fatal constitutional violations.

1. The Second, Sixth, Seventh, and Tenth Circuits have concluded that a state rule that abates or restricts a Section 1983 claim regarding a fatal constitutional violation fails to meet the consistency standard of Section 1988(a).

In *McFadden v. Sanchez*, 710 F.2d 907 (2d Cir.), *cert. denied*, 464 U.S. 961 (1983), the plaintiff was shot to death by police officers. *Id.* at 908. The jury awarded punitive damages, and the officers appealed, relying on a then-extant New York statute barring the survival of punitive damages claims. *See id.* at 910. The Second Circuit rejected that argument, holding that it would be inconsistent with the purposes of Section 1983 to foreclose the possibility of punitive damages. *Id.* at 911. Relying on this Court's reasoning in *Carlson v. Green*, 446 U.S. 14 (1980), which had required the survival of *Bivens* claims, it held that "limitations in a state survival statute have no application to a section 1983 suit brought to redress a denial of rights that caused the decedent's death." *Id.* at 911.[4]

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[4] The Fourth Circuit has cited *McFadden* with approval, stating that after *Robertson* and *Carlson* "it would appear that a federal rule of survival supersedes any state law requiring abatement when the acts of § 1983 defendants caused the death

The Sixth Circuit reached the same result in *Jaco v. Bloechle*, 739 F.2d 239 (6th Cir. 1984). Police shot and instantly killed Jaco's son. Her Section 1983 suit challenging the police action was dismissed by the district court on the grounds that, under Ohio's survivorship law, the son's civil rights action did not survive his death. *Id.* at 240. The Sixth Circuit reversed, finding that "strict adherence to the relevant state law eviscerates the civil rights claim." *Id.* at 244. "Surely, § 1983's further purpose to discourage official constitutional infringement would be threatened if Jaco were not permitted to champion her dead son's civil rights. Ohio's survivorship law *is* then hostile to 'the Constitution and laws of the United States.'" *Id.* at 245 (quoting 42 U.S.C. § 1988) (emphasis in original).

So, too, in the Seventh Circuit. In *Bass v. Wallenstein*, 769 F.2d 1173 (7th Cir. 1985), a jury awarded $250,000 under Section 1983 to Bass's estate after he died from inadequate medical care in an Illinois prison. *See id.* at 1176. On appeal, the defendants argued that the jury should not have been instructed to award damages for Bass's death. *Id.* at 1188. Any such damages, the defendants argued, should have been sought in a separate wrongful death action by his survivors. The court of appeals disagreed. To the extent that Illinois law "den[ied] recovery on behalf of the estate for loss of life," it "effectively call[ed] for abatement of Bass'

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of the injured party." *Jones v. Prince George's County, Md.*, 355 F. Appx. 724, 730 n.8 (4th Cir. 2009) (citing *McFadden*, 710 F.2d at 911).

constitutional claim that defendants deprived him of his fourteenth amendment right to life through deliberate indifference to his serious medical needs." *Id.* at 1189. The court of appeals held that "where the constitutional deprivation sought to be remedied has caused death, state law that precludes recovery on behalf of the victim's estate for the loss of life is inconsistent with the deterrent policy of section 1983." *Id.* at 1190.

Finally, the Tenth Circuit also agrees that state abatement or survival rules cannot restrict recovery in a Section 1983 case arising from a constitutional violation that causes the victim's death. The plaintiff in *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), was a widow who alleged deliberate indifference by prison officials when her husband was strangled by fellow inmates in the city jail. *Id.* at 1492. In the course of deciding an appeal from the jury verdict in her favor, the Tenth Circuit rejected the city's argument that the proper measure of damages in the case on retrial would be those recoverable under Oklahoma's survival statute. *Id.* at 1500, 1504. It reasoned that the Oklahoma law "would provide extraordinarily limited recovery, possibly only damages to property loss, of which there were none, and loss of decedent's earnings between the time of injury and death, of which there also were none." *Id.* at 1504. Relying on the Sixth Circuit's decision in *Jaco*, the Tenth Circuit responded that not only were these damages inadequate to serve the purposes of Section 1983, but even supplementing them "with a state wrongful death action d[id] not satisfy the criteria of § 1988 for borrowing state law." *Id.* at 1506. And it emphasized that states could not

"define the scope and extent of recovery" for a violation of federal constitutional law. *Id.* The Tenth Circuit thus fashioned a federal common law remedy allowing plaintiff to recover "appropriate compensatory damages." *Id.* at 1507.

2. In addition to the four circuits that have refused to apply state survival or wrongful death limitations to Section 1983 cases involving fatal constitutional violations, three other circuits – the Fifth, the Eighth, and the Eleventh – have expressly conditioned the use of state survival and wrongful death rules on those rules' providing an opportunity for full recovery.

The Fifth Circuit so held in *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961), which this Court cited in *Robertson* as an example of the kind of case where a Section 1983 cause of action survived the victim's death. Brazier's widow brought suit under Section 1983 both in her individual capacity and as administrator of his estate, after police beat him to death. *Id.* at 402. The district court dismissed the complaint, holding that "the right of action which James Brazier might have been vested with, had he lived, was extinguished with his death," and that because there was "no federal statute giving [his widow] a cause of action for the wrongful death of her husband, this action cannot be maintained." *Brazier v. Cherry*, 188 F. Supp. 817, 819 (M.D. Ga. 1960). The court of appeals reversed. It began with the premise 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. It therefore borrowed from Georgia law the provision that abrogated common law abatement in any case where the wrongdoer caused the death of the plaintiff. *See id.* at 407 n.15.

The Eighth Circuit took a similar approach in *Andrews v. Neer*, 253 F.3d 1052 (8th Cir. 2001). Andrews brought a Section 1983 action for the fatal injury suffered by her father at a state mental hospital after staff used excessive force to subdue him. *Id.* at 1055-56. The court held that Missouri's combined "death and survival" statute satisfied Section 1988(a)'s consistency test only because it authorized a decedent's survivors to recover for the constitutional injury the decedent had suffered as well as for their own loss. *Id.* at 1058. In reaching that conclusion, the Eighth Circuit relied on the Tenth Circuit's decision in *Berry v. City of Muskogee*, 900 F. 2d 1489 (10th Cir. 1990), for the proposition that "Congress intended § 1983 to provide a 'significant remedy for wrongful killings,' to provide compensation to victims, and to 'provide special deterrence for civil rights violations.'" *Andrews*, 253 F.3d at 1058 (quoting *Berry*, 900 F.2d at 1503).

Finally, the Eleventh Circuit has adopted pre-1981 Fifth Circuit precedent as binding. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc). District courts within the Eleventh Circuit have therefore continued to follow *Brazier*'s reasoning. For example, in *Heath v. City of Hialeah*, 560 F. Supp. 840 (S.D. Fla. 1983), the court refused to limit the plaintiff's recovery in a Section 1983 case arising out of a fatal police shooting to solely the damages available under Florida's wrongful death

action because it held that the compensable losses under that statute "offer[ed] little more than the cost of a casket." *Id.* at 842. Instead, that court, citing *Brazier* and this Court's decision in *Carlson*, held that because the state law restricted the damages available, it was inconsistent with Section 1983's purpose and therefore "the federal common law will govern any future assessment of damages in this case." 560 F. Supp. at 844.

3. By contrast, the supreme courts of Alabama and Idaho have held that there is nothing "inconsistent with the Constitution and laws of the United States," 42 U.S.C. § 1988(a), in borrowing state law that limits, or even eliminates, recovery in Section 1983 cases involving fatal constitutional violations.

In *Carter v. City of Birmingham*, 444 So. 2d 373 (Ala. 1983), *cert. denied*, 467 U.S. 1211 (1984), Bonita Carter was shot and killed by a Birmingham police officer. *Id.* at 374. The administrator of her estate brought a Section 1983 claim against the city. The Alabama Supreme Court held that any Section 1983 claim for a fatal constitutional violation would be governed by Alabama's wrongful death statute. *Id.* That statute, however, permitted recovery only of punitive damages, *id.* at 375, – which this Court had held in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), are unavailable in Section 1983 suits against municipalities. As a consequence, the Alabama court recognized, applying state law would "in effect preclude" *any* Section 1983 recovery against

municipalities responsible for fatal violations of federal constitutional rights. *Carter*, 444 So. 2d at 379.[5] But it nonetheless declared that "the policies of the civil rights statutes" were being "fully effectuated" and that plaintiffs were "in no way disadvantaged" by the application of Alabama law. *Id.* at 377 (internal quotation marks omitted). In *City of Tarrant v. Jefferson*, 682 So. 2d 29 (Ala. 1996), the Alabama Supreme Court reaffirmed *Carter*'s reasoning; in that case, it barred all Section 1983 claims arising out of a fatal fire despite allegations that the failure to rescue the decedent was racially motivated. *Id.* at 29, 31.

The Idaho Supreme Court has gone further, holding that all Section 1983 claims involving fatal constitutional violations, whether brought against individual defendants or municipalities, and whether seeking compensatory damages or punitive damages, are barred. Pet. App. 13a-14a. In this case, the court pointed to Idaho's common law rule, which abates all personal actions upon the death of the plaintiff. *Id.* 13a. The Idaho Supreme Court ignored this Court's caveat in *Robertson* with respect to fatal constitutional violations. Instead, it quoted only this Court's statement that, as a general proposition, "a rule of abatement is not inconsistent with the policies of § 1983." *Id.* Accordingly, because a Section 1983 claim is a personal claim, the Idaho Supreme Court held that Munroe's death barred any Section 1983

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[5] The Alabama Supreme Court adverted to the possibility of a "state law action against the city for wrongful death." *Carter*, 444 So. 2d at 379.

claims arising out of the actions that led to that death. *Id.* 13a.

4. Alabama and Idaho state courts foreclose Section 1983 remedies that would be available in Section 1983 suits brought in federal district courts in those states. The courts are aware of this conflict. Two of the three United States district courts sitting in Alabama have expressly rejected the position taken by the Alabama Supreme Court in *Carter*. In *Weeks v. Benton*, 649 F. Supp. 1297 (S.D. Ala. 1986), the district court entertained a Section 1983 claim alleging that an inmate had died from lack of adequate medical care. It held that Alabama's "complete immunization" of municipal defendants from compensatory damages was inconsistent with federal law because it "severely undermined" the "policy of deterrence of official misconduct that underlines § 1983." *Id.* at 1305-06. Application of Alabama's survivorship law would also undercut "§ 1983's policy of compensating the victims of official misconduct." *Id.* at 1306. Similarly, in *Lewis v. City of Montgomery*, 2006 WL 1761673 (M.D. Ala. 2006), the court refused to follow "multiple holdings by the Alabama Supreme Court insisting that there is nothing inconsistent with federal law" in applying Alabama abatement principles to Section 1983 cases involving fatal constitutional violations. *Id.* at *4. It chose instead to follow *Weeks*.

The same conflict exists in Idaho. The United States District Court for the District of Idaho has rejected the proposition that Idaho law can abate Section 1983 claims involving fatal constitutional violations. In *Van Orden v. Caribou County*, 2011 WL 841438 (D. Idaho 2011), Crystal Bannister

hanged herself in her jail cell. *Id.* at *1. The county argued that the Section 1983 lawsuit brought by her personal representative was barred by Idaho abatement law. The district court rejected that argument, holding that Idaho's failure to provide for survival of Section 1983 claims in this kind of case "conflicts with § 1983's purposes of providing a remedy for, and deterring constitutional violations." *Id.* at *4. Similarly, in *Cusack v. Idaho Dep't of Corr.*, 2012 WL 506008 (D. Idaho 2012), another inmate suicide case alleging constitutionally inadequate medical care, the court again rejected the defendant's argument that the lawsuit should be abated, stating that "Idaho's lack of a survivor statute is inconsistent with the strong policy embodied in § 1983 to provide a remedy for constitutional violations and to deter such conduct." *Id.* at *7. The *Cusack* court expressly refused to apply the Idaho Supreme Court's analysis in *Evans v. Twin Falls County*, 796 P.2d 87 (Idaho 1990).

Petitioner in this case informed the Idaho Supreme Court of the federal district court decisions in *Van Orden* and *Cusack*. *See* Appellant's Response and Reply Br. at 8, 9, 11. Without addressing either case, the Idaho Supreme Court adhered to its decision in *Evans* and adopted an absolute abatement rule.

II. The Question Presented Is Important.

This Court has already recognized that the question presented by this petition warrants review, and for good reason. Not only do claims involving fatal constitutional violations implicate one of the most fundamental constitutional rights, but they

arise with distressing frequency and continue to perplex the lower courts asked to resolve the question presented. In particular, the question whether state laws can simply wipe out effective recovery for the entire class of fatal constitutional violations is important for this Court to resolve.

1. The Court first encountered the question presented here in *Robertson v. Wegmann*, 436 U.S. 584 (1978). In that case, this Court addressed whether a state survivorship statute could ever abate a Section 1983 claim upon the death of the plaintiff. The Court held that applying an abatement rule was not invariably "inconsistent" within the meaning of Section 1988(a). *Id.* at 590, 93. But in *Robertson* the cause of the plaintiff's death was entirely unrelated to the underlying constitutional claim. *See id.* at 594-95. Accordingly, this Court specifically reserved the question "whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." *Id.* at 594.

The Court took up that specific question in *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997). In that case, the Alabama Supreme Court barred a Section 1983 claim based on an allegedly racially-motivated failure to rescue the decedent from her burning home. *See id.* at 78. This Court granted certiorari to resolve the question whether "when a decedent's death is alleged to have resulted from a deprivation of federal rights," state law could wipe out any "recovery by the representative of the decedent's estate under 42 U.S.C. § 1983." *See id.* at 80. This Court was unable to reach the question presented, however, because the decision of the Alabama Supreme Court was not a final judgment.

Id. at 77-78. Thus, this Court dismissed the case for lack of jurisdiction. *Id.* at 78.

Over the years, this Court has been stymied repeatedly in its efforts to provide guidance to the lower courts on how to deal with the application of state law to fatal constitutional violations. In *Jones v. Hildebrant*, 432 U.S. 183 (1977), this Court granted certiorari to decide "whether a State's limitation on damages in a wrongful-death statute would control in an action brought pursuant to § 1983." *Id.* at 185. The underlying case involved the fatal shooting of a Denver teenager. *Id.* at 183-84. At oral argument, however, the Court realized that the answer to the question presented would turn on answering an antecedent question that had not been properly raised and preserved below. *Id.* at 185, 188-89. Accordingly, this Court dismissed the writ of certiorari as improvidently granted. *Id.* at 189. And in *O'Dell v. Espinoza*, 456 U.S. 430 (1982), this Court granted certiorari to decide, among other questions, "whether the existence of a state wrongful death remedy precludes a section 1983 claim premised on the wrongful taking of a life." *See* Br. Pet. i, *O'Dell v. Espinoza* (No. 81-534), 1982 WL 608523 (third question presented). As in *Jefferson*, the Colorado Supreme Court had remanded the case for trial on other issues, and thus this Court dismissed the case for want of jurisdiction. *See O'Dell*, 456 U.S. at 430.[6]

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[6] By contrast, as petitioner explains *infra* p. 26, there is no impediment to reaching the question presented in this case.

2. The prior grants of certiorari no doubt reflect the Court's recognition that cases involving fatal constitutional violations implicate especially important rights. As this Court noted in the course of deciding a Section 1983 case brought on behalf of the estate of a teenager who was shot to death by a police officer, an individual's "fundamental interest in his own life need not be elaborated upon"; deprivations of that interest constitute an "unmatched" intrusion. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985).

3. It is hardly surprising that questions of the interaction between state survivorship and abatement rules and Section 1983 cases arise frequently, given the number of Section 1983 cases that involve fatal constitutional violations. A Bloomberg Law search[7] of the federal court dockets reveals that, in the last twelve months, 67 cases have been brought alleging a Section 1983 claim on behalf of a decedent. This case presents a common context in which the question presented can arise. In 2010, for example, 918 inmates died while in custody in a local jail. 1 Bureau of Justice Statistics, U.S. Dep't of Just., NCJ 239911, Mortality in Local Jails and State Prisons, 2000-2010 – Statistical Tables (2012). A third of those inmates – 305 – committed suicide, making suicide the leading cause of death in local jails in 2010. *Id.* at 2. An additional 3232 state

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[7] To reproduce these results, type the phrase "(dead or decedent or death) and 42: 1983." Then limit the results to the last 12 months and the PACER Nature of Suit codes to "Other Civil Rights [440]."

prison inmates died while in custody in 2010. *Id.* at 1.

4. The often-litigated question of how to apply state abatement law in Section 1983 cases involving a fatal constitutional violation continues to befuddle the lower courts. *Compare, e.g.*, *Seawright v. Arizona*, 2013 WL 452885, at *10 (D. Ariz. 2013), *and Gotbaum v. City of Phoenix*, 617 F. Supp. 2d 878, 883-85 (D. Ariz. 2008) (both refusing to apply state law limitations on pain and suffering to Section 1983 claims), *with Venerable v. City of Sacramento*, 185 F. Supp. 2d 1128, 1131-33 (E.D. Cal. 2002), *and Cardinal v. Bushnoff*, 2010 WL 1337489, at *1-2 (S.D. Cal. 2010) (both applying such laws). Indeed, the only reason the issue does not arise even more frequently is that many states have abandoned common-law abatement. In these states, there is no bar to bringing a Section 1983 claim on behalf of the estate or heirs of someone whose death resulted from a constitutional violation. *See, e.g.*, La. Civ. Code. Ann. Art. 2315.1 (2013); Me. Rev. Stat. tit. 18-A, § 3-817 (2013); N.C. Gen. Stat. § 28A-18-2 (2013); Nev. Rev. Stat. § 41.100 (2013); 20 Pa. Cons. Stat. § 3373 (2013); 42 Pa. Cons. Stat. § 8302 (2013).

5. It is particularly important to have this Court resolve the question presented given that the entrenched division between state and federal courts implicates fundamental principles of judicial administration. Plaintiffs in Idaho and Alabama are effectively robbed of their opportunity to bring all Section 1983 claims in state court when they allege fatal constitutional violations. In a state as large as Idaho, the practical effect may be to force plaintiffs to travel hundreds of miles to a federal courthouse to

protect their Section 1983 rights rather than permitting them to litigate their case in the county where the parties and all the relevant evidence are located. At the same time, the conflict imposes a cost on defendants for exercising their statutory right to remove Section 1983 claims to federal court. But as this Court explained in *Felder v. Casey*, 487 U.S. 131 (1988), "different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court" are unacceptable. *Id.* at 141.

III. This Case Is An Ideal Vehicle For The Court To Resolve The Conflict At Issue.

For three reasons, this case presents the ideal opportunity for this Court to address the issue presented.

1. In sharp contrast to *Jefferson v. City of Tarrant*, 522 U.S. 75 (1997), *Jones v. Hildebrant*, 432 U.S. 183 (1977), and *O'Dell v. Espinoza*, 456 U.S. 430 (1982), there are no procedural barriers in this case to reaching the question presented. The question presented was properly raised and adjudicated below, *contra Jones*, 432 U.S. at 185, 188-89. And the Idaho Supreme Court's decision was undoubtedly a final judgment within the meaning of 28 U.S.C. § 1257. Thus this Court clearly has jurisdiction, *contra Jefferson*, 522 U.S. at 84; *O'Dell*, 456 U.S. at 430.

2. The question presented was outcome-determinative in this case. The only substantive issue decided by the Idaho Supreme Court was whether Idaho abatement principles extinguished all

Section 1983 claims arising out of Munroe's suicide. Pet. App. 7a-8a.

If this Court were to hold that Idaho cannot categorically extinguish Section 1983 claims in cases involving fatal constitutional violations, this case would go forward. The Idaho Supreme Court would have to address petitioner's claim that the district court erred in granting summary judgment or qualified immunity to each of the respondents. The possibility that respondents might prevail on one or more of their arguments regarding these issues is no reason to deny review. This Court frequently grants review to decide an important question of federal law even when another issue may be dispositive on remand. *See, e.g.*, *Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1430-31 (2012); *Christian Legal Society v. Martinez*, 130 S. Ct. 2971, 2995 n.28 (2010). In any event, petitioner has strong arguments that the district court erred, particularly in how it assessed the question of municipal liability and how it applied this Court's qualified immunity jurisprudence.

3. This case presents a typical context in which the question presented arises. Most of the cases on both sides of the conflict among the lower courts involve fatal constitutional violations in correctional facilities. Indeed, many of them involve inmate suicides due to allegedly inadequate medical care. *See supra* pp. 24-25. While many of the other reported cases involve excessive use of force, the same analysis of survivor and abatement rules would apply there. Regardless of precisely how a claimant dies in the course of a violation of his constitutional rights, the survival of his Section 1983 claim turns on

the same factors, and an answer to the question here will provide guidance there as well.

IV. State Law Cannot Bar Section 1983 Claims In Cases Where A Constitutional Violation Causes The Death Of A Victim.

1. This Court's decision in *Carlson v. Green*, 446 U.S. 14 (1980), should answer the question left open in *Robertson v. Wegmann*, 436 U.S. 584 (1978), and presented by this case. Marie Green's son, Joseph Jones, died of an asthma attack while in a federal correctional center. *See id.* at 16 & n.1. Green, as administratrix of Jones's estate, brought a *Bivens* action against federal officials alleging they had violated the Eighth Amendment by failing to provide Jones with adequate medical care. *See id.* at 16 n.1. The district court dismissed the complaint because "in its view the damages remedy as a matter of federal law was limited to that provided by Indiana's survivorship and wrongful-death laws and, as the court construed those laws, the damages available to Jones' estate" failed to meet the then-existing jurisdictional-amount requirement for cases arising under federal law. *See id.* at 17. The Seventh Circuit reversed, holding "that the Indiana law, if applied, would 'subvert' 'the policy of allowing complete vindication of constitutional rights' by making it 'more advantageous for a tortfeasor to kill rather than to injure.'" *Id.* at 17-18.

This Court affirmed. It emphasized that "*Robertson* expressly recognized that to prevent frustration of the deterrence goals of § 1983" state and local officials "contemplating illegal activity must always be prepared to face the prospect of a § 1983

action." *Carlson*, 446 U.S. at 24-25 (quoting *Robertson*, 436 U.S. at 592). Accordingly, the Court reasoned that it was "essential" that *Bivens* claims "survive the decedent's death" so as "not to 'frustrate in [an] important way'" the reason for recognizing the right to bring damages claims in constitutional cases, *Carlson*, 446 U.S. at 25 (quoting *Auto Workers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 702 (1966)).

Numerous courts have recognized that the reasoning in *Carlson* applies equally to Section 1983 cases. Those courts have therefore refused to apply state laws that limited recovery in Section 1983 cases involving fatal constitutional violations. *See, e.g.*, *McFadden v. Sanchez*, 710 F.2d 907, 911 (2d. Cir.), *cert. denied*, 464 U.S. 961 (1983); *Bell v. City of Milwaukee*, 746 F.2d 1205, 1237-41 (7th Cir. 1984), *overruled on other grounds by Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005); *Weeks v. Benton*, 649 F. Supp. 1297, 1308-09 (S.D. Ala. 1986); *Heath v. City of Hialeah*, 560 F. Supp. 840, 843-44 (S.D. Fla. 1983).

