For Opinion See 261 F.3d 1037

United States Court of Appeals,
Eleventh Circuit.
John/Jane DOES 1-13, Plaintiffs/Appellees,
v.
Jeb BUSH, et al., Defendants/Appellants.
No. 99-14590-DD.
April 17, 2000.

On Appeal from the U.S. District Court, Southern District of Florida
Case no. 92-589-Civ-Ferguson

Appellants' Reply Brief

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1 *REPLY TO PLAINTIFFS/APPELLEES' STATEMENT OF FACTS

Appellants/Defendants (hereafter "Defendants") disagree and object to Plaintiff/Appellees' (hereafter "Does") Statement of the Facts on the basis that it misstates and misrepresents the record and relies on self-serving statements of counsel made throughout the proceedings below, as if such statements constituted evidence of record. Specifically, Defendants object to the following assertions:

C1) ***The parties and the court treated this as a class action.*** (Answer Brief at 26) (Only the Does treated this case as a class action, even though they knew the class was not certified, and the Defendants continually objected to certification);

2) ***There is a putative class of 600 persons who have not been served and are waiting for ICF/DD placements.*** (Answer Brief at 7) (There is not and never has been any putative class or even a list of 600 persons, eligible or otherwise, who have been identified and who have not been provided services and are waiting for ICF/DD placements);

3) The Does insist on referring to the "Defendants" generically, and continue to ignore that this is an appeal of a post-judgment *contempt* order, arising out of a §1983 action filed in 1992. Both the court and the Does are attempting to hold the present named Defendants in contempt for the alleged actions and inactions of prior office holders.

***2 1. This is not a class action.** The court acknowledged in its October 7, 1999, Order that "an order certifying class was never entered." R-587 p. 6 n. 2. Furthermore, the Defendants objected to the class allegations and motion for certification at every appropriate instance.

Contrary to the Does' assertions, the Final Judgment of August 28, 1996, as affirmed by this court in *Does 1 -13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998), did not grant class-wide relief. The final judgment provided:
ORDERED AND ADJUDGED that Defendants shall, within 60 days of the date of this Order establish within the State's Medicaid Plan a reasonable waiting list time period, not to exceed 90 days, for individuals who are eligible for placement in ICF/DD institutional care facilities.

As this court previously stated, this judgment meant only that "appellants must incorporate into their present scheme of providing services procedures that insure a waiting list period of not more than 90 days." This directive was accomplished in July of 1998. R-602, p. 126.

Defendants acknowledge that amending the State's Medicaid Plan to insure a reasonable waiting list time period, not to exceed 90 days, for individuals who are eligible for placement in ICF/DD institutional care facilities, *may now benefit other persons* who are not parties to this action. However, there is nothing in the ***3** record of the contempt proceedings that any identified person had been waiting for ICF/DD placement for more than 90 days.

After judgment and appeal, the Does and the trial court attempted to extend the relief granted beyond "ICF/DD residential placement" to community-based and other services and other persons in addition to the named 13 Does. It was in this setting that the *current* Defendants tried to avoid threatened sanctions and respond to the trial court's November 1998 directives to provide a "comprehensive plan…ready for implementation," by presenting plans to provide services to persons with developmental disabilities. The current Defendants assumed office in January of 1999, (as a result of the November 1998 gubernatorial elections and the subsequent change in Administration).

2. There is no list of 600 identified persons who have not been served and are waiting for ICF/DD placements. The first reference to "600 persons" appears in an "attachment #1" to a "Declaration of Charles Kimber" [FN1] filed with the court in November 1998 (Post-Judgment). *See* R-599, p.2 (the declaration itself is at R-531). Attachment #1 was a "Legislative Budget Request" (prepared under the direction of Ed Feaver and dated 4/1/98). The "600 persons" was clearly an estimate of individuals who "**might choose**" ICF/DD ***4** residential placement in fiscal year 1997 - 1998. "The 600 individuals below reflects any individual **anticipated to need** ICF/DD placement during FY 1997 -98" (R-531, Attachment #1, page 2, emphasis added); "Individuals in need of residential placement **who might choose** ICF/DD 600" (*Id*., emphasis added); "…the exact number of individuals who will seek placement in an ICF/DD is **currently unknown**…." (*Id*., emphasis added). No such individuals were identified or named.

> FN1. At the time, Mr. Kimber, then assistant secretary for developmental services in the Department of Children and Families, was a defendant. R-371.

The "600" is also referenced on page 4 of Attachment #2 to Kimber's "Declaration":
"Estimate of Need.
Districts were requested to verify recommended settings for individuals identified as waiting for an ICF/DD placement. Districts indicated the time frames in which the individuals requesting ICF/DD placement would need to receive the service. The 600 individuals below reflects any individual anticipated to need ICF/DD placement during FY 1997-98"

Again, there is no list and no such individuals were identified or named.

