No. 05-

IN THE

# Supreme Court of the United States

LOUIS NEWELL,

*Petitioner*,

*v.*

DEPARMENT OF MENTAL RETARDATION, AN EXECUTIVE DEPARTMENT OF THE COMMONWEALTH OF MASSACHUSETTS,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

1. Are judgments on the merits and court-ordered consent decrees the exclusive forms of judicial relief that create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees under 42 U.S.C. § 1988 and *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 121 S. Ct. 1835, 532 U.S. 598 (2001), or can other forms of relief provide the required "judicial imprimatur"?

2. Where a party to a consent decree entered in a federal court under 42 U.S.C. § 1983 successfully enforces that consent decree in a state court, is that party entitled to attorney's fees in the court's discretion under 42 U.S.C. § 1988?

3. Can oral orders constitute the "judicial imprimatur" required for an award of attorney's fees in a civil rights action under 42 U.S.C. § 1983, 42 U.S.C. § 1988, and *Buckhannon*?

4. Did the Supreme Judicial Court of Massachusetts err when it denied attorney's fees under 42 U.S.C. § 1988 and *Buckhannon* to a civil rights litigant who, through a written judicial order and oral orders, (a) achieved some of the benefits he sought in bringing suit and (b) successfully enforced a Section 1983 consent decree?

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The unpublished Memorandum of Decision and Order on Plaintiff's Request for Injunctive Relief, Motion for Attorney's Fees and Complaint for Civil Contempt issued by the Superior Court (the trial court) on December 1, 2000. (Appendix, pp. 35a – 65a)

## BASIS FOR JURISDICTION IN THIS COURT

The decision of the Massachusetts Supreme Judicial Court affirming the trial court's denial of attorney's fees under 42 U.S.C. § 1988 was entered on March 20, 2006. A motion for rehearing was summarily denied on May 1, 2006.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

The decision of the Massachusetts Supreme Judicial Court conflicts with decisions of the U.S. Circuit Courts of Appeal and with this Court's decision in *Buckhannon*. (Rule 10(b).)

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Civil Rights Act - 42 U.S.C. § 1983:**

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the district of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

**Civil Rights Act - 42 U.S.C. § 1988(b):**

> In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 13981 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. . . .

## STATEMENT OF WHEN FEDERAL QUESTIONS WERE PRESENTED (RULE 14.1(I))

A claim under the Fourteenth Amendment of the Constitution of the United States and under 42 U.S.C. § 1983 was raised in the Complaint. In a preliminary injunction phase of the case, the plaintiff discovered that he was a member of the "Ricci class" entitled to benefits under a consent decree entered under 42 U.S.C. § 1983. Questions under 42 U.S.C. § 1988 were raised when the plaintiff was awarded relief by the trial court in a post-trial, injunctive phase of the case. Federal questions under 42 U.S.C. § 1983 and 42 U.S.C. § 1988 were the basis of the plaintiff's appeal and were, thus, always extant in the appellate court. The appeal was taken on direct review by the Supreme Judicial Court of Massachusetts.

## STATEMENT OF THE CASE

Louis Newell is mentally retarded. He has been in the care of the Commonwealth for most of his 66 years.

In June of 1995, Louis lived in a group home run by the Charles River Association for Retarded Citizens ("CRARC"). He fell ill. He was hospitalized at Massachusetts General Hospital ("MGH") and was found to have long excoriations and bruises on his back, as well as a subdural hematoma.

Before being hospitalized, Louis had been very unsteady on his feet and had fallen many times. The bruises and excoriations on his back and the head injury for which he was hospitalized appeared to be caused by a serious fall, or from a beating.

Louis stayed at MGH for months, waiting for a placement from Defendant-DMR. He was transferred by his guardian to a nursing home. Louis did not, at that time, receive assistance from DMR.

In November of 1995, Louis sued CRARC and the Commonwealth under state law and 42 U.S.C. § 1983. He sought compensatory damages, injunctive relief, and appropriate care from the DMR. He sought a preliminary injunction to obtain one-to-one care and supervision from DMR to help prevent his falling and further injuries.

