

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' BRIEF ON THE MERITS

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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I. ISSUE PRESENTED FOR REVIEW

The Petition for Review stated the issue before the Court as follows: “Whether Code of Civil Procedure section § 377.34’s restriction on recovery for a decedent’s pain, suffering, or disfigurement applies to survival claims brought by the decedent’s representative under 42 U.S.C. section § 1983?”¹

The question is whether federal policy bars application of California’s limitation on recovery of emotional distress damages to the decedent’s section 1983 employment claim. This brief explains that the restriction does *not* violate either of the policies underlying section 1983, which are (1) compensating victims of section 1983 violations, and (2) deterring unlawful conduct.

1. The limitation does not violate the policy of compensating victims of civil rights violations. The United States Supreme Court has ruled that limitations on recovery in survival actions do not implicate section

¹ Section 377.34 provides:

In 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.

1983's compensation policy, where the victim has died. (*Robertson v. Wegmann* (1978) 436 U.S. 584, 592.)

2. The limitation does not violate the deterrence policy. No potential civil rights defendant would act differently merely because the damages might be reduced if the victim later died for reasons unrelated to the violation. (*Robertson v. Wegmann, supra*, 436 U.S. at p. 592.) In any event, the remedies available in survival actions are sufficient in themselves to deter wrongful conduct. For example, in this case, the decedent's representative may recover the decedent's economic loss, punitive damages against any individual wrongdoers, and attorneys' fees.

Therefore, this Court should direct that any claim for the decedent's emotional distress damages be stricken from the operative pleadings.

II. STATEMENT OF THE CASE

A. Nature of the Case

Patricia Cordova, the original plaintiff in this sexual harassment lawsuit, alleged a federal section 1983 claim based on supposed mistreatment during her employment as a Los Angeles County Deputy Sheriff. Her complaint sought emotional distress damages. Cordova died in a car accident while defendants' summary judgment motion was pending. The Superior Court and the Court of Appeal ruled that Cordova's representative — real party in interest Kim A. Schonert — could seek emotional distress damages at trial. This Court granted review to determine whether California's limitation on recovery of such damages in survival actions applies to section 1983 claims.

B. Summary of the Material Facts

Cordova worked for the Los Angeles County Sheriff's Department from June 1985 until 1992. (Ex. 4, p. 77:8-10.)² She claimed that various individuals harassed her at several different Sheriff's Department facilities. (Ex. 1, pp. 6:21-20:28 ¶¶ 15-52.) In April 1990, Cordova transferred to the Substance and Narcotic Education Bureau at Santa Clarita City Hall, where she claims that Petitioner Ron Boudreaux harassed her. (Ex. 1, pp. 17:9-

² References to exhibits in this Brief are to the separately bound volumes entitled "Exhibits to Petition for Writ of Mandamus," filed in the Court of Appeal.

19:27 ¶¶ 43-49.) On July 12, 1991, Cordova took a disability leave of absence. (Ex. 1, p. 19:17-27 ¶ 49.) After further alleged harassment in February 1992, she retired at half pay effective October 2, 1992. (Ex. 4, p. 78:25-26.) She alleged that the County had constructively discharged her. (Ex. 1, p. 21:14-17 ¶ 58.) She died in a car accident unrelated to her claims on October 17, 1995. (Ex. 23.)

At her deposition, Cordova testified that Petitioner 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. (Ex. 4, p. 204:21-205:23].) There was no other evidence that Sheriff Block had any direct involvement in the conduct that allegedly gave rise to this action.

C. Proceedings in the Superior Court and the Court of Appeal

Cordova filed this action on October 12, 1993. Her First Amended Complaint, the operative pleading, 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. (Ex. 1.) The Fifth Cause of Action was the only one alleged against Sheriff Block. (Ex. 1, p. 28:18-20.) Defendants filed their answer on July 18, 1994. (Ex. 2.)

Defendants filed a motion for summary judgment on July 6, 1995. (Ex. 3.) At a hearing on September 6, 1995, the Superior Court took the motion under submission. (Ex. 22.) After Cordova's death, the parties submitted briefs on the question of what claims survived. (Exs. 25, 26.) The Superior Court then held a hearing on January 11, 1996 (Ex. 28), after which it took the following actions. (See Ex. 29.)