The evidence presented at the hearing in May of 1999 conclusively established that *every* person eligible for and requesting ICF/DD services had received such services within 90 days. The record clearly reflects that the Defendants had a working system in place to ensure the provision of ICF/DD services within 90 days to those who were Medicaid eligible. R-601 pp. 115-116.

***5** The evidence *at the hearing* in May 1999 established that of "600 persons" allegedly eligible for and demanding ICF/DD services - the 634 "plaintiffs" the court identified in its contempt order[FN2] - actually consisted of people seeking any "alternative residential placements," which include not only ICF/DDs, but also nursing homes, foster homes, and group homes. R-601 pp. 163-164. Of this number, only 10 had in fact asked for ICF/DD placement. R-602 p. 159. There is no list of 600 identified and named individuals and there was no record evidence at the hearing that *any* person eligible for and choosing ICF/DD services had been waiting more than 90 days.

FN2. R-587 p. 6 n. 2.

3. The *current* Defendants[FN3] took office in or after January 1999. The current defendants were not parties to this action, nor were they present at the November 1998 contempt hearing which resulted in the trial court's November 10, 1998 "Memorandum Findings". They had no authority to act, plan, or implement changes to any Medicaid program until after January 1999.

FN3. They are Kathleen Kearney, secretary of the Department of Children and Families; Carl Littlefield, assistant secretary for developmental services in the Department of Children and Families; Charles Auslander, acting district 11 administrator, Department of Children and Families; and Gary Crayton, director of Medicaid, Agency for Health Care Administration.

The Does continue to ignore the fact that this is an appeal from a *contempt order*, arising out of a §1983 action filed in 1992, ***6** which seeks to hold certain individuals[FN4] personally liable for violations of the Does' federal rights. There is nothing in the record to indicate that the current defendants violated the federal rights of any plaintiff or any other person.

FN4. The original defendants were Lawton Chiles, governor; Robert Williams, secretary of the then-Department of Health and Rehabilitative Services; Gary Clarke, assistant secretary for Medicaid, Department of Health and Rehabilitative Services; Richard Lepore, assistant secretary for developmental services, Department of Health and Rehabilitative Services; and H. James Towey, district 11 administrator, Department of Health and Rehabilitative Services. R-1.

SUMMARY OF THE ARGUMENT

I. The trial court exceeded its authority in holding Defendants in contempt for not providing services not required by the Final Judgment and by expanding this action beyond the 13 named plaintiffs and beyond ICF/DD residential placement to the full range of Medicaid services. The record of the contempt proceedings does not establish that the Defendants failed to provide Medicaid services to those entitled to them.

II. Having never certified a class pursuant to Rule 23 prior to entry of the final judgment (or prior to entry of the contempt order), and having never even held a hearing on that issue, the trial court did not have jurisdiction to

order class-wide relief and restructuring of the State's Medicaid Program. The Defendants objected to certification of a class at all times prior to entry of the final judgment and did not waive their right to object to the ***7** report and recommendation of the Magistrate Judge, which they had not even received at the time the court entered final judgment. Furthermore, the pending motion for class certification was dismissed as moot by the final judgment. As a matter of law, therefore, the named Does had no right or standing to subsequently raise claims that could only have been raised, if at all, by persons who were not parties to this action.

The doctrine of res judicata can only bar claims brought and decided in other cases. It therefore has no application to this case. The law of the case doctrine likewise does not apply because neither the trial court nor this court ever ruled on the propriety of class certification-and, in fact, Defendants never had an opportunity to litigate that issue. They are, therefore, not precluded from doing so now.

III. The district court clearly erred in holding that the time periods to determine Medicaid eligibility and to provide ICF/DD services must run concurrently. These are distinctly different duties, and it is clear that 42 C.F.R. §425.911(a) provides for an initial 90-day period to determine eligibility, a regulation that the Does do not even discuss. The final judgment itself mandated a 90-day waiting period for "eligible" people.

In addition, the district court exceeded its authority in refusing to recognize that Florida has the authority and discretion to determine ICF/DD eligibility criteria. The court had no jurisdiction to determine Florida's compliance with state ***8** rulemaking procedures, and federal rulemaking procedures simply do not apply to the states. Florida's eligibility criteria were rationally based because those who were ineligible for ICF/DD services did not need continuous active treatment.

IV. Because of the trial court's decision to expand the scope of this action after final judgment, the contempt proceedings were in essence an attempt to enforce a complex civil injunction. Here, however, the order is not only vague and ambiguous, but so far-reaching that Defendants could do nothing to purge themselves of contempt within the ten days allowed even if they knew precisely what they were being ordered to do.

