ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-1244

TITLE C. DUANE HENSLEY ET AL., Petitioners v.
v.
THOMAS ECKERHART ET AL

PLACE Washington, D. C.

DATE November 3, 1982

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440 FIRST STREET, N.W.
WASHINGTON, D.C. 20001

IN THE SUPREME COURT OF THE UNITED STATES

- -x

C. DUANE HENSLEY ET AL., :

Petitioners, :

v. : No. 81-1244

THOMAS ECKERHART ET AL. :

- -x

Washington, D.C.

Wednesday, November 3, 1982

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 2:03 o'clock p.m.

APPEARANCES:

MICHAEL L. BOICOURT, ESQ., Assistant Attorney General of Missouri, Jefferson City, Missouri; on behalf of the Petitioners.

STANLEY J. EICHNER, ESQ., St. Louis, Missouri; on behalf of the Respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Hensley against Eckerhart.

Mr. Boicourt, I think you may proceed when you are ready.

ORAL ARGUMENT OF MICHAEL L. BOICOURT, ESQ.,
ON BEHALF OF THE PETITIONERS

MR. BOICOURT: Thank you. Mr. Chief Justice, may it please the Court, as oral argument is presented in this case today, the litigation is in its tenth year. The only issue remaining for resolution before this Court is one involving the attorneys' fees awarded by the district court and affirmed by the court of appeals. The case will require an interpretation and application of the Civil Rights Attorneys' Fees Awards Act of 1976, Title 42, Section 1988.

On behalf of Petitioners, I urge the Court to adopt the principle that award of attorneys' fees under the statute should fairly and accurately reflect the extent to which a plaintiff has prevailed on the substantial claims in his case. I ask the Court to accept the principle that the Attorneys' Fees Award Act does not compensate a plaintiff in a civil rights case for his failures, and it does not panalize a defendant in a civil rights case for his substantial successes.

On the facts, the district court approved in this case an attorneys' fee award of over $133,000. That represented 2,557 principal hours as found by the trial court. Again, that award was affirmed per curium by the court of appeals. No attempt was made by the district court to proportion the fee to reflect the extent to which the plaintiff succeeded on claims and the extent to which the defendants successfully defended, in effect, demonstrating that no constitutional deprivation had occurred with respect to certain claims in the lawsuit.

The district court itself found in its opinion relating to fees that the defendants did prevail on some of the issues. Nevertheless, it awarded in practical effect fees for every hour spent by plaintiff's attorneys on the case without respect to whether they prevailed or lost on specific issues.

This case involved a comprehensive --

QUESTION: Would that cover frivolous claims made if they showed they spent the time on them?

MR. BOICOURT: Yes, Your Honor. I think there were a few claims in this case that because they were not abandoned prior to trial had become close to being frivolous by being presented in the courtroom. There were other claims in the case which were unsuccessful

which I do not claim to you were frivolous. Nevertheless, they were unsuccessful. And Congress provided fees for prevailing civil rights litigants, not fees for merely asserting a civil rights claim.

QUESTION: Would you give me an example of those you regarded as frivolous?

MR. BOICOURT: Yes, Your Honor. I think by the time they got to the point in the lawsuit where they were trying to prove that defendants overrelied upon medication in controlling the patients in the forensic unit, that had become frivolous, because their own experts, all of whom had been contacted, employed some years in advance of the case, did not support the claim. They all came to the courtroom and testified there was no evidence of overmedication of patients. I think their failure to abandon that was frivolous.

QUESTION: Any other claims besides that one?

MR. BOICOURT: I think with respect to the mail policy, the fact that the mail policy of the forensic unit was amended in 1977 -- That was during the duration of the lawsuit. There was also some contemporary Eighth Circuit precedent which dealt with mail issues in the prison context. I think their failure to have abandoned that claim and to have presented it at trial when it was clearly -- the mail

policy was consistent with what was being done --

QUESTION: I take it you are conceding at this point, however, that frivolity had not been attained up to trial.

MR. BOICOURT: Well, with respect to a couple of those issues, I think they become frivolous by the time the trial occurred. I am not taking the position that --

QUESTION: They must have known what their experts were going to testify to.

MR. BOICOURT: That is my position. I would think they would, because many of these experts, again, had been retained some years in advance of trial.

QUESTION: How about the dismissal of Count 2 of the original complaint? The one that claimed that the forced performance of work if it had no therapeutic value violated the Thirteenth Amendment prohibition against involuntary servitude. It is my understanding that they accepted a voluntary dismissal on that.

MR. BOICOURT: The district court accepted a voluntary dismissal after a substantial number of hours had been spent by both sides. Plaintiffs, I think, have suggested in their brief that their lawsuit had something to do with some voluntary action on the part of the defendants, but in real point of the fact, that

motion for voluntary dismissal came very close after this Court's decision in National League of Cities versus Yuser. The Fair Labor Standards Act didn't apply to states.

Again, this lawsuit involved a multi-claim attack on the Forensic Unit, Fulton State Hospital. Now, as that name implies, the Forensic Unit is a mental institution designed to provide care and treatment to dangerous mental patients, patients who for the most part have been involuntarily committed --

QUESTION: Excuse me, counsel. One point before that. Would you have the lawyer -- wouldn't he have to keep books saying that today at ten minutes after 2:00 I am working on Point 3 of this case?

MR. BOICOURT: I think because --

QUESTION: Wouldn't he have to?

MR. BOICOURT: I think he should. He has the burden of proof, just like any --

QUESTION: That's what I thought. Well, wouldn't he spend all of his time bookkeeping?

