No. 07-15572

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLA CONN & DUSTIN CONN,

Plaintiffs-Appellants,

v.

CITY OF RENO, RYAN ASHTON & DAVID ROBERTSON,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

APPELLANTS' SUPPLEMENTAL BRIEF

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INTRODUCTION

While in the custody of defendants-appellees Ryan Ashton and David Robertson, City of Reno police officers, Brenda Clustka attempted to commit suicide by wrapping a safety belt around her neck. After the officers forcibly removed the belt from her neck, Clustka screamed at the defendants that she wanted to commit suicide. Rather than report this incident to subsequent custodians, Ashton and Robertson did nothing. Clustka was released and subsequently arrested the following day. Because her custodians were not informed of her recent suicide attempt and threat, no suicide precautions were taken and a bed sheet was provided in her cell. Clustka committed suicide, hanging herself with the sheet.

Clustka's death was not the only suicide at Washoe County Jail. Between January 2004 and August 2005, five other detainees committed suicide at the facility. Less than a month after Clustka's suicide, the Reno Police Department commenced a training program for its officers with respect to suicide prevention and also implemented a new suicide prevention policy to screen arrestees at intake.

Cluskta's survivors, plaintiffs-appellants here, filed suit against Ashton, Robertson, and the City of Reno. The district court granted summary judgment in favor of the defendants, but this Court reversed, finding

triable issues of fact with respect to both individual and municipal liability. *Conn v. City of Reno*, 591 F.3d 1081 (9th Cir. 2010). Defendants sought certiorari, and the Supreme Court granted, vacated, and remanded in light of its recent decision in *Connick v. Thompson*, 131 S. Ct. 1350 (2011). *See City of Reno v. Conn*, 131 S. Ct. 1812 (2011). Nothing in *Connick*, however, alters the outcome of this appeal.

In *Connick*, the Supreme Court reiterated the standard for municipal liability. The Court reaffirmed the longstanding view that "a municipality's failure to train its employees in a relevant respect" may be challenged under 42 U.S.C. § 1983 when it "amount[s] to deliberate indifference to the rights of persons with whom the untrained employees come into contact." *Connick*, 131 S. Ct. at 1359 (alteration & quotation omitted). "[W]hen city policymakers are on actual or constructive notice that a particular omission in their training program causes city employees to violate citizens' constitutional rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that program." *Id.* at 1360. Accordingly, a "pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train." *Ibid.* (quotation omitted).

Because the plaintiff in *Connick* did not assert a pattern of past events, he attempted to rely solely on a "single-incident" theory of liability, where a "showing of 'obviousness' can substitute for the pattern of violations ordinarily necessary to establish municipal culpability." 131 S. Ct. at 1361. Although the Court noted that "unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under [Section] 1983 without proof of a pre-existing pattern of violations," the Court held that a failure to train government attorneys to avoid violations of *Brady v. Maryland*, 373 U.S. 83 (1963), is not such a circumstance. *Connick*, 131 S. Ct. at 1361-63.

ARGUMENT

Connick has no implications for this Court's prior holding in this case, with respect to either individual or municipal liability. As it solely dealt with a municipal claim, *Connick* has no bearing on the individual liability theory that turns on deliberate indifference. Nor does *Connick* call into question municipal liability here, insofar as the plaintiffs' claims are based on a series of past events. Moreover, quite unlike the circumstance considered in *Connick*, the need for municipalities to train officers to report known suicide attempts and threats is obvious, rendering unnecessary the need for a series of past constitutional violations. Finally, *Con-*

nick's holdings with respect to a failure to train claim do not speak to a municipality's unconstitutional policies, which are also implicated here. The Court should affirm its prior ruling in its entirety.

I. *CONNICK* DOES NOT ALTER THIS COURT'S HOLDING WITH RESPECT TO INDIVIDUAL LIABILITY.

As an initial matter, *Connick*—which adjudicated solely a question of municipal liability—has no implications with respect to the liability of the individual defendants. Indeed, in supplemental briefing before the Supreme Court, defendants recognized that *Connick* does not alter "the scope of individual officers' liability." Pet. Supp. Br. at 4, *City of Reno v. Conn*, 131 S. Ct. 1812 (No. 09-1361), 2011 WL 1321237.