1. It ruled that Cordova's representative could seek recovery of Cordova's emotional distress damages at trial. The Superior Court felt that such damages were necessary to fulfill section 1983's deterrence policy. (Ex. 28, p. 1369:5-1371:9.)

2. It dismissed all claims against Defendants Springs, Cantor and Slater, on statute of limitations grounds.

3. It denied the motion for summary judgment with respect to Petitioners County of Los Angeles, Sheriff Block and Ron Boudreaux.

On March 7, 1996, the Court of Appeal granted an alternative writ, which it discharged as improvidently granted on May 20, 1996. This Court granted review on August 21, 1996, and transferred the matter back to the Court of Appeal. The Court of Appeal issued its decision denying the petition on November 20, 1996.

The Court of Appeal refused to apply section 377.34's limitation. It explained that "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 sec-

tion 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.” (Slip Op., at pp. 7-8.) The court’s principal concern seems to have been that Cordova’s survivors would be left “without any meaningful remedy” in this particular case. (Slip Op., at p. 6.)

III. ARGUMENT

A. The nature of wrongful death and survival actions

A decedent's representative may pursue two types of claims following the death of an individual — survival claims, and wrongful death claims:

The survival, pursuant to Probate Code section 573 [predecessor to section 377.34] of the cause of action the decedent could have maintained during his lifetime, is wholly distinct from a cause of action by the decedent's heirs for wrongful death pursuant to Code of Civil Procedure section 377 [predecessor to sections 377.60, 377.61] ... The action under Probate Code section 573 is by the estate and is for the injuries suffered by the decedent prior to this death. The action under Code of Civil Procedure section 377 is by the heirs, not the estate, and is for the loss of support, comfort and society suffered independently by the heirs as a result of the death itself.

(*Dominguez v. City of Alhambra* (1981) 118 Cal.App.3d 237, 243; see also *Grant v. McAuliffe* (1953) 41 Cal.2d 859, 864.)

Survival claims seek compensation for injuries sustained by *the decedent* before death. *Wrongful death claims* seek compensation for injuries sustained by *survivors* as a result of the decedent's death. This case involves a survival claim. Cordova's representative wishes to continue Cordova's claims for injuries that she sustained before her death.

B. Federal principles for applying state law in section 1983 actions

Robertson v. Wegmann, supra, held that a federal court in Louisiana must apply a Louisiana survival statute, even though the statute barred the section 1983 claim at issue. *Robertson* interpreted 42 U.S.C. section 1988, which requires application of state law in section 1983 actions where (1) federal law does not provide a rule of decision, and (2) the state law is not “inconsistent” with the policies of federal law. *Robertson* established the following principles to govern the survivability of section 1983 claims:

1. Section 1983 itself does not provide a rule of decision about survival of claims. (*Robertson, supra*, 436 U.S. at p. 589.) Therefore, state and federal courts *must* follow state survival rules, unless the rules are inconsistent with the policies underlying section 1983.

2. The federal policies underlying section 1983 are compensation and deterrence. (*Robertson, supra*, 436 U.S. at p. 591.)

3. The survivability of a section 1983 claim does not implicate the compensation policy of section 1983. As the Court explained, 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.” (*Robertson, supra*, 436 U.S. at p. 592.)

4. Restrictions on survival actions are unlikely to harm section 1983’s deterrence policy so long as the civil rights violation did not cause the decedent’s death. Even if the potential defendant contemplating illegal activity were aware of the restrictions, he “must always be prepared to face

the prospect of a § 1983 action being filed against him.” (*Robertson, supra*, 436 U.S. at p. 592.) Only if state law “significantly restricted the *types of actions* that survive” might it interfere with the policies behind section 1983. (*Robertson, supra*, 436 U.S. at p. 594.)