MR. BOICOURT: I don't think so.

QUESTION: Suppose while he's working on Point 2 he finds an answer to Point 3?

MR. BOICOURT: That will often occur, and I think --

QUESTION: And you have to keep books on that. Have you ever seen any books like that?

MR. BOICOURT: I have not seen any books like that in the Eighth Circuit, because he's going to get compensated no matter what he spent his time on.

QUESTION: My question was, have you seen any books that lawyers keep that they are working on Point 1 of Section C of Point 3 in the brief?

MR. BOICOURT: I think they should be required as a general matter to indicate what specific area of their lawsuit time is being expended on as they keep their records. It is pretty easy to devote a sentence or a short clause to saying, preparing an expert for testimony on staff matters, and saying, researching the matter of the mail policy. I don't think that's an unreasonable burden.

QUESTION: But the district judge did find -- I don't know just what he did, but he said, "After a close review of the detailed time records of these two attorneys and an opportunity to review the work of both attorneys, the court concluded that the amount of time spent by Mr. Berkowitz and Mr. Bastian both in trial and in non-trial activities is reasonable and their efforts are not duplicative of others."

Doesn't that kind of -- I don't know what the

judge did, but doesn't it indicate he did look pretty closely at what their time had been spent on?

MR. BOICOURT: I think he looked pretty closely to the records, Your Honor, but it was in the context of his attempting to follow a previous Eighth Circuit precedent which he believed foreclosed him from reducing the fee because of unsuccessful claims. I think that was more addressed to the matter of duplication of effort among counsel.

QUESTION: Does he say that he didn't think he had the authority to reduce it? He didn't give any enhancement, and he did chop off about 300 hours of the youngest lawyer in the group. Is there anything in his opinion that says he thought he didn't have the power to chop off a part of the fees if he thought -- you know, it was basically unsuccessful?

MR. BOICOURT: Well, I think when he addressed that issue he cited directly language from opinions out of the Eighth Circuit, and somewhat dissimilar cases, but the language clearly indicated a position of the Eighth Circuit that all hours were to be compensated, and I believe that the opinion read as a whole indicates that he was following that precedent.

QUESTION: I have read it, and I just didn't get that out of it, to be honest with you, that he was

under the impression the Eighth Circuit required compensation for all hours regardless of how useless the lawyer's time might have been. I don't think that's a fair reading of the opinion.

MR. BOICOURT: I think it's a fair reading in this regard, Your Honor. What the judge did, it is very clear from the entire record of this case that there were failures, substantial failures on behalf of plaintiff's attorneys, but once that one reduction was made for one attorney who was inexperienced, all hours claimed, every hour claimed that was requested was compensated, and he made no attempt to demonstrate that in any way the extent to which successful claims on behalf of defendants should have been taken into account. He in effect rejected the theory which I presented to him, I think, because of the Eighth Circuit precedent which he followed.

QUESTION: Is there any -- What is the Eighth Circuit precedent that most clearly states what you say their view of the law is on this?

MR. BOICOURT: The most clear Eighth Circuit precedent is Brown versus Bathke, which involves what I think creates a distinction which should be made. Brown versus Bathke has language of apparently very adverse character to our position, but it involved an

alternative legal theory case as opposed to a multiple claim case. That is, several different legal theories of recovery all in support of a common form of relief.

QUESTION: Right. I think you'd have a stronger -- I would understand that as a stronger -- but does he cite that case, the district judge?

MR. BOICOURT: Yes, sir.

QUESTION: Yes, he does, I see, on Page A-11.

MR. BOICOURT: Again with respect to the issues which were litigated in the case, pursuant to local rules, counsel on the morning the trial of this case began agreed there were 24 issues, substantial claims which remained to be litigated in the case. I will freely admit with respect to some of those 24 claims that they were related, cannot be substantially distinguished.

QUESTION: Mr. Boicourt --

MR. BOICOURT: Yes, Your Honor.

QUESTION: -- should we really look, though, at the ultimate relief sought in the broad terms of the complaint, or at a pretrial order list of issues in seeing if the attorneys' fees allowed were reasonable?

MR. BOICOURT: What I was attempting to do, Your Honor, is demonstrate -- I think on the face of the opinion of the court on the merits, the district court,

it is clear that there were some substantial failures. It is made even more clear by the pretrial order filed on the day before the case began, because in many instances the court did not take up or consider its opinion on the merits. Certain claims which were made and proof were offered on those claims at trial, and the court just ignored them in its opinion. I think that demonstrates the plaintiffs failed to prevail on those particular claims and that their time should be discounted.

Now, with respect to these 24 claims, and again, some of them were related, most of them, I submit, were not, the court ordered relief on six. I believe that each of these claims or the vast majority of these claims were truly separable, fractionable, that they would have served as an independent basis for a one-issue lawsuit. For the claims that lost, that would have been an unsuccessful one-issue lawsuit, and no attorneys' fees under any interpretation of the statute can be awarded to a party who does not prevail at all.

The principle which I am trying to get the Court to adopt I think is consistent with sound public policy. Fee shifting makes sense only where there has been a violation of civil rights. Only when it is found that a defendant has deprived another person of a civil

right should he be required to pay his opponent's counsel for substantiating that claim. There is no question that the Civil Rights Attorneys' Fees Award Act was intended as an inducement to civil rights litigation.

I assume that my opponent will argue at great length this afternoon that the theory that the Petitioners espouse would deter civil rights litigation, but the Awards Act, the Fees Act will encourage exactly that kind of litigation which it rewards.

