COURT OF APPEALS OF WISCONSIN
DISTRICT IV

CONNIE ANNE SHAW,

Plaintiff-Appellant,

vs. Appeal No. 03-2316

GREG LEATHERBERRY,
ROGER L. FINCH, AND
AMY ELVE,

Defendants-Respondents.

Appeal From The Circuit Court for Dane County
Case Number 98-CV-2857
Honorable Gerald C. Nichol, Presiding

NONPARTY BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, INC.

G. Michael Halfenger (WBN 1024062)
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wis. 53202-5306
(414) 271-2400

Laurence J. Dupuis (WBN 1029261)
ACLU OF WISCONSIN FOUNDATION, INC.
207 E. Buffalo Street, #325
Milwaukee, Wis. 53202
(414) 272-4032

Attorneys for the American Civil Liberties Union of Wisconsin Foundation, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

ARGUMENT 2

I. State Law Principles Require the Ordinary Civil Burden—Preponderance of the Evidence—in §1983 Actions................... 3

A. Wisconsin Principles Determine the Burden of Proof Applicable to Statutory Claims Based on the Statute's Purposes. 3

B. Wisconsin's Burden of Proof Principles Require Use of the Ordinary Civil Burden in §1983 Actions. 5

1. Section 1983 protects federal civil rights by authorizing private actions.............................. 6

2. The middle burden of proof is inconsistent with §1983's purposes.. 8

II. Federal Law Requires Application of the Ordinary Civil Burden of Proof in §1983 Actions. 9

A. The Burden of Proof in §1983 Actions is an Outcome-Determining Substantive Rule Governed by Federal Law. 12

1. The burden of proof is a substantive rule. 12

2. The deputies' argument that a higher burden protects police officers demonstrates the rule's substantive effect. 13

B. The Middle Burden of Proof Would Impermissibly Burden §1983 Rights Adjudicated in State Court........ 16

1. The middle burden of proof undermines §1983's objectives. 17

2. A heightened burden of proof would result in non-uniform application of §1983 in Wisconsin..................................... 19

CONCLUSION... 20

FORM AND LENGTH CERTIFICATION 22

CERTIFICATE OF FILING..................................... 23

CERTIFICATE OF SERVICE.................................. 24

TABLE OF AUTHORITIES

CASES

Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc., 190 Wis. 2d 650, 529 N.W.2d 905 (1995) 3, 4, 5, 8, 9, 19

Casteel v. Vaade, 167 Wis. 2d 1, 481 N.W.2d 476 (1992) 10

Crawford-El v. Britton, 523 U.S. 574 (1998) 10, 11, 17, 18

Felder v. Casey, 487 U.S. 131 (1988) 6, 9, 10, 13, 16, 17, 18, 19

Garrett v. Moore-McCormack Co., 317 U.S. 239 (1942) 13

Howlett v. Rose, 496 U.S. 356 (1990) 15, 16

Johnson v. Jones, 515 U.S. 304 (1995) 15

Lacy v. Berge, 921 F. Supp. 600 (E.D. Wis. 1996) 10

McNair v. Coffey, 234 F.3d 352 (7th Cir. 2000), *vacated on other grounds,* 533 U.S. 925 (2001) 10, 11, 12, 14, 15

McNair v. Coffey, 279 F.3d 463 (7th Cir. 2002)........ 14

Owen v. City of Independence, 445 U.S. 622 (1980) 7, 8

Sampson v. Channell, 110 F.2d 754 (1st Cir. 1940) 12

001.1626717

Saucier v. Katz, 533 U.S. 194 (2001)........................ 14

Stone v. City of Chicago, 738 F.2d 896 (7th Cir. 1984) 10

Wangen v. Ford Motor Co., 97 Wis. 2d 260, 294 N.W.2d 437 (1980) 4

Wilson v. Garcia, 471 U.S. 261 (1985) 7

Wilson v. Layne, 526 U.S. 603 (1999) 14

Wood v. Strickland, 420 U.S. 308 (1975)................. 15

Wyatt v. Cole, 504 U.S. 158 (1992)........................ 6, 17

STATUTES

42 U.S.C. §1983..passim

INTRODUCTION

Plaintiff Connie Shaw alleges that three Dane County sheriff's deputies violated her constitutional rights when they forcibly stripped her in a Dane County Jail cell. Seeking redress, she filed an action under 42 U.S.C. §1983 in the circuit court.