If anything, the rationale for refusing to let state law extinguish damages actions based on fatal constitutional violations is stronger in the context of Section 1983 than it is in the context of *Bivens*. After all, *Bivens* is an implied cause of action, while Section 1983 represents a considered congressional judgment that constitutional violations by state and local officers and municipalities demand a remedy "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Indeed, if Section 1988(a) did not direct courts to look in the first instance to state law, no one

would think a state could pass a statute extinguishing a federal claim.

Section 1988 was never intended to provide states a veto over Congress's decision to provide broad federal remedies for *all* constitutional violations by municipalities and by state and local government officials, including violations that result in death. The remedies available in Section 1983 cases are a question of federal law. In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court held that Congress "meant to give a remedy to parties deprived of constitutional rights," *id.* at 172, even in cases where those victims might actually have a remedy under state law, *see id.* at 183 (stating that the state remedy "need not be first sought and refused before the federal one is invoked"). This Court has recently reaffirmed its understanding that the "federal claim created by § 1983" is "broader" in important respects than "pre-existing torts," and that it would be only "the purest coincidence" if the remedies for a Section 1983 claim were "equivalent" to a state statutory or common law remedy. *Rehburg v. Paulk*, 132 S. Ct 1497, 1504-05 (2012) (quoting *Wilson v. Garcia*, 471 U.S. 261, 272 (1985) (internal quotation marks omitted)). In light of its commitment to providing a federal remedy for federal constitutional violations, "Congress surely did not intend to assign to state courts and legislatures a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson*, 471 U.S. at 269. Thus, "[t]he importation of the policies and purposes of the States on matters of civil rights is not the primary office of the borrowing provision in § 1988." *Id.*

2. Even if this Court had never decided *Carlson* it should reverse the judgment in this case. Section 1983's two "chief" policy goals of "compensation and deterrence," *Hardin v. Straub*, 490 U.S. 536, 539 (1989); *see Robertson*, 436 U.S. at 592, cannot be met when a state abatement law bars any relief for an entire category of constitutional violations.

From the very outset, Section 1983 has been directed at remedying and deterring constitutional injuries involving loss of life. As the Fifth Circuit's pathmarking decision in *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961), points out, Congress intended to "protect the security of life and limb as well as property against these actions. Violent injury that would kill was not less prohibited than violence which would cripple." *Id.* at 404. During the debates surrounding passage of the Civil Rights Act of 1871, Congressman Benjamin Butler stated the need for federal legislation to be "offer[ed] to a man whose house has been burned, as a remedy; to the woman whose husband has been murdered, as a remedy; to the children whose father has been killed, as a remedy." Cong. Globe, 42nd Cong., 1st Sess. 807 (1871). Similarly, Representative David Lowe located the need for a federal remedy in the fact that "the local administrations have been found inadequate or unwilling to apply the proper corrective" to cases involving the loss of life. *Id.* at 374. When state actors cause someone's death, Congress determined that the victim should have a federal remedy, without regard to what state law would or would not provide. *See Monroe*, 365 U.S. at 180.

It should go without saying that allowing state abatement rules to extinguish or severely limit the damages otherwise available in Section 1983 cases would undermine the compensatory function of Section 1983. Such rules also entirely eliminate Section 1983's deterrent effect precisely where it is needed most – contexts in which violations not only infringe on fundamental rights but also risk loss of life. Ralph Waldo Emerson famously remarked to Oliver Wendell Holmes, "When you strike at a king, you must kill him." Max Lerner, The Mind and Faith of Justice Holmes 197 (1943). The decision in this case imparts similar advice. It tells the worst bad actor that he will escape Section 1983 liability if he kills his victim. It defies reason that the Congress that enacted Sections 1983 and 1988 thought it was creating this kind of perverse incentive.

Nothing in *Robertson* compels such a result. In *Robertson*, the original plaintiff's death was entirely fortuitous. Thus, even if the claim at issue there – a claim for malicious prosecution – was abated, most plaintiffs in malicious prosecution cases are unlikely to die during the pendency of the litigation, and thus their suits will provide a substantial amount of deterrence for that category of constitutional violations. By contrast, the rule here wipes out liability and thus deterrence for an entire set of constitutional violations.

3. Contrary to what the Idaho Supreme Court thought here, *see* Pet. App. 14a, the possible availability of state law causes of action that may coincidentally be available where a constitutional violation has caused death cannot adequately substitute for Section 1983 suits that are

extinguished by operation of state abatement or survivorship rules.

Section 1983 "provides a uniquely federal remedy" against constitutional violations under color of state law. *Robertson*, 436 U.S. at 593. Thus, as this Court stated in *Zinermon v. Burch*, 494 U.S. 113 (1990), "overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983." *Id.* at 124.

A few examples show why reliance on state law causes of action is an inadequate substitute. First, many states impose quite restrictive notice-of-claim statutes and statutes of limitations in cases against municipalities or government officials. Under Idaho law, for instance, a condition precedent to filing any state law claims against a political subdivision or its employees is that a detailed notice of claim be filed with the political subdivision within 180 days from the date the claim arose or should have been discovered. *See* Idaho Code Ann. §§ 6-906 to -907 (2013). The putative plaintiff must generate that notice, including factual details of the claims, prior to any formal discovery. Failure to comply with these defendant-protective notice-of-claim rules bars the claims from going forward and will result in dismissal of a subsequent lawsuit. *See Van v. Portneuf Medical Center*, 212 P.3d 982, 987 (Idaho 2009). While this Court has held that Section 1983 cases cannot be precluded by failure to satisfy a notice-of-claim requirement, *see Felder v. Casey*, 487 U.S. 131, 134 (1988), no such protection exists for the plaintiff who seeks damages under state law. In contrast to the 180-day notice-of-claim period for state-law suits against the government, Section 1983

suits in Idaho are subject to a two-year statute of limitations, giving potential plaintiffs substantially more time to investigate and develop their case. *See* Idaho Code Ann. § 5-219 (2013); *Wilson v. Garcia*, 471 U.S. 261, 275, 280 (1985). Moreover, a Section 1983 plaintiff can amend his initial complaint in light of information obtained during formal discovery.

This case illustrates the problem. Petitioner was forced to file her notice-of-claim without access to information peculiarly within respondents' control. She initially filed a complaint raising both Section 1983 and state-law claims. Pet. App. 6a. Formal discovery provided her with additional information that clarified the relevant events and the nature of the constitutional violation. R. 284-85. Although she could amend her claims under Section 1983, she was foreclosed from amending her state-law claims by the specificity requirement in the notice-of-claim rule.

Second, the damages available under state law for an available tort claim may do very little to compensate fully for a particular constitutional violation or otherwise act as a sufficient deterrent to future constitutional violations. The tort damages available in a state-law case involving the death of a person with mental illness, a minimal employment history, or troubled familial relations are likely to be minimal. Yet many fatal constitutional violations involve such persons. Moreover, state law may contain damages caps or other restrictions on recovery in cases where a tort victim has died that would not be applicable if a Section 1983 lawsuit were permitted to proceed. Cases such as *Berry v. City of Muskogee*, 900 F.2d 1489 (10th Cir. 1990), and *Heath v. City of Hialeah*, 560 F. Supp. 840 (S.D.

Fla. 1983), discussed *supra* pp. 15 and 17-18, found state-law wrongful death actions an inadequate substitute for Section 1983 suits for precisely this reason. Therefore, state law cannot adequately compensate for the wholesale abatement of the most serious category of Section 1983 violations: those that cause death.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Darwin Overson
LAW OFFICE OF DARWIN OVERSON
1366 Murray Holladay Road
Salt Lake City, UT 84117

Kevin K. Russell
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave., NW
Suite 404
Washington, DC 20036

Pamela S. Karlan
Counsel of Record
Jeffrey L. Fisher
STANFORD LAW SCHOOL SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305
(650) 725-4851
pkarlan@stanford.edu

Eric B. Swartz
Joy M. Vega
JONES & SWARTZ PLLC
1673 West Shoreline Dr., Ste 200
Boise, ID 83702

October 21, 2013

APPENDIX

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF IDAHO

RITA HOAGLAND, *Plaintiff-Appellant-Cross Respondent*, v. ADA COUNTY, GARY RANEY, LINDA SCOWN, KATE PAPE, JAMES JOHNSON, JEREMY WROBLEWSKI, *Defendants-Respondents-Cross Appellant[s]*.	ORDER DENYING PETITION FOR REHEARING Supreme Court Docket No. 38775-2011; Ada County District Court DC No. 2009-1461 Ref. No. 13-17

The Appellant having filed a PETITION FOR REHEARING on June 6, 2013 and supporting BRIEF on June 20, 2013 of the Court's Opinion released May 16, 2013; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellant's PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 8th day of July 2013.

By Order of the Supreme Court

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record
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APPENDIX B

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 38775

RITA HOAGLAND, *Plaintiff-Appellant-Cross Respondent*, v. ADA COUNTY, GARY RANEY, LINDA SCOWN, KATE PAPER, JAMES JOHNSON, JEREMY WROBLEWSKI, *Defendants-Respondents-Cross Appellant[s].*	Boise, January 2013 Term 2013 Opinion No. 58 Filed: May 16, 2013 Stephen W. Kenyon, Clerk

Appeal from the District Court of the Fourth Judicial District, Ada County.

Hon. Ronald J. Wilper, District Judge.

The decision of the district court is affirmed in dismissing Appellant's § 1983 claim; reversed in finding that Appellant had a § 1983 cause of action for violation of her own constitutional rights; partially affirmed in its award of costs as a matter of right; reversed in its award of discretionary costs; and, affirmed in denying attorney fees below. This case is remanded for reconsideration and entry of express findings regarding award of discretionary

costs and entry of a judgment consistent with this Opinion. Costs on appeal are awarded to Respondent.

Jones & Schwartz, PLLC, Boise, attorneys for Appellant. Darwin L. Overson argued.

Greg H. Bower, Ada County Prosecuting Attorney, Boise, attorneys for Respondent. James K. Dickinson argued.

W. JONES, Justice.

I. NATURE OF THE CASE

This is an appeal and cross-appeal from summary judgment dismissing claims against Defendants (Ada County, Deputy Wroblewski, Kate Pape, and James Johnson) in a 42 U.S.C. § 1983 civil rights action brought by Rita Hoagland, ("Hoagland") on behalf of herself and the estate of her deceased son, Bradley Munroe ("Munroe"), claiming a violation of a Fourteenth Amendment right to medical care and safety while Munroe was detained at Ada County Jail where he committed suicide.

II. FACTUAL AND PROCEDURAL BACKGROUND

Munroe had a history of incarceration at Ada County Jail ("ACJ"). He was incarcerated for two days in October 2007; three days in July 2008; twenty-eight days in August 2008; and from September 12-26, 2008. During the evening of September 28, 2008, Munroe was again arrested and charged with the armed robbery of a convenience store. Munroe was intoxicated and uncooperative. Officers transported Munroe to St. Alphonsus for

medical clearance before continuing the booking process because he was exhibiting very odd behavior. At St. Alphonsus, Munroe said he would commit suicide if released, but qualified that he had no plans to commit suicide that night. St. Alphonsus cleared Munroe for booking at ACJ. During booking, Munroe was screaming, being rowdy, and not making sense when he spoke. Munroe also took a string and wrapped it around his neck. Because of his bizarre behavior throughout the night, Munroe was placed in a holding cell for observation until he was sober. While in the holding cell, a well-being check was made every fifteen minutes throughout the night. The booking process was postponed until the next morning.

The next morning at 8:00 a.m., the booking process continued, conducted by Deputy Jeremy Wroblewski ("Wroblewski"), who was in his final week of on-the-job training. As required by ACJ booking policies, Wroblewski administered a suicide risk questionnaire to Munroe. ACJ policy requires that if any of the suicide questions are answered affirmatively, the deputy must contact the jail's Health Services Unit (HSU) for further evaluation. However, because of Munroe's behavior the night before, Wroblewski's superior, Deputy Daniel Lawson, had already contacted HSU. ACJ's Psychiatric Social Worker, James Johnson ("Johnson"), arrived in the booking area at 8:01 a.m. to assess Munroe.

For his assessment of Munroe, Johnson reviewed Munroe's file from prior incarcerations, reviewed Munroe's medical history, and observed Munroe's interactions with Wroblewski and others in the

booking area. During this assessment, Johnson asked Munroe whether he was currently contemplating suicide. Johnson made the determination that Munroe's risk level was not sufficient to warrant admission to HSU or single cell housing. At 8:05 a.m., the booking process continued and Munroe was fingerprinted. At 8:26 a.m., Munroe was asked suicide risk questions by Wroblewski. Munroe answered some suicide questions affirmatively. However, Wroblewski did not contact HSU because HSU was already contacted earlier that day and had already assessed Munroe for suicide risk. Additionally, Wroblewski witnessed Johnson's assessment of Munroe and heard Johnson question Munroe about his suicidal tendencies, but nonetheless relied on the fact that Munroe was not found to be a suicide risk by Johnson.

Shortly after 9:00 a.m., Munroe told officers that he was "into a lot of stuff" and that people in the jail wanted to kill him. Munroe requested protective custody. Consequently, Munroe was placed in a cell by himself and a well-being check was scheduled to occur every thirty minutes. At the same time, Hoagland – Munroe's mother – called an administrative assistant at ACJ to express her concern that Munroe was suicidal. The administrative assistant conveyed Hoagland's concerns to Johnson, who did not change his assessment. At the 8:35 p.m. well-being check, the performing deputy found Munroe hanging from his top bunk by a bed sheet. Munroe was pronounced dead later that evening.

On November 17, 2008, the Estate of Bradley Munroe filed a Notice of Tort Claim.[1] On January 23, 2009, Hoagland filed a complaint ("First Complaint") in her personal capacity and as representative of Munroe's estate. This complaint named numerous parties, including Ada County, HSU supervisors, and several deputies, and the complaint alleged that deputies were watching football instead of watching detainees. The First Complaint included a § 1983 claim by Munroe's estate against Defendants, a state tort claim for the wrongful death of Munroe, and a state action for intentional infliction of emotional distress by Hoagland against the supervisor of HSU. On May 28, 2010, Defendants filed a Motion for Summary Judgment. Hoagland ultimately elected to withdraw all of her state law claims and proceed entirely under her § 1983 claim. Hoagland filed an Amended Complaint on July 12, 2010. Hoagland then sought leave to file a Second Amended Complaint on August 12, 2010, to add two parties. On August 13, 2010, Hoagland sought leave to file her Third Amended Complaint ("Third Complaint") to add a claim for punitive damages.

The Third Complaint was filed in the district court on September 14, 2010. On September 20, 2010, Defendants filed a Motion to Dismiss the Third Complaint. Defendants claimed that Munroe's estate was not a proper § 1983 plaintiff. On November 2, 2010, the district court entered an order granting Defendant's motion in part. The district court found that Munroe's estate was not a valid plaintiff, but

[1] The record is very unclear as to whether a Notice of Tort Claim was actually filed by Hoagland; and if so, whether it was timely filed.

found that Hoagland had standing to continue her lawsuit. Defendants filed a Restated Motion for Summary Judgment on November 12, 2010. On January 20, 2011, the district court granted summary judgment in favor of Ada County, all defendants in their official capacities, and every defendant in their personal capacities, except for Johnson. Both Hoagland and Defendants moved for reconsideration. Hoagland submitted numerous affidavits in support of her motion for reconsideration. Defendants objected to Hoagland's affidavits. Defendants also sought reconsideration, claiming that Johnson was entitled to qualified immunity. The district court granted both parties' respective Motions for Reconsideration, denied Hoagland's claims, and granted summary judgment in favor of Johnson based upon qualified immunity on March 28, 2011. On May 4, 2011, Hoagland filed her Notice of Appeal. Final Judgment was entered on May 25, 2011. On July 1, 2011, Defendants' filed their Notice of Cross-Appeal. On October 15, 2011, the district court denied Defendants' request for attorney fees but granted their request for costs. The Judgment for Costs was entered on October 24, 2011. Hoagland filed an Amended Notice of Appeal on October 29, 2011.

III. ISSUES ON APPEAL

1. Whether in a 42 U.S.C. § 1983 action, the plaintiff bears the burden of demonstrating a constitutional deprivation underlying his or her claim in order to survive summary judgment.

2. Whether a decedent's estate may assert a 42 U.S.C. § 1983 cause of action for alleged violations of decedent's constitutional rights.

3. Whether a parent has standing to pursue a 42 U.S.C. § 1983 cause of action for the suicide death of his or her adult child while incarcerated in jail.

4. Whether the district court erred when it awarded $93,253 in costs to Defendants.

5. Whether the district court erred when it failed to award Defendants' attorney fees.

6. Whether either the Plaintiffs or Defendants are entitled to attorney fees on appeal.

IV. STANDARD OF REVIEW

This Court exercises free review over a district court's conclusions of law. *Maresh v. State Dep't of Health & Welfare*, 970 P.2d 14, 17 (1998). An appeal of an order granting summary judgment is reviewed under the same standard a district court uses when granting a motion for summary judgment. *A & J Const. Co., Inc. v. Wood*, 116 P.3d 12, 14 (2005). Under Rule 56(c) of the Idaho Rules of Civil Procedure, summary judgment is proper if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." If the evidence reveals no disputed issues of material fact, then summary judgment should be granted. *Smith v. Meridian Joint Sch. Dist. No. 2*, 918 P.2d 583, 587-88 (1996). In making this determination, "all disputed facts are liberally

construed in favor of the non-moving party." *McCoy v. Lyons*, 820 P.2d 360, 364 (1991). Circumstantial evidence can create a genuine issue of material fact. *Id.* Inferences that can reasonably be made from the record are made in favor of the non-moving party. *Id.* However, the non-moving party may not rest on a mere scintilla of evidence. *Id.* Summary judgment proceedings are decided on the basis of admissible evidence. *Heinze v. Bauer*, 178 P.3d 597, 601 (2008).

Awards of costs and attorney fees are reviewed for an abuse of discretion. To determine whether the trial court abused its discretion, this Court must consider whether the trial court: (1) correctly perceived that the issue is one of discretion; (2) acted within the outer boundaries of its discretion and consistent with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason. *Bailey v. Sanford*, 86 P.3d 458, 462 (2004).

V. ANALYSIS

A. The District Court Applied the Proper Summary Judgment Standard.

In deciding the various motions for summary judgment before it, the district court ruled that "[s]ummary judgment of § 1983 cases involves an additional element of analysis. In § 1983 cases, plaintiff bears the burden of proof on the [c]onstitutional deprivation that underlies the claim, and must come forward with sufficient evidence to create a genuine issue of material fact to avoid summary judgment." Hoagland maintains that the district court erred in applying this added element to

the summary judgment standard. She argues that at all times the burden is on the moving party.

Extensive federal jurisprudence supports the district court's summary judgment standard. In order for the plaintiff to survive summary judgment on his or her § 1983 claim, he or she must demonstrate a genuine issue of material fact as to (1) whether there was a deprivation of a constitutional right; and (2) that the deprivation was caused under the color of law. *Parker v. Fayette Cnty. Pub. Sch.*, 332 F. App'x 229, 231 (6th Cir. 2009); *McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010) ("In a § 1983 case, the plaintiff bears the burden of proof on the constitutional deprivation that underlies the claim"); *see also Butler v. City of Norman*, 992 F.2d 1053, 1055 (10th Cir. 1993) (holding that to survive summary judgment on a § 1983 claim, "plaintiff [ ] has a further burden. [The Defendant] is not liable under § 1983 unless an 'affirmative link' exists between the constitutional deprivation [and the action of the defendant]"); *Ward v. Oliver*, 19 F.3d 1436, 1439 (7th Cir. 1994) (finding the plaintiff failed to raise sufficient facts to indicate that the denial of access to cigarettes and soda amounted to a constitutional deprivation); *Lindstedt v. Mo. Libertarian Party*, 160 F.3d 1197, 1198 (8th Cir. 1998) (affirming grant of summary judgment because plaintiff "had to show" that the action complained of was taken under the color of law, and that action resulted in a deprivation of a constitutional right); *Lawson v. Des Moines Indep. Sch. Dist.*, 356 F. App'x 885, 886 (8th Cir. 2009) (holding "summary judgment was proper because [plaintiff] failed to demonstrate the denial of a constitutional right").

We therefore hold that in a § 1983 action, on a motion for summary judgment, the plaintiff bears the burden of demonstrating a constitutional deprivation underlying his or her claim.

B. Munroe's Estate is Not a Permissible § 1983 Plaintiff.

Hoagland argues that the trial court erred when it ruled that she did not have standing as the personal representative of Munroe's estate to pursue a § 1983 cause of action for alleged violations of Munroe's constitutional rights while at ACJ. Hoagland argues that Idaho's Probate Code gives her standing to bring a survivorship and wrongful death claim under § 1983. She argues that Count I of her complaint did not abate upon the death of Munroe because the inquiry is whether Munroe's death was *caused* by the alleged constitutional violations. Hoagland argues that if the death was caused by the constitutional violation, then the claim does not abate, but if the death was unrelated to the constitutional violation then the claim abates.

Defendants argue that Idaho law precludes an estate from being a permissible § 1983 plaintiff because § 1983 is a personal cause of action that is actionable only by the person whose constitutional rights are violated. They argue that since common law in Idaho recognizes that personal causes of action abate upon the death of the claimant and since this common law rule has not been changed by statute, Munroe's estate cannot bring a § 1983 claim. Defendants further maintain that a § 1983 cause of action abates when the plaintiff dies before trial, even if caused by the alleged violations. Defendants

argue that there is no federal law on the issue of abatement, so the law of the forum state, Idaho, applies. Additionally, they argue that abatement is not inconsistent with federal law because a law that merely causes a plaintiff to lose a case does not render it inconsistent with federal law.

The district court held that Munroe's estate was not a valid § 1983 plaintiff because § 1983 creates a personal cause of action for violations of constitutional rights. The district court recognized the common law rule of abatement and found that because Idaho permits claims via its wrongful death statute, the abatement principle was not inconsistent with federal law.

Section 1983 provides a cause action against every person "who, under the color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects [another] person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . ." 42 U.S.C. § 1983. This Court has held that "[t]he § 1983 cause of action, by virtue of the statute's express language, is a personal cause of action, actionable *only by persons whose civil rights have been violated*." *Evans v. Twin Falls Cnty.*, 796 P.2d 87, 94 (1990) (emphasis added). Section 1988 provides that § 1983 actions should be exercised in accordance with federal laws. 42 U.S.C. § 1988. But in situations where federal law is deficient, the common law or statutes of the forum state shall govern, so long as they are "not inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988. At common law in Idaho, a victim's right of action for torts dies with the victim. *Evans*, 796 P.2d at 92. The common law in Idaho remains in

effect unless modified by the legislature. I.C. § 72-116 [sic]. The legislature has not modified Idaho's abatement rule, but it does permit wrongful death actions. I.C. § 5-311. The United States Supreme Court held that "nothing in [§ 1983] or its underlying policies indicate[s] that a state law causing abatement of a particular action should invariably be ignored in favor of a rule of absolute survivorship." *Robertson v. Wegmann*, 436 U.S. 584, 590 (1991). The policies underlying § 1983 are compensation of injured persons and the prevention of abuses of power. *Id.* at 591. The U.S. Supreme Court also ruled that the policy of compensating the injured does not require "compensation of one who is merely suing as the executor of the deceased's estate." *Id.* at 592.