The history of this case actually began years earlier, however, with the U.S. District Court's order in the class action suit of *Ricci v. Okin*, 832 F. Supp. 984 (D. Mass. 1993). *Ricci* was a class action brought against the Commonwealth by mentally retarded citizens such as Newell.

The final order in *Ricci* required DMR to "substantially provide services to each class member on a lifetime basis." *Id.* at 832 F. Supp. 986. Individual class members were given the right to enforce their *Ricci*/Section 1983 rights. *Id.*, at 988. ("Nothing in this [order] shall be construed to prevent a class member from bringing an independent action. . . .")

The complaint in this case was filed under state law and 42 U.S.C. § 1983 (V1, 23, 25) on November 6, 1995. A call for one-on-one care and supervision for Newell was at the heart of the request for relief.

## A. Application for Preliminary Relief

The complaint was paired with an application for a preliminary injunction. (V1, 055.) DMR "vigorously" (V1, 194) opposed the application and denied that 1-to-1 care was appropriate. (V1, 197-198.) It denied that Newell was in DMR's custody.[1] (V1, 197, 200.) It denied that DMR had any obligation to provide services to Newell. (V1, 200) ("The plaintiff has no legal right to a DMR placement.") (Also, V1, 206-207.) As DMR services coordinator Mary Reyenger would later concede, Newell would never have had an ISP absent a court order. (V4, 945-946.)

DMR's position that Newell "has no right to a DMR placement" was the equivalent of saying that he was not a member of the *Ricci* class because, if he *was* a member of the class, he was entitled to DMR services "on a lifetime basis." *Ricci*, at 832 F. Supp. 986.

After the lawsuit was filed, on November 22, 1995, the plaintiff obtained a Probate Court order giving Newell's guardian, Eve Ross, access to Newell's DMR-held files. (V2, 367.) Among those files was the first notice the guardian had ever received that Newell was a member of the *Ricci* class. (*See* V2, 368). Yet DMR continued to insist that "[Newell] is not a class member." (V2, 456.) If Newell was *not* a class member, then he had no right to services under *Ricci*.

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1. The court ultimately found that Newell was in state custody since 1946. (*See* Memorandum and Decision.) (V5, pg. 1152)

At a December 7, 1995 hearing on procedural issues, despite the fact that *Ricci* required an Individual Service Plan or "ISP" to identify and plan to meet Newell's needs, the DMR argued that, "[W]e . . . didn't want to put [Newell] through the ISP process." (V2, 398.)

On December 15, 1995, the court "ORDERED that defendant DMR shall complete an accelerated assessment of plaintiff. . . ." (V2, 411.) The trial court would later find that (1) this was the only time Newell received an ISP between "much of 1995 and continuing through the beginning of calendar 2000" (V7, 1565) and (2) that he received the 1996 ISP "only because of a Superior Court order." (V7, 1566.)

On March 1, 1996, the court denied the plaintiff's request for a preliminary injunction. It did so because DMR had "agree[d] to provide a final, Individual Service Plan . . . *within one week*. . . ." Because of that concession, there was "no need for interlocutory relief at this time." (V3, 510.)

**B. Discovery and Trial on Damages**

On April 2, 1996, the state defendants filed their answer to the complaint. DMR denied that it had any statutory or constitutional obligation to provide Newell with services (V3, 522, para. 168) despite its "agreement" to provide Newell with an ISP in the court order dated March 1, 1996. (V3, 510.)

In the final pre-trial memo, DMR continued to deny that Newell had a right to either "a specific placement or services." (V3, 537.) Also in the pre-trial memo was the question of "what impact, if any, the Ricci decision has on this case." (V3, 542.)

A jury verdict against DMR for $482,600 was returned on December 20, 1999 under state law only. The DMR was granted judgment notwithstanding the verdict under a Massachusetts statute not pertinent to this Petition.

## C. The Injunctive Phase of the Case

Next came the injunctive phase of the case under 42 U.S.C. § 1983 and the *Ricci* decision. The trial court ordered DMR to produce an ISP for Newell. (V7, 1566.) ("Two DMR meetings, on December 29, 1999 and February 11, 2000, occurred because there was a court hearing scheduled for 2/17/2000 at which DMR *was to produce* an ISP for Newell.") (*See also* V4, 807.)[2] (Emphasis added.)

