

No. _____

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION _____

COUNTY OF LOS ANGELES, SHERMAN BLOCK and RON BOU-
DREAUX,

Petitioners,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF LOS ANGELES,

Respondent.

PATRICIA CORDOVA,

Real Party in Interest.

Petition for Writ of Mandamus; Memorandum of Points
and Authorities in Support Thereof
[EXHIBITS SUBMITTED UNDER SEPARATE COVER]
Re: Order of the Los Angeles County Superior Court,
entered January 11, 1996 (Los Angeles Co. No. BC090848)
Honorable Joseph R. Kalin, Judge

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I. INTRODUCTION

A. Nature of the Proceeding

Patricia Cordova, the original plaintiff in this sexual harassment lawsuit, alleged federal and state causes of action based on supposed mistreatment during her employment as a Los Angeles County Deputy Sheriff. Her complaint included a claim for emotional distress damages. Plaintiff died in a car accident while defendants' summary judgment motion was pending. The Superior Court asked the parties to brief the issue of what claims for damages survived plaintiff's death. It then denied summary judgment, granted summary adjudication with respect to some issues,¹ and ruled that plaintiff's representative could pursue the claim for emotional distress damages at trial.

The Superior Court's ruling flies in the face of Code of Civil Procedure section 377.34, which provides that the damages available in a survival action "do *not* include damages for pain, suffering, or disfigurement." The Superior Court may have intended to limit its ruling to the federal cause of action under 42 U.S.C. section 1983. However, a very recent decision from the Court of Appeal has made clear that section 377.24's limitation *does* apply to claims for damages under section 1983. (*Garcia v. Superior Court* (Jan. 31, 1996) 1996 Cal.App.LEXIS 77.)

The Superior Court also erred in refusing to grant summary judgment to Sheriff Sherman Block. The undisputed material facts established

¹ The Superior Court dismissed individual defendants Jeff Springs, Harvey Cantor and Mark Slater from the action, on statute of limitations grounds. The remaining defendants are the petitioners in this proceeding—the County of Los Angeles, Sheriff Block and Ron Boudreaux.

that Sheriff Block had no personal involvement in the alleged conduct. Therefore, he cannot be the subject of a section 1983 claim—the only claim asserted against him.

Petitioners County of Los Angeles, Sheriff Block, and Deputy Ron Boudreaux seek a writ directing the Superior Court to vacate its order, and enter a new order (1) precluding plaintiff's representative from pursuing any claim for emotional distress damages, and (2) awarding summary judgment to Sheriff Block.

B. Why Relief By Writ Is Warranted

The Court should grant this Petition in order to effectuate the purpose behind the summary judgment procedure of providing a speedy legal resolution where the material facts are uncontested. The Code of Civil Procedure specifically authorizes a writ petition in circumstances like this. (Code Civ. Proc., § 437c, subd. (1).) Unless this Court grants their petition, petitioners will be denied the benefits of the summary judgment procedure. They will be forced to incur the costs of a full trial on the merits even though there is no triable issue as to any material fact with respect to the availability of emotional distress damages and the liability of Sheriff Block. Petitioners have no adequate remedy other than a writ.

Because of the policy behind the summary judgment procedure, the reviewing court should ordinarily consider the substantive merits of the motion when a writ petition seeks review of the denial of summary judgment:

Although the availability of an action at law or in equity normally precludes resort to the writ of mandate [citations omitted], courts generally consider the merits or a writ based upon a denial of summary judgment [citations omitted]. One

purpose of summary judgment is to provide a speedy legal resolution of uncontested facts; “a denial of [summary judgment] when it should as a matter of law have been granted should open the door to an equally speedy review of the matter.” [citation omitted]. Because there is no appeal from a denial of summary judgment [citation omitted], the writ is the only speedy review available.

(*Leyva v. Superior Court* (1985) 164 Cal.App.3d 462, 468 [210 Cal.Rptr. 545], quoting *Bank of America v. Superior Court* (1970) 4 Cal.App.3d 435, 441 [84 Cal.Rptr. 421].)