At trial, the court required her to meet the clear and convincing standard of proof, rather than the lesser preponderance of the evidence standard applicable to §1983 actions in federal court. The jury ruled for the defendants.

This error in raising the evidentiary bar too high is likely to insulate constitutional violations systematically. It will also tend to drive §1983 cases out of state courts, where plaintiffs are entitled to bring them. The American Civil Liberties Union of Wisconsin Foundation, Inc., urges reversal and a new trial.

ARGUMENT

In addressing the question presented—whether a plaintiff making a civil rights claim under 42 U.S.C. §1983 in state court must prove her case by preponderance of the evidence (the "ordinary civil burden") or by clear and convincing evidence (the "middle burden")—the parties differ principally on choice of law: Shaw argues that federal law applies and requires the ordinary burden; the deputies contend that state law applies and requires the middle burden.

This brief first explains that there is no conflict: state law principles require Wisconsin state courts to apply the ordinary civil burden of proof in §1983 actions. It next explains that interpreting state law to require the middle burden in §1983 cases would create a conflict with federal law that must be resolved by applying the federal standard.

I. STATE LAW PRINCIPLES REQUIRE THE ORDINARY CIVIL BURDEN—PREPONDERANCE OF THE EVIDENCE—IN §1983 ACTIONS.

A. Wisconsin Principles Determine the Burden of Proof Applicable to Statutory Claims Based on the Statute's Purposes.

Wisconsin law determines what burden of proof applies to a statutory claim by looking to the statute's purposes. *Carlson & Erickson Builders, Inc. v. Lampert Yards, Inc.*, 190 Wis. 2d 650, 658, 661-62, 529 N.W.2d 905, 908-09 (1995). That principle requires application of the ordinary civil burden in §1983 litigation.

In *Carlson*, Lampert Yards contended that the middle burden of proof should be used in adjudicating claims under the Wisconsin antitrust law, Chapter 133. Its arguments were similar to those relied on by the deputies here, that Wisconsin uses the middle burden for certain intentional tort claims, so statutory claims having arguably analogous elements should use the same burden. Specifically, Lampert

Yards argued that use of the middle burden in actions involving "punitive damages, conduct that could be prosecuted as a crime, and allegations of fraud, and undue influence" suggested application of the middle burden to statutory antitrust claims. *Id.* at 659-61, 529 N.W.2d at 908-09. As do the deputies here, it contended that, like intentional tort claims, the statutory claim at issue involved "matters [that] are more serious than the factual issues in the ordinary civil case and fall within 'certain classes of acts for which stigma attaches.'" *Id.* at 660, 529 N.W.2d at 908 (quoting *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 300, 294 N.W.2d 437, 458 (1980)).

Our Supreme Court rejected the analogy and looked instead to the purposes of Chapter 133's private civil remedy: "the court must examine the cases imposing the middle burden of proof—imposing a barrier to a claimant's relief—in the context of the purpose of [a] private, civil antitrust action." 190 Wis. 2d at 661-62, 529 N.W.2d at 909. The Court

concluded that the legislature's purpose was to "encourage private enforcement" and to "supplement[] the government's limited resources." *Id.* at 663, 529 N.W.2d at 910. This "longstanding policy of encouraging vigorous private enforcement," *id.* at 664, 529 N.W.2d at 910,[1] reasoned the Court, required applying the ordinary civil burden, because doing so "bolsters the legislative purpose of the antitrust statutes." *Id.*

B. Wisconsin's Burden of Proof Principles Require Use of the Ordinary Civil Burden in §1983 Actions.

The middle burden of proof is as inconsistent with §1983's purposes as it is with those of Chapter 133.

---

[1] Unless noted, all internal quotations and footnotes are omitted.

1. Section 1983 protects federal civil rights by authorizing private actions.

In 1871, Congress enacted what is now §1983 "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). As the United States Supreme Court has stated repeatedly, §1983 provides a "uniquely federal remedy." *Felder v. Casey*, 487 U.S. 131, 139 (1988). Perceiving that government protection of civil rights was inadequate, Congress provided for private enforcement, making liable for damages any person acting under color of state law that infringes rights "secured by the Constitution and laws of the Nation." *Id.*

Section 1983's private claim continues to serve as the principal means of protecting a wide variety of civil rights, as the Supreme Court has explained:

> [C]onstitutional claims that have been alleged under § 1983 would encompass numerous and diverse topics and subtopics: discrimination in public employment on the basis of race or the exercise of First Amendment rights, discharge or demotion without procedural due process, mistreatment of schoolchildren, deliberate indifference to the medical needs of prison inmates, the seizure of chattels without advance notice or sufficient opportunity to be heard – to identify only a few.

