

ORIGINAL

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PROCEEDINGS BEFORE

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THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-1622

TITLE ELIZABETH BRANDON, ET AL., Petitioners v. JOHN D.
HOLT, ETC., ET AL.

PLACE Washington, D. C.

DATE November 5, 1934

PAGES 1 thru 49



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1 IN THE SUPREME COURT OF THE UNITED STATES

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3 ELIZABETH BRANDON, ET AL., :

4 Petitioners, :

5 v : No. 83-1622

6 JOHN D. HOLT, ETC., ET AL. :

7 - - - - -x

8 Washington, D.C.

9 Monday, November 5, 1984

10 The above-entitled matter came on for oral
11 argument before the Supreme Court of the United States
12 at 1:23 o'clock p.m.

13 APPEARANCES:

14 ERIC SCHNAPPER, ESQ., New York, New York; on behalf of
15 the petitioners.

16 HENRY L. KLEIN, ESQ., Memphis, Tennessee; on behalf of
17 the respondents.

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1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments
3 next this morning in Branden against Holt.

4 I think you may proceed when you are ready,
5 Mr. Schnapper.

6 ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.,

7 ON BEHALF OF THE PETITIONERS

8 MR. SCHNAPPER: Mr. Chief Justice, and may it
9 please the Court, the question presented by this case is
10 neither complex nor novel. The issue, simply put, is
11 whether a judgment against a public official in his
12 official capacity runs against the official personally
13 or against the entity for which the official works.

14 The District Court in this case found that the
15 director of the police department in Memphis was liable
16 in his official capacity. The Court of Appeals
17 concluded -- I think this is maybe best cast as a
18 construction of what such a judgment would mean -- that
19 a judgment against an official in his official capacity
20 runs against the official personally, not against the
21 entity of which he is an employee.

22 The question before the Court is whether the
23 District Court erred in this regard.

24 QUESTION: Well, something would depend,
25 wouldn't it, Mr. Schnapper, on how the case was tried,

1 the theory on which he was tried?

2 MR. SCHNAPPER: Well, I think there are --
3 that would be a somewhat different question. The first
4 issue is, if we have a judgment against the official in
5 his official capacity, assuming that judgment was
6 correctly entered, who has to pay.

7 The second question, I think, encompassed
8 within your own is, might such a judgment be improper
9 because of the nature of the case and the way it was
10 tried.

11 QUESTION: Well, particularly when the case
12 was tried before Monell was decided, or rather, the
13 complaint was filed before Monell was decided, so you
14 have a fairly ambiguous situation, it seems to me.

15 MR. SCHNAPPER: Well, I don't think we have an
16 ambiguous situation as of the time the case went to
17 trial or even as of 19 months before that. As I
18 indicated, 19 months before trial, we filed a memorandum
19 in the District Court making crystal clear that we
20 sought to impose liability on the defendant only in his
21 official capacity, and noted that this Court's decision
22 in Monell had held that an official capacity judgment
23 ran against the entity.

24 QUESTION: Why didn't you move to amend your
25 complaint?

1 MR. SCHNAPPER: Well, on our reading of the
2 federal rules, no such amendment was necessary. The
3 defendant was certainly on notice as to what we were
4 trying to do and on whom the liability would be
5 imposed. There is nothing in the federal rules as they
6 now stand that requires that notice be in the
7 complaint.

8 QUESTION: But ordinarily a prudent lawyer
9 wanting a judgment against a city would be fairly
10 certain to make sure the city was named defendant if the
11 city were suable, I would think. You wouldn't rely on a
12 provision in the rules that you thought might justify an
13 argument in the Supreme Court of the United States that
14 perhaps the Court would rule for you on the point.

15 MR. SCHNAPPER: Well, Your Honor, the Supreme
16 Court had decided the issue twice by 1979, both in our
17 favor. All the Courts of Appeals had concluded that
18 Rule 25(d) means what it says on its face, that a
19 judgment against an official in his official capacity is
20 a judgment against the entity.

21 I don't disagree that we would have avoided a
22 trip to Washington had we amended the complaint in that
23 way, but in our view the trip should have been
24 unnecessary, and the rules mean what they say.

25 QUESTION: Mr. Schnapper, is this anything

1 more than a lesson in pleading?

2 MR. SCHNAPPER: Well, I think it may more
3 reasonably be cast as a lesson about --

4 QUESTION: Because if so, we have more
5 important things to do.

6 MR. SCHNAPPER: Well, I think that the federal
7 rules don't require the notice at issue to have been in
8 any particular form as long as the defendants had actual
9 notices to the entity against which the judgment would
10 run, and they certainly had that.

11 QUESTION: Who did? The city?

12 MR. SCHNAPPER: The city.

13 QUESTION: How do you know they knew?

14 MR. SCHNAPPER: We filed a memorandum in
15 February of 1979.

16 QUESTION: In court.

17 MR. SCHNAPPER: In court. Expressed this --

18 QUESTION: Was the city a party? Was the city
19 a party to that case?

20 MR. SCHNAPPER: The city's lawyer was
21 representing the defendant at that point.

22 QUESTION: But except for this rule, except
23 for this rule you rely on, which -- except for that
24 rule, the city would not have been bound by the
25 judgment?

1 It wasn't a party, and it wasn't served.

2 QUESTION: Well, prior to the existence of
3 Rule 25(d) and its predecessor under the 1937 Rules of
4 Federal Civil Procedure, there were lawsuits against
5 officials in their official capacity. There was an
6 enormous amount of confusion as to just what that meant,
7 and Rule 25(d) was meant to clear that up.

8 But I would argue were we now standing and
9 arguing this in 1936, that the result would be the
10 same. It would be a more difficult argument, however.
11 But the notion, the concept of official capacity
12 lawsuits has been around for quite some time, going back
13 well into the previous century.

14 In any event --

15 QUESTION: Mr. Schnapper --

16 MR. SCHNAPPER: Yes.

17 QUESTION: -- when this action went to trial,
18 it apparently was tried and liability was found on the
19 basis of whether Officer Chapman knew or should have
20 known of the dangerous propensities of the other
21 officer. Is that right?

