

No. S053930

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, SHERMAN BLOCK,
and RON BOUDREAUX,

Petitioners,

v.

LOS ANGELES COUNTY SUPERIOR COURT,

Respondent.

KIM A. SCHONERT,

Real Party in Interest.

PETITIONERS' ANSWER TO AMICUS BRIEF OF
PROTECTION AND ADVOCACY, INC.

Re: Decision of the Court of Appeal, Second Appellate District,
Division One, filed November 20, 1996
Court of Appeal No. B099753, Los Angeles County No. BC090848

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TABLE OF CONTENTS

I. PRELIMINARY STATEMENT	1
II. ARGUMENT.....	3
A. Section 377.34 does not interfere with section 1983's compensation goal	3
B. Section 377.34 does not interfere with section 1983's deterrence goal.....	4
C. There is no federal law of damages that requires California courts to award a decedent's emotional distress damages to her estate.....	8
III. CONCLUSION	13

TABLE OF AUTHORITIES

Cases

<i>Carey v. Phipus</i> (1978) 435 U.S. 247	3, 6, 9
<i>Carlson v. Green</i> (1980) 446 U.S. 14	6
<i>City of Newport v. Fact Concerts, Inc.</i> (1981) 453 U.S. 247	6, 9
<i>City of Riverside v. Rivera</i> (1986) 477 U.S. 561	7
<i>Edelman v. California</i> (1953) 344 U.S. 357.....	9
<i>Espinoza v. O’Dell</i> (Colo. 1981) 633 P.2d 455.....	8
<i>Evans v. Twin Falls County</i> (Idaho 1990) 796 P.2d 87	8
<i>Felder v. Casey</i> (1988) 487 U.S. 131.....	1
<i>Garcia v. Superior Court</i> (1996) 42 Cal.App.4th 177	6, 7
<i>Harrington v. Flanders</i> (Ariz.Ct.App. 1965) 407 P.2d 946	7
<i>Howlett v. Rose</i> (1990) 496 U.S. 356.....	9
<i>Hoyt v. United States</i> (5th Cir. 1961) 286 F.2d 356	11
<i>Lauderdale v. United States</i> (M.D.Ala. 1987) 666 F.Supp. 1511	11
<i>Martin v. United Sec. Services, Inc.</i> (Fla. 1975) 314 So.2d 765	8
<i>Massachusetts Bonding & Ins. Co. v. United States</i> (1956) 352 U.S. 128 (1956).....	11
<i>Memphis Community Sch. Dist. v. Stachura</i> (1986) 477 U.S. 299	9

<i>Monell v. Department of Soc. Services</i> , (1978) 436 U.S. 658	6
<i>Moor v. County of Alameda</i> (1973) 411 U.S. 693	10
<i>Robertson v. Wegmann</i> (1978) 436 U.S. 584	1, 3, 8, 10
<i>Smith v. City of Fontana</i> (9th Cir. 1987) 818 F.2d 1411, cert. den. (1987) 484 U.S. 935.....	3, 9
<i>Sullivan v. Little Hunting Park, Inc.</i> (1969) 396 U.S. 229.....	1
<i>Utley v. City of St. Petersburg</i> (1934) 292 U.S. 106.....	9
<i>Ward v. City of San Jose</i> (9th Cir. 1991) 967 F.2d 280.....	3

Statutes

28 U.S.C. § 2674	11
33 U.S.C. § 908	10
38 U.S.C. § 5112	11
38 U.S.C. § 5121	11
42 U.S.C. § 1983	passim
42 U.S.C. § 1985	11
42 U.S.C. § 1986	11
42 U.S.C. § 1988	6
45 U.S.C. § 59	10
Code Civ. Proc., § 36.....	5
Code Civ. Proc., § 377.34.....	passim
Gov. Code, § 818.....	10
Gov. Code, § 915.2.....	9
Gov. Code, §§68600 et seq.....	5