Connick thus provides no basis to revisit the holding on deliberate indifference. Previously, the Court concluded that "[a] heightened suicide risk or an attempted suicide is a serious medical need." *Conn*, 591 F.3d. at 1095. Where there is "sufficient evidence" that an individual has an "objective, serious medical need," an officer must respond reasonably. *Ibid*. Accordingly, when a police officer witnesses a detainee attempt to commit suicide and hears the detainee announce an intention to kill herself, a reasonable response entails writing an incident report or otherwise informing future custodians about these events to permit appropriate medical treatment. *Id*. at 1098. Given the substantial evidence in the record, the Court

properly found triable questions of fact with respect to the individual defendants' subjective knowledge, as well as causation. *Id.* at 1098-1102.

Perhaps recognizing that this case is a pedestrian application of fact to law, defendants attempted to change the terms of debate when seeking certiorari. In their petition, they argued that *Conn* somehow creates a duty for officers to "*diagnose* and report detainees' symptoms of suicidal tendencies" (*see* Pet. for Writ of Cert. at i, *City of Reno*, 131 S. Ct. 1812 (No. 09-1361), 2010 WL 1861008 (emphasis added)), and invoked a supposed duty to "diagnose" literally dozens of times. Defendants further asserted that this Court's opinion creates "novel, undefined, and potentially costly psychiatric-training duties on thousands of cities and towns," and "obligates officers to make nuanced psychiatric diagnoses." *Id.* at 3. Their characterization was dire: "in the Ninth Circuit officers must now detect and report myriad potential symptoms of suicidal ideations in all 38,000 arrestees each day to prevent less than one actual suicide among them." *Id.* at 16-17. Defendants speculated that this Court's opinion "might require formal psychological exercises or even clinical training." *Id.* at 17.

But this case simply has nothing to do with the fanciful theory that defendants have now concocted. This Court never held that police officers must detect hidden symptoms of suicidal intention. It never suggested

that officers must become psychiatrists, diagnosing mental disease. And it surely does not require officers to undergo "formal psychological exercises" or "clinical training."

Rather, the legal holding of this Court was plain and plainly correct: when an officer *watches* a detainee attempt to commit suicide and then *hears* the detainee state an affirmative intention that she will kill herself, the officer has sufficient knowledge of a serious medical condition that requires a reasonable response. *Conn*, 591 F.3d at 1096. These observations require no more of a "diagnosis" than does an officer's observation that an arrestee is suffering from a bullet wound to the leg—both are patently obvious, absent any "clinical training," and both require an officer to take appropriate action.

The proof of the pudding is that neither this Court nor the district courts have viewed *Conn* as creating anything akin to the duty imagined by defendants. In *Simmons v. Navajo County*, 609 F.3d 1011 (9th Cir. 2010), for example, a boy committed suicide while detained. This Court affirmed summary judgment for the defendants, finding there was no evidence that defendants actually knew the boy "was 'in substantial danger' of killing himself." *Id.* at 1018. Changes in the boy's mood were not sufficient evidence for a claim. *Id.* at 1019-20. The Court's analysis turned sole-

ly on what the defendants saw and heard—not whether they properly "diagnosed" certain "symptoms of suicidal ideations." District courts have viewed *Conn* similarly. *See, e.g.*, *Kodimer ex rel. Ramskill v. County of San Diego*, 2011 WL 805859, at *3 (S.D. Cal. 2011) ("[A] nurse is not expected to employ the expertise of a psychiatrist * * *.").

In sum, this Court's holding with respect to individual liability does not require police officers to become psychiatrists. Rather, it merely obligates an officer to respond reasonably to a detainee's known suicide attempt or threat. We are unaware of *any* court that has reached a contrary result. Defendants have attempted to manufacture a conflict where none exists, and *Connick* provides no occasion to revisit this issue.

II. *CONNICK* DOES NOT ALTER THIS COURT'S HOLDING WITH RESPECT TO MUNICIPAL LIABILITY.

Connick similarly does not affect the municipal liability claim. Quite unlike *Connick*, the claim here is based on a series of incidents. Past suicides provided notice to the City of Reno Police Department of the need to better train its officers. Because single-incident liability is not necessary here, *Connick* is simply beside the point.

