

1986

Vie Steele v. Robert H. Breinholt : Brief of Appellant

Utah Court of Appeals

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UTAH
BRIEF

IN THE SUPREME COURT OF UTAH

STATE OF UTAH

VIE STEELE,

Appellant,

vs.

ROBERT H. BREINHOLT dba
ASPEN CARE CENTER,

Respondent.

:

:

:

:

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Case No. 860347

860321-CA

BRIEF OF APPELLANT

Appeal from the Second Judicial District Court of
Weber County, John F. Wahlquist, District Judge.

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SEP 2

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Statutes

Section 76-6-206(4) iii, 7, 8

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Plaintiff Vietta Steel sued the defendant, Robert Breinholt, dba Aspen Care Center, for damages arising from her arrest for trespass at the Aspen Care Center on October 22, 1984 after the criminal charge was dismissed against her in November, 1984 because there was insufficient evidence for a prosecution. Her civil complaint alleged causes of acts for malicious prosecution; abuse of process; false imprisonment; and a tort of outrage as set out in the Restatement (2nd) of Torts, §46.

The trial court instructed the jury that if plaintiff had committed a criminal trespass she could not recover against the defendant under theories of malicious prosecution, abuse of process or false imprisonment regardless of defendant's motive in having her arrested. The trial judge refused, however, to instruct the jury that under Section 76-6-206(4) plaintiff was not guilty of trespass if:

(a) that the property was open to the public when the actor entered or remained and

(b) the actor's conduct did not substantially interfere with the owners use of the property.

The failure to so instruct was prejudicial error.

STATEMENT OF THE CASE

Statement of the Nature of the Case

Plaintiff Vietta Steele appeals to this court for an order granting her a new trial due to the trial courts failure to properly instruct the jury on the legal defense to the charge of criminal trespass.

Disposition of Case in Lower Court

Trial was held on May 27, through 30, 1986 before the Honorable John F. Wahlquist sitting with a jury. The jury found no cause of action by plaintiff against defendant and awarded no damages in the case. Plaintiff's Complaint was accordingly dismissed.

Statement of Facts

Plaintiff Vietta Steele was an old friend of a man named Zenon Domper. They met in 1968 when both worked at the Defense Depot, Ogden. A friendship developed and Mr. Domper was thereafter a frequent guest in the Steele household. (TR.5, R.612) Later when confined in a nursing home, the Steeles were frequent and regular visitors with Mr. Domper through June, 1984.

In June 1970, Mr. Domper suffered a stroke. At his request and through his personal attorney Pete Vlahos, Mrs. Steele was appointed his legal guardian. (TR.6, R.613) She served in that capacity for about five (5) years and her husband did so for another year. Thereafter Mr. Domper's

financial affairs were turned over to the First Security Bank where they remained until his death. (TR.9, R.616)

In late 1983, Mrs. Steele learned of money being given by Mr. Domper to employees of the Aspen Care Center in excess of normal nursing home expenses. She felt that gifts of \$300.00 to \$500.00 to nursing home employees were inappropriate due to the possibility of coercion or undue influence on Mr. Domper by Aspen Care Center employees. She made complaint to the Veteran's Administration and the State of Utah. (TR.11-14, R.618-621)

Aspen Care Center was notified of these complaints around the month of January or early February, 1984 (TR.314, R.921). In March, 1984 Mr. Domper allegedly wanted to see an attorney about terminating a Power of Attorney he believed Mrs. Steele possessed concerning his financial affairs. Attorney Burt Havas was contacted by the Care Center (TR.289, R.896). Mr. Havas had previously worked for the Care Center but did not know Mr. Domper (TR.277, R.884). There had been no effort made by Care Center employees to contact Mr. Domper's personal attorney of many years standing, attorney Pete Vlahos. As a result of Mr. Havas' meeting with Mr. Domper, a letter was sent by Mr. Havas to Mrs. Steele terminating the Power of Attorney which in fact never existed (TR.277, R.884).

On June 21, 1984, Mrs. Steele received another

letter from Attorney Havas demanding that she not see Mr. Domper or attempt to do so in the future or a restraining order would be obtained. Mr. Domper did not authorize or request that this letter be sent (TR.295, R.902). Rather, it was generated at the request of the Care Center. At the same time instructions were given Aspen Care Center that Mrs. Steele was not to visit Mr. Domper for more than 30 minutes at a time. These latter instructions again came from Mr. Havas.

Mrs. Steele stayed away from the Care Center until late 1984 although she remained in contact with Care Center employees, specifically Steven Anderson, receiving reports about Mr. Domper's health. (TR.275, R.882)

In late September, 1984 Mrs. Steele visited Mr. Domper in the company of Robert Lowe a Veteran's Administration specialist employed by the State of Utah, Department of Employment Security (TR.132, R.739). Mr. Domper appeared glad to see them and appreciative of their visit (TR.135, R.742). Around October 21, 1984 Mrs. Steele learned that Mr. Domper's health was deteriorating so she went to visit Mr. Domper in the company of her friend, Anna Holman who was also acquainted with Mr. Domper. She found Mr. Domper in poor physical health and dressed in a dirty soiled shirt. She and Mrs. Holman changed the shirt while visiting with Mr. Domper. Again Mr. Domper seemed apprecia-

tive of the visit (TR.151-52, R.758-759).

Alarmed at Mr. Domper's condition, early the next morning (a Monday) Mrs. Steele called the Veteran's Administration Hospital in Salt Lake City. She was referred again to Robert Lowe who she spoke to by telephone. She informed Mr. Lowe that she was very alarmed about Mr. Domper's condition (TR.138, R.745). Mr. Lowe contacted the Veteran's Administration in Salt Lake City and was instructed to tell Mrs. Steele to go see Mr. Domper and inquire whether he wanted to go to the hospital. If he did, Mrs. Steele could then bring Mr. Domper to the hospital immediately. (TR.139, R.746). Mr. Lowe relayed these instructions to Mrs. Steele. (TR.139-40, R.746-747).

After receiving these instruction from Mr. Lowe, Mrs. Steele and her husband went to the Aspen Care Center. Mrs. Steele had a pocket tape recorder in her purse. She turned it on as she got out of her car to enter the Care Center. The tape recording (R.218) is an important piece of evidence because it contains no evidence of any disturbance or unreasonable conduct on the part of Mrs. Steele from which it can be concluded that she in any way substantially interfered with the defendant's operation of its Care Center.

When Mrs. Steele and her husband entered the Care Center, Mr. Domper was in a wheelchair in the lobby (TR.159,

R.766-767). Mr. Steele asked Mr. Domper if he wanted to go to the Veteran's Administration Hospital and he nodded yes (TR.160, R.767).

While Mr. Steele was speaking to Mr. Domper, a woman arrived and asked Mrs. Steele if she was Vietta Steele. Receiving an affirmative answer the woman (Jolene Hill) told Mrs. Steele that she could not be in the facility because there was a restraining order in existence prohibiting her presence in the Care Center. Mrs. Steele requested that she be shown the order. None could be produced because none existed.

