# THE CASES AGAINST PROVO CANYON SCHOOL
# MORE LAWSUITS ARE ON THERE WAY!

## MILONAS v. WILLIAMS

Timothy MILONAS. Jr, and Kenneth Rice, by and through their Attorney and Guardian Ad Litem, Kathryn Collard, on behalf of themselves and all others similarly situated, Plaintiffs-Appelles,

v.

Jack I. WILLIAMS. Owner and Administrative Director, Provo Canyon School; Robert H. Crist, Owner and Medical Director, Provo Canyon School; D. Eugene Thorns, Owner and Executive Director, Provo Canyon School, Defendants-Appellants,

John F. McNamara. Director and
Administrator, Interstate Compact
on Juveniles. Défendant.

Nos. 80-1569, 81-1407.
United States Court of Appeals,
Tenth Circuit.
Sept. 13, 1982..
Rehearing Denied Nov. 9, 1982

Former students brought action against private school for youths with behavioral problem for its use of "behavioral-modification program allegedly violative of section 1983 and of the Rehabilitation pct. The United States District Court for hp District of Utah, Bruce S. Jerkins, J., entered judgment, and appeal was taken. 'The Court of Appeals, McWilliams, Circuit Judge held that: (1) plaintiff students' removal from private school did not preclude hem from having standing required for hem to be entitled to represent class of students: (2) owners and operators of private school for youths with behavioral problems sere acting "under color of state law," as squired for former students to be able to bring section 1983 action; (3) record supported finding that the schools use of polygraph machine it: monitoring and censoring of student mail, its use of isolation rooms, and s use of eve physical force violated students' First and Fourteenth Amendment rights; and (4) fact that some parents approved of the "behavioral-modification" program did not compel finding that practices employed were "necessary," as required for them not to violate students' constitutionally protected liberty interests.

Affirmed

1. Federal Civil Procedure 164
Uninjured plaintiff cannot bring suit on behalf of injured class. Fed.Rules Civ. Proc. Rule 23(ax3), 28 U.S.C.A.; U.S.C.A. Const.Art. 3, § 2, cl. 1.

2 Federal Civil Procedure 187.5
Plaintiff students' removal from private school did not preclude them from having standing required for them to be entitled to represent class of students in action against private school for youths with behavioral problems for its use of "behavioral-modification" program allegedly violative of section 1983 and of Rehabilitation Act Fed.Rules Civ.Proc. Rule 23(a), (b)(4). 28 U.S.C.A.; Rehabilitation Act of 1973, § 5K 29 U.S.C.A. § 794; 42 U.S.C.A_ § 1983; Education of the Handicapped Act, §§ 602-661, 612(2)(B) as amended 20 U.S. C.A.. §§ 1401-1461, 1412(2)(B).

3. Federal Civil Procedure 62 Federal Courts 817
Class certification determination is matter -within sound discretion of trial court, and its conclusions as to whether class representative has demonstrated that numerosity, commonality, typicality. and adequacy of representation requirements have been met will not be disturbed absent showing of abuse of such discretion. Fed. Rules Civ.Proc. Rule 23(a), 28 U.S.C.A.; U.S.CA.Const.Art. 3, § 1 et seq.

4. Federal Civil Procedure 187.5
Named plaintiffs' having tuition at private school funded from sources differing from those of other student members of class did riot establish lade of- typicality

precluding certification in farmer students' action against private school for youths with behavioral problems for is use of behavioral-modification" program allegedly violative of section 1983 and Rehabilitation Act where all of youths at the school were in danger of being subjected to the allegedly unlawful "behavior-modification" practices. Fed.Rules Civ.Proc. Rule 23(a)(1, 3, 3, 4), 28 U.S.C.A.
5. Civil Rights 13.5(2) .
Conduct that constitutes "state action" for Fourteenth Amendment due process purposes is also action "under color of state Law" for purposes of section 19$3 civil rights suits. U.S.C.A.Const.Amend. 14; 42 U.S.C.A. § 1983. See publication words and Phrases for other judicial constructions and definitions.
6. Civil Rights 13.5(4)
Owners and operators of private school for youths with behaviors( problems were acting "under color of state law;" as required for former students to be able to bring section 1983 action against school for alleged violations of their civil rights occurring as result of the school's use of "behavioral-modification" program, where many students were placed at school involuntarily by juvenile courts and other state agencies. detailed contracts were drawn up by school administrator and agreed to by local school districts placing youths at the school, there was significant state funding of tuition, and there was extensive state regulation of educational program at the school. 42 U.S.C.A. § 19$11.
7. Prisons 4(5)
Person involuntarily confined by state is institution retains liberty interests that are protected by due process clause of Fourteenth Amendment: the right to reasonably safe conditions of confinement; the right to be free from unreasonable bodily restraints; right to such minimally adequate training as reasonably way be required by such liberty interests; right to-be free from censorship of correspondence; and right to privacy of his own thoughts, U.S.C.A.Const. Amend. 14.
8. Constitutional Law 82(13)
First Amendment rights do not terminate upon institutionalization. U.S.C.A Const,Amend. L
9. Criminal LAW 1213
The Eighth Amendment's proscription against "cruel sad unusual punishment" does not apply in situation where involuntarily confined person has not been adjudicated guilty of any crime. U.S.C.A.Const. Amend. 8.
10. Civil Right 13.13(3)
In former students' action against private school for youths with behavioral problems for its use of "behavioral-modification" program allegedly violating section 1983, record supported finding that the school's use of polygraph machine, its monitoring and censoring of student mail, its use of isolation rooms, and its use of excessive physical force violated students' First and Fourteenth Amendment rights. U.S.C.A. Const.Amends. 1, 14; 42 U.S.C.A. § 1983.

11. Constitutional Law 255(4)
Children, as well as adults, have substantial liberty interests that are protected from state action by Fourteenth Amendment, and such liberty interests. include right not to be confined unnecessarily for medical treatment, and concomitant with such right is right to be fees of unnecessary restrictions of other fundamental rights once confined to state institution. U.S.C.A. Const.Amend. 14.
12. Constitutional Law 255(4)
While judgments of parent are to be considered by court in determining "necessity" of burdens placed upon 'Wren's fundamental right by state institutions, parent - cannot authorize state to limit child's liberty without showing good cause therefore. U.S.C.A. Const.Amend. 14.

13. constitutional Law 278.5(6)
Fact that some parents approved of "behavioral-modification" program employed by private school for youths 'with behavioral problems did not compel finding that practices were "necessary,- as required for them not to violate students' constitutional protected liberty interests. U.S.C.A. Const.Amend. 14.
14. Judges 49(1)
Trial judge's serving as member of advisory counsel for local chapter of civil liberties association did not require judge's disqualification from ruling upon attorney fee application made in section 1983 action in which plaintiffs were represented by the association. 42 U.S.C.A. § 1988.
15. Civil Rights 13.17
No error occurred in including as party against whom attorney fee award was entered in section 1983 actor against private school defendant who became part owner of the school after the action was commenced 42 U.S.C.A. § 1988.
16. Federal Courts 543
Nonsettling party had no standing to appeal consent decree which. did not bind him nor interfere with legal relationship between nonsettling party and settling parties Kathryn Collard of Collard, Kuhuhausen, Pixton & Downes, Salt Lake City. Utah, and Mack I. Soler, San Francisco, Cal. (and Loren M. Warboys and Jan C. Costello, Juvenile Justice Legal Advocacy Project, San Francisco, Cal., with them on the brief), for plaintiffs-appellees. Max D. Wheeler, Salt Lake City, Utah (Harold G. Christensen and Paul C. Droz of Snow, Christensen & Martineau, Salt Lake City, Utah, with him on the beef), for defendants-appellants. Kathleen B. Boundy and Geraldine S. Hires. Attys., Cambridge, Mass, filed a brief on behalf of the Canter for Law and Educ., amicus curiae. Before McWILLIAMS and SEYMOUR. Circuit Judges, and BRINKER, District Judge.

