

Supreme Court Case no. S156334
2d Civil No. B194373

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BOSS PERRYMAN, et al.,

Plaintiffs and Petitioners,

vs.

COUNTY OF LOS ANGELES, et al.,

Defendants and Respondents.

Appeal from the Superior Court of Los Angeles County
Superior Court Case No. BC 351404
Honorable Elizabeth A. Grimes, Judge

ANSWER TO PETITION FOR REVIEW

LEWIS, BRISBOIS, BISGAARD & SMITH, LLP
LAURA INLOW, SBN 130584
221 North Figueroa Street, Suite 1200
Los Angeles, California 90012
213-250-1800 // Fax 213-250-7900

GREINES, MARTIN, STEIN & RICHLAND LLP
MARTIN STEIN, SBN 38900
CAROLYN OILL, SBN 130721
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036
310-859-7811 // Fax 310-276-5261

Attorneys for Respondent COUNTY OF LOS ANGELES

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INTRODUCTION

Plaintiffs and petitioners contend the Los Angeles County Coroner's office had a mandatory duty to preserve and refrigerate a dead body in its custody in a condition that is subjectively amenable to public viewing. In a published opinion, the Court of Appeal, Second Appellate District, Division Two, held that plaintiffs failed to identify a statute as the source of this purported duty and, therefore, affirmed the judgment in the County's favor.

Plaintiffs now seek review of that decision in this court, arguing that the court of appeal's opinion goes against "over 100 years of social and legal history," conflicts with other published opinions, and violates plaintiffs' federal civil rights. As we now explain, plaintiffs have not stated a valid ground for review.

STATEMENT OF THE CASE AND RELEVANT FACTS

Eugene Perryman died on August 3, 2005, at Los Angeles County/USC Medical Center after suffering a gunshot wound on June 25, 2005. Plaintiffs – the decedent's surviving wife, children and siblings – did not pick up the body until August 11, by which time, plaintiffs contend, the body was decomposed and "unrecognizable." (Clerk's Transcript ["CT"] 8.) Their complaint, filed April 26, 2006 (CT 4), alleged generally that the County of Los Angeles ("the County") was negligent in failing "to store, refrigerate, preserve, or otherwise properly care for" the body (CT 10), in violation of "mandatory duties under Health and Safety Code §§ 7100 *et seq.*" (CT 8).

The County demurred to the complaint on the ground that it failed to allege a statutory duty on the part of the County to "ensure that the remains of plaintiffs' decedent would be in a condition subjectively amenable to a

public viewing and open casket” (CT 30) or to train its employees to do so (CT 32-33). The trial court sustained the demurrer with 20 days leave to amend (CT 66-67), but plaintiffs’ first amended complaint (CT 69), was not significantly different from the original (CT 69), so the County demurred again (CT 80, 83). This time the demurrer was sustained without leave to amend and the action was dismissed on September 28, 2006. (CT 127-128.) Plaintiff appealed, and in a published opinion on July 31, 2007, the court of appeal affirmed the judgment against plaintiffs, finding no mandatory duty on the part of the County or its coroner to preserve dead bodies in its possession in any particular condition. (Slip Opn., p. 6.) Plaintiffs seek review of that decision.

LEGAL DISCUSSION

PLAINTIFFS HAVE NOT DEMONSTRATED A VALID GROUND FOR REVIEW BY THIS COURT.

As pertinent here, this court may grant review of a court of appeal decision “[w]hen necessary to secure uniformity of decision or to settle an important question of law.” (Cal. Rules Court, rule 8.500(b).) Plaintiffs contend that review should be granted in this case: (1) to secure uniformity of decision – i.e., to clarify whether California Health & Safety Code section 7100 imposes a duty on a county coroner “to not negligently handle/preserve a decedent’s remains”; and (2) to settle an important question of law – namely, to ensure that California does not “infringe a Plaintiff’s right to bring a federal civil rights claim under 42 U.S.C. Section 1983.” (Petition for Review [“PR”] 2-3.) As we will explain, there is nothing for this court to review.

A. There Is No Dispute Among The Courts Of Appeal: Section 7100 Does Not Impose A Mandatory Duty On The Coroner To Preserve A Dead Body.