If the merit of a claim is not going to be the key factor in a judicial determination as to whether fees should be rewarded -- awarded for time spent establishing that claim, then I submit to you that the merit of the claim will not be the key factor in the decision of counsel whether to include that claim in his original litigation or whether to abandon that claim in an attempt to narrow the scope of his lawsuit before it comes to trial.

As a result --

QUESTION: Do you think that the statute prohibits giving attorneys' fees for the so-called catalytic results if the lawsuit is filed and relates to several claims, and before it comes to trial the defendants change the practice, and it isn't necessary to go to trial on it? Under the statute, can attorneys'

fees be secured for those results?

MR. BOICOURT: Yes, I believe they can, Your Honor. If the burden of proof is carried by plaintiff's counsel and his lawsuit that has served as a catalyst to voluntary action by defendants, I think the time reasonably expended to accomplish that voluntary action should be compensated, but only that time reasonably expended up until the voluntary action took place. If he continues to litigate that claim after the voluntary action and up through the end of trial, the end of the litigation, the time after that voluntary action takes place should not be compensated.

I submit that the rule in the Eighth Circuit which in effect results in all hours being compensated regardless of the relative success of the parties in the various claims at issue would and does create an imposition on the courts. It must encourage frivolous pleading and congested court dockets. One of the most important functions of a district court judge is to narrow the scope of litigation in front of him, to get the parties to agree to make the case as workable and as presentable in the courtroom as is possible.

There is no incentive for a civil rights litigant in the Eighth Circuit to narrow the scope of his issues, because he will be rewarded for all time

expended on the case, regardless of how many unmeritorious, unsuccessful issues are included in his case. I think that frustrates the ability of the trial judge to effect a narrowing of the issues, to make case workable -- make cases workable, and --

QUESTION: Is there anything in this judge's opinion that said he paid him for working on frivolous matters?

MR. BOICOURT: No, there is nothing in the decision of the judge that says that.

QUESTION: Well, where do you get your basis for your argument?

MR. BOICOURT: I suggest to the Court that there were some issues that at the time of trial had become frivolous. I don't take the position that because issues are not frivolous, are of substance, that that would change my position, that the Act requires or provides for compensation for prevailing, for winning. Even if the issues were not frivolous, were substantial, but he lost, he still should not be paid for his time spent on it.

QUESTION: Did the judge say he paid them for the lost ones?

MR. BOICOURT: Yes, sir. The judge said that some issues were won by plaintiffs and some issues were

won by defendants, and he paid them for all their hours.

QUESTION: My question was, did the judge say, I am paying you for the lost ones?

MR. BOICOURT: No, Your Honor. I wouldn't expect the trial judge to say that. He doesn't intend to be reversed.

QUESTION: Can anyone looking at the record of the time identify accurately the items for which you say no fee should be allowed?

MR. BOICOURT: I think in this particular case because time records were not kept which were in any way related to various claims of the course of the lawsuit, it would be difficult for anyone to do that except the trial judge. That is why I don't ask this Court to find what a reasonable fee should be in the case, or determine how many issues I won and how many issues my opponents won. I ask that the case be remanded so the district court can do that, that he had control of the case throughout the entire years of this litigation --

QUESTION: Has the issue come up in other circuits?

MR. BOICOURT: Yes, Your Honor, there has. That is one reason why I think it is very important that some position be taken by this Court.

QUESTION: What have other circuits said?

MR. BOICOURT: Well, that's interesting. Including the Eighth Circuit, the Fifth and Sixth Circuits have a line of cases with language very similar to the Eighth Circuit, contrary to my position. With respect to four circuits, different panels within the circuit have disagreed on the issue on their face, but within the circuit there are conflicts.

With respect to the District of Columbia Circuit and four others, the cases support my position. This is a classic example of a true split in the circuits.

QUESTION: So there are express examples of courts paring down, sorting the case out as between what is won and what has been lost.

MR. BOICOURT: Yes, Your Honor. The preponderance of the total number of cases support my position, that attorneys' fees are not to be awarded for unsuccessful claims, and it is the duty of the trial court to determine how successful the litigants were and to fashion an award which fairly reflects that success.

QUESTION: So that if there has been part won and part lost and the district court doesn't go through that process in the circuits that agree with you they set it aside and tell him to do it.

MR. BOICOURT: Yes, Your Honor. I think that

is the case.

QUESTION: I understand you to say you are not limiting this to frivolous claims, that your emphasis is on successful claims.

MR. BOICOURT: Successful --

QUESTION: The claims on which relief was granted.

MR. BOICOURT: Yes, Your Honor. I don't think that my -- I don't want to give the impression my argument rises or falls with respect to whether a particular claim was frivolous. That is not my point at all. It is whether or not it was successful, because the Fees Act rewards prevailing civil rights litigants. It does not reward someone merely for asserting a civil rights claim.

QUESTION: What would you say the position is that if somebody claims they denied their civil rights, and they bring a lawsuit, and the other side gives in immediately? Would that be a successful lawsuit?

MR. BOICOURT: Yes, Your Honor.

QUESTION: Completely so?

MR. BOICOURT: If he gives up completely with respect to all claims, yes.

QUESTION: Well, then, if he goes to trial, then you have to prorate it. But if he gives up up

front, you don't prorate.

MR. BOICOURT: If the --

QUESTION: Because I am warning you, my next question is, if you give up halfway through, will you split it in half?