Honorable Clarence A. Brimmer Jr. Chief Judge. U. S. District Court for the District of McWILLLAMS, Circuit Judge.

The Provo Canyon School for Boys, located near Provo, Utah, is a private school for boys between the ages of twelve and seventeen. Timothy Milonas, Jr., age fifteen, and Kenneth Rice, age sixteen, then students at the Provo Canyon School, brought the present action against the owners and operators of the Provo Canyon School. Also named as parties defendant were various agencies, officers, and employees of the State of Utah.'
The individual plaintiffs, Milonas and Rice, challenged the education, treatment and conditions of confinement of juvenile boys placed at the Provo Canyon School and averred that the school administrators acting under color of state law, had caused the plaintiffs to suffer and to be subjected to cruel and unusual punishment, anti-therapeutic and inhumane treatment, and denial of due process of law. Milonas and Rice sought class actions certification and, both
1. Jack L Williams owner and administrative director of the Provo Canyon School and Robert K Crist. owner and medical director of the Provo Canyon School were named as parties defendant is the original complaint Filed on September 21. 1978. D. Eugene Thorne became the executive director of the Provo Canyon School on Aped 1. 1979. and was added as a party defendant as September 11. 1979. Their defendants are appellants herein.
2. State defendants were: Anthony W. Mitchell Director, of the Utah Department of Social Services; the Utah Department of Social Services; James P. Wheeler Director of the Utah Division of Family Services; the Utah Division of Family Services; John F. McNamara, Director and Administrator of the Interstate Compact on Juveniles Walter D. Talbot, Superintendent of Public Instruction. Utah State Board of Education; and

the Utah State Board of Education. These defendants were either dismissed from the lawsuit or entered into consent decrees. Is this appeal, none of these defendants challenge the district court's disposition of the matter. .

3. The claim against defendant McNamara the director and Administrator of the Interstate Compact on Juveniles for the State of Utah was that he had failed to administer adequately his supervisory responsibilities regarding the placement of youths in Utah institution. It was McNamara's job to supervise the placement in Utah of juveniles from other states sent to Utah by juvenile courts and other welfare agencies. Milonas and Rice alleged that for themselves and the members of the class, asked for money damages and declaratory story and injunctive relief pursuant to 42 U.SC. § 1983 (1976). The named plaintiffs also alleged that they had been denied a free appropriate public education and sought relief pursuant to the Education for All Handicapped Children Act, 20 U.S.C §§ 1401-1461 (1976) and Section 504 of the Rehabilitation Act of 1973, 219 U.S.C. § 791 (1976).

Pursuant to Fed.R.Civ.P. 23(a) and (b)(2). the district court provisionally certified the class. For purposes of the preliminary relief requested, the class was described as consisting of all juveniles residing at the Provo Canyon School during the pendency of the civil rights action. At that time, the district court also entered a preliminary injunction that enjoined four "behavior-modification" practices then in. effect at the school.

McNamara's negligence had resulted in their placement at the Provo Canyon School, where they were subjected to abusive treatment During the course of the proceedings in the district court, the plaintiffs and defendant McNamara entered into a consent agreement in which defendant McNamara agreed, inter alis, to request that out-of-state officials hove boys form the Prow Canyon School and refrain from placing any other juveniles at the school.

The claim against defendant Talbot. the superintendent of public instruction for the State of Utah. and defendant Utah State Board of Education was that each had failed to provide an adequate free appropriate public education for all handicapped children is the State of Utah as required by the Education for All Handicapped children Act. 20 U.S.C, 1412(2)(B) (1976). During the course of the proceedings in the district court, these defendant also entered into a consent decree with the plaintiffs. In this consent decree the Utah defendants agreed. inter alis. that they were subject to the provisions of Sections 504 of the Rehabilitation Act of 1973, 29 U.S.C. ; 794 (1976). and the Education for All Handicapped Children Act, 20 U.S.C. § 1401-1461 (1976), and the regulations promulgated there under. . to adopt regulations and procedures to implement these federal laws in the State of Utah to -monitor institutional compliance with the new state guides nod to provide a safe and free appropriate public education to all handicapped children in the State of Utah.

The plaintiffs' claim for money damages was tried to a jury; the district court reserved for its determination the claims for declaratory and injunctive relief. At the conclusion of a lengthy trial, the jury returned a verdict in favor of the defendants on the damages issue. Nonetheless, the trial judge later entered a permanent injunction as to those four school administrative practices that were the subject of the preliminary injunction previously entered. For purposes of this permanent relief, the district court certified a class consisting of all boys reading at the Provo Canyon School as of the date of the permanent injunction. and in the future.

The permanent injunction specifically prohibited the defendants from: (1) opening, reading, monitoring or censoring the boys' mail; (2) administering polygraph examinations for any purpose whatsoever; (3) placing boys in isolation facilities for any reason other than to contain a boy who is physically violent; and (4) using physical force for any purpose other than to restrain a juvenile who is either physically violent and immediately dangerous to himself or others? or physically

resisting institutional rules.
The district court later found that the plaintiffs were the "prevailing party" pursuant to 42 U.S.C §1988 (1976) and that they was entitled, therefore. to an award of attorneys fees The district court filed an exhaustive memorandum opinion wherein it made findings of fact and conclusions of law. This opinion was not published.
*4. Tuition* at the *Prow* Canyon School is *$1,600* per *month However* from the date of its inception as an institution in 1973. the *Provo* Canyon School has *received* significant amounts *of* government money *to* sustain its its operations. Many of the *boys* are placed at the *school by* local school districts for special education purposes School districts in California, Wyoming, Utah. Illinois, North Carolina , Alaska, New York, Minnesota, Washington, and Idaho have sent boys to the faculty. These placement are accomplished through contractual arrangements between the local school of officials and the Provo Canyon School administrators. "Funding for the boys' special education from federal and state treasuries pursuant to the Education for *All Handicapped Children Act* and corresponding state special The district court then entered final judgment and fixed the attorneys' fees at $133,546.54 For a discussion of the procedural history of this appeal, see Milonas v. Williams 648 F.2d 688 (10th Cir. 1981).
The Provo Canyon School is privately owned and operated, although it does receive funds from both state governments and the United States. The school was established in 1973 for the primary purpose of educating teenage boys whose problems are so severe that their treatment and education require a restricted, therapeutic environment. All of the boys admitted to the school have problems of one sort or another, including physical, psychological, and emotional problems, and are handicapped by a general inability to conform to normal behavioral standards. The district court described the school as follows:
The Provo Canyon School is not a school in the traditional ordinary or classic sense. It does offer classes on a secondary level to its resident population, and in most instances does a good job in its formal teaching. Provo Canyon School is also a correctional and detention facility. Students are restricted to the grounds Students are confined. Some students are locked in and locked up with varying degrees of personal liberty restored as each progresses through the institutional *program.* If a student leaves without permission, he is hunted down, taken into custody and returned.

Provo Canyon School is also a mental health facility. Adolescent males education levee to *1979.* the school received *$568,278.24 from* local *school* districts. Additional governmental funding dale has . juvenile courts said probation departments and county *governments* end welfare agencies. 1Ue figure below demonstrate that the *school* relied heavily upon government financing:perceived to have mental health or emotional difficulties or who are chemically dependent persons, see counseled and treated. Adolescent makes with forms of learning disability, physical, mental or emotional, are housed. counseled and "taught.." The student population, intermixed and various, is subjected to a form of behavior modification" described by those who run the school as eclectic. Some of its salient features are isolation from the outside world, little or no communication with the outside world, physical confinement, physical punishment, progressive restoration of liberty, investigation and evaluation of student "attitude" and "truthfulness" and "future conduct" through the use of a machine, and counseling.

