



A.R. v. Dudek

United States District Court for the Southern District of Florida

February 29, 2016, Decided; February 29, 2016, Entered on Docket

CASE NO. 12-60460-CIV-ZLOCH

Reporter

2016 U.S. Dist. LEXIS 95432 *

A.R. by and through her next friend, Susan Root, et al., Plaintiffs, vs. ELIZABETH DUDEK, in her official capacity as Secretary of the Agency for Health Care Administration, et al., Defendants. UNITED STATES OF AMERICA, Plaintiff, vs. STATE OF FLORIDA, Defendant.

Prior History: *A.R. v. Dudek*, 2015 U.S. Dist. LEXIS 179552 (S.D. Fla., Aug. 7, 2015)

Core Terms

Recommendation, class certification, proposed class, ascertainable, institutionalization, recipient's, declines, ratify, nursing facility, no necessity, no objective, approve, reasons, adopts

Counsel: [*1] For A.R., by and through her next friend, Susan Root, C.V., by and through his next friends, Michael and Johnette Wahlquist, M.D., by and through her next friend, Pamela DeCambra, C.M., by and through his next friend, Norine Mitchell, B.M., by and through his next friend, Kayla Moore, T.F., by and through his next friend, Michael and Liz Fauerbach; each individually, and on behalf of all other children similarly situated in the State of Florida, A.C., by and through his next friend, Zurale Cali; each individually, and on behalf of all others who are similarly situated in the State of Florida, T.H., by and through her next friend, Paolo Annino, Plaintiffs: Edward J. Grunewald, LEAD ATTORNEY, The North Florida Center for Equal Justice, Inc., Tallahassee, FL; Paolo G. Annino, LEAD ATTORNEY, FSU College of Law Public Interest Law Center, Tallahassee, FL; Matthew Wilson Dietz, Matthew W. Dietz, Miami, FL.

For L.J., by and through his next friend, Paolo Annino, A.G., by and through his next friend Gamal Gasser, Plaintiffs: Matthew Wilson Dietz, Matthew W. Dietz, Miami, FL.

For United States of America, Consol Plaintiff: Beth A.

Esposito, Travis W. England, LEAD ATTORNEYS, U.S. Department of [*2] Justice, Civil Rights Division, Washington, DC; H. Justin Park, Lindsey Weinstock, LEAD ATTORNEYS, Elizabeth Erin McDonald, Victoria Thomas, US Department of Justice, Washington, DC; Eliza Dermody, U.S. Department of Justice, Disability Rights Section- NYA, Washington, DC; Veronica Vanessa Harrell-James, United States Attorney's Office, Miami, FL.

For Disability Rights Florida, Consol Plaintiff: David Allen Boyer, LEAD ATTORNEY, Disability Rights Florida, Hollywood, FL; Molly Jean Paris, LEAD ATTORNEY, Hollywood, FL.

For Elizabeth Dudek, FI, in her official capacity as Secretary of the Agency for Health Care Administration, Defendant: Michael Garrett Austin, LEAD ATTORNEY, DLA Piper LLP (US), Miami, FL; Allison Goodson Mawhinney, Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee, FL; Andrew T. Sheeran, Agency for Health Care Administration, Office of the General Counsel, Tallahassee, FL; Leslei Gayle Street, Agency for Healthcare Administration, Office of the General Counsel, Tallahassee, FL; Stuart Fraser Williams, Agency for Health Care Administration, Tallahassee, FL; George N. Meros, Jr., Gray Robinson, Tallahassee, FL.

For Harry Frank Farmer, Jr., M.D., in his official capacity [*3] as the State Surgeon General and Secretary of the Florida Department of Health, Defendant: Jennifer Ann Tschetter, LEAD ATTORNEY, Florida Department of Health, Tallahassee, FL; Allison Goodson Mawhinney, Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee, FL; Andrew T. Sheeran, Agency for Health Care Administration, Office of the General Counsel, Tallahassee, FL; Caryl Kilinski, Department of Health, Office of the General Counsel, Tallahassee, FL.

For Kristina Wiggins, in her official capacity as Deputy Secretary of the Florida Department of Health and Director of Children's Medical Services, Defendant: Jennifer Ann Tschetter, LEAD ATTORNEY, Florida

Department of Health, Tallahassee, FL; Andrew T. Sheeran, Agency for Health Care Administration, Office of the General Counsel, Tallahassee, FL; Caryl Kilinski, Department of Health, Office of the General Counsel, Tallahassee, FL.

For State Surgeon General John Armstrong, MD, Defendant: Allison Goodson Mawhinney, Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee, FL; George N. Meros, Jr., Gray Robinson, Tallahassee, FL; Jay Patrick Reynolds, Tallahassee, FL.

For Deputy Secretary Dr. Celeste Philip, Defendant: Allison Goodson Mawhinney, [*4] Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee, FL; George N. Meros, Jr., Gray Robinson, Tallahassee, FL.

For Dennis Cookro, Defendant: George N. Meros, Jr., Gray Robinson, Tallahassee, FL.

