2000 WL 33978815 (C.A.11) (Appellate Brief)
United States Court of Appeals,
Eleventh Circuit.

John/Jane DOES 1-13, Plaintiffs/Appellees,
v.
Jeb BUSH, et al., Defendants/appellants.

No. 00-12097-DD
September 25, 2000.

From the U.S. District Court for the Southern District of Florida Case no. 92-589-Civ-Ferguson

Appellants' Reply Brief

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*1 ARGUMENT

I. THE TRIAL COURT DID NOT CERTIFY A CLASS TO ENFORCE THE JUDGMENT OR TO AID THE CIRCUIT COURT IN DECIDING THE APPEAL OF THE CONTEMPT ORDER.

The district court's failure to certify a class at or before final judgment was intentional. When the district court entered final judgment, it had deliberately decided not to certify a class.

One document in particular, the order denying the defendants' motion to stay pending appeal (R-481), shows this to be true. In January 1997, the defendants moved to stay the effect of the final judgment pending appeal. R-461. Among other things, the defendants protested the class-wide nature of the relief. They argued that such relief was inappropriate because no class had been certified, no class- or system-wide injury had been shown, and no actual injury to the named plaintiffs had been demonstrated.

The district court dismissed these arguments, saying that *class certification was not necessary*:
The finding, that this case is the type [which is] "capable of repetition yet evading review,' eliminated the need for a further finding of actual harm to the named plaintiffs *or a determination that this case should be certified as a class action*.[2]

R-481 pp. 3-4, emphasis added, footnote in original.

***2** Footnote 2 reads: "At the time of the final judgment, Magistrate Judge William C. Turnoff had entered a Report and Recommendation that the plaintiffs' motion for class certification be granted." *Id.* p. 4.

Thus, the district court, while aware of the R&R recommending class certification, said that a "finding, that this case is the type [which is] 'capable of repetition yet evading review,' eliminated the need for … a determination that this case should be certified as a class action." Thus, the court made a finding at the time it entered final judgment that class certification was unnecessary. In short, the court considered and *rejected* the need for class certification. The court may have decided for the wrong reasons - that a harm is transitory and evades review is not a reason to deny class certification - but the court's choice nonetheless was deliberate, if wrong.

So, the failure to certify a class by the time of final judgment was a deliberate, considered choice. Rightly or wrongly, it was the court's express decision - and became law of the case.

The final judgment makes sense when read in light of the court's order denying a stay pending appeal. In the final judgment, the district court dismissed all pending motions as moot. R-449 p. 1. As a pending motion, the motion for class certification was among those dismissed as moot. Clearly, the ***3** court intended to dismiss the motion for class certification because it had

expressly decided that class certification was unnecessary.

The fact the court understood that the case was not a class action is evident from the contempt order, R-587. There, in footnote 2, p. 6, the court recognized that it had never certified a class: "Only 634 eligible individuals are plaintiffs in this lawsuit *as an order certifying a class was never entered*."

All this has three implications for this lawsuit. First, the class certification order is an implicit effort to revise the final judgment - expanding its scope to people who, until now, were not parties, and imposing on the defendants vast, new obligations. See e.g., *General Motors Corp. Pickup Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 792 n. 14 (9th Cir. 1995) ("Under Rule 23(c)(1), the court retains the authority to re-define or decertify the class until the entry of final judgment on the merits. This capacity renders all certification orders conditional until the entry of judgment."). Yet the court does not use the rules designed to amend final judgments, such as Fed.R.Civ.P. 60(b). If allowed to stand, the trial court's action undermines the doctrine of finality of judgments, which is critical to the functioning of the judicial system. See *Custis v. U.S.*, 114 S.Ct. 1732, 1739 (1994) ("'[i]nroads on the concept of ***4** finality tend to undermine confidence in the integrity of our procedures' and inevitably delay and impair the orderly administration of justice."); *In re Miscott Corp.*, 848 F.2d 1190, 1193 (11th Cir. 1988) ("The requirement of finality is essential to avoid piecemeal review, inconvenience and unnecessary costs.").

Second, the court cannot have been attempting to "clarify" the final judgment, as the plaintiffs argue. One cannot clarify the final judgment by changing one's mind to do what one had originally decided not to do.

