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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Patricia Welsch, et al.,

Plaintiffs,

v.

Leonard W. Levine, et al.,

Defendants.

CIVIL 4-72-451

MEMORANDUM AND ORDER

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Luther A. Granquist, Legal Advocacy for Developmentally Disabled Persons in Minnesota, 222 Grain Exchange Building, 323 Fourth Avenue South, Minneapolis, MN 55415, for plaintiffs.

Hubert H. Humphrey, III, Attorney General, State of Minnesota, and Deborah L. Huskins, Special Assistant Attorney General, Second Floor Space Center Building, 444 Lafayette Road, St. Paul, MN 55101, for defendants.

Richard A. Cohen, Court Monitor, 106 Legal Education Center, 40 North Milton Street, St. Paul, MN 55104.

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This matter is before the Court on plaintiffs' motion for an order establishing entitlement to an award of attorneys' fees. Plaintiffs' motion will be granted.

FILED JUN 13 1986

JUDGMENT ENTERED

FACTS

This is a matter involving the Welsch consent decree[1] (the decree). Plaintiffs seek attorneys' fees in connection with a proceeding to enforce compliance with the decree. Defendants seek dismissal of plaintiffs' action, on the ground that the Court lacks subject matter jurisdiction, or, in the alternative, that plaintiffs are not "prevailing parties" within the meaning of 42 U.S.C. § 1988.

The facts giving rise to this litigation are as follows. In 1984, E.M. (pursuant to the decree the names of mental health class members are kept confidential) died of cardiac arrest at an unspecified nursing home. E.M. was a mental health patient and a Welsch class member at the time of her death. It is undisputed that the cause of death was cardiac arrest caused by a major seizure, and that none of the personnel in attendance administered cardio-pulmonary resuscitation (CPR)[2] in an attempt to revive E.M.

Subsequently, plaintiffs requested that Welsch consent decree court monitor Richard A. Cohen (Cohen) issue a notice of non-compliance with respect to the handling of E.M.'s death, and in particular with respect to the Department of Human Services' (DHS)

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[1] The Welsch consent decree is the product of a 1972 class action brought by mentally retarded residents of Minnesota mental hospitals, all of whom had been judicially committed, seeking improvements in hospital conditions.

[2] CPR is a procedure which attempts to provide artificial ventilation for a person who has stopped breathing and artificial circulation for a person whose pulse has stopped.

failure to assure that discharged class members who are placed in community care facilities are cared for by staff persons trained to perform CPR.[3] Cohen issued a notice of non-compliance March 20, 1985. The notice provided:

> In short, given the lack of policies and standards of statewide applicability and the fact that class members have been and continue to be placed in facilities which do not (or very likely do not) have adequate policies governing use of CPR and staff training, it is found that the Commissioner's failure to take the following steps, particularly in light of Plaintiff's request to him, constitute non-compliance with his obligations under Paragraphs 1, 24 and 26 of the Welsch Consent Decree:
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> A. The failure of the Commissioner to take action to assure that class member(s) at the facility in which [E.M.] resided are cared for by staff persons trained to perform CPR;
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> B. The failure to take action to assure that staff members at said facility have an established policy or standard to follow in determining when to perform CPR;
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> C. The failure to take action to assure that Welsch class members are discharged to community residential and day programs, or are residing in such programs, in which they will be cared for by staff persons trained to perform CPR; and
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> D. The failure to take action to assure that community residential and day programs to which class members are discharged and reside have an established policy to follow in determining when to perform CPR.

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[3] Also at issue in the compliance proceedings were DNR's -- "Do Not Resuscitate" orders. As the name implies, a DNR is an instruction to hospital or nursing home staff not to attempt to revive particular patients in the event of a seizure or cardiac arrest. Plaintiffs contend that DNRs were placed in the files of certain class members. Plaintiffs seek to require the defendant to institute uniform policies for the issuance of DNRs.