We hold that Munroe's § 1983 claim abated with his death. This Court has clearly held that § 1983 is a personal cause of action. Furthermore, there is no federal law governing the issue of abatement. Therefore, the law of Idaho governs to the extent that it is not inconsistent with federal law. At common law in Idaho, a personal tort cause of action abates with the death of the plaintiff. That rule has only been modified to the extent that wrongful death claims are permissible by statute. The U.S. Supreme Court has clearly held that a rule of abatement is not inconsistent with the policies of § 1983 and that the policy of compensating injured persons does not extend to the estate of those persons. Just because the estate is unable to bring an abated cause of action does not render Idaho's abatement rule inconsistent with federal law.

Hoagland makes a distinction between death *caused* by the constitutional violation and death not

caused by the constitutional violation. Neither Idaho nor federal law makes this distinction. Indeed, in *Evans* this Court held that plaintiff's § 1983 claim abated with the death of the decedent, who died of cardiac arrest allegedly *caused* by the alleged constitutional violations. *Evans*, 796 P.2d at 93-95. Additionally, in the present matter, the district court properly noted that the abatement rule is not inconsistent with the policies of § 1983 because there is an adequate remedy available through Idaho's wrongful death statute for the death of Munroe. However, Hoagland opted not to avail herself of that statute, allegedly failed to timely file her Notice of Tort Claim, and voluntarily dismissed her wrongful death claim. The mere fact she chose not to pursue a cause of action available outside of § 1983 does not render Idaho's abatement rule inconsistent with federal law.

Thus, the district court properly held that Munroe's estate is not a valid § 1983 plaintiff.

C. Hoagland Did Not Possess a § 1983 Cause of Action Against Defendants.

Defendants bring a cross-appeal and allege that the district court erred in permitting Hoagland to bring a § 1983 claim for the death of Munroe. Defendants argue that the Seventh Circuit at one time permitted a § 1983 claim for the loss of companionship resulting from the death of a child; however, the Seventh Circuit overruled itself at the risk of constitutionalizing all tort claims. Defendants argue that the only constitutional right Hoagland could assert is an intentional severance of her relationship with Munroe. Since Hoagland made no

such assertion or argument, they suggest she has no constitutional deprivation and thus no cause of action.

In her Third Complaint, Hoagland identifies the constitutional right implicated as a "violation of Munroe's constitutionally protected rights under the Eighth and Fourteenth Amendments of the United States Constitution that resulted in the wrongful death of Munroe and the termination of [ ] Hoagland's familial relationship with Munroe and the loss of his society and companionship." Before the district court, Hoagland clarified that her reliance on Idaho's wrongful death statute "is used only to provide [her] standing to assert the § 1983 claim . . . [it] is not asserted as a basis for remedy in itself." But on appeal, Hoagland argues that her § 1983 claim "incorporates Idaho's wrongful death statute, . . . which gives her standing to assert the claims [Munroe] could have asserted had he survived." Hoagland maintains that the district court permitted her to pursue her § 1983 claim, not for a violation of her constitutional rights, but as a wrongful death claim. Hoagland asks this Court to permit her to bring "a wrongful death claim under § 1983." In the alternative, Hoagland argues that this court should recognize familial association as a constitutional right. Hoagland further argues that the standard required to impose liability should be deliberate indifference and not intentional interference.

The district court examined several approaches by federal circuits. It noted that multiple circuits hold that a parent does not have a right to bring a § 1983 wrongful death action for activity not specifically aimed at interfering with the parent-child

relationship. The Ninth Circuit is alone in permitting recovery based on unintentional interference. The district court, however, opted for the approach used by the Fifth Circuit in the 1992 case of *Rhyne v. Henderson Cnty.*, 973 F.3d 386 (5th Cir. 1992). The district court read this case as permitting a § 1983 claim on the basis of a forum state's survivorship laws. As such, it concluded that Hoagland had standing to pursue her § 1983 action.

The district court later clarified its ruling on Hoagland's standing as follows:

> The [c]ourt is not holding that [ ] Hoagland experienced a constitutional deprivation because of the actions of [ACJ] employees. Rather, [the district court] holds that she had a constitutionally protected interest in a relationship with her son, and because Idaho wrongful death law allows her standing to bring claims for her own damage, she may state a claim for deprivation of the constitutional interest . . . when the state allegedly deprived her son of his constitutionally protected interest in adequate healthcare.

The district court then examined whether the following alleged constitutional deprivations occurred: "potential pretrial detainee's constitutional deprivation under the Fourteenth Amendment's Due Process Clause, or a prisoner's constitutional deprivation under the Eighth Amendment."

1. Hoagland's Constitutional Interest.

Section 1983 grants a cause of action "to the party injured" by a deprivation of a constitutional

right. 42 U.S.C. § 1983. Section 1983 is a personal cause of action, *actionable* only by persons whose *civil rights* have been violated. *Evans v. Twin Falls Cnty.*, 796 P.2d 87, 94 (1990). The U.S. Supreme Court has held that "a plaintiff [to state a § 1983 claim,] must allege the violation of a right secured by the Constitution and laws of the United States." *West v. Atkins*, 487 U.S. 42, 48 (1988). Because § 1983 is not a source of substantive rights, but merely a vehicle to vindicate those rights, "[t]he first step in any such claim is to identify the specific constitutional right allegedly infringed." *Albright v. Oliver*, 510 U.S. 266, 271 (1994). Courts are reluctant to expand the concept of substantive due process. *Id.* In particular, courts are reluctant to permit § 1983 actions in a manner that would constitutionalize remedies available in tort. *Russ v. Watts*, 414 F.3d 783 (7th Cir. 2005) (denying attempt to pursue a § 1983 action without sufficient evidence to demonstrate that an officer shot the plaintiff with the specific purpose of terminating decedent's relationship with his family).

The district court relied on *Minix v. Canarecci*, 597 F.3d 824 (7th Cir. 2010), for the framework it used to analyze the deprivation of Hoagland's constitutional rights. In that case, an inmate in the county jail with a history of suicidal tendencies committed suicide. The inmate's mother brought a § 1983 action against several jail officials. In examining the claim by decedent's mother, the court examined whether the jail violated the Eighth and Fourteenth Amendment rights of the decedent. *Id.* at 831. The test it utilized was (1) whether the prisoner suffered an objectively serious harm that presented a substantial risk to his safety; and (2) whether the

defendants were deliberately indifferent to that risk. *Id.* Ultimately, the court found that suicide is always a substantial risk, but there were insufficient facts to demonstrate deliberate indifference. *Id.*

We find that *Minix* is not relevant to Hoagland's constitutional claim. Minix brought her § 1983 claim as the personal representative of decedent. *Id.* at 829. "Minix, as the personal representative of [decedent]'s estate, brought a § 1983 action against multiple defendants . . . Minix alleged that the defendants violated [decedent]'s Eighth and Fourteenth Amendment rights by displaying deliberate indifference to his risk of suicide." *Id.* In Idaho, such estate claims are impermissible. Furthermore, the district court itself recognized such estate claims were impermissible. *Minix* involves an estate's § 1983 claim for violation of the decedent's Eighth Amendment rights, not a parent's § 1983 claim for violation of her right to a familial relationship.

Hoagland maintained in her Third Complaint, that ACJ's actions violated her Fourteenth Amendment rights to associate with her son. But the district court effectively permitted Hoagland to pursue a claim for the constitutional violations suffered by Munroe, not for the violations Hoagland suffered herself as a result of ACJ's actions. Section 1983 is a personal cause of action that abated with Munroe's death. Thus, the district court erred by examining the Eighth and Fourteenth Amendment constitutional violations of Munroe because those violations abated. Instead, Hoagland must demonstrate *her* civil rights were violated. It is improper to analyze whether the state violated Hoagland's constitutional right to a familial

relationship with Munroe based on whether the state violated Munroe's Eighth and Fourteenth Amendment rights.

Whether a parent of an adult child can recover under § 1983 on the basis of interference with their familial relations is a question of first impression in Idaho. The U.S. Supreme Court is always reluctant to expand the concept of substantive due process. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). There is, however, a fundamental constitutional liberty interest in the care, custody, and control of a person's minor child. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).[2] It is broadly recognized that finding a constitutional violation based on actions not directed at the parent-child relationship stretches the concept of due process too far. *See Russ*, 414 F.3d at 790; *McCurdy v. Dodd*, 352 F.3d 820, 829-30 (3d Cir. 2003); *Valdivieso Ortiz v. Burgos*, 807 F.2d 6, 8-9 (1st Cir. 1986). All federal circuits that have addressed this issue, except the Ninth Circuit, disallow § 1983 claims for the unintentional termination of the parent-child relationship. *See, e.g.*, *Russ*, 414 F.3d at 791 (reversing *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984), which permitted a § 1983 claim by a parent for the unintentional termination of familial relationship); *McCurdy*, 352 F.3d at 829-30 (requiring official action to be "deliberately directed at the parent-child relationship"); *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). We find that the best and most concise articulation of

[2] The *Troxell* case involves the constitutional rights of a parent with regard to his or her *minor* child. The constitutional implications of a parent's right to have a relationship with an adult child are significantly less clear.

the standard required to make out a violation of a right to a familial relationship sufficient to warrant a § 1983 claim is that articulated by the Tenth Circuit in *Trujillo v. Bd. of Cnty. Comm'rs of Santa Fe Cnty.*: "an allegation of intent to interfere with a particular relationship protected by the freedom of intimate association is required to state a claim under [§ 1983]." 768 F.2d 1186, 1190 (10th Cir. 1985).

Hoagland argues that a deliberate indifference standard should apply. Deliberate indifference, however, is the standard used when determining whether Eighth Amendment rights were violated, not whether a Due Process right to familial relations was impermissibly terminated. *See Minix*, 597 F.3d at 831. The Tenth Circuit's articulation is consistent with the decisions of other circuits, which recognize a constitutional right to familial relations, but looks for activity to be directed at that relationship.[3] Applying

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[3] *McCurdy*, 352 F.3d at 829-30 (requiring official action to be "deliberately directed at the parent-child relationship"); *Claybrook v. Birchwell*, 199 F.3d 350, 357 (6th Cir. 2000) ("no cause of action may lie under section 1983 for . . . loss of a loved one . . . allegedly suffered personally by the victim's family"); *Shaw v. Stroud*, 13 F.3d 791, 805 (4th Cir. 1994) (holding Fourteenth Amendment does not "encompass deprivations resulting from governmental actions affecting the family only incidentally"); *Valdivieso Ortiz*, 807 F.2d at 9 (declining to find interest in incidental deprivation of the relationship between appellants and their adult relative).

It is not clear in Idaho whether Hoagland has a constitutional right to familial relations with Munroe. Certainly, no decision from this Court has recognized a constitutionally protected interest in a relationship with an adult child. Nor has this right been clearly established in the Federal Constitution. The Ninth Circuit recognizes a constitutionally protected right to a familial relationship that is protected from unintentional

this standard to the present matter, Hoagland lacks a cause of action. Though she alleged interference with her familial relations, she does not raise, allege, or argue any facts demonstrating that the activities at ACJ were directed at her *relationship* with Munroe. Much less does she claim that such interference was intentional.

Therefore, Hoagland failed to establish a violation of her constitutional rights underlying her § 1983 claim.

2. Hoagland's § 1983 Claim Did Not Incorporate a Wrongful Death Claim.

Hoagland argues that even though she dismissed her state law claims against Defendants, § 1983 incorporates a wrongful death claim against Defendants, and she can proceed on that basis. In her First Complaint, she raised several state law claims, including a wrongful death claim. After Defendants raised questions about whether Hoagland properly filed a Notice of Tort Claim, she dismissed the state law claims. Her attorney told the presiding judge that she was proceeding entirely on § 1983. The basis for wrongful death in Idaho is statutory. Section 1983 is not a substantive source of rights, and serves to

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interference by the state. However, other circuits, like the Sixth, suggest that there is no constitutional right implicated by the loss of a family member. The remaining circuits hold that there is a constitutional right not to have a familial relationship directly or intentionally interfered with by the state. Hoagland might not have a cause of action, because she might not even be able to identify a constitutional right allegedly violated.

Even if we assume that Hoagland has a constitutional right to a familial relationship with her adult son, Hoagland fails to allege facts demonstrating a violation of that right.

vindicate constitutional, not statutory rights. Now on appeal, Hoagland attempts to resurrect her wrongful death claim, which she voluntarily dismissed.

Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first. *See Loomis v. Church*, 277 P.2d 561, 565 (1954). The policy behind judicial estoppel is to protect "the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding." *A & J Constr. Co. v. Wood*, 116 P.3d 12, 16 (2005). It is intended to prevent parties from playing fast and loose with the legal system. *Id.*; *see also* 31 C.J.S. *Estoppel and Waiver* § 186 (2012).

We hold that Hoagland is estopped from further advancing this argument. Hoagland told the district court that she was pursuing only a § 1983 claim and that her reliance on Idaho's wrongful death statute in her § 1983 claim was for standing, not as a basis for remedy. Now she argues that her § 1983 claim incorporates the wrongful death claim, thereby attempting to revive a claim she voluntarily dismissed. These are inconsistent positions. Consequently, Hoagland is estopped from pursuing this argument.

D. All Remaining Issues Related to the District Court's Grant of Summary Judgment Are Moot.

"It is well-established that this Court does not decide moot cases." *Comm. for Rational Predator Mgmt. v. Dep't of Agric.*, 931 P.2d 1188, 1190 (1996). An issue or case becomes moot if a judicial

determination on that issue will have no practical effect upon the outcome of the case. *Id.* Because Hoagland cannot pursue her § 1983 claim as the personal representative of Munroe's estate, or in her personal capacity for alleged violations of her constitutional rights, the issues raised by both her and Defendants relating to punitive damages, summary judgment to various individuals, qualified immunity, stay of discovery, dismissal of *Monell*[4] claims, and questions of evidentiary admissibility are rendered moot and will not be considered.

E. The District Court Did Not Make Adequate Findings in its Award of Costs to Defendants.

On March 4, 2011, after the last defendants were dismissed from this action, Defendants moved for an award of costs and fees. The district court denied the motion for costs and attorney fees, finding that the action was not pursued frivolously. Defendants filed a motion for clarification or reconsideration. The district court awarded Defendants $15,815.31 in costs as a matter of right, and $77,438.12 in discretionary costs.

Hoagland argues that the district court's grant was erroneous because it includes costs that are not available as a matter of right; the district court did not make express findings in support of its award of discretionary costs; and this is not an exceptional case that permits the award of costs. Hoagland

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[4] A *Monell* claim permits suit against a local government entity under § 1983. *Monell v. Dept. of Soc. Serv.*, 436 U.S. 658, 694 (1978). This is an exception to the general rule that "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id.*

argues that she is unable to pay the discretionary costs, and as such, costs should not have been awarded.

Defendants argue that they are entitled to collect all of their costs as a matter of right, even if they were incurred before trial. Also they argue the district court properly awarded their discretionary costs because this case is exceptional. Defendants argue the case was exceptional because of the type of claims raised, the convoluted procedural history, and the extensive costs required to reconstruct Munroe's state of mind in order to defend against the action. Finally, Defendants argue that the district court should not consider Hoagland's financial ability to pay costs.

1. The District Court Erred in Awarding Costs Totaling $918 as a Matter of Right.

This Court exercises free review of the district court's compliance with the rules of civil procedure in awarding costs and attorney fees. *J.F. Simplot v. Chemetics Int'l*, 939 P.2d 574, 576 (1997).

First, Hoagland only challenges $1,097.81 of the costs the district court awarded as a matter of right. The first cost she challenges is $182.10 for "Attempted Service." Rule 54 awards, as a matter of right, "[a]ctual fees for service of any pleading or document in the action whether served by a public officer or other person." Here, these fees were incurred in the process of serving documents. There is no indication the attempted service fees were "not reasonably incurred." I.R.C.P 54(d)(1)(C). The cost did not accrue while planning for service, but for attempting to perfect service.

Second, Hoagland challenges an award of $500 for "exhibit preparation." She alleges, and Defendants do not dispute, that the challenged exhibits were not used at trial or at hearing. Rule 54 awards, as a matter of right, "[r]easonable costs of the preparation of models, maps, pictures, photographs, or other exhibits *admitted in evidence* as exhibits in a hearing or trial of an action, but not to exceed the sum of $500 for all of such exhibits of each party." I.R.C.P. 54(d)(1) (emphasis added). The plain language of Rule 54 restricts the cost of preparing exhibits to those "admitted in evidence." The restrictive nature of this language precludes awards for exhibits *not admitted* in evidence. Thus, because the exhibits prepared by the Defendants were not admitted, it was improperly allowed.

Third, Hoagland challenged an award of $415 for transcription fees of depositions that were cancelled. Rule 54 awards, as a matter of right, "[c]harges for reporting and transcribing of a deposition taken in preparation for trial of an action, whether or not read into evidence in the trial of an action." Here, the plain language of the rule restricts the charges of reporting and transcribing of a deposition to those *taken* in preparation for trial. Here, however, the depositions were cancelled, and were thus never taken. Consequently, this cost is not available as a matter of right.

2. The District Court Failed To Make All Express Findings Necessary To Award Discretionary Costs.

Idaho Rule of Civil Procedure 54(d)(1)(D) permits the district court to award "[a]dditional items of costs

not enumerated in, or in an amount in excess of that [allowed as a matter of right]." Such costs are permissible "upon a showing that [they] were necessary and exceptional costs reasonably incurred, and should in the interest of justice be assessed upon the adverse party." *Id.* The award of such costs is left to the discretion of the trial court. *Van Brunt v. Stoddard*, 39 P.3d 621, 629 (2001). The district court shall, however, make express findings that the discretionary costs awarded are necessary, exceptional, reasonably incurred, and should be assessed against the adverse party in the interest of justice. *Evans v. State*, 18 P.3d 227, 237 (Ct. App. 2001).

a. There are inadequate findings demonstrating that this case was exceptional.

The district court determined that this case was procedurally exceptional because four complaints were filed. Furthermore, Hoagland later abandoned her state law claims. Then Hoagland shifted the focus of her lawsuit from an action against the deputies who were supposed to be watching Munroe to the medical care that Munroe received at ACJ. Hoagland then amended her claim again adding new defendants. Then she amended it again seeking punitive damages. The district court also noted the extensive motions filed back and forth in this case. All these express findings led the district court to the conclusion that this case was procedurally exceptional.

The district court also made findings that the case was factually exceptional because inmate suicide

is rare at ACJ. Furthermore, because of the nature of the facts and claim, ACJ was required to reconstruct the events of the day and attempt to determine Munroe's mental state before his suicide. Also, Defendants had to do extensive discovery and take a variety of depositions of experts because of Hoagland's Monell claims.

The district court's findings do not demonstrate that this case is exceptional. Over the years, this Court and the Court of Appeals have been inconsistent with handling discretionary costs. *Compare, e.g.*, *Hayden Lake Fire Protection Dist. v. Alcorn*, 109 P.3d 161, 168 (2005) (holding expert witness fees can be exceptional), *and In re Univ. Place/Idaho Water Ctr. Project*, 199 P.3d 102, 121 (2008) (upholding award of discretionary costs on the district court's finding discretionary costs were equitable and just), *and Puckett v. Verska*, 158 P.3d 937, 945 (2007) (permitting discretionary cost for expert witness in medical malpractice case based on the long course of litigation), *with, e.g.*, *Nightengale v. Timmel*, 256 P.3d 755, 762 (2011) (holding that case was not exceptional merely because an expert was necessary), *and City of McCall v. Suebert*, 130 P.3d 1118, 1126-27 (2006) (holding intervenor costs were not exceptional but were "routine costs associated with modern litigation overhead"), *and Fish v. Smith*, 960 P.2d 176-77 (1998) (finding hiring of expert for accident reconstruction was routine). We therefore clarify that numerous complaints, depositions, and expert testimony does not render a case in and of itself exceptional. Rather, courts should assess the context and nature of a case as a whole along with multiple circumstances. *See*

Nightengale, 256 P.3d at 762. The mere fact numerous experts were retained or numerous amendments were filed does not standing alone render a case exceptional. Particular standards a court should consider include, but are not limited to, whether there was unnecessary duplication of work, whether there was an unnecessary waste of time, the frivolity of issues presented, and creation of unnecessary costs that could have been easily avoided. Most importantly, however, a court should explain *why* the circumstances of a case render it exceptional.

It is true that Hoagland's attorneys caused a significant amount of wasted work. Hoagland filed multiple hundred-page complaints, dismissed those complaints, and then tried to rely on claims that she dismissed. Her adding and dismissing defendants and shifting of positions made the case significantly more complicated than it ought to have been. However, most of the discretionary fees awarded by the district court were not related to this wasted work but were for expert witnesses. Section 1983 claims are not per se exceptional. Also, there is nothing clearly exceptional about the state having to hire experts and conduct depositions in its defense. We decline to hold that a case is exceptional merely because the state retains experts and conducts several depositions or incurs travel expenses in connection with discovery.

Thus, the district court failed to make adequate findings regarding the exceptional nature of this case or explaining why it was exceptional sufficient to justify an award of discretionary costs.

b. There are inadequate findings that the costs were reasonably incurred.

The district court made the conclusion that $12,140 of travel costs; $63,060 in expert fees; $303 in record copies; and $233 in investigator fees were necessary and reasonably incurred. But the district court failed to make any express findings as to *why* they were necessary or exceptional. Because there are no express findings it cannot be said that it was necessary or exceptional to incur $63,060 in expert fees. It is not clear who these experts were and what reasonable fees for such experts would be. Also, it is not clear from the order that $12,140 for travel expenses were exceptional for this type of case or reasonably incurred; particularly when Hoagland asserts that people unrelated to the lawsuit were a part of these trips. However, the district court made no findings of fact on these assertions. Therefore, the district court failed to make express findings on the exceptional nature or necessity and reasonableness of the discretionary costs awarded.

c. The district court failed to make adequate findings demonstrating that its award of discretionary costs was in the interest of justice.

Hoagland argues that because she lacks the financial assets to pay the large costs awarded to Defendants, it is not in the interest of justice to make such an award. She argues that the district court cannot award costs without considering whether the party can pay the costs.

Though Hoagland cites a string of cases for the proposition that a court shall consider ability to pay

when awarding costs, most of these are federal cases dealing with the "presumption" that costs are awarded to the prevailing party. *See Badillo v. Cent. Stell & Wire Co.*, 717 F.2d 1160, 1165 (7th Cir. 1983). Federal Rule of Procedure 54 varies significantly from Idaho Rule of Civil Procedure 54. Under the federal rule, "costs . . . should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). The federal rule creates a presumption that all costs should be awarded. Based on this rule, many circuits permit a party to overcome the presumption that costs will be awarded to the prevailing party with a specific showing of indigency. *Rivera v. City of Chicago*, 469 F.3d 631, 634 (7th Cir. 2006); *Durrett v. Jenkins Brickyard*, 678 F.2d 911, 917 (11th Cir. 1982). However, the burden is on the party against whom costs are to be awarded to establish indigency. *Rivera*, 469 F.3d at 634 (finding that plaintiff failed to establish her inability to pay when the affidavit she submitted did not discuss her future expenses).

