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Supreme Court of Texas.
County of Dallas, Petitioner,
v.
Christopher Shawn Sempe and Carl Raymond Sempe, Sole Heirs of Charles
Ray
Sempe, Respondents.
No. 05-0022.

November 15, 2006.

Appearances:
Cynthia Keely Timms, Locke Lord Bissell & Liddell LLP, Dallas,
Texas, for petitioner.
John A. Goren, Dallas, Texas, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Don R. Willett, Harriet
O'Neill, Dale Wainwright, Paul W. Green, Phil Johnson, Nathan L. Hecht,
Scott A. Brister, and David M. Medina, Justices.

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CHIEF JUSTICE JEFFERSON: The court are now ready to hear argument
in 05- 0022 County of Dallas versus Christopher Shawn.

COURT CLERK: May it please the Court. Ms. Timms will present
argument for the petitioner. Petitioner will always reserve five
minutes for rebuttal.

ORAL ARGUMENT OF CYNTHIA KEELY TIMMS ON BEHALF OF THE PETITIONER

MS. TIMMS: Thank you. May it please the Court. My name is Cynthia
Keely Timms representing County of Dallas in this case. Fundamentally,
there are two substance of questions before the court. The first is:
whether the district court had jurisdiction over plaintiff's claims for
wrongful death remedy under 42 U.S.C. Section 1983, when Texas does not
provide for wrongful death liability against counties. And then the
section-- second substantive question is: whether the court had
jurisdiction over claimed under the Texas survival statute from the
phase of the claimed ' been shared that the action is time forth.
Before I get in to anything else in, in talking to people about his
face, I've noted that there is for most people that certainly is for me
or was for me. A lot of confusing over 1983 have rolled. So I just want
to grant you the-- in just one minute. Before 1983 thus inacted, we had

a word in which we had constitutional provision. We had constitutional rights, we had constitutional deprivation and there the story ended. So that if you were deprive at the constitutional rights. It was not fair that you have any kind of cause of action, 1983 change that after the civil war. And so it created the world in which if you were deprive of your civil rights, you had the cause of action. If you have a constitutional deprivation, you could bring the lawsuit. But the, but the cause of action that was task is a very personal one. And I, I enclosed it in with the hand-outs were is the first one under the first tab. In which you see is the cause of action to a person. It is against the person who deprive that person of their, of their constitutional rights. It allows a, a lawsuit in action equity or other proper procedure. But it is a very personal action and that is something that, that contains and proposed that actually received in a number of cases directly United States.

JUSTICE: The counties are covered by 1983 actions.

MS. TIMMS: I'm sorry.

JUSTICE: Counties are included within those defendants ...

MS. TIMMS: Yes. Under, under Monell and it isn't interesting, it shows the confusion about 1983. The, the statute was out that 400 years plus, before the United States Supreme Court. Realized for the first time, maybe it would apply against cities and counties only, only or their actual misdeeds for their policies for the procedures for, for their, for their customs that they have developed that have allowed this bad thing to happened never by-- it's never by about curious [inaudible]. There are gaps. There are very significant gaps in the statute. For one thing, it has no statute limitation. It does not provide for one. It does not say, "What it is that supposed to happened if someone dies, possessed of a life 1983 cause of action." And so that's were you get in to far, is to fill in those gaps. And, and that takes you over to the next page which is section 1988. And section 1988 recognizes that 1983 in the [inaudible] and what it does. Is it set of pro-- procedure that if those laws are deficient that you turn to the common law as modified and change by the constitution and the statutes of the state in which the cases pending And, and that is the borrowing provision. And so what we have in this case is Mr. Sempe was in jail. He died in jail. He-- you know, he, he probably could have at least to allege to a 1983 claimed. And-- but he died and so what we have here in this Court are his children who's constitutional rights were not, were not violated. It was their father's constitutional rights. So the question is: how can they be here? How can they have been ...