Declaration of Luther A. Granquist in Support of Motion for Award of Attorney's Fees -- CPR, Appendix A, Document 1, at 6-7. Subsequent discussions between the parties resulted in a settlement agreement. The monitor issued a formal Resolution of Notice of Initial Determination of Non-Compliance, dated October 24, 1985, which set forth the settlement terms negotiated by the parties. Because the parties were able to settle the matter, an evidentiary hearing before the monitor as required by paragraph 95g of the decree was not conducted.

Plaintiffs subsequently brought this motion for attorneys' fees. Plaintiffs seek to recover fees incurred in connection with compliance proceedings initiated following E.M.'s death. For purposes of this motion, plaintiffs have not submitted detailed affidavits of fees incurred, but rather seek an order of the Court establishing their entitlement to fees. Should plaintiffs prevail in this motion, they propose thereafter to detail the extent of their claimed entitlement.

DISCUSSION

A. Jurisdiction

The Court has little difficulty concluding that it has jurisdiction over these fee proceedings. The fact that the matter was settled prior to federal court proceedings does not preclude a fee award. See, e.g., J. & J. Anderson, Inc. v. Town of Erie, 767 F.2d 1469, 1474 (10th Cir. 1985). Plaintiffs have in the past routinely recovered fee awards encompassing expenses incurred in connection

with compliance proceedings before the monitor. This is an ongoing section 1983 class action over which the Court has retained jurisdiction for the purpose of monitoring compliance with the consent decree executed by the parties. As such, the jurisdictional issue is controlled by cases such as New York State Association for Retarded Children v. Carey, No. 72-C-356/357, slip op. (E.D.N.Y. Mar. 21, 1978). The cases cited by defendants, wherein litigants prevailing in state court pursued wholly independent fee actions in federal court, are inapposite.

B. Prevailing Party

Plaintiffs' motion for attorneys' fees is brought pursuant to 42 U.S.C. § 1988, which provides:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

A threshold issue in any motion for attorneys' fees brought pursuant to section 1988 is whether plaintiffs are "prevailing parties" within the meaning of the statute. Jaeger v. City of Farmington, Minnesota, 528 F.Supp. 684 (D.Minn. 1981). It is well established that in determining whether a party is a prevailing party the applicable standard is the two-part test of Nadeau v. Helgemoe, 581 F.2d 275, 281 (1st Cir. 1978), which was adopted by the Eighth Circuit in United Handicapped Federation v. Andre, 622 F.2d 342, 346-47 (8th Cir. 1980) and endorsed by the Supreme Court in Hensley v. Eckerhart, 103 S.Ct. 1933, 1939 (1983):

> First, whether plaintiffs' actions were a factor in achieving the results sought and obtained [this is a factual inquiry];
>
> Second, whether the result obtained was one required by law [this is a legal inquiry].

See Jaeger, 528 F.Supp. at 685.

1. The Factual Test

The standards evolved by the courts for resolving the factual prong of the Nadeau test are not rigorous. It has been stated that a plaintiff is a prevailing party within the meaning of section 1988 if "plaintiff's suit and their attorney's efforts were a necessary and important factor in achieving "the desired result," Nadeau, 581 F.2d at 281, or where the lawsuit "played a provocative role" or was "instrumental" in obtaining relief, Illinois Welfare Rights Organization v. Miller, 723 F.2d 564, 569 (7th Cir. 1983). In Williams v. Leatherbury, 672 F.2d 549 (5th Cir. 1982) it was stated that, in order to satisfy the first prong of the Nadeau test, plaintiffs' suit "must be a substantial factor or a significant catalyst in motivating the defendants to end their unconstitutional behavior." Leatherbury, 672 F.2d at 551 (emphasis added). In applying this "catalyst" standard the focus is on whether there is a causal connection between plaintiff's act of filing suit and the achievement of the intended result. In Hensley v. Eckerhart the Supreme Court quoted with approval language from Nadeau, 581 F.2d at 278-79, to the effect that "plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit

the parties sought in bringing suit." Hensley, 103 S.Ct. at 1939 (emphasis supplied). Thus, the fact that plaintiff did not achieve all of the desired relief will not bar a fee award. Nor is it necessary to prove that plaintiffs' acts were the sole factor motivating change, so long as plaintiffs' conduct was a substantial factor.