Regardless of origin, condition or motivation, once arrived, each person during the beginning phases of the school program was locked in, isolated from the outside world, and whether anti-social, crippled or learning disabled, was subject to mandated physical standing day after day after day to promote "right thinking" and "social conformity." Mail was censored. Visitors were discouraged. Disparaging remarks concerning the institution were prohibited and punished. To "graduate" from

confinement to a more liberated phase, one had to "pass" a lie detector test relating to "attitude," "truthfulness and "future conduct." Some failed to pass and remained in confinement for extended periods of time

Students generally are admitted to the Provo Canyon *School at* the insistence of one or both of their parents. Typically, the parents have had extreme disciplinary problems and being unable to control their child have contacted, the Provo Canyon School as a *"last* resort" Other boy are received at the school directly directly from juvenile courts and probation officers from across the nation. Many of the youths are placed at the Provo Canyon School by the boy's local school *districts,* with tuition funding coming from state and federal agencies pursuant to state special education laws and the federal Education for All Handicapped Children Act. Plaintiff Timothy Milonas Jr., had resided in the State of Nevada prior to being involuntarily committed to the Provo Canyon School by his mother. Milonas' commitment was a condition of probation imposed by a Nevada juvenile court. Milonas' father thereafter received a coded letter from his son, which letter implied that the son needed assistance. Because of that letter, Milonas' father independently contacted counsel regarding the school and how it was being run. Kenneth Rice, the other individual plaintiff, had resided in Alaska until his involuntary commitment to the Provo Canyon School. Rice was placed in the school pursuant to an order of an Alaska juvenile court. Four months after he was admitted to the Provo Canyon School, Rice ran away from the school, and, before he was returned. he made contact with an attorney and complained about conditions at the school. As a result of the complaints thus made by Milonas and Rice, the present action was instituted.

*Class Certification*

Both Milonas and Rice were students at the Provo Canyon School on the date this action was commenced. On the date the complaint was filed, counsel for Milonas and Rice, fearing that the boys would be subject to retaliation by the defendants because of the commencement of the lawsuit, sought and obtained an immediate hearing before the district court. Based on such bearing and a stipulation between the parties, the district court ordered that Milonas and Rice be removed temporarily from the school and placed for the time being with the Utah State Division of Family Services. Each boy sought damages and injunctive relief for himself, and, in addition, they also asked for damages and injunctive relief for a class which they sought to represent. The class, according to the complaint, consisted of "all juveniles who have been, are now, or in the future will be placed at the Provo Canyon School." The district court provisionally granted plaintiffs motion for class certification, and, later, at the conclusion of the trial, such grant was made permanent. The first issue raised by the defendants in this appeal concerns the propriety of class certification. The defendants contend that the district court erred is granting the individual plaintiffs' request for class certification. This particular contention is based on either of two grounds. Fist, the defendants assert that by leaving the Provo Canyon School on the day that the lawsuit was filed, pursuant to the order of court to which reference was made above, Milonas and Rice lost membership in the class that they sought to represent The defendants reason that Milonas and Rice. being "outsiders" at the time of class certification, could not represent those boys "inside" the school. In essence, the defendants aver that the named plaintiffs lacked standing to pursue the lawsuit on behalf of the class members. Second, the defendants assert that the individual claims of Milonas and Rice were not "typical" of the claims of the class members and, therefore, at the time of class certification, Milonas and Rice were merely "officious intermeddlers." Fed.R.Civ.P. 23(a)(3). We are not persuaded by either of these arguments.

(1) It is axiomatic that an uninjured plaintiff cannot bring suit on behalf of an injured class. U.S.Const. art III, §. 2, d 1; Worth v. Seldin, 472 U.S. 490, 502, 95 S.Ct. 2197, 2207, 45 L.Ed.2d 343 (1975): Bailey v. Patterson, 369 U.S. 31, 32-.33, 82 S.Ct. 549, 550-551, 7 L.Ed.2d 512 (1962). It is well settled, however, that a named plaintiff may continue to represent a class that has been certified as such even after the named plaintiff's personal stake in the outcome of5. the Supreme Court's most recent pronouncement as this matter appears in United state " Parole Comm' n v.

Geraghty 445 U.S. 388. 398. *100 S.Ct. 1202, 1209. 63* L.Ed.2d 479 (1980). wherein the court noted that. [although one might argue that Sosna contains at least an implication that the critical factor for Art. III purposes is the timing of class certification other case, applying a "relation back" approach, clearly demonstrate that timing is not crucial. When the claim as the merits is "capable of repetition. yet evading review," the named plaintiff Drives the class certification issue despite loss of his personal stake in the outcome of the litigation E.g., Gerstein . Pugh, 420 the litigation has been mooted. Soma v. Iowa, 419 US. 393, 399, 95 S.Ct. 553, 657, 42 L.Ed.2d 532 (1975). Furthermore. "[there may be cases in which the controversy involving the named plaintiffs in such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." Id at 402 n.11, 95 S.Ct. 559 n.11. In such instances, the district court may apply a "relation back" theory and grant late certification in an otherwise moot case and thereby prevent mootness. Id; Napier v. Gertude, 542 F.2d 825, 828 (10th Cir 1976), cert. *denied, 429* U.S. 1049, 97 S.Ct. 759, 50 L.Ed.2d 765 (1977). See generally Note, Class Standing and the Class Representative, 94 Harv.L Rev. 1637 (1961). The key to whether a particular case falls within that "narrow class of cases in which the termination of a class representative's claim [prior to class certification] does not moot the claims of the unnamed members of the class," Gerstein v. Pugh. 420 U.S. 103, 110 n.11, 95 S.Ct. 854, 861 n.11, 43 L.Ed.2d 54 (1975), is whether the claim on its merits is "capable of repetition, yet evading review." United States Parole Comm'n n v. Geraghty, 445 U.S. 388, 398, 100 S.Ct. 12(12, 1209, 63 L.Ed.2d 479 (1986). Ours is such a case.

[2] . When the present action was instituted, Milonas and Rice were students in the Provo Canyon School, and as such were members of the class, they sought to represent. Understandably, the boys were removed from the Provo Canyon School at the earliest possible date. The district court could not have been expected to rule on a U.S 103. 110 a.11, 1. 95 S.Ct. *e54. 861 x411. 43* L.Ed.2d x (1975) The "capable of repetition, yet evading *review" doctrine to* be *sure,* was developed outside *the* class *action context . ..* but it has been applied *where* the named plaintiff does have a personal stake *at the* outset of the lawsuit, and where the claim may arise *again* with respect to *that* plaintiff; *the litigation* then may continue notwithstanding the cased *plaintiff's* current*. lack of a* personal stake . . .. Since the *litigatant faces some* likelihood of becoming involved in the same controversy in the *future,* vigorous advocacy can be expected *to continue.* class certification motion prior to the date of the boys' removal from the school premises. Also, the district court's order placing the boys in the care of state officials was temporary in nature and, therefore, it was possible that the boys would be returned to the school. In our view, the fact that Milonas and Rice were removed temporarily from the school as a precautionary measure does not mean that they thereby lost their "personal stake" in the controversy. And most certainly the controversy itself was postured in a truly adversary setting. It is our conclusion, therefore, that Milonas and Rice satisfied the constitutional requirement of presenting a live case and controversy to the district court on behalf of themselves and the members of the class. Defendants' "lack of typicality" argument is based primarily on the fact that Milonas' tuition at the school was funded by his parents and that Rice's tuition was funded by the State of Alaska, whereas other students were funded by different financial sources, including federal special education money. According to counsel, such demonstrates that the individual claims of Milonas and Rice are not typical of the class's claims. We disagree.