The issue of emotional distress damages was appropriately determined as part of the summary judgment proceedings. An emotional distress claim is a “claim for damages,” for which section 437c, subdivision (f)(1) authorizes a grant of summary adjudication. Alternatively, the procedure may be characterized as a motion in limine, or a motion to strike under Code of Civil Procedure section 436.² (See *Macy’s California, Inc. v. Superior Court* (1995) 41 Cal.App.4th 744, 746, fn. 2 [48 Cal.Rptr.2d 496].) However one characterizes the procedure, it is appropriate for this Court to review the Superior Court’s decision in this writ proceeding. Unless this Court grants relief, defendants will have to devote substantial time and expense in discovery and trial preparation with respect to the emotional distress claim, even though the claim is without merit.

² Section 436 provides that “[t]he court may, upon a motion made pursuant to Section 435, or at any time in its discretion, and upon terms it deems proper: [¶] (a) strike out any irrelevant, false, or improper matter inserted in any pleading. [¶] (b) Strike out all or any part of any pleading not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court.” A motion to strike is an appropriate procedure for removing an emotional distress claim from a lawsuit. (See *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033 [13 Cal.Rptr.2d 133].)

II. PETITION

By this verified Petition, Petitioners show:

1. Plaintiff Patricia Cordova commenced this action by filing her Complaint for damages on October 12, 1993.

2. On February 8, 1994, the Superior Court sustained defendants' demurrer to the original complaint, and granted plaintiff leave to replead in certain respects.

3. On March 8, 1994, plaintiff filed her "First Amended Complaint for Damages." A true and correct copy of that complaint is included as Exhibit 1 in the separately bound volumes of exhibits that accompany this Petition.

4. On July 18, 1994, defendants filed their "Answer to First Amended Complaint for Damages." A true and correct copy of that answer is included as Exhibit 2 in the separately bound volumes of exhibits that accompany this Petition.

5. On July 6, 1995, defendants filed their motion for summary judgment, or, in the alternative, summary adjudication of issues. True and correct copies of the following papers submitted in support of that motion are included in the separately bound volumes of exhibits that accompany this Petition: (i) "Notice of Motion and Motion for Summary Adjudication of Issues" (Exhibit 3); (ii) "Separate Statement of Undisputed Facts and Supporting Evidence on Motion for Summary Adjudication of Issues" (Exhibit 4); (iii) "Declaration of Nohemi Gutierrez Ferguson in Support of Motion for Summary Adjudication of Issues" (Exhibit 5).

6. On July 13, 1995, defendants filed their “Updated and Amended Separate Statement of Undisputed Facts and Supporting Evidence on Motion for Summary Adjudication of Issues.” A true and correct copy of that statement is included as Exhibit 6 in the separately bound volumes of exhibits that accompany this Petition.

7. On July 18, 1995, plaintiff filed papers in support of a motion to strike defendants’ Updated and Amended Separate Statement. True and correct copies of the following papers submitted in support of that motion are included in the separately bound volumes of exhibits that accompany this Petition: (i) “Notice of Objections and Notice of Motion and Motion to Strike Defendants’ Updated and Amended Separate Statement of Undisputed Facts and Supporting Evidence on Motion for Summary Adjudication of Issues” (Exhibit 7); (ii) “Declaration of Barbara Enloe Hadsell in Support of Plaintiff’s Objection and Motion to Strike Defendants’ Updated and Amended Separate Statement of Undisputed Facts and Supporting Evidence of Motion for Summary Adjudication of Issues” (Exhibit 8).