JUSTICE: The Fifth circuit, the Fifth circuit has said that survival action is a wrongful death claims or can be borrowed through 1988.

MS. TIMMS: Yes. And lets talk about those separately, because that's, that's very important. The Fifth circuit and the Eleventh circuit, because the original Fifth circuit case came from 1957. So now [inaudible] of the circuit has said, "You can borrow survival." The survival statute should 'been borrow the wrongful debt claimed. Now, as to wrongful debt, that is I would say, "A controversy of ruling in this Court." Because the law that gathered courts have gone the other way and has part of that personal issue. Those the-- that heirs, the survivors or the, the children, their, their rights were not violated. In, in this that theoretical difference between the survival claimed and the wrongful debt claimed. The wrongful debt claimed, I'm suing for what the bad things that happened to me.

JUSTICE: But can you think of the reason why we would want to go

against the Fifth circuit.

MS. TIMMS: I think that Fifth circuit ruling-- I think that more and more courts are going against Fifth circuit. I do recognized the problem that this Court was sitting within the Fifth circuit in the briefings ...

CHIEF JUSTICE JEFFERSON: Technically, is that why you're here instead of-- in the federal assistance. Why would-- how was this case I [inaudible] ...

MS. TIMMS: Technically, the failed to remove. That's, that's why we're here. We're we-- that was, that was the tactic that has been here today in so in Fifth circuit. But lets look at and, and there is no question throughout the United States that, that a survival, a survival claimed does float through to the airs. And, and lets talk about survival a minute because it's very important and it's over on my third tab and it's the last page of my third tab. And this is another area where I think there's a lot of confusion. First of all, the title of the statute is: Survival of a Cause of Action, plus a time for short "Thank you." Keep a calls survival claimed or survival cause of action. But it is not a new cause of action. It is not a new claimed. It is the claimed that Mr. Sempe had when he died. And what the statute does that changes the common law. And common law that, that claimed whatever his 1983 claimed were, whatever's claimed could have been would have died with it. This statute keeps us alive but that's all it does. It doesn't create a new cause of action, so that's the way this is written. It says that the cause of action does not obeyed because of the death of the injured person. And then lets look back to over to the-- I'm sorry, to the, to the statute limitations here is 16.062. And it talks about the death of the person and whose favor they maybe a cause of action is suspends the applicable statute of limitations. And so survivor statutes are simply that he had a cause of action. It does not, it does not die within anymore. It goes into his heirs. They have high-aidas su-- suspension of the statute limitations, so that they can get this state together, get the right together, whatever. And then the statute limitations huge running. On wrongful death, lets talk about the wrongful death claimed because that's, that's the very big issue in this case. If you focus back on what we cover on, on 1988 the statute itself which is under the first tab, second page. What we'll see is when it allows for borrowing. It's very precise issues shall borrow from the common law as modified in change by the constitution and the statute in the state. So that is were we look forward. And so even if we're going to say, "Yes, we can have a wrongful death claimed in this heirs." They can have their own separate independent cause of action. We go to the law of Texas. There is no, there is no federal wrongful death act of common law that should be come from. So that you're into the borrowing statute. So you go to the law of Texas and, and you brought and you see the common law. The common law has no wrongful death claimed. So then you go to the statute, and the statute that have been passed do not have a wrongful death claimed against the county. And then the constitutional provision in which there are not an issue here that I know of. So what you indict with is it fails on the second test. It was set forth and some of the supra-- Supreme Court cases on borrow. First, you'd look to the federal law to see if it's deficient. I'm not sure on wrongful death is deficient. But then, if you decide there's a deficiency, go to the state statute and see if there's something you've been borrow. The answer of Texas is "no." There's nothing that you can borrow from here.

JUSTICE: Let me, let me ask, the briefing seems confusing to me

with respect whether there was ever a cause of action against the county of a wrongful death or whether the county is in need of that action.

MS. TIMMS: Yes.