At a hearing on February 10, 2000, the court ordered that "the Commonwealth prepare and serve" the ISP by "the end of business on [February 15th]." (V4, 786.) The court also ordered DMR and the nursing home where Mr. Newell was now a resident to increase the frequency of Newell's walking. (V4, 798.) The court ordered that DMR would pay for any costs associated with having Mr. Newell walk more frequently between February 10th and the next hearing date. (V4, 792.)

On February 11, 2000, the DMR did produce an ISP pursuant to the court's December 1999 and February 11th orders. The plaintiff alleged that the ISP was not complete and filed a bench memo to that effect on February 16, 2000. (V4, 807.)

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2. The hearing at which the ISP was ordered was not recorded.

Another hearing on injunctive relief took place on February 17th. One subject of the hearing was the February 11, 2000 ISP. The plaintiff claimed that the ISP was incomplete and, therefore, did not comply with previous court orders. (V4, 807.) During colloquy, the DMR conceded that, "The court, on Thursday, February 10th ordered that this ISP be prepared and filed by February 18th." (V4, 892.)

Mary Reyenger, the Department's ISP coordinator for Mr. Newell, testified that the then-current (but incomplete) February 11th ISP for Mr. Newell was created under court order. (V4, 945-946.)

In a colloquy with Ms. Reyenger, the trial judge said, "I understood that I would be getting an ISP but then DMR hadn't done it. So, I wasn't — I didn't know that it would take more than — that's why I ordered it." (V4, 961.)

Meanwhile, the plaintiff had filed a Memorandum in Support of Request for Injunctive Relief. (V3, 664.) The plaintiff's demands were (1) recognition that Newell was a *Ricci* class member entitled to lifetime services, (2) completion of an ISP under *Ricci*, (3) dental and other medical services, and (4) "some form of one-to-one support and supervision." (V3, 664.) The DMR continued to insist that Newell had "no right" to services of any kind. (V3, 721.)

On March 3, 2000, the plaintiff moved to preserve the issue of attorney's fees. (V5, 1064.)

The court held a hearing on Newell's new ISP on March 29, 2000. DMR Service Coordinator Mary Reyenger conceded that she had not received any funding for Newell's one-to-one care. (V5, 1026, 1031-32.)

After the hearing, the court ordered DMR to (a) provide Newell with 25 hours per week of one-to-one care. (V5, 1041), (b) provide Newell with a private room at that point in time (V5, 1041-42), (c) incorporate into the plaintiff's ISP a letter written by DMR Regional Supervisor Jeff Kielson providing the private room (V5, 1042), and (d) implement Newell's ISP. (V5, 1194.)

DMR continued to object to all such relief, but conceded that "we are going to do it, *if the court orders.*" (V5, 1039.) (Emphasis added.)

At a subsequent hearing, the court asked Counsel for DMR, "[Y]ou are not disputing that I ordered A through D, in some fashion?" DMR responded, "In some fashion; no, your Honor. I am not disputing that the Court, in some fashion, ordered A through D." (V5, 1194.)

On April 7, 2000, the Commonwealth submitted a record of the trial exhibits. (V1, 0015.) Among the exhibits was the notice that Plaintiff-Louis Newell was a member of the *Ricci* class. (V5, 1074.)

On April 19, 2000, DMR filed a motion for reconsideration. DMR cited the court's March 29th "order" regarding the March 20, 2000 ISP. (V5, 1127.)

**D. DMR is Held in Contempt**

A verified complaint for contempt against the DMR was filed by the plaintiff on May 31, 2000. (V1, 0016.) The complaint stated that, "As of May 30, 2000, the Defendant-DMR has failed to comply with any of the provisions of the court's order[s of March 29, 2000]."

On August 10, 2000, the court issued its "Findings of Fact and Order" dated August 10, 2000. The findings included (1) that Newell "is a member of the class of litigants identified for lifetime services in *Ricci*" and (2) the fact that Newell had, through litigation, received a February 11th ISP "with further modification as ordered on March 29, 2000 that substantially complies with the requirements of *Ricci*." (V5, 1149-50.)