[3] We note that in addition to Article III standing requirements, Fed.R.Civ.P. 23(a) lists four prerequisites to the certification of a class and the maintenance of a class action. Upon the failure of the class representative to meet any one of the

prerequisites of the rule, class certification will be denied. This determination, however, is a matter within the sound discretion of the trial court and the trial court's conclusions as to whether the class representative has
6 Fed.R.Civ.P. 23(a) provides that a class action may be maintained only if the following requirements are met: (1) the class is so numerous that the joinder of all class members is impracticable; (2) there are questions of law and fact common to the class; (3) the claims of the representative parties are typical of the claims of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
7. Defendants' reliance upon our decision in Albertson's; Inc. v. *Amalgamated S*ugar, lnc. 503
demonstrated that. the numerosity. commonality, typicality, and adequacy of representation requirements have been met "will not be disturbed absent a showing of abuse of that discretion." Rex v. Owens ex rel State of Oklahoma, 585 F.2d 432, 436 (10th Cir. 1978).
[4] In determining whether the typicality and commonality requirements have been fulfilled, either common questions of law or fact presented by the class will be deemed sufficient. Factual differences in the claims of the class members should not result in a denial of class certification where common questions of law exist. Penn v. San Juan Hospital, Me, 578 F2d 1181, 1189 (10th Cir. 1975); Lice v. Carter. 448

F2d 798, 802 (8th Cir. 1971 As we have stated previously, every member of the class need not be in a situation identical to that of the named plaintiff. Rich v. Martin Marietts Corps, 522 F.2d 333, 340 (10th Cir. 19773).
Milonas and Rice, together with the class which they were certified to represent, have common claims against the defendants, Le, that the disciplinary practices carried on at the school violated various constitutional and statutory rights of the individual plaintiffs and of the class Regardless of their source of funding or; indeed, their individual disability or behavioral problems, all of the boys at the school were in danger of being subjected to the four enjoined "behavior-modification" practices. In our view, the typicality and commonality requirements of Fed.R.Civ.P. 23(a)(3) have hem met In sum. the district court did not err in granting alas certification.
F.2d 459 (10th Cir. 1974). is misplaced In that case, we upheld the trial court 's denial of class certification because we found that the party seeking to represent the class had bad interests antagonistic to the persons he sought to represent. Id at 463. Such is not the case in the instant action.
8. No challenge is made on appeal to the district court's finding that the requirements of Fed.R Civ.P. 23(a)(l) and 23(a)(4) was satisfied.
State Action
Section 1983, 48 U.S.C. § 1983 (1976) provides, in essence,- that any Person who, under the color of state law, taste another to be deprived of rights secured by the Constitution or laws of the United States shall be liable to the-injured party in an action at law or a suit in equity. 28 U.S.C. § 1343 (1976) confers original jurisdiction on federal district snorts to hear proceedings brought under Section 1.983. In the instant cage, the plaintiffs alleged, and, at trial, attempted to show, that their constitutional and statutory rights had been violated by the owners and operators of the Provo Canyon School and that, in so doing, the defendants were acting under the color of state law. In awarding to the plaintiffs injunctive relief, the district court found that the enjoined practices were carried out under the cloak of state action This conclusion was based on the fact that various states, be it through their juvenile courts or their school districts. had planed the plaintiffs, or at least many members of the class, in the institution, and that there was significant funding and regulation by the state. We agree.

[5] When a private party, as compared to a state employee, for example, is charged with abridging rights guaranteed by the Constitution or laws of the United States. the plaintiff, in order to prevail under Section 1983,~tnust show that the private party
9. Having concluded that the *district* court had jurisdiction to issue the injunction under 42 U.S.G S 1983 (1976) and 28 U. S. C. § 1343 (1976), we need not decide whether there was independent jurisdiction order the Education for AV Handicapped (31iWnen Add 1975. 2O U.S.G §§ 1401-1461 (1976) or under Section 504 of the Rehabilitation Act of 1973. U.S.G § 794 (1976).
The Education for All Handicapped Children Act of 1975 is a funding statute, requiring states seeking and receiving funds under the Act to provide a free appropriate public education for all school age children in their jurisdiction. The requirements of the Act are sent forth in the form of conditions on the receipt of federal funding. For a general review of the proposes of this Act and the meaning of the term "free appropriate public education," see generally Hendrick Hudson Dist. Bd of *Educ. v.* Rowley, - US. -, 102 S.Ct 3034, 73 was acting under the color of state law. The reason for this is fundamental. The fourteenth amendment, which prohibits the mates from denying federal constitutional rights and which guarantees due process, applies to the acts of the states, not to acts of private persons or entities. *Shelley v.* Kraemer, 334 US. 1, 13, 68 S.Ct. 836, 842, 92 L.Ed. 1161 (1948); *(Civil* Rights Cases, 109 U.S. 3, 11, 3 S.Ct. 18, 21, 27 L.Ed. 835 (1883). And Section 1983, which was enacted pursuant to the authority of Congress to enforce the fourteenth amendment, prohibits interference with federal rights by persons acting under color of state taw. Conduct that constitutes "state action" for fourteenth amendment due process purposes is also action "under color of state 4w" for purpose's of Section 183 *Civil* rights suits. Lugar v. Edmondson Oil Co.. *-U.S.-_, 102 S.Ct. 2744. 73 L.Ed.2d* 482 (1982); United States v. Price, 383 U.S. 787, 794 n.7, 86 S.Ct. 1l52, 1156 n.7, 16 L.Ed.2d 267 (1966). The United States Supreme Court has stated that the ultimate issue in determining whether a person is subject to snit under Section 1983 is whether the alleged infringement of federal frights is fairly attributable to the state. *Rendell-Baker v. Kohn, -U.S. , 102* S.Ct. 2764, ?3 LFd.2d 418 (198'L).
[6] In our view, the district court's finding that the defendants, owners and operators of the Provo Canyon School, were act
L.Ed.2d 690 (1962); Hyatt. Litigating the Rights of Handicapped Children to an Appropriate Education: Procedure and Remedies, 29 U.C.L.C L.Rev. 1 (1961): Note, Enforcing the Ri6ttt to as "Appropriate" Education: 'tire Education for AM Handicapped Children Act of 1975. 92 Harv.L.Rav. 1103 (1979). Section 504 of the Rehabilitation Act of 1973 Provides, in pertinent part, that "[no otherwise qualified individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial. assistance." 28 U.S.C. f 794 (Supp. III 1979). For a general review of this Act. see Southeastern Community. College v. Davis, 442 U.S. 397.99 S.Ct 2361. 60 L.Ed.2d 980 (1979) Pushkin v. Regents of the University at Colorado 658 F.2d 1372 (10th -Cir. 1961).
ing under color of state law finds support in the record and is in accord with applicable law. In the instant case, the state has so insinuated itself with the Provo Canyon School as to be considered a joint participant in the offending actions, *See Burton* v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961): *Browns v:Mitchell. 409* F.2d 593, 595 (10th Cir. 1969). Many of the members of the class were placed at the school involuntarily by juvenile courts and other state agencies acting alone or with the consent of the parents Detailed contracts were drawn up by the school administrators and agreed to by the many local school districts that placed boys at the school. There was significant state

funding. of tuition and, in fact, the school itself promoted the availability of public school funding in its promotional pamphlet. These was extensive state regulation of the educational program at the school. These facts demonstrate that there was a sufficiently done nexus between the states sending boys to the school and the conduct of the school authorities so as to support a claim under Section 1983.
In the district coat. defendants relied heavily an Rendell-Baker v. Kohn, 641 F2d 14 (1st Cir 1981). The defendant school involved in Rendell-Baker was indeed quite similar *in* its, operation to the Provo Canyon School The party chiming a Section 1983 violation in that case were employees discharged flora the school. The holding of the First Circuit in Rendell-Baker was that m discharging the plaintiffs the school officials bad *not* acted under the color of state *taw.* In so ruling, the First Circuit did comment, however, that students in the school there involved "would have a stronger argument than do plaintiffs that' the school's action toward them is taken 'under color of date taw; since the school derives its authority caves them from the state." 611 F2d at 25 (in original). .
On review, *the* Supreme Court affirmed the First Circuit's decision. *Rendell* v Kohn. - U.S.- , 102 S.Ct. 2764, 73 L.Ed.2d 418 (1982). The Supreme Court phrased the issue there to be resolved as "whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under the color of state law when it discharged certain employees" Id (empha*sis* added). As indicated, the Supreme Court held that state funding and regulation was not sufficient to support a finding of state action in the discharge by the private school of employees of the school. The Court recognized that "in contrast to the extensive regulation of the school generally, the various regulators showed relatively little interest in the school's personnel matters." Id. To us, Rendell-Baker differs from the present case in at least one important respect. The plaintiffs in the present case are not employees, but students, some of whom have been involuntarily placed in the school by state officials who were aware of, and approved of, certain of the practices which the district court has now enjoined. *Rendell-Baker does* not control the Section 1983 issue before us.