MR. BOICOURT: Any time remedial action, whether ordered by the court or voluntary on behalf of defendant is the direct result of the lawsuit, the hours expended in establishing that relief should be compensated. I don't agrue that position.

QUESTION: Well, how do you know it is brought on by the lawsuit or not?

MR. BOICOURT: Well, that is --

QUESTION: I have seen cases settled on the day of trial that have been in preparation for six years.

QUESTION: You would allow them to receive fees for their preparation even if you didn't go to trial, would you?

MR. BOICOURT: Yes, if the preparation was reasonably related to the matter of their successas, I would allow tha compensation.

QUESTION: But you wouldn't after trial.

MR. BOICOURT: Not if they lost, no. In this case, they substantially lost. They lost a lot more

than they won, and I don't see why my client should pay their attorneys for unsuccessfully suing them.

QUESTION: May I ask you, I have got the Brown opinion in front of me. I notice the Eighth Circuit does say that the issues which are clearly frivolous, that are manufactured, do not represent time which has been reasonably expended on a matter, and thus any time claimed for them can be properly disregarded by the court. So that is the rule of the Eighth Circuit. You disregard time spent on frivolous claims.

MR. BOICOURT: That is correct, Your Honor.

QUESTION: And you don't question that. But then I gather this is the sentence that you take issue with. "Attorneys' fees for a claim which is reasonably calculated to advance a client's interest should not, however, be denied solely because that claim did not provide the precise basis for the relief granted." That is what you want us to change.

MR. BOICOURT: Yes, as it is implied for a multiple claim case. Yes, Your Honor. And again --

QUESTION: Even though it was a reasonable -- the reasonable work of a lawyer who was conscientiously trying to represent his client, for which he would normally be paid by a private client. You would say he should not be paid in the civil rights context.

MR. BOICOURT: That is correct in the multiple claim case. Conscientiousness is not to be rewarded.

QUESTION: Well, the test is reasonably calculated to advance a client's interests.

MR. BOICOURT: And again, that case involves the alternative legal theory situation. That is, more than one theory or cause of action in support of common relief. So I think it is very important that the distinction be made between that and this multiple claim lawsuit, in which the relief depends on the nature of the issue itself and the nature of the claim.

QUESTION: Well, but the court says it should not be denied solely because that claim did not provide the precise basis for the relief granted. And your view is that it should be denied solely because it did not provide the precise basis for the relief granted. Is that right?

MR. BOICOURT: That would not be the case only if the plaintiff could demonstrate his burden of proof that the time spent was reasonably related to securing the actual relief awarded.

QUESTION: Well, I'm not sure you've answered my question. Is it your view that the compensation should be denied solely because the claim did not provide the precise basis for the relief granted?

MR. BOICOURT: In the multiple claim situation, yes, Your Honor. Again, that was an alternative legal theory case, and it has nothing to do with the type of circumstances we have here. Not only is the Eighth Circuit rule an imposition on the courts that will lead to more court congestion. It is an imposition on the resources of defendants. If there is no incentive for the plaintiff's attorney to narrow the scope of his litigation when pled or when prepared for trial, the defendant in civil rights litigation, the institutions, the programs, the statutes that get sued in this type of litigation, have to expend vast amounts of resources to defend these cases in the courtroom.

It is very hard to negotiate claims when the plaintiff's attorney knows that all hours he expends on his total case are going to be compensated, regardless of his success on individual claims. The shotgun approach to lawsuit is a drain on the resources of states and other types of people that have to defend these types of lawsuits. The parameters of civil rights litigation must not be contained solely within the imagination of a plaintiff's attorney. There must be some other control over that litigation, and if these are going to be awarded for all hours, who is going to exercise the control?

It would be very difficult for the trial judge to narrow that case because there is no incentive for the plaintiff's attorney to do so. In addition, attorneys' fees do cause a penalty to be levied against defendants. I think that was the purpose of Congress in enacting the Attorneys' Fees Award Act, and in the context of other attorneys' fees provisions this Court has found that Congress intended to penalize defendants who deprive others of their civil rights.

But when a claim is successfully defended, when there is found to have been no deprivation of anyone's civil rights, why should the defendant be required to accept the burden of his adversary's fees? That is not consistent with that purpose. Otherwise, the prevailing party language of the statute means nothing.

Now, again in this case there were truly fractionable claims, claims that could have been one-issue lawsuits which were unsuccessful. For example, a one-claim lawsuit on the validity of the defendant's mail policy would have been unsuccessful. No fees. A one-issue lawsuit on the claim that defendants overmedicated their patients would have been unsuccessful. No fee. An unsuccessful lawsuit on the claim that defendant's staff was constitutionally

inadequate would have been unsuccessful. No fees.

Why should a fee attach to these totally unsuccessful constitutional claims merely because they were under the umbrella of a lawsuit which included some other claims which resulted in limited relief being afforded? It is an inequitable result.

In addition, the statute requires the exercise of discretion. It says a court may in its discretion award to the prevailing party a reasonable attorney's fee. Under the Eighth Circuit rule, there is no discretion. If all that must be shown is that one claim was successful, then all hours will be compensated at the prevailing hourly rate. Where is there room for the trial judge to use his discretion? Where is there authority for him to fashion an award which is fair to all parties, and reflects the extent to which a plaintiff actually demonstrated --

QUESTION: Well, I take it your position is that the trial judge has no discretion to pay -- to award fees on a single issue claim that could have been a separate lawsuit on which there is a loss.

MR. BOICOURT: I think it would be an abuse of discretion for him to award a claim --

QUESTION: Yes, so I have no discretion.

