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**FILED**

DEC 29 2004

RICHARD W. WIEKING  
CLERK U.S. DISTRICT COURT,  
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

KELY WILKINS, et al.,  
Plaintiffs,  
v.  
CITY OF OAKLAND, et al.,  
Defendants

No. C 01-1402 MMC

**AMENDED ORDER GRANTING IN PART  
AND DENYING IN PART PLAINTIFFS'  
MOTION TO FILE FIRST AMENDED  
COMPLAINT**

Before the Court is plaintiffs' Motion to File a First Amended Complaint ("FAC"), pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. Defendants have filed opposition, to which plaintiffs have replied. Having considered the papers filed in support of and in opposition to the motion, the Court hereby VACATES the hearing scheduled for June 18, 2004, and rules as follows.<sup>1</sup>

In the original complaint, plaintiffs allege that defendants, in violation of 42 U.S.C. § 1983, used excessive force against plaintiff's decedent and that such force resulted in decedent's death. Plaintiffs seek leave to amend to include additional allegations concerning the use of force and the basis for plaintiffs' claim for municipal liability and to

<sup>1</sup>The instant order amends the Order Granting in Part and Denying in Part Plaintiffs' Motion to File a First Amended Complaint, filed June 24, 2004. (See Order Granting Defs.' Mot. for Order Certifying Order for Interlocutory Appeal; Setting Forth Reason for Amendment of Order Granting in Part and Denying in Part Pls.' Mot. to File FAC, filed concurrently herewith).

1 more specifically identify the types of damages plaintiffs seek.

2 Defendants state no objection to plaintiffs' amending to include additional  
3 allegations concerning the use of force and the basis for municipal liability.<sup>2</sup> Defendants  
4 oppose, however, plaintiffs' proposed inclusion of two types of damages, specifically,  
5 damages available under California's wrongful death statute and for the decedent's pre-  
6 death pain and suffering.<sup>3</sup>

7 Where federal law is "deficient in the provisions necessary to furnish suitable  
8 remedies, . . . the common law, as modified and changed by the constitution and statutes  
9 of the State wherein the court having jurisdiction of [a § 1983] cause is held, so far as the  
10 same is not inconsistent with the Constitution and laws of the United States, shall be  
11 extended to and govern the said courts in the trial and disposition of the cause . . . ." See  
12 42 U.S.C. § 1988. Federal law is "deficient" on the issue of "the survival of civil rights  
13 actions under § 1983 upon the death of . . . the plaintiff." See Robertson v. Wegmann, 436  
14 U.S. 584, 589 (1978). Consequently, state law governing the survival of claims applies in  
15 actions under § 1983 unless the state law is "inconsistent with the Constitution and laws of  
16 the United States." See id. at 589-90, 594 (applying in § 1983 action Louisiana law abating  
17 civil action upon death of plaintiff where plaintiff not survived by spouse, children, parents  
18 or siblings; holding such law not inconsistent with Constitution and laws of United States).

19 "In resolving questions of inconsistency between state and federal law raised under  
20 § 1988, courts must look not only at particular federal statutes and constitutional  
21 provisions, but also at the policies expressed in them." See id. at 590 (internal quotation  
22 and alteration omitted). "The policies underlying § 1983 include compensation of persons

23  
24 <sup>2</sup>Defendants observe that plaintiffs could, rather than amend their allegations in  
25 support of municipal liability, supplement their answers to defendants' interrogatories.  
26 Defendants, however, do not contend amendment to clarify the factual basis of plaintiffs'  
27 claims is improper.

28 <sup>3</sup>Additionally, defendants oppose amendment to the extent plaintiffs have referred,  
in the proposed FAC, to substantive claims other than a claim for violation of the Fourth  
Amendment, specifically, claims for violation of substantive due process and the First  
Amendment. In reply, plaintiffs clarify that the only substantive claim plaintiffs propose to  
assert is their Fourth Amendment claim.

1 injured by deprivation of federal rights and prevention of abuses of power by those acting  
2 under color of state law." Id. at 590-91.

3 The Ninth Circuit has explained California law governing the survival of actions, as  
4 follows:

5 Section 377.34 provides that virtually all causes of action survive a  
6 decedent's death, but places several limitations on the damages recoverable  
7 from or by a decedent's estate. For example, damages for pain and suffering  
8 are expressly excluded, as are other damages not sustained or incurred by  
9 the decedent before death. However, surviving relatives of the decedent may  
bring a wrongful death action seeking to recover pecuniary losses caused by  
the death, including pecuniary support the decedent would have provided  
them, and noneconomic damages for being deprived of the decedent's  
society and comfort.