The actual contempt hearings began on September 6, 2000. The trial judge referred to her "order[s]" at least eleven times during the hearing. The DMR referred to the court "order[s]" at least six times. (V5, 1171-1247.)

The DMR agreed that, on March 29th, the court had ordered it to (a) provide Newell with 25 hours per week of one-to-one care and supervision, (b) provide Plaintiff-Louis Newell with a private room at that point in time, (c) incorporate into Newell's ISP a letter written by DMR Regional Supervisor Jeff Kielson providing the private room, and (d) Implement Newell's ISP. (V5, 1194.)

The contempt hearing reconvened on September 8th. The court heard argument on the plaintiff's petition for attorney's fees on September 26th. (V7, 1528.)

## E. The Court's December 1, 2000 Order

On December 1, 2000, nearly a year after the court ordered DMR to provide Newell with an ISP, the judge issued a 23-page opinion on the issues of contempt, injunctive relief, and attorney's fees. (Appendix, pp. 35a – 65a.) The court found that, "DMR willfully and without excuse failed to obey this Court's order [of March 29, 2000] to incorporate such

provisions into Newell's ISP." (V7, 1581.) The trial court found several ways in which the DMR violated court orders. (V7, 1578-81.)

The December 1, 2000 order required DMR to place language in Mr. Newell's ISP that, "Mr. Newell will have approximately 25 hours a week of one-on-one assistance on both those days that he attends BCTS and those days he does not. . . ." (V7, 1585.) This is precisely the kind of relief that Newell sought when he filed his Complaint.[3]

The court awarded $215,965.80 in attorney's fees and costs (V7, 1585), finding that the "plaintiff's first amended complaint asserted a claim pursuant to 42 U.S.C. § 1983, alleging that Newell was deprived of a liberty interest when DMR failed to provide him with an Individual Service Plan (ISP) as required by *Ricci* . . . and failed to assure his safety without unnecessary restraint." (V7, 1563-64.)

The court determined that "Newell is entitled to lifetime services from DMR in accordance with the requirements of the *Ricci* decision." (V7, 1565.) The court found that, "During much of 1995 and continuing through the beginning of calendar year 2000, DMR failed to provide Newell with an ISP and resulting services despite the requirements of *Ricci* and his being in state custody." (V7, 1565-66.)

On one-to-one care, the court held, "[W]ith respect to the provision of one-to-one care, it appears that DMR has

3. *See* Complaint (V1, 022-054), paras. 50, 70-72, 75, 77, 78, 80-87, 130-132, 136-139, 142, 174, 176, and relief requested #1, #2.) (*See* Application for Preliminary Injunction (V1, 055-059), paras. 4-7, 9-11, 14, 15, 17, 19, and 20.) (*See* final pre-trial order.) (VIII, 551)

not yet incorporated the specific language agreed to by DMR and ordered by this court . . . Accordingly, this court will again order DMR to do so, within twenty days of the entry of this decision. (V7, 1583.)

## F. The Appeal and the "*Buckhannon*" Events

The DMR filed its notice of appeal on January 22, 2001. (V1, 0013.) The plaintiff filed his cross-appeal on January 24, 2001. (V1, 0013.)

DMR moved for reconsideration of the award of attorney's fees, relying on the *Buckhannon* decision. (V7, 1591.) The court denied the motion, saying the appeal had divested it of jurisdiction. (V1, 0019.)

The DMR then wrote a letter to the judge, again relying upon *Buckhannon*. (V7, 1595.) On March 18, 2002, the trial court treated the letter as a "motion for reconsideration" and vacated the award of attorney's fees. (V7, 1581.)

The plaintiff responded by filing a revised notice of cross-appeal on April 2, 2002 (V1, 0019) and by filing a notice of appeal on April 5, 2002. (V1, 0019.)

The Supreme Judicial Court affirmed the trial court's decision denying an award of attorney's fees on March 20, 2006.

## REASONS FOR GRANTING THE PETITION

When the Court decided *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 121 S. Ct. 1835, 532 U.S. 598 (2001), it relegated the "catalyst theory" for the recovery of attorneys fees under 42 U.S.C. § 1988 to the dust-bin of history.