22 MR. SCHNAPPER: Well, I think that --

23 QUESTION: Is that the theory?

24 MR. SCHNAPPER: That is not the only theory of
25 liability. We indicated at the --

1 QUESTION: Is that what the District Court
2 found as the basis for liability?

3 MR. SCHNAPPER: Well, that is one of the
4 findings it made. It made several specific findings
5 with regard to city practices.

6 QUESTION: Do you think that that finding
7 alone is even appropriate under the Monell standard for
8 liability in an official capacity suit?

9 MR. SCHNAPPER: I think, Your Honor, it would
10 depend on who the official was that knew or should have
11 known. There are some officials --

12 QUESTION: I just didn't see anything at all
13 in Monell to that effect. It seemed to me that maybe
14 what had to be found was whether it was an official
15 policy or practice of the department or city.

16 MR. SCHNAPPER: I think that's correct, and I
17 think there are a number of specific findings with
18 regard to practices that I would like to come back to in
19 a second, but with regard to the question of whether a
20 finding that an official knew or should have known about
21 the sort of aberrant policeman at issue here, Monell
22 refers not merely to policies but to acts.

23 There are some natural persons within any
24 governmental unit whose actions are official actions,
25 and I think that while --

1 QUESTION: But that doesn't necessarily mean
2 that their actions are official policies. A policy
3 certainly means more than just the action of a
4 particular individual.

5 MR. SCHNAPPER: I think that Monell refers to
6 actions and decisions as well as policies. I mean,
7 there are any number of decisions that have to get made
8 in a given case which aren't policies that affect a lot
9 of cases. They are just decisions on a particular
10 situation.

11 QUESTION: Well, if it turns out that we
12 disagree with you and think that what has to be
13 established for an official capacity suit is whether it
14 was an official policy or practice of the department or
15 city, would it have to be sent back then for a new
16 trial?

17 MR. SCHNAPPER: Well, I don't think so, Your
18 Honor. We do have a number of very specific findings of
19 governmental practices here set out in the District
20 Court's opinion. There was a finding that it was the
21 policy of the department never to fire a violent
22 officer, not to transfer officers for disciplinary
23 reasons.

24 There is a finding that it was the policy of
25 the director of the department to insulate himself from

1 knowledge of any abuses by officials, and there is also
2 a finding of what I think is clearly a custom within the
3 meaning of Monell, a code of silence among all the
4 officers involved not to disclose what abuses might be
5 going on within the department.

6 We think those findings are sufficient to meet
7 the Monell standards, and they are express findings.
8 This is not a case like Wainwright against Witt. We
9 aren't arguing that just because we won in the District
10 Court, the Court should presume there must have been
11 some unstated findings in our favor.

12 We think that Rule 52, like Section 2254,
13 refers to real live written or oral findings, but we
14 have those here. And we think they are entirely
15 sufficient. Indeed, they are considerably more specific
16 in detail than are present in ordinary Monell cases.

17 QUESTION: Well, the Court of Appeals didn't
18 reach the issue of policy.

19 MR. SCHNAPPER: That's correct.

20 QUESTION: So that you could still lose this
21 case back in the Court of Appeals, even if we agreed
22 with you now.

23 MR. SCHNAPPER: Yes, and I don't mean by my
24 response to Justice O'Connor's question to suggest that
25 that is an issue that ought to be addressed here. It,

1 like the problem of Peratt against Taylor, was not
2 raised at the trial court, was not raised in the Court
3 of Appeals.

4 It probably can't be raised at this stage in
5 the litigation in any event, but certainly if it can be
6 raised it ought to be looked at in the first instance by
7 the Court of Appeals. I think the only thing that is
8 properly addressed by this Court is whether the judgment
9 that we won, assuming it was correct, ran against the
10 city.

11 We are delighted to win this case at any time
12 on any issue in any forum, but I am constrained to
13 acknowledge that, as Mr. Justice White suggests, under
14 the ordinary practice of this Court, the Monell issues
15 are issues which should be dealt with in the first
16 instance by the Court of Appeals.

17 The specific events which gave rise to
18 liability in this case are set out in the findings of
19 the District Court. The most important finding with
20 regard to that incident was that the assault in question
21 happened under color of law.

22 Patrolman Allen used his police weapon. He
23 used his police identification to get one of the
24 petitioners out of the car, and then assaulted one
25 petitioner with a knife, and as the petitioners fled used

1 his service revolver to attempt to kill them.

2 The District Court, as I also noted, found a
3 number of specific policies which had been engaged in by
4 the police department, and concluded, I think correctly,
5 that --

6 QUESTION: Mr. Schnapper, is it not correct
7 that those policies in the District Court's finding
8 merely were to establish the proposition that Chapman
9 should have known about this officer's propensities,
10 rather than saying that the policies were what actually
11 caused the injury. That is the way one might read the
12 conclusions of law.

13 MR. SCHNAPPER: That is a possible reading of
14 it, but that, I think, only puts an additional wrinkle
15 in the causation claim. That is to say, on your
16 characterization, the judge found four policies which
17 caused Chapman not to know about what was going on, and
18 Chapman's lack of knowledge caused the assault.

19 So whether you see the causation as a two-step
20 -- or a one-step --

21 QUESTION: Well, I am not sure -- well, you
22 say and the lack of knowledge caused the assault? It
23 doesn't go that -- the District Court I'm not sure said
24 that. I thought he more or less held him liable on a
25 respondent superior theory and explained why he should

1 have known of the propensities of the officer.

2 MR. SCHNAPPER: We don't read the District
3 Court's opinion like that. All of the findings with
4 regard to these practices would make no sense if the
5 District Judge thought that the mere fact that Chapman
6 was the supervisor is enough to impose liability on
7 him.

8 QUESTION: Well, he certainly didn't
9 articulate any -- articulate his ruling in terms of the
10 city's liability under Monell.

11 MR. SCHNAPPER: Well, let me answer that
12 question in -- with before and after the point which I
13 broke it up with my interruption. Certainly the Judge
14 made it clear he understood that the city was going to
15 be liable. Not only did he reiterate on three occasions
16 that Chapman was liable in his official capacity, but in
17 his opinion he quoted that portion of this Court's
18 decision in Monell which said a finding of liability
19 against an official in his official capacity runs
20 against the entity rather than the official person.