Court Rules

California Judicial Council, Standards of Judicial
Administration, § 2.1 5

I. PRELIMINARY STATEMENT

Amicus Curiae Protection and Advocacy, Inc. acknowledges that the principles set forth in *Robertson v. Wegmann* (1978) 436 U.S. 584 control the result in this case. (Amicus Brief, pp. 4-5.)¹ However, its analysis ignores those principles:

1. *Robertson v. Wegmann* held that “[t]he goal of compensating those injured by a deprivation of rights provides no basis for requiring compensation of one who is merely suing as the executor of the deceased’s estate.” (436 U.S. at p. 592.) Real party in interest Kim Schonert is pursuing this lawsuit solely as a representative of his deceased’s estate. Nonetheless, Protection and Advocacy argues that limits on the damages that Schonert may recover interfere with section 1983’s compensation goal. We explain in Section II.A below (at p. 3) why that argument lacks merit.

2. *Robertson v. Wegmann* also explained that

the fact that a particular action might abate surely would not adversely affect § 1983’s role in preventing official illegality,

¹ *Robertson v. Wegmann* interpreted 42 U.S.C. section 1988, which, by its terms, only applies to federal district courts. Therefore, it is possible that state courts have more leeway to apply state law than what the United States Supreme Court allowed the federal courts in *Robertson v. Wegmann*. (*Sullivan v. Little Hunting Park, Inc.* (1969) 396 U.S. 229, 256-257 (Harlan, J., dissenting) (pointing out that section 1988 “is concerned with the remedial powers of federal district courts”).) However, the Supreme Court has also held that section 1983 preempts state rules that are inconsistent with the goals of the federal civil rights laws. (*Felder v. Casey* (1988) 487 U.S. 131, 138.) That suggests that *Robertson v. Wegmann*’s principles probably apply to cases brought in state court.

at least in situations in which there is no claim that the illegality caused the plaintiff's death. A state official contemplating illegal activity must always be prepared to face the prospect of a § 1983 action being filed against him. In light of this prospect, even an official aware of the intricacies of [state] survivorship law would hardly be influenced in his behavior by its provisions.

(436 U.S. at p. 592.) In this case, Petitioners did not cause the death of Schonert's decedent. Nonetheless, Protection and Advocacy argues that barring recovery of the decedent's emotional distress damages in this particular case would encourage unlawful conduct. We explain in Section II.B below (at p. 4) why that argument lacks merit.

Protection and Advocacy also seems to argue that California law should only determine whether the substantive claim survives. Apparently, the courts would then have to apply a federal rule as to what damages survive, although no such rule currently exists. We explain in Section II.C below (at p. 8) why that argument lacks merit.

II. ARGUMENT

A. Section 377.34 does not interfere with section 1983's compensation goal

Protection and Advocacy contends that section 377.34 defeats section 1983's compensation goal because it denies recovery of a decedent's emotional distress damages to her survivors. As part of that argument, the amicus brief spends several pages establishing a point that is not disputed — a section 1983 plaintiff may recover non-economic damages to fulfill the statute's goal of “compensat[ing] persons for injuries caused by the deprivation of constitutional rights.” (*Carey v. Phipps* (1978) 435 U.S. 247, 254.) However, that does *not* mean that survivors are entitled to recover all the decedent's compensatory damages. *Robertson v. Wegmann* held that section 1983 only requires compensation for the person who actually suffered the injury. (436 U.S. at p. 592.)

The amicus brief confuses two very different interests that a survivor of the direct victim of a civil rights violation may have. The survivor may have an interest in collecting damages for injuries suffered by the decedent. According to *Robertson v. Wegmann*, section 1983 does not protect that interest. The survivor may also have a separate interest in recovering for any injuries that he or she suffered as a result of the civil rights violation.²

² See, e.g., *Ward v. City of San Jose* (9th Cir. 1991) 967 F.2d 280; *Smith v. City of Fontana* (9th Cir. 1987) 818 F.2d 1411, cert. den. (1987) 484 U.S. 935. See also *Robertson v. Wegmann*, *supra*, 436 U.S. at p. 592,

The amicus brief is discussing that interest when it says (at p. 17) that “the family cannot be made whole without compensation for their emotional pain and suffering.” Section 377.34 does not bar recovery for the survivor’s own emotional pain and suffering. It only affects recovery on claims that belonged to the decedent.