Additional insight into federal policy comes from 42 U.S.C section 1986. That statute was originally enacted along with section 1983 as part of the 1871 Civil Rights Act. Section 1986 establishes a claim against a person who knows about, but fails to prevent, a conspiracy to deprive someone of his or her civil rights under section 1985. It also expressly provides for survival of the claim, but (1) restricts that remedy to cases where the wrongful act caused the death, and (2) limits the total damages to \$5,000. It is unlikely that the Congress which enacted the limited survival provision contained in section 1986 intended to require substantial awards of emotional distress damages to estate representatives under section 1983, particularly where the wrongful act did not cause the death. (Cf. *Robertson, supra*, 436 U.S. at p. 592, fn. 8 (assessing the “reasonableness” of the state’s approach to survival claims by referring to federal survival provisions that took the same approach).)

C. Treatment of survival claims under California law

California law does not restrict the types of actions that survive death. It expressly provides that *all* decedent’s claims survive. (Code Civ. Proc., § 377.20.) It also allows a decedent’s representative to recover puni-

tive damages on such claims, where appropriate. (Code Civ. Proc., § 377.34.) It imposes two limited restrictions.

1. The representative may only recover those damages that the decedent “sustained or incurred before death.” (Code Civ. Proc., § 377.34.) However, if the wrongdoer causes the decedent’s death, the representative may bring a wrongful death action to recover for any loss of support that the heirs suffered as a result of the death. (Code Civ. Proc., §§ 377.60, 377.61.)

2. Recoverable damages do not include those for “pain, suffering, or disfigurement.” (Code Civ. Proc., § 377.34.) The policy behind that restriction is to limit recovery to those who have actually suffered the emotional distress. (*Garcia v. Superior Court* (1996) 42 Cal.App.4th 177, 186, review den. (May 15, 1996).)

D. Limiting recovery of emotional distress damages does not defeat section 1983’s compensation policy.

In *Robertson v. Wegmann, supra*, the Supreme Court explained 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.) In *Garcia*, the Court of Appeal similarly recognized that “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.) Courts in other jurisdictions have adhered to the same principle.³

To the extent that the Court of Appeal in this case may have been concerned that Cordova’s *survivors* lacked a meaningful remedy (see Slip Op., at p. 6), its concern was misplaced. Where the victim’s death is unrelated to the civil rights violation, the wrongdoer has not deprived the *survivors* of anything. Therefore, denying emotional distress damages to survivors does not subvert the compensation policy. Section 377.34 is the product of a reasonable legislative decision to limit recovery of emotional distress damages to the direct object of wrongdoing. (Cf. *Robertson, supra*, 436 U.S. at p. 592 (no contention that the state restriction on survival

³ In *Parkerson v. Carrouth* (8th Cir. 1986) 782 F.2d 1449, 1455, for example, the court explained:

[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.

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).

actions in that case was “an unreasonable one”).) Other jurisdictions impose similar restrictions.⁴

On the other hand, when the violation causes a death, the decedent’s dependents may also be victims. The violation deprives them of the financial support and companionship of the decedent. Section 1983’s compensation policy may require that they be able to recover damages for that loss. In California, they may do that through a wrongful death action. (See *Garcia, supra*, 42 Cal.App.4th at pp. 186-187; Code Civ. Proc., §§ 377.60, 377.61.) Such considerations do not apply where, as here, the alleged wrongdoers did not cause the decedent’s death.

E. Limiting recovery of emotional distress damages does not defeat section 1983’s deterrence policy.

1. Limitations on recovery in a particular action do not reduce the overall deterrent value of section 1983.

In *Robertson v. Wegmann, supra*, the Supreme Court applied a Louisiana survival statute that required dismissal of the section 1983 action before the Court. It discerned no adverse effect on the deterrence policy:

And, given that most Louisiana actions survive the plaintiff’s death, *the fact that a particular action might abate surely*

⁴ See *Martin v. United Sec. Services, Inc.* (Fla. 1975) 314 So.2d 765, 769; *Evans v. Twin Falls County* (1990) 118 Idaho 210 [796 P.2d 87], cert. denied (1991) 498 U.S. 1086; *Wooldridge v. Woolett* (1981) 96 Wash.2d 659, 666 [638 P.2d 566]; Ariz.Rev.Stat. Ann., § 14-3110; Colo.Rev.Stat. Ann., § 13-20-101.

would not adversely affect § 1983's role in preventing official illegality, 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 Louisiana survivorship law would hardly be influenced in his behavior by its provisions.

