

52,220 H

G. CURTIS DRAKE
P. KEITH KELLER
Keller, Reynolds, Drake,
Johnson & Gillespie, P.C.
38 South Last Chance Gulch
Helena, MT 59601
Telephone: (406) 442-0230

ATTORNEYS FOR DEFENDANTS



IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
HELENA DIVISION

SHIRLEY SMALL; HOWARD JAY WOODS;
ANDREW ADLER; DIAN WALLILA;
EDWARD W. NELSON; and
CHARLES ZWERNEMAN, on behalf of
themselves and all others
similarly situated,

Plaintiffs,

) No. CV-96-49-H-CCL
)
) Civil Action

-vs-

) **REPLY MEMORANDUM OPPOSING**
) **CLASS ACTION CERTIFICATION**

STATE OF MONTANA; MARC
RACICOT, Governor of the
State of Montana; PETER BLOUKE,
Director, Montana Department of
Public Health and Human Services;
DAN ANDERSON, Administrator,
Addictive and Mental Disorders
Division, Department of Public
Health and Human Services;
CARL KEENER, Medical Director
of the Montana State Hospital;
RON BALAS, Superintendent,
Montana Mental Health Nursing
Care Center; MONTANA HEALTH
FACILITY AUTHORITY; and,
JERRY HOOVER, Executive Director,
Montana Health Facility Authority,

Defendants.

1 NUMEROSITY

2 Plaintiffs argue that they meet the Rule 23(a)(1) numerosity
3 requirement because there are approximately 200 persons currently
4 on the patient census at MSH, 144 persons at the Lewistown
5 facility, and an anticipated large number of persons will be
6 patients at both facilities in the future. Actually, the group of
7 persons who would constitute the "class" in this case is much
8 smaller, and may only consist of a handful of patients. While the
9 Plaintiffs' pleadings assert that the class to be certified would
10 consist of all persons now or in the future who may be confined
11 within MSH or the Lewistown facility, Plaintiffs' Court filings
12 actually state claims (if at all), only on behalf of persons who
13 are "inappropriately" placed at those facilities. For example, at
14 p. 13 of their Memorandum of Law Opposing Defendants' Motion for
15 Partial Judgment on the Pleadings, Plaintiffs assert in no
16 uncertain terms that:

17 Plaintiffs do not assert that every patient
18 within MSH and MMHNCC must be discharged.
19 Plaintiffs are not seeking the general and
total deinstitutionalization of the State
Hospital population.

20 As Plaintiffs concede that there are patients who need to be
21 placed at the two facilities in question, the class of persons who
22 are "inappropriately" placed is less than the total number of
23 patients currently at each facility.

24 Plaintiffs have not yet provided the Court or the parties with
25 any information about the number of patients which they contend are
26 "inappropriately" placed at the questioned facilities. Until they
provide the Court with some idea of the number of persons whom they

1 believe are inappropriately placed, they have not carried their
2 burden of proof to demonstrate numerosity. Barlow v. Marion County
3 Hospital Dist., 88 F.R.D. 619 (1980).

4 COMMONALITY

5 The Plaintiffs state at p. 2 of their Memorandum Regarding
6 Class Certification:

7 At the heart of Plaintiffs' Complaint is the
8 fact that the Defendants confined Plaintiffs
within State operated institutions needlessly.

9 Plaintiffs' Memorandum does not directly confront the need for
10 individual medical and psychiatric determinations which would have
11 to be made to determine whether each class member's psychiatric and
12 physical condition is such that their institutional confinement is
13 necessary. Plaintiffs recite in summary fashion that "Plaintiffs
14 and their class are subject to confinement at MSH and MMHNCC based,
15 on the need to generate revenue to pay services, not based on
16 clinical necessity." This is, by Plaintiffs' account, the "core"
17 of their claims. However, that conclusory statement merely points
18 out the need for proof on why each patient is confined. Plaintiffs
19 concede that at least ~~some~~ patients are properly confined. Brief

20 ~~Opposing Motion for Judgment on Pleadings~~ at p. 13. In order to
21 determine Plaintiffs' "core" issue, evidence of the medical basis
22 for each patients confinement would have to be received.

23 The Court cannot judge the reason for individual confinement
24 without making complex individual medical and psychiatric
25 determinations, both now and in the future.

26 ///

27 ///

1 Resolution of whether "unnecessary confinement" is occurring
2 sill require proof of the medical reasons for each person's
3 confinement. This must be determined on a case-by-case basis by
4 law in Montana.