JUSTICE: It seems to me that I think in your pleadings that to fact characterized to this immunity. But it isn't actually, that they never was a claimed granted in federal of the county [inaudible]

MS. TIMMS: Right. And I think you're talking about the pleadings that were filed in the trial court. And I think they dropped the word "immunity" at some point. You have to understand that the trial court, there was more at issue then the recent issue now. They had, also there're are state borrow causes of action. But the answer to your question is: there never has been, we have never created that liability in the first place. And, and that was the purpose of tracing the statute. The fact, the 1860 when, when they first adapted a wrongful death of remedy of this very narrow in a group over time to where it is now. But it is never expanded to creating the liability against the county. So where you end up with is it fails to that second step. There just simply nothing to borrow. And the 1988 doesn't talked about what happened here.

CHIEF JUSTICE JEFFERSON: There is nothing to borrow in Martinez versus California, right?

MS. TIMMS: Martinez versus California was a -

CHIEF JUSTICE JEFFERSON: [inaudible]

MS. TIMMS: - case were I think that they rejected the cons ...

CHIEF JUSTICE JEFFERSON: The space-- the statute gave the parole board in that case. Absolute immunity and -

MS. TIMMS: Right.

CHIEF JUSTICE JEFFERSON: - the Supreme Court said, "That is not sufficient precluded claimed under section 1983?"

MS. TIMMS: Right. As I recall, the aptial of that case, there was- - that there was no liability. Isn't that right?

CHIEF JUSTICE JEFFERSON: Well, the court that-- The court found that California immunity statute in that case does not controlled its decision even though federal cause of action has being [inaudible] federal state law versus Rong 200 section 1983 cannot be immunize by state law.

MS. TIMMS: Lets talk about that for second because it's that so important concept. You see that same concept in Rose v. Hallowed which is the case of the [inaudible] Particularly, Rose v. Hallowed it was a classic deprivation or alleged deprivation of the constitutional rights. It was an Illegal Search and Seizure. Then before they did was it planned back and try to basically, remove that liability permit statute due for pursuing the 1983 claimed of federal court. But on in, in, in court of state court because it, it tried to put a, a layer of immunity of whatever you want. So that they were all immunize except, unless ruled of law had stated otherwise. I think that's the same issue in Martinez is this granting of immunity. Here, we don't have that. And, and as much as you may want to sit around and, and question of why is it that we can't sue counties for wrongful death in this Court district of a wrongful death. The answer is: we've never created the liability. It's not as if we have created liability and then go back and try to immunize it and try to protect it from unused by federal court in 1983 action is that the liability simply is not fair. There're simply nothing to borrow in the circumstances.

JUSTICE: But do we actually need to look at the wrongful death act to night that determination or do you even get beyond 1983? 'Cause it

seems to me your argument is: survival's fund, because that's the, the-- here, to see that cause, own cause of action. Wrongful death or a third parties' benefit, just that, that would-- then the plain meaning of 1983. So do you even need to examine the statute.

MS. TIMMS: If you decide that wrongful death does not fit within the meaning of 1983 and you don't have to stop right there because there is what you decided is that there's no deficiency in the federal law. There's no reason to go around and tried to fill in a gap because no one exist. It's only if you say that the Fifth circuit's decision maybe right or maybe we don't want to address -

JUSTICE: Well,

MS. TIMMS: - it.

JUSTICE: I would ...

MS. TIMMS: That's what you've been to borrowing.

JUSTICE: Think we need to give a great difference because their interpreting a federal statute.

MS. TIMMS: Yes.

JUSTICE: At no valuable point. A case to connect differently whether it's found in federal court or state court. So see that is a problem, but ...

MS. TIMMS: Yeah, I understand. And, and it is, it is if you, if you decide, I don't feel like disagreeing with Fifth circuit. Then that's when you get in to the second question of: can we even borrow to see.

JUSTICE: And do you know about how the circuits in line the-- across the country on borrowing wrongful death section?