The complaint in this action only sought recovery for injuries that Patricia Cordova suffered. (Ex. 1, pp. 2:1-13, 33-34.) Kim Schonert appeared in this case solely as a representative of his wife’s estate to recover on her causes of action. Neither he nor Cordova’s children have asserted a claim for any injuries that they may have suffered personally. Further, nothing in this case prevents them from pursuing a wrongful death claim against whoever caused the car accident that killed Cordova. Therefore, any compensation interest that Cordova’s family may have is not an issue here.

B. Section 377.34 does not interfere with section 1983’s deterrence goal

The amicus brief asserts that application of section 377.34 to federal civil rights claims will put the elderly and infirm in danger. Government officials will not hesitate to trample on such plaintiffs’ rights, so the argument goes, because there is a good chance that they may die before judgment. The argument lacks merit, for the following reasons:

fn. 9 (explaining that the decision did not “preclude recovery by survivors who are suing under § 1983 for injury to their own interests”).

1. The premise is incorrect. Unless the officials secure a medical opinion before they act, they cannot be certain that they will avoid liability to such plaintiffs for emotional distress damages. A person who appears infirm may live for a long time. Moreover, California's commitment to reducing trial court delays substantially restricts a defendant's ability to delay the prosecution of a claim.³ Counsel for elderly or infirm plaintiffs may ensure an early trial date by insisting on their right to a trial preference.⁴

2. An individual official contemplating unlawful conduct faces liability for punitive damages. The United States Supreme Court has explained that the prospect of punitive damages against individual officials is an effective way to serve section 1983's deterrence goal:

By allowing juries and courts to assess punitive damages in appropriate circumstances against the offending official, based on his personal financial resources, the statute directly advances the public's interest in preventing repeated constitutional deprivations. [Footnote omitted] In our view, this provides sufficient protection against the prospect that a public official may commit recurrent constitutional violations by reason of his office. The Court has previously found, with respect to such violations, that a damages remedy recoverable

³ See Trial Court Delay Reduction Act, Gov. Code, §§68600 et seq.; California Judicial Council, Standards of Judicial Administration, § 2.1(h) (the goal of each superior court should be to dispose of 90 percent of its cases within 12 months from filing).

⁴ See Code Civ. Proc., § 36, subds. (a), (d) (establishing trial preferences for persons over the age of 70 whose health makes a preference necessary, and for persons with medical documentation "raising substantial medical doubt of survival of that party beyond six months").

against individuals is more effective as a deterrent than the threat of damages against a government employer.

(*City of Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247, 269-270; see also *Carlson v. Green* (1980) 446 U.S. 14, 21.) Protection and Advocacy does not explain why the prospect of punitive damages will fail to deter individual unlawful conduct.

3. To the extent that section 1983 is intended to deter official misconduct at the policy-making level as explained in *Monell v. Department of Soc. Services*, (1978) 436 U.S. 658, the amount that one plaintiff may collect in a particular case does not matter. Government officials must take account of *prospective* liability in developing policy. They cannot adopt a policy in the hope that some future victims may not live to judgment.

4. The amicus brief argues that, if section 377.34 applies, “a defendant might reduce his exposure by aggravating the injury.” (Amicus Brief, p. 9.) Only the potential plaintiff’s death could reduce the defendant’s exposure by operation of section 377.34. However, an official who contributes to a potential plaintiff’s death does not *reduce* his overall exposure. He *increases* it, by making a wrongful death law suit possible, as explained in *Garcia v. Superior Court* (1996) 42 Cal.App.4th 177.

