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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

**Elvira Fernandez, individually and as
Co-Personal Representative of the
Estate of Daniel Frank Rodriguez;
Frank Rodriguez, individually and as
Co-Personal Representative of the
Estate of Daniel Frank Rodriguez,**

Plaintiffs,

vs.

**Sergio Virgillo and Maria Virgillo
husband and wife,**

Defendants.

2:12-cv-02475 JWS

ORDER AND OPINION

[Re: Motion at Docket 33]

I. MOTION PRESENTED

At docket 33, Plaintiffs Elvira Fernandez and Frank Rodriguez, both acting individually and as co-personal representatives of the Estate of Daniel Frank Rodriguez, (“Plaintiffs”) filed a motion for summary judgment on Count 1 of their Amended Complaint. Count One is a § 1983 claim for unlawful entry, which alleges that Defendant Sergio Virgillo, a police officer with the Phoenix Police Department, unlawfully entered the home of their son, Daniel Frank Rodriguez (“Rodriguez”), in violation of his Fourth Amendment privacy rights. They allege that as a result of

1 Virgillo's wrongful conduct, the Estate of Rodriguez has suffered damages.¹ Defendant
2 responds at docket 53. Plaintiffs reply at docket 57. Oral argument was not requested
3 and would not be of assistance to the court.

4 II. BACKGROUND

5 On October 5, 2010, Elvira Fernandez ("Fernandez") called 911 concerning her
6 son, Rodriguez. In the call, Fernandez stated her son was acting violently, throwing
7 things, and hurting her dog. She stated that he was violent and that she was afraid he
8 would hurt her and afraid for her life. She had left her trailer and was at the neighbor's
9 trailer making the call. Virgillo, a Phoenix Police Officer, and Richard Chrisman
10 ("Chrisman"), who was also a Phoenix Police Officer at the time, responded to the call.
11 They first went to the neighbor's home to talk to Fernandez. It is undisputed that at a
12 minimum Fernandez told the officers that Rodriguez was acting violently and threw
13 something at the wall of the trailer. She wanted the officers to get Rodriguez to leave
14 the trailer.

15 The officers went next door and knocked, but Rodriguez did not respond. The
16 officers returned to the neighbor's home to speak to Fernandez. She told the officers
17 that the door to her trailer was unlocked and gave them permission to go inside. The
18 two officers returned to the trailer and knocked again. When no one responded,
19 Chrisman opened the door, announced himself, and asked Rodriguez to step outside to
20 talk.

21 Rodriguez appeared and shouted at the officers, telling them they did not have a
22 right to be in his trailer and to leave. As Rodriguez tried to shut the door, Chrisman
23 stopped him from doing so and a verbal and physical altercation occurred inside the
24 home.² It is undisputed that early in the encounter Chrisman pulled a gun out and at

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26 ¹Doc. 1-1 at pp. 4-5.

27 ²The evidence presented shows that Chrisman and Virgillo have differing recollections
28 as to exactly when they entered the home. Chrisman asserts that he did not actually enter the
home until Rodriguez tried to shut the door. Virgillo asserts that the two officers were inside or

1 least pointed it in the direction of Rodriguez.³ Chrisman then re-holstered his gun and
2 engaged in a physical struggle with Rodriguez. He resisted Chrisman's attempts to
3 restrain him, which led to Chrisman spraying pepper spray at Rodriguez who was not
4 deterred and continued to resist compliance. Chrisman and Virgillo used their tasers
5 against Rodriguez who fell down momentarily.

6 Virgillo then talked to Rodriguez to try and calm the situation, suggesting they
7 step outside or that he give him a ride somewhere. Rodriguez said he wanted to go to
8 his father's house and that he would ride his bike. Rodriguez walked towards his
9 bicycle, which was against the wall of the living room. Virgillo moved back to the
10 threshold of the door so Rodriguez could get his bike to the front door. As Rodriguez
11 wheeled the bike toward the officers, Chrisman grabbed Rodriguez over the bike.
12 Rodriguez's dog began barking, and Chrisman pulled out his gun and shot the dog.
13 Rodriguez became upset, yelling at Chrisman about the dog. About five seconds later,
14 Chrisman aimed his gun at Rodriguez and shot twice, killing Rodriguez.