MR. BOICOURT: Excuse me.

QUESTION: His discretion is just to award a reasonable fee on issues that -- on which the plaintiff prevails.

MR. BOICOURT: But that is where he can actually exercise his discretion to make that determination.

QUESTION: I understand. I understand, but your position is, there is no discretion to award fees for -- on issues that the plaintiff does not prevail on.

MR. BOICOURT: Unless he can show that the hours spent --

QUESTION: Yes.

MR. BOICOURT: -- were reasonably related to the actual relief ultimately granted --

QUESTION: That is impossible in the examples you gave us, these single-issue claims, these claims that could have been single-issue lawsuits.

MR. BOICOURT: I don't think it would be possible for them to claim, yes, that their proof or that their time expended on the mail policy had anything to do with whether or not there was sufficient privacy --

QUESTION: So your position is that the judge had absolutely no discretion to award any fees with respect to that claim.

MR. BOICOURT: That is correct.

I would like to reserve the rest of my time for rebuttal, please.

CHIEF JUSTICE BURGER: Mr. Eichner, let me see if I can clarify some of these things for myself with a hypothetical. This extends the question Justice White was just putting. Suppose you have a hypothetical case with three claims, and two of them are successful and one isn't, and the time records which most lawyers keep and all lawyers should keep if they want to get paid show that the time was spent about equally on the three, just to make the arithmetic simple here.

In your view, are the lawyers entitled to recover on the ones on which they did not prevail?

ORAL ARGUMENT OF STANLEY J. EICHNER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. EICHNER: The answer to that question, Mr. Chief Justice, depends on whether we are talking about a situation such as we had here, where there was one overall broad claim, that is, a constitutional right to treatment, and the specific aspects under that broad claim, and those subparts being related to each other in part and parcel of the same claim, or were they perhaps three totally separate claims which didn't necessarily relate to each other.

QUESTION: Well, let's assume at least, whether they are totally separate or not, that they are readily identifiable, or not readily, but reasonably identifiable.

MR. EICHNER: Well, I -- I have to repeat that it comes back to what extent those claims relate to each other or not. If they were three separate actions that could have been brought as three totally separate lawsuits, and the work involved in Claims 1 and 2 wouldn't necessarily relate to the preparation and preparing of Claim 3, then --

QUESTION: Let's help it out by saying the complaint has Count 1, Count 2, Count 3, and that their interrelationship is limited to the fact that they involve the same people and the same institutions.

MR. EICHNER: Well, again, it is going to be a factual determination by the district court to what extent do those varying claims relate to each other.

QUESTION: How about Count 2 of the original complaint, the involuntary servitude count? Would you say that that was in the severable category with respect to the other counts of the complaint, or do you think that was part of your overall umbrella?

MR. EICHNER: That was -- I believe you are referring to Count 3, which was the uncompensated labor,

Your Honor.

QUESTION: It says -- at least where I am looking at the Joint Appendix on Page 4, it says Count 2. Perhaps there is a --

MR. EICHNER: In any case, the uncompensated labor claim was a separate claim. It is unlike what went to trial in this lawsuit. What went to trial in this lawsuit was Count 3, which was the claim that plaintiff's constitutional right to treatment was being violated, and then within that claim there are various specific subparts and aspects, but the uncompensated labor, which, by the way, was in a time period prior to when we are seeking fees for, would be considered in that case a separate claim. The mere fact that it had as its subject the same institution doesn't necessarily mean that you get time for all of it.

It really ties again, coming back to the question presented by the Chief Justice, what is the extent of interrelatedness and interconnectedness between the various claims.

QUESTION: But here you received some compensation for work on Count 2, did you not? I am referring to Page 228 of the Joint Appendix. There is an entry for May 29th, '75, research and drafting of plaintiff's memorandum of law on the applicability of

the Eleventh Amendment to plaintiff's claim for damages in Count 2.

QUESTION: I merely raise the question, there are several complaints in the Joint Appendix. At least three.

MR. EICHNER: That is correct.

QUESTION: Maybe that's where the confusion is on Counts 2 and 3.

MR. EICHNER: Well, the specific answer to Justice Rehnquist's question is yes, there was time on the uncompensated labor claim which was after 1975. We didn't ask for fees prior to '75, but the work after January, '75, we sought fees for, and the example that you just cited was work which we sought and obtained.

QUESTION: But if you agree that was severable, and you took a voluntary dismissal of it, how under your own theory of how the fee statute should be administered were you entitled to be paid for that particular item of work?

MR. EICHNER: Because it is an incorrect understanding that we were wholly unsuccessful on that. We obtained minimally catalytic relief on that claim. There were two parts to it. One was the injunctive claim which sought that the defendants compensate the residents of Fulton State Hospital for labor, and that

was effectuated by the lawsuit. There was a second part which was the back wages claim. That is the part which was dismissed, Your Honor. There are two parts to it.

QUESTION: Counsel?

MR. EICHNER: Yes.

QUESTION: I will put an easy question to you that may clarify your position. Assume you had a 1983 suit against prison officials, and the complaints alleged were that there was double bunking and that the law library was inefficient. You won on one of those issues. You submitted a bill based on 1,000 hours. Should there be any apportionment or not?

MR. EICHNER: I don't wish to or intend to duck the question, but quite honestly, I am unfamiliar enough with prison litigation to know which -- how much those -- the preparation, trying, and litigating of those claims would necessarily relate to each other, and I -- I would have to come back to, that's the real issue, how much do those two interrelate.