5. Protection and Advocacy does not discuss the deterrent effect of attorneys’ fee awards under 42 U.S.C. section 1988. The United States Supreme Court has explained that potential liability for attorneys’ fees “provides additional — and by no means inconsequential — assurance that agents of the State will not deliberately ignore due process rights.” (*Carey*,

supra, 435 U.S. at p. 257, fn. 11.) Even a small monetary award allows a prevailing plaintiff to recover substantial attorneys’ fees. (See, e.g., *City of Riverside v. Rivera* (1986) 477 U.S. 561 (upholding a \$245,000 fee award for recovering \$33,350 in total damages, of which only \$13,300 was for federal claims).)

6. The amicus brief attempts to support its argument with an analysis of section 377.34’s legislative history. Based on that history, Protection and Advocacy asserts that the statute serves no valid state purpose. The materials cited belie the claim. The Law Revision Commission’s consultant thought that claims for pain and suffering damages should not survive the decedent’s death, because they would constitute “a penalty upon the wrongdoer for his tortious conduct.” (Amicus Brief, p. 21.) The Law Revision Commission disagreed. However, the Legislature overruled the Commission, and adopted the limitation. That does not establish lack of a valid purpose. It shows a difference of opinion, with the concern about an unfair penalty ultimately prevailing.

As the Court of Appeal explained in *Garcia*, section 377.34 “represents the Legislature’s reasonable judgment that, once deceased, the decedent cannot in any practical way be compensated for his injuries, pain and suffering, or be made whole.” (42 Cal.App.4th at p. 186)⁵ The same rea-

⁵ Other states that limit what damages survive the decedent’s death had similar goals in mind. (*Harrington v. Flanders* (Ariz.Ct.App. 1965) 407 P.2d 946, 948 (“The Legislature apparently contemplated that once an injured person is dead he cannot benefit from an award for his pain and suf-

soning led the United States Supreme Court to conclude in *Robertson v. Wegmann* that section 1983's compensation goal "provides no basis for requiring compensation of one who is merely suing as the executor of the deceased's estate." (436 U.S. at p. 592.) Therefore, there is no conflict between state policy and federal policy with respect to the application of section 377.34.

C. There is no federal law of damages that requires California courts to award a decedent's emotional distress damages to her estate's representative

Protection and Advocacy suggests that courts should only use state law to determine whether an "action" survives. (Amicus Brief, p. 6.) Apparently, a federal rule would then have to be developed to determine which damages claims survive. There is no legal basis for such a theory with respect to section 1983 claims brought in state court.

fering"); *Espinoza v. O'Dell* (Colo. 1981) 633 P.2d 455, 466 ("The estate, not the deceased himself, is the real beneficiary of the surviving cause of action, which serves to compensate the estate for actual property losses it has incurred"), cert. granted (1981) 454 U.S. 1122, cert. dismissed (1982) 456 U.S. 430; *Martin v. United Sec. Services, Inc.* (Fla. 1975) 314 So.2d 765, 769 (the "clear purpose" of the limitation is "that any recovery should be for the living and not for the dead"); *Evans v. Twin Falls County* (Idaho 1990) 796 P.2d 87, 91 ("The philosophy, simply stated, is that an injured person who is dead cannot benefit from an award for his pain and suffering"), cert. denied (1991) 498 U.S. 1086.) Similar concerns led the United States Congress to restrict Federal Tort Claims Act damages to pecuniary loss in some circumstances. (See below, at p. 11.)

The United States Supreme Court has developed a body of damages law for section 1983 actions brought in *federal* court.⁶ However, it has never ruled that *state* courts entertaining section 1983 actions must follow that body of law. The Supreme Court has recognized that, in a federal system, state courts may apply their own remedial and procedural rules when they enforce federal rights, so long as they do not discriminate against the federal rights or violate federal law.⁷ Plaintiffs who prefer federal remedies and procedures may pursue their federal claims in federal court.

California's damages rules are at least as broad as the United States Supreme Court's rules for section 1983 actions.⁸ They are also rules of gen-

⁶ That body of law allows section 1983 plaintiffs to recover full compensatory damages, economic and non-economic, and punitive damages against individual defendants. (*Carey v. Phipps*, *supra*, 435 U.S. at pp. 254-259; *Smith v. Wade* (1983) 461 U.S. 30.) They may not recover presumed damages for the inherent value of any rights infringed. (*Memphis Community Sch. Dist. v. Stachura* (1986) 477 U.S. 299.) Local government entities are not liable for punitive damages. (*City of Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247.)