MS. TIMMS: I think my, my brief had that it's the: Eighth, Sixth and Tenth. And then the Western District or a West Virginia. The, the district court, West Virginia saying, "No."

JUSTICE: For when that day ...

MS. TIMMS: This Fifth and the Eleventh appear to be the only ones that have really discussed it, talked about it and said, "Yes, we're going to borrow." But frankly, we trapped the nations in more recent years. If you look at Brazier versus Jerry. What you see is a case that cried out for granted. It was 1957, it was the abusive of the old self. And the-- when the court fought down to survival wrongful death. It would-- it reads almost likely. Survival wrongful death, whatever. She does a cause of action. And, and that's how they dealt with it. I think not thinking about the details of what was happened if talked about to deal with today. I see my time is up. And -

CHIEF JUSTICE JEFFERSON: [inaudible]

MS. TIMMS: - so I'm on a rest ...

CHIEF JUSTICE JEFFERSON: [inaudible] of questions. You will give beyond rebuttal.

MS. TIMMS: Thank you very much.

CHIEF JUSTICE JEFFERSON: The court is now ready to hear argument from the response.

COURT CLERK: May it please the Court. Mr. Goren will present argument from the respondent.

ORAL ARGUMENT OF JOHN A. GOREN ON BEHALF OF THE RESPONDENT

MR. GOREN: May it please the Court. My name is John Goren and I represent the respondent. The court is already pointed out to the

petitioner. What I see is the biggest problem in the case which is the Fifth circuit for forty-five years as rolled down this issue. The Court of Appeals followed Fifth circuit precedent. The district court's ...

CHIEF JUSTICE JEFFERSON: Sometimes we don't, sometimes we do.

MR. GOREN: I know you don't have to your Honor. This Court can't choose to go to otherwise, but there, there you know, it's usually the Court has committee for the Fifth Circuit says and their, their problems that are arise if the result is taskly different between state and Federal Courts. And then normally that, that presents.

JUSTICE: This states most plaintiffs not on a big risk given the Federal Court.

MR. GOREN: I, I would think not, your Honor. I think the focus needs to be however, I think, the lab the briefing got bar down maybe was I was trying to be to academic about the procedure of how you got to the result. The question really before this Court is not so much what the Court of Appeal said. It is the, the judgment of the District Court that their jurisdiction to perceive the lawsuit. And what the case was very clear about is that there has to be a significant remedy for a deprivation of rights-- civil rights under Section 1983. The rule as, as I've said in the Fifth Circuit has been that the Sempe funds act standing under the Texas wrongful death act to bring an action due to their father's death. And that the Fifth circuit has been clear cases that the only really looks to the survival and the wrongful death's statute to provide that standing. They're not-- look, apparently, not looking at the whole statute. Andrews versus ...

JUSTICE: First, we should look to, to-- we should look to who consider or you should have look to.

MR. GOREN: They're looking at who can sue not who can be sue because that's a matter of federal law. Monell says, "On section 1983, one can sue a county, a Texas county." Therefore, you don't have-- there's no gap really to be fill. When you go and look at, at state law, the course ...

JUSTICE: You seems curious that the-- that you will borrow one side and not the other.

MR. GOREN: Yes. In section 1983 says, "Borrow so far as it is not inconsistent." In fact, in section 1980-- 88, excuse me. So far as language is used twice. So far as with respect to federal law. So far as with respect to state law. So far as means you, you take as much as you can before it becomes inconsistent.

JUSTICE: So what if there, if the legislature never passed wrongful death statute to your clients wouldn't have a claimed.

MR. GOREN: No, that's not correct, your Honor. I, I'd-- I don't-- I-- There's couple ways to look to this. There has to be a remedy. Section 1983 -

JUSTICE: [inaudible]

MR. GOREN: - does not kind of crack those remedies. We're that -

JUSTICE: But ...

MR. GOREN: - what the court ...