5 The Complaint requests that this Court act as a "gate keeper"
6 for all patients currently housed and for whom admission is sought
7 by issuing and monitoring an Injunctive Order to:

8 [A]ppropriately screen and evaluate all
9 patients confined at MSH...and determine
10 whether services in a community setting is the
11 most integrated setting...[and for those
12 patients] for whom the most integrated setting
appropriate to their needs is a community
setting, [to see they] are discharged...and
ensure that community treatment services are
provided to Plaintiffs.

13 Complaint, Prayer for Relief at pp. 22-23. These functions are
14 already performed each day by Montana State District Judges as they
15 adjudicate each patient's commitment or continuation of
16 confinement.

17 The unique requirements of patients admitted to MSH in
18 particular makes the Rule 23(a)(2) requirement nearly impossible to
19 meet. Before persons can be involuntarily confined at MSH, a State
20 District Court must specifically find that MSH is the least
21 restrictive environment required to protect the life and safety of
22 the detainee, after a hearing with evidence on that point.

2 The "appropriateness" of the placement of each patient in the
2 questioned facilities is heavily regulated by Montana statute,
2 which require each such placement to be based on a judicial
2 determination that each individual has been placed in the "least
restrictive environment."

1 The commitment statutes already require that treatment be
2 accomplished in a community-based setting whenever possible and
3 that institutionalization is allowed only when less restrictive
4 alternatives are unavailable or inadequate, or when the person's
5 mental illness so requires. 53-21-101(2), (3), M.C.A. In order to
6 detain any of the class members based upon mental illness, a State
7 district court must have determined that each was "detained in the
8 least restrictive environment required to protect the life and
9 physical safety of the person detained or members of the
10 public...." 53-21-120. The detainee has the right to a jury trial
11 of their need for commitment, and the standard of proof at that
12 hearing is "beyond a reasonable doubt" for physical facts or
13 evidence, and "clear and convincing" evidence as to all other
14 matters. 53-21-126. Professional persons must be present to be
15 examined, and the detainee has a number of rights throughout the
16 proceedings, similar to those granted to a defendant in a criminal
17 prosecution. See §§ 53-21-115, 125, M.C.A.

18 Commitments beyond three months require recommitment
19 petitions, which must meet the requirements for an original
20 commitment "in all respects," except the right for trial by jury.
21 In order to commit or recommit any putative class member a State
22 district court judge was required to have found what alternatives
23 for treatment of the patient were available, what alternatives were
24 investigated, why the investigated alternatives were not considered
25 suitable, and that treatment through commitment to the facility was
26 the least restrictive alternative. See 53-21-127(c); 53-21-
128(1)(c), (d), (3), M.C.A. By law, each patient's commitment must

1 | be based solely upon their individual circumstances, All persons
2 | confined involuntarily must receive an individualized treatment
3 | plan during their commitment. The plan must contain a statement of
4 | the "specific problems and specific needs of the patient" and a
5 | statement of the "least restrictive treatment conditions necessary
6 | to achieve the purposes of commitment," a description of treatment
7 | goals, time tables for their attainment, and criteria for the
8 | release of the patient to a less restrictive treatment environment.
9 | Section 53-21-135, M.C.A.

10 | The individualized finding requirements for each of the
11 | putative class members confined involuntarily at MSH demonstrate
12 | that the appropriateness of their confinement is an individual
13 | determination by law. It is a determination which has already been
14 | ruled upon by a Montana State District Court Judge, reviewed at a
15 | three-month commitment hearing, and periodically thereafter.

16 | Determination of the "appropriateness" of all placements at
17 | MSH in this case would require individualized medical and
18 | psychiatric testimony as to how each putative class member's
19 | particular mental illness affected their confinement needs. This
20 | requirement for detailed testimony regarding each putative class
21 | member's mental health history and current status clearly cannot
22 | meet the requirements of Rule 23(a) for common questions of fact.
23 | As the "appropriateness" of each person's confinement is the
24 | central issue in this case, this testimony cannot be avoided.

25 | It is unclear if the Plaintiffs recognize they are requesting
26 | this Court to ignore or supplement the procedures provided by
Montana commitment law, as they request this Court to make a

1 | wholesale, non-individualized determination as to the
2 | "appropriateness" of the entire institution's population as a
3 | "class." This is clearly illegal under Montana's commitment laws.