8. On July 20, 1995, plaintiff filed her papers in opposition to defendants’ motion. True and correct copies of the following opposing papers are included in the separately bound volumes of exhibits that accompany this Petition: (i) “Opposition to Defendants’ Motion for Summary Adjudication of Issues; Declaration of Virginia Keeney in Support Thereof” (Exhibit 9); (ii) “Separate Statement of Disputed Facts in Opposition to Motion for Summary Adjudication of Issues” (Exhibit 10); “Exhibits 1-18 in Support of Plaintiff’s Opposition to Motion for Summary Adjudication of Issues” (Exhibit 11); “Exhibits 19-26 in Support of Plaintiff’s Opposition to Motion for

Summary Adjudication of Issues” (Exhibit 12);“Notice of Lodging Original Certified Copies of Deposition Transcripts in Opposition to Defendants’ Motion for Summary Adjudication” (Exhibit 13).

9. On July 27, 1995, defendants their papers in opposition to plaintiff’s motion to strike. True and correct copies of the following opposing papers are included in the separately bound volumes of exhibits that accompany this Petition: (i) “Opposition to Plaintiff’s Objection and Notice of Motion and Motion to Strike Defendants’ Updated and Amended Separate Statement of Undisputed Facts and Supporting Evidence on Motion for Summary Adjudication of Issues” (Exhibit 14); (ii) “Declaration of Nohemi Gutierrez Ferguson in Support of Defendants’ Opposition to Plaintiff’s Objection and Notice of Motion and Motion to Strike Defendants’ Updated and Amended Separate Statement of Undisputed Facts and Supporting Evidence on Motion for Summary Adjudication of Issues” (Exhibit 15).

10. On July 29, 1995, defendants filed their “Reply to Plaintiff’s Opposition to Motion for Summary Adjudication of Issues.” A true and correct copy of that reply is included as Exhibit 16 in the separately bound volumes of exhibits that accompany this Petition.

11. On August 25, 1995, plaintiff filed additional papers in opposition to defendants’ motion. True and correct copies of the following additional opposing papers are included in the separately bound volumes of exhibits that accompany this Petition: (i) “Updated and Amended Separate Statement of Disputed and Undisputed Facts in Opposition to Motion for Summary Adjudication of Issues and Exhibits 27-29 in Support Thereof”

(Exhibit 17); (ii) “Sur-Reply in Opposition to Defendants’ Motion for Summary Adjudication” (Exhibit 18).

12. On August 29, 1995, defendants filed their “Notice of Lodging of Original Deposition Transcripts in Support of Motion for Summary Adjudication of Issues.” A true and correct copy of that notice is included as Exhibit 19 in the separately bound volumes of exhibits that accompany this Petition.

13. On August 31, 1995, defendants filed their “Objections to Evidence and Separate Statement of Disputed Facts Submitted in Support of Plaintiff’s Opposition and Sur-Reply to the Motion for Summary Adjudication of Issues.” A true and correct copy of those objections is included as Exhibit 20 in the separately bound volumes of exhibits that accompany this Petition.

14. On September 1, 1995, plaintiff filed her “Reply to Defendants’ Objections to Evidence and Separate Statement.” A true and correct copy of those objections is included as Exhibit 21 in the separately bound volumes of exhibits that accompany this Petition.

15. On September 6, 1995, the Superior Court held a hearing on defendants’ motion, and took it under submission. A true and correct copy of the court reporter’s Transcript of Proceedings for that hearing is included as Exhibit 22 in the separately bound volumes of exhibits that accompany this Petition.

16. On November 28, 1995, plaintiff’s counsel notified the Superior Court that plaintiff had died, and asked the Court to specially set a Status Conference. A true and correct copy of the “Notice of Plaintiff’s Request for

the Court to Specially Set a Status Conference” is included as Exhibit 23 in the separately bound volumes of exhibits that accompany this Petition.

17. On December 7, 1995, the Superior Court entered its Minute Order, which set a status conference for December 22, 1995. A true and correct copy of the Minute Order is included as Exhibit 24 in the separately bound volumes of exhibits that accompany this Petition.

18. On December 18, 1995, defendants filed their “Court Ordered Memorandum of Points and Authorities on What claims and Damages survive the Death of Plaintiff and May Be Pursued by Her Estate.” A true and correct copy of that memorandum of points and authorities is included as Exhibit 25 in the separately bound volumes of exhibits that accompany this Petition.