15 Plaintiffs filed a lawsuit against Chrisman and the City of Phoenix (the "City").
16 The City and Chrisman were represented by separate counsel, and the City denied any
17 legal responsibility for the actions of Chrisman in shooting the unarmed suspect. The
18 court dismissed the claims against the City.

19 On July 26, 2012, after the City's dismissal from the first case, Plaintiffs filed this
20 separate lawsuit against Virgillo in state court, which he removed to federal court on
21 November 16, 2012. The complaint in this case alleges four claims against Virgillo:
22 (1) a § 1983 claim for unlawful entry; (2) a §1983 claim for unreasonable use of force;

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25 just walking into the home as Rodriguez began shouting at them to get out.

26 ³Again, the officers' testimonies are differing as to the first time Chrisman pulled the gun
27 out. Chrisman asserts he pointed the gun at a barking and aggressive-looking dog and told
28 Rodriguez to call the dog off and then waved the gun toward Rodriguez. Virgillo asserts that
Chrisman pointed the gun directly at Rodriguez's head.

1 (3) a § 1983 claim for unreasonable use of force for failure to intervene; and (4) a
2 § 1983 claim for interference with the right to family society and companionship.

3 Plaintiffs' motion for summary judgment at docket 33 asks the court to grant
4 summary judgment in their favor as to Count One. Plaintiffs argue that Rodriguez told
5 the officers they could not enter his home without a warrant, revoking his mother's prior
6 consent to enter, and that there was no exigency that would otherwise provide them
7 with the authority to do so. Defendant argues that this particular § 1983 claim based on
8 unlawful entry under the Fourth Amendment does not survive decedent's death or,
9 alternatively, that his entry was lawful under the Fourth Amendment based on dicta in
10 *Georgia v. Randolph*⁴ or on the exigencies that existed at the time of his entry.
11 Defendant also argues that, at a minimum, he is entitled to qualified immunity on the
12 unlawful entry claim.

13 Defendant recently filed his own motion for summary judgment at docket 63,
14 asking that all counts in the complaint be resolved in his favor. That motion has not yet
15 been fully briefed.

16 **III. STANDARD OF REVIEW**

17 Summary judgment is appropriate where "there is no genuine dispute as to any
18 material fact and the movant is entitled to judgment as a matter of law."⁵ The
19 materiality requirement ensures that "only disputes over facts that might affect the
20 outcome of the suit under the governing law will properly preclude the entry of summary
21 judgment."⁶ Ultimately, "summary judgment will not lie if the . . . evidence is such that a
22 reasonable jury could return a verdict for the nonmoving party."⁷ However, summary
23 judgment is mandated under Rule 56(c) "against a party who fails to make a showing
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25 ⁴547 U.S. 103 (2006).

26 ⁵Fed. R. Civ. P. 56(a).

27 ⁶*Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

28 ⁷*Id.*

1 sufficient to establish the existence of an element essential to that party's case, and on
2 which that party will bear the burden of proof at trial."⁸

3 The moving party has the burden of showing that there is no genuine dispute as
4 to any material fact.⁹ The moving party need not present evidence; it need only point
5 out the lack of any genuine dispute as to material fact.¹⁰ Once the moving party has
6 met this burden, the non-moving party must set forth evidence of specific facts showing
7 the existence of a genuine issue for trial.¹¹ All evidence presented by the non-movant
8 must be believed for purposes of summary judgment, and all justifiable inferences must
9 be drawn in favor of the non-movant.¹² However, the non-moving party may not rest
10 upon mere allegations or denials, but must show that there is sufficient evidence
11 supporting the claimed factual dispute to require a fact-finder to resolve the parties'
12 differing versions of the truth at trial.¹³

13 **IV. DISCUSSION**

14 Defendant argues that the court should deny Plaintiffs' request for summary
15 judgment on Count One, because as a matter of law the § 1983 claim based on
16 unlawful entry does not survive Rodriguez's death under Arizona law. Section 1983 is
17 silent on the issue of survival; therefore, pursuant to 42 U.S.C. § 1988, the court applies
18 the applicable state survivorship statute so long as the application of that law is not
19 inconsistent with the policies of § 1983.¹⁴

21 ⁸*Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

22 ⁹*Id.* at 323.

23 ¹⁰*Id.* at 323-25.

24 ¹¹*Anderson*, 477 U.S. at 248-49.

25 ¹²*Id.* at 255.