Government Code section 815 requires that government tort liability be based on a statute. (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890, 895-896.) Government Code section 815.6 provides that a public entity is liable for injury caused by its failure to discharge a mandatory duty imposed by statute and designed to protect against the risk of that injury. A plaintiff asserting a mandatory duty on the part of a public entity “‘must specifically allege the applicable statute or regulation.’” (*Brenneman v. State of California* (1989) 208 Cal.App.3d 812, 817.)

Plaintiffs argue here, as they did in the trial court and in the court of appeal, that Health and Safety Code sections 7100, *et seq.*, impose a duty on the part of the coroner's office "to act with reasonable care toward the remains of a decedent" (PR 7) and that an *implied* corollary to that duty is a duty to take affirmative steps to preserve and/or refrigerate dead bodies in its custody for an indefinite period of time, until the family retrieves the body. (PR 10; AOB 15.) This contention was properly rejected by the court of appeal. First, plaintiffs must identify a particular statute to establish a mandatory duty. Merely pointing to a series of statutes (e.g., sections 7100, *et seq.*) does not satisfy this requirement. Second, the duty imposed by statute must be "*obligatory*, rather than merely discretionary or permissive," and "it must *require*, rather than merely authorize or permit, that a particular action be taken or not taken." (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 498.) As the court of appeal aptly explained in its opinion, Health and Safety Code section 7100 only "establishes only an orderly process" for disposing of human remains. (Slip opn., p. 4.) The statute neither mentions the coroner nor directs the coroner to take, or refrain from taking, any particular action. (*Ibid.*)

Indeed, plaintiffs have previously admitted in this litigation that the Health and Safety Code does *not* expressly impose a duty to preserve dead bodies on the coroner, calling the issue one of "first impression" in the court of appeal. (AOB 9, 15.) Their contention now, before this court, that somehow the court of appeal *ignored* well-settled law in this area rings untrue.

Plaintiffs contend one of the purposes of section 7100 is to ensure that the family of the deceased can dispose of the body as they wish. (PR 9-10.) But the primary purpose of the statute is to protect the County's treasury by imposing financial responsibility for disposal of dead bodies on someone other than the government. (*Spates v. Dameron Hosp. Assn.*

(2003) 114 Cal.App.4th 208, 219.) Moreover, the statute gives the right and responsibility for disposing of the body first to the “agent under a power of attorney for health care” for the decedent – someone who may not be a relative. (Health & Saf. Code, § 7100.) It would be inconsistent to say that the family has a right to well-preserved remains if someone else may very well have the statutory right and duty to dispose of those remains.

Plaintiffs’ contention that the family has the primary right to protect the dead body is also inconsistent with the statutes that give the coroner substantial rights to custody and control of the remains that supersede any familial rights. For example, section 7102 permits the coroner to possess the body for purposes of investigating the cause of death, “until the conclusion of the autopsy or medical investigation,” and requires any person who possesses the remains to surrender them to the coroner upon demand. (Health & Saf. Code, § 7102.) The coroner is required to investigate any number of suspicious deaths, but it is within his discretion to determine the extent of the inquiry and he may even exhume a previously buried body for investigation, without the family’s consent. (Gov. Code, § 27491.) The coroner is entitled to examine the body at the scene of death and to determine whether to take custody of it or turn it over to the next of kin. (Gov. Code, § 27491.2, subd. (a).) When a coroner’s inquiry is required, no one – not even family members – is permitted to disturb or remove the body from the place of death without the coroner’s permission. (*Id.*, subd. (b).) If it appears that the death may be related to or the result of a crime, custody and control of the body “shall remain with the coroner at all times.” (Gov. Code, § 27491.3, subd. (c).) The coroner also has “the right to retain parts of the body . . . removed at the time of autopsy . . . as may, in the opinion of the coroner, be necessary or advisable for scientific investigation and training.” (Gov. Code, § 27491.45, subd. (a)(1).) That

the coroner has all of these rights necessarily conflicts with the idea that the family has a right to a perfectly preserved body.

1. Case law does not support plaintiffs' position.

Plaintiffs contend that the court of appeal's decision goes against "more than 100 years of social and legal history regarding the respect accorded the remains of the dead, and the rights of their loved ones to bury the remains as they so desire." (PR 5.) However, nowhere in their petition have plaintiffs pointed to a single case – let alone a 100-year history of cases – that talk about a family's purported right to a well-preserved body for disposal.