21 QUESTION: Yes, but he didn't say, now, I am
22 going to identify a city policy. Certainly there wasn't
23 any city policy to have -- to encourage officers to go
24 around and act the way this officer did.

25 MR. SCHNAPPER: Well --

1 QUESTION: They didn't train them to do it,
2 for example.

3 MR. SCHNAPPER: Let me answer those questions
4 in reverse order. I think your description of the
5 policy is correct. It was not the policy of the city to
6 encourage assaults on teenagers parked in shady lares in
7 the middle of the night, but it was the policy of the
8 department to take no action and indeed to make no
9 effort to remove from the force officials whom were well
10 known to be dangerous officers, people who have a
11 propensity for violence, who were regarded in this case
12 as so dangerous by their colleagues in the department
13 that other police officers would not ride in the same
14 squad car with the patrolman who committed this
15 offense.

16 This is a case in which there was virtually a
17 complete breakdown in control. I mean, people were
18 given guns and badges and set loose on the citizenry.
19 There was simply no control over them. If they turned
20 out to be dangerous, violent human beings who went
21 around beating people up or shooting at them, the police
22 department in Memphis had a policy of doing nothing
23 about it.

24 And we think that such a policy certainly is
25 sufficient under Monell. Monell contemplates that

1 liability is imposed not merely for --

2 QUESTION: Well, at the very least, you do
3 pose a question of what does "policy" mean under McNell.

4 MR. SCHNAPPER: I think there are interesting
5 questions like that raised by this case but not at this
6 time. I think that you earlier suggested, and I think
7 correctly so, that that is an issue which, if it can be
8 addressed at all, ought to be addressed in the first
9 instance by the Court of Appeals, and it is a situation
10 like the situation discussed in Footnote 3 of Peratt
11 against Taylor, in which these -- that is to say, these
12 issues were never raised in the District Court, the
13 questions that are raised --

14 QUESTION: Did the District Court say exactly
15 what the constitutional violation was here?

16 MR. SCHNAPPER: No, it did not.

17 QUESTION: It is kind of hard to find one,
18 isn't it?

19 MR. SCHNAPPER: I think that your
20 characterization of it is a very strained one.
21 Reviewing the trial transcript, and indeed the briefs on
22 appeal, looking at that very issue, my reading of what
23 happened is that no one really questioned that there was
24 a constitutional violation here.

25 You had two individuals accused of no crime

1 whatsoever who were assaulted by a police officer acting
2 under color of law. There doesn't seem to have been a
3 point in the litigation where the defendants denied, and
4 I think no defendant reasonably could, that that
5 violated the Constitution in a number of ways.

6 The issue as all parties perceived it below
7 was whether or not liability for that extended beyond
8 the particular patrolman who wielded the knife and
9 pulled the trigger.

10 And again, like the problem about Monell, that
11 is an issue which was not raised in the District Court,
12 was not raised in the Court of Appeals, probably can't
13 be raised at this late date, and in any event shouldn't
14 be raised in the first instance here without the Court
15 of Appeals having a chance to look at it.

16 The District Court judgment, as I indicated,
17 ran against the director in his official capacity. The
18 Court of Appeals concluded that that judgment in fact
19 was a judgment against him personally. Based on that
20 premise, it then applied the good faith and immunity
21 rule of Scheuer against Rhodes and Procunier against
22 Navarette, and found that Director Chapman had acted in
23 good faith.

24 At the point of the District Court opinion, as
25 chance would have it, by operation of Rule 43(c) of the

1 Federal Rules of Appellate Procedure, Director Chapman
2 was no longer a party to the litigation. Of course, he
3 had left office prior to the decision of the Court of
4 Appeals, and the nominal defendant at that point was
5 Police Director Holt.

6 In any event, the narrow issue which we think
7 is before this Court is not an issue of first
8 impression. In our view, it is an issue of fourth
9 impression. The question of whether a judgment against
10 an official in his official capacity runs against the
11 entity or against the individual personally has been
12 resolved three times before.

13 It was first resolved by this Court in
14 Monell. In Monell, the question was what standard would
15 apply in the case of an action against a municipality,
16 and the Court noted that that same standard, the precise
17 scope of which I think we agree is not entirely clear
18 yet, was equally applicable to a suit against an
19 official in the official's official capacity.

20 Secondly, in the same month --

21 QUESTION: To say that the same standard
22 applies doesn't mean that the two are the same thing.

23 MR. SCHNAPPER: Well, Mr. Justice Rehnquist,
24 there may be circumstances, none of which come to mind
25 at this point, where there might be some difference.

1 The specific question in this case is whether the good
2 faith immunity rule would apply in such a case, and you
3 expressly resolved that question in Owen against City of
4 Independence.

5 QUESTION: I thought you were citing cases to
6 say that we have already decided precisely this
7 question, and you say that in the first case we said
8 that the same standard would apply in a suit against a
9 city as in a suit against an officer in his official
10 capacity.

11 One can subscribe to that view without in any
12 way subscribing to the view that the two are identical
13 so far as imposing liability is concerned.

14 MR. SCHNAPPER: Mr. Justice Fehngquist, I
15 perhaps understated the language in Monell. Monell says
16 that a claim against an individual in his official
17 capacity is generally the same as a claim against the
18 entity of which he is an official.

19 Now, the word "generally" I take it was sort
20 of precautionary language the Court customarily and
21 wisely uses, you know, to guard against the possibility
22 that some situation might arise where such a claim
23 wasn't to be treated as identical to a claim against the
24 city.

25 But Rule 25 in our view contemplates that they

1 are to be treated as the same thing, and no case comes
2 to mind which would be different. It is one of the
3 annoying things about the law that cases which don't
4 come to mind sometimes do come to pass, and I don't want
5 to -- as the President is prone to say, Presidents never
6 say never, I am a little reluctant to say never myself.

7 But certainly no case that I can imagine
8 exists in which these -- in which a judgment against an
9 official in his official capacity would be any different
10 than a judgment against the entity itself.

11 In any event, the specific question at issue
12 here is whether there is any difference between a
13 judgment against an official in his official capacity
14 and a judgment against the entity with regard to the
15 good faith defense recognized by Percunier and Scheuer
16 against Rhodes.