A second employee, Debra Hill, was called to the front office area. She wheeled Mr. Domper out of the lobby. When Debra Hill learned that Mrs. Steele was present she called Salt Lake City. She spoke to a Pamela Bues who was the bookkeeper for the Aspen Care Center. Pamela Bues instructed Debra Hill to have Mrs. Steele arrested for trespass. It was the intent of Pamela Bues that the arrest be used to get Mrs. Steele out of the facility. (TR.239, R.846). There was no intent at any time that Mrs. Steele be prosecuted for criminal trespass, rather that the arrest process simply be used as a vehicle to remove her from the facility on that particular day.

The Ogden City Police were called with Officer Ann Grotegut responding. It was the testimony of the two Care

Center employees and Officer Grotegut that Mrs. Steele was asked to leave the premises voluntarily or she would be arrested. It was the testimony of Mrs. Steele and her husband that she was never asked to voluntarily leave the facility before she was placed under arrest.

Mrs. Steele was then placed under arrest by Officer Grotegut, transported to the Weber County Jail and there booked into that facility. She was searched, her mug shot and fingerprints obtained. She remained in jail for approximately an hour and a half before she was released on her own recognizance. She was directed to appear in Circuit Court in November, 1984. She hired attorney Don Sharp to defend her on the criminal charge. On the day set for trial the criminal trespass charge was dismissed because there was insufficient evidence to proceed. Actually the Car Center had been contacted and declined prosecution.

Four days following Mrs. Steele's arrest at the Aspen Care Center on October 22, 1984 Mr. Domper's whose deteriorating health Mrs. Steele had been gravely concerned about, died at the Aspen Care Center.

Following the testimony at trial and over plaintiff's objections, Judge Wahlquist instructed the jury that Mrs. Steele could not recover in the case under theories of malicious prosecution, abusive process or false imprisonment if she was at the time of her arrest guilty of criminal

trespass regardless of the defendant's intent or motive in having her arrested or using the criminal process only to obtain her removal from the Care Center Facility on October 22, 1984. The trial court refused to instruct the jury that it is a defense to the charge of criminal trespass that the facility was open to the public when Mrs. Steele entered or remained in the building and her conduct did not substantially interfere with the defendant's use and operation of the Care Center.

The pertinent instruction given by the court is set out in the explanation on pages 194 and 195 of the record. It states:

The plaintiff here alleges that the agents of the defendant lack both proper motive, that is, acting with malice, and acted also without probable cause, that is a reasonable basis for the belief that she had committed criminal trespass. The defendant denies these allegations. The defendant further alleges that the plaintiff is in fact guilty of the charge. The law provides that persons should be encouraged to bring criminal offenders to justice, and does not intend to reward guilty people with civil judgment, and, therefore, guilty persons should not recover for any of the first three civil wrongs here alleged, such as malicious prosecution, abusive process, false arrest or imprisonment. If she is in fact guilty of criminal trespass, she cannot recover under any of the first three theories or questions here presented, and the answer to each question should be "no". For this defense to come into play, the defendant must prove by at least a preponderance of the evidence the elements of that offense. The elements are as follows: (1) That the plaintiff entered or remained on the defendant's premises; and (2) did so after she was reasonably informed that she was requested not to enter, or remain.

Plaintiff's objections to that portion of the jury instructions are set out in the record at pages 928-939, (TR.321-332).

Summary of Argument

The trial court improperly refused to instruct the jury that it is a defense to the criminal charge of trespass that the property in question was open to the public when plaintiff entered or remained in the Care Center and plaintiff's conduct did not substantially interfere with the defendant's use of the property pursuant to Section 76-6-206(4), UCA. This is a factual issue under the criminal trespass section of the Code and should have been submitted to the Jury.

ARGUMENT

There are no cases in Utah which discuss the perimeters of the meaning or application of the language contained in Section 76-6-206(4). A logical interpretation of that statutory language, however, is that the legislature recognized that circumstances may occur in which a person has a legitimate reason for remaining on property or refusing to leave when demanded to so do, and that the criminal trespass statute cannot be used as a pretext in those circumstances to obtain the otherwise improper removal of another from the premises.

The primary reason advanced by the trial court for

failing to instruct the jury concerning the statutory defense to criminal trespass set out in the statute was the trial judge's opinion that the statute must only refer to a public building, for example a court house, municipal, county or state office building rather than a privately owned facility otherwise open to the public (TR.328, R.935).

There was no question in this case that the Care Center was open to the public when plaintiff entered. The deposition of the defendant is pertinent:

Q: The nursing home facilities, or specifically Aspen Care, do they maintain visiting hours or open visiting with people?

A: It's open visitation. People can come visit the patients there most any time that's a reasonable hour.

Q: Is the facility generally then open to the public for visitation purposes like that?

A: Well, in the sense that visitors are welcome at any hour it is. It's not generally open to the public who have no purpose for being there. (Brienholt Depo. P.29, R.594)

Q: Now, the Aspen Care Center, do you consider it as open to the public?

A: Well, it's private property. And it's open to people who have a purpose for being there for. . . . and it's also open to patient visitors whom the patient would want. (TR.306, R.913)

Clearly a nursing home is a quasi-public facility in the sense that anyone who has a legitimate purpose in

visiting or confining with a patient may enter at any hour. Mrs. Steele's sole purpose in going to the Care Center on October 22, 1984 was her legitimate concern about Mr. Domper's deteriorating health. Absent a restraining order preventing her from entering the facility, she was legally entitled to do so. Assuming she was asked to leave the premises before she was placed under arrest, which is disputed, was her refusal justified by her concern for Mr. Domper's health? She was a friend of many years standing, familiar with Mrs. Domper's physical condition and appearance; had received word that Mr. Domper's health was deteriorating; had verified that information through her own observation on the previous day; and had been so concerned that she felt it necessary to try and obtain immediate hospital care; and in fact he died four days later. Those facts would certainly seem to lend the air of legitimacy to her presence at the Care Center on October 22, 1984.

From a social standpoint, the elderly who are physically or mentally infirm are routinely placed in nursing care facilities like Aspen Care Center. The elderly themselves may be too ill or too dependant or too scarred to themselves monitor the care or conduct of a nursing home facility to be assured that they are receiving proper care or treatment. Therefore, the obligation of scrutinizing that care and conduct must fall on friends and relatives of

the patient. In that circumstance if there is a legitimate belief that the medical treatment a patient is receiving is inadequate and the need for additional care immediate that concern should not be capable of defeat via the criminal trespass statute simply because a person is asked to leave a facility and if she or he refuses can be placed under arrest and removed. At that point a more searching inquiry into the facts, as via a hearing on request for a temporary restraining order would certainly seem preferable and more appropriate than resort to a pretext arrest under the trespass statute.

There is extremely little law on this subject. Utah has no statute guaranteeing access to a patient in a nursing care facility. There have been some limited cases dealing with this subject matter. These are set out in Nursing Home Law contained in Chapter 5, Access to Facilities, attached hereto as Appendix 1 and referred to in the case of Rabbi Samuel Teitelbaum and Larry and Louise Diehl, plaintiffs, v. Theordore Sorenson, dba Waitwell Nursing Home, Civil No. 79-199 in the United States District Court in and for the District of Arizona, the Findings of Fact and Conclusions of Law and Order granting preliminary injunction, a copy of which is attached hereto as Appendix 2.

