

# 9th Cir. Okays New Civil Rights Action

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If police cover up evidence that plaintiffs need to make their case, it's a civil rights violation, the 9th U.S. Circuit Court of Appeals held May 11 in a ground-breaking decision against the Nevada Highway Patrol and the Metropolitan Police Department of *Las Vegas*. *DeLew v. Wagner*, 97-15778.

Bicyclist Erin R. DeLew, 27, died in a 1994 accident after a car struck her. The driver, Janet K. Wagner, was the wife of a local officer; police investigators determined she wasn't at fault. Unconvinced, Ms. DeLew's husband and parents sued for wrongful death. The family alleged that police skipped or delayed tests that could have shown Ms. Wagner was drunk and that investigators deliberately failed to preserve skid marks that could have shown she had been speeding.

When the family tried to add a Sec. 1983 civil rights action to their wrongful death suit, the state court insisted on a separate filing. That new action was transferred to a federal court, where it was dismissed by a judge who saw no evidence that the alleged conspirators had infringed on a protected right.

Reversing, the 9th Circuit noted that the only other circuit to come close to addressing this issue -- the 6th -- last year held that the Constitution guarantees the right of court access, which is violated when actions that occur before a suit is filed subsequently make state court remedies ineffective. *Swekel v. City of River Rouge*, 119 F.3d 1259 (1997).

It is too soon to label the DeLew family's state court remedy ineffective. Their state case is pending, with trial set for February, so the appellate panel ordered the federal action dismissed without prejudice, to allow for refiling.

The opinion has personal resonance for the attorney for Ms. DeLew's family, civil rights specialist Timothy M. Rastello, of Denver's Holland & Hart L.L.P. In 1989, Mr. Rastello's father sued police in Torrance, Calif., maintaining they conspired to protect an off-duty sergeant who had been drinking before his car struck and killed Tim's brother, 19-year-old motorcyclist Kelly.

With Tim acting as co-counsel, Brown Green, of Santa Monica, Calif.'s Green, Broillet, Taylor, Wheeler & Panish, offered the then-novel theory that the suit was a Sec. 1983 civil rights action. The theory was never heard by an appellate court because Torrance agreed to pay \$ 6.5 million.

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