Third, it is evident the district court certified a class to moot the defendants' appeal of the contempt order. The trial court clearly had the pending appeal in mind when it certified the class:

> In a pending appeal the defendants have challenged the breadth of an order on grounds that it compels relief for a class of individuals beyond the named plaintiffs. This Order on class certification is germane to that issue and should be added to the record on appeal as a supplement.

R-604, class certification order p. 1 n. 1. The court's evident expectation is that class certification, even if belated, will affect the appeal's outcome.

II. THE DEFENDANTS HAVE NEVER CONCEDED THIS CASE IS A CLASS ACTION.

***5** At every critical juncture, the defendants have objected that this case is not a class action. For example, they did so in their motion to stay pending appeal filed in the trial court(R-461 pp. 5-6); they did so in their motion to stay pending appeal to this court and in their brief in *Doe 1-13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998); and they did so in their memorandum of law during contempt proceedings in May 1999 (R-579).

The plaintiffs make much over a passing comment by one defendants' lawyer during a November 1998 hearing. R-599 p. 60. This was nothing more than a slip of the tongue, an easy mistake to make in a complex case like this with a long, tangled, confusing history. It was not an admission that the case was a class action. The slip means nothing when stacked against the defendants' consistently articulated legal position that the case is not certified as a class action and the trial court's admission that the case was not certified at the time of final judgment.

III. THE DEFENDANTS DID NOT WAIVE THEIR RIGHT TO CLASS CERTIFICATION BEFORE OR AT THE TIME OF FINAL JUDGMENT.

It is true that the defendants asked the court to delay class certification until a ruling on the merits. R-321 p. 2 n. 3. The thrust

of this request was for a delay until the district determined whether, as a matter of law, the defendants were ***6** liable. The defendants did *not*, however, waive any right to have a class certified before final judgment. They never asked the court to wait until final judgment - or afterward. At most, the request amounts to an appeal for class certification to take place simultaneously with final judgment.

The plaintiffs cite a number of cases[1] that stand for the proposition that a defendant who files a summary judgment motion before determination of a class certification motion waives any objection to a determination of the merits before a ruling on the certification motion. These cases do not apply. The facts are different here. None of these cases involve a *post-judgment* class certification. There is a big distinction between post-summary judgment class certification and post-judgment certification. Summary judgment determinations are not necessarily final judgments. A summary judgment, for instance, that determines liability but imposes no remedy is not final. *Meadowbriar Home for Children, Inc. v. Gunn*, 81 F.3d 521, 528 (5th Cir. 1996); *In re King Memorial Hospital, Inc.*, 767 F.2d 1508, 1510 (11th Cir. 1985) ("An order is not final unless it 'ends the litigation on the merits and leaves nothing for the court to do but exercise the judgment."').

***7** In any case, the court decided the case against the defendants in July 1996, a month before rendering final judgment, when it ruled on the pending motions for summary judgment. R-439. By holding off on a ruling on the class certification motion until after the July 1996 order, the court did what the defendants had requested.

In any event, the final judgment is the "merits," for Rule 23(c) purposes. Certainly, Rule 23(c)(1) requires a class certification order "before the decision on the merits." But one must read that paragraph with paragraph (3), which requires a class definition in the "judgment." Putting the two together, class certification may come after a determination of liability, technically a determination on the merits. But it must come at or before the *judgment*, because the class must be defined in the judgment.

This makes sense, because the judgment terminates all activity in the case, except for enforcement. Allowing post-judgment class certification not only violates the express language of Rule 23(c)(3), but it means that a final judgment, in essence, isn't final.

Plaintiffs apparently imply that the defendants' requests for extensions of time to respond to the class certification motion constituted illicit foot-dragging, and that this somehow amounts to a waiver of a right to expect class certification ***8** before or at the time of final judgment. But they haven't told the whole story.

It is true that the defendants sought four extensions of time to file their response. R-71, 83, 179 and 207. They were forced to seek these extensions. They could not meaningfully respond to the motion because the plaintiffs insisted on remaining anonymous and because of the plaintiffs' refusal to cooperate in class discovery. R-86 pp. 3-4; R-321. In fact, the court agreed that the plaintiffs' anonymity and discovery presented problems. While denying a defendants' motion to strike the motion for class certification, the court said the defendants needed additional discovery time:

> Although the Court will not strike Plaintiffs' Motion, it will allow Defendants additional time to complete discovery. The representative Plaintiffs filed anonymously in this matter, which has understandably impeded Defendants' discovery. Although the Court has ruled that anonymity is proper, that ruling was conditioned on Defendants' ability to uncover the information they need to defend themselves. Some Plaintiffs have waived their anonymity, allowing further discovery; the need for additional information must be resolved on a case-by-case basis. Only through this discovery can the Defendants properly address the merits of the Motion for Class Certification, especially concerning the adequacy of the representatives.

