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' REPLY BRIEF

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

De Witt W. Clinton
LOS ANGELES COUNTY COUNSEL
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012
Telephone: 213/626-7446

Calvin House
(Bar No. 134902)
Nohemi Gutierrez Ferguson
(Bar No. 125293)
Gabrielle Harner Brumbach
(Bar No. 175431)
GUTIERREZ & PRECIADO
200 South Los Robles Avenue, Suite 210
Pasadena, CA 91101
Telephone: 818/449-2300

Attorneys for Petitioners
County of Los Angeles, Sherman Block and Ron Boudreaux

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. PRELIMINARY STATEMENT

Petitioners' Brief on the Merits explained that 42 U.S.C. section 1988 requires courts in California to apply Code of Civil Procedure section 377.34 to claims brought under 42 U.S.C. section 1983. The arguments to the contrary in real party Kim Schonert's Answer Brief are not convincing.

Schonert's principal argument is that denying him his wife's emotional distress damages in this case will somehow encourage the Los Angeles County Sheriff's Department to engage in unlawful conduct. (See Answer Brief, pp. 20-24.) The argument ignores the teachings of *Robertson* v. *Wegmann* (1978) 436 U.S. 584, and defies common sense. As the United States Supreme Court has explained:

> 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.)

II. ARGUMENT

A. Section 1988 *requires* application of state law.

The Answer Brief suggests that a court has some discretion in deciding whether to apply state rules in section 1983 survival actions.[1] There is no discretion. Section 1988 provides that, where federal law is "not adapted to the object" or is "deficient," state law "*shall* be extended to and govern" the litigation of section 1983 claims (emphasis supplied). The United States Supreme Court has stated that section 1988 "quite clearly instructs us to refer to state statutes." (*Robertson* v. *Wegmann*, *supra*, 436 U.S. at p. 593.)

The United States Supreme Court has also made it clear that federal law does *not* provide rules to govern survivorship actions under section 1983. Therefore, "[u]nder § 1988, this state statutory law [governing survival of state actions] provides the principal reference point in determining survival of civil rights actions, subject to the important proviso that state law may not be applied when it is 'inconsistent with the Constitution and laws of the United States.'" (436 U.S. at pp. 589-590.)

Both Schonert and the Court of Appeal have seized on the Supreme Court's statement that its holding in *Robertson* v. *Wegmann* was a "narrow one" (436 U.S. at p. 594) as a license to ignore the principles laid down in

---

[1] Schonert asserts that courts "may consider borrowing" state law in such actions. (Answer Brief, p. 16.)

the decision. In the same paragraph where it used that phrase, the Court explained the factors that confined its holding:

> Our holding today is a narrow one, limited to situations in which no claim is made that state law is inhospitable to survival of § 1983 actions and in which the particular applications of state survivorship law, while it may cause abatement of the action, has no independent adverse effect on the policies underlying § 1983. A different situation might well be presented … if state law "did not provide for survival of any tort actions" [citation omitted], or if it significantly restricted the types of actions that survive. … We intimate no view, moreover, about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death.

(*Ibid.*)

As explained in the Brief on the Merits (see pp. 9-10), there can be no claim here that California law does not provide for survival, or that it restricts the types of actions that survive. This is also not a case in which the deprivation of federal rights caused death. Therefore, the only question is whether application of section 377.34 would have an independent adverse effect on any federal policy. As we now explain, denying emotional distress damages to Schonert is *not* inconsistent with the policies underlying section 1983,[2] or with any other federal policy.

---

[2] The federal policies at stake in section 1983 actions are "compensation of persons injured by deprivation of federal rights and prevention of abuses of power by those acting under color of state law." (436 U.S. at p. 591.)

B. Schonert has not overcome Petitioners' showing that section 377.34 does not interfere with section 1983's compensation policy.