JUSTICE: Someone they passed to survival statute but not a wrongful death. Your claims would have a survivor claimed they bring home their daddies claimed. But they wouldn't have a wrongful death that been nothing to borrow.

MR. GOREN: I think the court can go ahead and create that, that remedy of mo-- mo-- if you look at the-- for example, the Brazier versus Jerry and a lot of the other cases and they look at it for two ways. They, they compare those survival on wrongful death statute, here as said, "You have to look at both classes of, of plaintiffs because

they are different even in Texas." Other courts that have look at as if survival damages alone are, are not a significant remedy. So they look at the wrongful death type component. You can go to about three different ways of looking and how you get to the bottom line result that the bottom line result can and should be that both types of damages need to be recognize in order to have a full section 1983 remedy.

JUSTICE: I mean, what part of the statute says that, that the common law didn't recognize the wrongful death claimed if legislator didn't passed the statute. It's just that the federal constitution preempts Texas Law creates one.

MR. GOREN: The, the, the federal law says, "There needs to be remedy."

JUSTICE: Well, my-- hypothetical was there is a survival. There's a survival claimed that the kids would have if they passed to survival statute that there wasn't a wrongful death or there wasn't when the civil-- at the time of the civil war, there wasn't. In common law and so the-- we disassumed congressment to creek that cause of action that they never heard of.

MR. GOREN: Well, I, I, I think in my brief I go through the congress clearly did hear of those thirty and the thirty-seven states in 1871 had this cons of statute. There was a-- it wa-- it was the fact that the majority rule of thirty out of thirty-seven, they, they were tried to get rid of the common law rule left and right. I think that they did have within might and, and from the legislate history to put in the brief. It's clear that had in mind some kind of remedy for the wives and children of, of those chilt They-- as far as the analysis goes through, I mean, you, you got the first part which you don't have to feel look out because the court now is only looking at what it needs. That is who has standing under state law to, to bring the action or decline. It's all we're really talking about is the damage claimed under Section 1983. A second view is the Preemption or Supremacy clause view which has because of Martinez and Hollowed versus rosema so that you cannot have immunity. It's been of published. The cases are very clear. That part of the statute just doesn't even exist. And the third view is this partial borrowing that we can't adapt above down in. When I looked at the three steps, I don't see anything that says, "You just reject all state law and have to go off on your own." I think that they can take what they need because that's what the statute says are, are discussed before. The petitioner challenged us to find the case that is analogist to situation here. Texas has a unique statutory to find more can which is infused the immunity directly into the wrongful death statutory. In all of my looking and maybe the court supports to find something but I could find any other other state that was-- that had that same time though immunity and drafted directly into the statute. But I did ...

JUSTICE: [inaudible] the petitioner says that there's no case in which the county in the Fifth circuit. In which the county has been very reliable. Do you agree with that?

MR. GOREN: Maybe at the Fifth circuit but it's happened in daily at, at the district court level. And, and the court if-- I mean, the sole in cases could be found were they do it. And they have been doing it for forty-five years, your Honor.

JUSTICE: Well, the statement is all over Fifth circ-- this was not responded to have a brief. The statement in the brief on the merits was all over the Fifth circuit has discussed the liability to Texas Counties to wrongful death. On the Section 1983, it has never found the

county to be liable and I do not see if you response to that.

MR. GOREN: Up-- Well, counties have been found liable. I'm sure the cases that are read, I could put my finger on wrong one. I, to-- But as far as the wrongful death situation, I, specifically, don't remember any that, that would deal on of this issue.

JUSTICE: And just another clarification in your, in the brief that were applied. The petitioner says, "The over-right in public served this arguments whether death claimed is incorporated in Section 1983." A respect of state law is that no court has ever reached that conclusions. They never thought of that.