Like the federal rule, the Idaho rule has a presumption that costs are to be awarded to the prevailing party. I.R.C.P. 54(d)(1). However, the Idaho rule provides an exhaustive list of what costs are recoverable as a matter of right, and in what amount. *Id.* Limiting the amount of costs presumed to be awardable greatly mitigates the need for an indigency exception. Where the rules dramatically differ, however, is with the inclusion of subsection (d)(1)(D) to the Idaho rule, which is not in its federal counterpart. This section permits all other costs to be awarded in the district court's discretion after considering the necessity, exceptionalness, reasonableness, and interests of justice. The cases

relied upon by Hoagland deal with costs being awarded presumptively, not the awarding of discretionary costs.

We conclude that the district court failed to make adequate findings that its award of discretionary costs against Hoagland is in the interest of justice. In determining whether an award of attorney fees is in the interest of justice, a court should consider the overall conduct of the lawsuit and balance that conduct against the American Rule, which presumes that each party is responsible for their own attorney fees and costs. *See Caldwell v. Idaho Youth Ranch*, 968 P.2d 215, 222 (1998). Factors to consider include but are not limited to the merits of the lawsuit and whether or not it was pursued frivolously, *see* I.R.C.P. 11; the relationship of the costs incurred to the final disposition of the proceeding, and the value added to the proceeding by the costs incurred, *see Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 36 P.3d 218, 227 (2001); the necessity of the proceedings to the final resolution of the lawsuit; and the behavior of the parties, and whether they needlessly ran up costs and fees. Justice is not dependent upon one's wealth or ability to pay costs; as such, this is one factor that should not be considered in this analysis.

As to the disputed discretionary costs in the present matter, we begin with the presumption that it is in the interest of justice for each party to pay their own costs unless the overall conduct of the lawsuit indicates otherwise. Here, this was a complicated case and was not pursued frivolously; the district court noted as much when it denied attorney fees. Most of the discretionary costs incurred are for

Defendant's expert witnesses. Here, all indication is that Defendant's retention of expert witnesses was necessarily related to its case, but that does not necessarily mean they were exceptional. Though Defendant points to the multiple amended complaints filed by Hoagland's attorneys, amended complaints are not in and of themselves exceptional. Additionally, the amended complaints ultimately aided Defendants in their case because the amendments dismissed one of Hoagland's most promising claims of wrongful death. Finally, though Hoagland's attorneys might have created more work than necessary, there is no indication they were acting unreasonably or intentionally racking up the costs of the suit. We therefore hold that the district court failed to demonstrate that an award of discretionary costs was in the interest of justice, or if so, why?

Therefore, the district court's order of costs awarded as a matter of right is reduced by $918.00. The district court's judgment of discretionary costs is vacated and remanded for reconsideration and entry of express findings justifying the award.

F. The District Court Did Not Err in Failing to Award Defendants' Attorney Fees Below.

Defendants requested the district court to award attorney fees under both I.C. § 12-121 and 42 U.S.C. § 1988(b), which the district court denied. Defendants appeal and argue that they are entitled to attorney fees, because Hoagland pursued this action without a reasonable basis in fact or law.

1. Fees Requested Pursuant to I.C. § 12-121.

This court reviews a trial court's determinations regarding attorney fees for an abuse of discretion. *Bybee v. Isaac*, 178 P.3d 616, 620 (2008). Idaho Rule of Civil Procedure 54(e) permits the award of attorney fees to the prevailing party. Such an award is only permissible when the court finds that a case was "brought, pursued or defended frivolously, unreasonably or without foundation." I.R.C.P. 54(e)(1). This court will consider the entire course of the litigation when determining whether attorney fees should be awarded. *Nampa & Meridian Irrigation Dist. v. Washington Fed. Sav.*, 20 P.3d 702, 708 (2001). "Attorney fees are not warranted where a novel legal question is presented." *McCann v. McCann*, 275 P.3d 824, 838 (2012).

The district court did not abuse its discretion in failing to award attorney fees, because even though much of Hoagland's case was frivolous and she might have somewhat abused the process below, Hoagland presented a novel issue related to the standard required to succeed on a § 1983 claim for violations of her own rights. This issue is one of first impression in Idaho. Thus, the district court did not abuse its discretion in failing to award attorney fees pursuant to I.C. § 12-121.

2. Request of Fees Pursuant to 42 U.S.C. § 1988(b).

Section 1988(b) provides that "[i]n any action or proceeding to enforce a provision of section[ ] . . . 1983 . . . of this title . . . the court, in its discretion may allow the prevailing party, other than the United

States, a reasonable attorney's fee as part of the cost. . . ." 42 U.S.C. § 1988(b).

Defendants have failed to demonstrate that the district court abused its discretion in denying attorney fees below. As already discussed, this case presented a novel legal issue and was thus, not brought unreasonably, frivolously, or without an adequate basis in fact or law. Thus, the district court did not abuse its discretion in failing to award attorney fees pursuant to 42 U.S.C. § 1988(b).

G. Defendants Are Not Entitled to Attorney Fees on Appeal.

Defendants request attorney fees on appeal pursuant to I.C. § 12-121. "Where a case involves a novel legal issue, attorney fees [on appeal] should not be granted under I.C. § 12-121." *Campbell v. Kildew*, 115 P.3d 731, 743 (2005); *Weaver v. Stafford*, 8 P.3d 1234, 1244 (2000).

Defendants also request attorney fees on appeal pursuant to 42 U.S.C. § 1988(b). That section permits an award of attorney fees in an action to enforce § 1983 where the district court, "in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the costs . . . ." 42 U.S.C. § 1988(b).

As discussed above, this case involves the novel issue of whether Hoagland had a clearly established constitutional right to a familial relationship with her adult son. Even though much of Hoagland's appeal was riddled with mischaracterizations of the law and frivolous argument, she did present this one novel issue. As such, we decline to award attorney fees on appeal.

VI. CONCLUSION

We therefore hold that the district court (1) is affirmed in dismissing Hoagland's § 1983 claim on behalf of Munroe's estate; (2) is reversed in finding that Hoagland had a § 1983 cause of action for violations of her own constitutional rights; (3) is partially affirmed in its award of costs as a matter of right; (4) is reversed in its award of discretionary costs; and (5) is affirmed in denying attorney fees below. The case is remanded for the reconsideration and entry of express findings regarding the district court's award of discretionary costs and entry of a judgment consistent with this Opinion. Costs on appeal are awarded to Respondents as the prevailing party.

Chief Justice BURDICK, Justices EISMANN, J. JONES and HORTON concur.

APPENDIX C

Erin B. Swartz, ISB #6396
Darwin L. Overson, ISB #5887
Joy M. Bingham, ISB #7887
JONES & SWARTZ PLLC
1673 W. Shoreline Drive, Suite 200 [83702]
Post Office Box 7808
Boise, Idaho 83707-7808
Telephone: (208) 489-8989
Facsimile: (208) 489-8988
E-mail: eric@jonesandswartzlaw.com
darwin@jonesandswartzlaw.com
joy@jonesandswartzlaw.com
Attorneys for Plaintiff

[SEAL]
May 25 2011
Christopher D. Rich,
Clerk
By Inga Johnson
Deputy

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

RITA HOAGLAND, individually, and in her capacity as Personal Representative of the ESTATE OF BRADLEY MUNROE, *Plaintiffs*, vs. ADA COUNTY, a political subdivision of the State of Idaho; *et al.,* *Defendants*.	Case No. CV-OC-2009-01461 **FINAL JUDGMENT**

In its Memorandum Decision and Order filed January 20, 2011, this Court granted, in part, Defendants' Motion for Summary Judgment, dismissing all counts except those brought against Defendant Johnson in his individual capacity.

This Court then issued its Order Granting Defendants' Motion for Reconsideration on March 28, 2011, dismissing all counts against the remaining Defendant, James Johnson.

The Court therefore enters final judgment in favor of Defendants, dismissing all of Plaintiffs' claims and causes of action in their entirety.

IT IS SO ORDERED.

DATED this 25th day of May, 2011.

/s/ Ronald J. Wilper
RONALD J. WILPER, DISTRICT JUDGE

APPENDIX D

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

[Filed March 28, 2011]

CV-OC-09-01461

RITA HOAGLAND, individually, and in her capacity as Personal Representative of the ESTATE OF BRADLEY MUNROE,

Plaintiffs,

vs.

ADA COUNTY, a political subdivision of the State of Idaho; ADA COUNTY SHERIFF, GARY RANEY, an elected official of Defendant Ada County and operator of the Ada County Sheriff's Office and Ada County Jail, in his individual and official capacity; LINDA SCOWN in her individual and official capacity; KATE PAPE, in her individual and official capacity; STEVEN GARRETT, M.D., in his individual and official capacity; MICHAEL E. ESTESS, M.D., in his individual and official capacity; RICKY LEE STEINBERG, in his individual and official Capacity; KAREN BARRETT, in her individual and official capacity; JAMES JOHNSON, in his individual and official capacity; JEREMY WROBLEWSKI, in his individual and official capacity; DAVID WEICH, in his individual and official capacity; LISA FARMER, in her individual and official capacity; JAMIE ROACH, in her individual and official capacity; and JOHN DOES I-X, unknown persons/entities who may be liable to Plaintiffs,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTIONS TO STRIKE; GRANTING DEFENDANTS' MOTION FOR RECONSIDERATION; AND DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

These matters came before the Court on plaintiff Rita Hoagland (Hoagland) and defendants Ada County, *et al*'s [sic] (the Defendants) Motions for Reconsideration of the Court's January 20, 2011 Memorandum Decision and Order (January 20 Order) granting summary judgment to twenty-four of the twenty-five defendants in this action. That Order denied summary judgment as to defendant James Johnson (Johnson) in his individual capacity; Johnson was also denied qualified immunity. On January 21, 2011, the Defendants filed a Motion for Interlocutory Appeal and Stay of Proceedings, re: Denial of Qualified Immunity. On January 24, 2011, the parties filed a stipulated Motion to Vacate the Trial and Stay the Proceedings, which was granted by the Court. A January 25, 2011 Status Conference revealed that both parties planned to submit Motions for Reconsideration of the Court's Order primarily based upon new facts that had come to light through deposition testimony. Idaho Rule of Civil Procedure 11(a)(2)(B) requires Motions for Reconsideration be filed within fourteen days of the original order. In this case, the parties stipulated to a Motion to Enlarge Time to file their Motions. The Court granted the motion, and the Motions for Reconsideration were filed on February 11, 2011. The

defendants have also filed multiple Motions to Strike, which will be taken up in turn below.

This order now grants in part and denies in part the Motions to Strike, grants the Defendants' Motion for Reconsideration, and denies Ms. Hoagland's Motion for Reconsideration. Because the Defendants' Motion for Reconsideration has been granted, their January 21 Motion for Interlocutory Appeal is moot. In considering all of these motions, the Court incorporates the facts and legal analysis in its January 20 Order.

I. MOTIONS TO STRIKE

The Defendants move to strike 1) numerous portions of plaintiff counsel Overson's first and second affidavits submitted in support of Hoagland's Motion for Reconsideration, 2) the supplemental opinion of Hoagland's expert Dr. Thomas White, and 3) portions of Hoagland's memorandum filed in opposition to the defendants' Motion for Reconsideration.

Admissibility of evidence is a matter within the Court's discretion. *Burgess* v. *Salmon River Canal Co., Ltd.,* 127 Idaho 565, 574, 903 P.2d 730, 739 (1995). "The admissibility of evidence in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial." *J-U-B- Engineers* v. *Security Ins. Co. of Hartford,* 146 Idaho 311, 314-5, 193 P.3d 858, 861-2 (2008). Affidavits submitted to support or oppose summary judgment "shall be made

on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e). Affidavits containing the opinions of lay witnesses may be considered by the trier of fact; however, when the determination of an issue requires expert knowledge, a lay opinion is not sufficient to raise a genuine issue of material fact preventing summary judgment. *Puckett* v. *Oakfabco Inc.,* 132 Idaho 816, 823, 979 P.2d 1174, 1181 (1999).

Idaho Rule of Evidence 702 allows testimony by experts if "specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Witnesses are qualified as experts by virtue of their "knowledge, skill, experience, training, or education" and may testify in the form of an opinion or otherwise. I.R.E. 702. "The determination of whether expert testimony will assist the trier of fact 'lies within the broad discretion of the trial court.'" *Kuhn* v. *Coldwell Banker Landmark Inc.,* 150 Idaho __, __, 245 P.2d 992, 1004 (2010) (quoting *Sliman v. Aluminum Co. of America,* 112 Idaho 277, 285, 731 P.2d 1267, 1275 (1986)). Conflicting expert opinions are often sufficient to raise a genuine issue of material fact and are to be resolved by the trier of fact. 32A C.J.S. *Evidence* § 1006 (2011).

a. Plaintiff Counsel Overson's February 11, 2011 Affidavit submitted in support of Hoagland's Motion for Reconsideration (First Affidavit)

The defendants object to and move to strike as improperly admitted the following deposition exhibits

referenced in paragraphs thirteen (13) and fourteen (14) of Overson's February 11, 2011 Affidavit:

- Exhibit 11, which is exhibit E of Dep. Jeremy Wroblewski's Deposition
- Exhibit 12, which is exhibit SS of Det. Matt Buie's Deposition
- Exhibit 13, which is exhibit QQQ of Nurse Michael Brewer's Depositions
- Exhibit 14, which is exhibit RRR of Nurse Michael Brewer's Deposition
- Exhibit 15, which is a CD containing complete copies of deposition exhibit binders

The Defendants' [sic] object that a proper foundation was not laid for exhibits eleven (11) through fourteen (14). They object to exhibit fifteen (15) to the extent it purports to admit exhibits that were not actually admitted during depositions or to the extent it includes exhibits for which a proper foundation was not laid, even though they may have been referred to and marked. Defendants emphasize that simply stating that the court reporter maintained these exhibits in a deposition file until they were submitted to the Court is not a proper foundational basis for admission. Defendants also assert that all five of these exhibits are irrelevant, unauthenticated, contain hearsay, and that Overson is not competent to admit them.

Exhibit twelve (12) contains audio recordings of phone calls between Det. Matt Buie and, respectively, Catherine Saucier and Rita Hoagland. These calls were made in furtherance of Det. Buie's in-house investigation into Munroe's death. Overson attaches

these recordings to his February 11, 2011 affidavit and indicates to the Court that the recordings were originally admitted as Exhibit SS to Det. Buie's Deposition. The Record includes Notice of Buie's Deposition to occur on December 22, 2010. The Record also includes an earlier reference to these recordings in that they are attachments to Det. Buie's Report. Det. Buie's Report was admitted into the Record as Exhibit D to Leslie Robertson's November 16, 2010 Deposition, which in turn was attached as Exhibit A to Overson's November 25, 2010 Affidavit submitted in Support of his Opposition to the Motion for Summary Judgment. However, the Record does not contain Det. Buie's actual Deposition. The Court finds that this circular methodology has not laid a proper foundation for admitting the audio recordings. Therefore, defendants' Motion to Strike Exhibit twelve (12) is GRANTED. Moreover, even if a proper foundation had been laid for the recordings, the Court has listened to them and finds that while they are relevant, they do not affect the outcome of this case.

The Court finds that a proper foundation was laid for exhibits eleven (11), thirteen (13), and fourteen (14); they were admitted, referred to, and explained by the deponents during depositions. Additionally, they are relevant and do not contain hearsay. Therefore, defendants' Motion to Strike those exhibits is DENIED. The court finds exhibit fifteen (15) is redundant, as it simply submits on one CD the depositions and deposition exhibits that have already been admitted elsewhere. To the extent exhibit fifteen (15) seeks to admit exhibits already properly admitted elsewhere in the record or any exhibits for

which a proper foundation has not been laid, it is stricken.

b. Plaintiff Counsel Overson's March 4, 2011 Affidavit submitted in support of Hoagland's Motion for Reconsideration (Second Affidavit)

The defendants object to characterizations made in this affidavit to the extent they intimate that the defendants are responsible for Hoagland's late filing of supplemental expert opinions. More specifically, the defendants move to strike paragraph seven (7) of Overson's March 4, 2011 affidavit. In that paragraph, Overson attempts to lay foundation for affidavit exhibit five (5), a document entitled "JCIS Survey on Psych Questions, October 2006."

The Court finds exhibit five (5) of Overson's March 4, 2011 affidavit is improperly admitted. Overson does not have personal knowledge of the document, nor is he competent to testify to its contents. Therefore, the defendants' Motion to Strike portions of Overson's March 4, 2011 affidavit is GRANTED to the extent it strikes paragraph seven (7) and exhibit five (5).

c. Supplemental Opinion of Dr. Thomas White

In conjunction with her Motion for Reconsideration, Hoagland submitted a supplemental opinion of her expert Dr. Thomas White. The defendants object to the admission of the supplemental opinion as untimely, and therefore prejudicial, and because it makes misleading statements.

As to the argument that the supplemental opinion is untimely, the Court notes that parties have a duty to seasonably supplement discovery. I.R.C.P. 26(b). The proper way to object to the untimely nature of the supplemental opinion would have been an I.R.C.P. 56(f) Motion for a Continuance; however, none was filed. Therefore, the Motion to Strike Dr. White's Supplemental Opinion as untimely is DENIED.

Dr. White is a licensed psychologist. He worked with the Federal Bureau of Prisons (FBOP) for more than twenty-six years. He coordinated the FBOP's Suicide Prevention Program for more than twelve years, and has extensive clinical and management experience in prison systems nationwide. He submitted his original opinion in an October 11, 2010 report. The defendants deposed him on November 18, 2010, based upon the opinions he expressed in that report. Dr. White's supplemental report was written on February 3, 2011, and filed in conjunction with Hoagland's Motion for Reconsideration on February 11, 2011. His supplemental report contains his evolving opinion based upon depositions, and their accompanying exhibits, which have occurred since his November 18, 2010 deposition and based upon this Court's January 20 Order. The defendants have not had the opportunity to depose Dr. White to inquire of him in relation to his supplemental opinion and report.

Dr. White is qualified to be an expert in this case and the Court finds that his testimony could properly assist the trier of fact in resolving issues of fact connected to jail suicides. Therefore, in the summary judgment context, to the extent that genuine issues of

material fact remain concerning the defendants' actions in this jail suicide case, Dr. White's opinion is appropriate and may be helpful. However, while Dr. White is qualified to opine concerning the *clinical* standards to which jail clinicians are held, he is not qualified to opine as to whether clinicians acted with deliberate indifference, which is the relevant *legal* standard in this case. Furthermore, to the extent that this Court grants summary judgment to the defendants based on its finding that the facts in the record support the legal conclusion that the conduct of the defendants did not rise to the level required by law in order to find liability, Dr. White's conflicting opinion does not preempt this Court from granting summary judgment.

Said another way, Dr. White is not qualified to be, nor submitted as, a legal expert. To the extent that his opinion attempts to render legal conclusions or legal opinions, the defendants' Motion to Strike is GRANTED.

d. Hoagland's February 25, 2011 Memorandum in Opposition to Defendant's Motion for Reconsideration

Defendants assert that much of Hoagland's Opposition Memorandum is unsupported by facts and inaccurately depicts actual deposition testimony in the record. Defendants also object to Hoagland's references to audio recordings of phone calls between Bradley Munroe and, respectively, his girlfriend Catherine Saucier and his mother Rita Hoagland. The Court is privy to those recordings not because a foundation was laid for them admitting them into evidence, but because the Court requested copies of

them in order to rule on a *Motion in Limine*. Unless and until the recordings have been properly admitted, the defendants object to Hoagland's reliance on them or reference to them.

No motion has been made to admit the audio recordings nor were they submitted by foundational affidavit; rather, they were provided to the Court upon the Court's request in conjunction with its consideration of a *Motion in Limine* seeking to prohibit their introduction at trial. The Court has reviewed the recordings; however, because they are not officially in the record, the Court did not consider them when analyzing the Motion for Summary Judgment, nor does it consider them now when analyzing the Motions for Reconsideration. Therefore, the defendants' Motion to Strike Hoagland's reference to and discussion of the audio recordings is GRANTED.

The Defendants' objection and Motion to Strike also provides many examples of how they believe Hoagland has relied on unsubstantiated facts to make impermissible arguments. The defendants acknowledge that these examples are simply that, examples. Due to the amorphous nature of this portion of the motion, the Court is unable to address it with specificity. However, the Court reminds both parties that it is under a duty to consider only evidence which has been properly admitted into the record. The Court also acknowledges it has discretion in deciding the relevance of admitted evidence. It is under these constraints that the Court has read and analyzed all of the information in the record, Hoagland's Opposition Memorandum being no exception.

II. MOTION FOR RECONSIDERATION

A. Standard for Reconsideration

Idaho Rule of Civil Procedure 11(a)(2)(B) allows parties to bring Motions for Reconsideration of interlocutory orders.

> A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be. When considering a motion of this type, the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. *Coeur d'Alene Mining Co.* v. *First Nat'l Bank,* 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990).

The Court held a hearing on the Defendants' Motion for Summary Judgment on December 9, 2010, and had the issue under advisement until the issuance of its January 20, 2011 Memorandum Decision and Order. During that time, the parties continued to conduct discovery, primarily in the form of depositions. Therefore, by the time the Court issued its January 20 Order, myriad new facts had come to light. In order to obtain a full and complete presentation of all available facts, so that the truth may be ascertained and justice done, the parties moved the Court for reconsideration. This Order now grants the Defendants' Motion for Reconsideration

and denies Ms. Hoagland's Motion for Reconsideration.

B. Defendants' Motion for Reconsideration

The Defendants move the Court to reconsider its denial of Qualified Immunity as to James Johnson, the Ada County Jail Social Worker who determined Bradley Munroe was not at imminent risk of suicide the morning of the day he committed suicide. In its January 20 Order, the Court held that because genuine issues of material fact existed rendering the Court unable to find that Johnson did *not* act with deliberate indifference, qualified immunity was not appropriate as to Johnson. Upon reconsideration of a more comprehensive presentation of both law and fact, this Court now holds that Qualified Immunity is appropriately granted to James Johnson.

Qualified immunity is "an entitlement not to stand trial or face the other burdens of litigation." *Saucier* v. *Katz,* 533 U.S. 194, 200 (2001). It protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson* v. *Callahan*, 555 U.S. 223, 230 (2009) (quoting *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982)). "Qualified immunity balances two important interests – the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson,* 555 U.S. at 230. "The issue of whether an official should have known that he or she acted unlawfully is a question of law." *Nation v. State of Idaho, Dep't of*

Corrections, 144 Idaho 177, 187, 158 P.3d 953, 963 (2007). However, qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Pearson,* 555 U.S. at 230.

"The contours of qualified immunity are the same under both Idaho and Federal law." *Nation,* 144 Idaho at 186, 158 P.3d at 962. In 2001, the U.S. Supreme Court held that qualified immunity required a mandatory two-part, sequential[1] analysis: first, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. *Saucier,* 533 U.S. at 199. "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Id.* The inquiry into what is clearly established turns on the "objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken." *Pearson,* 555 U.S. at 237. Addressing the proper analysis for whether a right

[1] In 2009, the U.S. Supreme Court revisited its Qualified Immunity analysis and held that the two part inquiry was still correct; however, the district courts were not bound to enforce it sequentially. *Pearson*, 129 S. Ct. at 815. "The judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818.

was "clearly established", the U.S. Supreme Court held:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Anderson v. Creighton, 483 U.S. 635, 640 (1987).