V. Governor Bush is clearly not a "party" who can be held in contempt. In the first place, this action was dismissed as to his predecessor in office, Governor Chiles. Governor Bush, whose name was substituted only by operation of a rule *after* the contempt proceedings, did not become a party responsible for complying with the Final Judgment. Furthermore, he was not governor at the time in which the Defendants allegedly failed to comply with the Final Judgment.

***9 ARGUMENT**

INTRODUCTION

Plaintiffs' answer brief contains *seven* POINTS of argument that do not directly correspond or respond to the *five* main POINTS of the initial brief. This procedure is objectionable and contributes to plaintiffs' efforts to confuse the controlling issues in this case. In order to aid this Court and attempt to reduce the confusion, Defendants have prepared this Reply by setting forth POINTS I - V of the initial brief and listing after each, what appears to be the corresponding POINT (or POINTS) of the brief.

I. THE TRIAL COURT EXCEEDED ITS AUTHORITY IN HOLDING GOVERNOR JEB BUSH AND OTHER DEFENDANTS IN CONTEMPT FOR FAILURE TO TAKE ACTIONS THAT WERE NOT REQUIRED BY THE FINAL JUDGMENT, AS AFFIRMED *AND NARROWLY APPLIED* BY THE HOLD-

ING OF THIS COURT.

PLAINTIFF/APPELLEES' ANSWER BRIEF, POINT I: *THE TRIAL COURT PROPERLY ORDERED DEFENDANTS TO COMPLY WITH THE FINAL JUDGMENT AND THIS COURT'S MANDATE BY ACTUALLY PROVIDING MEDICAID SERVICES WITH REASONABLE PROMPTNESS AS REQUIRED BY FEDERAL LAW.*

The Does do not directly respond to this point of the initial brief and fail to offer any legal authority in opposition to the arguments raised by Defendants: that the trial court exceeded its jurisdiction by holding Defendants in contempt for actions not required by the Final Judgment. As stated in the initial brief, a finding of contempt must be based on a specific, unambiguous decree ***10** or final judgment. *See Stotler & Co. v. Able*, 870 F.2d 1158, 1163 (7th Cir. 1989) (to hold a party in contempt, the district court must be able to point to a decree that sets forth in specific detail an unequivocal command which the party violated). Moreover, a trial court may not expand the scope of the litigation or the relief accorded in the final judgment, as affirmed by the appellate court. *Litman v. Massachusetts Mutual Life Ins. Co.*, 825 F.2d 1506, 1510-1511 (11th Cir. 1987). Plaintiffs ignore these authorities and fail to offer any counter argument.

The Does argue instead that the trial court merely ordered the Defendants to comply with federal law by providing "Medicaid Services" to 600 persons, and did not order a restructuring or a "comprehensive plan". However, "Medicaid Services" are not defined or limited to ICF/DD residential placement; the record does not establish that there are 600 actual and identified people not being served; and the court specifically ordered the Defendants to devise a "comprehensive plan ….ready for implementation" that complies with "the letter and spirit" of the Final Judgment. R-587, p. 15. It is clear that the trial court and the Does were attempting to: 1) expand this action and the final judgment beyond the 13 named plaintiffs; 2) expand the action beyond ICF/DD residential placement to the full range of "Medicaid Services"; and 3) restructure the program through a "comprehensive plan….ready for implementation." How the Defendants could comply with "the letter and spirit" of the Final Judgment, to what measure, and to whose ***11** satisfaction is unclear. These directives were not specific, unambiguous decrees in the final judgment, and they cannot be implied. In fact, they constituted an impermissible post-judgment, post-appeal expansion of the litigation and the relief granted. As a result, the trial court exceeded its jurisdiction in holding the Defendants in contempt.

II. THE TRIAL COURT DID NOT HAVE JURISDICTION TO ORDER THE DEFENDANTS TO PROVIDE CLASS-WIDE RELIEF (TO AN UNDEFINED CLASS THAT WAS NEVER CERTIFIED) WHICH WOULD CONSTITUTE A COMPREHENSIVE RESTRUCTURING OF THE STATE'S MEDICAID PROGRAM FOR THE DEVELOPMENTALLY DISABLED AND ALL SERVICES AS WELL AS REQUIRE SUBSTANTIAL LEGISLATIVE APPROPRIATIONS TO IMPLEMENT.

PLAINTIFFS' ANSWER BRIEF, POINT II: THE DISTRICT COURT HAD JURISDICTION TO ORDER CLASSWIDE RELIEF

The answer brief asserts three subpoints in response to Defendant's argument that the trial court did not have jurisdiction to order class-wide relief to an undefined class that was never certified. Those three subpoints are: a) the final judgment ordered class-wide relief; b) the Defendants failed to object to the magistrate's report on class certification and therefore waived any right to object to class certification; c) the magistrate's report became a part of the final judgment affirmed by this court on appeal, and thereby constitutes res judicata or "law of the case," precluding Defendants from objecting to or litigating class certification at this point. Defendants reply to

these three ***12** subpoints as follows: 1) the final judgment and the affirming appellate decision did not order class-wide relief (as previously discussed in Point I of this reply); 2) the Defendants objected to class certification at every appropriate instance; 3) the Defendants did not waive their right to object; 4) res judicata and law of the case do not apply to the class certification issue in this case; 5) the prior appellate decision in this case did not hold that this was a class action.