The catalyst theory had been relied upon by most federal and state trial and appellate courts for at least 20 years. (*See, e.g., Nadeau v. Helgemoe*, 581 F.2d 275, 279 (1st Cir. 1978)); *Buckhannon*, at 121 S. Ct. 1838 n.3. It comes as no surprise, therefore, that the *Buckhannon* decision left many questions unanswered for the nation's trial and appellate courts.

*Buckhannon* requires that a court place the "judicial imprimatur" upon the outcome of litigation in order for a party to achieve "prevailing party" status. *Id.* at 532 U.S. 605. Just what constitutes a "judicial imprimatur" has divided the Circuit Courts of Appeal. Whether various forms of relief not mentioned in *Buckhannon* suffice for a party to prevail is currently in dispute.

This case provides an opportunity for the Court to further explicate the meaning of the "judicial imprimatur" to bring greater consistency to state and federal courts in their application of 42 U.S.C. § 1988, and to resolve a conflict among the United States Circuit Courts of appeal.

This is a matter of compelling urgency where civil rights litigation constitutes a large portion of the dockets of the United States District Courts and United States Courts of Appeal.

**A. There is a split in authority among the circuits as to what is required to establish the "judicial imprimatur" required by *Buckhannon*. The decision of the Massachusetts Supreme Judicial Court is the result of that uncertainty. This case contains oral orders and written orders that provide the Court with an opportunity to clarify the "judicial imprimatur" and in so doing to create consistency in the law among the nation's trial and appellate courts in an important area of law.**

As the court below stated, "[T]here has been some disagreement among Circuit Courts of the United States Court of Appeals whether a judgment on the merits and a court-ordered consent decree are the only forms of relief that meet the 'judicial imprimatur' requirement. . . ." (Appendix, 20a)

In *Pres. Coalition v. Fed. Transit Admin.*, 356 F.3d 444, 451 (2d Cir. 2004), the Second Circuit agreed, saying, "After Buckhannon, courts have split on the kinds of judicial actions that confer prevailing party status." (*See Oil, Chem. & Atomic Workers Union v. DOE*, 351 U.S. App. D.C. 199 (D.C. Cir. 2002) (discussing varying approaches taken by U.S. District Courts as well as Circuit Courts of Appeal.)

The First Circuit has discussed the split of authority without reaching a clear consensus about the approach it will take. *Smith v. Fitchburg Pub. Sch.*, 401 F.3d 16, 23-24 (1st Cir. 2005) (discussing conflicting results among the circuits); *Doe v. Boston Pub. Schs*, 358 F.3d 20, 24 (1st Cir. 2004) (same.)

Some circuits have treated Buckhannon's reference to judgments and consent decrees as mere examples of the types of judicial action that establish prevailing party status. *Roberson v. Giuliani*, 346 F.3d 75, 81 (2d Cir. 2003).

By contrast, the Eighth Circuit has read Buckhannon narrowly on this point. *Christina A. v. Bloomberg*, 315 F.3d 990, 993 (8th Cir. 2003).

This case provides the Court with a compelling opportunity to clarify the definition of the "judicial imprimatur" and in so doing, create greater consistency among the nation's trial and appellate courts in an important area of law.

**B. The Petitioner submits that the Court should decide how *Buckhannon* should be applied to situations in which civil rights litigants are called upon to enforce existing orders or decrees issued pursuant to 42 U.S.C. § 1983.**

The court below gave short shrift to the Petitioner's argument that enforcement of the consent decree established in *Ricci v. Okin*, 823 F. Supp. 984 (D. Mass. 1993) provided him prevailing party status. In so doing, it misinterpreted a portion of Justice Scalia's concurring opinion in *Buckhannon*. (Appendix, 28a.)

The court below failed to grasp how favorably the law looks upon those seeking to enforce civil rights judgments and, in so doing, failed to properly state the controlling rule of law. (S.C. Rule 10.) The plaintiff submits that the Court should provide guidance on how lower courts should apply *Buckhannon* in an "enforcement" situation.

