

No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

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

Petitioners,

v.

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

Respondent.

KIM A SCHONERT, as Personal Representative,

Real Party in Interest.

PETITION FOR REVIEW

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

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

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I. ISSUE PRESENTED FOR REVIEW

Whether Code of Civil Procedure 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 42 U.S.C. section 1983?¹

¹ Section 377.34 provides as follows:

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.

II. NATURE OF THE CASE

A. Introduction

This Petition brings back before the Court a case involving an important unsettled issue at the intersection of federal and state law. On August 21, 1996, This Court granted review of the Court of Appeal's initial decision to discharge its alternative writ without rendering a decision. (No. S053930.) It then transferred the matter back to the Court of Appeal for hearing and decision. On November 20, 1996, the Court of Appeal denied the writ petition in a decision that it certified for publication. The Court of Appeal's decision acknowledges a conflict with the reported decision that this Court cited in its grant of review. (*Garcia v. Superior Court* (1996) 42 Cal.App.4th 177 [49 Cal.Rptr.2d 580] review den.) As explained more fully below, the decision also ignores binding United States Supreme Court precedent on the issue presented for review.

Code of Civil Procedure section 377.34 bars a decedent's representative from recovering damages for "pain, suffering, or disfigurement" in an action belonging to the decedent. In *Robertson v. Wegmann* (1978) 436 U.S. 584, 593, the United States Supreme Court ruled that courts should apply state rules on the survival of decedents' claims in actions under 42 U.S.C. section 1983, unless the particular rule is "inconsistent with the Constitution and laws of the United States."

The Courts of Appeal and the Superior Courts in this state must choose among conflicting decisions about the applicability of section 377.34 to section 1983 claims. Division Four of the Second District Court of Appeal has held that the restriction applies to such cases. (*Garcia v. Superior Court* (1996) 42 Cal.App.4th 177 [49 Cal.Rptr.2d 580] review den.) The United States District Court for the Northern District of California has refused to apply the restriction in two reported decisions. (*Williams v. City of Oakland* (N.D.Cal. 1996) 915 F.Supp. 1074 (Patel, J.); *Guyton v. Phillips* (N.D.Cal. 1981) 532 F.Supp. 1154 (Patel, J.).)²

² The Ninth Circuit has expressly declined to decide the question. (*Smith v. City of Fontana* (9th Cir.) 818 F.2d 1411, 1417, fn. 8, cert. denied (1987) 484 U.S. 935.)

In the decision that is the subject of this Petition, Division One of the Second District has adopted the reasoning of the *Williams* case, and stated its disagreement with some of the reasoning in *Garcia*.

State courts handle many section 1983 claims, and the number appears to be growing. (See Herman, *Beyond Parity: Section 1983 and the State Courts* (1989) 54 Brook. L. Rev. 1057.) There is a two-volume scholarly treatise devoted to the subject. (Steinglass, *Section 1983 Litigation in State Courts* (1995).) It is not uncommon to find representatives pursuing decedent's claims in such cases, as illustrated by the two opinions on the subject published by courts in California this year alone. (See *Garcia, supra*; *Williams, supra*.) Therefore, the question of what damages a decedent's representative may recover will be a recurring one for California's courts. It merits a definitive answer from this Court.

B. Procedural History

The original plaintiff in this action, Patricia Cordova, worked for the Los Angeles County Sheriff's Department from June 1985 until approximately 1992. She claimed that she was subjected to sexual harassment at several Sheriff's Department facilities. Plaintiff filed her original complaint on October 12, 1993. She filed the operative First Amended Complaint on March 8, 1994. 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.

Defendants filed a motion for summary judgment on July 6, 1995. At a hearing on September 6, 1995, the Superior Court took the motion under submission. Cordova died in a car accident unrelated to her claims on October 17, 1995. The Superior Court asked for briefs on the question of what claims survived.³ On

³ The Superior Court properly considered the issue during the proceedings on Petitioners' motion for summary judgment. An emotional distress claim is a "claim for damages," for which section 437c, subdivision (f)(1) authorizes a grant of summary adjudica-

January 11, 1996, it (1) ruled that plaintiff's representative could pursue a claim for emotional distress damages at trial, and (2) dismissed all claims against individual defendants other than Ron Boudreaux and Sheriff Block, on statute of limitations grounds.

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.

tion. Alternatively, the procedure may be characterized as a motion in limine, or a motion to strike under Code of Civil Procedure section 436. (See *Macy's California, Inc. v. Superior Court* (1995) 41 Cal.App.4th 744, 746, fn. 2 [48 Cal.Rptr.2d 496]; see also *Smith v. Superior Court* (1992) 10 Cal.App.4th 1033 [13 Cal.Rptr.2d 133] (motion to strike used to eliminate claim for emotional distress damages).)