For The State of Florida, Consol Defendant: Christopher N. Johnson, LEAD ATTORNEY, GrayRobinson, P.A., Miami, FL; Allison Goodson Mawhinney, Ashley Hoffman Lukis, GrayRobinson, P.A., Tallahassee, FL; Andrew T. Sheeran, Agency for Health Care Administration, Office of the General Counsel, Tallahassee, FL; George N. Meros, Jr., Gray Robinson, Tallahassee, FL; James Timothy Moore, Jr., GrayRobinson, Tallahassee, FL; John A. Boudet, GrayRobinson, P.A., Orlando, FL; Leslei Gayle Street, Agency for Healthcare Administration, Office of the General Counsel, Tallahassee, FL; Stuart Fraser Williams, Agency for Health Care Administration, Tallahassee, FL.

For United States of America, Amicus: Lindsey Weinstock, LEAD ATTORNEYS, Elizabeth Erin McDonald, Victoria Thomas, US Department of Justice, Washington, DC; Travis W. England, LEAD ATTORNEY, U.S. Department of Justice, Civil Rights Division, Washington, DC Veronica Vanessa Harrell-James, United States Attorney's Office, Miami, FL.

Judges: WILLIAM J. ZLOCH, United [*5] States District Judge.

Opinion by: WILLIAM J. ZLOCH

Opinion

ORDER

THIS MATTER is before the Court upon Plaintiffs' Second Renewed Motion For Class Certification (DE

329), Magistrate Judge Hunt's Report And Recommendation (DE 395), Plaintiffs' Objection To Report And Recommendation (DE 397), and the State Defendants' Objections To The Report And Recommendation On Plaintiffs' Second Renewed Motion For Class Certification (DE 398). The Court has carefully reviewed said Motion, Report, and Objections, conducted a *de novo* review of the entire court file herein, and is otherwise fully advised in the premises.

By the instant Motion (DE 329), Plaintiffs seek certification of a class comprised of "All current and future Medicaid recipients in Florida under the age of 21, who are (1) institutionalized in nursing facilities, or (2) medically complex or fragile and at risk of institutionalization in nursing facilities." Magistrate Judge Hunt's Report (DE 395) recommends that said Motion be denied because Plaintiff's proposed class definition is not sufficiently ascertainable and class certification is not necessary. Plaintiffs objected to both of these reasons.

The Court adopts the Magistrate's reasoning and conclusions [*6] with respect to ascertainability of the proposed class, with additional comment as follows. As Magistrate Judge Hunt found, the determination of whether a Medicaid recipient is sufficiently "at risk" of institutionalization is inherently a fact-specific inquiry. Indeed, a particular Medicaid recipient's risk of institutionalization will often turn on individualized circumstances, such as the recipient's particular medical condition and the recommendations of her physicians. Plaintiffs offer no objective measure by which to gauge the persons included within the class. As a consequence, the proposed class definition is not sufficiently ascertainable as required by the Eleventh Circuit. See *DeBreaecker v. Short*, 433 F.2d 733, 734 (5th Cir. 1970).¹

In their Objections (DE 397), Plaintiffs propose a new definition for the class to remedy this defect.² This

¹ In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1980.

² Plaintiffs now propose that the class be comprised of "All Medicaid recipients in the state of Florida under the age of 21, who are (1) unnecessarily institutionalized in nursing facilities, or (2) medically complex or fragile and at risk of unnecessary institutionalization by receiving materially less private duty nursing services, personal care or respite care services than

definition, and any arguments attendant to it, were not presented to the Magistrate and therefore will not be considered by this Court. See *Cohen v. Implant Innovations, Inc.*, 259 F.R.D. 617, n. 4 (S.D. Fla. Aug. 21, 2008)(declining to address new proposed class definition that plaintiff did not present to Magistrate). The Court briefly [*7] notes, however, that the Plaintiffs' new class definition is no more ascertainable than their last. The newly-injected concepts of "materiality" and "necessity-of-institutionalization," like the "at-risk" concept in the original definition, have no objective criteria that the Court can apply to determine who would be a class member.

The Court also adopts Magistrate Judge Hunt's reasoning and conclusions with respect to the necessity of class certification. For the reasons set forth in the Magistrate's Report (DE 395), the Court finds that class certification is not necessary at this stage. Having found that class certification is unnecessary, and that Plaintiffs' proposed class is not sufficiently ascertainable, the Court declines to adopt the alternative finding recommended [*8] by Magistrate Judge Hunt's Report (DE 395), which applies the factors set forth in *Federal Rule of Civil Procedure 23(a)*. The Court will therefore decline to approve, adopt, and ratify said Report's reasoning and conclusions in that respect. The Court will likewise overrule Defendants' Objections (DE 398), which are germane to Magistrate Judge Hunt's alternative recommendation.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED as follows:

1. Magistrate Judge Hunt's Report And Recommendation (DE 395) be and the same is hereby approved, adopted, and ratified to the extent that it finds class certification unnecessary and Plaintiffs' proposed class definition unascertainable;
2. Consistent with the terms of this Order, the Court declines to approve, adopt, and ratify the alternative finding in Magistrate Judge Hunt's Report And Recommendation (DE 395);
3. Plaintiffs' Objection To Report And Recommendation (DE 397) be and the same is hereby overruled;
4. The State Defendants' Objections To The Report And Recommendation On Plaintiffs' Second Renewed Motion For Class Certification (DE 398) be and the

same are hereby overruled; and

5. Plaintiffs' Second Renewed Motion For Class Certification (DE 329) be and the same [*9] is hereby **DENIED**.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida, this 29TH day of February, 2016.

/s/ William J. Zloch

WILLIAM J. ZLOCH

United States District Judge

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