17 That was the precise issue that was before the
18 Court in Owen against City of Independence, in which the
19 officials -- the defendant was not just in that case the
20 City of Independence, but a number of officials who were
21 sued in their official capacity, and the Court in Owen
22 noted that only the liability of the municipality was at
23 issue in Owen, not any liability of the individuals.

24 A similar reading of what it means to have a
25 judgment against an official in his official capacity

1 was made by the Court in Huddo against Finney with
2 regard to liability issues and the Eleventh Amendment.

3 We think that all of these decisions are
4 clearly correctly decided, and one need look no further
5 than the actual language of Rule 25(d), which provides
6 that upon the removal from office of any official in an
7 official capacity action, his or her successor is to be
8 substituted.

9 That rule would make absolutely no sense if an
10 official capacity judgment imposed personal liability.
11 That would mean that if we had a judgment against Mr.
12 Chapman in his official capacity for \$1 million, he
13 resigned and was replaced by Director Holt, that we
14 could then garnish Director Holt's salary and seize
15 Director Holt's house.

16 It is simply inconceivable that the framers of
17 Rule 25 contemplated that an official capacity action
18 could produce personal liability of that sort. On the
19 contrary, the committee note makes it quite clear that
20 official capacity actions are actions which, although
21 brought in form against a named officer, are
22 intrinsically against the government.

23 QUESTION: Does the committee language
24 indicate any thought that the rule applies beyond
25 injunctive suits?

1 MR. SCHNAPPER: I am not sure about that, but
2 I would say that certainly must have been its intent,
3 because the problems which arose that Justice
4 Frankfurter referred to in 1951 about official capacity
5 lawsuits were mostly lawsuits against government
6 officials for money. Snyder against Buck and the like
7 were actually damage actions, and it had long been
8 assumed in those cases, in suits against a postmaster or
9 whatever, that the government was going to actually have
10 to pay the bill.

11 The problem in those cases was one postmaster
12 would leave office, another postmaster would come in,
13 and there would be procedural chaos. But I expect if we
14 took another look at the committee notes, there would be
15 reference to a number of these cases, most of which, as
16 I say, were damage actions, not injunctive actions.

17 I would like to reserve the balance of my
18 time.

19 CHIEF JUSTICE BURGER: Mr. Klein.

20 ORAL ARGUMENT OF HENRY L. KLEIN, ESQ.,

21 ON BEHALF OF THE RESPONDENTS

22 MR. KLEIN: Mr. Chief Justice, and may it
23 please the Court, the question really involved in this
24 case is whether or not this is in reality an official
25 capacity lawsuit or a lawsuit against an individual, and

1 it is the position of the respondent that this is
2 actually an individual capacity case.

3 The Court of Appeals in its opinion clearly
4 stated that this was a suit against an individual and
5 not against the city, and further went on to say that
6 what claimants were doing in effect was attempting to
7 amend their complaint at this stage to include the city
8 under the guise that it was an official capacity
9 lawsuit.

10 The court recognized that --

11 QUESTION: That's what the Court of Appeals
12 said. What did the District Court say?

13 MR. KLEIN: The District Court said that in
14 dealing with the question, and as they commented, the
15 sole issue is whether Director Chapman should have known
16 about the dangerous propensities of the officer in
17 question, that in dealing with that, they concluded --

18 QUESTION: Excuse me. What page of the
19 appendix are you on?

20 MR. KLEIN: If Your Honor please, this is
21 the --

22 QUESTION: Petition?

23 MR. KLEIN: -- petition for writ of
24 certiorari, on Page 20A. The court says both parties to
25 the case agreed that Mr. Chapman had no actual knowledge

1 of Officer Allen's dangerous propensities. Thus, they
2 said that the sole issue was whether Director Chapman
3 should have known, not knew, but should have known that
4 Officer Allen's dangerous propensities created a threat
5 to the rights and safety of other citizens.

6 That was determined by the District Court as
7 to be the ground rules or the framework under which this
8 case was to be tried, and that is the way it was tried.
9 Now, counsel argues that there is discussion about
10 various policies that were in effect, but it is obvious
11 -- at least it is our contention that it is obvious in a
12 reading of the District Court's opinion that what they
13 were doing was really directing everything to that one
14 question, and that is, whether or not --

15 QUESTION: Of course, you didn't read the next
16 sentence, did you?

17 MR. KLEIN: Because Mr. Chapman as police
18 director should have known of Officer Allen's dangerous
19 propensities, the courts find that he must be held
20 liable in his official capacity to the complainants.
21 But the problem there, if Your Honor please, is that
22 that is really an inconsistent finding, because if the
23 only question is whether he should have known, this is
24 obviously a negligence type questio, not a Monell type
25 question.

1 Nothing ever came into play in the District
2 Court's findings with regard to Monell. No reference
3 whatsoever. No reference to the Monell standards. That
4 is the part about the District Court's opinion that
5 becomes a little bit confusing, because on the one hand
6 you are dealing with the issue of should have known,
7 which we submit is clearly nothing more than a
8 negligence issue, and then on the other hand it is
9 finding him liable in his official capacity, and as we
10 read the law, there would be no way under a simple
11 negligence finding that he could be liable in his
12 official capacity.

13 But in any event, the court did, as Your Honor
14 points out, the court did make such a finding, but then
15 when it got up to the Court of Appeals, it was obvious
16 that they considered it nothing more than a negligence
17 type question as to whether or not there were any
18 dangerous propensities or he should have known, but then
19 went further to say that in that this is just a case
20 against the city -- or against the individual, and not
21 against the city, that the director was entitled to good
22 faith immunity.

23 QUESTION: Well, whether it is obvious or not,
24 that's the issue here.

25 MR. KLEIN: Yes, sir. Yes, sir.

1 QUESTION: Mr. Klein --
2 MR. KLEIN: Yes, Your Honor.
3 QUESTION: -- was Officer Chapman represented
4 in the District Court by the city attorney?
5 MR. KLEIN: He was represented by me, Your
6 Honor.
7 QUESTION: And would that be the normal
8 procedure in an individual capacity suit?
9 MR. KLEIN: Yes, it would.
10 QUESTION: Would the city step in and
11 representing the officer?
12 MR. KLEIN: Yes, it would, Your Honor. That
13 is done -- that is done quite frequently, and there have
14 been a number of cases that I can state where I have as
15 -- my official title is staff attorney for the city of
16 Memphis -- where I have represented --
17 QUESTION: Do you think there normally would
18 be an automatic substitution of parties in an individual
19 capacity suit wherein Officer Holt was substituted for
20 officer Chapman if it is an individual action?
21 MR. KLEIN: No, I do not, Your Honor.
22 QUESTION: Well, how did that come about?
23 MR. KLEIN: Well, that came about, the
24 plaintiffs, and if my memory serves me correctly, that
25 came about after the case was up on appeal, and before

1 the Court of Appeals. Then they filed a motion to
2 substitute.

