

Filed 11/20/96

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

COUNTY OF LOS ANGELES et al.,

Petitioners,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

KIM A. SCHONERT, as Personal
Representative, etc.,

Real Party in Interest.

No. B099753

(Super. Ct. No. BC090848)

ORIGINAL PROCEEDING; petition for a writ of mandate. Joseph R. Kalin, Judge. Writ denied.

Gutierrez & Preciado, Calvin House, Nohemi Gutierrez Ferguson and Gabrielle Harner Brumbach for Petitioners.

Hadsell & Stormer, Barbara Enloe Hadsell, Virginia Keeny and Lise Anderson for Real Party in Interest.

No appearance for Respondent.

In *Garcia v. Superior Court* (1996) 42 Cal.App.4th 177, a survival action brought under the federal Civil Rights Act (42 U.S.C. § 1983)¹ to recover damages for a death allegedly caused by a police officer's use of excessive force, the excessive force was both the cause of death and the violation of the decedent's civil rights. On those facts, Division Four of our court held that, under Code of Civil Procedure section 377.34,² the damages recoverable by the survivors were those sustained by the decedent before his death, plus punitive damages the decedent would have been entitled to recover, but not the emotional distress damages the decedent could have recovered had he survived. (*Garcia v. Superior Court, supra*, 42 Cal.App.4th at p. 180.)

In the case now before us, Patricia Cordova sued the County of Los Angeles and others, alleging she had been constructively terminated from her employment as a deputy sheriff by reason of on-the-job sexual discrimination and harassment, and claiming damages on a variety of theories, including violations of the federal Civil Rights Act. After the County answered, Cordova was killed in an automobile accident wholly unrelated to her lawsuit, and her personal representative thereafter prosecuted this action under section 377.34. About two weeks before

¹ All references to section 1983 are to 42 U.S.C. section 1983.

² All references to section 377.34 are to that section of the Code of Civil Procedure.

Garcia was decided, the trial court held (over the County's objection) that Cordova's claims for emotional distress damages survived her death.

After *Garcia* was decided, the County filed a writ petition asking us to direct the trial court to vacate its order. At first glance, it appeared to us that *Garcia* supported the County's view, and we issued an alternative writ. On closer examination, it became apparent that *Garcia* was based on entirely different facts and thus not dispositive, and we discharged the writ as improvidently granted and denied the County's petition. The County then filed a petition with the Supreme Court, which granted review and, citing *Garcia*, transferred the cause back to us with directions to vacate our order denying the County's petition, issue an alternative writ and hold oral argument.³ We complied, and we now hold that where, as here, the decedent's death is unrelated to the civil rights violation, section 377.34 is inhospitable to the survival of section 1983 claims and plainly inconsistent with the laws of the United States and the policies expressed in those laws, that *Garcia* does not apply to our facts, and that Cordova's survivors are therefore entitled to pursue their claim for the emotional distress damages Cordova would have

³ In its petition for review by the Supreme Court, the County raised only one issue -- "[w]hether . . . section 377.34's restriction on recovery for a decedent's pain, suffering, or disfigurement applies to claims brought by the decedent's representative under . . . section 1983" -- and that is the only issue we address in this opinion, notwithstanding that the County's original petition raised an additional issue concerning an unrelated order affecting an individually named defendant.

been able to recover had she survived. Once again, we deny the County's petition.

DISCUSSION

The federal Civil Rights Act does not specify the damages recoverable for its violation, nor does it address the survival of claims and remedies upon the death of the victim.⁴ Accordingly, we look to our state's common law, as modified by the California Constitution and our statutes, and apply that law unless it is inconsistent with the laws of the United States and the policies expressed in those laws. (*Garcia v. Superior Court, supra*, 42 Cal.App.4th at pp. 181-182.) In *Garcia*, the court looked to section 377.34, California's survival statute, and concluded that, when considered with California's wrongful death remedies (Code Civ. Proc., §§ 377.60, 377.61), the statutory scheme "taken as a whole" was consistent with the laws and expressed policies of the United States because it "promote[d] the purposes of the federal Civil Rights Act." (*Garcia v. Superior Court, supra*, 42 Cal.App.4th at pp.

⁴ The essence of section 1983 is that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , 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."

182, 186-187.)⁵ As we will explain, the consistency present in *Garcia* is absent in our case.

Section 377.34 provides that, “[i]n an action or proceeding by a decedent’s personal representative or successor in interest on the decedent’s cause of action, *the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.*” (Italics added.) As applied to the facts before the court in *Garcia* -- where the civil rights violation was the cause of the decedent’s death -- section 377.34 “represents the Legislature’s reasonable judgment that, once deceased, the decedent cannot in any practical way be compensated for his injuries or pain and suffering, or be made whole. [Citation.] This does not mean, however, that the statutory scheme for survivors, taken as a whole, provides no compensatory damages. California law provides, in addition to recovery by the representative of the estate on the decedent’s cause of action, a wrongful death action by decedent’s heirs. (Code Civ. Proc., §§ 377.60, 377.61.) Under these provisions, designated surviving relatives or the decedent’s heirs at law can recover pecuniary losses caused by the death, including pecuniary support the decedent would have provided them, and noneconomic

⁵ The purposes of the federal Civil Rights Act are “compensation of persons injured by deprivation of federal rights and prevention of abuse of power by those acting under color of state law.” (*Robertson v. Wegmann* (1978) 436 U.S. 584, 591.)

damages for being deprived of the decedent's society and comfort. [Citation.] These are significant compensatory damages flowing from the actor's killing of the victim, and which the actor must take into account; this provides both compensation and deterrence. In determining whether California law is consistent with the federal Civil Rights Act, it is appropriate to consider the state provisions not only for survival of decedent's action but also for the survivors' wrongful death action. . . . California law provides for significant compensatory damages by way of a wrongful death action." (*Garcia v. Superior Court, supra*, 42 Cal.App.4th at pp. 186-187, fn. omitted, emphasis added.)