Citing *Burke v. Guiney*, 700 F.2d 767, 771 (1st Cir. 1983), one U.S. District Court recently held that a plaintiff was entitled to attorney's fees for efforts to collect damages for his Section 1983 victory. *Johnson v. Spencer Press of Maine, Inc.*, 2004 U.S. Dist. LEXIS 16560 (D. Me. 2004). The Johnson Court cited numerous cases to support the proposition that "securing compliance" is compensable activity. These included *Balark v. Curtin*, 655 F.2d 798, 802-03 (7th Cir. 1981) (reversing district court's denial of attorney fees for wage-garnishment efforts); *Brinn v. Tidewater Trans. Dist. Comm'n*, 113 F. Supp. 2d 935, 936-38 (E.D. Va. 2000), *aff'd*, 242 F.3d 227 (4th Cir. 2001) (awarding attorney fees incurred in defending against attempt to delay payment of previously awarded attorney fees via motion to amend judgment); *Seibel v. Paolino*, 249 B.R. 384, 386 (E.D. Pa. 2000) (awarding attorney fees incurred in efforts to collect Title VII judgment through bankruptcy dischargeability proceedings); *Dotson v. Chester*, 937 F.2d 920, 932-33 (4th Cir. 1991). Like the prevailing party plaintiffs in the collection cases above, Newell was simply trying to "collect" the benefits to which he was already entitled under *Ricci*.

In a similar vein, in *Miller v. Carson*, 628 F.2d 346 (5th Cir. 1980), class action plaintiffs prevailed in a suit to improve conditions at a county jail. Much later, the plaintiffs' attorneys were awarded fees for enforcing the injunction against the recalcitrant defendant.

A declaratory judgment may support an award of attorney's fees. *Cobell v. Norton*, 407 F. Supp. 2d 140 (D.D.C. 2005) ("[T]he Court's December 21, 1999 declaratory judgment was just that, a judgment or decree and an order from which an appeal lies.") (internal quotations omitted.)

The Eighth Circuit awarded attorney's fees to the plaintiff for his partial success in defending a consent decree in *Cody v. Hillard*, 304 F.3d 767, 775 (8th Cir. 2002). The court found no conflict between *Buckhannon* and the award of post-judgment attorney's fees. The Eighth Circuit, which has read *Buckhannon* narrowly (*See Christina A., supra*), found that the entry of a consent decree twelve years prior to the defendant's motion to dissolve the decree was "clearly a 'judicially sanctioned change' in the parties' relationship that conferred prevailing party status on the class under *Buckhannon*." *Id.* at 773 (citations omitted). In *Cody*, the consent decree enforced was twelve years old. Newell had to defend the consent decree from which he benefited just over two years after the *Ricci* decision was entered by the U.S. District Court.

The Eighth Circuit's *Cody* panel noted that a previously-established prevailing party status extends to postjudgment work only if it is "a necessary adjunct to the initial litigation." The test, it held, is whether the later litigation was "inextricably intertwined with those [issues] on which the plaintiff prevailed in the underlying suit." It held, however, that "work done to defend a remedy for a constitutional violation is inextricably intertwined with the litigation that yielded that remedy." *Id.* at 304 F.3d 775. (citations omitted.)

The Eight Circuit's post-*Buckhannon* analysis is similar to pre-*Buckhannon* analysis by the Fourth Circuit in *Plyler v. Evatt*, 902 F.2d 273, 280-81 (4th Cir. 1990). In *Plyler*, the Fourth Circuit held that once a party has achieved "prevailing party" status by obtaining a consent decree, the extension of that status to post-decree litigation depends on how the later action is related to the initial consent decree. *Id.* at 280. Under *Plyler*, a plaintiff who engages in post-decree litigation that

preserves the "fruits" of the consent decree will be entitled to "prevailing party" status. *Id.* at 281. Such was the case with Louis Newell, particularly where the *Ricci* opinion expressly provided class members the right to enforce the decree in state court. *Ricci*, at 823 F. Supp. 988.

Similarly, in *Barcia v. Sitkin*, 2005 U.S. Dist. LEXIS 13665 (S.D.N.Y. July 7, 2005), the defendants argued that there was no "enforceable alteration of the legal relationship between the parties," even though the plaintiffs successfully opposed a motion to end a consent decree. The district court rejected that argument and called the plaintiffs "prevailing parties" because they obtained an enforceable judgment requiring the defendants to conduct certain hearings in compliance with the consent judgment. The court held that "the judgment, and the ability to enforce it, has altered the legal relationship between the parties. . . ." As argued above, Newell gained the ability to enforce his rights (1) as the result of oral orders made during the course of the hearings on injunctive relief and (2) when the Superior Court entered its written order or December 1, 2000.