The remaining question involved is whether or not

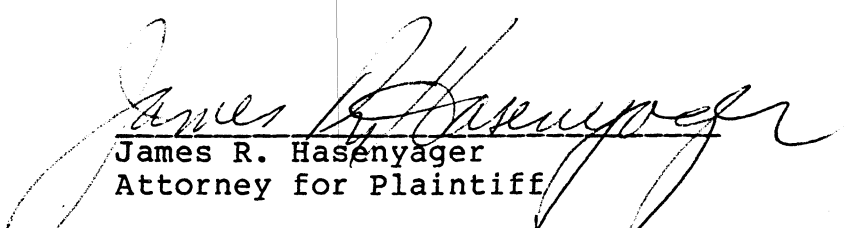
Mrs. Steele's presence at the nursing care facility substantially interfered with the defendant's use and operation of that facility during her presence in the Aspen Care lobby. This would appear to be a purely factual question for determination by the jury and if it concluded that the purpose of her visit was legitimate and she was not behaving in an unreasonable manner would have permitted the jury to find that despite a request to leave the premises, if in fact such a request was made, a refusal to do so was proper under the circumstances, thereby permitting her to recover under her theories of malicious prosecution, abuse of process or false arrest and imprisonment. Having received only an instruction that a criminal trespass occurred if Mrs. Steele was asked to leave and declined to do so, or simply remained on the premises the jury was erroneously instructed and the error was completely prejudicial to plaintiff's first three causes of action.

CONCLUSION

The trial court erroneously failed to instruct the jury on the statutory defense to criminal trespass and this error was prejudicial requiring an Order be entered granting plaintiff a new trial.

DATED this 24 day of September, 1986.

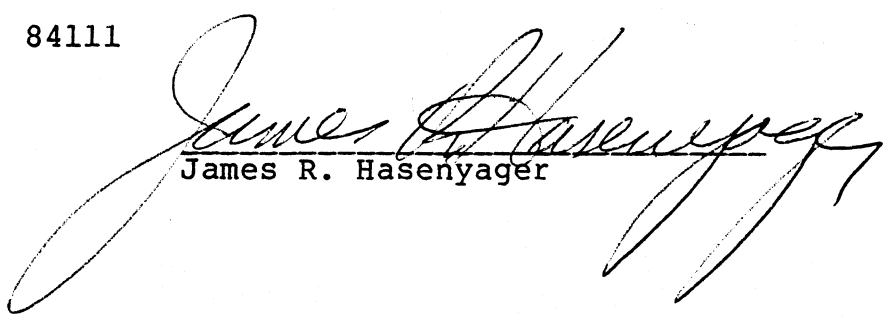
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Attorney for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that on this 29th day of
September, 1986, I mailed 4 true and correct copy of the
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CHAPTER 5 NURSING HOMES ACCESS TO FACILITIES

5.1 THE PROBLEM OF ACCESS

Access to nursing homes by members of the public is an issue of renewed concern to residents' advocates. Effective advocacy is usually not possible unless advocates are physically able to enter nursing homes to visit and meet with residents.

In the early 1970s, several cases were brought by community groups seeking entry into nursing homes.¹ Prompt settlement of the early litigation, giving plaintiffs the access they sought, led to little serious development of case law in this area.

Recently, attention has again been focused on the problem of access, as nursing homes have begun to close their doors to advocates. An advocate in Minneapolis, Minnesota, for example, was convicted of criminal trespass for visiting a disabled friend after being advised that her "privilege" to visit had been revoked by the facility.² Other advocates have also been physically barred at the door and told not to enter. Still others face a new series of restrictions on the access they are "given." For example:

- Residents may be visited only if a staff person is present;
- Only certain issues may be discussed;
- No photographs may be taken; and
- No reports may be issued unless they are first cleared with the facility's administration.

Access to facilities by residents' invited guests is not usually a problem. A resident may generally see and visit with persons of his/her own choice. Exceptions may arise if the resident is under guardianship or conservatorship or in instances in which local law permits a particular visitor to be barred as "medically contraindicated."

More difficult access issues arise:

- When the resident, because of mental and/or physical infirmities, is unable to communicate his/her wishes to see particular visitors in a manner readily understood by others; and
- When the resident is initially unaware of the existence of an outside advocate and contact between them is initiated by the advocate.

To secure full and free access to facilities in these situations, administrative advocacy and litigation should be used. In addition, legislation at both the federal and state levels is appropriate and necessary.

5.2 ESTABLISHING RIGHTS OF ACCESS

5.2.1 ADMINISTRATIVE ADVOCACY

An administrative complaint³ was filed with the Office for Civil Rights (OCR), Department of Health and Human Services (HHS), seeking enforcement of the federal skilled nursing facility regulations,⁴ of the regulations enforcing section 504 of the Rehabilitation Act of 1973,⁵ and of the California Long-Term Care Health, Safety and Security Act of 1973.⁶ The administrative complaint alleged three major categories of violations:

- Failure to provide adequate resident care;
- Retaliation against and intimidation of residents and an advocacy group (United Neighbors in Action) that complained about residents' care; and
- Illegal restrictions on access and on the rights of speech and association of residents and the advocacy group.

Among other remedies, complainants ask HHS, the Health Care Financing Administration (HCFA), and OCR to issue

written guidelines for skilled nursing facilities that clearly set forth patients' rights to voice and seek resolution of complaints of patient care violations and to associate with advocacy organizations, and the right of advocacy organizations to work toward improving patient care and to have access to facilities in order to do so.⁷

OCR's July 20, 1981, report of its investigation states that Section 504's prohibition against intimidatory or retaliatory acts applies only to rights or privileges secured by the Rehabilitation Act and not, more generally, to questions about quality of care. Nevertheless, it requires the facility to amend its grievance procedure to guarantee access to advocates:

1 Citizens for Better Care v. Alden Care Enterprises, Inc., No. 72-214876, 6 CLEARINGHOUSE REV. 687 (Mar. 1973) (Clearinghouse No. 9,505) (Cir. Ct. Mich., filed Aug. 11, 1972); Health Law Project v. Sarah Allen Nursing Home, No. 71-17195, (Clearinghouse No. 6,177) (E.D. Pa., filed July 20, 1971) (stipulation entered Aug. 13, 1971).

2 State v. Hoyt, No. 1021885 (Mun. Ct. Minn., First Div., July 5, 1979), *aff'd*, No. 73573 (Dist. Ct. Minn., Fourth Jud. Dist., Dec. 11, 1979), *rev'd on appeal*, No. 50889 (Minn., Apr. 14, 1981). The reversal of Hoyt's conviction occurred nearly two years after the conviction. Hoyt was barred from the facility for the entire intervening period.

3 United Neighbors in Action v. Sequoia Manor Convalescent Hospital, Inc., OCR Docket No. 09-80-3074 (Dec. 27, 1979), 14 CLEARINGHOUSE REV. 374 (July 1980) (Clearinghouse No. 29,300).

4 42 C.F.R. §§ 405.1101-1137 (1980).

5 29 U.S.C. § 794 (1976), 45 C.F.R. Part 84 (1980). See § 6.2.1.1 *infra*.

6 22 CAL. ADM. CODE §§ 70001-74525 (1972) (§§ 1417-39 of the CALIFORNIA HEALTH & SAFETY CODE) (1979).