Even assuming, for sake of argument, that no other suicides could have notified the City of its deficient training, a reasonable jury could nonetheless find municipal liability. Because the record demonstrates that

police officers routinely confront detainees who threaten or attempt to commit suicide, and because police officers (unlike the prosecutors at issue in *Connick* who come equipped with extensive legal training) receive their essential training only from the municipality that employs them, the duty of a police department to train its officers with respect to reporting suicide attempts and threats is obvious. The City of Reno's shortcomings here could thus establish liability consistent with *Connick*, even absent past constitutional violations.

Finally, plaintiffs have asserted an independent basis for municipal liability—that the City's suicide prevention policy (or lack thereof) at the time of Clustka's death was constitutionally deficient. *Connick* does not touch this claim.

A. The Failure To Train Does Not Turn On A Single-Incident Theory.

In their supplemental briefing before the Supreme Court, defendants recognize that *Connick* addresses only failure-to-train claims that arise from a single-incident liability theory. Pet. Supp. Br., *supra*, at 1. Thus, as defendants appear willing to concede, *Connick* has no bearing on a case where liability is based on a "pattern of similar" past events. *Connick*, 131 S. Ct. 1360. Defendants, however, contend that this case does not present a "pattern" claim.

That contention is wrong. Plaintiffs' theory throughout this case has grounded municipal liability in the pattern of past prison suicides, demonstrating that the City of Reno Police Department should have been well-aware of the need to train its officers to respond to suicidal detainees. For example, plaintiffs alleged in the complaint that "[t]he Washoe County Detention Facility has had several jail suicides. Less than one month before Clustka succeeded in killing herself, on March 29, 2005, inmate Patrick Boyle was found hanging in his cell." ER9 ¶ 48. The complaint emphasized that "[d]espite the known prevalence of jail suicides, City of Reno Police Department failed to train its officers on their responsibilities to report information they have regarding suicide attempts by detainees." *Id.* ¶ 49.

Similarly, on appeal to this Court, plaintiffs argued that Clustka's death was the fifth of six suicide deaths in less than two years at the Washoe County Jail. Pl.-App. Opening Br. at 19. *See also* ER 392, 395-96. Officer Robertson testified that he had encountered between 500 and 1,000 suicidal individuals. *Conn*, 591 F.3d at 1103. Yet prior to Clustka's death, the Reno Police Department had no written suicide policy. ER260-61; 274-77. It was not until after Clustka's death that the Department began to train its officers to respond to suicide attempts and threats. There are accordingly triable questions of fact as to whether the prior suicides were

sufficient to provide the Reno Police Department "notice that a course of training is deficient in a particular respect." *Connick*, 131 S. Ct. at 1360.

And that is how this Court understood the claim, too. Because of the past suicide deaths and the frequent encounters of law enforcement with suicidal individuals, the Court found that the "failure to train officers on how to identify and when to report suicide risks produces a 'highly predictable consequence': that police officers will fail to respond to serious risks of suicide and that constitutional violations will ensue." *Conn*, 591 F.3d at 1103. The Court thus properly concluded that the several other suicides preceding Clustka's create questions of fact for the jury.

To the extent that any question remains, the appropriate course would be to remand this case to the district court to permit plaintiffs the opportunity to further develop their municipal liability claim in light of *Connick*'s new guidance.

B. Even Absent A Pattern Of Past Events, A Failure To Train Claim Is Cognizable Here.

Although this case is decidedly not premised solely on a single-incident theory of liability, a pattern of past unconstitutional occurrences is unnecessary to demonstrate a municipality's duty to properly train its officers to respond to suicide attempts and threats.

Connick squarely permits municipal liability in circumstances where "the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable under § 1983 without proof of a preexisting pattern of violations." 131 S. Ct. at 1361. Citing the hypothetical introduced in *City of Canton v. Harris*, 489 U.S. 378, 390 (1989), the Court explained that "[g]iven the known frequency with which police attempt to arrest fleeing felons and the predictability that an officer lacking specific tools to handle that situation will violate citizens' rights," it is possible that "a city's decision not to train the officers about constitutional limits on the use of deadly force could reflect the city's deliberate indifference to the highly predictable consequence, namely, violations of constitutional rights." *Connick*, 131 S. Ct. at 1361 (quotation omitted). Because there is "no reason to assume that police academy applicants are familiar with the constitutional constraints on the use of deadly force," and "in the absence of training, there is no way for novice officers to obtain the knowledge they require," "there is an obvious need for some form of legal training." *Ibid.*

That analysis describes precisely the situation at issue here.