A. The Defendants Objected to Class Certification at Every Appropriate Instance. Even If The Trial Court and Plaintiffs Acted as If the Case Were a Class Action, Such Behavior Does Not Satisfy Rule 23.

Through out this case, Defendants consistently objected to class treatment of this action. The Defendants resisted certification before judgment. R-84, 85, 86, 139, 278, 281, 282, 321, 322, 330, 331, 351, 390, 394, 401, 403. They raised the issue in their initial brief in the appeal on the merits. *Doe 1-13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998). And, they objected before the contempt hearing in May 1999. R-579. Evidently, the Defendants' latest objection was finally recognized because in the October 1999 contempt order the court conceded that the case was not a class action. R-587 p. 6 n. 2.[FN5]

> FN5. The Does contend that the magistrate's report and recommendation on class certification "became the order of the District Court" upon entry of the final judgment. Answer brief p. 26. This is a strange argument given the district court's post-judgment admission that this is not a class action, and its subsequent certification of a class four years after final judgment. *See* Eleventh Circuit case no. 99-11034-E.

***13** During post-judgment contempt proceedings, the *current* Defendants in this case tried to avoid threatened sanctions and further litigation by responding to the trial court's demands for a "comprehensive plan" and class-wide remedies. These Defendants, having only recently taken office and constituting a new administration, were at the same time attempting to appreciate the past problems and implement new program and policy changes to address them. The trial court nevertheless insisted on treating the case as a class action despite the lack of class certification. At one point, the district court threatened to terminate funding to *all* state Medicaid beneficiaries unless the Defendants provided class-wide relief. R-530 p. 3; R-599 p. 64, Nov. 4, 1998 transcript ("I will enter an order prohibiting the expenditure of any Medicaid funds other than for the developmentally disabled.").

The fact that, post-judgment, post-appeal, the Defendants were required to respond to the court's demands and treatment of the case as a class action is not relevant. The post-judgment actions of the court do not convert the case into a class action, where no class was formally certified pursuant to Fed.R.Civ.P. 23. *See Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551 (1976); *Board of Commissioners of the City of Indianapolis v. Jacobs*, 420 U.S. 128, 95 S.Ct. 848, 43 L.Ed.2d 74 (1975); and ***14***Pasadena City Board of Education v. Spangler*, 427 U.S. 424, 96 S.Ct. 2697, 49 L.Ed. 599 (1976).

Moreover, and as a matter of law, the named plaintiffs in this action cannot rest their claims-here for contempt-on the purported rights or interests of third parties who have never been brought into the case. The Does' standing to seek relief must rest on injury to their own rights. *See Warth v. Seldin*, 422 U.S. 490, 499 (1975). A plaintiff may invoke federal court jurisdiction only when the plaintiff has suffered threatened or actual injury from the putatively illegal action. *Id*. at 99. *See also Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979).

B. The Defendants Did Not Waive Their Right to Object to the Report and Recommendation under 28 U.S.C. § 636.

First, the Defendants had not seen the two-day-old report and recommendation when the court entered final judgment. The magistrate judge issued his report and recommendation on class certification (R&R) on August 26, 1996, two days before the district court rendered final judgment. R-446, 449. Neither the Does nor the defendants saw the R&R before the entry of final judgment. The Does admitted at an August 28, 1996, hearing that they had not received the R&R:

Mr. Weinger [the plaintiffs' lawyer]: The motion for class certification was filed four years ago and is still pending before the magistrate.

***15** The court: I have the Magistrate's recommendation now. I received it. I guess you received it too.

Mr. Weinger: *I have not*.

R-458, p. 23-24 (emphasis added).

The Does apparently are now asserting that the Defendants were obliged to object to a document which neither they nor the Defendants had received.

Second, by dismissing all pending motions in the final judgment, the court dismissed the motion for class certification. The court thus obviated the need to object to the R&R. The final judgment states: "Any pending motions are dismissed as moot." R-449 p. 1. This sentence is so broad and unqualified that the Defendants had no reason to doubt that the court included the class certification motion - then pending - as dismissed too. The Defendants were entitled to take the term "any pending motions" at face value.

With all pending motions dismissed, including the class certification motion, the Defendants were not on notice of the need to file objections to the R&R, to move for rehearing, or anything else.