7 United Neighbors in Action v. Sequoia Manor Convalescent Hospital, Inc., OCR Docket No. 09-80-3074 (Dec. 27, 1979), 14 CLEARINGHOUSE REV. 374 (July 1980) (Clearinghouse No. 29,300). Administrative Complaint, Relief V-C-9, at 40.

the grievance policy and procedure must include the right of [Sequoia Manor Convalescent Hospital] SMCH residents to have access to persons such as friends, relatives, lawyers, or representatives of advocacy groups, who may assist them in making complaints under Section 504. Access to assistance must be under circumstances which provide for confidentiality and reasonable visiting times. Potential complainants desiring to utilize the grievance procedure may need such assistance in order to be notified of their rights or communicate their concerns because of their handicapping condition (e.g., aural or visual impairments, speech impediments). In these circumstances, the denial of such assistance would constitute a denial of due process.⁸

5.2.2 LITIGATION BY ADVOCACY GROUPS

The first amendment rights of members of a community advocacy group to visit nursing home residents on their own initiative, without an invitation from the residents, are affirmed in *Teitelbaum v. Sorenson*.⁹ Volunteers with a nursing home resident outreach project sponsored by the Arizona Center for Law in the Public Interest attempted to visit a local nursing home to distribute a brochure on residents' rights and to discuss with residents a state law entitling them to a state renter's tax credit or refund. They were granted admission only for the purpose of discussing residents' rights. When the nursing home's administrator prohibited a return visit to discuss the tax law, several volunteers with the project filed suit against the facility.

Asserting that communication between plaintiffs and residents is indisputably protected under the first amendment, plaintiffs phrased the single issue before the court as whether the conduct of the privately owned nursing home was under color of law.¹⁰

In its Findings of Fact, Conclusions of Law and Preliminary Injunction, entered July 3, 1979, the court found that the residents of the facility are elderly and infirm and that "their lives are characterized by dependency upon the nursing home staff and administration."¹¹ The fact of institutionalization, the court concluded, discourages residents from voicing concerns and grievances, thus making independent advocacy essential.

Citing the state action doctrines of company town¹² and nexus theory,¹³ the court held that state action was present in the nominally private facility.

While the court specifically found that plaintiffs' visit to the facility was not at the request of any resident, it held that plaintiffs nevertheless enjoyed a constitutionally protected right of access to the facility, that plaintiffs' communication with Waitwell residents is constitutionally protected, and that the facility may only place "reasonable time, place and manner restrictions" on advocates' visits.¹⁴

On August 6, 1979 in a judgment, the court permanently enjoined the facility from "directly or indirectly, interfering, obstructing or hampering in any manner visits, meetings, discussions or other communication" between Waitwell residents and volunteers with the nursing home resident outreach program.¹⁵

In another case, a legal services program, one of its paralegals, and the husband of a nursing home resident sued a facility for denying them access.¹⁶ The suit alleged violation of the first and fourteenth amendments and the federal nursing home Residents' Bill of Rights.¹⁷

Plaintiffs' complaint alleged that while visiting a client, the paralegal was approached by another resident regarding a problem at the nursing home. A member of the facility staff interrupted the conversation, telling the paralegal that he could not speak with the resident because she was on "behavior modification" for being "a chronic complainer which results in disruption to the staff and other residents."¹⁸ The paralegal was unable to speak with the resident. On subsequent days, during posted visiting hours, the building was locked and the paralegal could not enter at all. Another plaintiff complained about the reduction in

12 See § 4.2.1.2.3 *supra*. The court ruled that Waitwell "provides all necessary services to residents and they are physically and psychologically isolated from other community activities." Conclusions of Law at ¶ 4. Citing *Marsh v. Alabama*, 326 U.S. 501 (1946), and two migrant labor cases, *Mid-Hudson Legal Services, Inc. v. G & U Inc.*, 437 F. Supp. 60 (S.D.N.Y. 1977), and *Folgueras v. Hassle*, 331 F. Supp. 615 (W.D. Mich. 1971), the court held that Waitwell is the "functional equivalent" of a town. *Id.*

13 See § 4.2.1.2.2 *supra*. The court found that there was "sufficient interdependence between public and private conduct" to make Waitwell's actions under color of law. Conclusions of Law at § 4. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Persuasive indicia of this interdependence are the facts that Waitwell receives a majority (80%) of its income from the county for the care of indigent persons, that Waitwell is "extensively regulated", and that "the duty to provide care for indigent persons is a public function under Arizona law." Conclusions of Law at ¶ 4.

14 *Teitelbaum v. Sorenson*, Civ. A. No. 79-199 PHX WEC (D. Ariz., filed Mar. 16, 1979), Preliminary Injunction Order ¶ 2.

15 *Id.*, Judgment (Aug. 6, 1979). Plaintiffs are entitled to attorneys' fees. *Teitelbaum v. Sorenson*, 648 F.2d 1248 (9th Cir. 1981).

16 *Legal Services Corp. of Iowa v. Bladister, Inc.*, Civ. A. No. 80-263-C, 14 CLEARINGHOUSE REV. 770 (Nov. 1980) (Clearinghouse No. 29,916) (S.D. Iowa, filed June 24, 1980).

17 42 C.F.R. § 442.311 (1980).

18 *Legal Services Corp. of Iowa v. Bladister, Inc.*, Civ. A. No. 80-263-C, 14 CLEARINGHOUSE REV. 770 (Nov. 1980) (Clearinghouse No. 29,916) (S.D. Iowa, filed June 24, 1980). Amended and Substituted Complaint ¶ 39 (Nov. 18, 1980) (quoting the staff member).

8 Letter from Floyd L. Pierce, Director, OCR, Region IX to Steven Ronfeldt, Legal Aid Society of Alameda County (July 20, 1981) (copy in National Senior Citizens Law Center (NSCLC) files).

9 Civ. A. No. 79-199 PHX WEC (D. Ariz., filed Mar. 16, 1979) (permanent injunction issued Aug. 6, 1979). Plaintiffs were represented by Bruce Meyerson, Arizona Center for Law in the Public Interest, P. O. Box 2783, Phoenix, Arizona 85002. July 3, 1979 Order is reproduced in App. 2. Copies of pleadings are in NSCLC files.

10 See § 4.2.2.1 *supra* (discussion of "under color law").

11 *Teitelbaum v. Sorenson*, Civ. A. No. 79-199 PHX WEC (D. Ariz., filed Mar. 16, 1979). Findings of Fact, Conclusions of Law and Preliminary Injunction ¶ 5 (July 3, 1979) (Appendix 2).

visiting hours from 12 hours (8 a.m. to 8 p.m.) to 7 hours (12 noon to 7 p.m.), which limited the time he could spend with his wife, who was a resident.

On November 18, 1980, the district court granted defendant's motion to dismiss, finding that there was no state action under the theory of joint venturer,¹⁹ nexus,²⁰ affirmative approval,²¹ delegation of statutory public function,²² or delegation of traditional state function.²³ Plaintiffs then filed a motion to amend the judgment and to amend the complaint, which the court granted on January 22, 1981.²⁴ The court found two sets of factual allegations in the amended complaint sufficient to indicate state action in the pleadings state of the civil rights litigation.