Wilson v. Garcia, 471 U.S. 261, 273 (1985). To this day, §1983 serves as the principal legal protection from governmental abuses.

Importantly, §1983's utility in safeguarding individual rights far exceeds the compensatory and injunctive relief it provides in individual cases. The existence of that relief creates incentives for governmental actors to develop training programs, policies, and procedures calculated to ensure behavior that protects, rather than endangers, the civil liberties of all citizens. *Cf. Owen v. City of*

Independence, 445 U.S. 622, 652 (1980) (reasoning that §1983 actions may cause "those in a policymaking position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights").

2. The middle burden of proof is inconsistent with §1983's purposes.

As the Court explained in *Carlson*, application of the middle burden of proof systematically favors defendants: "The middle burden . . . expresses a preference for the defendant's interests." 190 Wis. 2d at 664, 529 N.W.2d at 910. On the other hand, "[t]he ordinary civil burden of proof standard allows both parties to share the risk of error roughly in equal fashion." *Id.* The Court refused to apply the middle burden to Chapter 133 claims because doing so "would impede the private litigant and might undermine the enforcement of the antitrust laws by

private litigants, contrary to the legislative intent." *Id*.

By similarly impeding Shaw in litigating her §1983 claim, the court below erred. Given that §1983's very purpose is to provide a private cause of action for federal law violations, *Carlson*'s approach to determining the burden of proof applicable to statutory claims requires Wisconsin courts to apply the ordinary civil burden in §1983 actions.

II. FEDERAL LAW REQUIRES APPLICATION OF THE ORDINARY CIVIL BURDEN OF PROOF IN §1983 ACTIONS.

The Supreme Court explained in *Felder* that, although "States may establish the rules of procedure governing litigation in their own courts," 487 U.S. at 138, federal law is trump to state rules where: (1) the rule is substantive, rather than procedural, (2) application of the state rule would burden the §1983 litigant in a manner inconsistent with §1983's purposes, and (3) the application of the state rule "will frequently and predictably produce different

outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court," *id*. at 141. *See also Casteel v. Vaade,* 167 Wis. 2d 1, 13-14, 481 N.W.2d 476, 481 (1992).

As with other civil actions, federal courts consistently require plaintiffs to prove their §1983 claim by a preponderance of the evidence. *See, e.g., Crawford-El v. Britton*, 523 U.S. 574, 594 (1998); *McNair v. Coffey*, 234 F.3d 352, 355 (7th Cir. 2000), *vacated on other grounds,* 533 U.S. 925 (2001); *Stone v. City of Chicago*, 738 F.2d 896, 900-01 (7th Cir. 1984); *Lacy v. Berge*, 921 F. Supp. 600, 608 (E.D. Wis. 1996).

The deputies' suggestion that "[i]t is by no means clear which burden of proof would be used in a federal court case in the Seventh Circuit involving a claim of excessive force under section 1983" (Resps.' Br. 19) is disingenuous. While there is no case in which a holding to that effect was required, the road signs are clear. *Crawford-El* presumes the

preponderance standard applies to §1983 claims: "Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provide any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage *or in the trial itself*." 523 U.S. at 594 (emphasis added); *see also id.* at 595-96 (rejecting court of appeals' procedure in part because it "imposes a heightened standard of proof at trial upon plaintiffs with bona fide constitutional claims").

McNair, moreover, was an excessive force case. The original decision's general statement of the law could not be clearer: "Yet a § 1983 case is not a criminal prosecution, and the preponderance standard applies to civil claims of all sorts." 234 F.3d at 355.[2] In the absence of any contrary authority—

---

[2] Although this decision was subsequently summarily vacated by the Supreme Court, its statement on the burden of proof (which was not later at issue), at the very least, stands as that panel's view of Seventh Circuit law.

and the deputies reference none—there is no basis for contending that federal courts would apply a heightened burden in §1983 actions.

A. The Burden of Proof in §1983 Actions is an Outcome-Determining Substantive Rule Governed by Federal Law.

The burden of proof is outcome determinative: the higher the burden of proof, the less likely a plaintiff is to prevail. *See McNair*, 234 F.3d at 355 (noting that under a preponderance of the evidence burden, a §1983 plaintiff "can win a close case," but under a clear and convincing evidence rule "all close cases go to the defendant"). As the First Circuit has put it, "The incidence of burden of proof may determine the outcome of the case." *Sampson v. Channell,* 110 F.2d 754, 758 (1st Cir. 1940).