3 QUESTION: Did you object to that
4 substitution --

5 MR. KLEIN: No, I did not --

6 QUESTION: -- and why not, if you thought it
7 was an individual capacity suit?

8 MR. KLEIN: Well, if Your Honor please, we in
9 our -- when we got to the Court of Appeals, of course,
10 our whole argument was based on the fact that this was
11 an individual capacity lawsuit, and we felt like we made
12 it clear to the Court of Appeals at that time that it
13 was only being treated in this way, and that we were
14 entitled to good faith immunity, and also the question
15 about the standard which was to be imposed, but we did
16 not officially object to that, and the Court of Appeals
17 in its opinion is --

18 QUESTION: That is a bit inconsistent with
19 your theory, is it not?

20 MR. KLEIN: The fact that we did not object?

21 QUESTION: Yes.

22 MR. KLEIN: Well, the fact that we did not
23 object I don't think was inconsistent with what we were
24 trying to do or what our theory was. There could be no
25 question before the Court of Appeals what our theory

1 was. And frankly, we did -- I say ignore. We did not
2 respond. That's true. But we did not consider that
3 that had any merit, because it didn't apply or should
4 not apply in an individual capacity case.

5 QUESTION: Was Mr. Campbell removed from the
6 litigation at that point?

7 MR. KLEIN: Mr. --

8 QUESTION: Chapman, you mean?

9 QUESTION: Chapmar.

10 MR. KLEIN: Not -- well, if Your Honor please,
11 the Court of Appeals didn't treat him as having been
12 removed, because a reading of -- the Court of Appeals
13 opinion talks about Director Chapman throughout, and
14 never makes any reference to Director Holt.

15 Of course, what had happened was, Chapman had
16 left office, and Director Holt had been appointed by the
17 mayor, and that is when this attempted substitution was
18 filed. But a reading of the Court of Appeals opinion
19 clearly shows the Court of Appeals didn't consider that
20 Director Holt was in the picture because they considered
21 that it was an action individually against Director
22 Chapman, and so stated.

23 So, they didn't pay, so to speak, didn't pay
24 any attention to the fact that there had been this
25 proposed substitution.

1 QUESTION: And you didn't pay any attention to
2 your client, either. You just took him on as another
3 client.

4 MR. KLEIN: I beg your pardon, Your Honor?

5 QUESTION: You just took him on as your new
6 client.

7 MR. KLEIN: No, sir, I was still representing
8 Director Chapman.

9 QUESTION: And you weren't representing
10 anybody else?

11 MR. KLEIN: No, Your Honor, only Director
12 Chapman, and only represented Director Chapman --

13 QUESTION: Director Chapman is out of the case
14 now, isn't he?

15 MR. KLEIN: Well, that's the --

16 QUESTION: Isn't he?

17 MR. KLEIN: Well, we say that he's not, Your
18 Honor. That's a question. But our position is, he's
19 not out of the case, and never has been out of the case,
20 because he was sued individually.

21 QUESTION: Are you representing everybody
22 here?

23 MR. KLEIN: I beg your pardon?

24 QUESTION: Are you representing all of the
25 appellees here?

1 MR. KLEIN: If Your Honor please, our
2 contention is that the only true appellee in this case
3 is Director Chapman.

4 QUESTION: Are you representing the others,
5 the other named appellees?

6 MR. KLEIN: I am in effect representing
7 Director Chapman.

8 QUESTION: And nobody else?

9 MR. KLEIN: Well, it is our position, Your
10 Honor, that no one else is before the Court.

11 QUESTION: And as staff attorney of Memphis?

12 MR. KLEIN: Yes, sir, that's correct.

13 QUESTION: You are representing this private
14 litigant.

15 MR. KLEIN: Well, private litigant, although
16 he was --

17 QUESTION: Well, is he a private litigant?

18 MR. KLEIN: Well, in this particular case he
19 would be a private litigant, although at the time --

20 QUESTION: And you say he is a private
21 litigant.

22 MR. KLEIN: He would be a private litigant.

23 QUESTION: I didn't say would. I said is.

24 MR. KLEIN: Yes, sir.

25 QUESTION: Is.

1 MR. KLEIN: Yes, sir.

2 QUESTION: He is a private litigant?

3 MR. KLEIN: Yes, sir.

4 Now, again, from an analysis of the Court of
5 Appeals opinion, what is clear is that they were dealing
6 with only one issue, and that was whether or not there
7 was any liability on the part of Director Chapman, and
8 we say individually, and the standard that should be
9 applied to determine that liability.

10 The court comments that the parties in the
11 case expended considerable energy either relying on or
12 distinguishing in their opinion an opinion in the case
13 of Hayes versus Jefferson County, and that was a Sixth
14 Circuit case that applied the applicable standards. The
15 question was whether the standard in Peratt v. Taylor
16 would apply or whether a greater degree of negligence
17 should be applied.

18 And by the fact that both parties were
19 spending a considerable amount of time addressing
20 themselves to that issue, it was obvious to the Court of
21 Appeals that the only issue that was before them was one
22 -- a question of negligence, and not a question of
23 policy under the Monell standard.

24 And as I say, they go ahead to find that in
25 reality, the plaintiffs are attempting to amend their

1 complaint so as to treat the police director as though
2 he were the city in order to provide the qualified
3 immunity which shields Director Chapman. Nothing was
4 ever referred to, no mention was ever made of any Monell
5 standards in the Court of Appeals.

6 The case started out clearly as a case against
7 Director Chapman, without any reference to it being an
8 official capacity lawsuit. There was never any attempt
9 to bring the city in. There was never any attempt to
10 amend to bring the city in, which they clearly could
11 have done.