In *Anderson,* the Court analyzed whether Qualified Immunity protected an FBI officer from liability for a warrantless search.[2] That Court noted that the proper Qualified Immunity inquiry delves deeper into the facts of the case than simply alleging violation of a constitutional right; the violation must be placed into the context of the facts. *Id.* Therefore, in *Anderson,* the proper inquiry was not whether a warrantless search violated the Fourth Amendment, but whether a reasonable officer confronted with the situation with which the officer being sued was confronted would have thought his actions were unconstitutional. Such is the depth of inquiry required to analyze whether an official acted in an objectively legally reasonable manner.

> It simply does not follow immediately from the conclusion that it was firmly established that

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[2] *Anderson* involved the alleged violation of a Fourth Amendment *Bivens* right. "Qualified Immunity analysis is identical under both 42 U.S.C. § 1983 and *Bivens* actions." *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

> warrantless searches not supported by probable cause and exigent circumstances violate the Fourth Amendment that Anderson's search was objectively legally unreasonable. We have recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present, and we have indicated that in such cases those officials – like other officials who act in ways they reasonably believe to be lawful – should not be held personally liable. It follows from what we have said that the determination whether it was objectively legally reasonable to conclude that a given search was supported by probable cause or exigent circumstances will often require examination of the information possessed by the searching officials.

In this Motion for Reconsideration, the Record includes new deposition testimony which illuminates the actions of many of the named defendants in this case. Particularly relevant to the requisite factual inquiry this Court must conduct are the depositions of James Johnson, and Deputies Mike Drinkall and Ryan Donelson. Their deposition testimony assists the Court in understanding the practical implementation of proper jail procedures. For example, reading Donelson and Drinkall's depositions together, the Court is able to better understand the timeline involved in inmate classification. Additionally, the testimony of all three men indicates that 1) on the morning of his suicide, the deputies did not find Munroe's behavior to be abnormal in the jail context, and 2) the deputies did not communicate to

Johnson that Munroe was acting strangely or suicidal.

Furthermore, the deposition testimony of Dr. Michael Estess, coupled with the earlier opinions and testimony of the experts proffered by both parties[3], indicates that jail clinicians are daily confronted with inmates threatening suicide.

Perhaps most importantly, the Court now has deposition testimony of James Johnson in which Johnson explains the general clinical processes he utilizes in analyzing inmates for suicide potential and the specific thoughts he had concerning Bradley Munroe on September 29, 2008. Johnson's testimony walks through that day starting with Johnson's early morning suicide evaluation of Munroe, to learning that Ms. Hoagland had called to inform the jail that she thought Munroe was suicidal, to Johnson's misunderstanding of how Munroe was housed.

Applying the two part Qualified Immunity analysis to this situation, the Court first evaluates whether the facts as they are alleged by Ms. Hoagland make out a violation of a constitutional right. As it did in the January 20 Order, this court holds that they do. Ms. Hoagland alleges that Johnson deprived Munroe of his Fourteenth Amendment right to adequate mental healthcare by acting with deliberate indifference as to the likelihood that Munroe could commit suicide.

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[3] The Expert Witnesses in this case are Dr. Thomas White, Dr. Michael Estess, Dr. Daniel Kennedy, Dr. Leslie Lundt, Brian Mecham, Nathan Powell, Dr. Glen Groben, Dr. Charles Novak, and Dr. Jeffrey Metzner.

Next, the Court evaluates whether the violation she alleges was one of clearly established law at the time of the alleged violation. The clearly established analysis requires the Court to evaluate whether Johnson acted in an objectively legally reasonable manner. Meaning the Court evaluates whether a reasonable jail social worker placed in Johnson's shoes on September 29, 2008, would have thought he was acting with deliberate indifference to Munroe's constitutional right to adequate mental healthcare if that hypothetical jail social worker cleared Munroe from suicide watch. Despite the existence of conflicting expert opinion in the record, the Court is the proper arbiter of this issue, as whether Johnson should have known that his actions were unlawful is a question of law.

After considering all the evidence in the Record, the Court finds that Johnson acted in an objectively legally reasonable manner when he incorrectly decided that Bradley Munroe was not at imminent risk of suicide on September 29, 2008. As the Court made clear in its January 20 Order, the standard to which Johnson is held is deliberate indifference, not negligence. His incorrect, but thoughtful, analysis is the sort of action that Qualified Immunity protects.

In Summary, while the facts as Ms. Hoagland has alleged them may make out a violation by Johnson of a constitutional right, the Court finds that a reasonable jail social worker would not have thought he was acting with deliberate indifference toward Munroe on September 29, 2008, by clearing Munroe from suicide watch, and, therefore, the right Hoagland alleges was violated was not clearly established at that time. Therefore, James Johnson is

granted the protection of Qualified Immunity, and the Defendants' Motion for Reconsideration is GRANTED.

Because this finding dismisses James Johnson from this lawsuit, there is no need for the Court to further reconsider its denial of summary judgment as to Johnson.

C. Plaintiff's Motion for Reconsideration

1. *Official Capacity Defendants*

Ms. Hoagland moves the Court to reconsider its grant of summary to Ada County, Sheriff Gary Raney, Captain Linda Scown, and Health Services Administrator Kate Pape in their official capacities, and its grant of summary judgment to Pape in her individual capacity. Hoagland makes this motion based on newly discovered evidence in the form of "deposition testimony of the Defendants, recently disclosed materials, and the supplemental expert report of Dr. White." *February 11, 2011 Memorandum of Support* at 1. In analyzing Hoagland's Motion for Reconsideration, the Court wishes to reiterate that the legal analysis in its January 20 Order is incorporated herein. Additionally, the Court wishes to restate the standard for official capacity deliberate indifference:

> For municipal or official capacity defendants to be found deliberately indifferent, it must be shown that the action "alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted by that body's officers." *Monell,* 436 U.S. at 690. The implementation of such a policy or practice

> must literally be a conscious choice. *City of Canton* v. *Harris,* 489 U.S 378, 389 (1989). If the plaintiff cannot identify a formal policy that is unconstitutional, the "plaintiff may show deliberate indifference through a series of bad acts which create an inference that the municipal officials were aware of and condoned the misconduct of their employees." *Minix,* 597 F.3d at 832. The courts have used the term "custom" when deliberate indifference is shown through this series of bad acts. A single instance of an unconstitutional practice is not sufficient to show custom in this context. *Id.* Regardless of whether the alleged constitutional deprivation is in the form of policy or custom it must be the "moving force behind," or causal link to, the Constitutional violation. *Id.*

While Hoagland's Memorandum and supporting documents provide a thorough explanation of the standard for official capacity deliberate indifference and they include analysis of deposition testimony not considered by the Court in its January 20 Order, the Court remains unpersuaded that official capacity deliberate indifference occurred in this case. Hoagland's argument focuses on Kate Pape's deposition testimony that she often varied from the specific directives of jail policy and procedure if they did not implement what she though[t] to be best practices. Hoagland argues that Pape's actions were an example of the type of practices that lead to a finding of deliberate indifference through a series of bad acts in that they created a deliberately indifferent custom within the jail, and that Pape's

supervisors are liable in that they condoned her actions. The Court disagrees.

In order for a series of bad acts to work a constitutional deprivation, they must be the moving force behind the deprivation. Additionally, a single instance of unconstitutional practice is not enough to show custom. Hoagland argues that Pape and her practices were the moving force behind the deprivation because she failed to enforce procedures and that her failure led to Johnson's incorrect suicide assessment of Munroe. However, Hoagland's argument fails to acknowledge Pape's testimony that any failure to follow policy stemmed not from lackadaisical or unconstitutional practices at the jail, but from her desire to ensure the jail had an assessment system that was "changing and constantly improving."[4] Moreover, even if the Record did show a custom as evidenced by a series of bad acts, there is nothing in the Record to indicate that such a custom caused more than a single unconstitutional deprivation.

Hoagland submits Dr. White's Supplemental Opinion to bolster her argument that Raney, Scown, and Pape are liable for official capacity deliberate indifference. However, while Dr. White appropriately opines as to the normal best practice standards of jail clinicians, it is not appropriate for him to opine as to whether their actions were in conformity with the legal standards applicable in this case. As this Court held in the Defendants' Motion to Strike, Dr. White's opinion is admissible, but not to the extent it renders

[4] Kate Pape January 5, 2011 Deposition, pp. 33-34, LL. 15-25, 1-4.

an opinion as to whether the actions of these defendants created a deliberately indifferent custom within the jail. It is the Court's responsibility to determine the appropriate legal standard by which the defendants are judged and the Court is not bound by Dr. White's impermissible legal opinion as to how these defendants acted.

Considering newly admitted deposition testimony, the properly admitted portions of Dr. White's supplemental report, and even drawing all reasonable factual inferences in favor of Ms. Hoagland, the Court still holds that no genuine issues of material fact remain which would prevent the Court from finding that official capacity deliberate indifference did not occur in this case. Therefore, Hoagland's Motion for Reconsideration of the grant of summary judgment to Ada County, Sheriff Gary Raney, Captain Linda Scown, and Kate Pape in their official capacities is DENIED.

2. *Kate Pape in her Individual Capacity*

Ms. Hoagland also moves the Court to reconsider its grant of summary judgment as to Pape in her individual capacity. An individual capacity defendant "cannot be liable for deliberate indifference unless he or she 'knows of and disregards an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Simmons* v. *Navajo County*, 609 F.3d 1011, 1017 (9th Cir. 2010) (quoting *Farmer* v. *Brennan,* 511 U.S. 825, 837 (1994)). Thus, a § 1983 plaintiff must show that an individual prison official defendant was (a)

subjectively aware of the serious medical need and (b) failed to adequately respond. *Farmer,* 511 U.S. at 828. Unlike James Johnson who met with Munroe and cleared him from suicide watch, Kate Pape did not interact with Munroe on September 29, 2008. Because she did not interact with Munroe, the only way she can be held liable in her individual capacity is if, in her supervisory capacity, she knew of a pattern of suicide or pattern of problems with policy enforcement by subordinates which she then condoned or to which she acquiesced. Even with the newly admitted deposition testimony, there is nothing in the Record to support such an allegation.

Drawing all reasonable factual inferences in favor of Ms. Hoagland, the Court still finds no genuine issues of material fact remain as to Pape's culpability in Munroe's suicide. Therefore, Hoagland's Motion for Reconsideration as to Kate Pape's grant of summary judgment in her individual capacity is DENIED.

D. Summary

The Court finds that Qualified Immunity protects James Johnson, therefore the Defendants' Motion for Reconsideration of the Court's earlier denial of summary judgment as to James Johnson is GRANTED, and Johnson is dismissed from this lawsuit.

The Court finds that upon consideration of new evidence in the Record there remains no evidence that official capacity deliberate indifference occurred. Therefore, Ms. Hoagland's Motion for Reconsideration as to Ada County, Sheriff Gary Raney, Captain Linda Scown, and Health Services Administrator Kate Pape in their Official Capacities

is DENIED, and they remain dismissed from this lawsuit. Additionally, the Court finds that the newly admitted evidence does not raise genuine issues of material fact regarding Kate Pape's liability in her individual capacity. Therefore, Ms. Hoagland's Motion for Reconsideration as to Kate Pape in her Individual Capacity is DENIED, and she remains dismissed from this lawsuit.

These findings have the effect of ending this case, and mooting any outstanding *Motions in Limine*.

Bradley Munroe's suicide was a tragic event, however in order for his death to result in a government official's civil liability, either officially or individually, the high bar of deliberate indifference must be met. Despite the proper introduction of new evidence into the Record, plaintiff's facts and argument have not cleared that bar.

IT IS SO ORDERED.

Dated this 28th day of March, 2011.

/s/ Ronald J. Wilper
Ronald J. Wilper
DISTRICT JUDGE

APPENDIX E

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

[Filed January 20, 2011]

CV-OC-09-01461

RITA HOAGLAND, individually, and in her capacity as Personal Representative of the ESTATE OF BRADLEY MUNROE,

Plaintiffs,

vs.

ADA COUNTY, a political subdivision of the State of Idaho; ADA COUNTY SHERIFF, GARY RANEY, an elected official of Defendant Ada County and operator of the Ada County Sheriff's Office and Ada County Jail, in his individual and official capacity; LINDA SCOWN in her individual and official capacity; KATE PAPE, in her individual and official capacity; STEVEN GARRETT, M.D., in his individual and official capacity; MICHAEL E. ESTESS, M.D., in his individual and official capacity; RICKY LEE STEINBERG, in his individual and official Capacity; KAREN BARRETT, in her individual and official capacity; JAMES JOHNSON, in his individual and official capacity; JEREMY WROBLEWSKI, in his individual and official capacity; DAVID WEICH, in his individual and official capacity; LISA FARMER, in her individual and official capacity; JAMIE ROACH, in her individual and official capacity; and JOHN DOES I-X, unknown persons/entities who may be liable to Plaintiffs,

Defendants.

MEMORANDUM DECISION AND ORDER OF CLARIFICATION; ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO STRIKE; AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

These matters came before the Court on defendants Ada County, *et al*'s [sic] Motion to Strike; plaintiff Rita Hoagland's Motion for Reconsideration, or alternatively Clarification, of the Court's November 2 Order; and defendants Ada County, *et al*'s [sic] Motion for Summary Judgment as to all claims. The Court heard oral argument on the motion to strike on Thursday, December 9, 2010, and the motions for reconsideration and summary judgment on Friday, December 10, 2010. Darwin Overson appeared for Plaintiff. James Dickinson, Sherry Morgan, and Ray Chacko appeared for the defendants. The Court took all the motions under advisement at those times. This order now grants in part and denies in part the motion to strike; clarifies the November 2 Order; and grants in part and denies in part the Motion for Summary Judgment.

I. Motion to Strike

Ada County objects to the submission of numerous elements of the November 26, 2010 affidavit submitted by plaintiff's counsel, Darwin Overson. Ada County's objections are anchored in Idaho Rule of Evidence 602 which requires affidavit testimony be supported by personal knowledge and I.R.E. 612(c) which prevents admission of any document where no foundation was provided.

Admissibility of evidence is a matter within the Court's discretion. *Burgess v. Salmon River Canal Co., Ltd.*, 127 Idaho 565, 574, 903 P.2d 730, 739 (1995). "The admissibility of evidence in affidavits and depositions in support of or in opposition to a motion for summary judgment is a threshold question to be answered before applying the liberal construction and reasonable inferences rule to determine whether the evidence is sufficient to create a genuine issue for trial." *J-U-B-Engineers v. Security Ins. Co. of Hartford*, 146 Idaho 311, 314-5, 193 P.3d 858, 861-2 (2008). Affidavits submitted to support or oppose summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." I.R.C.P. 56(e). Affidavits containing the opinions of lay witnesses may be considered by the trier-of-fact; however, when the determination of an issue requires expert knowledge, a lay opinion is not sufficient to raise a genuine issue of material fact preventing summary judgment. *Puckett v. Oakfabco Inc.*, 132 Idaho 816, 823, 979 P.2d 1174, 1181 (1999).

In its discretion, the Court strikes the following elements of Overson's affidavit: (1) Det. Matt Buie's Incident Report attached to Exh A: Leslie Robertson's November 16, 2010 Deposition; (2) Mr. Overson's narration of the VICON jail video recordings; and (3) paragraph ten of Overson's affidavit, in which he testifies as to what he believes is missing in the medical records submitted by Ada County over the course of discovery. Therefore, the Court will not consider these elements of Overson's

affidavit when considering Ada County's motion for summary judgment.

II. Motion for Reconsideration, or alternatively, Clarification

A. Standard for Reconsideration

Idaho Rule of Civil Procedure 11(a)(2)(B) allows parties to bring Motions for Reconsideration of interlocutory orders.

> A rehearing or reconsideration in the trial court usually involves new or additional facts, and a more comprehensive presentation of both law and fact. Indeed, the chief virtue of a reconsideration is to obtain a full and complete presentation of all available facts, so that the truth may be ascertained, and justice done, as nearly as may be. When considering a motion of this type, the trial court should take into account any new facts presented by the moving party that bear on the correctness of the interlocutory order. *Coeur d'Alene Mining Co. v. First Nat'l Bank*, 118 Idaho 812, 823 (1990).

In this instance, neither new law nor new facts are provided. However, both plaintiff Hoagland's motion and Ada County's response to it do attempt to further elucidate elements of the law. The arguments presented do not necessarily provide a more comprehensive presentation than what was made in the original Motion to Dismiss that prompted the November 2 Order; rather, they are a continuation of those original arguments.

In its November 2 Order the Court held that any claim brought by Hoagland on behalf of, or as an heir

to, the Estate of Munroe was dismissed. However, the Court allowed Hoagland standing to bring a § 1983 constitutional deprivation claim in state court pursuant to her status as a statutorily named heir according to Idaho's wrongful death statute. Primarily, Hoagland's motion for reconsideration emphasizes that "the Court may have granted relief to the Defendants beyond that which was demanded" in their motion to dismiss. *Memorandum of Support for Plaintiff's Motion for Reconsideration* at 2. The County responds that in fact, the Court granted "exactly what the Defendants requested." *Defendant's Response to Plaintiff's Motion for Reconsideration* at 2. The only different relief preferred by the County would be dismissal of the entire case.

Despite the lack of new law or facts, the Motion for Reconsideration provides an opportunity to revisit the Court's November 2 Order.

B. Review of November 2 Order and Reasoning

Ms. Hoagland's complaint states two causes of action.[1] They are:

> (1) by Hoagland on behalf of the Estate of Munroe, and herself as an heir to the Estate, pursuant to I.C. § 5-311 and 42 U.S.C. § 1983. This claim alleges a violation of Munroe's Eighth and Fourteenth Amendment Constitutional

[1] During the December 10, 2010 hearing, Mr. Overson clarified that this lawsuit is a federal 42 U.S.C. § 1983 claim, and I.C. § 5-311 is used only to provide Ms. Hoagland standing to assert the § 1983 claim. I.C. § 5-311 is not asserted as a basis for remedy in itself.

> rights for failure to provide adequate healthcare and security, the lack of which resulted in his death; and
>
> (2) by Hoagland, individually and on her own behalf as Munroe's mother, pursuant to I.C. § 5-311 and 42 U.S.C. §§ 1983, 1988. This claim alleges a violation of her Fourteenth Amendment due process right to maintain familial relations, society and companionship with her son.

The U.S. Supreme Court has addressed the proper analysis for a district court when considering survivability of § 1983 claims. *Robertson v. Wegmann*, 436 U.S. 584 (1978). In that case, the Court held that when considering the applicability of state survivability statutes to § 1983 claims, courts should be guided by 42 U.S.C. § 1988 which evaluates whether the statute is "inconsistent with the Constitution and laws of the United States." Idaho does not allow survivability of § 1983 claims. *Evans v. Twin Falls County*, 118 Idaho 210 (1990). Accordingly, in its November 2 Order, this Court held that Idaho law precluded Ms. Hoagland's attempt to assert § 1983 claims on behalf of her deceased son or his estate. Similarly, because the estate has no claim, there is no claim for her to bring as an heir to the estate. Therefore, all of Count I was dismissed. However, the Order also stated dismissal of the Estate's claims was not "inconsistent with the laws of the United States" because Idaho law does allow Ms. Hoagland's wrongful death claim to stand.

Idaho Code § 5-311 allows parents to bring wrongful death actions seeking damages for the injuries they personally suffered due to the wrongful

loss of an adult child. In this case, no one disputes that Ms. Hoagland had standing to bring a state wrongful death claim. Instead, the dispute is whether Idaho recognizes that she had a Constitutional right to maintain a familial relationship with her adult son, and, if so, whether the deprivation of that constitutional right is one of the injuries that she may assert under her § 1983 constitutional claim.

For clarification's sake, the heart of the issue under reconsideration is:

> Whether, using § 1988 as the incorporating vehicle, this Court can allow a state statutorily named wrongful death heir standing to bring a federal § 1983 claim when the federal claim is borne out of the alleged Fourteenth Amendment constitutional deprivation of the heir's loss of familial relations, society and companionship with her son?

This is a unique question and it does not appear to previously have been raised in Idaho. The federal circuits have analyzed this issue in multiple ways, providing persuasive approaches to analysis of this motion. This Court was most persuaded, and remains most persuaded, by the logic utilized in the Fifth Circuit.

C. The Fifth Circuit's Analysis

The Court's November 2 Order adopted the analysis of the Fifth Circuit which allowed the mother of a pretrial detainee who committed suicide to bring a § 1983 action "for her injury caused by the state's deprivation of her son's constitutionally secured liberty interests." *Rhyne v. Henderson*

County, 973 F.2d 386, 391 (1992). *Rhyne* provides particularly relevant reasoning for Hoagland's claims for two reasons: (1) very similar to Ms. Hoagland's status in Idaho, the *Rhyne* court discussed that Ms. Rhyne was in the class of people entitled to recover under Texas state law for the wrongful death of a child, and (2) Ms. Rhyne achieved standing even though she was alleging a deprivation of her own rights by virtue of an initial deprivation of her son's rights.

As further support for its holding, the *Rhyne* Court cited another Fifth Circuit case which allowed a parent to recover for loss of society and companionship incurred by the wrongful death of his adult son. *Grandstaff v. City of Borger*, 767 F.2d 161, 172 (5th Cir. 1985); *see also Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961) (allowing a widow to recover for the wrongful death of her husband because 42 U.S.C. § 1988 incorporated both Georgia's survivorship and wrongful death statutes to provide full remedies for violations of constitutional rights). Particularly important to Ms. Hoagland's claim of standing is the following quote from *Rhyne*:

> We recognize the strength of the argument that, unlike survival statues, wrongful death statutes arguably create new causes of action and therefore ought not to be incorporated by § 1988. We also acknowledge that allowing suit by the parent in her own right is not an inevitable companion of a wrongful death statute. At the same time, Texas wrongful death law provides Rhyne with the right to recover for her son's wrongful death and she can recover for injury to herself caused by her

> son's death. **To be more precise, our decisions allow recovery by Rhyne for her injury caused by the state's deprivation of her son's constitutionally secured liberty interests**. 973 F.3d at 391 (emphasis added).

Furthermore, and central to this Court's reasoning in the November 2 Order, the *Rhyne* court's analysis of Texas wrongful death law was guided by the U.S. Supreme Court's analysis of Louisiana's survivorship law in *Robertson v. Wegmann*, the § 1983 case which held that § 1988 could be used to incorporate state survivorship law. For all of these reasons, in its November 2 Order this Court applied the analysis followed by the Fifth Circuit resulting in the conclusion that, pursuant to I.C. § 5-311, and using 42 U.S.C. § 1988, Hoagland has standing to bring a § 1983 constitutional deprivation claim for her loss of familial relations, society and companionship with her son.

While the Fifth Circuit does not have the support of its many sister circuits, it is the only circuit that uses analysis analogous to the U.S. Supreme Court's analysis in *Robertson v. Wegmann*. In Robertson, the plaintiff's claim was dismissed, because Louisiana state survivorship law did not allow for its survival, but it is not the specific **outcome** of *Robertson* that is determinative. Instead, it is the *Robertson* **analysis** that is relevant. Robertson required a district court to evaluate whether application of state survivorship law was inconsistent with the purpose behind § 1983. In this case, the Court dismissed the estate as a plaintiff because Idaho survivorship law does not allow the estate to be a plaintiff. That finding is supported by the Idaho

Code and *Evans v. Twin Falls County*. However, Idaho law does allow heirs to bring wrongful death claims, and it is because Ms. Hoagland could bring a wrongful death claim that the November Order held Idaho law was not inconsistent with the laws of the United States.