For example, in this lawsuit, time spent on the overmedication claim, on which there was not relief, was related both from a theoretical point of view as well as the actual trying of the lawsuit to the physical environment, where we obtained significant relief.

QUESTION: Have you read our opinion on Romeo

last term?

MR. EICHNER: Yes, Your Honor.

QUESTION: Do you think the lawyers in that case should win 100 percent on everything they claimed? They lost on their major contention in this Court. I think you could assume they did. We reversed the court below on right to treatment. They won on some issues. If you are not familiar with it, you can pass that up. What I really would like to ask you --

MR. EICHNER: Your Honor --

QUESTION: Do you want to answer that?

MR. EICHNER: Yes and no. I want to answer it in that the analysis, that is, the answer to the question -- Congress intended a two-part analysis determining whether or not a person is entitled to a fee. The first part is a determination whether or not they are prevailing parties within the meaning of the Act. Once you find that the party is a prevailing party, there is a separate second analysis, so in the Romeo case, I can't answer specifics because I'm not familiar with it enough, but the first threshold test is whether or not there are prevailing parties within the meaning of the statute.

The prevailing party issue is not presented in this case. It was not appealed, and the issue is

whether -- what time is reasonably expended in this lawsuit, and whether the district court awarded the all time -- in conformity with all time reasonably expended standard. And so the answer to the question in Romeo would be, you would have to go through that two-step process. One, are there prevailing parties, and two, assuming that they were, you would exclude compensation for time which was in bad faith, clearly meritless, or three, wholly separable or distinguishable that they in no way contributed to the ultimate result achieved.

QUESTION: Do you think the court, the district court in this case went through this catechism that you just --

MR. EICHNER: Yes, Justice White.

QUESTION: Where do you find that in its opinion?

MR. EICHNER: The district court began with an analysis of whether or not plaintiffs were a prevailing party within the meaning of the statute.

QUESTION: Well, sure they did, and then I take it that they said as long as the party receives some of the relief requested, the status as a prevailing party will not be jeopardized, and then they just -- and rejects the suggestion that he should put aside any of these claims.

Was there any finding that they were interrelated?

MR. EICHNER: Yes, implicitly, Your Honor, because --

QUESTION: Implicitly? Where is it even --

MR. EICHNER: I would like to explain the answer to you, which is that in the portion of the fee decision where the district court examined the amount of the fee after finding the prevailing party issue, the district court said, defendants have argued for a mathematical mechanical approach, which fails to take into account the interrelatedness and interconnection of the various claims. Presumably --

QUESTION: That may well be true, but --

MR. EICHNER: -- by --

QUESTION: -- the court didn't go on and say that these are interrelated claims.

MR. EICHNER: By rejecting an approach which doesn't take into account the fact that the claims are interrelated and interdependent, I would submit that it is clear that the court was doing -- was finding that they did interrelate and interconnect.

The issue in this case, presented in this case is whether the district court complied with Section 1980(a) in its fee award; specifically, whether the

court was correct when it analyzed the case as a whole and looked to the ultimate results achieved, thus rejecting the mechanical and mathematical approach urged by defendants.

Resolution of that question involves a narrow question or issue of statutory construction. That undertaking begins with the statute itself. The Fees Act is a broad Congressional charter authorizing courts to award a prevailing party a reasonable attorneys' fee as part of costs. Congress accompanied this statute with a substantial legislative history consisting of both the Senate and House report, both of which have been authoritatively cited by this Court. In the context of attorneys' fee awards, the legislative history is especially instructive in light of this Court's holding in Alyeska that the circumstances under which attorneys' fee awards are to be awarded and the range of discretion of courts in making those awards are matters for Congress to determine.

Congress -- In the legislative history, Congress anticipated a number of issues which would accompany a fee shifting statute, and provided specific guidance for resolution of those issues. In a section of the legislative history which addresses the method of computing the amount of the fee, Congress explicitly

stated what the proper standard was to be.

"In computing the fee, counsel for the prevailing party should be compensated, as is traditional with attorneys for fee-paying clients, for all time reasonably expended on a matter."

Congress provided further direction on this issue by stating that proper fee computation had taken place in two specific cases, the Davis versus County of Los Angeles case and the Stanford Daily versus Zirker case. Those cases established that the all time reasonably expended standard does not permit apportioning the fee award to only winning claims.

In the Davis case, which was a Title 7 suit, defendants had argued for a proportional fee reduction. The court specifically held it was not legally relevant that a certain amount of limited time and effort was devoted to issues which were either not litigated or upon which they were not successful. Instead, the court looked to the ultimate results achieved, and found that plaintiff was entitled to fees for all time reasonably expended.

In the Stanford Daily case, the court similarly disapproved of a proportionality analysis and rejected defendant's argument that there should be a reduction in fees for the hours expended on unsuccessful

work. The court held that although fees were to be denied for clearly meritless claims, they were to be granted for legal work reasonably calculated to advance their client's interest.

QUESTION: That is certainly a different test than you suggest to us.

MR. EICHNER: I think it is the same test, Your Honor. We are saying that the proper test is looking at the case as a whole and awarding fees for all time reasonably expended, and in this case --

QUESTION: Well, that isn't what -- I thought you said you were only supposed to award fees for time spent on successful claims and on other claims that are interconnected or interrelated.

MR. EICHNER: What I said is that --

QUESTION: That's quite a different test than awarding time spent that is reasonably calculated to advance a client's interests.

MR. EICHNER: Once somebody is found to be a prevailing party, they are entitled for all time reasonably expended, and that three-part explanation that I did in answer to your question was what goes into a finding of what time is reasonably expended.