19. On December 19, 1995, plaintiff’s representative filed his “Analysis of Decedent’s Surviving Claims and Damages in Connection with Status Conference.” A true and correct copy of that analysis is included as Exhibit 26 in the separately bound volumes of exhibits that accompany this Petition.

20. On December 20, 1995, plaintiff’s representative filed his “Notice of Errata.” A true and correct copy of that notice is included as Exhibit 27 in the separately bound volumes of exhibits that accompany this Petition.

21. On December 22, 1995, the Superior Court held a status conference. The proceedings were not on the record, and no transcript is available. The Court scheduled a hearing on defendants’ summary judgment motion, and the issues raised as a result of plaintiff’s death for January 11, 1996.

22. On January 11, 1996, the Superior Court held a hearing on defendants' summary judgment motion and on the issues raised as a result of plaintiff's death. A true and correct copy of the court reporter's Transcript of Proceedings for that hearing is included as Exhibit 28 in the separately bound volumes of exhibits that accompany this Petition.

23. On January 11, 1996, the Superior Court entered a Minute Order, which (i) denied defendants motion for summary judgment, (ii) granted summary adjudication with respect to the causes of action against defendants Springs, Cantor and Slater, (iii) denied summary adjudication with respect to defendants Boudreaux and Block, (iv) determined the claims for damages that survived plaintiff's death, and (v) continued the trial in the action to March 11, 1996. A true and correct copy of the Minute Order is included as Exhibit 29 in the separately bound volumes of exhibits that accompany this Petition.

24. On January 24, 1996, plaintiff's counsel served a written notice of entry of the Court's order of January 11. A true and correct copy of that notice is included as Exhibit 30 in the separately bound volumes of exhibits that accompany this Petition.

25. On February 5, 1996, defendants filed their "Objections to Plaintiff's Notice of Ruling." A true and correct copy of those objections is included as Exhibit 31 in the separately bound volumes of exhibits that accompany this Petition.

26. Code of Civil Procedure section 437c, subdivision (l) provides: "Upon entry of any order pursuant to this section except the entry of summary judgment, a party may, within 20 days after service upon him or her of

a written notice of entry of the order, petition an appropriate reviewing court for a peremptory writ. If the notice is served by mail, the initial period within which to file the petition shall be increased by five days if the place of address is within the State of California.” This Petition is timely.

27. Unless an appropriate writ is granted, petitioners will be denied the benefits of the summary judgment procedure. They will be forced to incur the costs of a full trial on the merits even though there is no triable issue as to any material fact. Since appellate courts may not review the denial of summary judgment on direct appeal, petitioners have no adequate remedy at law or equity other than a writ.

WHEREFORE, Petitioners pray that this Court:

1. Issue a peremptory writ in this first instance directing the Superior Court to vacate its order of January 11, 1996, and enter an order granting petitioners’ motion for summary judgment, and precluding plaintiff’s representative from introducing any evidence with respect to emotional distress damages at trial.

2. Alternatively, first issue an alternative writ directing the Superior Court either (a) to vacate its order of January 11, 1996, and enter an order granting petitioners’ motion for summary judgment, and precluding plaintiff’s representative from introducing any evidence with respect to emotional distress damages at trial, or, in the alternative, (2) to show cause why it should not do so; and thereafter issue a peremptory writ directing the Superior Court to vacate its order of January 11, 1996, and enter an order granting petitioners’ motion for summary judgment, and precluding plaintiff’s rep-

representative from introducing any evidence with respect to emotional distress damages at trial.

3. Award Petitioners their costs in this proceeding.
4. Grant such other and further relief as the Court may deem just and proper.