1. The burden of proof is a substantive rule.

Because the burden of proof may determine a case's outcome, it is a rule of substance, not procedure. *See, e.g., id.* ("the burden of proof as to

contributory negligence is to be classified as a matter of substantive law"). As a result, if a claim arises under federal law, federal law governs application of the burden of proof. *See Felder,* 487 U.S. at 151; *see also Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 249 (1942) (federal law governs burden of proof for federal Jones Act claim; burden of proof is a "part of the very substance of [the Jones Act] claim and cannot be considered a mere incident of a form of procedure").

As explained above, federal law applies the preponderance of the evidence burden to §1983 claims. State courts, therefore, must also apply the preponderance burden to those claims. *Felder*, 487 U.S. at 151.

2. The deputies' argument that a higher burden protects police officers demonstrates the rule's substantive effect.

The deputies argue that Wisconsin courts should apply the middle burden of proof to §1983

excessive force claims because this heightened standard is needed to protect the police: "the reasoning behind the higher standard of proof," they write, is "that police officers have a privilege to use force in carrying out their duties." (Resps.' Br. 15.) Respondents thus unapologetically ask this Court to raise a substantive bar to §1983 relief.

This bar is not only improper, it is unnecessary. State officials already have immunity, for exactly the purpose of putting the proper play into the joints. Officials are immune from a §1983 damages action if either (a) no constitutional violation could be found on the facts alleged, or (b) the official's conduct did not violate a clearly established right. *See Saucier v. Katz,* 533 U.S. 194, 200-01 (2001); *Wilson v. Layne,* 526 U.S. 603, 614-18 (1999). Depending on the circumstances, this immunity bars excessive force claims. *See*, *e.g., Saucier,* 533 U.S. 194, 205-09; *McNair v. Coffey,* 279 F.3d 463 (7th Cir. 2002).

This immunity's source, however, is federal law. *See Wood v. Strickland,* 420 U.S. 308, 314-22 (1975). States are not free to expand its scope: "[A]s to persons that Congress subjected to [§1983] liability, individual States may not exempt such persons from federal liability by relying on their own common-law heritage." *Howlett v. Rose*, 496 U.S. 356, 383 (1990); *see also id*. at 376 ("Conduct by persons acting under color of state law which is wrongful under 42 U.S.C. § 1983. . .cannot be immunized by state law.").

Just as a state cannot change the §1983 immunity available to its officers, it cannot do what is the same thing by employing a higher burden of proof. This is the corollary of *McNair*'s reasoning that expanding the scope of immunity has the same substantive effect as raising the burden of proof. Both "make a substantial change in the scope of liability under 42 U.S.C. § 1983." *McNair*, 234 F.3d at 355; *cf. Johnson v. Jones,* 515 U.S. 304 (1995)

(emphasizing link between immunity and legal uncertainty). Since both immunity and burden of proof have this substantive effect, both are governed by federal law. *Cf. Howlett,* 496 U.S. at 377-78 ("To the extent that the [state law] . . . reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law."). Wisconsin cannot, therefore, afford its officials greater protection from §1983 claims by burdening plaintiffs who seek to litigate in state court with a more difficult standard of proof.

B. The Middle Burden of Proof Would Impermissibly Burden §1983 Rights Adjudicated in State Court.

Even if the burden of proof were not a substantive rule, federal law would require state courts to apply the preponderance standard in adjudicating §1983 claims. In *Felder,* the Supreme Court made clear that as a matter of federal law,

state courts are not free to employ procedural rules that are either (1) inconsistent with the objectives of §1983 or (2) inconsistent with Congress's desire that civil rights laws be uniformly applied throughout the Nation. *Felder,* 487 U.S. at 138, 151-53. Use of the middle burden in state court §1983 litigation violates both principles.

1. The middle burden of proof undermines §1983's objectives.

As explained above in Part I, the middle burden is inconsistent with §1983's purposes—compensating civil rights victims and deterring abuses of state power. *See Wyatt*, 504 U.S. at 161. For this reason, the United States Supreme Court in *Crawford-El* rejected a federal court's attempt to impose a higher burden of proof on §1983 litigants.