In affirming its November 2 Order, this Court wishes to clearly state the implications of the Order. The Court is not holding that Ms. Hoagland experienced a constitutional deprivation because of the actions of Ada County jail employees. Rather, the Order holds that she had a constitutionally protected interest in a relationship with her son, and because Idaho wrongful death law allows her standing to bring claims for her own damage, she may state a claim for deprivation of the constitutional interest of which she was deprived when the state allegedly deprived her son of his constitutionally protected interest in adequate healthcare.

It is important to note the separateness of the constitutionality of the standing issue from the constitutional deprivation issue that underlies the lawsuit. The constitutional deprivation that allows Ms. Hoagland to have standing is not the same as her son's constitutional deprivation. Yet, her constitutional deprivation is borne out of her son's constitutional deprivation. The analysis of his deprivation is the heart of the summary judgment motion.

D. Conclusion

The Court reaffirms its November 2 Order which (1) dismissed all claims of the estate, or flowing from the estate, of Bradley Munroe, and (2) granted Ms.

Hoagland standing to bring a claim for her own constitutional deprivation allegedly caused by the state's deprivation of her son's constitutionally secured interest in adequate healthcare.

III. Motion for Summary Judgment

Ms. Hoagland's complaint alleges what can be subdivided into twenty-five (25) separate 42 U.S.C. § 1983 claims. One is made against Ada County, twelve are made against individuals in their official capacities, and twelve are made against individuals in their personal capacities. In this motion, Ada County moves for summary judgment as to each of the twenty-five (25) defendants.

A. Factual Background

For reference sake, it is important to know that the Ada County Jail (ACJ) utilizes two computerized records' systems: Jail Inmate Classification System (JICS) and CorEMR.[2] The JICS is used by deputies in classifying inmates and can be seen by both deputies and medical personnel.[3] However, the CorEMR contains confidential medical records; therefore, it is only viewable by certain medical personnel.[4]

On the evening of September 28, 2008, Boise City police officers arrested Bradley Munroe, charging him with armed robbery of a convenience store.[5] He was intoxicated and became uncooperative.[6] His

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[2] Robertson Deposition, November 16, 2010.

[3] *Id.*

[4] *Id.*

[5] Urian Affadavit, May 27, 2010.

[6] *Id.*

behavior was so odd that after initialing taking him to the police department, officers called paramedics to transport Munroe to St. Alphonsus for medical clearance before continuing the booking process.[7] St. Alphonsus' personnel noted that Munroe admitted to being intoxicated and said if he was released he would commit suicide, however he simultaneously said he had no plans to commit suicide that night.[8] He was medically cleared at the hospital and returned to the ACJ, where the booking process began.[9] However, he was "yelling, screaming, was rowdy and was not making a lot of sense when speaking."[10] At one point he took a string and wrapped it around his neck.[11] Because his behavior was so bizarre, he was placed in a holding cell in the booking area of the jail where he could be observed by deputies while he sobered up; the booking process would resume the next morning.[12] Jail logs show that well-being checks were made on him approximately every fifteen minutes throughout the night while he slept.[13]

He woke the next morning and, at approximately 8:00am, the booking process began again; it was conducted by Dep. Jeremy Wroblewski.[14] Dep.

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[7] *Id.*

[8] Medical Clearance for Incarceration, Dickinson Affidavit, May 28, 2010, Exhibit G.

[9] Johnson Affidavit, May 28, 2010.

[10] *Id.* at ¶6.

[11] *Id.* at Exhibit A.

[12] *Id.* at ¶7-9.

[13] *Id.* at Exhibit A.

[14] Wroblewski Deposition, November 16, 2010.

Wroblewski was in his last week of on-the-job training.[15] Wroblewski noted the well-being log from the night before and its references to Munroe's behavior.[16] The ACJ booking process requires deputies to go over a suicide risk questionnaire to help determine the initial housing assignment for the inmate.[17] Should certain suicide risk questions be answered affirmatively, the booking deputy is to contact the Health Services Unit (HSU) of the jail for further evaluation of the inmate before a housing classification is made.[18] In this instance, because of Munroe's behavior the night before, the HSU had already been notified of Munroe's need for an evaluation. Therefore, while Wroblewski was in the process of booking Munroe, Psychiatric Social Worker James Johnson arrived in the booking area to assess Munroe.[19] Johnson temporarily interrupted the booking to talk with Munroe.[20] Additionally, Johnson reviewed Munroe's prior incarceration files, his medical history, and observed Munroe's interactions with Wroblewski and other deputies in the booking area.[21] After several minutes, he left the area having made the assessment that Munroe's suicidal risk level was not sufficient to warrant admission into the

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[15] *Id.*

[16] *Id.*

[17] Ada County Policy Manual at ¶1.1.10: Suicide Risk Prevention.

[18] *Id.*

[19] Wroblewski Deposition, November 16, 2010.

[20] Johnson Affidavit, May 28, 2010 at ¶18.

[21] *Id.* at ¶17-19.

HSU or to require single cell housing.[22] He logged his decision in the CorEMR.[23] Once Johnson left, Wroblewski finished booking Munroe into the jail.[24] Jail records show that Munroe answered the following questions affirmatively:[25]

- Have you ever been in a mental institution or had psychiatric care?
- Have you ever contemplated suicide?
- Are you now contemplating suicide?

A final question on the questionnaire required Wroblewksi to answer: "Does the inmate's behavior suggest a risk of suicide?" Wroblewski responded "yes."[26] Wroblewski submitted the questionnaire, but did not ensure that it was transmitted to the HSU.[27]

Around 9:00am that morning, after booking, it was recommended that Munroe be housed in a Closed Custody Unit (CCU) in a multi-person cell.[28] While walking to the CCU, Munroe told the deputy accompanying him that he (Munroe) was "into a lot of stuff" and people in the jail wanted to kill him; Munroe felt he would only be safe if he was housed in Protective Custody (PC).[29] The deputy called his

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[22] *Id.* at ¶26.

[23] Munroe's CorEMR patient history, at Leslie Robertson Deposition, November 16, 2010, Exhibit C.

[24] Wroblewski Deposition, November 16, 2010.

[25] ACJ Initial Classification, Temporary Cell Assignment Questionnaire: Overson Affidavit, November 26, 2010 at Exhibit F (Wroblewski Deposition) at Exhibit E.

[26] *Id.*

[27] Wroblewski Deposition, November 16, 2010.

[28] Donelson Affidavit, May 28, 2010, at ¶4.

[29] *Id.* at ¶5-6.

supervisor, the on-duty classification deputy, who instructed him to house Munroe in Cellblock 7 in the "side chute cell."[30] This was a PC cell and placement there meant that Munroe would be housed alone and well-being checks would occur on him no less than every thirty minutes.[31] In making the housing assignment, the on-duty classification deputy had noted Munroe's suicidal history and therefore felt it necessary to call James Johnson to report Munroe's new housing assignment, so he did.[32] After Munroe was housed, the JICS log noted that the combination of his suicide history coupled with his placement in a single cell meant that, according to Ada County procedure,[33] his placement as a segregated inmate would be reviewed in two days.[34]

Around the same time Munroe was housed, HSU Administrative Assistant Leslie Robertson spoke with Ms. Hoagland.[35] Ms. Hoagland expressed her concern that Munroe was suicidal and that she did not believe he was on his medications.[36] Soon after Robertson spoke with Ms. Hoagland, Johnson came into Robertson's office and she conveyed Ms. Hoagland's concerns to him.[37] Robertson then called

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[30] *Id.* at ¶7-8.

[31] Overson Affidavit, Exh. E: ACJ SOP: Suicide Prevention

[32] Drinkall Affidavit, May 27, 2010, at ¶6.

[33] Overson Affidavit, Exh. F: Wroblewski Deposition at Exh. J, Suicide Risk Reduction § 1.1.10.

[34] Overson Affidavit, Exh. F: Wroblewski Deposition at Exh. E, JICS Records.

[35] Robertson Deposition, November 16, 2010.

[36] *Id.*

[37] *Id.*

Ms. Hoagland to inform her that her concerns had been conveyed and Munroe was being taken care of.[38]

At 11:57am, on September 29 Nurse Lisa Farmer reviewed Munroe's JICS intake record and noted in his CorEMR record that he was "on celexa (none brought in), seen at St. Al's before coming to ACJ, has suicide [history], seen at Intermountain [hospital]. Inmate is OOC."[39]

The rest of that day passed uneventfully, with Munroe's only activity being a mid-afternoon arraignment. Well-being checks were performed on Munroe approximately every thirty minutes throughout the day.[40] That evening a deputy performed a well-being check at 8:08pm.[41] The next well-being check was performed at 8:35pm; it was during this check that a deputy found Munroe hanging by a bed sheet from his top bunk.[42] Despite resuscitation efforts, Munroe could not be revived.[43] He was pronounced dead later that evening.

This incarceration was not Munroe's first incarceration at the ACJ. He was previously incarcerated in October 2007 for two days, in July

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[38] *Id.*

[39] Munroe's CorEMR patient history, attached to Defendant's Second Supplemental Response to Plaintiff's First Set of Interrogatories, Requests for Production and Requests for Admission to Defendant Ada County, found at Overson Affidavit, November 26, 2010, Exhibit D. [hereinafter Second Supp. Responses].

[40] McKinley Affidavit, May 26, 2010, at Exh. A.

[41] *Id.*

[42] *Id.*

[43] *Id.*

2008 for three days, and in August 2008 for twenty-eight days: August 28-September 26, 2008.[44] His September 26 release fell about forty-eight hours before his final arrest and incarceration on September 28, 2008. Upon intake for his August 28 incarceration, he informed deputies that he was on medication for numerous mental health disorders and that he was under the care of a Dr. Bushi.[45] The JIGS lists his classification status upon that intake as "3-Med. High with High Risk and Special Condition Code for SUIHIST [suicide history]."[46] Nurse Farmer reviewed his intake form and scheduled an assessment of Munroe as a high priority.[47] Johnson conducted the assessment on September 1 and then released him from the 3-Med. High classification.[48]

Munroe received his medications on a regular basis during his twenty-eight day incarceration.[49] On September 26, Deputy Jamie Roach and Medical Attendant David Weich jointly prepared for Munroe's release. One of the ACJ's Standard Operating Procedures states that "[m]ost medications (2 weeks worth) are released with the inmate providing they have no abuse potential."[50] Weich had the

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[44] Durrant Affidavit, May 27, 2010, at ¶3-5.

[45] Second Supp. Responses, *supra* note 39, at Exh. D.

[46] Overson Affidavit, Exh. D at JICS Records.

[47] Overson Affidavit, Exh. D at CorEMR Records.

[48] *Id.*

[49] *Id.*

[50] ACJ Medical Standard Operating Procedure: Inmate Care and Treatment J-E-13. See attachment to Defendant's First Response to Plaintiff's First Set of Interrogatories,

responsibility of retrieving medications from the pharmacy and sending them over to deputy Roach for Munroe's release.[51] While Weich created a CorEMR sheet for Munroe's release which indicates that the medications were retrieved, it is unclear from the record if Deputy Roach received the medications and released Munroe with them.

B. Summary Judgment Standard for §1983 Claims

Idaho Rule of Civil Procedure 56(c) provides that summary judgment is "rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *See also First Sec. Bank of Idaho, N.A. v. Murphy*, 131 Idaho 787, 790, (1998). I.R.C.P. 56(e) provides that an adverse party may not simply rely upon mere allegations in the pleadings, but must set forth in affidavits specific facts showing there is a genuine issue for trial. *See Rhodehouse v. Stutts*, 125 Idaho 208, 211 (1994). The affidavits either supporting or opposing the motion must set forth facts that would be admissible in evidence and show that the affiant is competent to testify. *See id.*; I.R.C.P. 56(e).

To withstand a motion for summary judgment, the non-moving party's case must be anchored in something more than speculation; a mere scintilla of

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Requests for Production and Requests for Admission to Defendant Ada County.

[51] Overson Affidavit, Exh. E: ACJ SOP: Discharge Planning.

evidence is not enough to create a genuine issue. *Zimmerman v. Volkswagon of America, Inc.*, 128 Idaho 851, 854 (1996). Generally, liberal construction of the facts in favor of the non-moving party requires the court to draw all reasonable factual inferences in favor of the non-moving party. *See Williams v. Blakley*, 114 Idaho 323, 324, (1988); *Blake v. Cruz*, 108 Idaho 253, 255 (1985). If reasonable people could reach different conclusions or draw conflicting inferences from the evidence, the motion should be denied. *Friel v. Boise City Housing Authority*. 126 Idaho 484, 486 (1994).

Summary judgment of § 1983 cases involves an additional element of analysis. In § 1983 cases, plaintiff bears the burden of proof on the Constitutional deprivation that underlies the claim, and must come forward with sufficient evidence to create a genuine issue of material fact to avoid summary judgment. *McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010).

In this case, Ms. Hoagland is the non-moving party, thus all reasonable inferences should be drawn in her favor. Additionally, even though she is the non-moving party, as the plaintiff bringing a § 1983 cause of action, Ms. Hoagland bears the burden of proof on the underlying Constitutional deprivation.

C. Section 1983 Constitutional Deprivations

The U.S. Supreme Court has stated the standard Ms. Hoagland must meet in order to maintain her § 1983 claim. The same standard applies whether evaluating a potential pretrial detainee's Constitutional deprivation under the Fourteenth Amendment's Due Process Clause, or a prisoner's

Constitutional deprivation under the Eighth Amendment's protection against cruel and unusual punishment. *Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979); *Clouthier v. Contra Costa County*, 591 F.3d 1232, 1243-44 (9th Cir. 2010); *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010). The standard contains two elements: (1) the prisoner/detainee suffered an objectively serious harm that presented a substantial risk to his safety, and (2) the defendants were deliberately indifferent to that risk. *Minix*, 597 F.3d at 831 (quoting *Collins v. Seeman*, 462 F.3d 757, 769 (7th Cir. 2006)).

In a jail suicide case, the "first element is automatically satisfied because it goes without saying that suicide is a serious harm." *Id; see also Simmons v. Navajo County*, 609 F.3d 1011, 1018 (9th Cir. 2010). Therefore, that Bradley Munroe suffered an objectively serious harm that presented a substantial risk to his safety is established in this lawsuit. The second element, deliberate indifference, requires different showings depending on a defendant's status.

For individual capacity defendants, it must be shown that the defendant: (1) subjectively knew the prisoner was at substantial risk of committing suicide and (2) intentionally disregarded the risk. *Minix*, 597 F.3d at 831. For municipal and official capacity defendants, it must be shown that the action "alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted by that body's officers." *Monell v. Dep't of Social Servs.*, 436 U.S. 658, 690 (1978). If the plaintiff cannot identify a formal policy that is unconstitutional, the "plaintiff may show deliberate indifference through a series of bad acts

creating an inference that the municipal officials were aware of and condoned the misconduct of their employees." *Minix*, 597 F.3d at 832.

Ms. Hoagland asserts her § 1983 claim against Ada County as a political subdivision and each individual defendant in his/her official and personal capacities. Again, the first element of the § 1983 constitutional deprivation standard is met in this case as to each of these defendants: Munroe suffered an objectively serious harm that presented a substantial risk to his safety. What remains to be shown is whether there are genuine issues of material fact as to the second element of the standard, proof of deliberate indifference, when applied to each defendant.

1. *Municipal & Official Capacity Liability*

For municipal or official capacity defendants to be found deliberately indifferent, it must be shown that the action "alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted by that body's officers." *Monell*, 436 U.S. at 690. The implementation of such a policy or practice must literally be a conscious choice. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). If the plaintiff cannot identify a formal policy that is unconstitutional, the "plaintiff may show deliberate indifference through a series of bad acts which create an inference that the municipal officials were aware of and condoned the misconduct of their employees." *Minix*, 597 F.3d at 832. The courts have used the term "custom" when deliberate indifference is shown through this series of bad acts. A single instance of

an unconstitutional practice is not sufficient to show custom in this context. *Id.* Regardless of whether the alleged constitutional deprivation is in the form of policy or custom it must be the "moving force behind," or causal link to, the Constitutional violation. *Id.*

In this case, Ms. Hoagland alleges that the ACJ's written policies were constitutionally sound, but the implementation of those policies was so lacking as to fall below constitutional standards. *Plaintiff's Opposition to Defendant's Restated Motion for Summary Judgment* at 13. Thus, her allegation is not that Ada County, through the ACJ, purposely adopted an unconstitutional policy which led to a constitutional deprivation, but that the failure of jail employees to properly carry out jail policies created a deliberately indifferent custom of which policy-making employees were aware. Therefore, when analyzing whether the municipal and official capacity defendants were deliberately indifferent, this Court reviews the Record for evidence of a custom. Such a custom can be shown by evidence of a series of bad acts which creates an inference that the municipal officials were aware of and condoned the misconduct of their employees.

As a preliminary matter, Ms. Hoagland stipulates that certain defendants are inappropriately named in their Official Capacity as they do not have the authority to set or enforce policy and, therefore, the municipal deliberate indifference standard should not be applied to them. This Court agrees. Therefore, the § 1983 Official Capacity claims against defendants Ricky Lee Steinburg, James Johnson, Jeremy

Wroblewski, David Weich, Lisa Farmer, and Jamie Roach are dismissed.

This leaves § 1983 Official Capacity claims against Sheriff Gary Raney, Captain Linda Scown, Dr. Steven Garrett, Dr. Michael Estess, Kate Pape, and Karen Barrett, Sheriff Raney and Capt. Scown are the first and second in command at the jail. Drs. Garrett and Estess are medical doctors contracted to supervise jail medical employees and to oversee policy compliance. Pape is the jail's Health Services Administrator and oversees the logistics of the entire HSU. Barrett is the Sr. Physician's Asst. and is charged with supervising other P.A.s and Nurse Practitioners; Barrett also oversees inmate assessment at intake. Additionally, Ms. Hoagland asserts a claim against Ada County as a municipality.

a. Individual Defendants in their Official Capacities

Official capacity lawsuits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Monell*, 436 U.S. at 690, n. 55. As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the municipality. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). It is *not* a suit against the official personally, for the real party in interest is the municipality. *Id.* However, even though the real party in interest is the municipality, proof of the claim requires evidence of acts or omissions by municipal officials. In analyzing Ms. Hoagland's

official capacity claims against the individual defendants in this summary judgment inquiry, the Court, while drawing all reasonable factual inferences in favor of Ms. Hoagland, searches the record for evidence of a genuine issue of material fact as to whether a series of bad acts existed which creates the inference that these ACJ officials were aware of and condoned misconduct by their employees. Other courts have analyzed this issue and provide this court guidance.

When analyzing whether the municipal deliberate indifference standard was met when "a concededly valid policy [was] unconstitutionally applied by a municipal employee" in *City of Canton*, the U.S. Supreme Court established what some courts have since called the "so obvious" standard. 489 U.S. at 391. In *Canton*, a pretrial detainee brought a claim against the city for its failure to sufficiently train police officers who had the responsibility of deciding when to seek outside medical assistance for detainees and inmates. The Court held:

> It may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury. 489 U.S. at 391.

The Sixth Circuit applied *Canton* when it held that a municipality may be liable under § 1983 where the risks of its decision not to train its officers were "so obvious" as to constitute deliberate indifference to the rights of its citizens. *Gray v. City of Detroit*, 399 F.3d 612, 618 (6th Cir. 2005). The *Gray* court went on to analyze the so obvious standard as applied to suicide claims, stating: "the case law imposes a duty on the part of municipalities to recognize, or at least not to ignore, obvious risks of suicide that are foreseeable." *Id.* Where such risk is clear, the municipality has a duty to take reasonable steps to prevent the suicide. *Id.*

The Third Circuit also applied the so obvious standard to a jail suicide. *Simmons v. City of Philadelphia*, 947 F.2d 1042 (3d Cir. 1991). In *Simmons v. City of Philadelphia*, a young man was arrested for public intoxication, became confused and agitated, and subsequently committed suicide. *Id.* at 1049-50. "Of twenty suicides by individuals in the five years prior to Simmons' death, fifteen had been arrested for public intoxication." *Id.* at 1093. They were all young men who hung themselves with their own clothing. *Id.* The jury found that policy-making officials were on notice that a change in policy was needed because the similarities in the suicides were "so obvious." The Third Circuit upheld that jury's finding of § 1983 municipal deliberate indifference.

This Court evaluates whether the finders-of-fact, when drawing all inferences in a light most favorable to Ms. Hoagland, could find that the Ada County officials with policy-making power acted or failed to act in a way that satisfies the municipal deliberate indifference standard. If reasonable people could

reach different conclusions or draw conflicting inferences from the evidence, the motion should be denied.

The record contains the ACJ Standard Operating Policies[52] (SOP) and its policy manual.[53] The Court has read these documents and finds them to be in conformity with the constitutional standard of providing adequate medical and mental healthcare to detainees and inmates. However, the Court has found several inconsistencies between the written policy and procedure, and their actual implementation. Three inconsistencies stand out.

First, even though jail policies and job descriptions required jail social workers to be licensed in the State of Idaho, James Johnson was not a licensed social worker in the State of Idaho. At a minimum, this was known to Johnson and to his supervisor, HSU Administrator Kate Pape. Secondly, the record does not reflect whether the jail fully complied with its policy that most inmates receive two weeks of their medications when Munroe was released on September 26. Third, it appears that confusion surrounded the sufficiency of Munroe's suicide risk assessment during his booking on September 29.

When analyzing these inconsistencies for § 1983 official capacity deliberate indifference, the Court must evaluate whether they create a series of bad

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[52] Oyerson Affidavit, Exh. F: Wroblewski Deposition, November 16, 2010 at Exh. H, ACJ Medical Standard Operating Procedures.

[53] Overson Affidavit, Exh. F: Wroblewski Deposition, November 16, 2010 at Exh. J, ACJ Policy Manual.

acts which put the ACJ policy making officials on notice that pretrial detainees and inmates could be at a higher risk of suicide, or whether they reflect a lack of training so likely to result in a deprivation of constitutional rights that the ACJ policy-making officials can be said to have been deliberately indifferent to the need.

The Court finds that Johnson's lack of Idaho licensure was not proximately connected to Munroe's suicide. While he wasn't licensed in Idaho, the record reflects his education and work history, both of which indicate that he was qualified to do his job. The failure of officials up the chain of command, from HSU Administrator Pape to Captain Scown and Sheriff Raney, to ensure that Johnson was licensed in Idaho, while improper, is not causally connected to any alleged deliberate indifference as to Munroe's risk of suicide. Therefore, it does not constitute one in a series of bad acts sufficient to put the ACJ policy-makers on notice that Munroe's suicide was imminent, or even likely. Nor does it qualify as a lack of training so likely to cause a constitutional deprivation that these officials can be said to have been deliberately indifferent.

Even as the record indicates that Munroe's medications were gathered from the pharmacy for his release, there is a genuine issue of material fact as to whether he actually received them. There is also a genuine issue of material fact as to whether Munroe should have been re-assessed by Health Services *after* the completion of the booking process. However, even when drawing these two factual inconsistencies in Ms. Hoagland's favor, they are not enough to create a series of bad acts which was so obvious that

it must have put ACJ policy-making officials on notice that the jail's suicide prevention policies were inadequate. Unlike the facts in the Third Circuit's *Simmons v. Philadelphia*, the record in this case contains no evidence that other pretrial detainees or inmates had recently or repeatedly committed suicide in situations similar to Munroe. In short, there is nothing in the record to indicate that these procedural inconsistencies were so likely to result in an inmate's suicide that the official capacity defendants were on notice of a problem.