**The Enjoined Practices:**

**As indicated, the district court entered a permanent injunction which enjoined the defendants from their use of the polygraph, monitoring and censoring of mail, use of isolation rooms, and acre of excessive physical force. In this regard, the district court found that the defendants' actions violated fast and fourteenth amendment rights of the plaintiffs.**

The trial of this case was a protracted one, lasting some four weeks. The district court beard testimony from numerous educational experts, present and forever students in the school, present acrd former employees of the school, and from the defendants themselves. Needless to say, the testimony of these witnesses was in conflict to some appreciable degree. The plaintiffs witnesses tended to paint a picture of undue punishment, if *not* outright brutality, in no wise related to the school's educational program. The defendants' witnessed, on the contrary, indicated that the *schools dis*ciplinary practices were a necessary adjunct to its educational program and that the use of force or *coercion* was limited to those extreme cases where a student was "out of control" and posed a threat to himself or others. It was on this sort of a record that the district court permanently enjoined four disciplinary practices. At the same time, the district court refused to enjoin nine other practices which the plaintiffs also sought to enjoin. As noted, the district court did enjoin the defendants' use of the polygraph. Specifically, the district court made the following findings concerning the defendants' use of the polygraph:
As to the polygraph, the court has difficulty envisioning a set of facts that would

justify the use of the polygraph on juveniles, either in the tame of "therapy" or for security. That set of facts certainly did not oust at Provo Canyon School. Although there was some evidence offered in support of justification, and some evidence of "voluntary" use of the Polygraph by boys. this device is inherently coercive and represents the most serious intrusion into the very thought processes of an individual. It was certainly used in a coercive manner at the Provo Canyon School. Refusal to take the polygraph resulted in punishment hours that boys ,had to sit or stand off and meant that a boy could not advance within the school program and could not leave the school. Boys were abject to punishment not only for what the polygraph revealed that they had done, but also for what the polygraph showed they had *thought* about doing. Until this court's Preliminary Injunction, all boys at the school were subject to the same polygraph polices, even those [boys] placed exclusively for special education and those [boys] with no record of juvenile offences.

The school also used the polygraph to prevent the flow of any negative information about the school. Boys entered into agreements and even formal contracts with the school to obey the rain acid avoid "negative thinking;" which included saying bad things about the school. The polygraph was used to test. performance of those agreements or con was used on the students. Brief mention should be made .of the defendants' use of a practice nick-named the hair- dance." The Pro" Canyon School Manual suggested that in dealing with a belligerent 'student, a school employee should grab one of the student's arms and clutch the boy's hair with his other band. Such grabbing and pulling of the hair was believed to be the least harmful and, at the same time, the most effective way of bringing a student under control. In connection with the use of force at the Novo Canyon School, the district court found as follows:

(Although written school policies forbade excessive or inappropriate use [of force] actual practices varied from written policies, and excessive and inappropriate ass of isolation and physical force tools place. The "hair dance," designed as a means of controlling physically Violent juveniles without causing them undue physical harm, was used in response to conduct other than physical violence or physical resistance, was used as punishment rather than simply for immediate control, was used as a threat, and on occasion resulted in the very physical injuries it was supposed to prevent.

[The use of the term "out of control" as a justification for the basically uncontrolled discretion in subjecting juveniles to the P-Room and hair dance permitted 'unreasonably harsh school responses b the conduct of disturbed boys.

It was the defendants' position in the district court, as it in on .appeal, that the practices enjoined by the district court are reasonably related to considerations of administration and security and am rationally directed toward the realization of legitimate and important objectives of education, therapy, and' social rehabilitation. In this regard, the defendants accept the basic constitutional standards enunciated in Bell v.

10. The eighth amendment's proscription against "cruel and unusual punishment" does not apply in the situation, such as we have in the instant case, where the involuntary confined person as not been adjudicated guilty of any crime. Bell v. Wolfish, 441 U.S. 520,535 n.16, 99 S.Ct 1861, 1871 n.16, 60 L.Ed.2d 447(1979); Ingraham v. Wright, 430 U.S 651, 97 S.Ct. Wolfish 441 US. 52D, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), and assert that, under Bell, institutional restrictions which actually do infringe on specific constitutional guarantees still must be evaluated in the light of the legitimate objectives of the institution, and that a court should adopt a "reasonable relationship" test to effect the teary balancing.

[7-9] A person involuntarily confined by the state to an institution retains liberty

interests that are protected by the due process clause of the fourteenth amendment. Bell v. Wolfish, 441 U.S. 520, 99 S.Ci;. laic, 60 L.Ed2d 44? (1979). Such person has the right to reasonably safe conditions of confinement, the right to be free from unreasonable bodily restraints, and the right to such minimally adequate training as reasonably may be required by these interests. Youngberg v. Romeo, -- U.S. --, lO2 S.Ct. 2452. 73 L.Ed.2d 28 (1982). Such person also loss the right to be free from censorship of correspondence, because first amendment rights do not terminate upon institutionalization. Procunier v. Martinez, 416 US. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) And such person has the right to the privacy of his own thoughts, which cannot be probed by use of polygraph examinations.

[l0] In assessing institutional restrictions. courts must take into account both the liberty interests of the individual and the legitimate seeds of the institution for order and security. The district court below properly undertook a balancing process to determine whether the challenged disciplinary practices were so onerous as to overcome the legitimate administrative sad security interests of the school. We are in accord with the district court's findings and conclusions on this matter bee each are

*1401, 51 L.Ed.2d* 711 (1977). Any institutional rules that amount to punishment of those involuntarily confined prior to an adjudication of guilt of criminal wrongdoing are volative of the due process clause per se. The district court blow property rejected the *plaintiffs'* claim that the Provo Canyon School had violated rights guaranteed by the eighth amendment.

amply supported by the record. Furthermore, we believe that the district court's conclusions of law are in accord with the applicable cases. See Procunier v. Martinez; 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974) (invalidating mail censorship by prison officials); Levine v. Wright, 423 F.Supp. 357, 366 (D.Utah 1976) (upholding use of polygraph by prison officials for limited purpose only); Penn v. New York State Div. for Youth, 419 F.Supp. 203 (S.D.N.Y. 1976) (use of isolation rooms for punishment unconstitutional); and Nelson v. Heyne, 491 F2d 352 (7th Cir. 1974) (nee of undue physical force invalidated).

Parental Consent

As above indicated, in many instances a parent not only consented to the placement of a con in the Provo Canyon School, but also knew in advance of the very disciplinary practices enjoined by the district court On appeal, the defendants- argue that the district court failed to give "proper deference" to such parental consent. In this connection, it is not defendants' position that parental consent permit/ the defendants to violate student/' constitutional right/. Rather, the defendant/' position on this particular matter that, in determining whether the enjoined practices bone a reasonable and rational relationship to the legitimate objectives of the Provo Canyon School, the district court failed to take into consideration. or give proper weight to, the fact that some parents consented to the enjoined "behavior modification" practices. We are not persuaded by this argument.