Like the Court of Appeal, Schonert seems to confuse his interest in recovering compensatory damages with the compensation policy discussed in *Robertson* v. *Wegmann*. That decision said that the compensation policy is only concerned with compensation for the *victim*. However, Schonert repeatedly argues that denial of compensation to the *survivors* requires rejection of section 377.34's limits on damages.[3] In light of *Robertson* v. *Wegmann*, the argument is beside the point. As the Court of Appeal explained in *Garcia* v. *Superior Court* (1996) 42 Cal.App.4th 177, 186, "once deceased, the decedent cannot in any practical way be compensated for his injuries, pain and suffering."[4]

---

[3] For example, Schonert asserts that California law "den[ies] close surviving kin the ability to obtain a real measure of compensation." (Answer Brief, p. 20.) Elsewhere, he states that section 377.34 "strips even spouses and dependent children of significant compensatory damages," and that it leaves them "with no meaningful remedy." (*Id.* at p. 24.) He also refers to the "importance" of providing "full compensatory damages" to the decedent's family. (*Id.* at p. 26.)

[4] See also *Carter* v. *City of Birmingham* (Ala. 1983) 444 So.2d 373 (compensation policy not violated by denial of *all* compensatory damages to estate, "because the cruel fact is that [the decedent] is no longer present to benefit from any damages awarded"), cert. denied (1984) 467 U.S. 1211; *Culver-Union Township Ambulance Serv.* v. *Steindler* (Ind.Ct.App. 1993) 611 N.E.2d 698 (holding that compensating heirs and beneficiaries "does not accomplish the same goal" as compensating the direct victim of the violation).

Schonert claims that his case is different because it involves living relatives, instead of non-relatives. (Answer Brief, p. 19.) Indeed, he goes so far as to claim that *Robertson* v. *Wegmann* had "disapproved of survival statutes which denied compensation to blood relatives." (Answer Brief, p. 21.) *Robertson* v. *Wegmann* made no such distinction. What the Supreme Court said was that the "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.) Its ruling rested on the party's capacity, not his or her relationship to the decedent. Schonert is not suing here in any capacity other than as the estate's representative.

The Eighth Circuit Court of Appeals rejected an argument just like Schonert's in *Parkerson* v. *Carrouth* (8th Cir. 1986) 782 F.2d 1449, 1455:

> [Decedent's widow] is not suing for injuries that she derivatively suffered when defendants allegedly violated her husband's civil rights. She is suing merely as executrix of her husband's estate, and thus for this Court to override Arkansas law by mandating the survival of this action would not further the section 1983 goal of compensating those injured by civil rights violations.

Schonert cites no authority for his position.

C. Schonert has not overcome Petitioners' showing that section 377.34 does not interfere with section 1983's deterrence policy.

1. Schonert has not shown that the remedies available under section 377.34 are insufficient to serve the deterrent policy of section 1983.

The Brief on the Merits explained (at pp. 15-19) that the remedies available to survivors are sufficient to fulfill the deterrence policy of section 1983. Those remedies include full economic damages, attorneys' fees, and punitive damages against individual defendants. The Answer Brief focuses on the unavailability of punitive damages against the County, but fails to even discuss why the other items are insufficient.

Indeed, in one portion of his brief, Schonert appears to confirm the deterrent value of the economic damages that he may recover. The Brief on the Merits pointed out that Schonert stands to recover at least $63,000 in compensatory damages if he prevails at trial. Schonert does not refute the point. However, in his discussion of the survivor's remedy available under 42 U.S.C. section 1986, he appears to acknowledge the deterrent effect of such a sum. He points out that the $5,000 available under section 1986 would equate to $65,000 in current dollars, which he concedes is a "significant amount." (Answer Brief, pp. 46-47.)

In discussing punitive damages, Schonert ignores the United States Supreme Court's statement about the utility of punitive damages against individual officers. In *City of Newport* v. *Fact Concerts, Inc.* (1981) 453 U.S. 247, 269, the Court said that "assess[ing] punitive damages in appro-

priate circumstances against the offending official, based on his personal financial resources" is a "more effective means of deterrence" than imposing damages on the local government entity. The contrary position of Schonert and the Court of Appeal is without merit.

2. Schonert has not established that limits on the damages recoverable in this case will encourage civil rights violations.

Schonert contends that denying recovery of Cordova's emotional distress damages will encourage civil rights violations. He emphasizes the fact that his claim "is primarily one against the County of Los Angeles for maintaining over years, through the action and inaction of many rank and file and supervisory officers, a practice or policy of sexually harassing female deputies." (Answer Brief, p. 22.) The scope of recovery in a particular case has the *least* effect in the area of practice and policy.