First, plaintiffs alleged that under the state's civil penalty system, violations of regulations relating to freedom of association between residents and visitors constituted class III violations, but that the state imposed no fine for class III violations.²⁵

The court said that this state law might serve to make the state a joint venturer with the facility. The court described plaintiffs' affirmative allegation

that the state has lent its approval to the challenged restriction of visiting hours through its failure to implement an enforcement mechanism designed to deter violations of statutory and regulatory provisions which mandate the protection of rights of access of nursing home residents. In this manner, plaintiffs have pointed to specific state laws which could be deemed to have sanctioned the offending conduct for purposes of imputing such conduct to the state under the joint venturer doctrine.²⁶

Second, plaintiffs alleged that the state approved the facility's reduced visiting hours through the annual inspection and certification procedures.²⁷ Plaintiffs further alleged, on information and belief, that restricted visiting hours were more economical for both the facility and the state.²⁸ The court analyzed these allegations as the "encourage-

ment theory" of state action: "[T]he state's acquiescence in defendants' imposition of limitations upon visiting hours through annual inspection and certification procedures conducted by state agencies encouraged or fostered an atmosphere wherein the private actors were relatively free to promulgate restrictive policies and practices which functioned to deprive residents of their First Amendment rights."²⁹

The Second Circuit Court of Appeals, however, recently affirmed the dismissal for failure to state a claim of a suit by the Cape Cod Nursing Home Council and Legal Services for Cape Cod and Islands, Inc., seeking access to a nursing home.³⁰ The court expressly found the company town theory of state action did not apply³¹ and suggested that recognizing constitutionally guaranteed rights of access to "outsiders . . . could threaten patient care and pose significant risks to the elderly residents,"³² citing a case discussing union solicitation in hospitals.³³

5.2.3 LITIGATION BY STATE ATTORNEYS GENERAL

The Massachusetts Attorney General successfully sued a nursing home that had suspended all visiting hours "until further notice" because of the facility's desire to prevent the "flu on the outside" from "coming into our home."³⁴ The Attorney General filed suit after receiving a call from a paralegal with Cambridge and Somerville Legal Services who had attempted to visit two clients at the facility and was threatened with arrest because of the facility's ban on all visitors.

The state's case was based on two provisions of the Attorney General's Rules and Regulations Relating to Nursing Homes,³⁵ promulgated by the Attorney General under the state consumer protection law.³⁶

Section 4.1 of these regulations makes it an unfair or deceptive trade practice for a nursing home

to fail or refuse to permit a resident to associate or communicate privately, either inside or outside the nursing home, with persons of his/her choice at reasonable hours or to permit a resident to receive or refuse visitors, unless medically contraindicated as documented by his/her physician in his/her medical record.³⁷

19 *Id.*, Memorandum Opinion (granting defendants' Motion to Dismiss) ¶¶ 3-4 (Nov. 18, 1980). See § 4.2.1.2.2 *supra*.

20 *Id.*, Memorandum Opinion ¶¶ 4-5. See § 4.2.1.2.2 *supra*.

21 *Id.*, Memorandum Opinion ¶ 5.

22 *Id.*, Memorandum Opinion ¶¶ 57. The court distinguished *Teitelbaum v. Sorenson* because it found that Iowa, unlike Arizona, does not by statute designate the provision of medical services to the elderly as a state function. See § 4.2.1.4 *supra*.

23 Legal Services Corp. of Iowa v. Bladister, Inc., Civ. A. No. 80-263-C, 14 CLEARINGHOUSE REV. 770 (Nov. 1980) (Clearinghouse No. 29,916) (S.D. Iowa, filed June 24, 1980), Memorandum Opinion, ¶¶ 78 (Nov. 18, 1980). The court explicitly rejected the *Teitelbaum* holding that a private nursing home is the functional equivalent of a company town. See § 4.2.1.2.3 *supra*.

24 Legal Services Corp. of Iowa v. Bladister, Inc., Civ. A. No. 80-263-C, 14 CLEARINGHOUSE REV. 770 (Nov. 1980) (Clearinghouse No. 29,916) (S.D. Iowa, filed June 24, 1980), Memorandum Opinion (Jan. 22, 1981).

25 *Id.*, Memorandum Opinion 1-2. *Id.*, Amended and Substituted Complaint ¶¶ 31-33.

26 *Id.*, Memorandum Opinion 1-2 (Jan. 22, 1981), citing *Howe v. United Parcel Service, Inc.*, 379 F. Supp. 667, 670 (S.D. Iowa 1974), which cited *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 726 (1961).

27 *Id.*, Amended and Substituted Complaint ¶ 51.

28 *Id.*, Amended and Substituted Complaint ¶ 52.

29 *Id.*, Memorandum Opinion 2 (Jan. 22, 1981), citing *Adickes v. Kress*, 398 U.S. 144 (1970), and *Reitman v. Mulkey*, 387 U.S. 369 (1967). *Id.*, Amended and Substituted Complaint ¶¶ 51-54.

30 *Cape Cod Nursing Home Council v. Rambling Rose Rest Home*, No. 81-1379 (2d Cir., Dec. 30, 1981) (2d Cir. 1981).

31 *Id.*, Slip Op. at 3. See § 4.2.1.2.3 *supra*.

32 *Id.* at 6-7.

33 *Eastern Maine Medical Center v. NLRB*, 658 F.2d 1 (1st Cir. 1981).

34 *Commonwealth of Massachusetts v. QT Services, Inc.*, No. 78-564 (Mass. Sup. Ct., Middlesex County, filed Jan. 31, 1978) (order issued Feb. 22, 1978). Letter from Administrator to All Patients and Their Families (Jan. 11, 1978), Exhibit A to Complaint.

35 20 CODE OF MASS. REGS. pt. 5 at 55 (1976).

36 MASS. GEN. LAWS ANN. ch. 93A, § 2(c).

37 Attorney General's Rules and Regulations Relating to Nursing Homes, 20 CODE OF MASS. REGS. pt. 5 at 55, § 4.1 (1976).

tion 4.10 states that is an unfair or deceptive trade practice for a nursing home "to fail or refuse to provide access to the nursing home to individuals or representatives of community groups or of other groups who seek to provide legal services to residents without charge to the resident at reasonable hours."³⁸

In an interlocutory order, the court lifted the ban on visitors and reinstated the previous visiting hours.³⁹ The preliminary injunction expanded visiting hours for family and friends.⁴⁰

5.2.4 FEDERAL LAWS AND REGULATIONS

Access is a significant issue at the federal level in both the nursing home ombudsman program and the Conditions of Participation for Medicare and Medicaid facilities.

5.2.4.1 Nursing Home Ombudsman Program

The Comprehensive Older Americans Act Amendments of 1978⁴¹ considerably strengthened the nursing home ombudsman program by requiring every state to have such a program, by giving the program explicit statutory authority the program had been operated as a model project by the Commissioner on Aging since 1975), and by specifically defining ombudsman functions and responsibilities.⁴² Under the 1978 Amendments, the states must "establish procedures for appropriate access" by the ombudsman to long-term care facilities and to residents' records.⁴³ This statutory directive provides the impetus for many states to enact laws and regulations addressing the access issue. Advocates need to make sure that state laws establishing ombudsman programs do not inappropriately or inadvertently block access of advocates and community groups to nursing homes.

