

(TJM)

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the nineteenth day of March, one thousand nine hundred and ninety.

Present:

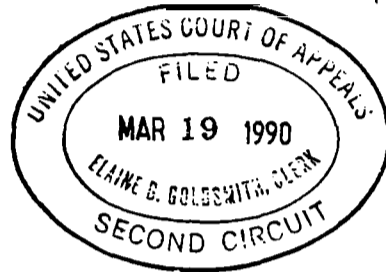
HONORABLE WILLIAM H. TIMBERS,  
HONORABLE THOMAS J. MESKILL,  
HONORABLE FRANK X. ALTIMARI,

45,058  
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P.

Circuit Judges.

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(3pp)

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MICHELE CATANZANO, by her parents and next friends, FRANCINE CATANZANO and SAM CATANZANO, on behalf of herself and all persons similarly situated, and FRANCINE CATANZANO and SAM CATANZANO,



Plaintiffs-Appellees,

v.

Docket No. 89-9163

W. BURTON RICHARDSON, as Director of the Monroe County Department of Social Services, and JOEL NITZKIN, M.D., as Director of the Monroe County Department of Health,

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Defendants-Appellants.

This is an appeal from an **order of the** United States District Court for the Western District of New York, Larimer, **J.**, granting **plaintiffs-appellees'** motion **for** a preliminary injunction requiring defendants-appellants to provide the level of home health care ordered by the treating physician until a contrary determination concerning the level of care needed is made in accordance with the relevant state regulations.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The order of the district court-is AFFIRMED.

We ordinarily review a district court's order entering a preliminary injunction for an abuse of discretion. Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975). Appellants argue that in this case the district court's order should be reviewed de novo because of the court's failure to hold an evidentiary hearing. A district court must hold such a hearing on a motion for a preliminary injunction if "essential" facts are in dispute. Fenaler v. Numismatic Americana, Inc., 832 F.2d 745, 747 (2d Cir. 1987). Appellants' attempt at creating a factual dispute over the propriety and basis of the treating physician's order is unavailing. The relevant issue, at least at this juncture of the proceedings, is not whether the treating physician was correct in his assessment of the need for home health care, but rather whether appellants, when faced with the treating physician's order, followed the appropriate procedures in providing a level of care that did not conform with that order. Because appellants failed to place an essential fact into dispute, the district court could properly rule on the motion solely on the basis of the affidavits submitted by the parties.

The district court did not abuse its discretion by entering the preliminary injunction. The record reveals that appellees made a substantial showing of irreparable harm in the form of the danger to **Michele Catazano's** recovery. Moreover, the record amply supports the district court's **determination of** a likelihood of success on appellees' claims that appellants failed to follow the relevant state regulations governing home health care **services, see** N.Y. Comp. Codes R. & Regs. tit. 18, § 505.23(e) (1988), and that appellants failed to provide the notice and hearing required under state law, **see** N.Y. Soc. Serv. Law § 22

(McKinney 1983 & Supp. 1990); N.Y. Comp. Codes R. & Regs. tit. 18, §§ 358-2.2, 358-3.1 (1989).

*Wm H. Timbers*

William H. Timbers, U.S.C.J.

*Thomas J. Meskill*

Thomas J. Meskill, U.S.C.J.

*Frank X. Altamari*

Frank X. Altamari, U.S.C.J.

N. . This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.