February ____, 1996

GUTIERREZ & PRECIADO
Calvin House
Nohemi Gutierrez Ferguson
Gabrielle Harner Brumbach

By _____
Calvin House
Attorneys for Petitioners

III. VERIFICATION

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I, Calvin House, am one of the attorneys for Petitioners in connection with this writ proceeding. I have personally reviewed and am familiar with the records, files and proceedings described in and the subject of the present Petition, and know the facts set forth in the Petition to be true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed: February ____, 1996

Calvin House

IV. MEMORANDUM OF POINTS AND AUTHORITIES

A. The Undisputed Material Facts

Plaintiff was employed by the Los Angeles County Sheriff's Department from June 1985 until approximately 1992. (Exh. 4, p. 77:8-10.)³ She claims that she was subjected to harassment at several different Sheriff's Department facilities by a number of individuals. (Exh. 1, pp. 6:21-20:28 ¶¶ 15-52.) The Superior Court dismissed the claims against the individual defendants at the facilities to which plaintiff was assigned before 1990 on statute of limitations grounds. (Exh. 29.)

In April 1990, plaintiff transferred to the Substance and Narcotic Education Bureau at Santa Clarita City Hall. (Exh. 1, p. 17:9-15 ¶ 43.) She claims that she was harassed there by petitioner Ron Boudreaux. (Exh. 1, pp. 17:16-19:27 ¶¶ 44-49.) On July 12, 1991, Plaintiff took a disability leave of absence. (Exh. 1, p. 19:17-27 ¶ 49.) After further alleged harassment in February 1992, plaintiff retired at half pay effective October 2, 1992. (Exh. 4, p. 78:25-26.) She died in a car accident unrelated to her claims on October 17, 1995. (Exh. 23.)

At her deposition, plaintiff testified that Sheriff Block never personally harassed her. She also testified that she "would not know" whether he had even heard about the allegedly harassing conduct before she filed her lawsuit. (Exh. 4, p. 204:21-205:23].) There was no other evidence that

³ The exhibits to this Petition are included in separately bound volumes entitled "Exhibits to Petition for Writ of Mandamus."

Sheriff Block had any direct involvement in the conduct that allegedly gave rise to plaintiff's complaint.

B. Proceedings in the Superior Court

Plaintiff filed her original complaint on October 12, 1993. After the Superior Court sustained a demurrer to that complaint on February 8, 1994, she filed her First Amended Complaint on March 8, 1994. (Exh. 1.) It alleged five causes of action: (1) unlawful sexual discrimination and harassment under the Fair Employment and Housing Act ("FEHA"), (2) failure to prevent discrimination, harassment, and retaliation under FEHA, (3) retaliation for opposing discrimination and harassment, (4) sexual discrimination resulting in wrongful termination under FEHA, and (5) violation of 42 U.S.C. section 1983. The Fifth Cause of Action was the only one alleged against Sheriff Block. (Exh. 1, p. 28:18-20.) Defendants filed their answer on July 18, 1994. (Exh. 2.)

Defendants filed a motion for summary judgment on July 6, 1995. (Exh. 3.) At a hearing on September 6, 1995, the Superior Court took the motion under submission. (Exh. 22.) After plaintiff's death, the parties submitted briefs on the question of what claims survived. (Exhs. 25, 26.) The Superior Court then held a hearing on January 11, 1996 (Exh. 28), after which it took the following actions:

1. Ruled that plaintiff's representative could pursue a claim for emotional distress damages at trial.
2. Dismissed all claims against defendants Springs, Cantor and Slater, on statute of limitations grounds.

3. Denied Sheriff Block's motion for summary judgment.
4. Denied defendant Boudreaux's motion for summary judgment.

(Exh. 29.)

C. Argument

Summary adjudication should be granted when there is no triable issue as to any material fact, and the moving party is entitled to relief as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) This writ petition presents two issues of pure law. The relevant facts are undisputed.

1. Whether plaintiff's representative may pursue a claim for emotional distress damages at trial. As explained below, Code of Civil Procedure section 377.34 bars any such claim.

2. Whether plaintiff's representative may assert a claim under section 1983 against Sheriff Block in the absence of any evidence that he was directly involved in the conduct that is the subject of the complaint. As explained below, settled legal principles bar such a claim.