In *Thompson v. United States HUD*, 2002 U.S. Dist. LEXIS 23875, 16-19 (D. Md. 2002), the district court ordered post-judgment attorney's fees for monitoring and enforcement activities, calling them the "very sine qua non of the obligations to remedy past discriminatory activity."

On the subject of post-judgment enforcement of civil rights decisions, one court has held:

> There is no suggestion in Buckhannon that the Court intended to overturn its prior precedent on this issue. To the contrary, the distinction drawn

> by the Court in Buckhannon between private settlements and consent decrees, and, in particular, the reference to the "judicial approval and oversight" of the latter implicitly affirms the reasoning of the Court in *Pennsylvania v. Delaware Valley Citizens' Council For Clean Air*, 121 S. Ct. at 1840 n.7. Therefore, this Court concludes that the cases holding that a prevailing party may be awarded fees for reasonable monitoring of a court-approved consent decree — with or without subsequent judicial intervention — remain good law.

*Burt v. County of Contra Costa*, 2001 U.S. Dist. LEXIS 25929 (D. Cal. 2001).

These post-*Buckhannon* cases demonstrate the continuing validity of pre-*Buckhannon* cases such as *Plyler*, *Burke v. Guiney, and Balark v. Curtin* for the proposition that the successful defense of a consent decree can form the basis of an award of attorney's fees.

The trial court's December 1, 2000 order changed the legal relationship of the parties by holding that, "Louis Newell is entitled to life-time services from DMR in accordance with the requirements of the *Ricci* decision." (V7, pg. 1565.)

DMR had long insisted that Newell was not a *Ricci* class member and had failed to provide him with any *Ricci*-required services. The Supreme Judicial Court's decision even describes the extra legal rights that Ricci class members enjoy. (Appendix, pg. 26a n.33.) By finding that Newell is a *Ricci* class member, the Superior Court prevented DMR from denying his membership or reducing his benefits. If DMR

ever tried to reduce or end his benefits, Newell, unlike most DMR clients, would be able to use the findings of fact to prevent such action. He, unlike other DMR clients, would be able to bypass the DMR appeal process and proceed directly to the trial court.

The December 1, 2000 order also changed the legal relationship of the parties by ordering that specific language providing Newell with "approximately 25 hours a week of one-on-one assistance . . ." be included in Mr. Newell's ISP.

By taking this case and deciding these issues, the Court would clarify the relationship of the *Buckhannon* decision to post-trial enforcement efforts. The Petitioner submits that this is an issue worthy of the Court's consideration.

**C. Whether oral orders can constitute the required "judicial imprimatur" under *Buckhannon* is an important question for the state and federal trial and appellate courts of the United States. The decision below conflicts with U.S. Circuit law.**

The court below acknowledged a split among the federal circuits concerning what can constitute the necessary "judicial imprimatur." The court held, "Whatever the ultimate resolution of that question, no court has concluded that oral statements by a judge . . . not reduced to writing, are sufficient to satisfy the requirement of a 'judicial imprimatur.'" (Appendix, 20a.) This was a misstatement of the controlling federal law. (S.C. Rule 10.)

Fed. R. Civ. P. 52(a) states, *inter alia*, that, "it will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close

of the evidence or appear in an opinion or memorandum of decision filed by the court."

The court below may not have been aware of this rule. It may also not have been aware of *Universal Fidelity LP v. United States of America*, 70 Fed. Cl. 310 (Ct. Cl. 2006), in which an oral order was held to satisfy *Buckhannon*, citing *Rice Servs., Ltd. v. United States*, 405 F.3d 1017, 1025 (Fed. Cir. 2005).

In *Envtl. Prot. Info. Ctr. v. Pac. Lumber Co.*, 103 Fed. Appx. 627, 629 (9th Cir. 2004), the Ninth Circuit held that a district court's orders "rest[ing] on factual findings and legal conclusions delivered orally by the district judge" would support "prevailing party" status under *Buckhannon*. Although unpublished, that case reflects the need for the Court's guidance in this area of law.