4 | The determinations of the Montana State District Court judges
5 | have made placing each of the putative class members at MSH is res
6 | iudicata in this proceeding. This has included a ruling that all
7 | are currently placed in their least restrictive environment. As to
8 | future patients, this Court could not issue an order as to the
9 | propriety of their commitment without even knowing what risk they
10 | posed to themselves or others at the time commitment is sought for
11 | them, and those persons' commitments are not yet ripe for
12 | determination.

13 | The cases cited by the Plaintiffs, while dealing generally
14 | with class actions and the ADA, do not support a class action in
15 | this circumstance. Even the quoted language from ~~Messier v.~~
16 | ~~Southbury Training School~~ upon which Plaintiffs apparently rely
17 | heavily indicated that:

18 | However, even if this Court were to grant
19 | injunctive relief, the Court has no intention
20 | to become involved in individual placement
21 | decisions on a continuing basis.

22 | ~~Plaintiffs' Memorandum of Law in Support of Class Action~~ at p. 12,
23 | citing Messier at p. 16.

24 | For the most part, the cases cited by the Plaintiffs did not
25 | require individualized judicial factual determinations, and none so
26 | much as would be required here. While the Plaintiffs cite to
27 | Dillon v. State of Montana, 451 F.Supp. 168 (1978) as proof that
28 | individual damage determinations do not **preclude** class

1 certification, the Dillon Court did not make such a ruling. In
2 fact, the Dillon Court held that the individual damage
3 determinations would not be made by that Court, but would be made
4 by the Plaintiff class independently of the Court through a State
5 tax refund procedure. Dillon at pp. 178, 179. The case closest to
6 the instant case factually and cited by the Plaintiffs is Conner v.
7 Branstad, 839 F.Supp. 1346 (S.D. Iowa 1993). The opinion in Conner
8 does not address the propriety of the class certification in that
9 case, as that had previously been decided by a different Judge,
10 seven years earlier. Conner at p. 1348.

11 The case which seems to provide the most guidance is Burnham
12 v. Department of Public Health, 349 F.Supp. 1335 (N.D. Georgia
13 1972). Burnham involved constitutionally-based claims regarding
14 patient treatment in mental health hospitals in Georgia. A patient
15 class-action was sought. While Burnham's discussion of
16 jurisdiction is outdated and was late overdue, its discussion of
17 the difficulties with class-action certification in cases
18 determining individual treatment decisions is on point and valid
19 precedent. The Court's ruling denying class-action certification
20 when individualized circumstances (whether treatment or
21 confinement), are the ultimate issue, captures the point well:

22 Since each patient is an individual and what
23 is good treatment for one might mean disaster
24 for another, the only feasible way in which
25 the adequacy of treatment could ever be
26 measured is against the needs of a particular
patient. Under these circumstances it is the
opinion of this Court that the class action
requisites of Rule 23 are not met in that (1)
there would be relatively few questions of law
or fact common to members of the alleged
class, (2) the claims of the plaintiffs would

1 not be typical of the claims of the class, and
2 (3) plaintiffs are not necessarily
3 representative of or in a position to
adequately protect the interests of the class
(citing cases).

4 See also Nguyen Da Yen v. Kissinger, 70 F.R.D. 656, 663 (1976).

5 The commonality requirement cannot be met, as a matter of law,
6 because Montana's statutes require individualized determination of
7 the appropriateness of each patient's placement. See 53-21-101, et
8 seq. Additionally, even if Montana's law did not otherwise require
9 it, the nature of the relief sought is based on a determination of
10 the appropriateness of each patient's placement, which requires
11 extensive evidence regarding the reasons for each patient's current
12 placement. Because these individual determinations must be made,
13 the commonality requirement of Rule 23(a)(2) cannot be met.

14 TYPICALITY

15 Rule 23(a)(3) requires that the claims of the representative
16 parties be typical of those of the class they seek to represent.
17 This requirement is also not met.

18 As with most class actions, the representatives are "hand-
19 picked" as hopefully providing the best face available for the
20 class action petitioners. However, in this selection process,
21 Plaintiffs in this case have failed to pick representatives. For
22 example, no indication is given as to how the class of
23 representatives somehow represent persons who are living at the
24 Lewistown facility.