1. Code of Civil Procedure section 377.34 bars any claim by Plaintiff's representative for emotional distress damages.

Code of Civil Procedure section 377.34 provides that the damages available in an action continued by a decedent's representative "do *not* include damages for pain, suffering, or disfigurement." That limitation includes what are commonly referred to as emotional distress damages. (*Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 920, fn. 3 [148 Cal.Rptr. 389,

582 P.2d 980]; *Urbaniak v. Newton* (1991) 226 Cal.App.3d 1128, 1133 [277 Cal.Rptr. 354].) There is no question that section 377.34 bars a decedent's representative from pursuing emotional distress damages on state causes of action. That is so no matter how late in the litigation the plaintiff may die. (*Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397 (emotional distress damages unavailable where plaintiff died after submission of case, but before entry of judgment); *Williamson v. Plant Insulation Co.* (1994) 23 Cal.App.4th 1406 [28 Cal.Rptr.2d 751] (emotional distress damages unavailable where plaintiff died after completion of evidence but before instruction of the jury).)⁴

The Superior Court may have thought that the answer was not so clear-cut with respect to plaintiff's federal claim under section 1983. However, a Court of Appeal decision handed down after the Superior Court ruled makes clear that section 377.34's limitation *does* apply to such claims. (*Garcia v. Superior Court* (Jan. 31, 1996) 1996 Cal.App.LEXIS 77.) The *Garcia* decision followed the United States Supreme Court's direction in *Robertson v. Wegmann* (1978) 436 U.S. 584 to look generally to state law in determining the survivability of section 1983 claims.⁵

Until *Garcia*, the only decision dealing with section 377.34's application to emotional distress claims under section 1983 was *Guyton v. Phil-*

⁴ Both *Kellogg* and *Williamson* were decided under former Probate Code section 573. Its provisions were continued "without relevant change" in section 377.34. (*Kellogg, supra*; *Williamson, supra*, 23 Cal.App.4th at p. 1413, fn. 2.)

⁵ *Robertson* held that state survival statutes should be applied, unless they are "inconsistent with the Constitution and laws of the United States." (436 U.S. at p. 593.)

lips (N.D.Cal. 1981) 532 F.Supp. 1154. In that case, Judge Patel declined to apply section 377.34's limitation, because she viewed it as inconsistent with the policies underlying section 1983. However, lower federal court decisions interpreting federal law are not binding on California state courts. Only United States Supreme Court decisions are. (*People v. Bradley* (1969) 1 Cal.3d 80, 86 [81 Cal.Rptr. 457, 460 P.2d 129]; *Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 520, fn. 8 [27 Cal.Rptr.2d 433].)

Citing the absence of any binding United States Supreme Court precedent on the precise question before it, the *Garcia* court made an independent determination of federal law. It expressly declined to follow *Guyton*:

We respectfully decline to follow the reasoning of *Guyton* and *Bell* [*v. City of Milwaukee* (7th Cir. 1984) 746 F.2d 1205]. The deterrent purpose of the federal Civil Rights Act is satisfied, we believe, by the fact that Code of Civil Procedure section 377.34 expressly allows punitive damages the decedent would have been entitled to recover had he survived. [Citations omitted]

Decedent had a cause of action arising before his death. Code of Civil Procedure section 377.34 permits the representative of decedent's estate to sue on this cause of action. Even though the statute does not permit the estate to recover specific damages for decedent's pain and suffering, California law permits the estate representative to seek punitive damages for the violation of decedent's rights.

(*Garcia, supra*, 1996 Cal.App.LEXIS 77 at pp. 15-16.)

The same considerations apply to this case. Under section 377.34, plaintiff's representative may recover any compensatory damages (other than those for emotional distress) that accrued until plaintiff's death. If he should be able to establish sufficiently egregious conduct, he may also be able to recover punitive damages against any individual defendant who remains in the

case. (*Urbaniak v. Newton, supra.*) That is all that is necessary to fulfill the policies underlying section 1983.