C. The Doctrine of Res Judicata Does Not Apply to the Class Certification Issue in this Case.

The doctrine of res judicata, also known as "claim preclusion," does not apply to the class certification issues in ***16** this case. *Citibank N.A. v. Data Lease Financial Corp.*, 904 F.2d 1498, 1504 (11th Cir. 1990). Res judicata only bars claims brought in different lawsuits, not rulings or issues already litigated in the same case. *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 n. 3 (11th Cir. 1990). Thus, it applies only to actions taken - or claims made - by a plaintiff in a separate lawsuit. It is inappropriate to apply the doctrine to bar objections to class treatment in this case.

D. Law of the Case Does Not Bar the Defendants' Appeal of the Class Certification Order.

The law of the case does not bar the Defendants' current objections to lack of class certification because: 1) they never had an opportunity to question the propriety of class certification; 2) the court of appeals never ruled on the propriety of class certification; and 3) the court lacked jurisdiction over putative class members at the time of the final judgment and the decision on appeal in this court.

Law of the case doctrine generally bars the reopening of "issues decided in earlier stages of the same litigation." *Agostini v. Felton*, 521 U.S. 203, 117 S.Ct. 1997, 2017 (1997). The doctrine precludes re-litigation of a "settled" issue. *Klein v. Arkoma Production Inc.*, 73 F.3d 779, 784 (8th Cir. 1996). But law of the case doctrine is not as rigid as res judicata and "does not bar consideration of matters that could have been, but were not, ***17** resolved in earlier proceedings." *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir. 1991). "While law of the case preclusion is limited to those issues previously decided, the doctrine does operate to encompass issues decided by necessary implication as well as those decided explicitly." *Id. See also In re Justice Oaks II, Ltd.*, 898 F.2d 1549 n. 3 (law

of the case does not bar litigation of what might have been decided but was not).

The law of the case comes not from what an opinion says or its words imply, but from what the prior ruling decided, considering all the facts then before the court. *In re U.S.*, 60 F.3d 729, 731 (11th 1995).

Thus, in the instant case, the Defendants are not precluded from raising an argument that they had no prior opportunity to raise. *Bagola v. Kindt*, 131 F.3d 632, 637 (7th Cir. 1997). Furthermore, they are not precluded from raising the class certification issue where there has been no ruling by the trial court, *In re U.S.*, 60 F.3d 729, 731 (11th Cir. 1995), and where the court had no jurisdiction over the parties. *Bagola, supra.* Because the court did not certify a class under Rule 23, the putative class members were not parties to this litigation, and not bound by the final judgment. *See*, *e.g.*, *Goff v. Menke*, 672 F.2d 702, 704 (8th Cir. 1982) (class member is a party to the class action, and "After rendition of a final judgment, a class member is ***18** ordinarily bound by the result of a class action."); *McNeil v. Guthrie*, 945 F.2d 1163 (10th Cir. 1991) (class members are bound by consent decree in a class action).

E. The Court of Appeals Did Not Decide the Question of Class Certification in the Prior Appeal.

In *Doe 1-13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998), this court did not hold that this case was properly treated as a class action. This court merely held that the final judgment meant that the Defendants "must incorporate into their present scheme of providing services procedures that ensure a waiting list period of not more than ninety days." *Id.* at 721.

Class certification and a demonstration of class-wide injury were not necessary to justify this relief. Requiring procedural amendments to Florida's Medicaid state plan to limit ICF/DD waiting times to 90 days for eligible individuals, R-449 p. 1, directly benefitted the named plaintiffs. The court found that the relief imposed targeted the precise act that harmed the named plaintiffs. *Doe* at 722. The fact that the relief granted the Does may have also benefitted others does not make this a class action or constitute class-wide relief.

Furthermore, the lack of pre-judgment class certification prohibited the Defendants from raising any meaningful challenge to the propriety of class certification in the trial court or on ***19** appeal. The Defendants have not been able to question the proposed definition of the class; whether the named plaintiffs are fit to serve as class representatives; whether the necessary commonality and typicality of claims exist; and whether the named plaintiffs will fairly and adequately represent the interests of the class.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT THE DEFENDANTS MUST DETERMINE MEDICAID ELIGIBILITY AND PROVIDE ICF/DD SERVICES WITHIN 90 DAYS, CONTRARY TO FEDERAL REGULATIONS, AND IMPROPERLY USURPED THE DEFENDANTS' AUTHORITY TO SET ELIGIBILITY REQUIREMENTS FOR MEDICAID SERVICES BASED ON "MEDICAL NECESSITY."