Defendants do not dispute that plaintiffs' act of initiating compliance proceedings was the catalyst which motivated defendants to take remedial action. The DHS initially proposed to effect remedial measures less sweeping than those measures eventually agreed to per the settlement. Only following an extensive period of negotiation and following entry of the monitor's initial non-compliance notice did the DHS agree to effect the remedial measures sought by plaintiffs. Significantly, plaintiffs obtained via the settlement agreement substantially all the relief which they set out to obtain.[4] As such, plaintiffs' initiation of

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[4] Defendants agreed to require that state hospital residents not be placed in community-based services unless the residential and day program provides at least one CPR-trained staff person on each shift. For persons particularly "at risk," the trained staff must be on duty within one month or less. For others, these persons must be on duty within three months. Defendant also agreed to issue Instructional Bulletin #85-131 (November 22, 1985) informing county boards and residential providers that the Department would, effective January 1, 1987, apply the present licensing rule to require CPR training and to issue Instructional Bulletin #85-83 (August 15, 1985) which placed significant limits on use of DNR orders for 6,755 state wards. See Plaintiffs' Memorandum in Support of Motion for Attorneys' Fees, Appendix A, document 6.

compliance proceedings was a substantial factor and a significant catalyst motivating defendants' remedial endeavors.[5] The Court finds that plaintiffs have met the first prong of the Nadeau test.

2. The Legal Test

The second prong of the Nadeau test requires proof that remedy obtained by plaintiffs was one "required by law." Jaeger, 528 F.Supp. at 685. The legal test has been stated in the following terms:

> If it has been judicially determined that defendants' conduct, however beneficial it may be to plaintiffs' interests, is not required by law, then defendants must be held to have acted gratuitously and plaintiffs have not prevailed in a legal sense.

Nadeau, 581 F.2d at 281. The significance of the legal test derives from a literal reading of section 1988: absent proof that plaintiffs have obtained vindication of a "legal right" it is not possible to conclude that plaintiffs have prevailed "[i]n [an]

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[5] Nor can the Court ignore the "chronological sequence of events . . . in determining whether . . . defendant[s] can be reasonably inferred to have guided his actions in response to plaintiffs' lawsuit." Nadeau, 581 F.2d at 281. Defendants made no effort to institute uniform CPR and DNR policies until after plaintiffs initiated compliance proceedings.

action or proceeding to enforce section . . . 1983 . . . ." 42 U.S.C. § 1988. Rather, it is equally plausible, absent such proof, to conclude that the defendants voluntarily and gratuitously agreed to the requested relief.[6]

In determining whether the legal Nadeau test has been met the burden is on the defendants to "demonstrate the worthlessness of the plaintiff's claims and [to] explain why he nonetheless voluntarily gave the plaintiffs the requested relief." Hennigan v. Ouachita Parish School Board, 749 F.2d 1148, 1153 (5th Cir. 1985). In Premachandra v. Mitts, 727 F.2d 717 (8th Cir. 1984), modified on rehearing en banc, 753 F.2d 635 (8th Cir. 1985), it was held that the legal Nadeau test had been met absent proof that plaintiff's position was "clearly devoid of merit under traditional constitutional theory," Mitts, 727 F.2d at 722, or was "so 'frivolous, groundless and unreasonable' that the [defendant's] voluntary compliance may be presumed to be gratuitous." Id. at 723. And in the Andre case the Eighth Circuit stated that the "critical question [is] whether defendant's conduct can be viewed as 'gratuitous,' that is, whether plaintiffs' lawsuit was 'frivolous, unreasonable, or groundless.'" Andre, 622 F.2d at 347. See also Prochaska v. Marcoux, 632 F.2d at 848 (10th Cir. 1980) (finding that second prong of Nadeau test had been met where there was "some slight legal support" for the constitutional deprivations claimed by plaintiff).