The Superior Court appears to have rested its decision to allow emotional distress damages on the fact that punitive damages would not be available against the County of Los Angeles. (Exh. 28, p. 1369:5-26].) However, punitive damages are *never* available for section 1983 claims against government bodies like the County of Los Angeles. (*City of Newport v. Fact Concerts* (1981) 453 U.S. 247.) That is not a limitation imposed by section 377.34. As the *Garcia* court held, the availability of punitive damages against individual defendants sufficiently serves the purposes of section 1983.

Applying section 377.34's limitation on emotional distress damages is even more appropriate in this case than it was in *Garcia*. There the alleged civil rights violation led directly to the decedent's death. That is the same circumstance that led Judge Patel to allow recovery of emotional distress damages in *Guyton*.⁶ However, there is *no* case precedent for refusing to apply section 377.24's limitation on emotional distress claims for civil rights violations that do *not* result in death, as is the case here.

In fact, in *Robertson v. Wegmann, supra*, the United States Supreme Court went so far as to hold that a state survival statute that completely foreclosed a civil rights claim did not conflict with section 1983's policies. In

⁶ Judge Patel explained her reasoning: "Had the victim survived, he could have recovered, among other things, loss of earnings and pain and suffering. The inescapable conclusion is that there may be substantial deterrent effect to conduct that results in the injury of an individual but virtually no deterrent to conduct that kills its victim." (532 F.Supp. at p. 1166.) That reasoning does not apply in this case, because defendants' alleged conduct had nothing to do with plaintiff's death.

that case, as in this one, the alleged civil rights violation did not cause the death of the victim. If state survival laws may abate a claim without violating the policies underlying section 1983, then surely a statute that merely limits the recoverable damages cannot conflict with section 1983. The Superior Court should have stricken any claims for emotional distress damages.

2. Plaintiff's representative has no claim against Sheriff Block, because there is no evidence that he was directly involved in the allegedly illegal conduct.

Although plaintiff asserted a section 1983 claim against Sheriff Block, she conceded at her deposition that he was not directly involved in the harassing conduct. In response to Sheriff Block's motion for summary judgment, plaintiff simply asserted the legal conclusion that Sheriff Block "acquiesced and ratified and condoned" the various acts that she had alleged. (Exh. 10, p. 404:11-23.) She submitted no evidence to establish that he was directly involved in a civil rights violation.

A superior officer has no liability under section 1983 for the actions of his subordinates, unless there is evidence of direct involvement in the claimed violation. There is no respondeat superior liability for section 1983 claims. (*Monell v. Department of Social Services* (1978) 436 U.S. 658, 692; *Palmer v. Sanderson* (9th Cir. 1993) 9 F.3d 1433, 1438.) Therefore, plaintiff's representative has no claim against Sheriff Block in this action.

The Superior Court appeared to agree in part with the foregoing analysis, but nonetheless allowed the section 1983 claim to proceed against Sheriff Block in his "official capacity." (Exh. 28, pp. 1373:26-1374:10.)

There was no justification for doing so. An “official capacity” law suit is the same thing as a lawsuit against the County of Los Angeles. (*Kentucky v. Graham* (1985) 473 U.S. 159, 165.)

Since the complaint in this case already includes a claim against the County of Los Angeles, it is redundant to have a claim against the Sheriff. Dismissing such “official capacity” defendants “clarifies and streamlines the pleadings.” (*McLin v. City of Chicago* (N.D.Ill. 1990) 742 F.Supp. 994, 997; see also *Robinette v. Barnes* (6th Cir. 1988) 854 F.2d 909, 911, fn. 1.) The Superior Court should have entered summary judgment for Sheriff Block.

V. CONCLUSION

For the reasons stated above, this Court should issue a peremptory writ directing the Superior Court to vacate its order of January 11, 1996, and enter a new order (1) precluding plaintiff's representative from pursuing any claim for emotional distress damages, and (2) awarding summary judgment to Sheriff Block.

February ____, 1996

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By _____
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