

1  
2  
3 **FOR PUBLICATION**

4  
5 **IN THE SUPERIOR COURT**  
6 **OF THE**  
7 **COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

8 Cheryl Indalecio, as Personal Representative  
9 of Christopher Ray Indalecio, deceased,

10 Plaintiff,

11 v.

12 John Yarofalir, Commonwealth of the  
13 Northern Mariana Islands, and the  
14 Department of Public Health and Services,

15 Defendants.

**Civil Action No. 03-0514**

**ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS**

16 **I. INTRODUCTION**

17 **THIS MATTER** came before this Court for hearing on Defendants' Motion to Dismiss, on  
18 January 15, 2004. Michael W. Dotts, Esq., represented the Plaintiff, Cheryl Indalecio, as Personal  
19 Representative of Christopher Ray Indalecio, deceased. Assistant Attorney General, David  
20 Lochabay, represented the Defendants John Yarofalir, Commonwealth of the Northern Mariana  
21 Islands, and the Department of Public Health and Services. The Court, having reviewed the  
22 arguments of counsel, having examined the evidence, having reviewed the complete record, and  
23 being fully informed of the facts and premises of the current action, now renders its decision.

24 **II. FACTS**

25 Christopher Ray Indalecio, the decedent, was admitted to Commonwealth Health Center on  
26 June 24, 2002, for respiratory problems. The decedent also suffered with end-stage muscular  
27 dystrophy. He received a tracheotomy on July 2, 2002, performed as a necessary procedure to assist  
28 his breathing. Indalecio died July 16, 2002. Plaintiff filed their medical malpractice action  
thereafter.

1 **III. DISCUSSION**

2 The central issue relevant to the Defendants' *Motion to Dismiss*, is whether both wrongful  
3 death and survival actions in tort extend to the survivors of a person fatally injured. Precisely, the  
4 question is whether the decedent's medical malpractice action can be prosecuted by his survivors.  
5 A wrongful death action grants a cause of action to the decedent's survivors for losses suffered from  
6 the decedent's death. A survival action allows the next of kin to prosecute a tort action itself for  
7 wrongs against the decedent as part of the decedent's estate. The survival action fictitiously allows  
8 the decedent to continue to prosecute his claim for injuries suffered before death.

9 Wrongful death actions have been codified at 7 CMC §§ 2101, *et seq.*, which states:

10 When the death of a person is caused by wrongful act, neglect or default such as  
11 would have entitled the party injured to maintain an action and recover damages in  
12 respect thereof if death had not ensued, the person or corporation which would have  
13 been liable if death had not ensued, or the administrator or executor of the estate of  
14 that person, as the administrator or executor, is liable to an action for damages  
15 notwithstanding the death of the person injured, and although the death was caused  
16 under circumstances which make it in law murder in the first or second degree, or  
17 manslaughter.

18 7 CMC § 2101(a). Wrongful death actions must be brought by the personal representatives of the  
19 deceased. 7 CMC § 2102.

20 Survival of actions in the Commonwealth are codified at 7 CMC § 2601, which states in part:

21 A cause of action based on tort shall not be lost or abated because of the death of the  
22 tortfeasor or other person liable. An action thereon may be brought or continued  
23 against the personal representative of the deceased person, but punitive or exemplary  
24 damages may not be awarded nor penalties adjudged in the action.

25 7 CMC § 2601(a). Section 2601(a) does not provide a basis for survival of an injured decedent's  
26 action, only that of an action against the estate of the one who caused injury. In the Commonwealth,  
27 wrongful death actions benefit the next of kin, and damages which can be recovered are limited to  
28 the pecuniary damages of the next of kin. 7 CMC § 2103. The Commonwealth Supreme Court has  
described our wrongful death statute as:

Our wrongful death statute stems from and is substantially the same as the  
Trust Territory wrongful death statute. *See* 6 TTC §§ 201-203. The Trust Territory  
High Court determined that this statute was fashioned after England's 'Lord  
Campbell's Act,' meaning that 'damages are limited to the pecuniary benefits which  
the beneficiaries might reasonably be expected to have derived from the deceased  
had his life not been terminated.' *Ychitaro v. Lotius*, 3 TTR 3, 17 (Trial Div. 1965);  
*see also Sepeti v. Fitek*, 5 TTR 613, 615 (Trial Div. 1972).