10 See Sposato v. Electronic Data Systems Corp., 188 F. 3d 1146, 1149 (9<sup>th</sup> Cir. 1999)  
11 (internal quotations, citations, and alteration omitted).

12 Plaintiffs argue that, under § 1988, both the California survival statute and wrongful  
13 death statute should be extended to and govern a claim brought, as here, on behalf of a  
14 decedent. Defendants disagree. The parties do agree, however, that the question has not  
15 been directly addressed by the Ninth Circuit.

16 Under California state law, a wrongful death claim is "not merely a continuation of  
17 the decedent's claim for personal injuries, but is an entirely new cause of action created in  
18 the heirs and based on the death of the decedent as that death inflicted injury upon them."  
19 See Larcher v. Wanless, 18 Cal. 3d 646, 656-57 (1976). The Sixth Circuit, in considering a  
20 similar statutory scheme, has held that where the state provides for both a survival action  
21 "predicated upon the decedent's claim for damages sustained during his lifetime," and a  
22 separate wrongful death action predicated upon the heirs' claim for damages "resulting  
23 from losses of prospective advantages which have been pretermitted by the wrongful death  
24 of the victim," only the survival statute is to be extended to a § 1983 claim based on a  
25 violation of the decedent's rights. See Jaco v. Bloechle, 739 F. 2d 239, 242-43 and n.4 (6<sup>th</sup>  
26 Cir. 1984) (holding claim under Ohio wrongful death law "not equivalent to decedent's  
27 personal § 1983 action"; stating Ohio's "wrongful death statute is irrelevant to the § 1988  
28 analysis"). This Court adopts the reasoning of the Sixth Circuit and, accordingly, will apply

1 only the California survival statute to plaintiffs' § 1983 claim, unless application thereof  
2 would be inconsistent with the policies underlying § 1983. See 42 U.S.C. § 1988.

3 As noted, the policies underlying § 1983 are compensation of persons injured and  
4 prevention of abuses of power. "The goal of compensating those injured by a deprivation  
5 of rights provides no basis for requiring compensation of one who is merely suing as the  
6 executor of the deceased's estate," however. See Robertson, 436 U.S. at 592; see also  
7 County of Los Angeles v. Superior Court, 21 Cal. 4<sup>th</sup> 292, 304 (1999) ("[O]ur law does not  
8 undermine the federal civil rights law's goal of compensation of persons injured by  
9 deprivation of federal rights, for California's limitation on damages affects only the estate,  
10 not the party actually injured by the constitutional deprivation.") (internal citation omitted).  
11 Consequently, the remaining policy relevant to the Court's determination of whether  
12 application of the California survival statute would be inconsistent with federal law is the  
13 policy of prevention of abuses of power.

14 Under California's survival statute, "damages recoverable are limited to the loss or  
15 damage that the decedent sustained . . . before death, including any penalties or punitive  
16 or exemplary damages that the decedent would have been entitled to recover had the  
17 decedent lived, and do not include damages for pain, suffering, or disfigurement." See  
18 Cal. Code Civ. Proc. § 377.34. If, however, such damages were the only remedies  
19 available where a Fourth Amendment claim is based on force resulting in the decedent's  
20 death, such limitation would significantly undermine § 1983's deterrence objective in the  
21 category of cases involving the most serious uses of excessive force, specifically, in those  
22 cases in which the degree of force is such that death is, or would be expected to be,  
23 almost instantaneous. See Guyton v. Phillips, 532 F. Supp. 1154, 1167 (N.D. Cal. 1981)  
24 (holding purpose underlying § 1983 is "hardly served when the police officer who acts  
25 without justification suffers a harsher penalty for injuring or maiming a victim than for killing  
26 him").

27 In such cases, as in the present case, given the short span of time between the  
28 alleged Fourth Amendment violation and death, there would no award for lost wages and

1 any award for medical costs would be minimal. As a consequence, recovery in the  
2 resulting survival action is, essentially, limited to an award of punitive damages. Punitive  
3 damages, unlike compensatory damages, cannot be recovered against a municipality, see  
4 City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 271 (1981), thereby providing little to  
5 no deterrence with respect to public entities. With respect to individual defendants, the  
6 amount of any punitive damages award is "governed by the financial condition of the  
7 individual officer without regard to the pain and suffering he may have inflicted on the  
8 decedent," see Garcia v. Whitehead, 961 F. Supp. 230, 233 (C.D. Cal. 1997) (internal  
9 quotation and citation omitted), and, as a practical matter, any such award may not be  
10 collectible, see Cal. Gov't Code § 825(b) (providing public entity may not indemnify  
11 employee for punitive damage award unless, inter alia, employee acted "in good faith,  
12 without actual malice").