5.2.4.2 Conditions of Participation for Long-Term Care Facilities Participating in Medicare and/or Medicaid

Federal regulations governing access appear in the residents' rights section of the Condition of Participation for skilled nursing facilities⁴⁴ and in the standards for intermediate care facilities.⁴⁵ They guarantee residents' rights to associate and communicate privately with individuals, to send and receive mail unopened, and to participate in social, religious, and community group ac-

tivities. Since these regulations govern only the rights of residents, they are of limited value in dealing with the most common access problems, which involve the rights of nonresidents to enter nursing homes. Proposed new regulations in 1980 would have expanded current access requirements by requiring facilities to designate a minimum of 10 visiting hours per day, by granting ombudsmen and two persons of the residents' choice unlimited access, and by ensuring that all visitors be allowed access to residents during posted visiting hours.⁴⁶ These regulations were withdrawn in 1981 by the new administration.⁴⁷

5.2.5 STATE LAWS

A ideal state access law would include provisions:

- Explicitly establishing a right of access for legal services programs, community groups, and other advocates (group or individual) that want to visit, talk with, and make personal, social, or legal services available to residents without charge;
- Authorizing such advocates to initiate communications or visits;
- Establishing explicit enforcement mechanisms.

The District of Columbia's access provision is considered by many advocates to be model legislation. Section 3 of the Health Care Facilities Regulation states:

- (a) The health care facility shall permit members of community organizations and representatives of community legal services programs, whose purposes include rendering assistance without charge to nursing home patients, to have full and free access to the health care facility in order to:
 - (1) Visit, talk with, and make personal, social and legal services available to all patients.
 - (2) Inform patients of their rights and entitlements, and their corresponding obligations, under Federal and District laws by means of distribution of educational materials and discussion in groups and with individuals.
 - (3) Assist patients in asserting their legal rights regarding claims for public assistance, medical assistance, and social security benefits, as well as in all other matters in which patients are aggrieved. Assistance may be provided individually, as well as on a group basis, and may include organizational activity, as well as counseling and litigation.
 - (4) Inspect all areas of the health care facility except the living areas of a patient who protests such inspection. Such authority shall not include the right to examine the business records of the facility without the consent of the Administrator, nor the clinical record of a patient without his consent.
 - (5) Engage in all other methods of assisting, advising, and representing patients so as to extend to them the full enjoyment of their rights.⁴⁸

³⁸ *Id.* § 4.10.

³⁹ *Commonwealth of Massachusetts v. QT Services, Inc.*, No. 78-564 (Mass. Sup. Ct., Middlesex Co., filed Jan. 31, 1978), Interlocutory Order 1-2 (Feb. 22, 1978). The previous visiting hours were 2 p.m. to 4 p.m. and 6 p.m. to 9 p.m. *Id.* at 1.

⁴⁰ *Id.*, Preliminary Injunction.

⁴¹ Pub. L. No. 95-478, 92 Stat. 1535 (1978).

⁴² 42 U.S.C. §§ 3001-3057g (Supp. III 1979). Final regulations implementing the 1978 amendments appear at 45 Fed. Reg. 21,151 (Mar. 31, 1980). A program instruction on the ombudsman program was issued on Jan. 19, 1981.

⁴³ 42 U.S.C. § 3027(a)(12) (Supp. III 1979).

⁴⁴ 42 C.F.R. §§ 405.1121(k)(11), (12) (1980).

⁴⁵ *Id.* § 442.311(i).

⁴⁶ 45 Fed. Reg. 47,368 (July 14, 1980).

⁴⁷ 46 Fed. Reg. 7,408 (Jan. 23, 1981).

⁴⁸ No. 74-15, tit. III, § 3 (June 14, 1974).

The D.C. regulation includes the following enforcement provisions.

- (a) Any person or representative thereof, who is damages due to violation of this regulation shall:
1. have a civil cause of action against any person violating this regulation, and
 2. be entitled to recover from any such person:
 - (i) actual damages
 - (ii) punitive damages
 - (iii) a reasonable attorney's fee and litigation costs reasonably incurred ⁴⁹

A number of states have enacted nursing home access legislation or regulations ⁵⁰. A new legislative approach to the access issue that is potentially damaging to the rights of residents' advocates requires community advocacy groups to register with a state agency or to receive formal state approval in some other way before they may visit nursing home residents. Such laws have been enacted in Michigan⁵¹ and Ohio⁵². Three problems may result from registration laws:

- Groups that have challenged the state may not gain approval;
- Registration laws may not provide for registration of independent advocates who are not formally affiliated with advocacy groups; and
- Such laws may constitute a prior restraint on the speech of potential visitors, in violation of the first amendment ⁵³

⁴⁹ *Id.*, tit III, § 1(d)

⁵⁰ FLA. STAT. ANN. § 400.022(1)(b) (West Supp. 1981); MO. HEALTH CODE ANN. art. 43, § 565(C)(a)(11) (1980); MICH. COMP. LAWS ANN. § 333.21763, 21764 (1980); N.J. STAT. ANN. §§ 30-13-3, -4 (1981); OHIO REV. CODE ANN. § 3721.14 (Page 1980); OKLA. STAT. ANN. tit. 63, § 1-1919 (West Supp. 1981); WIS. STAT. ANN. § 50.09 (West Supp. 1981-82); Mass. Nursing Home Regs. of Att'y Gen., 20 Code of Mass. Regs. pt. 53 at 55 § 4.1, 10 (1976); Pa. Long-Term Care Regs. § 201.35(c)(e)

⁵¹ MICH. COMP. LAWS ANN. §§ 333.21763, 21764 (1980).

⁵² OHIO REV. CODE ANN. § 3721.14 (Page 1980).

⁵³ See § 5.2.2 *supra*.

ADMISSION: DISCRIMINATION AGAINST MEDICAID RECIPIENTS AND OTHER POOR PEOPLE

THE PROBLEM OF DISCRIMINATION

Securing nursing home care and services for poor people who want and need such care is commonly a problem. Though nursing home placement is not the first or most desirable option for most older people, it may at times be necessary and appropriate. Discrimination against poor people, including Medicaid recipients, is all-too-frequent. It occurs in large part because facilities are able to charge private-pay residents rates that are higher than those paid to government programs, chiefly Medicaid, for identical services. Avoidance of delay in receiving government payment also motivates providers to prefer a private-pay clientele. While the problem of discrimination often arises in the context of involuntary transfer of residents who have exhausted their personal financial resources and converted to Medicaid, discrimination at the time of original admission is an equally serious concern.

Participation by nursing homes in Medicaid creates few obligations under federal law. Generally, the fact of participation means only that the facilities will be reimbursed, on a per capita basis, for the care and services they provide to however many Medicaid recipients they choose to serve. Medicaid participation, in the absence of explicit state regulation, imposes no obligations to provide care for specific recipients. Facilities use Medicaid for their own purposes¹ and make unilateral (and usually unchallenged) decisions whether to admit or refuse Medicaid recipients seeking admission.