[11-13] Children. as well as adults, have substantial liberty interests that are protected from state action by the fourteenth amendment. See Addington Texas, 441 U.S. 418, 425, 99 3.1.1804, 1808. 9t/ *L.Ed.2d* 323 (1979): In re Gault; 987 U.S. 1, 21, 87 S.Ct. 1428, 1443, 18 L.Ed.2d 527 (1967). These liberty interest include the right not to be confined unnecessarily for medial treatment. Parham v. J. R, 442 U.S. 584: 600, 99 S.Ct , 2493, 2503, 61 L.Ed2d 101 (1979). Concomitant with this right is the right to be free at unnecessary restrictions

of other fundamental rights once confined to a stele institution. The district court below recognized that the boys placed at the Provo Canyon School retained certain fundamental rights that could be curtailed only if necessary to maintain order and security at the school. As indicated, the trial court? after balancing the various

interests, and noting, incidentally, that same parent/ who had placed their boys in the school had knowledge of the school's disciplinary practices, concluded that the four enjoined practices were not necessary and that they unduly burdened the boys' constitutional rights. While judgments of a parent ire to be considered by the court in determining the "necessity" of burdens placed upon children's fundamental rights, a parent cannot authorize the stele to limit a child's liberty without slowing good carne therefore. Cf. Bellotti v. *Baud,* 443 U.S. 622, 633,-,79, 99 S.CL 3035, 30C-3016, 61 *L.Ed.2d 797 (19T9); Planned Parenthood of* Central Missouri v. *Danforth,* 428 U.S. 52, *72-75,* 96 SAX 2831, 2842-2843, 49 L.E42d 788 (1976). The district court's balancing process comported with proper constitutional procedure. We are in accord with it/ conclusion that the fact that some parents approved of the enjoined practices does not compel a finding that the practices were necessary.

Attorneys' Fees

The district court awarded to the plaintiffs attorneys fees in the amount of :133; 31654 under 42 US.C. J 1988 (L976~ On appeal, the defendants argue that if this Court should vacate the permanent injunction then the plaintiffs would cot be a "prevailing party," and, in such circumstances the sward of attorneys' fees should also be vacated. We agree. However, we are not reverses the district court is the present proceeding: but rather affirming.

[14] The Honorable Bruce S. Jenkins, a United States District Judge for the District of Utah, prided over the trial of this case and later, in a separate hearing. awarded attorneys' fees. Prior to the hearing on attorneys' fees, the defendants sought to have Judge Jenkins disqualify himself from setting the fee. The basis for this challenge was that, in 1965, long prior to his appointment as a federal district court judge, Judge Jerkins served as a member of the advisory council for the local chapter of the American Civil Liberties Union. Defense counsel argued that the American Civil Liberties Union represented Milonas and Rice in the present proceeding and that, in fact, it was the real *party* in interest. Judge Jenkins. who had handled pretrial matters and the lengthy trial, declined to disqualify himself in connection with the setting of attorney' fees. We find so error. Indeed, the ground for disqualification, La., some minor connection with the ACLU fifteen years ago, is most tenuous on its face.

[15] Defense counsel also its that the award of attorneys' fees against the defendant Dr. D. Eugene Thorne was not justified. We disagree. At the time of the entry of the permanent injunction, Dr. Thorne. along with *Jack* L. William and Robert & Crist, was a co-owner and co-operator of the Provo Canyon School. Although William and Crist had been associated with the school from its inception. Dr. Thorne became associated with the school shortly after the commencement of the present action, initially as paid consultant, and later as executive director and part owner of the school. And, as indicated, he was serving as the executive director and part owner of the school when the. permanent injunctions was entered. We find *no* error in including Dr. Thorns as one of the defendants against whom the award of attorneys' fees was entered.

The Consent Decrees

The three co-owners of the Provo Canyon School were not the only defendants named in the complaint. Also named as portion. defendant ware *the* Utah Board of Education and Walter D Talbot. Superintendent . of *Public* Instruction for the State of Utah. A consent decree was entered as *to* the Utah Board of Education and Talbot. This consent decree related to the regulation and monitoring by these particular defendants of special educational services for handicapped children in "private" institutions in the Stile of Utah, which institutions were . receiving monies from the Sate of Utah, such monies. in turn, having been received from the federal

government under the provisions of the Education for All Handicapped Children Act In this connection, see also note 3, supra

Another defendant named in the complaint was John F. McNamara, the Administrator of the Interstate Compact on Juveniles for the State-of Utah. Juvenile courts in states outside of Utah placed boys at the Provo Canyon School facility. There was some dispute as to whether these placements were, strictly speaking, made under the interstate compact. or made directly by the placing state with the school. In any event, McNamara did make monthly visits to these out-of-state students and forwarded reports to tire sending states concerning the students' health and general welfare.
The plaintiffs and McNamara also entered into a consent decree in which McNamara agreed: (1) not to approve any future out-of-state placements in Provo Canyon School or any other private juvenile educational facility in Utah unless such facility was approved by the Utah Division of Family Servers: (2) to request, after thirty days, out-of-state sending officials to remove their placements from unapproved Utah facilities: and (3) to notify out-of-state Interstate Compact Administrators of the term of the consent decree. As a part of the present appeal, the co-owners of the Provo Canyon School seek to have set aside and vacated this consent decree entered against McNamara.
[16] The general rule is, that a nonsettling party has no standing to appeal a consent deem which does not bind him and interferes with no legal relationship between the nonsettling party and the settling parties. event though the noting party may have sustained some economic loss as a result of the consent decree. Utility Contractors: Amen of New Jersey, lnc: v. Toops, 507 F.2d 83 (3rd Cir: 1974). We see no reason to depart from that general rule the instant case. Further, in our view, the consent decree itself appears to be a reasonable one, and, contrary to the contention of counsel, does not impose unlawful conditions.

Judgment affirmed

**162 F.3d 827**
**David TAYLOR, Plaintiff-Appellant-Cross-Appellee,**
**v.**
**CHARTER MEDICAL CORPORATION, and Charter Provo School, Inc. d/b/a Provo Canyon School, Defendants-Appellees.**
**No. 97-10084.**
**United States Court of Appeals,**
**Fifth Circuit.**
**Dec. 9, 1998.**

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Frederick Henry Shiver, Daniel Wayne Shuman, Dallas, TX, for Plaintiff-Appellant.

Terriann Trostle, Houston, TX, Marcy Hogan Greer, Austin, TX, Walter A. Herring, Fulbright & Jaworski, Dallas, TX, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas.

Before SMITH, DUHE and WIENER, Circuit Judges.

WIENER, Circuit Judge:

Plaintiff-Appellant David Taylor ("Taylor") appeals the district court's grant of partial summary judgment in favor of Defendant-Appellee Charter Provo School, Inc. d/b/a Provo Canyon School ("New

Provo Canyon"), holding that New Provo Canyon is not a state actor for purposes of 42 U.S.C. § 1983. Concluding that the district court's holding is correct, we affirm.

I.

FACTS AND PROCEEDINGS

This case involves claims arising from the psychiatric treatment Taylor received while a student/patient at New Provo Canyon, a wholly-owned subsidiary of Defendant-Appellee Charter Medical Corporation ("CMC") and a private, adolescent, residential hospital in Provo Canyon, Utah. Taylor was a minor when his mother voluntarily admitted him to New Provo Canyon where he was a residential patient from October 1990 to August 1991.