25 Many patients at MSH are voluntary patients. It is difficult
26 to see how the relief sought by the named representatives (a Court
Order requiring services be provided to the Plaintiffs in the

1 community), Plaintiffs' Memorandum of Law Regarding Judgment of
2 Pleadings at p. 15, would serve individuals who have voluntarily
3 sought admission, not to a community-based program, but to MSH.

4 By hand-picking their representatives, the Plaintiffs have
5 purposely omitted naming any of the intractable ill, violent, and
6 medication resistant patients who form much of the long-term core
7 of patients at MSH.

8 FAIR AND ADEOUATE REPRESENTATION

9 What must be obvious by this point is that this lawsuit is but
10 a continuation of a longstanding history of litigation and
11 lobbying, beginning at least as early as the Plaintiffs' failed
12 attempt in Ihler v. Chisolm, et al. to receive an Order requiring
13 deinstitutionalization and community care. After having lobbied
14 the Legislature to prevent construction of the new MSH facility,
15 this lawsuit is the unfortunate next step of that crusade.

16 However, it is not the attorneys who will be the recipients of
17 the health care at issue. The patients' needs must be considered,
18 and there is no evidence in the pleadings or otherwise that even
19 the named class representatives have consented to this suit, let
20 alone whether it serves the best interests of the putative class
21 -members these attorneys seek to represent.

22 While there is little question that the attorneys representing
23 the claim will aggressively pursue this action, there remains the
24 question as to whether the suit is actually in the best interests
25 of the persons they seek to represent. For example, the Affidavits
26 provided by the Defendants indicate that the current facilities
housing many of the putative class members are not as desirable as

1 those being proposed for construction, and may not meet recognized
2 standards. In spite of this, Plaintiffs seek an injunction against
3 the funding (and therefore the construction) of an improved
4 facility, preferring instead to request that the patients be
5 released to "community" services.

6 As to the many involuntary patients, they are by definition
7 incompetent, although many of them have legally appointed
8 guardians. The best interests of the patients, as expressed as
9 best they are able on their own behalf, and through their
10 guardians, should be paramount, not any ongoing desire of the
11 Plaintiffs' attorneys to create judicial authority for community
12 care through the ADA.

13 As all the named plaintiffs are relatively high-functioning
14 individuals, they do not seem to have anything in common with the
15 needs or desires of the more intractable mentally ill who are much
16 more dangerous to themselves and others. The Defendants' concern
17 is that, in their zeal, the Plaintiffs' pleadings are at best over-
18 inclusive, as they seek to prevent the construction of a new
19 facility which even they agree will be necessary to house the most
20 intractable mentally ill population of Montana. Despite this,
21 their Complaint seeks to include all residents of MSH within its
22 purview and to seek "community care," even for those persons for
23 whom that is admittedly not even a possibility, While aggressive,
24 this causes Defendants' concern as to whether a political zeal of

25 ///

26 ///

///

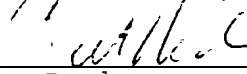
1 the Plaintiffs' attorneys overshadows the best interests of the
2 persons they seek this Court's blessing to represent.

3 DATED this 4th day of October, 1996.

4 WILL HUTCHISON
5 KIMBERLY A. KRADOLFER
6 AGENCY LEGAL SERVICES BUREAU
7 215 North Sanders
8 Justice Building
9 Helena, MT 59620

10 RUSS CATER
11 BEDA J. LOVITT
12 DEPARTMENT OF PUBLIC HEALTH
13 & HUMAN SERVICES
14 P. O. Box 4210
15 Helena, MT 59620-4210


16 G. CURTIS DRAKE
17 P. KEITH KELLER
18 KELLER, REYNOLDS, DRAKE,
19 JOHNSON & GILLESPIE, P.C.

20 BY: 
21 G. Curtis Drake
22 38 South Last Chance Gulch
23 Helena, MT 59601
24 Attorneys for Defendants

25 **CERTIFICATE OF SERVICE**

26 I, G. Curtis Drake, one of the attorneys for the Defendants,
above-named, hereby certify that I mailed a true and correct copy
of the **REBUTTAL MEMORANDUM REGARDING CLASS ACTION CERTIFICATION**,
postage fully prepaid by U. S. Mail, on this 4th day of October,
1996, to the following:

Lonnie J. Olsen, Esq.
Allen Smith, Jr., Esq.
Maire Gallagher
C.J. Lassila
Montana Advocacy Program
P. O. Box 1680
316 North Park, Room 211
Helena, MT 59624


G. Curtis Drake