APPELLEES' ANSWER BRIEF, POINT III: *THE TRIAL COURT PROPERLY HELD THE DEFENDANTS IN CONTEMPT SINCE DEFENDANTS DID NOT COMPLY WITH THE DISTRICT COURT'S FINAL JUDGMENT AS AFFIRMED BY THIS COURT*;

APPELLEES' ANSWER BRIEF, POINT IV: *THE DISTRICT COURT PROPERLY FOUND THAT THE DEFENDANTS' FORMULATED AND IMPLEMENTATION OF NEW ELIGIBILITY CRITERIA CONTAINED IN THE FSTS CONSTITUTED INVALID RULE MAKING WITHOUT NOTICE AND COMMENT;*

APPELLEES' ANSWER BRIEF, POINT V: *THE TRIAL COURT PROPERLY FOUND THAT DEFENDANTS ARE REQUIRED TO PROVIDE ICF/DD PLACEMENTS TO CLASS MEMBERS WITHIN 90 DAYS OF A REQUEST, AND NOT 180 DAYS AS DEFENDANTS NOW ASSERT.*

Point III of Defendants' initial brief presents two issues. First, Defendants present the argument that Medicaid regulations, 42 C.F.R. §425.911(a), provide for a 90-day time period to determine Medicaid eligibility upon receipt of a request for ***20** services, and that after eligibility is determined, services for eligible individuals must be provided "with reasonable promptness," ("not to exceed 90 days," as set forth in the Final Judgment, affirmed by this court). Second, Defendants assert that the trial court exceeded its authority by interfering with Defendants' right to set ICF/DD eligibility criteria and by holding that Defendants had failed to comply with state and federal rule making requirements.

A. The "Not to Exceed" 90-day Time Period to Provide ICF/DD Services Begins to Run Only after a Determination of Eligibility.

Defendants do not assert that they have 180 days from initial request for services to deliver services. Defendants assert that there are two separate time periods: one of *up to 90 days* from the date of a request to determine Medicaid eligibility; and another subsequent time period to deliver services to eligible individuals "with reasonable promptness," which is not to exceed 90 days. *See* 42 C.F.R. §425.911(a). The trial court erred by directing the defendants to determine Medicaid eligibility *and* deliver services within 90 days of a request for services, (and by holding defendants in contempt for not anticipating a contrary interpretation). This would only be proper if eligibility for the individual had been determined prior to the request for services.

***21** In Points III & V of their answer brief, the Does misrepresent Defendants' position and argue that Defendants are asserting a right to maintain a 180-day "waiting list" for ICF/DD placement (Point III) and making eligible individuals wait six months for services. (Point V). As explained above, this is not Defendants' position.

Furthermore, the answer brief fails to discuss the provisions of 42 C.F.R. §425.911(a) which provide for an initial 90-day period to determine Medicaid eligibility, prior to delivery of services. The brief further fails to respond to any of the Defendants' citations to legal authority acknowledging separate time periods to determine eligibility and to deliver services after eligibility is determined.

None of the cases the Does cite holds or even suggests that a district court can disregard the separate determination deadline in 42 C.F.R. s. 435.911(a). *Brown v. Luna*, 735 F.Supp 762 (N.D. Tenn. 1990), *reversed*, 936 F.2d 572 (6th Cir. 1991) (finding of contempt reversed), was a contempt proceeding for the alleged violation of a consent decree. *Salazar v. District of Columbia*, 954 F.Supp. 278 (D.D.C. 1996), was about the failure to timely process Medicaid applications. *Padron v. Feaver*, 180 F.R.D. 448(S.D. Fla. 1998), also was about the timely processing of Medicaid applications. In *Sobky v. Smoley*, 855 F.Supp. 1123, 1147 (E.D. Cal. 1994), the issue ***22** was whether Congress meant the statutory reasonable promptness requirement to apply only to eligibility determinations or to time limits for providing services. The *Sobky* court did not decide that the deadline for providing services also included the time for determining eligibility.

At least one court has recognized that 42 C.F.R. § 435.911(a) creates definitive, enforceable rights and deadlines for processing eligibility applications which are distinct from the duty to provide services. *Wellington v. District of Columbia*, 851 F.Supp. 1, 5 (D.D.C. 1994). Also, in *King v. Sullivan*, 776 F.Supp. 645 (D.R.I. 1991), the court viewed time limits for determining eligibility and for providing services as separate. *Id.* at 657-658.

Finally, the trial court in the instant case acted contrary to the express language of the final judgment, which mandates a maximum 90-day waiting period for services for "eligible" people. "Eligible" as used in the judgment must embrace the separate notions of Medicaid eligibility and ICF/DD eligibility. *See* 42 C.F.R. § 435.911(a)(1) (90-day deadline for determining Medicaid eligibility involving a disability); § 65A-1.205(1)(c), Fla. Admin. Code (adopting the 90-day deadline) and §§ 59G-4.170(3), 59G-4.171, 59G-4.180. Fla. Admin. Code (providing for eligibility determinations for ICF/DD services), § 59G-4.180(2)(a), Fla. Admin. Code (eligibility for ICF/DD care requires need for 24-hour nursing ***23** care). *See also* R-602 pp. 147-148 (eligibility is a "three prong process" consisting of determinations of Medicaid and ICF/DD eligibility and need determination). Clearly the law contemplates a time period to determine eligibility, (unless it had been previously determined), upon request for Medicaid services and then a reasonable time to provide those services.