The U.S. Supreme Court held in *Canton* that that in light of the duties assigned to specific officers or employees the need for more or different training may be so obvious, and the inadequacy so likely to result in a constitutional deprivation, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need. However, here, a lack of training does not appear to be responsible for Munroe's suicide. Dep. Wroblewski, who chose not to forward the suicide questionnaire to HSU, was still in training; if anyone is responsible for his failure to forward that information, it was perhaps his supervisor, who is not a defendant in this lawsuit. However, even if his supervisor was a defendant, there is not enough evidence in the record to show that reasonable jurors could agree that Wroblewski's mistake reflects an insufficiency of training that was so likely to result in the violation of constitutional rights that the official capacity defendants can be said to have been deliberately indifferent. Wroblewski did not act in a vacuum. The Court cannot ignore the fact that Wroblewski explained why he made the decision he did: he had

actual knowledge that Munroe had been assessed for suicide risk by Johnson. There is nothing to indicate that had Wroblewski not known of Munroe and Johnson's interaction, he would not have followed typical procedure and forwarded Munroe's questionnaire to HSU.

For all of these reasons, the Court finds that when drawing all reasonable factual inferences in favor of Ms. Hoagland, the record does not show that a series of bad acts existed sufficient to have put the official capacity defendants on notice that Munroe's suicide was imminent or that the ACJ procedures and training practices, as they were being performed, were so inadequate that the official capacity defendants were deliberately indifferent to likely constitutional deprivations. Therefore, Ada County's motion for summary judgment as to the § 1983 Official Capacity claims against Sheriff Gary Raney, Captain Linda Scown, Dr. Steven Garrett, Dr. Michael Estess, Kate Pape, and Karen Barrett is GRANTED.

b. Municipal Liability as to Ada County

As to defendant Ada County, a political subdivision of the State of Idaho, the U.S Supreme Court has held that a governmental entity may not be held liable under § 1983 for *respondeat superior*. *Monell*, 426 U.S. at 691. Therefore, Ada County may not be sued under § 1983 solely for constitutional deprivations caused by employees of any of its subdivisions. However, the Idaho Supreme Court has addressed the specific circumstances in which a government subdivision may be sued under § 1983 for its own acts or failures to act. *Nation v. State*

Dep't of Corrections, 144 Idaho 177, 186, 158 P.3d 953, 962 (2007). The *Nation* Court quoted the U.S. Supreme Court in *Monell* when it held that that municipal deliberate indifference requires proof of an unconstitutional policy, practice, or custom that has been approved by the government entity. 436 U.S. at 690.

In this case, this Court finds that the record does not sustain a finding that Ada County either adopted an unconstitutional policy, or that a pattern is present that shows Ada County's practices constituted an unconstitutional custom. In order for municipal liability to stand, such a policy or custom would not only have to exist, but it would have to be the moving force behind a constitutional deprivation. For each of these reasons, Ada County's motion for summary judgment as to the § 1983 against itself is GRANTED.

2. *Individual Liability*

Individual capacity suits "seek to impose personal liability upon a government official for actions he takes under color of state law." *Kentucky v. Graham*, 473 U.S. 159, 165 (1985). In this case, all of the individual defendants are named in their individual capacities. Of these twelve defendants, some are shown to have had personal contact with Bradley Munroe; others did not personally interact with Munroe. As is explained below, the standard varies slightly depending on whether a defendant personally interacted with the deceased.

a. Individual Defendants

"A prison official cannot be liable for deliberate indifference unless he or she 'knows of and disregards

an excessive risk to inmate health and safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Simmons v. Navajo County*, 609 F.3d 1011, 1017 (9th Cir. 2010) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). Thus, a § 1983 plaintiff must show that an individual prison official defendant was (a) subjectively aware of the serious medical need and (b) failed to adequately respond. *Farmer*, 511 U.S. at 828.

When analyzing deliberate indifference in jail suicides, Courts properly inquire into whether individual defendants had actual knowledge of the significant likelihood that the deceased would take his life. *Minix v. Canarecci*, 597 F.3d 824, 832 (7th Cir. 2010); *see also Collins v. Seeman*, 462 F.3d 757, 760 (7th Cir. 2006). "Without knowledge of a deceased's risk of suicide, it cannot be said that a defendant was deliberately indifferent to the risk." *Id.* It is not enough that there was a danger of which a prison official "*should have been aware*, rather, the official must both be aware of a set of facts from which the substantial risk of serious harm may be drawn, and he must also draw that inference." *Minix*, 597 F.2d at 831-32; *Collins*, 462 F.3d at 761.

In *Minix*, the plaintiff mother argued that the mental health professional that evaluated her son and did not find him at imminent risk for suicide was deliberately indifferent because "any qualified mental health professional would have probed more deeply into his psychological history and discovered his suicidal tendencies." *Id.* The Seventh Circuit disagreed, holding that, even assuming the mental

health professional's assessment of the inmate was inadequate, a poor assessment amounted to, at most, negligence. And negligence is not sufficient to meet the deliberate indifference standard which requires actual knowledge coupled with purposeful inaction. *Id. See also Toguchi v. Chung*, 391 F3d 1051, 1060 (9th Cir. 2004).

Several courts have emphasized that "once a suicide has been accomplished in spite of preventative measures, it is all too easy to point out the flaws of failure." *Navajo County*, 609 F.3d at 1020 (*quoting Rellegert v. Cape Girardeau County*, 924 F.2d 794, 796 (8th Cir. 1991)). However, while a jury may conclude that a defendant acted "imprudently, wrongly, or negligently," when considering deliberate indifference the question before it is not whether an employee did everything he could have, but whether he did all that the Constitution requires, *Rellegert* at 797-98.

In *Clouthier v. County of Contra Costa*, 591 F.3d 1232 (9th Cir. 2010), two deputies were not found to be subjectively aware even though the deceased's family asserted they "should have known." Soon before his suicide, the inmate's behavior manifested numerous suicide trigger signs: he refused meals, refused outdoor recreation time, and seemed withdrawn. *Id.* at 1237-40. When the inmate was admitted, the deputies were informed by a mental health professional that this inmate's suicide potential was "the real deal." However, the deputies did not have access to the inmate's medical records; and, while they knew he had been considered a danger to himself initially, over the course of a week during which he did not threaten suicide, the

deputies admittedly did not have a firm understanding of why the inmate was still under observation. *Id.* at 1246. Without actual knowledge that he posed a substantial risk of serious harm to himself, those deputies were not held to be deliberately indifferent to the likelihood he might commit suicide. *Id.*

Miscommunication among employees charged with caring for suicidal inmates is often not enough to show deliberate indifference. In *Collins v. Seeman*, an inmate reported to an officer that he wanted to see a crisis counselor because he was "feeling suicidal." 462 F.3d at 759. The inmate's request was passed up the chain of command; however, the "feeling suicidal" element of his request was not conveyed. *Id.* While three additional officers were informed that he wanted to see a "crisis counselor," none of those officers learned that it was because he was suicidal. The district court found the subjective awareness requirement of the deliberate indifference standard was dispositive to the three officers, as they had no actual knowledge of the substantial risk of serious harm. Nor was the crisis counselor herself held to have been subjectively aware, even though she was often called in to counsel suicidal inmates. Without actual knowledge of imminent harm as to the individual inmate, deliberate indifference cannot stand.

Placing a pretrial detainee on some level of suicide watch, "even the highest level, does not demonstrate a subjective awareness of a substantial risk of imminent suicide." *Navajo County*, 609 F.3d at 1018 (quoting *Collingnon v. Milwaukee County*, 163 F.3d 982, 990 (7th Cir. 1998)). In *Navajo County*, the

plaintiffs asserted that a jail nurse was deliberately indifferent because she had knowledge of a pretrial detainee's previous suicide attempts, his history of depression, and was aware of the possibility that he might take his own life, yet she placed him on an intermediate suicide watch level as opposed to the highest level. *Id.* The Court held that while she may have known he had suicidal tendencies, to meet the subjective awareness requirement of deliberate indifference she would have been required to have had actual knowledge that he was in imminent danger of himself and then disregarded that knowledge. *Id.* Therefore, she was not found to have been deliberately indifferent.

In this case, Ms. Hoagland has asserted § 1983 personal capacity claims against the following defendants who were directly involved with her son's care at the jail: Medical Attendant David Weich; Dep. Jamie Roach; Ricky Lee Steinburg, P.A.; Lisa Farmer, R.N.; James Johnson, M.S.W.; and Dep. Jeremy Wroblewski. The Court analyzes the record, drawing all reasonable factual inferences in Ms. Hoagland's favor, for evidence that these defendants were subjectively aware of Munroe's risk of suicide and then disregarded that knowledge.

i. Weich, Roach, Steinburg, Farmer, and Wroblewski were not Deliberately Indifferent in their Personal Capacities

Medical Attendant David Weich

The record reflects that David Weich's sole interaction with Munroe was on September 26, 2008. Weich was the medical attendant who had the responsibility to implement the ACJ policy of

providing inmates with two weeks of most medications upon release. He was not a doctor, physician assistant, nurse, or nurse practitioner; rather, he was support staff to the medical professionals who held those positions. The record includes two separate CorEMR charts reflecting that Weich did gather Munroe's medications in anticipation of his September 26 release.[54] However, it is unclear from the records whether Munroe actually received the medications.

In order to find that Weich acted with deliberate indifference, the record must show that he was subjectively aware that Munroe was at substantial risk of serious harm and then ignored that knowledge. Weich was not a pharmacist. He was not responsible to know that the medications Munroe was taking were ones that might be taken by patients with mental illness. He was not a caregiver; his role involved checking items off a list that would be provided to an inmate patient upon his release. Moreover, there is also no indication that, during their sole interaction, Munroe acted in any manner that would have alerted Weich to the fact that he might commit suicide two days later.

After careful review of the record, and drawing all reasonable factual inferences in Ms. Hoagland's favor, the Court finds that Weich was not subjectively aware of a serious medical need to which he failed to adequately respond and no genuine issues of material fact remain as to Weich's culpability in Munroe's suicide. For all of these reasons, the defendants' motion for summary judgment as to

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[54] Overson Affidavit, Exh. D: Bates Nos. 120,150.

Defendant David Weich in his personal capacity is GRANTED.

Deputy Jamie Roach

The record reflects that Roach's sole interaction with Munroe was on September 26, 2008. She was Munroe's releasing deputy on September 26 and one of her responsibilities included ensuring that Munroe was released with at least two weeks supply of the medications he had been taking while in jail. It is unclear whether Munroe received these medications. However, even if he did not, it cannot be said that Roach was deliberately indifferent to Munroe's suicide risk. Personal capacity defendants in this context must be proven to have known that the deceased posed an imminent risk to himself and then disregarded that knowledge. "Without knowledge of a deceased's risk of suicide, it cannot be said that a defendant was deliberately indifferent to the risk." *Minix*, 597 F.3d at 832. Roach was not a medical professional and she did not have access to Munroe's medical history. There is not an expectation that she would have known and understood why Munroe was taking any of the medications he had been taking while he was in jail. There is also no indication that, during their sole interaction, Munroe acted in any manner that would have alerted her to the fact that he might commit suicide two days later.

After careful review of the record, and drawing all reasonable factual inferences in Ms. Hoagland's favor, the Court finds that Roach was not subjectively aware of a serious medical need to which she failed to adequately respond and no genuine issues of material fact remain as to Roach's culpability in Munroe's

suicide. For all of these reasons, the defendants' motion for summary judgment as to Defendant Deputy Jamie Roach in her personal capacity is GRANTED.

Physician Assistant Ricky Lee Steinburg

Ricky Lee Steinburg was a P.A. at the jail. He worked on a contract basis and agreed to "refer medical issues discovered during inmate assessments to full-time ACSO medical staff for follow-up, unless, in [his] professional opinion, immediate action is required to safeguard the physical or mental health of the inmate."[55] It does not appear that he was working on either September 28 or 29, 2008, and, even if he was, there is nothing in the record to suggest that he had any involvement with Munroe's care on those days. Thus, he could not have had subjective awareness of the likelihood that Munroe would commit suicide on September 29. Therefore, in order to find that he acted with deliberate indifference, the record must include evidence that Steinburg was somehow otherwise subjectively aware of Munroe's serious risk of suicide and that he then disregarded that knowledge. Steinburg was intermittently involved with Munroe's medical care during his twenty-eight day incarceration; however, the record shows that during that incarceration Munroe saw medical staff regularly and that he received his medications regularly. Nowhere does the record indicate that Steinburg was subjectively aware of a serious risk to Munroe that he then disregarded.

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[55] Overson Affidavit, Exh. C: Professional Services Agreement with Ricky Lee Steinburg at 1.

After careful review of the record, and drawing all reasonable factual inferences in favor of Ms. Hoagland, the Court finds no genuine issues of material fact remain as to Steinburg's culpability in Munroe's suicide. For all of these reasons, the defendants' motion for summary judgment as to Ricky Lee Steinburg, P.A., in his personal capacity is GRANTED.

Lisa Farmer, R.N.

Nurse Farmer worked as part of the HSU, and her responsibility was not to assess Munroe herself, but to ensure that someone else did. Her job required her to identify and schedule inmate psychiatric assessments as needed. The record reflects that she did that upon Munroe's booking for the August 28 incarceration. Aside from several non-mental health related medical appointments during Munroe's earlier twenty-eight day incarceration, it appears that Farmer did not personally interact with Munroe. Similar to the nurse in *Navajo County* who knew of an inmate's suicidal history yet was not found to have acted with deliberate indifference, Farmer did note on September 29 on Munroe's CorEMR chart that he had a suicide history and that he had been to St. Al's before being booked at ACJ. The chart reflects that she knew of Munroe's housing status and she knew that it had been approved by James Johnson. That same CorEMR chart reflects that Munroe's chart was then passed on to another HSU professional in an attempt to get the ER records from St. Al's. All of these facts contribute to the Court's conclusion that even though Farmer knew of Munroe's suicidal past, she had no reason to think he was imminently suicidal. Additionally, evidence in the record

indicates Farmer complied with her job responsibilities the day Munroe committed suicide; therefore, even if she *did* think Munroe was suicidal, she acted appropriately and in accordance with her job description in furthering his medical records in order to provide him further medical care.

After careful review of the record, and drawing all reasonable factual inferences in Ms. Hoagland's favor, the Court finds that Farmer was not subjectively aware of a serious medical need to which she failed to adequately respond and no genuine issues of material fact remain as to her culpability in Munroe's suicide. For all of these reasons, the defendants' motion for summary judgment as to Defendant Lisa Farmer, R.N. in her personal capacity is GRANTED.

Dep. Jeremy Wroblewski

Dep. Jeremy Wroblewski was in his final week of on-the-job training when he acted as Munroe's booking deputy the morning of September 29. His deposition testimony and documents in the record reflect that he followed procedure by asking Munroe questions intended to elicit possible suicidal tendencies. According to jail policy and procedure, when Munroe answered "yes" to certain questions, Wroblewski was required to inform health services personnel so that they could conduct a further risk assessment. In this case, Munroe did answer "yes" to the questions related to suicide. However, because of Munroe's expression of suicidal ideations the night before, health services had already been called by the time Wroblewski began the booking process around 8:00am.

As Wroblewksi was asking Munroe about thoughts of and history of suicide, Psychiatric Social Worker James Johnson arrived to discuss the same topics. Johnson completed his assessment before Wroblewski completed the booking process. When the booking was finished, it was not clear to Wroblewski that he still needed to call the HSU, because he had *actual* knowledge that Munroe had been simultaneously assessed by the HSU. Wroblewski knew that James Johnson or someone in Johnson's department was the proper party to receive Munroe's intake form. However, Wroblewski also knew that Johnson had already interviewed Munroe. If Wroblewski had followed procedure, he would have re-informed the HSU. However, he was new on the job and, more importantly, in his judgment Munroe had received the assessment that was required. Additionally, Wroblewski's trainer was present and did not indicate to Wroblewski that needed to further follow up.

Wroblewski was arguably negligent in not ensuring that Munroe's intake questionnaire was not furthered to the HSU, however, negligence is not the standard to which he is held. To be granted summary judgment the record must show that there is no genuine issue of material fact regarding whether Wroblewski acted in a way that constituted deliberate indifference. After careful review of the record, and drawing all reasonable factual inferences in Ms. Hoagland's favor, the Court finds that Wroblewski was subjectively aware of a serious medical need, but that he did not fail to adequately respond to that need. He did what he understood he should do in the circumstances; his failure to notify

the HSU of Munroe's answers is understandable considering the unfortunate timing of Johnson's assessment of Munroe coupled with the fact that Wroblewski was still in training. In retrospect, he should have notified the HSU, however, as other courts have observed, once a suicide has been accomplished in spite of preventative measures, it is all too easy to point out the flaws of failure. And those flaws cannot be the basis for a finding of fault. For all of these reasons, the defendants' motion for summary judgment as to Defendant Deputy Jeremy Wroblewski in his personal capacity is GRANTED.

ii. Genuine issues of material fact exist as to whether James Johnson acted with deliberate indifference

Psychiatric Social Worker James Johnson

James Johnson, M.S.W., was the ACJ psychiatric social worker who twice evaluated Munroe for suicide risk and twice decided he was not at risk: first at the beginning of his twenty-eight day incarceration and again on September 29. Other than these two assessments, Johnson did not interact with Munroe. Johnson's September 29 assessment had the effect of communicating to other ACJ employees that Munroe was not at risk of suicide. In retrospect, Johnson's September 29 assessment was incorrect: Munroe committed suicide approximately twelve hours after Johnson met with him. The fact that Johnson was wrong in his assessment may support a finding that he was negligent, but, standing alone, it is not sufficient for a finding of personal deliberate indifference.

However, subsequent to his initial assessment of Munroe during the booking process, Johnson was twice more informed of Munroe's suicide risk on September 29 and he did not pursue that information. He was first informed when the HSU Admin. Asst. Leslie Robertson notified him of Ms. Hoagland's phone calls that morning. Possibly more important was the notification a short time later by classification deputies, when they informed Johnson of Munroe's strange behavior and sought permission to change his housing classification. The Court notes that this notification by the deputies was almost two hours after Johnson's initial assessment and, while the deputies did not seek an additional suicide assessment, reasonable people could disagree as to whether this information should have triggered a deeper assessment by Johnson into the mental well-being of an inmate with a known suicidal history.

Additionally, the record contains conflicting expert witness testimony as to the appropriateness of Johnson's response to Munroe's behavior.

After careful review of the record, and drawing all reasonable factual inferences in Ms. Hoagland's favor, the Court finds that genuine issues of material fact remain as to whether James Johnson was subjectively aware of a serious medical need to which he failed to adequately respond. Therefore, the defendants' motion for summary judgment as to Defendant James Johnson, M.S.W., in his personal capacity is DENIED.

iii. Qualified Immunity

In denying the motion for summary judgment as to James Johnson in his personal capacity, the Court

must next analyze whether he is protected by the defense of Qualified Immunity. Qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow v. Fitzgerald*, 102 S. Ct. 2727 (1982)). "Qualified immunity balances two important interests-the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson*, 129 S. Ct. at 815. Qualified immunity applies regardless of whether the government official's error is "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.*

In 2001, the U.S. Supreme Court held that qualified immunity required a mandatory two-part, sequential analysis: first, a court must decide whether the facts that a plaintiff has alleged or shown make out a violation of a constitutional right. *Saucier v. Katz*, 121 S. Ct. 2151, 2156 (2001). "Second, if the plaintiff has satisfied this first step, the court must decide whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* "Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right." *Id.* In 2009, the U.S. Supreme Court revisited its Qualified Immunity analysis and held that the two part inquiry was still correct; however, the district courts were not bound to enforce it sequentially. *Pearson*, 129 S. Ct. at 815.

"The judges of the district courts . . . should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818.

This Court finds that reversing the *Saucier* questions makes for a more logical analysis in this case. Therefore, the first inquiry is whether the constitutional right allegedly violated was clearly established at the time of the alleged misconduct. The second inquiry is whether the facts, as Ms. Hoagland asserts them, make out a violation of that clearly established constitutional right.

Ms. Hoagland's complaint alleges that Munroe did not receive adequate healthcare while in the custody of the ACJ, causing a violation of Munroe's Fourteenth Amendment Due Process right to adequate healthcare when he was a pretrial detainee in the ACJ. Courts have repeatedly held that pretrial detainees have the right to adequate healthcare;[56] therefore, the answer to the first question is yes. The constitutional right allegedly violated was clearly established at the time of the alleged misconduct.

Ms. Hoagland alleges that the combined mistakes of multiple ACJ employees caused the alleged constitutional deprivation. Even drawing all reasonable factual inferences in Ms. Hoagland's favor, this Court has determined that the behavior of many of the employees did not violate Munroe's

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[56] *Bell v. Wolfish*, 441 U.S. 520, 537 n.16 (1979); *Clouthier v. Contra Costa County*, 591 F.3d 1232, 1243-44 (9th Cir. 2010); *Minix v. Canarecci*, 597 F.3d 824, 831 (7th Cir. 2010).

constitutional right to adequate healthcare. However, as applied to James Johnson's response to both the information that Ms. Hoagland called to inform the ACJ of Munroe's suicide risk and the classification deputy's concern about Munroe's behavior, the court is unable to find that Johnson did not act with deliberate indifference. Therefore, the court does not find that the facts, as alleged by Ms. Hoagland, do not make out a violation of Munroe's clearly established right to adequate healthcare. Thus, Qualified Immunity does not provide James Johnson with a shield from civil liability in this instance.

b. Individual defendants who were not directly involved with Munroe's care

If an individual defendant did not directly participate in the prisoner's care, deliberate indifference claims are even harder to prove, as "individual liability under §1983 requires personal involvement in the alleged constitutional deprivation." *Minix*, 597 F.3d at 833-34; *see also Palmer v. Marion County*, 327 F.3d 588, 594 (7th Cir. 2003); *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). To find defendants personally liable in such indirect care circumstances, the defendant must have condoned or acquiesced in a subordinate's unconstitutional treatment of a prisoner. *Minix*, 597 F.3d at 834. This is known as supervisory liability.

In *Minix*, a doctor working as the Medical Director of Health Services for the jail was relatively new on the job and not yet familiar with all the jail's suicide prevention policies. *Id.* Admittedly, he was working in his full capacity without full knowledge of the policies for which he was responsible. However,

that fact alone did not support the inference that he condoned any unconstitutional practices by employees under his supervision. *Id.* Without evidence that a supervising doctor was *aware of* an unconstitutional practice, deliberate indifference will not stand. Similarly, "without knowledge of the allegedly unconstitutional care that [a nurse] provided, [a supervising doctor] cannot be liable by mere virtue of his supervisory status. *Id.*; *see also Palmer*, 327 F.3d at 594.

In this case, Ms. Hoagland has asserted § 1983 claims against the following defendants in their personal capacities even though they did not personally interact with her son at the jail: Sheriff Gary Raney; Linda Scown, ACJ Captain; Dr. Steven Garrett, Supervising Physician; Dr. Michael Estess, Supervising Psychiatrist; and Kate Pape, ACJ HSU Administrator. Finally, defendant Karen Barrett, Sr. P.A., had both direct involvement with Munroe's healthcare and acted in a supervisory role over others who were involved with his direct care.