1 *Ito v. Macro Energy, Inc.*, 4 N.M.I. 46, 62 (1993). *Ito* dealt with a plaintiff’s request for loss of  
2 consortium damages, but does not alter the construction of the Commonwealth’s wrongful death  
3 statute as one focused on the pecuniary loss of the next of kin. The Federal District Court of the  
4 Northern Mariana Islands determined that the *Ito* Court has “interpreted the CNMI’s wrongful death  
5 statute as limiting the damages in a wrongful death suit to those damages suffered by the victim’s  
6 dependents or beneficiaries.” *Awitan v. Kan Pacific Saipan, Ltd.*, Civ. No. 00-0028 (D.C. N.M.I.  
7 Dec. 11, 2000) (Order Granting Defendant’s Motion to Strike and to Dismiss).

8 In the absence of local law, the Court is required to use the Restatement in as far as it  
9 constitutes a representation of the common law of the United States. 7 CMC § 3401. Section 925  
10 of the RESTATEMENT (SECOND) OF TORTS, governs wrongful death actions. “Normally, under a  
11 death statute that is not combined with a survival statute, recovery is not permitted for the suffering  
12 of the deceased or for medical and other expenses caused by the injury unless these are borne by the  
13 survivor.” RESTATEMENT (SECOND) OF TORTS § 925 cmt. e (1979). Comment k to Section 925  
14 deals with the development of wrongful death statutes creating an applicability of that action in the  
15 common law. However, Comment k to section 925 does not concern survival actions as they relate  
16 to next of kin maintaining the decedent’s action for pain and suffering, etc. The RESTATEMENT  
17 (SECOND) OF TORTS 926, concerns survival actions and states:

18 Under statutes providing for the survival or revival of tort actions, the damages for  
19 a tort not involving death for which the tortfeasor is responsible are not affected by  
the death of either party before or during trial, except that

20 (a) the death of the injured person limits recovery for damages for loss or  
21 impairment of earning capacity, emotional distress and all other harms, to harms  
suffered before the death, and

22 (b) the death of the tortfeasor terminates liability for punitive damages.

23 Statutes, as stated by the RESTATEMENT (SECOND) OF TORTS, § 926, provide the basis for  
24 maintaining the type of recovery the Plaintiff here seeks. This Court has previously stated that, “the  
25 CNMI wrongful death statute is patterned after [] a wrongful death statute and not a survival statute  
26 because the statute makes no mention of the benefits that the deceased may have been awarded.”  
27 *Flores v. Hazelwood*, Civ. No. 00-0332 (N.M.I. Super. Ct. July 5, 2001) (Order Granting  
28 Defendant’s Motion for Partial Judgment on the Pleadings at 4). A primary basis of the Court’s

1 decision in that case was deference to the Commonwealth Legislature. In *Flores*, despite the  
2 existence of a modern trend to acknowledge the survivability of claims, the Court refused to do so,  
3 as it would assume the role of the Commonwealth Legislature. Arriving at the conclusion that  
4 survival actions are creatures of statute, and that the Commonwealth is without such a creature the  
5 Court followed the line of reasoning in two previous Superior Court cases. *Flowers v. Hyatt*  
6 *Regency Hotel*, 1 CR 692, 696 (“There is clearly no survival of a cause of action for the  
7 deceased..”); *Evangelista v. Mobil Oil Mariana Islands, Inc.*, Civ. No. 97-0652 (N.M.I. Super.Ct.  
8 May 19, 1999) (Order at 5) (“the [CNMI] legislature did not provide for a claim of pain and  
9 suffering to survive after the victim was dead.”). In keeping with the notion that the Commonwealth  
10 does not currently have a survival statute and that to provide one would require judicial legislation,  
11 the Court will continue to deny assumption of the legislative role here.

12 One Commonwealth case has held that a tort action survives the death of the injured party.  
13 *Whitlatch v. CNMI*, Civ. No. 90-0926 (N.M.I. Super. Ct. Aug. 27, 1992) ([Unpublished] Order).  
14 The Court is not bound by the order issued in *Whitlatch*, and finds the decision contrary to  
15 overwhelming Commonwealth precedent holding no right of survival action exists.

16 Both of Plaintiff’s causes of action are based on negligence theories as they relate  
17 specifically to injuries suffered by the decedent. As stated above, survival actions are not at present  
18 available in the Commonwealth, and cannot be maintained. Plaintiff’s action is hereby dismissed  
19 without prejudice.

#### 20 IV. ORDER

21 The Defendant’s Motion to Dismiss is hereby **GRANTED**. Plaintiff’s action is dismissed  
22 without prejudice.

23 **SO ORDERED** this 6th day of May 2004.

24  
25 /s/  
David A. Wiseman  
Associate Judge  
26  
27  
28