12 And even though this case was filed before
13 Monell was decided, the Sixth Circuit in various
14 opinions had held that the city could be brought in
15 under Section 1331 and the Fourteenth Amendment. But be
16 that as it may, no attempt was ever made to bring the
17 city in.

18 QUESTION: Well, I guess if there were an
19 official capacity suit which had been brought against
20 Director Chapman and liability was found, the city would
21 be liable, whether or not it was named. Would you agree
22 with that?

23 MR. KLEIN: I would agree that that is what
24 the cases -- that is what the cases seem to hold. But
25 the problem is --

1 QUESTION: So it wouldn't have been necessary
2 to amend to bring the city in as a named party in order
3 to impose liability if it were an official capacity
4 suit?

5 MR. KLEIN: If it were an official capacity
6 suit. That is what the cases have held, Your Honor.
7 That is correct. But since this was not done, it is our
8 position it was clearly tried as an individual capacity
9 lawsuit.

10 Interestingly enough, a motion for summary
11 judgment was filed pretrial, and at that time there were
12 three defendants in the case. There was Officer Allen,
13 and there was the mayor, and there was the police
14 director, Chapman.

15 And the court dismissed the mayor on the
16 grounds that he did not actively participate in the acts
17 that were involved, and as a supervisory personnel,
18 there was nothing to establish any liability on his
19 part, and considered very carefully whether or not
20 Director Chapman should have been dismissed, and then
21 finally concluded that because through discovery there
22 were two letters that were found that may indicate that
23 he may have known something about this individual
24 officer, the court declined, on that basis and that
25 basis alone, the court declined to grant the summary

1 judgment, and said that there may be some genuine issue
2 as to whether Director Chapman knew or should have known
3 about the danger.

4 QUESTION: Mr. Klein, were you involved at the
5 trial stage?

6 MR. KLEIN: Yes, Your Honor, I was.

7 QUESTION: Was there ever any discussion by
8 counsel with the Court about Monell and what was
9 required under that?

10 MR. KLEIN: No, Your Honor, there was not.

11 QUESTION: You just weren't aware that that
12 case had been decided?

13 MR. KLEIN: We were aware that the case had
14 been decided, but it was clearly established that the
15 sole issue was whether or not Director Chapman should
16 have known about the dangerous propensities, which we --

17 QUESTION: There was no discussion about what
18 the proper standard would be?

19 MR. KLEIN: No discussion. Now, counsel for
20 the plaintiff did say that they were contending, and
21 this was at the trial and opening statement, that they
22 did contend that Monell was the same, in this instance
23 would be the same as a suit against the entity itself
24 under the holding of Monell.

25 But with regard to the standards under which

1 the case was tried, there was never any discussion about
2 Monell standards, and of course, again --

3 QUESTION: And you never objected to the
4 standard that was being employed?

5 MR. KLEIN: No, Your Honor, because we felt
6 like -- we felt like that was the appropriate standard.
7 That's the way the case was brought. That's the way it
8 was framed. And quite frankly, that's the way it was
9 tried on the question of whether he should have known.
10 Nothing about -- nothing about Monell.

11 QUESTION: Mr. Klein, on that point, the Court
12 of Appeals concluded that the good faith defense was
13 available because Chapman neither knew nor should have
14 known of the misconduct, and I don't understand how they
15 did that in view of -- maybe this is beyond the question
16 presented, but in view of the unequivocal finding in the
17 District Court that Chapman should have known.

18 How do you reconcile that?

19 MR. KLEIN: Well, Your Honor, what they did,
20 they made their findings based upon good faith, and what
21 the Court said, and they said the record was clear that,
22 Number One, he knew nothing about Officer Allen,
23 including his instability, that he had only assumed his
24 office six months prior to the occurrence of this
25 incident, that at the time he was in the process of

1 instituting significant changes to stop police brutality
2 in Memphis --

3 QUESTION: I understand all that, but still,
4 is it not correct that the District Court did squarely
5 say that in view of the various policies that your
6 opponent has discussed, the code of silence and all the
7 rest, that he in fact should have known.

8 MR. KLEIN: That's what they're saying.

9 QUESTION: That's what the District Court
10 said.

11 MR. KLEIN: Yes, sir. The District Court said
12 that. But the Court of Appeals disagrees.

13 QUESTION: They don't say the finding was
14 clearly erroneous. In fact, they don't even acknowledge
15 that the District Court made such a finding.

16 MR. KLEIN: They don't say anything about them
17 being erroneous other than the fact that they say the
18 District Court failed to consider the good faith
19 immunity defense, and that based on what was in this
20 record, it was clear that what Officer or Director
21 Chapman has been doing in the six months that he had
22 been in office was trying to effect changes to correct
23 whatever problems existed.

24 QUESTION: How do we take the record? Should
25 he or should he not have known of the misconduct of the

1 officer?

2 MR. KLEIN: Well, we say that he should not
3 have known, and of course that's what we argued down at
4 the trial level.

5 QUESTION: And you lost before the District
6 Court --

7 MR. KLEIN: We lost --

8 QUESTION: -- on that precise issue.

9 MR. KLEIN: The the precise issue of whether
10 -- not whether he knew --

11 QUESTION: But should have known.

12 MR. KLEIN: -- but whether he should have
13 known. Yes, sir. We lost that precise issue. And we
14 could contend, and I could, of course, go back over the
15 facts -- I won't reargue the case --

16 QUESTION: No.

17 MR. KLEIN: -- but we contended that --

18 QUESTION: Do you think that was a question of
19 fact or a question of law, whether he should have
20 known?

21 MR. KLEIN: What was decided by the Court of
22 Appeals?

23 QUESTION: The question whether Chapman should
24 have known of the officer's misconduct. Is that a
25 question of fact?

1 MR. KLEIN: That's a question, I would say, a
2 question of fact.

3 QUESTION: Isn't that a mixed question of fact
4 and law?

5 MR. KLEIN: Well, conceivably it could be.

6 QUESTION: Well, as soon as they invoked the
7 idea that Chapman should have known, it could only have
8 been in his official capacity. Could it be in any other
9 way?