(436 U.S. at p. 592.) In a footnote to the foregoing, the Court explained:

In order to find even a marginal influence on behavior as a result of Louisiana's survivorship provisions, one would have to make the rather farfetched assumptions that a state official had both the desire and the ability deliberately to select as victims only those persons who would die before conclusion of the § 1983 suit (for reasons entirely unconnected with the official illegality) and who would not be survived by any close relatives.

(*Id* at p. 592, fn. 10.)

Here, the Court of Appeal did not address the Supreme Court's point at all. It dismissed *Robertson*'s holding as a "narrow one," and found an adverse effect on section 1983's policies, because it felt that, in this particular case, Cordova's representative should recover more than what section 377.34 allows. (Slip Op., at pp. 7-8.) (The Court of Appeal's conclusion about the deterrent value of section 377.34's remedies is addressed in Section E.2 below, at p. 15.) However, other decisions have confirmed the

view that limitations on recovery in a particular survival action do not defeat section 1983's overall deterrent effect.⁵

Denying emotional distress damages to Cordova's representative in this particular case will not encourage potential wrongdoers to ignore federal civil rights. A potential wrongdoer cannot know whether the next purported victim will die from unrelated causes before judgment. As the County establishes its policies, and its employees go about their day-to-day duties, they must be prepared to face the prospect of a section 1983 action by a plaintiff entitled to recover unlimited compensatory damages. They cannot deliberately select only victims who will die before recovering damages. How much a particular plaintiff recovers will have little effect on de-

⁵ See *Parkerson v. Carrouth*, *supra*, 782 F.2d at p. 1454 ("In cases like the present one, in which the alleged civil rights violations were not committed for the purpose of inflicting physical injury, we do not believe that the possibility that injured parties will die and their actions abate is likely to give any encouragement to potential wrongdoers"); *Evans v. Twin Falls County* (1990) 118 Idaho 210 [796 P.2d 87], cert. denied (1991) 498 U.S. 1086 (restrictions on recovery in survival actions were not inconsistent with section 1983); *Strickland v. Deaconess Hospital* (1987) 47 Wash.App. 262, 266-267 [735 P.2d 74], review denied (1987) 108 Wash.2d 1028 (finding that Washington's statutory bar to recovery of emotional distress damages in survivorship actions did not offend the policies underlying section 1983). Cf. *Rosenblum v. Colorado Dept. of Health* (D.Colo. 1994) 878 F.Supp. 1404 (application to decedent's claim under the Americans with Disabilities Act (also governed by section 1988's principles) of Colorado's ban on recovery of emotional distress damages in survival actions was not inconsistent with the policies of the ADA).

terrence. It is the *potential* recovery that matters. While one plaintiff may recover \$1.00, the next may recover \$1 million.

2. The remedies available under section 377.34 are sufficient to deter wrongful conduct.

Section 377.34 allows a representative to recover all the decedent's "loss or damage" sustained before death, plus "any penalties or punitive or exemplary damages." Nonetheless, the Court of Appeal said that applying section 377.34 "would result in a lawsuit without any meaningful remedy." (Slip Op., at p. 6.) That conclusion is wrong.

a) Compensatory damages

The court first opined that Cordova's "economic damages (lost wages) appear to be minimal," and that her "major claim" would have been for emotional distress damages. (Slip Op., at p. 6, fn. 6.) It then went on to make the sweeping claim that the "primary component of damages" in *all* section 1983 actions was "recovery for emotional distress." (Slip Op., at p. 7.) There was no basis for those conclusions.

The statement about the supposed "minimal" nature of Cordova's economic damages was based on the fact that she retired at half-pay in 1992. The Court of Appeal did not calculate the amount that Cordova's survivors might have been able to recover. However, there is sufficient information in the record to make a rough calculation.