QUESTION: Counsel?

MR. EICHNER: Yes.

QUESTION: In this case, you requested an enhancement fee over and above the multiplication results that hourly rates would provide. The district judge did not allow it. Would you view that as a two-way street so that hourly charges that arguably were expended reasonably by counsel but nevertheless produced a poor result should be discounted?

MR. EICHNER: No, Your Honor. I believe that --

QUESTION: Do you think it ought to go only up, but not down?

MR. EICHNER: I believe the district court found that the reason for not awarding an enhancement factor was that the same factors and considerations as the Johnson factors which go to enhancement were already taken into account in the reasonable fees, so that there was no reason to repeat those same factors and award upwards.

QUESTION: Suppose --

MR. EICHNER: This case, I don't believe presents the issue of enhancement of fees.

QUESTION: You would never discount.

While you are thinking about that, let me ask you this. Suppose after you brought this lawsuit, you had so impressed counsel for the hospital that they

agreed to everything you requested before you had even taken discovery depositions, and you had only recorded 50 hours of time. Would you be entitled to -- Suppose you charged $200 an hour. That is $10,000, I think. Was that the limit -- Would that be the limit of your fee?

MR. EICHNER: The limit of the fee would be whatever hourly rate you were asking for for those number of hours.

QUESTION: Right, that would be $10,000 in this case, and you've won a victory that was probably worth millions of dollars, perhaps?

MR. EICHNER: Yes, because it relates to -- the method of awarding fees relates to the number of hours, and I don't think --

QUESTION: You are saying results are of no importance.

MR. EICHNER: The results are important. They are one of the Johnson factors. But the determination of reasonable fee is tied to the number of hours.

QUESTION: Well, Mr. Eichner, what was it you were awarded in this case, something like $130,000?

MR. EICHNER: $133,000, Your Honor.

QUESTION: Well, what if, as Justice Powell has hypothesized, the defendant agreed to do, right

after you had filed the complaint and the memorandum of authorities in opposition to a summary judgment, because the counsel for the state was so impressed by your arguments, he said, well, I'll give you A, B, C, and D, which turns out to be exactly what you ultimately got after years of litigation? Wouldn't you be entitled to something more than just hours spent, if, kind of in a rather dramatic legal move, you get a whole lot without spending a lot of time?

MR. EICHNER: Well, I come back to the same point. I think that the results obtained are one of the Johnson factors, and the district court considered that, but I think the fee is generally tied to the number of hours.

Congress's citation of the fee computation in the Davis case and Stanford Daily case endorses a two-step process for determining reasonable attorneys' fees. As I said before, first is whether or not the person is a prevailing party or not, and once they are found to be a prevailing party, the second portion of that two-step process is a look at the case as a whole to see what time was reasonably expended.

Now, legal sources are considered reasonably expended unless they are brought in bad faith, spent on clearly meritless claims, or devoted to claims so wholly

unrelated, so distinguishable and separable, that they in no way contributed to the ultimate result achieved. The district court's fee analysis in this case is fully consistent with the standard provided by the Act and the legislative history.

The court analyzed whether plaintiffs were a prevailing party, and found that based -- looking just at the court order of relief, there was substantial enough relief to find that plaintiffs were the prevailing party, so much so that the court did not feel it necessary to look at those issues which were mooted prior to trial.

Secondly --

QUESTION: Mr. Eichner, can I interrupt you with a question? Do you think the standard that the district judge followed in this case or one who follows the 12 Johnson factors is any different from the standard followed in fixing fees, say, in an antitrust case, or in a trust case, all sorts of cases where courts fix fees? Do you think this is a special standard, or is this just the regular standard?

MR. EICHNER: I think the process is generally the same. I think that the civil rights area is special to some extent, because Congress has singled that out as a particularly important place for vigorous enforcement

of civil rights, and found that the award of attorneys' fees was particularly tied to the enforcement of civil rights, and therefore directed the courts to use the broadest and most flexible standards to ensure the enforcement of the civil rights.

QUESTION: But do you think that the award given in this case was more liberal than would have been appropriate in any other kind of litigation?

MR. EICHNER: No, I don't believe that the award in this case was more liberal at all. I thought you were asking whether it is generally the same.

QUESTION: I frankly don't see much difference between the Johnson factors and factors I run into in countless other situations.

MR. EICHNER: No, there is -- there is a difference of views within the circuits between the so-called Johnson factors and the Loadstar analysis, and various courts have been critical of the Johnson factors because they find them not that precise and hard to work with, and they have gone to a Loadstar analysis.

That issue is not presented in this case, and regardless of which approach you use, that is, whether you use Johnson or Loadstar, an issue which needs to be determined prior to deciding which approach is going to be the determination of what constitutes compensable

hours, and that is what the issue is in this case, and that needs to be -- that's an issue which must be decided prior to employing either one of those standards.

We aren't necessarily arguing for the Johnson factors per se. We would suggest that that is one permissible approach. It is the factors which were specifically endorsed in the legislative history, and the district court's employment of the Johnson factors was correct. It was not incorrect.

After the district court had resolved the prevailing party issue, it then turned to the amount of the fee. Defendants had argued for an automatic across the board reduction in fees, suggesting that the amount of the fee should be tied to the amount of court-ordered relief.

The district court properly rejected those suggestions, finding that such an approach was improper for a number of reasons, that it was -- that is, it was incapable of giving consideration to the relative importance of issues. It doesn't address the interrelation of issues, the difficulty of identifying issues, nor the extent of prevailing on various issues.