Quoting from *Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893, plaintiffs argue that "'statutes governing the disposition of human remains [such as section 7100] . . . were enacted to prevent *the type of harm alleged here* to the statutory right holders.'" (PR 7, emphasis added.) But they don't identify the "type of harm" alleged in *Christensen*, which is very different from the "type of harm" alleged in this case. *Christensen* involved a contract between a private mortuary and the family of the deceased and the breach of that contract by the mortuary when it commingled ashes from several bodies and sold body parts and organs to a biological supply company without the family's consent. (54 Cal.3d at pp. 878-879.) The instant case is completely inapposite: It involves: (1) a public entity, not a private mortuary; (2) no contract and, therefore, no contractual duty; and (3) no commingling of bodies or sale of body parts. Plaintiffs in this case were not denied the right or responsibility to dispose of their loved one's body. They complain only that they were denied the "right" to a better body. *Christensen* doesn't promise them such a right.

Plaintiffs also rely on *Davila v. County of Los Angeles* (1996) 50 Cal.App.4th 137, 142-143, in which the coroner cremated the body without attempting first to locate the family. The court there merely held that a coroner has a duty *under Government Code section 27471* “to act with reasonable diligence in attempting to identify a body placed in his custody and then to attempt with reasonable diligence to locate some family member.” (PR 9.) The instant case does not involve section 27471, or the cremation of a body, or the failure of the coroner to contact the family. Thus, *Davila* does not help plaintiffs either.

Plaintiffs also erroneously rely on *Quesada v. Oak Hill Improvement Co.* (1989) 213 Cal.App.3d 596. (PR 7-8; AOB 13.) In that case, the county delivered the wrong body to the funeral home for burial. Even after the error was pointed out, the county denied that it was the wrong body. Days after the burial of the other body, the county admitted the mix-up and the mortuary exhumed the other body and buried the correct one. (213 Cal.App.3d at p. 600.) In holding that the plaintiffs had stated a claim for negligent mishandling of a corpse, the court noted that “the body itself suffers no legally cognizable damage by virtue of a defendant’s claimed negligence.” (*Id.* at p. 603) Rather, it was “the loss or misplacement of the deceased’s body, the failure to provide religious or spiritual rites to the deceased, and improper interment of another” that was actionable in that case. (*Id.* at p. 605.) Nothing of the sort happened here.

2. Public policy considerations do not support plaintiffs' position.

Unable to find a statute on which to hang their hats, plaintiffs make several public policy arguments. They contend this court should impose a duty on the County coroner's office to keep dead bodies in a "properly cooled refrigerator" because to do so would not be overly burdensome. (PR 10-11.) This goes way beyond the question presented in this appeal: The question is not whether a duty *should* be imposed on the coroner's office, but whether a statute *actually* imposes such a duty. Plaintiffs have already admitted that it does not, and all the policy arguments in the world cannot change that.

Nevertheless, plaintiffs warn that, in failing to hold the coroner's office liable for the decomposition of their relative's body, the court of appeal's opinion in this case will cause "a coroner's office [to] stack bodies in a hallway or room, leave them unrefrigerated, or in other ways cause damage to the bodies, without any consequences." (PR 10.) This is nonsense. As plaintiffs correctly note, such practices could quickly turn into a public health hazard and a nightmare for the coroner's office. (*Ibid.*) Plaintiffs have not offered any reason – let alone a credible reason – why it would ever work to the coroner's benefit to leave rotting bodies around.

Finally, plaintiffs ask whether a plaintiff is denied *any* remedy against the coroner's office for failure to preserve a body. (PR 1.) This is another wrong question. Whether a coroner can ever be held liable for damage to a corpse is not the issue: The only question is whether a statute imposes a mandatory duty on the coroner's office to take affirmative steps to prevent natural decomposition of a dead body in its custody. The court of appeal properly concluded that no such duty exists.

