

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

GERALD J. LINDSLY	:	CASE NO. C-1-07- cv-588
Plaintiffs	:	Judge Spiegel
vs.	:	REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR FAILURE TO COMPLY WITH CIVIL RULE 17(C)(2)
MICHAEL WORLEY	:	
and	:	
WILLY DALID	:	
Defendants	:	

REPLY MEMORANDUM

A. The Facts:

Plaintiff Lindsly filed his complaint with this Court on July 30, 2007 while he was under a state court order committing him to a mental institution. The suit was not brought in the name of a next friend. Defendants have moved to dismiss this action and supplied an affidavit of the a deputy clerk with certified copies of the commitment orders. Plaintiff responds that sometime after the suit was filed, he was released from confinement in a mental hospital. The attorney representing Plaintiff Lindsly signed an affidavit essentially agreeing that at the time this suit was filed, Plaintiff Lindsly was confined in a mental institution by Court Order. There is no factual dispute.

B. Argument

Federal Civil Rule 17 and Ohio law treats minors and incompetent persons identically. The statute of limitations for a minor does not run until the minor attains age 18. The statute of

limitations for an incompetent is tolled while he is confined in a mental institution. See *R.C. 2305.16*. In Ohio, minors do not have the capacity to sue. *Cornell v. Brumfield* 115 Ohio App. 3d 259, 263 (1996). Since incompetent individuals, confined in a mental hospital, are treated by Ohio law in an identical fashion to minors, incompetent individuals also lack capacity to sue.

In *Johns v. County of San Diego* 114 F.3d 874 (9th Cir.1997) the Court held explained that state law controls as to whether a person has capacity to bring suit in holding:

An individual's capacity to sue is determined by the law of the individual's domicile. Fed.R.Civ.P. 17(b). Under California law, an individual under the age of eighteen is a minor. Cal.Fam.Code § 6502. A minor may bring suit as long as a guardian conducts the proceedings. Cal.Fam.Code § 6601. Because Casey is a minor, he lacked the capacity to sue on his own. Accordingly,*878 the district court did not err in dismissing the complaint as to Casey.

The result approved in the Ninth Circuit for a minor was a dismissal without prejudice. Once the minor attained the age of majority, a new suit could be filed. There is no reason that the same result should be achieved here. The suit filed during the incompetence of Plaintiff Lindsly should be dismissed without prejudice. If, as Plaintiff Lindsly's attorney now avers, his client is not incompetent or confined, a new suit in his own name could then be filed.

Indeed, Federal Civil Rule 17(b) provides that the capacity of an individual, other than in a representative capacity, to sue and be sued shall be determined by the law of the individual's domicile. At the time the suit was filed, Plaintiff Lindsly lacked the capacity to sue under Ohio law. Plaintiff Lindsly did not comply with Federal Civil Rule 17(c) by having his next friend be a nominal party.

C. Conclusion

This case should be dismissed because Plaintiff Lindsly, at the time it was filed, lacked the capacity to sue and did not avail himself of the requirements of Federal Civil Rule 17(c) by filing suit in the name of his next friend or seeking the appointment of a guardian ad litem.

Respectfully submitted,

JOSEPH T. DETERS
PROSECUTING ATTORNEY
HAMILTON COUNTY, OHIO

/s/ Christian J. Schaefer
Christian J. Schaefer, 0015494
Jerome A. Kunkel, , 39562
Assistant Prosecuting Attorneys
Hamilton County, Ohio
230 E. Ninth Street, Suite 4000
Cincinnati, Ohio 45202-2151
513/946-3041 (Schaefer)
FAX 513/946-3018
TRIAL ATTORNEYS FOR
DEFENDANTS WORLEY AND DALID

CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of January, 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which constitutes service.

/s/ Christian J. Schaefer
Christian J. Schaefer
Assistant Prosecuting Attorney