Public agencies like the Sheriff's Department must take account of *prospective* liability in developing policy. They cannot adopt a policy in the hope that future victims may not live to judgment. Schonert concedes as much elsewhere in his brief when he states that "[i]t is the *specter* of significant emotional distress damages which concerns the Sheriff's Department." (Answer Brief, p. 24 (emphasis supplied).)

Schonert also attempts to draw support from several federal court decisions involving other states' statutory schemes. However, all those cases involved victims who died from the civil rights violation. As Schonert acknowledges (p. 30), such cases are not directly applicable here. *Robert-*

son v. *Wegmann* left open the possibility that different rules might determine "whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." (436 U.S. at p. 594.)

The decisions are not persuasive. Most of them come from a single circuit, the Seventh. Moreover, the rule adopted by the Seventh and Tenth Circuits does not appear to follow *Robertson* v. *Wegmann*. Both circuits rejected state rules providing for survival actions and wrongful death actions, in favor of a federal common law rule allowing an estate to recover for the decedent's loss of life. Neither circuit offered a compelling explanation for why the state remedies were insufficient. Neither circuit pointed to any basis in state tort law or in federal law for the new federal rule.

Schonert also relies on the federal district court's decision in *Williams* v. *City of Oakland* (N.D.Cal. 1996) 915 F.Supp. 1074. That decision is also unpersuasive. Like the Court of Appeal's decision in this case, *Williams* focused on compensation for the survivors, rather than on compensation for the victim, and on deterrence, as *Robertson* v. *Wegmann* requires.[5] *Williams* had no meaningful response to the point that an official contemplating illegal activity cannot know whether his or her victim will die be-

[5] For example, the *Williams* court worried that disallowing emotional distress damages "would leave the deceased plaintiff's survivors with no remedy," and that it "would deprive [the estate's representative] or other survivors of the only element of damages that the deceased might have been able to recover." (915 F.Supp. at p. 1078.)

fore judgment in a later lawsuit. The official always faces the prospect of an award of unlimited compensatory damages.

The Court of Appeal's analysis in *Garcia* v. *Superior Court* (1996) 42 Cal.App.4th 177, 187, 188 is more compelling:

> In conclusion, California law allows the representative of a decedent's estate to sue on decedent's cause of action arising before death and for punitive damages decedent would have been entitled to had he survived; California law also allows a decedent's survivors to sue for wrongful death for their pecuniary losses and their loss of decedent's comfort and society. In our opinion these provisions of state law suffice to fulfill the compensatory and deterrent purposes of the federal Civil Rights Act in a case where the civil rights violation caused the death. Therefore California law is not inconsistent with the law of the United States. We are not compelled by any United States Supreme Court authority to adopt a foreign rule of damages allowing plaintiff to recover for decedent's pain and suffering or for "hedonic" damages, and we are not persuaded by the lower federal court decisions allowing such damages.

In any event, there is no compelling reason for this Court to decide now what rule should apply to civil rights violations that cause death. The United States Supreme Court has granted certiorari in a case involving the application of Alabama law to just such a case. (*City of Tarrant* v. *Jefferson* (Ala. 1996), cert. granted (1997) 117 S.Ct. 1333.)[6] The decision in that case

---

[6] In granting certiorari, the Supreme Court stated the question to be decided as "Whether, when a decedent's death is alleged to have resulted from a deprivation of federal rights occurring in Alabama, the Alabama Wrongful Death Act … governs the recovery by the representative of the

will provide better guidance on what rule to apply in California than the disparate decisions cited by Schonert.

D. There is no other federal policy that mandates awards of emotional distress damages to survivors.

Schonert claims that there is a conflict between state and federal law, and that this Court must accede to the "federal" law enunciated by one of the judges in the Northern District of California. There is no conflict. The United States Supreme Court has made it clear that the "ultimate rule" adopted under section 1988 is a federal one. (436 U.S. at p. 588.) Only that Court may issue opinions on federal law that bind this Court.

In this area, the Supreme Court has ruled that section 1988 "quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby." (436 U.S. at p. 593.) State law may be rejected only if it violates a federal policy. We have already explained that section 377.34 does not interfere with the compensation and deterrence policies of section 1983. While Schonert hints at other policies that compel a ruling in his favor, his arguments are not persuasive.