Sheriff Gary Raney and Captain Linda Scown

While Sheriff Raney and Captain Scown are the ultimate supervisors of the jail, nowhere in the record does it indicate they had any direct involvement with Munroe's care. Nor does the record indicate that they were ever personally informed that Munroe was at risk for suicide. Therefore, the Court finds that Sheriff Raney and Captain Scown were not subjectively aware of a serious medical need to which they failed to adequately respond.

Furthermore, the record does not sustain a finding that would support an inference that Sheriff

Raney or Captain Scown knew of a pattern of suicide or pattern of problems with policy enforcement by subordinates which they then condoned or to which they acquiesced. Therefore, the Court finds that neither the sheriff nor the captain acted with deliberate indifference in his/her supervisory capacity.

After careful review of the record, and drawing all reasonable factual inferences in favor of Ms. Hoagland, the Court finds no genuine issues of material fact remain as to Sheriff Raney or Captain Scown's culpability in Munroe's suicide. For all of these reasons, the defendants' motion for summary judgment as to Sheriff Gary Raney and Captain Linda Scown in their personal capacities is GRANTED.

Dr. Steven Garrett and Dr. Michael Estess

Dr. Steven Garrett's was the jail's supervising physician.[57] He served in a supervisory role over all the jail's medical staff. Dr. Michael Estess served as the jail's Psychiatrist.[58] Both men provided weekly clinical care in addition to being on-call. Additionally, both men were responsible to assist in ACJ's compliance with the Ada County Mental Health Protocols. Neither doctor was directly involved with Munroe's medical care. In order to find these doctors acted with deliberate indifference in their personal capacities, the record must show that they were subjectively aware of Munroe's serious risk of suicide

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[57] Overson Affidavit, Exh. C: Garrett Medical Services Agreement at 1-5.

[58] Overson Affidavit, Exh. C: Psychiatric Services Agreement at 1-7.

and then disregarded that knowledge. Because the record shows that neither doctor had any knowledge of Munroe, the Court finds that neither of them was subjectively aware that Munroe was at serious risk of suicide and then disregarded that knowledge.

In order for either doctor to have acted with deliberate indifference in his supervisory capacity, the record must show that he was aware of an unconstitutional practice by ACJ medical staff which he condoned. The record does not include evidence indicating that either doctor was aware of or condoned such a policy. Therefore, the Court finds that neither doctor acted with deliberate indifference in his supervisory capacity.

After careful review of the record, and drawing all reasonable factual inferences in favor of Ms. Hoagland, the Court finds no genuine issues of material fact remain as to either Dr. Garrett's or Dr. Estess' culpability in Munroe's suicide. For all of these reasons, the defendants' motion for summary judgment as to Dr. Steven Garrett and Dr. Michael Estess in their personal capacities is GRANTED.

Kate Pape, Jail Health Services Administrator

Kate Pape was ACJ's highest ranking HSU administrator. She oversaw all the medical staff. There is no indication in the record that she had any direct involvement with Munroe during his time at the jail. It follows that the record contains no evidence that Pape knew Munroe was at serious risk of suicide and that she then disregarded that knowledge. Therefore, she could only be found to have been deliberately indifferent if, in her supervisory capacity, she knew of a pattern of suicide

or pattern of problems with policy enforcement by subordinates which she then condoned or to which she acquiesced. There is nothing in the record to support such an allegation.

After careful review of the record, and drawing all reasonable factual inferences in favor of Ms. Hoagland, the Court finds no genuine issues of material fact remain as to Pape's culpability in Munroe's suicide. For all of these reasons, the defendants' motion for summary judgment as to Kate Pape in her personal capacity is GRANTED.

Senior Physician Assistant Karen Barrett

The record shows that Karen Barrett actively participated in Munroe's medical care during the twenty-eight day incarceration. Her notations are repeatedly found in his CorEMR medical log from that incarceration. The record contains evidence that she provided Munroe with adequate healthcare during that incarceration. Barrett was on-call the day he committed suicide and did not have any direct contact with him, nor was she called in by any of the working medical staff that day. There is nothing in the record to substantiate a finding that she was subjectively aware that Munroe posed a serious risk to himself, and that she then disregarded that knowledge.

In order for her to have acted with deliberate indifference in her supervisory capacity, the record must show that she was aware of and condoned an unconstitutional practice of the ACJ medical staff who were working the day of his death. The record does not include evidence indicating that she was aware of or condoned such a policy. Therefore, the

Court finds that Barrett did not act with deliberate indifference in her supervisory capacity.

After careful review of the record, and drawing all reasonable factual inferences in favor of Ms. Hoagland, the Court finds no genuine issues of material fact remain as to Barrett's culpability in Munroe's suicide. For all of these reasons, the defendants' motion for summary judgment as to Karen Barrett in her personal capacity is GRANTED.

D. Conclusion

Bradley Munroe's suicide was a tragic event, however in order for his death to result in government official civil liability, either officially or personally, the high bar of deliberate indifference must be met. In this instance, the court finds that there are genuine issues of material fact as to whether James Johnson acted with deliberate indifference in providing medical care for Munroe. Therefore, as to him, summary judgment is denied. However, as to all other defendants in their individual and personal capacities and as to Ada County in its municipal status, the court finds that no genuine issues of material fact exist which would indicate that those defendants acted with deliberate indifference. Therefore, summary judgment as to those defendants is granted.

IT IS SO ORDERED.

Dated this *20th* day of January, 2011.

/s/ Ronald J. Wilper
Ronald J. Wilper
DISTRICT JUDGE

APPENDIX F

[Filed: November 2, 2010]

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

Case No. CV-OC-09-01461

RITA HOAGLAND, Individually, and in her capacity as Personal Representative of the ESTATE OF BRADLEY MUNROE,

Plaintiffs,

vs.

ADA COUNTY, a political subdivision of the State of Idaho; ADA COUNTY SHERIFF, GARY RANEY, an elected official of Defendant Ada County and operator of the Ada County Sheriff's Office and Ada County Jail, in his individual and official capacity; LINDA SCOWN in her individual and official capacity; KATE PAPE, in her individual and official capacity; STEVEN GARRETT, M.D., in his individual and official capacity; MICHAEL E. ESTESS, M.D., in his individual and official capacity; RICKY LEE STEINBERG, in his individual and official Capacity; KAREN BARRETT, in her individual and official capacity; JAMES JOHNSON, in his individual and official capacity; JEREMY WROBLEWSKI, in his individual and official capacity; DAVID WEICH, in his individual and official capacity; LISA FARMER, in her individual and official capacity; JAMIE ROACH, in her individual and official capacity; and JOHN DOES I-X, unknown persons/entities who may be liable to Plaintiffs,

Defendants.

MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

This matter came before the Court on Defendants' motion to dismiss for failure to state a claim upon which relief can be granted. The Court heard oral arguments on Thursday, October 7, 2010. Darwin Overson appeared for the Plaintiffs. James Dickinson and Ray Chacko appeared for the Defendants. The Court took the matter under advisement at that time. This Order now grants in part and denies in part Defendants' motion to dismiss.

BACKGROUND

Bradley Munroe was incarcerated in the Ada County Jail from September 12-26, 2008. On September 28, 2008, soon after his initial release, he was arrested on a robbery charge. Munroe was again taken to the Ada County Jail. The following day, September 29, 2008, Munroe was found with a bed sheet wrapped around his neck. Emergency resuscitation efforts were not successful.

Plaintiff Rita Hoagland is Munroe's mother. In her roles as the personal representative of Munroe's estate and as his mother and heir, Ms. Hoagland sued Ada County, the Ada County sheriff, and various Ada County Jail employees for the County's failure to administer proper healthcare and failure to place Munroe on suicide watch. Ms. Hoagland asserts these failures resulted in her son's suicide.

Her complaint contains two counts. Count I is brought by Ms. Hoagland on behalf of the Estate of Bradley Munroe, and herself as an heir to the Estate,

pursuant to I.C. 5-311 and 42 U.S.C. § 1983. Count I alleges violations of Munroe's Constitutional rights under the Eighth and Fourteenth Amendments of the U.S. Constitution for failure to provide Munroe with adequate medical and mental health care and adequate security under circumstances where those failures resulted in Munroe's death. Count II is brought by Ms. Hoagland, individually and on her own behalf as Munroe's mother, pursuant to I.C. 5-311 and 42 U.S.C. §§ 1983, 1988. Count II alleges violations of her Fourteenth Amendment due process interest in familial relations, society and companionship with her son.

STANDARD OF REVIEW

An Idaho Rule of Civil Procedure 12(b)(6) motion to dismiss is appropriate when there are no genuine issues of material fact and the case may be decided as a matter of law. *Coghlan* v. *Beta Theta Pi Fraternity,* 133 Idaho 388, 398, 987 P.2d 300, 310 (1999). In considering a 12(b)(6) motion to dismiss, the court may examine only those facts that appear in the complaint and any facts of which the court may appropriately take judicial notice. *Hellickson* v. *Jenkins,* 118 Idaho 273, 276, 796 P.2d 150, 153 (Ct. App. 1990). "[T]he nonmoving party is entitled to have all inferences from the record and pleadings viewed in its favor, and only then may the question be asked whether a claim for relief has been stated." *Coghlan,* 133 Idaho at 398, 987 P.2d at 310. "The issue is not whether the plaintiff will ultimately prevail, but whether the party is entitled to offer evidence to support the claims." *Orthman* v. *Idaho Power Co.,* 126 Idaho 960, 962, 895 P.2d 561, 563

(1995) (quoting *Greenfield* v. *Suzuki Motor Co. Ltd.,* 776 F. Supp. 698, 701 (E.D.N.Y. l991)).

42 U.S.C. § 1983 ACTIONS

42 U.S.C. § 1983[1] creates a personal cause of action for deprivation of federal statutory or constitutional rights. *Evans v. Twin Falls County*, 118 Idaho 210, 216, 796 P.2d 87, 93 (1990). Section 1983 is not itself a source of substantive rights; instead, it provides a cause of action for the vindication of federal rights. *Rinker v. Sipler*, 264 F. Supp. 2d 181, 186 (M.D. Pa. 2003). The purpose of §1983 is "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992).

A. 42 U.S.C. § 1983: SURVIVORSHIP CLAIMS

Although § 1983 provides a cause of action for the vindication of federal rights, "federal law simply does not 'cover every issue that may arise in the context of a federal civil rights action.'" *Robertson* v. *Wegmann,* 436 U.S. 584, 588 (1978) (quoting *Moor* v. *County of*

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[1] 42 U.S.C. § 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Alameda, 411 U.S. 693, 703 (1973)). Accordingly, 42 U.S.C. § 1988 provides that when "federal laws 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 [forum] State, shall be applied, as long as such law is not 'inconsistent with the Constitution and laws of the United States.'" *Robertson,* 436 U.S. at 588 (quoting 42 U.S.C. § 1988). The *Robertson* court specifically addressed the application of state survivorship law and noted that the "mere fact" that a forum state's law causes "abatement of a particular lawsuit is not sufficient ground to declare state law inconsistent with federal law." *Id.* at 594-95. Instead, a court should evaluate whether the state's law is generally hospitable to the survival of § 1983 actions and has "no independent adverse effect" on the § 1983 policies of 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 590-91.

The *Robertson* court specifically stated that it was not addressing "whether abatement [of survivorship claims] based on state law could be allowed in a situation in which deprivation of federal rights caused death." *Id.* Since *Robertson*, several state and federal courts have considered the proper application of state survivability law when the § 1983 violation complained of is also the alleged cause of death. In *Bell v. City of Milwaukee*, a shooting victim's family brought multiple § 1983 claims against Milwaukee police officers. 746 F.2d 1205 (7th Cir. 1984). In that case, the court borrowed "Wisconsin's wrongful death and survival causes of

action but disregarded, as inconsistent with constitutional and § 1983 policy, the limitations imposed by the state statutes, *i.e.* the wrongful death statute's preclusion of recovery by the victim's estate for loss of life itself, and the statute's $25,000 limit on damages for loss of society and companionship." *Id.* at 1254.

In *Davis* v. *City of Ellensburg,* the family of a prisoner who died shortly after being taken into custody brought § 1983 causes of action in conjunction with Washington state's survivability and wrongful death statutes. 651 F. Supp. 1248 (E.D. Wash. 1987). Similar to the Seventh Circuit in *Bell,* the *Davis* court disregarded a provision of the Washington survivability statute that only allowed parents to recover for the pre-death pain and suffering incurred by an adult child if the parent was dependent upon the decedent adult child. *Id.* at 1256.

While the circuits and other states may provide guidance on the issue of survivability of § 1983 claims when the actions complained of are the alleged cause of death, they are not binding on this court. More importantly, in *Evans* v. *Twin Falls County,* the Idaho Supreme Court has already addressed the issue of Idaho survivorship law in the context of §1983 actions. 118 Idaho 210, 796 P. 2d 87 (1990).

Mrs. Evans brought a § 1983 claim alleging that a Twin Falls sheriff's deputy committed assault and battery against her. Upon her death eleven months after the alleged assault and battery, Mr. Evans maintained Mrs. Evans' § 1983 claims on behalf of her estate, now also alleging wrongful death. While the court did not find that the deputy's actions

resulted in Mrs. Evans' death, the case is still instructive here. The relevant claim in *Evans* involved whether Mrs. Evans' existing § 1983 claim survived her death so that her estate might continue the litigation. First, the court noted that by its terms, § 1983 "grants a cause of action 'to the party injured.' Thus it is a personal action." *Id.* at 217 (quoting 42 U.S.C. § 1983). The *Evans* court reiterated the common law rule that if the victim of a tort died before she recovered a judgment, the victim's right to a cause of action also died. *Id.* at 215. The court then noted that, pursuant to I.C. § 73-116, common law rules are in effect in Idaho unless modified by other legislative enactments. *Id.* Although the Idaho legislature has modified the common law by providing a cause of action for wrongful death in IC. § 5-311, the legislature "has not enacted any statute specifically abrogating the common law rule of non-survival of causes of action *ex delicto* in cases where the victim dies before recovery." *Id.*

The *Evans* court next inquired whether Idaho's law was "inconsistent with the Constitution and laws of the United States." *Robertson*, 436 U.S. at 587 (citing 42 U.S.C. § 1988). Citing *Robertson*, the *Evans* court concluded that:

> [T]he fact that a particular action might abate surely would not adversely affect § 1983's rule in preventing official illegality. . . . Accordingly, we conclude that under the standards set out by the U.S. Supreme Court in *Robertson v. Wegmann*, application of the Idaho common law precluding survivability of a tort claim is not inconsistent with 42 U.S.C. §§ 1983, 1988.

Evans, 118 Idaho at 218.

The *Evans* court did not explicitly state why Idaho survivorship law is not inconsistent with the policy behind § 1983 actions. However, this Court notes that while an individual's tort action abates upon his death in Idaho, his heirs are able to bring claims via Idaho's wrongful death statute. Therefore, while Idaho's survivorship law does not allow compensation of a decedent's estate, the negative connotations associated with wrongful death claims and the potential financial penalties incurred as a result of wrongful death claims serve as deterrents to potential state actor tortfeasors. Such considerations are in keeping with the U.S. Supreme Court's analysis of Louisiana's survivorship law in *Robertson.*

In sum, Idaho law does not allow Munroe's estate to bring a claim. Standing alone, such an outcome might be inconsistent with the policies underlying 42 U.S.C. § 1983. However, because, when viewed through the larger lens of the entirety of Idaho's survivorship law, such an outcome is not inconsistent with the U.S. Supreme Court's holding in *Robertson,* the claim brought on behalf of Munroe's estate and by Ms. Hoagland as an heir to Munroe's estate must be dismissed. Therefore, Defendants' motion to dismiss Count I of plaintiffs' complaint is GRANTED.

B. 42 U.S.C. § 1983: WRONGFUL DEATH CLAIMS

While the U.S. Supreme Court specifically addressed survivorship law in a § 1983 context in *Robertson v. Wegmann*, that court has not specifically addressed the proper analysis of wrongful death law in a § 1983 context. Without U.S. Supreme

Court precedent, the circuits have addressed the § 1983 wrongful death analysis in various manners.

The Fifth Circuit[2] views the absence of a federal § 1983 wrongful death policy as a deficiency in federal law and, similar to the U.S. Supreme Court in *Robertson*, borrows state wrongful death law in accordance with 42 U.S. § 1988. The Tenth Circuit[3] evaluates whether a defendant's conduct, which caused the alleged wrongful death, violated any constitutionally protected rights of a surviving heir. Multiple circuits[4] take the stance that a parent simply does not have the right to bring a § 1983 cause of action for the wrongful death of an adult child, particularly when the state action complained of "was not aimed at specifically interfering" with the parent-adult child relationship.[5] The Ninth Circuit[6] stands alone in finding a constitutionally protected due process interest in the parent-adult child relationship, allowing a surviving parent to bring a wrongful death claim for loss of society and

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[2] *Ryne v. Henderson County*, 973 F.2d 386, 391 (5th Cir. 1992); *Grandstaff v. City of Borger*, 767 F.2d 161, 172 (5th Cir. 1985); *Brazier v. Cherry*, 293 F.2d 401, 404-06 (5th Cir. 1961).

[3] *Trujillo v. Bd. Of County Comm'rs*, 768 F.2d 1186, 1189-90 (10th Cir. 1985).

[4] *Valdivieso v. Burgos,* 807 F.2d 6, 9 (1st Cir. 1986); *McCurdy v. Dodd,* 352 F.3d 820, 830 (3d Cir. 2003); *Shaw v. Stroud,* 13 F.3d 791, 804-05 (4th Cir. 1994); *Claybrook v. Birchwell,* 199 F.3d 350, 357-58 (6th Cir. 2000); *Russ v. Watts,* 414 F.3d 783, 787 (7th Cir. 2005); *Butera v. District of Columbia,* 235 F.3d 637, 656 (D.C. Cir. 2001).

[5] *Russ v. Watts*, 414 F.3d 783, 787 (7th Cir. 2005).

[6] *Standberg v. City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986).

companionship. While all these analyses provide guidance, this Court is not bound by any of them, including the Ninth Circuit, of which Idaho is a member.[7]

This Court now holds that the appropriate analysis of Idaho wrongful death claims in a § 1983 context is that followed by the Fifth Circuit in *Rhyne* v. *Henderson,* which is the analysis most in keeping with the U.S. Supreme Court's analysis in *Robertson.* Both of these cases instruct a court to look to the forum state's survivorship laws and apply them to § 1983 causes of action, as long as the outcome of that application is not inconsistent with the policies underlying § 1983. Therefore, in evaluating whether Ms. Hoagland's wrongful death claims survive this motion to dismiss, whether brought individually or as personal representative of Munroe's estate, the Court looks to Idaho's wrongful death statute and analyzes its consistency with the policies underlying § 1983.

The right to recover for the wrongful death of another is statutory; therefore, in order to have standing to bring a wrongful death claim, the person seeking to recover must qualify under the statute. *Everett* v. *Trunnell,* 105 Idaho 787, 789, 673 P.2d 387, 389 (1983). In Idaho, the statute dictates that a decedent's mother is a proper wrongful death heir. I.C. § 5-31 1(2)(b). Furthermore, in interpreting Idaho's wrongful death statute, the Idaho Supreme Court has held that no right of action is given to the

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[7] In a decision concerning a *habeas corpus* appeal from an Idaho Supreme Court decision, the Ninth Circuit stated: "the state courts of Idaho are (and were) not bound to follow the Ninth Circuit." *Leavitt v. Arave*, 383 F.3d 809, 819 (9th Cir. 2004)

estate of the victim of a tort, but is granted only to his or her heirs. *Hagy v. State,* 137 Idaho 618, 623, 51 P.3d 432, 437 (Ct. App. 2002); *see also Moon v. Bullock,* 65 Idaho 594, 605, 151 P.2d 765, 770 (1944), *overruled on other grounds by Doggett v. Boiler Eng'g & Supply Co., Inc.*, 93 Idaho 888, 477 P.2d 511 (1970). If there are no heirs, no right of action vests in anybody. *Id.*

As her son's heir, Ms. Hoagland has standing to bring a wrongful death claim. *See* I.C. § 5-311 (2)(b). However, because the Idaho Supreme Court held in *Hagy* that "no right of action is given to the estate of a victim of a tort," her attempt to bring a claim on behalf of his estate must be dismissed. The Court finds this outcome to be consistent with the policies underlying 42 U.S.C. § 1983, particularly the policy of deterrence. At this time, the Court is not asked whether Ms. Hoagland's § 1983 wrongful death claim will succeed; rather, the Court is simply determining that she may bring a wrongful death claim.

SUMMARY

The Court is guided by *Robertson* in evaluating both counts of plaintiffs' complaint. Under this analysis, defendants' motion to dismiss Count I of the complaint, which was brought by Ms. Hoagland on behalf of Munroe's estate and herself as an heir to his estate, is GRANTED.

Defendants' motion to dismiss Count II of the complaint, brought by Ms. Hoagland individually and on her own behalf as Munroe's mother and heir, is DENIED.

IT IS SO ORDERED.

Dated this *2nd* day of November, 2010.

/s/ Ronald J. Wilper
Ronald J. Wilper
DISTRICT JUDGE

APPENDIX G

UNITED STATES CODE, TITLE 42 § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX H

UNITED STATES CODE, TITLE 42 § 1988

§ 1988. Proceedings in vindication of civil rights

(a) Applicability of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, 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 or criminal 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, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C.A. § 1681 *et seq.*], the Religious Freedom Restoration Act of 1993 [42 U.S.C.A. § 2000bb *et seq.*], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C.A. § 2000cc, *et seq.*], title VI of the

Civil Rights Act of 1964 [42 U.S.C.A. § 2000d *et seq.*], or section 13981 of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX I

IDAHO CODE § 5-311

§ 5-311. Suit for wrongful death by or against heirs or personal representatives—Damages

(1) When the death of a person is caused by the wrongful act or neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death, or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured. If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, or in case of his or her death, his or her personal representatives. In every action under this section, such damages may be given as under all the circumstances of the case as may be just.

(2) For the purposes of subsection (1) of this section, and subsection (2) of section 5-327, Idaho Code, "heirs" means:

> (a) Those persons who would be entitled to succeed to the property of the decedent according to the provisions of subsection (22) of section 15-1-201, Idaho Code.
>
> (b) Whether or not qualified under subsection (2)(a) of this section, the decedent's spouse, children, stepchildren, parents, and, when partly or wholly dependent on the decedent for support or services, any blood relatives and adoptive brothers and sisters. It includes the illegitimate

child of a mother, but not the illegitimate child of the father unless the father has recognized a responsibility for the child's support.

1. "Support" includes contributions in kind as well as money.

2. "Services" means tasks, usually of a household nature, regularly performed by the decedent that will be a necessary expense to the heirs of the decedent. These services may vary according to the identity of the decedent and heir and shall be determined under the particular facts of each case.

(c) Whether or not qualified under subsection (2)(a) or (2)(b) of this section, the putative spouse of the decedent, if he or she was dependent on the decedent for support or services. As used in this subsection, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(d) Nothing in this section shall be construed to change or modify the definition of "heirs" under any other provision of law.

APPENDIX J

IDAHO CODE § 73-116

§ 73-116. Common law in force

The common law of England, so far as it is not repugnant to, or inconsistent with, the constitution or laws of the United States, in all cases not provided for in these compiled laws, is the rule of decision in all courts of this state.