When Cordova retired in October 1992, she was earning \$3,500 per month. (Ex. 4, p. 158.) That equates to \$42,000 annually, or \$21,000 on a

half-pay basis. Therefore, her potential lost wages claim when she died three years later in October 1995 was \$63,000, even if one assumes no wage increase. That is not “minimal.” It also does not include prejudgment interest, or any expenses that Cordova may have incurred for treatment of her emotional and physical condition.

The reported decisions do not bear out the Court of Appeal’s conclusion that emotional distress is the “primary component” of damages in section 1983 actions. The values of economic loss and emotional distress vary from case to case. One cannot assume that emotional distress damages will always greatly exceed economic damages. For example, in *Webb v. City of Chester* (7th Cir. 1987) 813 F.2d 824, the Seventh Circuit found that awards for emotional distress ranged from \$500 to just over \$50,000 in cases where government employees brought section 1983 claims after they were fired.⁶ If he is successful, Cordova’s representative will recover more in economic damages than any of those plaintiffs did in emotional distress.

⁶ More recent decisions are consistent with the findings in *Webb*. (See *Lum v. City and County of Honolulu* (9th Cir.) 963 F.2d 1167 (\$8,000 for humiliation under section 1983), cert. denied (1992) 113 S.Ct. 659; *Finch v. City of Vernon* (11th Cir. 1989) 877 F.2d 1497 (\$30,000 jury award for wrongful discharge in violation of section 1983);

Reported decisions in this state involving the analogous state law tort of wrongful termination in violation of public policy show similar awards. (See, e.g., *Roberts v. Ford Aerospace & Communications Corp.* (1990) 224 Cal.App.3d 793 (\$100,000 for emotional distress, although economic damages were \$195,224); *Luck v. Southern Pacific Transportation*

b) Punitive damages

The Court of Appeal's decision in this case also seems to have rested on the unavailability of punitive damages against the County. (Slip Op., at p. 8.) However, neither Cordova's death nor section 377.34 made them unavailable. The United States Supreme Court has ruled that section 1983 does not permit recovery of such damages in *any* case. In doing so, it noted:

[T]here is available a more effective means of deterrence. 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 previously has found, with respect to such violations, that *a damages remedy recoverable 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 (emphasis supplied); see also *Carlson v. Green* (1980) 446 U.S. 14, 21.)

Here, by contrast, the Court of Appeal acknowledged the availability of punitive damages against individual defendants, but found that "largely irrelevant." (Slip Op., at pp. 7-8.) That conflicts not only with the United States Supreme Court's ruling, but also with the *Garcia* decision by Division Four of the Second District Court of Appeal:

Co. (1990) 218 Cal.App.3d 1 (\$32,100 for emotional distress, although economic damages were \$180,092), cert. den. (1990) 498 U.S. 939.)

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*, 42 Cal.App.4th at p. 185; see also *Carter v. City of Birmingham* (Ala. 1983) 444 So.2d 373, 377-379.)

c) Attorneys' fees

42 U.S.C. section 1988 provides that a prevailing plaintiff in a section 1983 case may recover his or her reasonable attorneys' fees. In appropriate cases, such awards can amount to hundreds of thousands of dollars. (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); *Cinevision Corporation v. City of Burbank* (9th Cir. 1984) 745 F.2d 560 (upholding a \$ 119,288 fee award for recovering \$ 25,000 in compensatory and punitive damages), cert. den. (1984) 471 U.S. 1054; *Morales v. City of San Rafael* (9th Cir. 1996) 96 F.3d 359 (reversing as inadequate a \$ 20,000 fee award for recovering \$ 17,500 in damages).) The prospect of a substantial attorneys' fee award has at least as much deterrent value as an award of emotional distress damages.

IV. CONCLUSION

Applying section 377.34 to a section 1983 claim does not violate any federal policy. A decedent's survivors may recover any economic damages that accrued until the decedent's death. They may also seek punitive damages against any individual defendants. If their action is successful, the survivors may also recover their attorneys' fees. Section 1983 requires nothing more.

Therefore, 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.

April ____, 1997

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