

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

GERALD J. LINDSLY

Plaintiff,

v.

MICHAEL WORELY

and

WILLY DALID

Defendants.

:
:
: Case No. 1:07- CV-588
:
: Judge Spiegel
:
: **PLAINTIFF'S MEMORANDUM IN**
: **OPPOSITION TO DEFENDANTS'**
: **MOTION TO DISMISS THE**
: **COMPLAINT**
:
:
:

I. INTRODUCTION

On July 27, 2007, Plaintiff Gerald J. Lindsly filed suit against Defendants Michael Worely and Willy Dalid. On December 27, 2007, Defendants filed their Motion to Dismiss the Complaint alleging a failure to comply with *Civil Rule* 17(c)(2). For the reasons set forth below, Defendants' Motion to Dismiss should be denied.

II. FACTS

On August 4, 2006, Mr. Lindsly was a pre-trial detainee inmate at the Hamilton County Justice Center in Hamilton County, Ohio. (Complaint ¶ 8.) On that date, Corrections officer Willy Dalid was escorting Mr. Lindsly to a court holding cell in the detention facilities on the first floor of the South Building at the Justice Center. (Complaint ¶ 12.)

While being escorted, Lindsly was accused by Officer Dalid of spitting on the floor. (Complaint ¶ 13.) Officer Michael Worley walked over to Mr. Lindsly and Officer Dalid. (Complaint ¶ 14.) One of the Officers ordered a nearby inmate orderly to give Mr. Lindsly a

towel to wipe the spit off the floor. (Complaint ¶ 15.) Mr. Lindsly cleaned the floor and then tossed the towel back to the inmate orderly. (Complaint ¶ 17.)

In response, Officer Dalid and Officer Worley instantly applied physical force to Mr. Lindsly consisting of chokes, kicks, blows, and knee strikes, and forced him to the floor. (Complaint ¶ 19.) At no time had Mr. Lindsly taken any actions that required or permitted the use of force by the officers. (Complaint ¶ 21.)

The officers acted in violation of General Order 208, Procedure No. C.7, concerning the use of force by officers, and other policies and procedures of the Hamilton County Sheriff concerning the use of force. (Complaint ¶ 23.) As a result, Mr. Lindsly sustained serious bodily injuries that have required and will require future medical care and treatment. (Complaint ¶ 27.)

On November 15, 2006, Mr. Lindsly was found not guilty by reason of insanity and sent to the Summit Behavioral Healthcare Center. (Hamilton County Clerk of Courts.) On November 13, 2007, the Hamilton County Court of Common Pleas dismissed the criminal case proceedings and referred the matter to the Probate Court. (Hamilton County Clerk of Courts.) Mr. Lindsly has since been released from the Summit Behavioral Healthcare Center. See *Affidavit of Plaintiff's Counsel Mark W. Napier* filed in support of this Memorandum.

III. ARGUMENT

A. Defendants' Motion to Dismiss Goes Against the Purpose of Civil Rule 17(c)(2).

Federal Rules of Civil Procedure 17(c)(2) states:

A minor or an incompetent person who does not have a duly appointed representative may sue by a next of friend or by a guardian ad litem. The court must appoint a guardian ad litem - or issue another appropriate order - to protect a minor or incompetent person, who is unrepresented in an action.

Capacity to sue or be sued is determined by the law of the party's domicile. *Fed. R. Civ. P.*

17(b). Unlike the determination of competency, the district court's decision to appoint a guardian ad litem or next friend is procedural and is not based on state law. *Scannavino v. Florida Department of Corrections*, Case No. 8:05-cv-684, 2007 U.S. Dist. LEXIS 41579, *15 (M.D. Fla.).

The district court has discretion over whether a guardian ad litem or next friend must be appointed. *Id.*, citing *In re Kloian*, 179 Fed. Appx. 262, 265 (6th Cir. 2006.) All persons are presumed to be competent and the "burden of proof of incompetency rests with the party asserting it." *Weeks v. Jones*, 52 F.3d 1559, 1569 (11th Cir. 1995).

The purpose behind Civil Rule 17(c)(2) is to protect the interests of the incompetent person. *Scannavino*, LEXIS *17, quoting *Richards v. Duke University*, 166 Fed. Appx. 595, 599 (3rd Cir. 2006). A guardian ad litem or next friend should not be appointed if it is apparent that it is not in the litigant's best interests, since the appointment of a guardian ad litem or next friend "deprives the litigant of the right to control the litigation." *Id.*, quoting *Thomas v. Humfield*, 916 F.2d 1032, 1034 (5th Cir. 1990).

Civil Rule 17(c)(2) is not mandatory and is meant to protect the interests of the incompetent person. Dismissal for failure to appoint a representative would be against the greater weight of justice.

It is not mandatory under *Civil Rule 17(c)(2)* for this District Court to appoint a next friend for Mr. Lindsly. This Court has discretion over whether a next friend must be appointed and the Defendants have failed to present evidence demonstrating that Mr. Lindsly is currently incompetent. While Mr. Lindsly was previously found not guilty by reason of insanity he has

completed rehabilitation at the Summit Behavioral Healthcare Center and has been released. Mr. Lindsly is free to move around, make his own decisions, and is maintaining a steady job. There is no documentation stating that Mr. Lindsly is incompetent. It would be against Mr. Lindsly's interests to not allow him control over his litigation.

Even if a next friend would be appropriate in this case, dismissal is not appropriate. *Civil Rule 17(c)(2)* is meant to protect the interests of the incompetent person, and dismissing Mr. Lindsly's claim only harms him rather than protects him.

Defendants' Motion to Dismiss is inappropriate and must be denied.

IV. CONCLUSION

Therefore, for all the reasons contained herein, Defendants' Motion to Dismiss has no merit and must be denied.

Respectfully submitted

/s/ Mark W. Napier
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CERTIFICATE OF SERVICE

I hereby certify that on January 9, 2008, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system

and copies will be mailed via U.S. mail to those parties who are not served via the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/Mark W. Napier