Recently, a number of facilities participating in Medicaid across the country have placed clauses in their admissions contracts requiring that residents agree to pay for care out of private funds (be "private-pay" residents) for a specified period of time (ranging from several months to several years) before their conversion to Medicaid will be "accepted" by the facility. Maryland sanctions this practice by state law.²

Another problem is that many poor people do not qualify for Medicaid, even though they lack sufficient financial resources to pay for nursing home (or other medical) care. The statutory linkage of Medicaid eligibility with categorical assistance programs³ results in the exclusion

of many poor people from Medicaid coverage. The problem is especially severe in states without programs for the medically needy.⁴ In these states, many poor people are ineligible for aid under the Medicaid program. Securing nursing home care for non-Medicaid eligible poor people is a second aspect of the access to care and services issue.

Two levels of response to the problem of discriminatory admissions are necessary. First, voluntary participation by a facility in the Medicaid program must be held to impose an obligation to provide care on a nondiscriminatory basis.⁵ Second, and more broadly, all facilities must be required to provide care for poor people because of the state's obligation to provide for the health and welfare of its citizens and because of the facilities' state-sanctioned monopoly.⁶

Few litigation strategies have been developed to address discriminatory admissions problems.⁷ More success, to date, has been reported in state legislative and administrative advocacy.⁸ To the extent that discrimination against Medicaid recipients masks racial discrimination or discrimination against handicapped persons, additional strategies, both administrative and litigative, may be used.⁹ Specific strategies for dealing with contractually-forced periods of private payment before conversion to Medicaid are also available.¹⁰

6.2 FEDERAL ADMINISTRATIVE ADVOCACY

Discrimination against poor people, including Medicaid recipients, might in fact be racial discrimination or discrimination against handicapped people. These kinds of discrimination are prohibited by federal law — Title VI of the Civil Rights Act of 1964¹¹ and section 504 of the Rehabilitation Act of 1973,¹² respectively — and may be the subject of administrative complaints to the Office for Civil Rights (OCR) of the Department of Health and Human Services (HHS). The Hill-Burton¹³ obligations of public and non-profit facilities may also be the subject of federal administrative advocacy.

6.2.1 TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Title VI of the Civil Rights Act of 1964¹⁴ prohibits discrimination on grounds of race, color, or national origin by pro-

1 See *Stitt v. Manor Care, Inc.*, No. C78-630, [1979-1] MEDICARE & MEDICAID GUIDE (CCH) ¶ 29.409, (N.D. Ohio Oct. 24, 1978) 12 CLEARINGHOUSE REV. 245 (Aug. 1978) (Clearinghouse No. 24,702) (Court observed that facilities participate in Medicaid when they open in order to develop a good cash flow, then withdraw from the program when they are able to fill their beds with residents from the more profitable private-pay market).

Other facilities restrict use of Medicaid to their own private-pay residents who spend their money and need to convert to Medicaid.

2 MD. PUB. HEALTH CODE ANN. 45, § 565C(a)(18)(v) (1981 Cum. Supp.).

3 See § 2.1.2.2 *supra*.

4 See § 2.1.2.2 *supra*.

5 See § 6.4.1 *infra*.

6 See § 6.4.2 *infra*.

7 See § 6.3 *infra*.

8 See § 6.4 *infra*.

9 See §§ 6.2.1, 6.2.2, 6.3.2 *infra*.

10 See § 6.5 *infra*.

11 42 U.S.C. § 2000d (1976), Pub. L. No. 88-352, § 601, 78 Stat. 252 (1964).

12 29 U.S.C. § 794 (1976), Pub. L. No. 93-112, § 504, 87 Stat. 394 (1973); 45 C.F.R. Part 84 (1980).

13 42 U.S.C. §§ 291 to 2910-1 (1976).

14 42 U.S.C. § 2000d (1976), Pub. L. No. 88-352, § 601 78 Stat. 252 (1964).

APPENDIX 2

FILED

JUL 3 11 40 AM '79

W. J. TEITELBAUM, CLERK
U.S. DISTRICT COURT FOR THE
DISTRICT OF ARIZONA

BY _____
C. J. BELL

IN THE UNITED STATES DISTRICT COURT

IN AND FOR THE DISTRICT OF ARIZONA

RABBI SAMUEL TEITELBAUM, and)
LARRY and LOUISE DIEHL,)

Plaintiffs,)

vs.)

THEODORE SORENSON, D/B/A)
WAITWELL NURSING HOME)

Defendant.)

CIV. NO. 79-199 PHX WEC

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER GRANTING
PRELIMINARY INJUNCTION

The plaintiffs' motion for preliminary injunction came on regularly for hearing at 2 o'clock p.m. on Wednesday, April 11, 1979, with all parties represented by counsel. The Court proceeded to take evidence and testimony and has now considered the matter, the memoranda and arguments of the parties and now makes the following Findings of Fact and Conclusions of Law pursuant to Rule 65(d), Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. The plaintiffs in this action are volunteers connected with a nursing home patient outreach project (outreach project) sponsored by the Arizona Center for Law in the Public Interest. The purpose of the program is to enable residents of nursing facilities to (1) learn about their rights and benefits, and (2) receive visitation from persons familiar with the problems of the elderly and knowledgeable about the rights of nursing home patients. (Affidavit of Rita Schmidt)

ATTEST W. J. TEITELBAUM

[Signature]
Clerk

1 2. Defendant Theodore Sorenson, operates as a sole
2 proprietorship, Waitwell Nursing Home, 5910 West Northern
3 Avenue, Glendale, Arizona 85302. Waitwell is a privately-
4 owned skilled nursing facility licensed by the Arizona Depart-
5 ment of Health Services to provide nursing services to 135
6 patients. Joseph Grabowski is the administrator.

7 3. On February 8, 1979, the plaintiffs along with
8 Rita Schmidt, who is the director of the outreach project,
9 visited Waitwell Nursing Home for the purpose of advising the
10 residents about the availability of an Arizona state renter's
11 tax credit or refund. Although the volunteers along with Ms.
12 Rita Schmidt were admitted into the facility, they were not
13 permitted to discuss the income tax information with the
14 patients. When Ms. Schmidt contacted Mr. Grabowski to arrange
15 a follow-up visit to see if the patients had filled out the
16 forms, Mr. Grabowski refused to allow the volunteers to return
17 for that purpose. (Testimony of Joseph Grabowski)

18 4. Waitwell Nursing Home provides skilled nursing
19 services to its patients. The patients eat their meals,
20 sleep, and carry out their daily activities, including recreation
21 at the facility. Houskeeping services are also provided.
22 Generally speaking, all of their needs are met through services
23 provided to them at the facility. The overwhelming percentage
24 of the patients are not able to easily leave the facility;
25 many are bedridden. (Testimony of Joseph Grabowski, Gary
26 Anderson)

27 5. The patients at Waitwell Nursing Home are
28 comparable to patients at skilled nursing facilities throughout
29 Arizona. They are elderly and/or infirm and their lives are
30 characterized by dependency upon the nursing home staff and
31 administration. The institutional environment in which they
32 live tends to deprive the patients from expressing individual

1 and voicing concerns and grievances. Many of the patients are
2 physically unable to care for themselves and many are mentally
3 unable to effectively communicate. (Testimony of Gordon Aldridge,
4 Gary Anderson)

5 6. Patient contact should not be limited to staff
6 of the facility. Visitation by persons from outside the facility
7 is essential because patients in an institutional environment
8 can lose touch with the world outside of the institution.
9 (Testimony of Gordon Aldridge)