13 In sum, the Court finds that in excessive force cases resulting in death, application  
14 of only the California survival statute, with its concomitant limitations on the types of  
15 recovery available to the estate of the decedent, would be inconsistent with the deterrence  
16 policy underlying § 1983. Consequently, the Court must "fashion a remedy that will fit the  
17 penalty to the deprivation and will serve as a deterrent to abusive conduct in the future."  
18 See Guyton, 532 F. Supp. at 1167.

19 The Court finds that the proper remedy, i.e., a remedy that will serve, in a  
20 meaningful way, the deterrence purpose underlying § 1983, is to allow for recovery of the  
21 types of damages available under both the California survival and wrongful death statutes.  
22 See, e.g., Brazier v. Cherry, 293 F. 2d 401, 409 (5<sup>th</sup> Cir. 1961) (holding, for purposes of  
23 § 1983 claim based on injury to decedent, damages available under state survival statute  
24 and wrongful death statute are available "[t]o make the policy of the Civil Rights Statutes  
25 fully effectual").<sup>4</sup> Such a remedy is the usual "penalty" provided by California law for  
26

27 <sup>4</sup>It is unclear whether the Fifth Circuit, in Brazier, held that both the state survival  
28 statute and the wrongful death statute should, pursuant to § 1988, be "extended to and  
govern" in a § 1983 case, or whether the Fifth Circuit determined that the remedies  
available under both state statutes were necessary in order to avoid an inconsistency with

1 wrongful conduct that causes death, and provides a safeguard against double recovery.  
2 See Sposato, 188 F. 3d at 1149 (referring to California's survival statute and wrongful  
3 death statutes as "comprehensive survival statutes"; observing those "statutory provisions  
4 preclude double recovery for the survivors of a decedent in cases where the decedent's  
5 injury is both the foundation of the decedent's cause of action in tort and the cause of the  
6 decedent's death"); see also Yamaha Motor Corp., U.S.A. v. Calhoun, 516 U.S. 199, 204,  
7 216 (1996) (holding proper remedy in federal maritime action based on decedent's death  
8 was forum state's "wrongful-death and survival statutes"); Nev. Rev. Stat. § 41.100(3)  
9 (providing, under Nevada state law, "when a person who has a cause of action dies before  
10 judgment, the damages recoverable by his executor or administrator include all losses or  
11 damages which the decedent incurred or sustained before his death, . . . and loss of  
12 probable support, companionship, society, comfort and consortium").

13       Although some courts have concluded that the deficient remedies provided by the  
14 forum state's survival statute should be supplemented by a remedy measured by the  
15 "amount that fairly represents the loss of human life," see Guyton, 532 F. Supp. at 1167-  
16 68, or, stated otherwise, "the loss of the [decedent's] life and enjoyment thereof," see Bell  
17 v. City of Milwaukee, 746 F. 2d 1205, 1234, 1240 (7<sup>th</sup> Cir. 1984), this type of remedy,  
18 sometimes referred to as "hedonic damages," has been the subject of extensive criticism,  
19 see, e.g., Loth v. Truck-A-Way Corp., 60 Cal. App. 4<sup>th</sup> 757, 766-68 (1998) (citing cases, law  
20 review articles, and annotations criticizing hedonic damages; citing cases excluding expert  
21 testimony purporting to "supply a formula for computing the value of life and, by  
22 extrapolation, the value of the loss of enjoyment of life"). Moreover, assuming all the  
23 remedies provided by California's survival and wrongful death statutes will be available in  
24 the present case in the event liability is established, there is no need to provide for  
25 additional remedies in order to effectuate the purposes underlying § 1983.

26       Finally, the Court addresses plaintiffs' argument that they should be allowed to seek  
27  
28 the purposes underlying § 1983. In either event, the result is the same.