Crawford-El's reasoning requires that the preponderance burden also be applied in state court §1983 litigation. Crawford-El alleged that a prison official violated his First Amendment rights by

intentionally depriving him of access to his personal legal materials, thereby interfering with his right to access the courts. *Id.* at 577-79. He sued the official under §1983. The Court of Appeals for the D.C. Circuit dismissed his claim because he failed to establish by clear and convincing evidence that the prison official had an improper motive. *Id.* at 594.

The Supreme Court reversed, explaining that requiring a §1983 claimant to prove elements of his case by clear and convincing evidence would "alter[] the cause of action itself in a way that "undermines the very purpose of § 1983—to provide a remedy for the violation of federal rights." *Id.* at 595. Imposing a higher burden of proof, the Court concluded, would be contrary to the "purpose of § 1983," *id.,* because it would "directly limit[] the availability of the remedy." *Id.* at 595 n.16.

State courts are no more at liberty to impose rules that "alter the [§1983] cause of action" or "undermine[] the very purpose of § 1983" than are

their federal counterparts. *See Felder,* 487 U.S. at 151-53. Consequently, state courts adjudicating §1983 claims, like federal courts after *Crawford-El*, must apply the preponderance of the evidence standard.

2. A heightened burden of proof would result in non-uniform application of §1983 in Wisconsin.

In *Felder*, the Supreme Court reasoned that the Constitution's Supremacy Clause requires that the outcome in a §1983 claim not depend on whether the claim is brought in state or federal court. 487 U.S. at 138. Because federal courts apply the preponderance standard in §1983 litigation, were Wisconsin courts to apply the middle burden of proof, plaintiffs (at least those in close cases) would be systematically worse off in a Wisconsin court, than in one of Wisconsin's federal courts. *Cf. Carlson*, 190 Wis. 2d at 659, 529 N.W.2d at 908.

To illustrate this point, consider a police officer's use of the same arguably excessive force

against two individuals. Both individuals decide to bring a §1983 claim against the officer—but one files in state court, the other in federal court. If evidence is close, the federal court plaintiff, who only has to prove excessive force by a preponderance, may win. The state court plaintiff, facing a more rigorous middle burden, will inevitably lose, as Shaw did.

Felder precludes this scenario. Wisconsin courts may not apply a more onerous burden than the preponderance standard.

CONCLUSION

The judgment should be reversed and the case remanded for a new trial in which the jury is instructed that Shaw must meet the ordinary civil burden of proof to recover on her §1983 claim.

Dated: June ___, 2004

____

G. Michael Halfenger (WBN 1024062)
FOLEY & LARDNER LLP
777 East Wisconsin Avenue
Milwaukee, Wis. 53202-5306
(414) 271-2400

Laurence J. Dupuis (WBN 1029261)
AMERICAN CIVIL LIBERTIES UNION OF WISCONSIN FOUNDATION, INC.
207 E. Buffalo Street, #325
Milwaukee, Wis. 53202
(414) 272-4032

Attorneys for the American Civil Liberties Union of Wisconsin Foundation, Inc.

FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for an nonparty brief produced with a proportional serif font. The length of this brief is 2,969 words.

Dated: June ___, 2004

____

G. Michael Halfenger

CERTIFICATE OF FILING

I hereby certify that on June 28, 2004, I caused the original and copies of Nonparty Brief of American Civil Liberties Union of Wisconsin Foundation, Inc., to be deposited in the United States mail for delivery to the clerk by first-class mail, postage pre-paid, thereby effectuating filing on this date pursuant to Wis. Stat. § 809.80(3)(b)1.

Dated: June ___, 2004

____

G. Michael Halfenger

CERTIFICATE OF SERVICE

I certify that I caused three copies of Nonparty Brief of American Civil Liberties Union of Wisconsin Foundation, Inc. to be served on June 28, 2004, via U.S. Mail upon:

Allen Steven Porter, Esq.
Porter, Jablonski & Associates, S.C.
354 W. Main Street
Madison, WI 53703-3115

John M. Moore, Esq.
Bell, Gierhart & Moore, S.C.
44 E. Mifflin Street, Suite 1000
Madison, WI 53701-1807

Jeff Scott Olson, Esq.
The Jeff Scott Olson Law Firm, S.C.
131 W. Wilson Street, Suite 1200
Madison, WI 53703-3245

Laurence J. Dupuis, Esq.
American Civil Liberties Union of
Wisconsin Foundation, Inc.
207 E. Buffalo Street, Suite 325
Milwaukee, WI 53202

____
G. Michael Halfenger