MR. GOREN: There are courts that-- many courts have with the thing have legislative history. They have not gone as far as to say, "It's right there at the statute but whenever they get in to this questions of, most of time they have something to borrow." And they say, "Well, it's clear that they had this in mind." So I mean that, that legislate history kind of work to two ways. I made that argument that is in there but nobody never had to go that far because they don't really have the situation that we have. And I do believed Texas is unique. I did find one case: June of this year, Eastern District of Washington, Wence versus Bobken County and the, the cite has been filed with the clerk. So you have it. There the defendant sought Summary judgment on the ground that the republic was precluded and that the pel-- plaintiff parents and sibilings lacked standing because the Washington State wrongful death and survival statute require them to be financially dependent under to see and it was conceded. They were, in other words, Washington State have a requirement. The plaintiffs have to be financially dependent. They were-- they had no standing. What did the federal court do? It determined that the, the requirement was inconsistent with the purposes in values of Section 1983 that is deterrence. Deterring government from killing people and compensation which is exactly to Robertson versus Wegmann analysis. And they further said that it was also a matter of the Supremacy clause. They rejected the standing requirement, permitted the case to go forward with wrongful death survival claimed. Now, here is the situation very similar to hours were if you read the statutory language that they're facing on. It precludes a lawsuit and what did the court do, it knocked it out.

JUSTICE: Which court was this?

MR. GOREN: Eastern District of Washington of June 27, 2006. There are some, some melar situation that more in the damage area. But this in the first one I found that it was that actually went clearly to kind of a standing argument. In, in Alabama Court, the Supreme Court rules that it's a wrongful death statute, only allows unit of damages. And for some twenty years now, the court in Alabama have been rejected that provision. They have been using the wrongful-- the, the wrongful death act in Alabama, but they knocked out the punid of provision. And they say, "You could have compensatory damages." And as Lewis versus City of Montgomery. And as June 27, 2006, Noble District Alabama, there's a 1986 case and there in the letter with to it the court. In the weeks, court that the, the court actually wrote that the stripped application, the entire state actually can be justify under the, the Robertson versus Wegmann analysis. Since the case, the way that they have framed that there're issue. This case presents the question that was left open in Robertson which is what happened if you have a, a death as a result of unconstitutional governmental conduct in Section 1983 action. But state law appeals to provide an adequate remedy of ...

JUSTICE: But wha-- why wrong with this survival cause of action

should not be liable as some run?

MR. GOREN: The course that have she-- in his some limited remedy. Most of the court-- I won't say most, there're all over the map that addressed the issue. There a-- One there is a difference in who are the beneficiaries of a survival versus a wrongful death act ...

JUSTICE: But not in, but not in this case.

MR. GOREN: At it-- Not in this case but probably in most cases there would be a difference. And the court should be adaptive ...

JUSTICE: One at, one at a time, not in this case.

MR. GOREN: Not in this case. This-- The amount of damages are would be just negligible. Could got the fight to death, bingo, not fast. No lost of income. I mean that argue get in his burial expenses, and maybe some pain and suffering for a few seconds maybe. That's it. Wa-- that doesn't provide a, a sufficient deterrence to lot of the court say because with the problem that doubts county has is their sign. We can go, tell people on the jails when go-- tell people wherever.

JUSTICE: What was that?

MR. GOREN: And we're not liable, period. No way. Under federal or, or state statute.

JUSTICE: So then probably, the damage cancelled be applicable to but that the-- in prosecutor.

MR. GOREN: That's a question to be dete-- determined. There was a decision in the Northern District to Texas three months ago that did not applied the proportionate responsibility part but that this circuit has adapted certain to damage provisions. I don't think that-- I don't think it's been a decision on, on cops for sake. There are some cases that do-- Excuse me. I think I did see a faces on Moor that addressed that issue. And, and probably, did not agreed with the cops.

JUSTICE: The petitioner cite the second sort of [inaudible] that did not borrow the cops.

MR. GOREN: May will be. I mean, but of damage is that are different issue.

JUSTICE: What?