10 MR. KLEIN: No, sir.

11 QUESTION: Why should he have to know the
12 propensities of a dangerous policeman except in his
13 capacity as an official of the city?

14 MR. KLEIN: That's --

15 QUESTION: Directly in charge.

16 MR. KLEIN: That's correct.

17 QUESTION: How do you get away from this being
18 an official capacity case under Monell?

19 MR. KLEIN: Well, the way I get away from it,
20 Your Honor, is because of the standard which should be
21 applied under Monell. The fact that he was acting in
22 his official capacity, and there are many cases which I
23 am sure Your Honor is fully familiar with where we deal
24 with individuals acting in their official capacity in
25 the operation of whatever it may be, school board,

1 police department, or what have you, and there can be no
2 question that he was acting in that role. He wasn't
3 acting as just an individual off the street. Of course
4 not. He was acting in his official capacity.

5 But the standards that have to be applied are
6 entirely different, we contend, with regard to whether
7 or not he would be liable in his individual and liable
8 in his official capacity, and the only way that he could
9 be liable in his official capacity would be under the
10 Monell standards, whereas he is the alter ego of the
11 police department.

12 The police department obviously can't function
13 without its representatives, and he, of course, stands
14 in that position, and anything that he does, of course,
15 does represent the police department. But in order to
16 hold the police department liable or the city liable in
17 this circumstance, we would have to, as we say, apply
18 the Monell standards.

19 But I cannot say that he wasn't acting in his
20 -- in an official capacity, but I think it is quite
21 common that suits against officials, whether they be
22 individual or in his official capacity, he was certainly
23 acting as school board member, or as an officer of the
24 state, or as a member of the police department.

25 But the fact that whether he is individually

1 liable or liable in his official capacity really brings
2 into play two different standards, and if you are going
3 to say that liability or at least suing him in his
4 official capacity is just another way of suing the
5 entity itself, we submit that the Monell standards would
6 have to apply, and not the typical negligence standards
7 which apply in cases against individuals who, although
8 are acting in a so-called official capacity, but who
9 would be liable individually rather than as a
10 representative of the city.

11 As I mentioned, the court preliminarily came
12 very close to dismissing Director Chapman on a motion
13 for summary judgment, and it was obvious at this point
14 that the Court was only considering Director Chapman in
15 his individual capacity.

16 QUESTION: Is that fact apparent from the
17 record, that it came close to deciding?

18 MR. KLEIN: Yes, sir, it is. There is the --

19 QUESTION: I wish I could say that about every
20 case that I have lost.

21 MR. KLEIN: If Your Honor please, in the
22 appendix there is a reference to the order granting the
23 motion for summary judgment, and in denying the summary
24 judgment as to Director Chapman, the court said that it
25 was denied, but granted leave to file a renewed motion

1 for summary judgment if additional discovery shows that
2 there was no actual or genuine issue as to Chapman's
3 lack of knowledge.

4 So, when we say close, if Your Honor please,
5 what we are saying is, the court was giving very careful
6 consideration to whether there was even enough in the
7 case to hold Director Chapman liable based on what he
8 knew or should have known, and did grant leave to file a
9 renewed motion on that one point.

10 But again, what we are saying is, it was clear
11 that the only thing that was being considered was
12 Chapman as an individual, and not in an official
13 capacity, which would be another way of holding the city
14 in.

15 The findings of the court, the District Court,
16 with regard to the liability of Director Chapman, as I
17 have stated previously, do not meet the Monell
18 standards, and the court talks about, for example,
19 unjustified inaction.

20 QUESTION: May I ask this question?

21 MR. KLEIN: Yes, Your Honor.

22 QUESTION: Assume for the moment that they did
23 meet the Monell standards. What would be the effect on
24 your client, Mr. Chapman?

25 MR. KLEIN: If they did meet the Monell

1 standards?

2 QUESTION: Yes. That would make the city
3 liable?

4 MR. KLEIN: That would make the city liable.

5 QUESTION: Would Mr. Chapman still be liable?

6 MR. KLEIN: No, Your Honor.

7 QUESTION: Well, are you representing him or
8 the city here?

9 MR. KLEIN: Well, I am representing him
10 because it is our contention the city is not involved,
11 never has been involved, was never brought in, was never
12 served with process, was never required to answer.
13 There was never an amendment to bring the city in.
14 There was never an amendment to try this lawsuit under
15 Monell standards, and it is our position that we are
16 here in behalf of Director Chapman.

17 But in response to your question, if the
18 Monell standards applied and the city were found to be
19 liable, it is our position there would be no liability
20 as to Director Chapman.

21 QUESTION: Would he win either way this case
22 goes?

23 MR. KLEIN: I beg your pardon, sir?

24 QUESTION: Would Monell win either way?
25 Sorry. Would Chapman win either way this case goes? If

1 he is viewed as liable personally, then it was found
2 that he had good faith immunity.

3 MR. KLEIN: That's correct.

4 QUESTION: If we rule that Monell applies and
5 he acted only in official capacity, he would be out then
6 also, wouldn't he?

7 MR. KLEIN: That's correct, Your Honor.

8 QUESTION: So he doesn't need counsel here,
9 does he?

10 MR. KLEIN: Well --

11 (General laughter.)

12 MR. KLEIN: I would use the expression, I am
13 sort of put between the rock and the hard place with
14 regard to this particular situation, but yes, we think
15 he needs to be represented, because he is the only one
16 in the lawsuit at this particular juncture, and that is
17 the problem that we perceive with these official
18 capacity lawsuits as trying to distinguish them from
19 individual capacity lawsuits.

20 QUESTION: Mr. Klein, am I correct or is this
21 just something in the briefs, or is it in the record
22 that the city has undertaken to obey any judgment of the
23 District Judge?

24 MR. KLEIN: No.

25 QUESTION: That is not in the record?

1 MR. KLEIN: No, sir. There was a finding,
2 Your Honor, with regard to damages, but there is nothing
3 in the record with regard to whether the city has
4 undertaken to --

5 QUESTION: What is the finding with regard to
6 damages?

7 MR. KLEIN: The finding with regard to damages
8 was that Director Chapman, I believe, was responsible
9 for approximately \$26,000.