B. The Trial Court Exceeded its Authority by Interfering with Defendants' Right to Set ICF/DD Eligibility Criteria and by Holding That Defendants Had Failed to Comply with State and Federal Rule Making Requirements.

1. Florida has authority and discretion under Medicaid law to modify eligibility requirements for ICF/DD placements.

Contrary to the Does' arguments, Florida has the authority and discretion to change or modify eligibility requirements for ICF/DD placements. In *King v. Sullivan*, 776 F.Supp. 645 (D.R.I. 1991), the court held that a state may condition ICF/DD eligibility on "medical necessity." The court stated:

Rhode Island seeks to avoid institutional placement and to encourage home care whenever possible… Such a restriction on eligibility is proper, as is Rhode Island's policy of offering home care assistance as an alternative to institutional care… The Medicaid Act does not require a more lenient ICF-MR admissions standard than is set forth in the State Plan.

Id. at 651-652.

***24 2. The district court did not have jurisdiction to challenge changes in eligibility criteria as invalid rule making.**

The district court could not invalidate Florida's ICF/DD eligibility criteria as improperly adopted rules. The court lacks jurisdiction to hold them invalid under state law, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984), and the federal administrative procedures act (the basis for the federal cases cited by the plaintiffs) does not apply to state agencies. *Hill v. Richardson*, 7 F.3d 656, 658 (7th Cir. 1993); *Riverbend Farms Inc. v. Madigan*, 958 F.2d 1479, 1483-1484 (9th Cir. 1992) (federal APA "ensures that the massive federal bureaucracy remains tethered …"); 5 U.S.C. s. 551(1) (definition of agency subject to the act does not include state governments).

3. The eligibility criteria are rationally based.

Under a proposed five-point assessment scale, individuals assessed as 3-5 were eligible for ICF/DD services, while those assessed as 1-2 were not. Concerning the five-point assessment scale, experts testified that individuals assessed as "extensive" (level 4) and "intensive" (level 5) "are probably going to be eligible for [ICF/DD] services based on level of need." R-601 p. 166-167; R-602 p. 148-149. Individuals assessed as "moderate" (level 3) "may be eligible and I think they ought to be reviewed for potential active treatment services." R-601 p. 166-167; R-602 ***25** p. 148-149. Individuals at levels 1 and 2 "are not people that you would envision needing a

continuous, aggressive, active treatment program, because to a large extent they are fairly resilient. They are pretty independent in many of their scales and they don't have significant behavioral problems or health needs." *Id.*[FN6]); R-603 p. 102, 105, 151 (1s and 2s don't need continuous active treatment, which they must need to qualify for ICF/DD services).

> FN6. The decision to remove individuals at levels 1 and 2 from ICF/DD eligibility did not deprive them of access to services. The defendants testified that they intended to continue providing services to people in that population using state funds. R-602 p. 67, 119.

Individuals initially assessed at levels 1 and 2 using the FSTS were not barred from obtaining ICF/DD services, however. Their assessments were automatically reviewed by a physician. Testimony of Dr. Cardona, R-603 pp. 89 et seq.

Furthermore, individuals assessed as 1-2 can request a re-evaluation if they disagree with their assessment. R-602 p. 90-91.

The Does presented no countervailing testimony.

Because the Defendants' assessment scheme has a substantial rational basis, the contention that it violates substantive due process fails.

***26 4. The decision to allow some ineligible individuals to remain in ICF/DDs was not arbitrary and capricious. Therefore, the defendants did not violate any substantive due process or equal protections rights that the Does may have.**

The Defendants' decision not to force individuals assessed at levels 1 and 2 out of their ICF/DD placements was not arbitrary and capricious or without a substantial rational basis. Nine percent of individuals living in ICF/DDs were assessed as levels 1 and 2. R-602 p. 200. The Defendants did not force them out because the sudden move would be "extremely disruptive … particularly if that is not what they want to have happen" and could put them at "great risk" of harm. R-602 pp. 200-201.

Because the Defendants' decision not to move individuals assessed as levels 1 and 2 already living in ICF/DDs was not arbitrary or capricious, and instead had a substantial rational basis, the contention that it violated substantive due process and equal protection guarantees fails.