Instead, the court looked to the Johnson factors to analyze the case and specifically the results obtained factor of Johnson to analyze the ultimate

accomplishments of the case as a whole. The district court realized that in the seamless fabric of those accomplishments, that is, vindication of plaintiff's constitutional rights, and substantial changes in the treatment environment, no time was spent on clearly meritless or unrelated claims.

By looking at the case as a whole and evaluating the claims within the context of the ultimate results achieved, the district court exercised discretion in the manner intended by Congress.

With that as a background, let's examine what the results were of this lawsuit. First of all, plaintiffs had to establish that there was a constitutional right to treatment. Defendants had vigorously fought against it, arguing that, one, there was no such a right, and two, to the extent that such a right existed, it would be inapplicable to this class of plaintiffs. The court found the existence of such a right, and then proceeded to analyze the six aspects of the treatment environment policies and conditions.

The court awarded court order relief on five out of six aspects: physical environment; individual treatment plans; least restrictive environment; visitation and telephone; and seclusion and restraint. In view of the substantial relief that plaintiffs really

did accomplish in this lawsuit, it is easy to understand why the district court as a -- found that, "The significance of this case cannot be measured in dollars and cents. It involves constitutional and civil rights of the plaintiff class, and resulted in a number of changes regarding their conditions and treatment at the state hospitals. Not only should plaintiffs be considered prevailing parties within the meaning of the statute, they are parties who have obtained relief of significant import. Plaintiff's relief affects not only them, but numerous other institutionalized patients similarly situated."

It is also important to point out that not only is the proportionality formula unsupported by the applicable law, but it discourages precisely the zealous representation which the Fees Act seeks and the Code of Professional Responsibility requires. As pointed out and argued in some detail in the amicus brief filed by the American Bar Association, under the Code of Professional Responsibility, attorneys are required to represent clients zealously within the law. If the case is novel or complex, it is difficult to predict which of several good faith arguments plaintiffs would ultimately prevail upon, and therefore to represent a client zealously and ethically, counsel must explore various

aspects of the case, develop all the evidence, and present supportable issues to the court.

To reward only those successful claims undercompensates the necessary early explanatory stages of the lawsuit, invites overly conservative tactics, and would prohibit high risk but deserving actions entirely. Petitioner's narrow construction penalizes counsel for acting in conformity with the canons and zealously pursuing the client's interests.

Not only has the state argued for an unsupportable standard, they have also, we believe, mischaracterized some of the facts in this lawsuit. Over and over again, they have made statements that plaintiffs prevailed -- lost on more things than they won. Without reciting the long list of the accomplishments, I would simply refer the court to the chart which begins on Page 25 of our brief, which analyzes in some detail the claims of constitutional violations that were in the complaint, and then compares those claims with the relief actually ordered by the court.

Coming back to the ethical issue involved, as some courts have noted, it hardly furthers the mandate to use the broadest and most flexible remedies available to us to enforce the civil rights law if we so directly

discourage innovative and vigorous delving in a changing area of the law. That mandate is best served by encouraging attorneys to take the most advantageous position they can that is possible in good faith with respect to their clients.

Defendants have urged adoption of what they call a standard principle to guide the lower courts in fashioning fees under Section 1988. The appropriate standard and method for applying the Fees Act has already been articulated and delineated by Congress in the Act and its legislative history. In making the fee award in this case, the district court acted in consonance with the standard and method of analysis intended by Congress.

Unless there are any further questions, that is the presentation.

CHIEF JUSTICE BURGER: Thank you, Mr. Eichner.

Do you have anything further, Mr. Boicourt?

QUESTION: I have a question that is tangential. I don't think it matters to the case. Did you find out in the regular equity cases in state or federal courts any instance where counsel fees were questioned on appeal? Not in a civil rights case.

ORAL ARGUMENT OF MICHAEL L. BOICOURT, ESQ.,

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. BOICOURT: I'm not sure I really researched that subject. I have been looking at counsel fees in civil rights cases.

QUESTION: That's all right. I was just wondering. It doesn't matter at all to me.

MR. BOICOURT: I want to briefly discuss the matter of legislative history which has been discussed by my opponent this morning. Congress established or set forth, said it was passing Section 1988 for two purposes, to attract competent counsel to civil rights litigation and to avoid windfalls to attorneys. Now, competent counsel hopefully will competently plead and competently narrow the scope of their litigation before it gets into the courtroom. The Act has secured that purpose. Counsel are being attracted. Before 1976, there was no provision for shifting of fees.

More importantly is the matter of windfalls to attorneys. I submit that an attorney who tries to establish a civil rights claim and fails does not succeed, loses. The result is the court -- or the defendant is vindicated with respect to that claim. If he is compensated for his hours spent on that claim, he is receiving a windfall, and Congress said that was one of the purposes of the Act to avoid.

We also discussed the language in the

legislative history that says counsel for a prevailing party should be paid is traditional with attorneys compensated by a fee-paying client. Now, in the first place, it says for a prevailing party, and my position obviously is that first you have to prevail on the claim to be a prevailing party for attorneys' fees purposes, but the same argument was presented to the District of Columbia Circuit in Copeland versus Marshall, and their response was, and I quote, "It does not follow that the amount of time actually expended is the amount of time reasonably expended. In the private sector billing judgment is an important component in fee setting."

That court concluded that time spent on non-prevailing claims should not be compensated.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:59 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

C. DUANE HENSLEY ET AL v. THOMAS ECKERHART ET AL

#80-1244

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