26 ¹³*Id.* at 248-49.

27 ¹⁴*Robertson v. Wegmann*, 436 U.S. 584, 588-91 (1978).

1 The court must first categorize Plaintiffs' §1983 claim and identify the most
2 analogous state law claim.¹⁵ Here, Count One alleges unlawful entry in violation of the
3 Fourth Amendment. Plaintiffs assert that Virgillo entered Rodriguez's home without a
4 warrant, proper consent, or exigent circumstances in violation of Rodriguez's Fourth
5 Amendment rights. As thoroughly explained by the Seventh Circuit in *Bentz v. City of*
6 *Kendallville*,¹⁶ the most analogous state claim to a § 1983 claim based on unlawful entry
7 is one for invasion of privacy.¹⁷ "[T]he crux of a Fourth Amendment claim of this nature,
8 whether framed as an unlawful search, an unreasonable entry into the home, or any
9 other similar action, is invasion of privacy."¹⁸ Plaintiffs do not argue otherwise; Count
10 One of their complaint specifically alleges that Defendant invaded Rodriguez's
11 privacy.¹⁹

12 The court must next determine whether an invasion of privacy claim would
13 survive under Arizona law. It would not. Arizona's survival statute, A.R.S. § 14-3110,
14 provides:

15 Every cause of action, **except a cause of action for damages for breach of**
16 **promise to marry, seduction, libel, slander, separate maintenance, alimony,**
17 **loss of consortium or invasion of the right of privacy,** shall survive the
18 death of the person entitled thereto or liable therefor, and may be asserted
by or against the personal representative of such person, provided that upon
the death of the person injured, damages for pain and suffering of such
injured person shall not be allowed.²⁰

20 ¹⁵See *Bentz v. City of Kendallville*, 577 F.3d 776, 779 (7th Cir. 2009) (citing *Bass by*
21 *Lewis v. Wallenstein*, 769 F.2d 1173, 1188 (7th Cir. 1985)).

22 ¹⁶*Bentz*, 577 F.3d at 781-83.

23 ¹⁷A person is liable for invasion of privacy if he or she intentionally intrudes upon the
24 solitude of seclusion of another if that intrusion would be highly offensive to a reasonable
25 person. See *Hart v. Seven Resorts, Inc.*, 947 P.2d 846, 853 (Ariz. Ct. App. 1997) (citing
Restatement (Second) of Torts §652B (1977)).

26 ¹⁸*Bentz*, 577 F.3d at 781.

27 ¹⁹Doc. 1-1 at ¶ 27.

28 ²⁰Ariz. Rev. Stat. § 14-3110 (emphasis added).

1 Thus, while most causes of action survive the death of the victim, a claim for invasion of
2 the right to privacy is one that does not. Again, Plaintiffs do not argue otherwise.

3 Instead, Plaintiffs argue that even if Arizona’s survivorship statute would not
4 allow an analogous invasion of privacy claim under state law to proceed, the court may
5 not apply the statute to their federal § 1983 claim because to do so would be
6 inconsistent with the policies underlying § 1983. “The policies underlying § 1983
7 include compensation of persons injured by deprivation of federal rights and prevention
8 of abuses of power by those acting under color of state law.”²¹ Plaintiffs argue that the
9 application of Arizona’s survivorship statute to bar their § 1983 unlawful entry claim
10 would essentially foreclose any Fourth Amendment claim based on the right to privacy,
11 which would thwart both of the policies underlying § 1983.

12 The parties do not cite, nor can this court find any cases dealing with the
13 compatibility of survivorship laws and § 1983 when the issue is the abatement of a
14 claim based on an invasion of privacy. While the Seventh Circuit in *Bentz* determined
15 that the plaintiff’s §1983 claim for unlawful entry did not survive under Indiana’s
16 survivorship law and thus dismissed the federal action, it did not have the occasion to
17 consider whether the application of that state law was consistent with the purpose
18 behind § 1983 because the plaintiff in that case, unlike here, did not make such an
19 argument. The Supreme Court, however, has provided some guidance on the issue of
20 compatibility that the court must consider.