---

decedent's estate under 42 U.S.C. Section 1983?" (117 S.Ct. 1333.) The Alabama statute in question is much more restrictive than the California provisions relied on by the Court of Appeal in *Garcia* v. *Superior Court*, *supra*. Where the civil rights violation causes death, the Alabama statute only allows the survivors to recover punitive damages. (*City of Tarrant*, *supra*, 682 So.2d at p. 30.)

For example, the Brief on the Merits relied in part on the limited survivor's remedy provided in 42 U.S.C. section 1986 as evidence that there is no federal policy *requiring* substantial emotional distress awards to survivors. Schonert argues that congressional silence on the subject in section 1983 shows intent to make damages available to survivors without limit. The argument flies in the face of *Robertson* v. *Wegmann*, where the Supreme Court ruled that federal law does *not* cover "survival of civil rights actions under § 1983." (436 U.S. at p. 589, quoting *Moor* v. *County of Alameda* (1973) 411 U.S. 693, 702, fn. 14.) Therefore, the Congress that enacted section 1983 did not intend to lay down any rule about what damages survivors may recover.

Further, the prevailing common law rule when the 1871 Civil Rights Act was adopted provided for abatement of *all* decedent's personal claims. (*Robertson* v. *Wegmann*, *supra*, 436 U.S. at p. 589; *Michigan Central R. Co.* v. *Vreeland* (1913) 227 U.S. 59, 67-68; *Sullivan* v. *Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 293-294.) In the absence of an express survival provision like that contained in section 1986, survivors would not have had *any* remedy under section 1983. Therefore, Congress could not have intended to require an award of unlimited compensatory damages.

There is no general federal rule requiring that survivors receive the same amount that their decedents would have, if he or she survived. For example, federal law affords veterans a disability compensation benefit, which terminates upon the veteran's death. (*Landicho* v. *Brown* (1994) 7 Vet.App. 42; 38 U.S.C. § 5112.) The deceased veteran's survivors may

pursue the claim only to the "limited extent" provided in another section of the law. (*Landicho, supra,* 7 Vet.App. at p. 47; 38 U.S.C. § 5121.)

The Answer Brief also speculates that a decision applying section 377.34 to section 1983 actions will encourage forum shopping. However, there is no federal rule that binds all the federal courts in California. The purported "rule" that Schonert relies on only applies to cases filed in the Northern District of California that wind up in the courtroom of Judge Patel, the author of *Williams* v. *City of Oakland* (N.D.Cal. 1996) 915 F.Supp. 1074, and *Guyton* v. *Phillips* (N.D.Cal. 1981) 532 F.Supp. 1154. Federal district court decisions have little precedential value. They are not even binding on other judges in the same district. (*Rohr Aircraft Corp.* v. *County of San Diego* (1959) 51 Cal.2d 759, 764-765, revd. on other grounds 362 U.S. 628.)

In any event, the number of cases in which the survivors would choose the forum is limited. Usually, the victim of the civil rights violation would have filed the action before his or her death. The survivors would be continuing the action in the forum chosen by the decedent.[7]

---

[7] In the following cases involving survivors' claims, the section 1983 action was filed before the decedent's death: *Robertson* v. *Wegmann*, *supra*; *Parkerson* v. *Carrouth*, *supra*; *Williams* v. *City of Oakland*, *supra*; *Rosenblum* v. *Colorado Dept. of Health* (D.Colo. 1994) 878 F.Supp. 1404: *Larson* v. *Wind* (N.D.Ill. 1982) 542 F.Supp. 25; *Evans* v. *Twin Falls County* (1990) 118 Idaho 210 [796 P.2d 87]; cert. denied (1991) 498 U.S. 1086; *Strickland* v. *Deaconess Hospital* (1987) 47 Wash.App. 262 [735 P.2d 74] review den. (1987) 108 Wash.2d 1028.

III. CONCLUSION

For the reasons stated above, and for those stated in the Brief on the Merits, this Court should direct that any claim for Cordova's emotional distress damages be stricken from the operative pleadings in accordance with section 377.34.

July ___, 1997

GUTIERREZ & PRECIADO
Calvin House
Nohemi Gutierrez Ferguson
Gabrielle Harner Brumbach

By_____
Calvin House
Attorneys for Petitioners