***27 IV. THE TRIAL COURT ABUSED ITS DISCRETION IN USING COERCIVE PUNITIVE CONTEMPT SANCTIONS AGAINST THE DEFENDANTS FOR ACTIONS TAKEN (OR NOT TAKEN) BY THEIR PREDECESSORS IN OFFICE, SPECIFICALLY WHERE THE COURT'S VARIOUS ORDERS CONSTITUTE A COMPLEX SCHEME OF ENFORCEMENT AND WHERE THE INDIVIDUAL DEFENDANTS HAVE NO ABILITY TO COMPLY OR PURGE THEMSELVES OF CONTEMPT.**

APPELLEES' ANSWER BRIEF, POINT VI: THE DEFENDANTS WERE HELD IN CIVIL CONTEMPT AND DEFENDANTS RECEIVED A FULL HEARING IN COMPLIANCE WITH ALL RELEVANT LEGAL REQUIREMENTS.

Defendants do not feel compelled to provide a lengthy "Reply" to the Does' argument on this point. For the most part, the Does' response to Defendants' specific legal arguments is that this case must involve civil contempt because "per diem" fines were imposed. However, the Does fail to provide any meaningful discussion or response

to *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 114 S.Ct. 2552 (1994), and its holding that enforcement of a complex civil injunction may constitute a criminal contempt proceeding under certain circumstances, regardless of whether it is labeled a civil contempt proceeding and per diem fines are imposed.

The Does' brief states affirmatively that the "District Court's Order on Motion for Contempt…is expressly and unambiguously coercive and remedial - not punitive." (Brief at 41-42) It then recites the Court's Order which provides:
***28** "The Defendants are fined $10,000 a day, which shall begin 10 days after the date of this order, **to continue until a comprehensive plan, which comports the letter and spirit of the judgement entered on August 28, 1996,** is submitted, ready for implementation." D.E.587 (Emphasis, Plaintiffs').

What the Does do not state, respond to, or answer is the following:

1. Why are the *current* Defendants, who were not even parties to this action until June 21, 1999, being held in contempt for the actions or inactions of previous defendants over the course of seven years of litigation and as a result of a hearing that took place in November of 1998?

2. How does an *individual* Defendant in this case comply with the letter and "spirit" of the final judgment?

3. What is a "comprehensive plan, which comports with the letter and spirit of the judgment…, ready for implementation"? What does "ready for implementation mean"?

4. What can the *individual* Defendants do to purge themselves, and *could it be done in 10 days* before the fines started?

5. Most importantly to these individual Defendants, who is supposed to pay the $10,000 a day fine? (Under a §1983 action, it can not be the State of Florida). The Does fail to address why the penalty should be considered civil when the court made no finding with respect to any defendant's ability to pay the fine.

***29 V. THE GOVERNOR IS NOT A DEFENDANT AND IS NOT SUBJECT TO CONTEMPT SANCTIONS.**

APPELLEES' ANSWER BRIEF, POINT VII: THE GOVERNOR IS A DEFENDANT PURSUANT TO ACTIONS TAKEN BY DEFENDANTS' COUNSEL

Prior to the Final Judgment of August 28, 1996, the trial court found that there was no legal or factual basis to hold the then-Governor of Florida, Lawton Chiles, personally responsible for any violation of any plaintiff's federal rights under the Medicaid act. Thus, the Governor's Motion to Dismiss was granted in this action.

The Does correctly point out that the Federal Rules of Civil Procedure require substitution of parties "when a public officer is a party to an action in his official capacity and during his pendency dies, resigns, or otherwise ceases to hold office." Apparently, their position is that, whether by mistake or not, Governor Bush was substituted in with every one else in accordance with the rules and he is therefor subject to the court's jurisdiction and the court's contempt sanctions.

What the Does ignore is that Governor Bush was not substituted in to this action until June 21, 1999. This was after the November 1998 contempt hearing and "Memorandum Findings" and after the May 1999 hearings to

show cause. The Governor was not a party before the court during any relevant time of the proceedings.

***30** Furthermore, there was a previous ruling of the trial court that there was no legal or factual basis to hold the Governor of Florida personally liable. More to the point, there is nothing in the record before the trial court, subsequent to the motion to dismiss, that would provide a legal or factual basis to hold the Governor of Florida in contempt, regardless of who the present office holder is. Plaintiffs have not answered as to what the present Governor has done to violate trial court's orders or the federal rights of any plaintiff in this cause, and where that is shown in the record.

***31 CONCLUSION**

This Court should reverse the trial court, vacate both the Order on Motion for Contempt and the "Memorandum Findings" of November 10, 1998, in their entirety, and remand with instructions to the district court to dismiss this action.

In the alternative, the mandate of this court should require the district court to make findings of fact concerning whether current individual defendants have failed to provide the named plaintiffs with ICF/DD residential placements to which they may be entitled and which they have requested.

John/Jane DOES 1-13, Plaintiffs/Appellees, v. Jeb BUSH, et al., Defendants/Appellants.
2000 WL 33983128 (C.A.11) (Appellate Brief)

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