21 In *Robertson v. Wegmann*, the plaintiff asserted a § 1983 claim for relief in
22 federal district court in Louisiana but died after commencing the action in a manner
23 unrelated to defendant’s alleged constitutional violation. The plaintiff did not have any
24 immediate family, but his personal representative continued the action in his place.
25 Under Louisiana law, the action would be abated because the Louisiana survivorship
26 statute only allows immediate family members to be substituted as plaintiff in cases not

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28 ²¹*Robertson*, 436 U.S. at 590-91.

1 involving property damage. The Court held that Louisiana’s survivorship law was
2 consistent with § 1983 and should apply even though it meant abatement of plaintiff’s
3 cause of action and no compensation for the alleged violation. The Court relied on the
4 fact that most causes of action survived under the law, and thus it was not generally
5 inhospitable to § 1983 claims.²² The court was careful to note, however, that its holding
6 was “limited to situations in which no claim is made that state law generally is
7 inhospitable to survival of § 1983 actions and in which the particular application of state
8 survivorship law, while it may cause abatement of the action, has no independent
9 adverse effect on the policies underlying § 1983,”²³ stressing that its holding did not
10 address “whether abatement based on state law could be allowed in a situation in which
11 deprivation of federal rights caused death.”²⁴

12 Plaintiffs argue that *Robertson* is distinguishable because the state survivorship
13 statute merely placed limitations on who could bring a survival claim, unlike here, where
14 the state statute precludes a whole category of § 1983 claims. The court finds that
15 *Robertson* is nonetheless persuasive authority. *Robertson* set forth what the relevant
16 inquiry is when determining the compatibility of state survivorship law with the policies
17 of § 1983 in situations where the alleged deprivation of federal rights did not cause
18 death. The Court noted that a state survivorship statute might be found to conflict with
19 the policies of § 1983 if it does not provide for the survival of any tort actions or it
20 significantly restricts the types of actions that survive.²⁵ It stressed that simply because
21 the application of a state survivorship law abates a particular plaintiff’s § 1983 claim and
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25 ²²*Robertson*, 436 U.S. at 591.

26 ²³*Id.* at 594.

27 ²⁴*Id.*

28 ²⁵*Id.*

1 prevents compensation does not mean that it is inconsistent with the federal law.²⁶

2 Thus, based on *Robertson*, when determining issues of compatibility, the court looks to
3 whether the state law is *generally* inhospitable to § 1983 claims, not whether a
4 particular § 1983 claim survives or not.

5 Here, the court concludes that A.R.S. § 14-3110, the state’s survivorship statute,
6 is not generally inhospitable to § 1983 actions. Most tort actions survive under the state
7 law. Furthermore, while at the heart of this case is a death that resulted from an officer
8 shooting, the claim at issue in the motion at hand is only Count One, which is distinct
9 from Plaintiffs’ excessive force claim. It is a claim of unlawful entry in violation of
10 Rodriguez’s Fourth Amendment privacy rights, which is not the constitutional violation
11 that caused Rodriguez’s death. Abating *unlawful entry* claims after the victim’s death
12 does not adversely affect the deterrence goals of § 1983. Unlawful entry, unlike
13 excessive force, is not likely to cause death in and of itself, and an officer contemplating
14 an illegal entry will certainly have to be prepared to face the prospect of a § 1983 claim
15 being filed against him by a living victim. Thus, the line of cases concluding that it is
16 inconsistent with § 1983 to apply state survivorship laws that preclude pain and
17 suffering damages from being asserted by survivors or estates upon the death of the
18 victim when the alleged deprivation of rights caused the victim’s death are not
19 relevant.²⁷

21 ²⁶ “A state statute cannot be considered “inconsistent” with federal law merely because
22 the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the
23 only benchmark, there would be no reason at all to look to state law, for the appropriate rule
24 would then always be the one favoring the plaintiff, and its source would be essentially
irrelevant.” *Id.* at 593.

25 ²⁷ See *Gotbaum v. City of Phoenix*, 617 F. Supp. 2d 878 (D. Ariz. 2008) (holding that
26 Arizona’s survival statute’s elimination of pain and suffering damages would not be applied to
27 the § 1983 claim where the alleged constitutional deprivation caused death); *Brillard v.*
28 *Maricopa County*, 232 P.3d 1263, 1277 (Ariz. Ct. App. 2010) (in situations where the alleged
constitutional violation caused death, the overwhelming majority of courts have concluded it
would be inconsistent with the purposes of § 1983 to bar pain and suffering damages under
state survivorship laws).