Quite obviously, Cordova's survivors cannot sue the County for her wrongful death, since the County's alleged discriminatory conduct had absolutely nothing to do with Cordova's subsequent accidental death. We believe it is equally obvious that *Garcia's* rule, which makes perfect sense on the facts of that case, cannot be applied to the facts of our case -- because the application of section 377.34 would result in a lawsuit without any meaningful remedy,⁶ and would thus be inconsistent

⁶ Cordova went to work for the County in 1985. She went on disability leave in July 1991, and "retired" at half pay effective October 1992. She died in 1995. Insofar as we can tell from the limited record now before us, her economic damages (lost wages) appear to be minimal and her major claim, had she survived, would have been for emotional distress damages, which are not recoverable under section 377.34. Assuming the facts support a claim for punitive damages, such damages could not be recovered at all from the County (*Newport v. Fact Concerts, Inc.* (1981) 453 U.S. 247 [punitive damages are not available against a municipality in a § 1983 action]) and they may be limited as against any individual defendants by Cordova's actual damages and the personal wealth of the individuals. (2 Steinglass, Section 1983 Litigation in State Courts (1996) § 16.3(c), pp. 16-12-16.22.4.)

with the laws and expressed policies of the United States because it would not promote the purposes of the federal Civil Rights Act. (*Garcia v. Superior Court*, *supra*, 42 Cal.App.4th at pp. 182, 186-187; *Williams v. City of Oakland* (N.D.Cal. 1996) 915 F.Supp. 1074, 1078-1079 [when the victim's death is unrelated to his civil rights claim, section 377.34 is "inimical to, and therefore inconsistent with, the purposes of section 1983"]; but see *Rosenblum v. Colorado Dept. of Health* (D.Colo. 1994) 878 F.Supp. 1404, 1409; *Strickland v. Deaconess Hosp.* (1987) 47 Wash.App. 272 [735 P.2d 74, 76-77].)

We reject the County's assertion that a different result is compelled by *Robertson v. Wegmann*, *supra*, 436 U.S. 584, where the Supreme Court held (in an action where the death was unrelated to the civil rights violation) that the policies of the federal Civil Rights Act would not be undermined if Louisiana law (which authorized only certain close relatives to maintain a decedent's action) caused the decedent's action to abate. (*Id.* at p. 592.) As the Supreme Court put it, the fact that the decedent "was not survived by one of several close relatives should not itself be sufficient to cause the Louisiana survivorship provisions to be deemed 'inconsistent with the Constitution and laws of the United States.'" (*Id.* at p. 593, emphasis added.) As the Supreme Court also explained, however, its holding was "a narrow one, *limited to situations in which no claim is made that state law generally is inhospitable to survival of § 1983 actions* and in which the particular application 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 . . . significantly restricted the types of actions that survive.” (*Robertson v. Wegmann*, *supra*, 436 U.S. at p. 594, emphasis added.)

In our view, *Robertson v. Wegmann* supports rather than defeats the conclusion we reach in this case. Here, as a practical matter, application of section 377.34 to cases where the decedent’s death was not caused by the civil rights violation would be generally inhospitable to the survival of section 1983 actions and would have an independent adverse effect on the policies underlying section 1983 -- because the primary component of damages in such actions is recovery for emotional distress, and because the availability of punitive damages under section 377.34 is largely irrelevant when the target defendant is a municipality and the individual defendants are public employees. (See *Smith v. Wade* (1983) 461 U.S. 30, 56 [punitive damages are recoverable in a section 1983 action only when the defendant’s conduct “is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others”].) ⁷

⁷ We agree with Division Four that where the civil rights violation is the cause of the decedent’s death, the combination of section 377.34 and a wrongful death action satisfies the policies underlying section 1983 insofar as compensation to the victim is concerned. (*Garcia v. Superior Court*, *supra*, 42 Cal.App.4th at pp. 186-187.) For the reasons stated in the text, however, we do not agree that the potential for “huge exemplary damages” (*id.* at p. 186) provides a meaningful deterrent in a section 1983 action. In our view, that potential is more imagined than real where punitive damages cannot be recovered at all from the agency and can be recovered in only modest amounts from the typical civil servant.

For all of these reasons, we hold that where, as here, the decedent's death is unrelated to the civil rights violation, section 377.34 is inhospitable to the survival of section 1983 claims and plainly inconsistent with the laws of the United States and the policies expressed in those laws. It follows that Cordova's survivors are entitled to pursue their claim for the emotional distress damages Cordova would have been able to recover had she survived, and that the trial court's ruling was correct.

DISPOSITION

The alternative writ is discharged and the petition is denied. The parties are to pay their own costs of these writ proceedings.

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VOGEL (Miriam A.), J.

We concur:

SPENCER, P.J.

MASTERTON, J.