After attaining the age of majority, Taylor filed suit in state court in 1995 against New Provo Canyon and CMC, alleging various state law claims--fraud, medical negligence, false imprisonment, breach of fiduciary duty, and gross negligence--arising from his treatment at New Provo Canyon. After the defendants removed the case to district court on diversity grounds, Taylor amended his complaint to add specified § 1983 claims. [1] New Provo Canyon then moved for partial summary judgment as to the § 1983 claims only, insisting that it was not "acting under color of state law" when it treated Taylor and

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was thus not liable as a state actor under § 1983. Taylor countered that consideration of New Provo Canyon's position on the "state actor" issue is foreclosed by the Tenth Circuit case of Milonas v. Williams. [2]

Milonas was a class action suit brought against the Provo Canyon School ("Old Provo Canyon") in 1980. In Milonas, a district court in Utah found that Old Provo Canyon--an independent institution not then affiliated with New Provo Canyon or CMC in any way--was a state actor for the purposes of § 1983 and enjoined Old Provo Canyon from continuing specified practices. The Tenth Circuit affirmed. [3] In the instant litigation, which commenced after CMC formed New Provo Canyon to acquire the assets of Old Provo Canyon, Taylor asked the district court to take judicial notice of the state actor holdings in both the district and the appellate court decisions in Milonas to establish that New Provo Canyon is a state actor for purposes of the present suit. [4] The district court rejected Taylor's argument and granted New Provo Canyon's motion for partial summary judgment, dismissing Taylor's § 1983 claims only.

The parties tried the remaining state court claims to a jury, which found that New Provo Canyon was 25% at fault for the damages Taylor suffered. [5] After the court determined that New Provo Canyon was liable to Taylor in the amount $7,500, Taylor timely filed a notice of appeal.

II.

ANALYSIS

A. Standard of Review

We review the district court's grant of summary judgment de novo [6] and its refusal to take judicial notice for abuse of discretion. [7]

B. Judicial Notice

In his appellate brief, Taylor argues that, "as a matter of stare decisis, collateral estoppel, or judicial notice, the district court's decision in Milonas should inform the decision of the district court and the decision of this Court." Taylor's contentions are wholly without merit. We write primarily to address when, if ever, a court can take judicial notice of the factual findings of another court, and we turn to this issue first.

Taylor argues that the district court erred in not taking judicial notice of the Milonas courts' determination that Old Provo Canyon was a state actor. Rule 201 of the Federal Rules of Evidence provides that a court may take judicial notice of an "adjudicative fact" if the fact is "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court

or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned." [8] Taylor asserts that the factual findings of the district court in Milonas--upheld on appeal--fall within this second category. We disagree.

We have not previously addressed this precise issue, but the Second, [9] Eighth, [10] and

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Eleventh Circuits [11] have, holding that, even though a court may take judicial notice of a "document filed in another court ... to establish the fact of such litigation and related filings," [12] a court cannot take judicial notice of the factual findings of another court. This is so because (1) such findings do not constitute facts "not subject to reasonable dispute" within the meaning of Rule 201; [13] and (2) "were [it] permissible for a court to take judicial notice of a fact merely because it had been found to be true in some other action, the doctrine of collateral estoppel would be superfluous." [14]

In General Electric Capital Corporation v. Lease Resolution Corporation, [15] the Seventh Circuit adopted a rule similar, but not identical, to that of the Second and Eleventh Circuits. The court in General Electric held that the district court had erred in taking judicial notice of a finding that a settlement in a prior, unrelated proceeding was "fair, reasonable, and adequate." The Seventh Circuit held that these findings did not qualify as facts "not subject to reasonable dispute." [16] The court did not, however, adopt a per se rule against taking judicial notice of an adjudicative fact in a court record, stating:

We agree [with the Second and Eleventh Circuits] that courts generally cannot take notice of findings of fact from other proceedings for the truth asserted therein because these are disputable and usually are disputed. However, it is conceivable that a finding of fact may satisfy the indisputability requirement of Fed.R.Evid. 201(b). This requirement simply has not been satisfied in this case. [17]

It is not necessary at this point for us to determine whether courts in this circuit are never permitted to take notice of the factual findings of another court or are permitted to do so on rare occasion, subject to the Rule 201's indisputability requirement, because the Milonas courts' state actor determination cannot clear the rule's "indisputability" hurdle. [18] That Old Provo Canyon was a state actor for the purposes of the Milonas suit (let alone for the purposes of the present suit) was certainly open to dispute and was, in fact, disputed by the parties. That determination simply was not the type of "self-evident truth[ ] that no reasonable person could question, [a] truism[ ] that approach[es] platitude[ ] or banalit[y]," as required to be eligible for judicial notice under Rule 201. [19]

In addition, the Milonas courts' state actor determination is not an "adjudicative fact" within the meaning of Rule 201. Whether a private party is a state actor for the purposes of § 1983 is a mixed question of fact and law

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and is thus subject to our de novo review. [20] Rule 201 authorizes the court to take notice only of "adjudicative facts," not legal determinations. [21] Therefore, a court cannot take judicial notice of another court's legal determination that a party constituted a state actor for the purposes of § 1983: That determination is neither an adjudicative fact within the meaning of Rule 201 nor beyond "reasonable dispute."

This result is wholly consistent with our precedent. In Colonial Leasing Co. of New England v. Logistics Control Group, [22] we addressed whether, in a creditor's subsequent suit against its debtor for fraudulent transfer of assets, the district court had improperly taken judicial notice of the existence of a prior judgment in favor of that creditor. [23] In holding that the district court did not abuse its discretion, we stated that "[t]he district court could properly take judicial notice, under Rule 201(b), of the judgment for the limited purpose of taking as true the action of the Oregon court in entering judgment for [the creditor] against [the debtor] .... The judicial act itself was not a fact 'subject to reasonable dispute'...." [24] This language suggests that a court cannot (at least as a general matter) take judicial notice of a judgment for other, broader purposes. We hold so expressly today.

The sole relevant case Taylor cites in favor of his argument, Kinnett Dairies, Inc. v. J.C. Farrow, [25] lends him no succor. In Kinnett, the plaintiff requested that the district court "take judicial notice of the record in [a separate, but related case] and asked the clerk to bring it into the courtroom particularly the

discovery depositions...." [26] The district court stated in its opinion that it had taken "judicial notice" of the subject material, but did not clarify of what exactly it had taken notice. On appeal, the defendant objected to the inclusion of the depositions and other evidence in the record. We rejected the defendant's argument, noting that the defendant (1) had not objected to the plaintiff's request for judicial notice in the district court and (2) had been granted the opportunity to submit its own evidence and to question those parties whose depositions were made part of the record. [27] In his brief, Taylor argues that, in so holding in Kinnett, we went beyond simply permitting a district court to take judicial notice of facts found true by another court, actually allowing the district court to take "as true certain evidence in depositions in a completely separate case."

Taylor misreads Kinnett. In fact, the issue in Kinnett was not even properly categorized as one of judicial notice, despite the court's use of that term. A fact that has been judicially noticed is not subject to dispute by the opposing party--indeed, that is the very purpose of judicial notice. [28] The district court in Kinnett, however, did not accept the deposition testimony and evidence presented to it as true, but rather granted the defendant the opportunity to present counter-evidence and examine witnesses on the issues covered by the alleged judicially-noticed deposition testimony. [29] The court did not, as Taylor asserts in his brief, take "as true certain evidence in depositions in a completely separate case." It simply admitted



into evidence deposition testimony taken in another case. Kinnett, therefore, in no way conflicts with our holding today that the district court did not err in refusing to take judicial notice of the Milonas courts' state actor determination.

C. Stare Decisis

We dispense with Taylor's remaining two arguments quickly. First, Milonas is not entitled to stare decisis effect in this Circuit because it is a Tenth Circuit case, and there is no rule of intercircuit stare decisis. [30] Moreover, "[s]tare decisis means that like facts will receive like treatment in a court of law." [31] Milonas was a class action suit, in which the federal district court in Utah looked to Old Provo Canyon's treatment of the class as a whole to determine whether state action existed. [32] The present inquiry--whether New Provo Canyon's treatment of one individual constituted state action--differs substantially from that in Milonas, irrespective of whether, for purposes of a class action suit, Old Provo Canyon's treatment of its patients generally constituted state action. Thus, the question here does not present the necessary "like facts" to trigger the stare decisis doctrine.