MR. GOREN: Well, there are some differences in federal and, and, and state law. For example, I think I pointed out in the brief the federal tort claims act takes all state law. Section 1983, because of it's to those-- the court have some discretion whether there're going to a class certain parts of the state law or not. And, and mostly were this, this areas errors in the damage area.

JUSTICE: But how look at side. Assuming that the state does not, does not have some negative ambushed tort. It's a Rex law [inaudible]. Why should a severize plaintiff have a great remedy than personal injury claimed?

MR. GOREN: The question is not the state's in a most-- What Robertson versus Wagmann tells you to do is: go and look at the, at the effect of the immunity provision. Does it or, or, or whatever it is, is it-- does it sufficiently deter, does it sufficiently compensate. Now, in Robertson, you have you know, I guess it's a great case to make: well, but this is was some perfect, you know, clational brings as basically, malicious prosecution suit. Then years later before it goes to trial does. So the death has nothing to do with, with a severized violation. And, and Louisiana law has this [inaudible] of alleged and this done had no body to, to-- of the personal representative, I think did not bring the lawsuit. It didn't survive to them. It survived to, to basically, family members in this type. You know, didn't have any brothers; didn't have any sisters; didn't have any parents; didn't have

any body of in a standing lot. Are there any issue of payments, so they looked at what was the effect. I mean, that was-- wait a minute, almost everybody has one of these relatives. There's no general in his that ability. It doesn't gen-- it doesn't have an effect on deterrence on the you know, somebody that tried to figure out to find the one guy who has to know, brothers, sisters, children and uncles. I hope that-- and think come out. That's not our situation. But again, the focus is on: what is the effect on deterrence and compensation those to goes ...

JUSTICE: But they just, but they just begs the questions. When the question is: if the legislator has decided that this is an empo deterrent against tort, why shouldn't the same damage limitation and portionment on the responsibility be applied in-- as, as deterrence against some alleged.

MR. GOREN: It's not their determination. It's always remains. The third step is the, is, is, is in the Robertson versus Wagmann approached as the court goes to have it and makes this decision based on federal principles and knows federal principles call out for a, a-- an adequate or sig-- significant remedy for the by alleged. It's not the call of, of the state court.

JUSTICE: If you're going to talked about limitations and when your client's survival claimed is at time bar

MR. GOREN: The, the-- I think that the, the limitation's issue is that it's depends on when in the crook-- whe-- when the cause of action increased. We're not talking about a, a traditional survival action. We're talking about a damage component in the Section 1983 case. So the question is whether there is any case that the sons have at all, not the survival separate from, from the, from the wrongful death confinement

JUSTICE: Do you -

MR. GOREN: The ...

JUSTICE: - will you agreed-- their claims is totally derivative of their father's claimed, correct?

MR. GOREN: I think that the-- if, if derivativeness is not-- again, you get back to federal law. And to lasma the Fifth circuit adapted the Texas rules of derivativeness for in-- for the facts of that case that they very clear they didn't adapt all the derivative nature of-- But I think that the-- it also depends ...

JUSTICE: [inaudible] yes or no.

MR. GOREN: I'm sorry.

JUSTICE: Is that mean yes or no? You can't be-- it's either direct claim or derivative claim. And I never heard of [inaudible]

MR. GOREN: I, I, I, I think that a s-- a survival claim under Texas laws clearly to reliv-- derivative. Whether at the damage claim and, and is-- and as a damage claimed component of, of 1983 is totally derivative. That's not the question.

JUSTICE: Further question. Thank you, John.

MR. GOREN: Thank you, your Honor.

JUSTICE: Ms. Timms, how do we get to the limitation's quest to interlocutory appeal?