⁷ See *Howlett v. Rose* (1990) 496 U.S. 356, 372 ("States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law"); *Edelman v. California* (1953) 344 U.S. 357, 361 (affirming state court conviction without reviewing federal issue, because "[t]he denial of petitioner's motion ... rested on an adequate state ground, his choice of the wrong remedy under local law"); *Utley v. City of St. Petersburg* (1934) 292 U.S. 106, 111 (affirming state court's dismissal of federal claim on the basis of laches and estoppel).

⁸ Under California law, government entities are generally liable for all damages caused by their employees. (Gov. Code, § 915.2.) Punitive

eral application that do not discriminate against federal claims. Therefore, there is no reason why California courts may not apply them to section 1983 actions.

Even if California courts were required to apply general federal damages rules, those rules would not bar application of section 377.34, for two reasons:

1. *Robertson v. Wegmann* held that federal law does not cover “the survival of civil rights actions under § 1983.” (436 U.S. at p. 589; see also *Moor v. County of Alameda* (1973) 411 U.S. 693, 702, fn. 14.) By that ruling, the United States Supreme Court has determined that there is no federal law governing what portions, if any, of a section 1983 action survive the death of the plaintiff. Therefore, there is no federal law on survival of damages in section 1983 actions to be imposed on the California courts. They are free to apply their own rule. As explained in Sections II.A and II.B above, California’s rule does not violate any federal policy.

2. Other federal laws do not establish a uniform rule that survivors must recover all damages that their decedent could have recovered. Some federal laws *do* provide for survival of all decedent’s damages.⁹ However,

damages are available against individual officials, but not against the government. (Gov. Code, § 818.)

⁹ See 33 U.S.C. § 908(d) (Longshoremen’s and Harbor Workers’ Compensation Act) and 45 U.S.C. § 59 (Federal Employers’ Liability Act).

others do *not*.¹⁰ The Federal Tort Claims Act provides an instructive example. That Act generally provides that the United States is liable for tort claims as if it were a private individual acting under the law of the state where the act or omission complained of occurred, but prohibits recovery of punitive damages. (28 U.S.C. § 2674.) However, if state law only allows punitive damages in a “case wherein death was caused,” the Act limits recovery to compensatory damages, “measured by the pecuniary injuries resulting from such death.”¹¹ That is analogous to the rule that section 377.34 establishes.

Where federal law provides for survivability, the rules about what damages survive vary. Therefore, there is no basis on which to construct a uniform federal rule regarding what damages may be recovered in a survival action to enforce federal rights. State courts may apply their own remedial and procedural rules to federal claims, so long as those rules do not

¹⁰ See, e.g., 38 U.S.C. §§ 5112, 5121 (providing only limited survivability for veteran disability compensation benefit claims); 42 U.S.C. § 1986 (restricting a survivor’s claim for conspiracy to violate 42 U.S.C. section 1985 to cases where the wrongful act caused death, and limiting total damages to \$5,000).

¹¹ *Massachusetts Bonding & Ins. Co. v. United States* (1956) 352 U.S. 128 (1956); 28 U.S.C. § 2674. “Pecuniary injuries” means “compensation for the deprivation of the reasonable expectation of pecuniary benefits that would have resulted from the continued life of the deceased.” It does *not* include non-economic damages. (*Hoyt v. United States* (5th Cir. 1961) 286 F.2d 356, 359-360; *Lauderdale v. United States* (M.D.Ala. 1987) 666 F.Supp. 1511, 1517.)

frustrate federal goals. Section 377.34 applies to this case, because it is consistent with section 1983's compensation and deterrence goals.

III. CONCLUSION

For the reasons stated above, this Court should determine that Code of Civil Procedure section 377.34 does not frustrate any federal policy, and order real party's claims for his decedent's emotional distress damages stricken from the operative pleadings.

September __, 1997

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