B. Plaintiffs Have Not Identified Any Facts That Would Support A Claim For Violation Of Civil Rights.

Plaintiffs contend that review is needed to ensure that California does not impede their federal civil rights under 42 U.S.C. section 1983. (PR 12-13.) Section 1983 provides that any person who, under color of state law, deprives another person of any rights, privileges, or immunities secured by the U.S. Constitution shall be civilly liable to the injured person. (42 U.S.C. § 1983.) Section 1983 does not give rise to any substantive rights itself; it merely describes a remedy for violation of constitutionally protected rights enunciated elsewhere. (*Chapman v. Houston Welfare Rights Org.* (1979) 441 U.S. 600, 617-618 [60 L.Ed.2d 508, 99 S.Ct. 1905, 1916]; *Baker v. McCollan* (1979) 443 U.S. 137, 144, fn. 3 [61 L.Ed.2d 433, 99 S.Ct. 2689, 2694].)

As a threshold matter, to state a claim for violation of civil rights, plaintiffs must allege facts that show: (1) a deprivation (2) of constitutionally protected property (3) under color of state law. (*Newman v. Sathyavaglswaran* (9th Cir. 2002) 287 F.3d 786, 789.) Plaintiffs have not come close to identifying a protected property right of which they were supposedly deprived. “Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law.” (*Baker v. McCollan, supra*, 443 U.S. at p. 146 [99 S.Ct. at p. 2695].) While the Constitution prohibits the taking of property without due process, the Constitution does not identify any “property” rights. Rather, state law determines whether there is a valid property right in a particular case. (*Wilson v. Garcia* (1985) 471 U.S. 261, 278 [85 L.Ed.2d 254, 105 S.Ct. 1938, 1948] [statute of limitations for

personal injuries in each state applies to a claim for violation of federal civil rights].)

The court of appeal here concluded that a plaintiff has no property interest in a dead body in California. At most, California recognizes “a “*quasi* property right . . . for the limited purpose of determining who shall have its custody for burial.”” (Slip Opn., p. 8.) Case law supports this conclusion, as noted in the court of appeal’s opinion, and plaintiffs’ displeasure with the holding in this case does not create a conflict for this court to review.

But even if California recognized a protected property interest in a dead body, plaintiffs still have not shown any basis for holding the County liable under section 1983. A public entity cannot be held vicariously liable for a violation of civil rights by its employees. (*Monell v. Dept. of Soc. Serv. of City of N. Y.* (1978) 436 U.S. 658, 690-691 [56 L.Ed.2d 611, 98 S.Ct. 2018, 2036].) A public entity may be held liable under section 1983 only for its own official policies or widespread customs that violate a person’s civil rights. (*Ibid.*) Plaintiffs here did not even mention *Monell*, *supra*, or the rule set forth in that case, in their opening brief in the court of appeal, and they make no attempt to identify for this court what facts they could allege to support such a claim. (AOB 18; PR 12-17.)

Plaintiffs cite *Newman v. Sathyavaglswaran*, *supra*, 287 F.3d 786, a Ninth Circuit opinion involving parents’ rights to control disposition of their dead children’s corneas. (AOB 18-21.) The court of appeal in this case refused to follow *Newman* on the ground that the Ninth Circuit erroneously concluded that California recognizes a property right in a dead body by citing California cases that do *not* recognize such a right. (Slip Opn., p. 10.) In fact, “federal decisional authority is neither binding nor controlling in matters involving state law.” (*Howard Contracting, Inc. v. G. A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 52.) Nor are

California appellate courts bound by lower federal court authority on issues of federal law. (*Venegas v. County of Los Angeles* (2004) 32 Cal.4th 820, 835 [rejecting 9th Circuit authority concerning the status of County Sheriffs as state actors for purposes of federal civil rights liability].) Thus, this court is not bound by Ninth Circuit authority either. Accordingly, any conflict between state court decisions and Ninth Circuit decisions does not create a “conflict” that this court can or should review.

CONCLUSION

The trial court correctly sustained the County’s demurrer without leave to amend and the court of appeal properly affirmed that decision. Plaintiffs have not shown any basis for this court to grant review. Accordingly, plaintiffs’ petition should be denied.

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Respectfully submitted,

LEWIS, BRISBOIS, BISGAARD & SMITH, LLP
Laura Inlow

GREINES, MARTIN, STEIN & RICHLAND LLP
Martin Stein
Carolyn Oill

Attorneys for Respondent
County of Los Angeles