The Ninth Circuit held that, "Until the case became moot, the orders furnished the precise relief for which Center brought suit." *Id.* The Environmental Protection panel cited the published Ninth Circuit decision in *Davis v. San Francisco*, 890 F.2d 1438, 1451 (9th Cir. 1989) which held that Fed. R. Civ. P. 52(a) "specifically permits the district court to make its findings orally." (*See Aoude v. Mobil Oil Corp.*, 862 F.2d 890, 895 (1st Cir. 1988) ("It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence. . . .", citing Fed. R. Civ. P. 52(a).) (*See In re De Lorean Motor Co.*, 755 F.2d 223 (6th Cir. 1985) (same); *Interpace Corp. v. Philadelphia*, 438 F.2d 401, 404 (3d Cir. 1971) (approving of articulation of reasons for decisions either "orally or in writing."); *Schwarz v. Folloder*, 767 F.2d 125, 133 (5th Cir. 1985) ("Findings of fact, be they written

or oral, need not be syntactically perfect."); *James Burrough, Ltd. v. Sign of Beefeater, Inc.*, 540 F.2d 266, 273 (7th Cir. 1976) (appellate court limited to oral findings and conclusions as they appear in the transcript); *Featherstone v Barash*, 345 F.2d 246 (10th. Cir 1965) (findings of fact may be dictated into record in open court and adopted as such); *Frazier v Coughlin*, 81 F.3d 313 (2d Cir. 1996) (oral opinion found sufficient to support judgment.))

The court below conceded that whether the "judicial imprimatur" exists is purely a question of federal law. (Appendix, 2a.) The court still erroneously found that oral orders could never provide the "judicial imprimatur." But even Massachusetts law appears to be to the contrary. *Commonwealth v. Murphy*, 362 Mass. 542, 544 (1972) (oral orders may be appealed); *Commonwealth v. D'Agostino*, 38 Mass. App. Ct. 206, 207 (1994) (same).

Since oral rulings and orders are uniformly allowed in federal courts under Rule 52(a), and since nothing bars a federal court from issuing oral orders or rulings in a Section 1983 case, oral orders must, per force, constitute the "judicial imprimatur" under federal law.

A fair reading of the transcript shows that DMR did nothing to voluntarily provide Newell with services. The trial court's numerous oral orders to create and modify Newell's ISP and to provide him with benefits was the sole reason why Newell did, ultimately receive benefits.

Those *oral* orders resulting in the ISP gave Newell further procedural rights to protect his services. If DMR reduced his services, he could appeal the alteration. If he disagreed with the results, he could file suit in the trial court. (115 CMR 6.31.)

Once the December 1, 2000 *written* order was issued, Newell's legal relationship with the DMR improved even further. If DMR were to reduce his services, he could bypass the internal procedures of the DMR and immediately file a contempt action, just as he had previously done. He would get to the trial court much faster. The burden of proof would have been more favorable. (*See* M.G.L.c. 30A, Section 14, establishing an "arbitrary and capricious" standard in DMR services review.)

Finally, because Newell could always go to Superior Court in a contempt action after the "25 hours" order of December 1, 2000 was entered, judicial oversight of the order was present. (*See T.D. v. La Grange Sch. Dist. No. 102*, 349 F.3d 469, 478 (7th Cir. 2003) ("attendant judicial oversight (in the form of continuing jurisdiction to enforce the agreement) may be . . . functionally a consent decree"); *Roberson v. Giuliani*, 346 F.3d 75, 83 (2d Cir. 2003) ("[T]he continuing jurisdiction involved in the court's inherent power to protect and effectuate its decrees entails judicial oversight of the agreement."))

It would appear that oral orders in this case changed the legal relationship between the parties and constituted the "judicial imprimatur." The Petitioner submits that the Court should use this opportunity to make the relationship of oral orders to the "judicial imprimatur" clear, especially in light of Fed. R. Civ. P. 52(a).

## CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for A Writ of Certiorari and reverse the judgment of the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

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