III. WHY REVIEW SHOULD BE GRANTED

The California Rules of Court provide for review in this Court “where it appears necessary to secure uniformity of decision or the settlement of important questions of law.” (Cal. Rules of Court, rule 29(a).) This case presents an important question of law that will arise frequently in California’s lower courts. Current decisions lack uniformity. Division Four of the Second District ruled in *Garcia v. Superior Court*, *supra*, that the availability of punitive damages against individual defendants under section 1983 sufficiently served section 1983’s deterrent purpose. In the decision presented for review, Division One expressly disagreed. (Exhibit 1, p. 8, fn. 7.) Unless this Court grants review, the lower courts will be without clear guidance on what rules to apply to section 1983 claims filed in state court.

IV. LEGAL DISCUSSION

A. The Nature of Actions Following Death

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 [173 Cal.Rptr. 345]; see also *Grant v. McAuliffe* (1953) 41 Cal.2d 859, 864 [264 P.2d 944].) *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.

The case presented for review involves a survival claim. Cordova's representative wishes to continue Cordova's claims for injuries that she sustained before her death. Cordova's heirs could not assert a claim for wrongful death against the Petitioners in this action, because the Petitioners had nothing to do with her death. As will become clear in the following discussion, the difference between the two types of claims is important in evaluating the impact of section 377.34 on the policies underlying section 1983.

B. Applicable Principles of Federal Law

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 is lacking, 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 plaintiff’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 those situations 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.

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 punitive 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 a tortfeasor 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.

D. Application of Federal Principles to section 377.34

This Court has already applied section 377.34's predecessor statute in ruling that a section 1983 claim brought in state court survives death. (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159 [216 Cal.Rptr. 661, 703 P.2d 1].)⁴ The question presented for review is whether section 377.34's bar to recovery of emotional distress damages is "inconsistent" with the policies underlying section 1983.

Section 377.34 does not interfere with section 1983's compensation policy, because it does not restrict the recovery of those who actually suffer loss. Where the wrongdoer does *not* cause the decedent's death, the representative may recover all economic damages incurred before death. That is the only loss by the beneficiaries of the estate that is attributable to the wrongdoer. Where the wrongdoer *does*

⁴ *Ochoa* interpreted the provisions of former Probate Code section 573, which were continued "without relevant change" in section 377.34. (*Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1404, fn. 6 [49 Cal.Rptr.2d 256]; *Williamson v. Plant Insulation Co.* (1994) 23 Cal.App.4th 1406, 1413, fn. 2 [28 Cal.Rptr.2d 751].)

cause the death, the beneficiaries may also recover the losses that they sustained as a result of the death.

Section 377.34 does not interfere with section 1983's deterrence policy. The question is whether a particular rule will affect the future conduct of one about to engage in illegal conduct. As *Robertson v. Wegmann* recognized, the unavailability of emotional distress damages to the estate of a deceased plaintiff could not affect the behavior of a potential defendant. It is inconceivable that a public official would assess a potential plaintiff's chances of living until judgment is entered in a hypothetical lawsuit in deciding how to act.⁵ The deterrence policy of section 1983 is sufficiently served by the survival of the decedent's cause of action, and the availability of punitive damages. (*Garcia, supra*, 42 Cal.App.4th at p. 185.)

Other courts have ruled that applying state damages restrictions to section 1983 claims does not violate the statute's policies. (See *Evans v. Twin Falls County* (1990) 118 Idaho 210 [796 P.2d 87] (claim for pain and suffering damages under section 1983 did not survive death), cert. denied (1991) 498 U.S. 1086; *Strickland v. Deaconess Hospital* (1987) 47 Wash.App. 262 [735 P.2d 74] (section 1983 claim seeking only pain and suffering damages did not survive), review denied (1987) 108 Wash.2d 1028. Cf. *Rosenblum v. Colorado Dept. of Health* (D.Colo. 1994) 878 F.Supp. 1404 (applying Colorado restriction to claim for emotional distress damages under the Americans with Disabilities Act, which is also governed by 42 U.S.C. section 1988).)

⁵ The United States Supreme Court put it as follows: "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 relative." (*Robertson, supra*, 436 U.S. at pp. 592-593, fn. 10.)

E. The Court of Appeal's Decision in this Case

Division One refused to apply section 377.34's limitations, because it felt that to do so would leave the plaintiff in this particular case without a meaningful remedy. (Exhibit 1, p. 6.) However, it did not adequately explain how application of the limitations would interfere with either the deterrence or the compensation policy of section 1983. The Court seems to have been principally concerned with ensuring that Cordova's estate was provided with a "meaningful remedy." However, it apparently failed to appreciate that, under *Robertson v. Wegmann*, compensation for the *survivors* is not one of section 1983's goals. (See above, p. 7.)

The Court of Appeal also failed to take account of *Robertson's* determination that restrictions on survival actions would not interfere with the deterrence policy so long as the violation did not cause the plaintiff's death. (See above, p. 7.)

V. CONCLUSION

For the reasons stated above, this Court should grant review to determine the applicability of section 377.34 to claims under 42 U.S.C. section 1983.

December ___, 1996

GUTIERREZ & PRECIADO
Calvin House
Nohemi Gutierrez Ferguson
Gabrielle Harner Brumbach

By _____
Calvin House
Attorneys for Petitioners