R-170 p. 4.

The court also took the plaintiffs to task for delays in *filing* the motion for class certification. *Id.* pp. 1-2.

***9 IV. THE CURRENT AVAILABLE EVIDENCE SHOWS THAT THE NAMED PLAINTIFFS ARE GETTING ICF/DD SERVICES, NO LONGER NEED THEM OR NO LONGER WANT THEM.**

The plaintiffs rely on old affidavits or those that don't address the important issues in arguing that the named plaintiffs are not getting ICF/DD services.

For example, the plaintiffs extensively cited Kathy Whitaker's declaration, attached to their June 1996 motion for preliminary injunction. R-413. Whatever probative value Ms. Whitaker's declaration had, time has erased it. It was three years out of date by the time of the May 1999 contempt hearing. Moreover, the plaintiffs' answer brief cites Ms. Whitaker for extensive facts concerning only one named plaintiff, John Doe 4, David Bissonette. However, the declaration itself describes Mr. Bissonette's situation in three brief sentences. The matters in the answer brief are, in fact, taken from an attachment to the declaration which is unauthenticated and which Ms. Whitaker neither identified nor adopted.

The plaintiffs also rely on a letter from Mr. Brola, the stepfather of one of the named plaintiffs, David Bissonette. R-525. This letter is not sworn; it is not a declaration. It is just a letter to plaintiffs' counsel. Thus, it is hearsay, and should not be considered.

***10** Even if the letter is admissible evidence, it does not address the central point of the defendants' presentation, R-585, for Mr. Bissonette, which is: he has chosen to take waiver services instead of ICF/DD services. That is, the evidence is that he has abandoned his quest for relief in this case, so the case is moot as to him.

Mr. Bissonette's situation is the only one the plaintiffs address.

V. THE FACT THE NAMED PLAINTIFFS ARE RECEIVING SERVICES MOOTS THE CASE AS TO THEM AND TO THE CLASS.

The plaintiffs argue that the provision of services to the named plaintiffs cannot moot this case as a class action.

The cases the plaintiffs cites, however, are all *pre*-judgment, rather than post-judgment, cases, so they do not apply.

Even if it is appropriate to certify a class four years after judgment, the named plaintiffs are no longer representative or the putative class because their claims are moot. The court should recognize that mootness.

There is some authority holding that providing the relief demanded by a plaintiff does not moot a class action *pre*-judgment. See e.g., *Zeidman v. J. Ray McDermott Co.*, 651 F.2d 1030, 1051 (5th Cir. 1981). *Zeidman* is fairly typical of this type of case. The court held that an as-yet uncertified class ***11** action cannot be dismissed as moot when the defendant tenders to the named plaintiffs the relief they seek. The policy behind this rule is the fear that powerful defendants can eliminate putative class actions before they have a chance to blossom into full-blown class cases, depriving the class of the ability to litigate a class-wide claim. *Id.* The legal premise underlying the policy is a well-known exception to the mootness doctrine: capable of repetition yet evading review. *Id.* at 1050. The underlying policy reason, of course, for the capable-of repetition-yet-evading review exception to the mootness rule is that there are some situations in which the harm suffered is so transitory that a federal court lacks the time to rule on the claim before the harm ceases. *Olmstead v. L.C.*, 119 S.Ct. 2176, 2184 n. 6 (1999)

The concern for fleeting harm did not, and does not, exist in this case. Here, the court had years to act even before entering judgment.