10 7. Advocacy efforts such as are provided by the
11 outreach project, cannot be effectively administered by the
12 nursing home staff. Patients are frequently intimidated by
13 staff and it is unrealistic to expect the staff of a facility to
14 encourage the patients to voice grievances and complaints.
15 (Testimony of Gordon Aldridge)

16 8. Although patients at the facility may at times
17 become confused or may not be entirely functional, they may still
18 benefit greatly from visitation. (Testimony of Mary Ann Linberg)
19 These patients have the greatest need for outside advocates such
20 as the volunteers from the outreach project. (Testimony of
21 Gordon Aldridge)

22 9. Waitwell Nursing Home permits a variety of
23 volunteer groups access to the facility. Activities include
24 arts and crafts, singing and religious services. Volunteers are
25 encouraged to bring clothing and other items to patients. The
26 emphasis of the Waitwell volunteer program is different from
27 the emphasis of the outreach project. (Testimony of Karen
28 Gowins)

29 10. Approximately 80% of the patients at Waitwell
30 Nursing Home are county patients. These patients are indigent
31 and their care is paid for by Maricopa County. Approximately
32 80% of the facility's revenue is derived from Maricopa County.

1 (Testimony of Joseph Grabowski)

2 11. Maricopa County has a Patient Care Team, composed
3 of a physician, a registered nurse and a social worker, which
4 visits nursing facilities caring for "county" patients. The team
5 visits each patient in accordance with the medical care plan, in
6 accordance with state regulations or depending upon the need of
7 the patient. The team monitors and reviews the total medical care
8 of indigent persons in accordance with state regulations and
9 accepted standards of care. Maricopa County expects that each
10 facility serving county patients will adhere to applicable state
11 regulations and acceptable standards of care with respect to the
12 services which the facility provides to the patient. (Affidavit
13 of Phyllis Biedess)

14 12. The plaintiffs and other persons connected with
15 the outreach project desire to return to Waitwell to inform
16 patients of their rights, assist patients in resolving complaints
17 and aiding patients with other matters of concern to them.
18 (Affidavit of Rita Schmidt)

19 13. There is nothing in the record to show that the
20 privacy of the patients will be interfered with in any manner
21 by the plaintiffs' activities. Based upon the evidence, it
22 appears that the outreach project operates in a responsible
23 manner. Even the defendant had no knowledge of any complaints
24 concerning the outreach project. (Testimony of Theodore
25 Sorenson, Gary Anderson)

26 14. The visitation of the plaintiffs and Rita Schmidt
27 on February 8, 1979 was not at the request of any patient of
28 The Waitwell Nursing Home, and was made over the objection of
29 the defendant.

30 15. The patients at The Waitwell Nursing Home are
31 patients requiring skilled nursing care, which is the highest
32 level of care which may be provided by nursing homes under Arizona

1 law, and each patient is under the care of a physician.

2 16. The Waitwell Nursing Home is subject to stringent
3 regulation by the Arizona Department of Health Services.

4 CONCLUSIONS OF LAW

5 1. This action has been properly filed under the
6 Civil Rights Act of 1871, 42 U.S.C. § 1983. The Court has
7 jurisdiction of the action pursuant to 28 U.S.C. § 1343 and 28
8 U.S.C. § 2201, the Declaratory Judgment Act.

9 2. The actions of the defendant restricting and
10 interfering with the plaintiffs' communication to the patients
11 here was under color of law within the meaning of 42 U.S.C.
12 § 1983.

13 3. Waitwell Nursing Home is the "functional equivalent
14 of a town, Marsh v. Alabama, 326 U.S. 501, 90 L.Ed. 265 (1946),
15 since the facility provides all necessary services to the resi-
16 dents and they are physically and psychologically confined and
17 isolated from other community activities. See Mid-Hudson Legal
18 Services, Inc. v. G. & U., Inc. 437 F.Supp. 60 (S.D.N.Y. 1977);
19 Folqueras v. Hassle, 331 F. Supp. 615 (W.D. Mich. 1971). Although
20 there are several "migrant labor camp" cases in which the
21 courts have found that state action did not exist, in those cases
22 there was an absence of proof that the migrant workers were, for
23 all practical purposes, physically or psychologically confined
24 to the perimeters of the private property. Illinois Migrant
25 Council v. Cambell Soup, 574 F.2d 374 (7th Cir. 1978); Asociacion
26 de Trabajadores v. Green Giant Company, 518 F.2d 130 (3rd Cir.
27 1975). The private property of Waitwell Nursing Home includes
28 all the components of a town thus it has become sufficiently
29 state-like to fulfill the state-action requirements for invoking
30 First Amendment rights.

31 4. Additionally, since Waitwell Nursing Home (1)
32 receives a majority of its income from Maricopa County for

1 providing care to indigent patients, (2) is extensively regulated,
2 and (3) where the duty to provide care for indigent persons
3 is a public function, *under Arizona law, there is sufficient*
4 interdependence between public and private conduct giving rise to
5 action under color of law. Mathis v. Opportunities Industriali-
6 zation Center, 545 F.2d 97 (9th Cir. 1976); Ginn v. Mathews, 533
7 F.2d 477 (9th Cir. 1976). See Burton v. Wilmington Parking
8 Authority, 365 U.S. 715, 6 L.Ed.2d 45 (1961).

9 5. The Plaintiffs' communication is constitutionally
10 protected under the 1st and 14th Amendments of the United States
11 Constitution and may not be restricted and conditioned by the
12 defendant, except that the defendant may place reasonable time,
13 place and manner restrictions, Martin v. Struthers, 319 U.S. 141,
14 87 L.Ed. 1119 (1943); Hague v. C.I.O., 307 U.S. 496, 83 L.Ed.
15 1423 (1939).

16 6. The denial and abridgement of the plaintiffs'
17 constitutional rights constitutes irreparable injury. Schnell v.
18 City of Chicago, 407 F.2d 1084 (7th Cir. 1969); Henry v. Green-
19 ville Airport Comm'n., 284 F.2d 631 (4th Cir. 1960).

20
21 ORDER

22 Pursuant to the foregoing Findings of Fact and Conclu-
23 sions of Law, and the Court finding (1) that plaintiffs will
24 suffer irreparable injury if an injunction is not granted, (2)
25 that the likelihood of any injury to the defendant is remote,
26 (3) *the plaintiffs will probably succeed on the merits, and*
27 (4) the public interest is served by granting injunctive relief,

28 IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

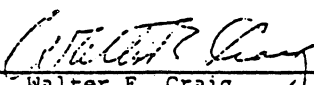
- 29 1. The defendant's Motion to Dismiss is denied;
30 2. The defendant, his employees, agents and all those
31 acting in concert with him, and any successor owner, are hereby
32 enjoined during the pendency of this action, from directly or

1 indirectly, interfering, obstructing or hampering in any manner
2 visits, meetings, discussions or other communication, between
3 the plaintiffs and those persons in active concert or participa-
4 tion with them and patients at Waitwell Nursing Home; except that
5 the defendant may place reasonable time, place and manner restric-
6 tions on visitations.

7 3. The defendant's motion for a stay of this Order
8 pending appeal is denied.

9 DONE IN OPEN COURT this 31 day of ^{July}~~June~~, 1979.

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Hon. Walter E. Craig
United States District Judge