First, it is a virtual certainty that a police department's officers will encounter suicidal individuals. *See Conn*, 591 F.3d at 1103 ("[P]laintiffs have provided evidence that officers predictably face situations where they

must assess and react to suicide risks in order to prevent grave harm to people under their protection."). One defendant here testified that, over the course of his career, he had "encountered between 500 and 1,000 people threatening to kill themselves." *Ibid*. Plaintiffs demonstrated that suicide is the leading cause of death in U.S. jails, making training critical. ER385.

Second, appropriate training is necessary for police officers to respond correctly to suicide attempts and threats. The individual officers here testified that they believed it appropriate for officers to fail to report suicide attempts and threats. *Conn*, 591 F.3d at 1103. But they are wrong; it is standard practice to require officers to report such incidents. Prison Health Services Director Gail Singletary, for example, testified that "[a]ll law enforcement officers should be aware of the signs and symptoms of suicide to communicate it and help avert it." E167. Lieutenant Perry of the Washoe County Sheriff's Office similarly testified that if a deputy hears an inmate announce an intention to commit suicide, the officer is "supposed to take action and tell a supervisor." ER311. And Reno Police Deputy Chief James Johns testified that the officers should have reported the suicide attempt and threat. ER260 & 264. Because appropriate training by the city and proper policies could have avoided the constitutional errors by the in-

dividual defendants, the "highly predictable consequence" of the City's failure to act despite an "obvious" risk was that constitutional violations would result. *Connick*, 131 S. Ct. at 1361.

Third, notwithstanding the obvious risk of constitutional violations, there is no dispute that the City of Reno had no relevant training programs whatsoever at the time of Clustka's death. *Conn*, 591 F.3d at 1103 (Plaintiffs "have provided substantial evidence in the form of deposition testimony that before Clustka's suicide the City did, in fact, fail to train its officers in suicide prevention and the identification of suicide risks."). *See also* ER186, 228, 260-61, 274-77. As there is "no reason to assume that police academy applicants are familiar with the constitutional constraints" with respect to deliberate indifference, and "in the absence of training, there is no way for the novice officers to obtain the legal knowledge they require" (*Connick*, 131 S. Ct. at 1361), it can come as little surprise that the individual officers misunderstood the relevant constitutional duties at stake here.

In sum, a jury could conclude on the basis of this record that the risk of police officers failing to appropriately address suicide attempts and threats is "obvious," and that a city's failure to train thus has the "highly predictable consequence" of a constitutional violation. *See, e.g.*, *Whitt v.*

Stephens County, 529 F.3d 278, 284 (5th Cir. 2008) ("In the specific context of prison suicide prevention, municipalities must provide custodial officials with minimal training to detect obvious medical needs of detainees with *known*, *demonstrable*, and serious medical disorders, but a failure to train custodial officials in screening procedures to detect *latent* suicidal tendencies does not rise to the level of a constitutional violation." (quotation omitted)).

Connick is not to the contrary. The Supreme Court rejected municipal liability in *Connick* because substantially different facts there caused the Court to conclude that the risk a prosecutor would commit a *Brady* violation was not "obvious." This was based on the extensive catalog of training that lawyers receive:

- **Law school and licensing:** "Before [attorneys] may enter the profession and receive a law license, all attorneys must graduate from law school or pass a substantive examination; attorneys in the vast majority of jurisdictions must do both." *Connick*, 131 S. Ct. at 1361.
- **Continuing legal education:** "Most jurisdictions require attorneys to satisfy continuing-education requirements." *Id*. at 1362.

- **Mentorship:** "Attorneys who practice with other attorneys, such as in district attorney's offices, also train on the job as they learn from more experienced attorneys." *Ibid.*
- **Character and fitness:** "[A]ttorneys in all jurisdictions must satisfy character and fitness standards to receive a law license and are personally subject to an ethical regime designed to reinforce the profession's standards." *Ibid.*

The Court concluded that "[i]n light of this regime of legal training and professional responsibility, recurring constitutional violations are not the 'obvious consequence' of failing to provide prosecutors with formal in-house training about how to obey the law." *Id.* at 1363.[1]

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[1] In concurrence, Justice Scalia suggested a yet narrower ground for *Connick*'s rejection of municipal liability: because the constitutional violation occurred due to the purposeful conduct of a "miscreant prosecutor" who "willful[ly] surpress[ed] evidence he believed to be exculpatory," it "was almost certainly" not caused by the municipality's "failure to give prosecutors specific training." *Connick*, 131 S. Ct. at 1368 (Scalia, J., concurring). Such intentional conduct—"a bad-faith, knowing violation"—can "not possibly be attributed to lack of training." *Id.* at 1369.