1 recovery of the decedent's pre-death pain and suffering. As noted, under California's  
2 survival statute, such damages are not recoverable. See Cal. Code Civ. Proc. § 377.34.  
3 Courts have differed, however, as to whether damages for the decedent's pre-death pain  
4 and suffering are recoverable in a § 1983 case where, as here, the death is alleged to have  
5 occurred as a result of a deprivation of civil rights. Compare Venerable v. City of  
6 Sacramento, 185 F. Supp. 2d 1128, 1133 (E.D. Cal. 2002) (holding restrictions set forth in  
7 § 377.34 not inconsistent with federal law), and Garcia v. Superior Court, 42 Cal. App. 4<sup>th</sup>  
8 177, 586-87 (1996) (same), with Garcia v. Whitehead, 961 F. Supp. at 233 (holding  
9 restrictions in § 377.34 inconsistent with federal law), and Guyton, 532 F. Supp. at 1166  
10 (same).

11       Having reviewed the cases cited above, as well as others bearing on the issue, the  
12 Court adopts the reasoning set forth in Venerable. In particular, the Court observes, as did  
13 the district court in Venerable, that the "possible array of damages" in § 1983 cases  
14 provides more than adequate deterrence against abuses of power by those acting under  
15 color of state law. See Venerable, 185 F. Supp. 2d at 1132 and n. 7. First, as discussed  
16 above, those damages include all of the damages set forth in California's wrongful death  
17 statute. See, e.g., Sposato, 188 F. 3d at 1149 (setting forth types of compensatory  
18 damages available under California's wrongful death statute). Additionally, although not  
19 available in all cases, the potential damages include: (1) "the deceased plaintiff's lost  
20 wages, medical expenses, and any other pecuniary losses incurred before death," see  
21 County of Los Angeles, 21 Cal. 4<sup>th</sup> at 304 (setting forth types of compensatory damages  
22 available under California's survival statute); (2) punitive damages, see Smith v. Wade,  
23 461 U.S. 30, 56 (1983) (holding, plaintiff, upon proper showing, may recover award of  
24 punitive damages in § 1983 action); and (3) attorney's fees and costs, see Carey v.  
25 Piphus, 435 U.S. 243, 257 n. 11 (1978) (noting "potential liability of § 1983 defendants for  
26 attorney's fees").

27       Accordingly, the Court finds it unnecessary, to effectuate the purposes underlying  
28 § 1983, to allow for recovery of the decedent's pre-death pain and suffering and,

1 consequently, that any amendment to include damages for the decedent's pre-death pain  
2 and suffering would be futile.

3 **CONCLUSION**

4 For the reasons set forth above, plaintiffs' motion to amend is hereby GRANTED in  
5 part and DENIED in part, as follows:

6 1. Plaintiffs' motion to file a First Amended Complaint is GRANTED, to the extent  
7 plaintiffs seek to amend to clarify that their claims are based only on the Fourth  
8 Amendment, to add new allegations pertaining to the use of force and the basis for  
9 municipal liability, and to include damages available under California's survival and  
10 wrongful death statutes.

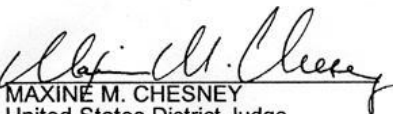
11 2. To the extent plaintiffs seek to include damages not available under California's  
12 survival or wrongful death statutes, the motion is DENIED.

13 3. On July 6, 2004, plaintiffs filed a FAC in conformity with the Court's original order  
14 granting in part and denying in part their motion to file a FAC. Because the instant  
15 amended order reaches the same result as the Court's original order, it is unnecessary for  
16 plaintiffs to refile the FAC.

17 4. For the reasons stated in the Order Granting Defendants' Motion for Order  
18 Certifying Order for Interlocutory Appeal, filed concurrently herewith, the Court finds that  
19 this order involves a controlling question of law as to which there is substantial ground for  
20 difference of opinion and that an immediate appeal from the order may materially advance  
21 the ultimate termination of the litigation.

22  
23 **IT IS SO ORDERED.**

24  
25 Dated: DEC 29 2004

26   
27 MAXINE M. CHESNEY  
28 United States District Judge



UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

Wilkins et al,  
Plaintiff,

Case Number: CV01-01402 MMC

**CERTIFICATE OF SERVICE**

v.

City of Oakland et al,  
Defendant.

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on December 29, 2004, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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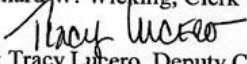
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Dated: December 29, 2004

Richard W. Wieking, Clerk

  
By: Tracy Lucero, Deputy Clerk