10 QUESTION: Oh, I see, it is the amount of
11 damages.

12 MR. KLEIN: Yes, sir.

13 QUESTION: Yes, I see.

14 MR. KLEIN: That's --

15 QUESTION: Mr. Klein, are punitive damages
16 available in an individual capacity suit if the facts
17 warrant it --

18 MR. KLEIN: Yes, Your Honor, they would --

19 QUESTION: -- against someone in an individual
20 capacity -- sued in their individual capacity?

21 MR. KLEIN: Yes, Your Honor.

22 QUESTION: But the court, the District Court
23 below determined that no punitive damages could be
24 awarded against Director Chapman, did it not?

25 MR. KLEIN: That's correct.

1 QUESTION: Since he was sued as the director
2 of the police department.

3 MR. KLEIN: Sued in his official capacity.
4 That's correct, Your Honor.

5 QUESTION: So that does look like at least to
6 that extent it was tried as an official capacity suit?

7 MR. KLEIN: Well, to that extent, but, Your
8 Honor, again, this is the point I was making before.
9 That's the confusion and inconsistency with the case.
10 When you look at the standard on which it was actually
11 tried, whether he should have known, which is clearly
12 not an official capacity, official policy case, and then
13 the District Court's conclusion that, yes, he was found
14 liable in his official capacity, that's where the
15 inconsistency comes, and that's where the confusion
16 comes.

17 And of course if the city had been brought in
18 initially, then a lot of this would have been avoided,
19 but unfortunately that wasn't --

20 QUESTION: Did you cross-petition? I can't
21 recall. Did you cross-petition for Chapman on the
22 theory that if in fact it were an official capacity
23 suit, that the standard below was the wrong one?

24 MR. KLEIN: Not -- you mean before court?

25 QUESTION: Up here.

1 MR. KLEIN: No, Your Honor, we didn't, did
2 not.

3 QUESTION: May I ask one other question about
4 the should have known finding? Was the finding of the
5 District Court that the supervisor should have known of
6 the incident after it happened, or that he should have
7 known of the officer's propensities even before the
8 incident?

9 MR. KLEIN: Should have known of his
10 propensities before. In other words, the idea or the
11 theory was that if they knew about his dangerous
12 propensities, some action would have been taken,
13 hopefully, to either reassign him or --

14 QUESTION: And that with such knowledge, it
15 would have been the equivalent of a policy to employ
16 such an individual?

17 MR. KLEIN: Well, that's hard to read into
18 what the District Court is saying. They do talk at one
19 point about a policy, but we always get back to the
20 threshold --

21 QUESTION: If you don't read that in, I can't
22 understand why you wouldn't have raised more Monell
23 issues, so that is why I was trying to figure out what
24 your theory of the defense was.

25 MR. KLEIN: Well, my theory of the defense was

1 that it was strictly a negligence question whether he
2 should have known, and of course our whole effort was
3 directed toward showing that there was really no way
4 that he would have known, not having come and been there
5 for the short period of time, and that he was trying to
6 implement new policies, trying to make changes, but that
7 it was almost as if they expected that he went back and
8 read every file on every -- on some 1,250 or 1,275
9 police officers to determine who was good and who was
10 bad.

11 It was our argument that the law just didn't
12 impose that standard on him.

13 Thank you.

14 ORAL ARGUMENT OF ERIC SCHNAPPER, ESQ.,

15 ON BEHALF OF THE PETITIONERS - REBUTTAL

16 QUESTION: I think you responded to someone
17 but I don't recall your response. Were you in the case
18 from the outset?

19 MR. SCHNAPPER: Personally?

20 QUESTION: Yes.

21 MR. SCHNAPPER: No.

22 QUESTION: That's what I understood.

23 MR. SCHNAPPER: A couple of quick things. Mr.
24 Justice Rehnquist earlier asked whether under Monell one
25 had to have a policy. At 436 US at 690, the list of

1 things that are sufficient under Monell includes a
2 decision, so a discrete act or, I would think, failure
3 to act as well as an ongoing failure would be
4 sufficient.

5 Mr. Klein suggested, though I may have
6 misheard him, that there was no discussion at the trial
7 court level of the Monell standards. At Page 21 of our
8 brief, we refer to a discussion of just those standards,
9 and the need to prove policy under Monell.

10 However, we think that much of the discussion
11 that we have presented runs a bit far afield of what the
12 Court should appropriately decide at this juncture.
13 There are two, perhaps two questions that we have been
14 considering. First, did the District Judge properly
15 find Chapman liable in his official capacity, and
16 second, is such a judgment against an official in his
17 official capacity a judgment which runs against the city
18 rather than against Chapman personally.

19 It is only the second question that was
20 decided by the Court of Appeals. Indeed, it was only
21 the second question that was raised in the Court of
22 Appeals.

23 The Court of Appeals at three points in the
24 Joint Appendix, Pages 30, 39, and 46, characterizes this
25 as a suit against Director Chapman in his official

1 capacity, and at Page 46 squarely holds that a judgment
2 against an official in his official capacity runs only
3 against him personally.

4 Now, at this juncture, that finding, I think,
5 stands almost undefended. I think Mr. Klein came close
6 to conceding that it was wrong. Certainly he has not
7 gone to the point of arguing that it is right. But in
8 any event, that is the only decision that was actually
9 resolved by the Court of Appeals, and we think that is
10 all that need appropriately be considered here.

11 The question of whether the District Court
12 should have imposed liability on Chapman in his official
13 capacity is a much more far-reaching, far-ranging kind
14 of bundle of problems, none of which were addressed
15 below. In discussing them, we have conducted something
16 of a grand tour of civil procedure jurisprudence, the
17 problems of Monell, of Percunier. Mr. Justice Stephens
18 raised some issues about the Swind against Pullman
19 standard. We've got problems under Rules 8 and 9 and 12
20 and a bunch of other rules.

21 None of these questions were raised below.
22 None of these questions were decided below. And none of
23 these questions in our view need be decided here.

24 CHIEF JUSTICE BURGER: Thank you, gentlemen.
25 The case is submitted.

1 (Whereupon, at 2:16 p.m., the case in the
2 above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#83-1622 - ELIZABETH BRANDON, ET AL., Petitioner v. JOHN D. HOLT, ETC., ET AL

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A. Richardson

(REPORTER)

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