Here, plaintiffs do not assert that the officers engaged in *intentional*, *affirmative* conduct designed to harm Clustka. Rather, the officers failed to respond reasonably to her obvious medical needs because they—as the officers have testified—were unaware that it was their constitutional duty to do so. *Conn*, 591 F.3d at 1103. Unlike the miscreant actor for whom training is irrelevant, the failure of the City to adopt any training thus had the "highly predictable consequence" of permitting this constitutional violation. *Connick*, 131 S. Ct. at 1361 (quotation omitted).

As the Supreme Court in *Connick* acknowledged, no such training regime exists for police officers. 131 S. Ct. at 1361. Police officers, unlike lawyers, depend on the municipality to train them with respect to their constitutional obligations. *Ibid.* And "legal training is what differentiates attorneys from average public employees." *Ibid.* (alterations & quotation omitted). Indeed, in urging the Supreme Court to grant certiorari notwithstanding *Connick*, defendants themselves acknowledged that "this case arises in a distinct factual context involving police rather than lawyers." Pet. Supp. Br., *supra*, at 1.

Police officers are not lawyers. Many police officers will see detainees attempt suicide or hear them threaten it, but absent appropriate training, officers will be unaware of their constitutional obligation to respond reasonably. The City of Reno's failure to adequately train its officers thus had the obvious and predictable consequence of causing the constitutional violation here.

C. Municipal Liability Is Also Established By The City's Unconstitutional Policies.

Finally, *Connick* has no bearing on the claim for municipal liability that turns on the City's unconstitutional policies. In *Connick*, the plaintiff sought municipal liability because of both a failure to train and unconstitutional municipal policies. But the "jury rejected [the] claim that an un-

constitutional office policy caused the *Brady* violation," because of testimony that "office policy was to turn crime lab reports and other scientific evidence over to the defense." 131 S. Ct. at 1357. Thus, when *Connick* reached the Supreme Court, no claim for an unconstitutional policy was at issue.

Not so here. Prior to Clustka's death, the City of Reno lacked any suicide prevention policy; there was thus no policy that required officers to notify future custodians of suicide attempts or threats. *Conn*, 591 F.3d at 1104 ("The Conns assert—and appear to be correct—that there was no written policy on reporting suicide threats at the time of Clustka's suicide."). The fact that the City implemented a policy (forced upon it by Washoe County) *after* Clustka's death underscores that none existed at the time of her suicide. *Ibid.* A jury could thus conclude, in the face of prior prison suicides and the obviousness of the risk to City officials, that the City of Reno's "lack of affirmative policies or procedures * * * amount[ed] to deliberate indifference." *Ibid.* (quotation omitted). The City's deficient policy thus provides a municipal liability theory apart from its failure to train.

* * * *

Several disputed questions of fact remain in this case. With respect to individual liability, the parties dispute whether the officers had subjective knowledge of Clustka's medical condition and, if they did, whether their conduct contributed to her suicide. If a jury concludes that the individual officers are liable, it must then consider whether the prior suicides put the City on notice of its deficient training or whether the risk of detainee suicide was sufficiently obvious that the City's failure to adopt any training program was, in part, responsible for Clustka's death. The jury must likewise consider whether the City's failure to adopt a suicide prevention policy was deliberately indifferent. This case must proceed to trial, where a jury will resolve these factual questions.

CONCLUSION

For the foregoing reasons, the Court should reinstate its prior opinion, reversing the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel for appellants certifies that this brief:

(i) complies with the word limitation of this Court's order of April 22, 2011, because it contains 3,794 words, including footnotes; and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

/s/ Paul W. Hughes

CERTIFICATE OF SERVICE

I certify that on this 20th day of May 2011, I served the foregoing Appellants' Supplemental Brief on all counsel via the Court's ECF system.

/s/ *Paul W. Hughes*
Paul W. Hughes