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[6] As stated in Premachandra v. Mitts, 727 F.2d 717, 722 (8th Cir. 1984), "If plaintiff's legal claims were truly 'frivolous, groundless, and unreasonable,' then, regardless of the form the relief took, awarding attorney's fees would serve neither to vindicate the plaintiff's legal rights nor to deter unreasonable governmental conduct."

The basis for plaintiffs' claims are paragraphs 24 and 26 of the decree, which provide:

> 24. Persons discharged from state institutions shall be placed in community programs which appropriately meet their individual needs. Placement shall be made in either a family home or a state licensed home, state licensed program, or state licensed facility except when, because of the resident's independent living skills, the most appropriate placement would be an independent community residence, such as an apartment. In addition, until July 1, 1981, placement may also be made in a certified foster home for four or less.
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> 26. All persons discharged from state institutions shall be provided with appropriate educational, developmental or work programs, such as public school, developmental achievement programs, work activity, sheltered work, or competitive employment.

Decree, ¶¶ 24, 26 (emphasis added). These provisions in turn derive from Judge Larson's finding that class members possess a due process right to receive adequate treatment, a right which entails an obligation on the part of state officials to "make good faith attempts to place [class members] in settings that will be suitable and appropriate to their mental and physical conditions while least restrictive of their liberties." Welsch v. Likins, 373 F.Supp. 487, 502 (D.Minn. 1974) (Larson, J.). In view of the concern expressed

in the Welsch decision for the physical safety and well being of class members,[7] it cannot be said that plaintiffs' claim that "appropriate" placement facilities of necessity incorporate CPR-trained staff is "frivolous, unreasonable, or groundless." In Judge Larson's original order discussing the primary legal issues in this case it was expressly declared that "plaintiffs have a right, whether grounded on due process or the Eighth Amendment, or both, to a humane and safe living environment while confined under State authority." Welsch, 373 F.Supp. at 502-03 (emphasis added). This right includes "protection from assaults or other harms from fellow residents, reasonable access to exercise and outdoor activities and basic hygienic needs." Id. Given this emphasis on the physical safety[8] and well-being of class members, a claim that an

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[7] That physical safety of class members was at the forefront of these proceedings is made clear by the monitor's initial non-compliance notice, which stated:

> The evidence is clear that CPR has saved many thousands of lives. The capacity to employ it in facilities which serve class members is particularly important because many class members are especially prone to cardiac arrest by virtue of their handicaps. They thus are and can be important beneficiaries of this technology.

Granquist Declaration, exhibit A, document I, at 6.

[8] Defendants argue that these provisions apply only to persons confined under state authority and not to persons discharged into community care facilities. Welsch was not limited, however, to a finding that class members have a constitutional right to treatment while confined. Judge Larson further found that the state had a due process obligation to seek out least restrictive alternative community care facilities which are appropriate for placement of class members. Welsch, 373 F.Supp. at 501-02. It is under this "least restrictive alternatives" prong of Welsch that plaintiffs' claims in the instant proceedings arise, and the fact that E.M. was no longer "confined" in a state hospital at the time of her death is inapposite.

"appropriate" facility is one which includes CPR-trained staff is far from "frivolous." While defendants are to be commended for responding to plaintiffs' demands with relative promptness, this alone is not a sufficient basis on which to deny plaintiffs fees as prevailing parties. Accordingly, the Court finds that plaintiffs have met the second prong of the Nadeau test and are entitled to a fee award.[9]

Based on the foregoing, **IT IS ORDERED** that plaintiffs' motion for an order establishing entitlement to an award of attorneys' fees is granted.

Judge Harry H. MacLaughlin
United States District Court

DATED: June 11, 1986

[9] Plaintiffs have requested an order setting forth their entitlement to a fee award in this matter and in all such future matters. The Court deems it inadvisable to enter an advisory opinion relative to future proceedings, particularly in light of the Eighth Circuit's admonition that fee awards are to be adjudicated on a case-by-case basis. See Premachandra, 727 F.2d at 723 (courts are to distinguish between frivolous and reasonable claims).