But *Zeidman*-type cases simply cannot apply post-judgment, and they should not require class certification under the facts in this record. Some courts have held that the mere potential to pick off named plaintiffs triggers this exception. See *White v. Mathews*, 559 F.2d 852, 857 (2d Cir. 1977). Other courts have held that the defendant must cease the complained of conduct *because* of the existence of the litigation. ***12** *Sze v. Immigration and Naturalization Service*, 153 F.3d 1005, 1008 (9th Cir. 1998) (moot because INS acted on naturalization petitions "in due course, albeit significantly delayed due course."). Pre-judgment, the better rule is to recognize the exception only if the defendant acted because of the litigation, rather than in the ordinary course of business or events. Otherwise, the defendant may be inhibited from providing important social services

because of a fear of appearing to be pressured by litigation, which may encourage others to sue to jump the line to get services. See e.g., *Olmstead v. L.C.*, 119 S.Ct. at 2190 (recognizing that litigation can result in people being jumped to the head of a waiting list ahead of others who have not filed suit).

But there is no meaningful way to apply this doctrine post-judgment, because post-judgment as in this case, defendants are *expected and required* to provide benefits to plaintiffs. The defendants *must* give the plaintiffs the relief they seek.

And in any event, the evidence of record here is that the 10 surviving named plaintiffs will not be exposed again to the alleged harm, unreasonable delay in providing ICF/DD services. They either are getting ICF/DD services or no longer want them. R-585, Mcgarity declaration. There is no reason to believe that the defendants will change their behavior toward these plaintiffs. See e.g., *Jews for Jesus Inc. v. Hillsborough County Aviation Authority*, 162 F.3d 627, 629 (11th Cir. 1998).

*13 VI. RES JUDICATA DOES NOT APPLY IN THIS SITUATION. IT ONLY BARS CLAIMS RAISED IN DIFFERENT CASES.

The plaintiffs misunderstand res judicata, a doctrine also known as "claim preclusion." *Citibank N.A. v. Date 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 litigation over the class certification order.

A. Law of the case does not bar the defendants' appeal of the class certification order.

If any preclusionary doctrine applies, it is law of the case. *In re Justice Oaks II Ltd.*, 898 F.2d at 1549 n. 3.

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 relitigation 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, resolved in earlier proceedings." ***14** *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.*; *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 wasn't).

Furthermore, only *holdings* constitute law of the case, which come 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). "Statements of dicta are not part of the law of the case." *Id.*

Law of the case "should not be read so rigidly that it precludes a party from raising an argument that it had no prior opportunity to raise." *Bagola v. Kindt*, 131 F.2d 632, 637 (7th Cir. 1997).

Law of the case presumes that the court had jurisdiction over the parties. *Id.*

In fact, whether to modify a ruling boils down to "primarily a matter of good sense." *Bagola v. Kindt*, 131 F.2d at 637.

1. The court of appeals did not decide the question of class certification in the prior appeal.

In the appeal on the merits of the final judgment, *Doe 1-13 v. Chiles*, 136 F.3d 709 (11th Cir. 1998), this court did not hold that this case was properly brought as a class action and such a ***15** holding was not necessarily implied in the opinion. In a very narrow decision, the court held that the final judgment meant only 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 limiting ICF/DD waiting times to 90 days, 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. *Does* at 722. The discussion in footnote 23 of the *Does* opinion about system-wide impact is dicta.

2. The lack of pre-judgment class certification prohibited the defendants from raising any meaningful challenge to the propriety of class certification.

Because the trial court never certified a class before final judgment, the defendants have never had a meaningful opportunity to fully litigate objections to class certification. They have not been able to question 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. ***16** (The defendants raised significant questions about the fitness of plaintiffs' counsel to represent the class due to conflicts of interest and counsel's litigation behavior. R-321.)

Thus, the defendants seek to raise issues and arguments that have never been decided, and law of the case does not apply.

3. The court lacked jurisdiction over putative class members when it entered the final judgment and when this court decided the appeal.

Rule 23 class certification is the formal means of making parties of class members so that they are bound by the 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 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).

Because the trial court and this court never had such jurisdiction at the time of the final judgment and rendition of the *Does* opinion, law of the case does not bar this challenge to the class certification order.

***17 CONCLUSION**

For these reasons, the court should vacate the class certification order.

Footnotes

[1] *Postow v. OBA Federal Savings and Loan Association*, 627 F.2d 1370 (D.C. Cir. 1980); *Barlow v. Evans*, 992 F.Supp. 1299 (M.D. Ala. 1997); *Haas v. Pittsburgh National Bank*, 381 F.Supp. 801 (W.D. Pa. 1974); *Wooten v. Hamilton County*, 94 F.R.D. 176 (S.D. Ohio 1982).

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