REBUTTAL ARGUMENT OF CYNTHIA KEELY TIMMS ON BEHALF OF PETITIONER

MS. TIMMS: On the-- on that survival claimed question, it is, it is the proposed as it was cited in the Court of Appeals has. And in the

brief that says here is, "A problem having to do where a-- in witness standing that the cause of action that there is no case in controversy." And it is because it is only face of the quickens. It is without dispute and I think that given that is on the face of the pleading is without dispute. And that 1983 allows a proper proceeding totally addressed. That it is proper in the circumstance to ask. Is this casement, is there're -

JUSTICE: Now ...

MS. TIMMS: - case of controversy left for us to decide because you don't mean to [inaudible]

JUSTICE: Don't-- To those who were a big fa-- big fans of pleas to the jurisdiction.

MS. TIMMS: Yes. I understand.

JUSTICE: Shall we throw limitations at everything else. That's in the rule 4. And to pleads of jurisdiction which are in the rule of [inaudible].

MS. TIMMS: I, I think in this narrow circumstances can [inaudible]

JUSTICE: This time but no, not again. Just want to make -

MS. TIMMS: Don't be spellcheck

JUSTICE: - sure.

MS. TIMMS: But, but if it is, it is on the face of the pleadings. It is without controversy and it is within the context of the 1983 action that allows for an action at law, a sue in equity or a, a proper proceedings for a [inaudible] And here is the adherent from the pleadings themselves that the survival, that the, that the survival of Mr. Sempe's cause of action had lapsed along before they had filed the lawsuit. And the-- I have a couple cases, I'll send you a couple more citations. I think one of the most from the court do courtspellcheck. But ...

JUSTICE: Ms. Timms, can I ask you a question. Earlier in, in your file argument you said, "You made a statement." You are not sure that federal law did not take care for wrongful death that I'm-- that I-- we're talking about borrowing and you said, "Something might have come that it made me misunderstood that you are not sure that the federal law did not take care or that we were as completely missing the sovereign federal law or the wrongful death claimed under 1983."

MS. TIMMS: I, I, I have never -

JUSTICE: Did I misunderstood on that ...

MS. TIMMS: - be sure of what I'm said but, but when I probably, hopefully was trying to say was that in federal law, there is no common wrongful death, you know, a cause of action.

JUSTICE: And it's not your position that they maybe under 1983 independent state law. That is -

MS. TIMMS: No ...

JUSTICE: - not what you have been decided ...

MS. TIMMS: No, that is not what I'm going to say. Getting back to the Fifth circuit. The Fifth circuit has never-- wait, go back to Prezier versus [inaudible], okay, wrongful death actions that they have never addressed and they never had liability against the Texas county. And they always reversed on another grounds but there's never been liability against the Texas county. In the decisions that you see, they've never discussed this particular issue of the problem with the Texas wrongful death act not allowing the plaintiff against the county. It was a brief in before the Fifth circuit in the Angularard decision but the Fifth circuit did not refer to that discussion at all and that ended up reversing the liability against the county on, on the merits as supposed to own this argument. But I don't think there would be any

conflict with the Fifth circuit or a decision to come from this court that he cannot pursue a wrongful death action under 1983 against the Texas county. Robertson versus Wagmann is an exam-- example of how you borrow because at, at no court in that process. The district court, the Court of Appeal or the Supreme Court ever suggested that we rewrite the, the provision of probably reasons in that statute. So it would have been very easy to just inter litigate just exactly liked what happened here. That's all they need to do, do, maybe out of word. But that did not have and it was-- the question was: do we borrow or do we not? And the, the answer from the Supreme Court was borrowing as for damages. The United States Supreme Court has step in and, and has laid out some rules on damages that when you get in to those rules, they will, they will overruled any of the, of the state. Provision is worth limited but they've gotten into. They allowed, they allowed exemplary damages in general but not as the cities or counties and that's an overruled. We would asked who have been to court reversed and render that the [inaudible] diction replacement. Thank you very much.

JUSTICE Ms. Timms?

MS. TIMMS: Yes?

JUSTICE: Just for the record, I'm just-- someone asked you if pleads to the jurisdiction under rule that pointed to rule 85.
[inaudible]

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