D. Collateral Estoppel

For the very same reason, Taylor's collateral estoppel argument fails. Collateral estoppel--or claim preclusion--is applied to bar litigation of an claim previously decided in another proceeding by a court of competent jurisdiction when--but only when--the facts and the legal standard used to assess the facts are the same in both proceedings. [33] Collateral estoppel does not bar the litigation of the state actor issue in the present suit because, although an entity may be deemed a state actor generally, in the case of a private party, the relevant question is whether the specific conduct in question constituted state action. [34] Milonas determined that Old Provo Canyon's challenged conduct--treatment of the class--constituted state action. That conduct is irrelevant to whether New Provo Canyon's individualized treatment of Taylor constitutes state action. The facts underlying the two disputes are by no means the same.

Finally, finding no merit in Taylor's remaining arguments, we decline to address them.

III.

CONCLUSION

For the foregoing reasons, we affirm the district court's grant of summary judgment.

AFFIRMED.

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1 The district court dismissed Taylor's claims--including his § 1983 claims--against CMC, holding that Taylor had failed to plead either a viable claim against CMC as a separate entity or grounds for disregarding CMC's and New Provo Canyon's corporate formalities.

2 691 F.2d 931 (10th Cir.1982). The district court's opinion in Milonas, Civil No. C-787-0352, is unpublished.

3 Id.

4 Given the nature of the acquisition by CMC and New Provo Canyon of Old Provo Canyon's assets, a serious question exists whether New Provo Canyon is the same entity as Old Provo Canyon or even its legal successor. As we reject Taylor's judicial notice claim, though, we do not reach the question whether a state actor determination as to Old Provo Canyon would apply to New Provo Canyon even if the district court were to take judicial notice of the prior determination of Old Provo Canyon's state actor status.

5 The jury found Taylor's mother 75% at fault for Taylor's damages.

6 Eugene v. Alief Indep. Sch. Dist., 65 F.3d 1299, 1303 (5th Cir.1995), cert. denied, 517 U.S. 1191, 116 S.Ct. 1680, 134 L.Ed.2d 782 (1996).

7 C.A. Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 337 (5th Cir.1982).

8 Fed. R. Ev. 201(b).

9 Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc., 969 F.2d 1384, 1388-89 (2d Cir.1992) (holding district court could not take judicial notice of bankruptcy court's finding that sellers had provided notice required to preserve their trust rights and were cash sellers).

10 Holloway v. A.L. Lockhart, 813 F.2d 874, 878-79 (8th Cir.1987) (holding district court could not take judicial notice of finding of another court that use of tear gas was reasonable and necessary).

11 United States v. Jones, 29 F.3d 1549, 1553 (11th Cir.1994) (holding district court could not properly take judicial notice of findings of another court establishing nature of salary dispute in question).

12 Lib. Mut. Ins., 969 F.2d at 1388; see also Jones, 29 F.3d at 1553; Colonial Leasing Co. of New England v. Logistics Control Group, 762 F.2d 454 (5th Cir.1985) (discussed below).

13 Jones, 29 F.3d at 1553-54; Lib. Mut. Ins., 969 F.2d at 1388-89; Holloway, 813 F.2d at 878-79; Nipper v. Snipes, 7 F.3d 415, 415-417 (4th Cir.1993) (holding district court abused its discretion in admitting state court findings of fact).

14 Id. at 1553; see also Lib. Mut. Ins., 969 F.2d at 1388-89; Holloway, 813 F.2d at 879.

15 128 F.3d 1074 (7th Cir.1997).

16 Id. at 1081-83. The court also noted that, if a court were to take judicial notice of another court's findings of fact, it would render the doctrine of collateral estoppel superfluous. Id. at 1083.

17 Id. at 1082 n. 6.

18 We note, however, that we have difficulty conceiving of an adjudicative fact found in a court record that is not subject of reasonable dispute and, therefore, of which a court could take judicial notice. If such a fact were to exist, it would seem that it would have to obtain its "indisputable" status from some source other than a court's imprimatur in the form of a factual finding.

19 See C.A. Hardy, 681 F.2d at 347-48 (holding that district court abused its discretion in taking judicial notice that asbestos causes cancer because proposition "is inextricably linked to a host of disputed issues"); Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc., 746 F.2d 278, 282 n. 1 (5th Cir.1984)

(taking judicial notice of the manner in which clerks of the district courts of the Fifth Circuit note date of entry of order, which was not disputed by the parties).

20 Albright, 884 F.2d at 838.

21 See Charles Alan Wright & Kenneth W. Graham, Federal Practice & Procedure: Evidence § 5103 at 472-73 (1977) (Courts cannot take judicial notice of legal determinations under Rule 201).

22 762 F.2d 454 (5th Cir.1985).

23 Id. at 459.

24 Id. (emphasis added).

25 580 F.2d 1260 (5th Cir.1978).

26 Id. at 1277 n. 33.

27 Id.

28 See Jones, 29 F.3d at 1553 ("Since the effect of taking judicial notice under Rule 201 is to preclude a party from introducing contrary evidence and in effect, directing a verdict against him as to the fact noticed, the fact must be one that only an unreasonable person would insist on disputing.") (quoting Wright & Graham, Federal Practice & Procedure: Evidence § 5104 at 485); C.A. Hardy, 681 F.2d at 347-48 ("The rule of judicial notice 'contemplates there is no evidence before the jury in disproof.' " (quoting Fed.R.Evid. 201 Adv. Comm. Note g (1975))).

29 Kinnett, 580 F.2d at 1277 n. 33.

30 See, e.g., United States v. Scallion, 548 F.2d 1168, 1173 n. 8 (5th Cir.1977) (refusing to follow Second Circuit); Samuel Estreicher & Richard L. Revesz, Nonacquiescence by Federal Administrative Agencies, 98 Yale L.J. 679, 735-41 (1989).

31 Brock v. El Paso Natural Gas Co., 826 F.2d 369, 374 (5th Cir.1987) (quoting Flowers v. United States, 764 F.2d 759, 761 (11th Cir.1985)). Black's Law Dictionary defines stare decisis as "to abide by, or to adhere to, decided cases". Black's Law Dictionary 1406 (6th ed.1990).

32 Milonas, 691 F.2d at 939-40.

33 Id.

34 See, e.g., Goss v. Memorial Hosp. Sys., 789 F.2d 353, 356 (5th Cir.1986) (examining whether private hospitals' revocation of doctor plaintiff's staff privileges constitutes state action).

**THE FOLLOWING CASES WERE DISMISSED BECAUSE THEY WERE FILED BEYOND THE STATUTE OF LIMITATIONS!**
**YOU MUST SUE WITHIN 4 YEARS OF DISCHARGE FROM A UTAH PROGRAM!**

CHRISTINA MAE ROMAINE, F/K/A CHRISTINA MAE **MUNDY,** Plaintiff, VS. **CHARTER** MEDICAL CORPORATION, ET AL, Defendants.

NO. 4:95-CV-542-A

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, FORT WORTH DIVISION

1996 U.S. Dist. LEXIS 8237

February 16, 1996, Decided
February 16, 1996, FILED; February 22, 1996, ENTERED

**DISPOSITION:** [*1] Plaintiff's motions are denied.

**COUNSEL:** For CHRISTINA MAE ROMAINE fka Christina Mae Mundy, plaintiff: Robert Franklin Andrews, Attorney at Law, Robert F Andrews Attys At Law, Fort Worth, TX USA.

For CHARTER MEDICAL CORP, CHARTER-PROVO SCHOOL INC dba Provo Canyon School, defendants: Walter Andrew Herring, Attorney at Law, Fulbright & Jaworski, Dallas, TX USA.

**JUDGES:** JOHN McBRYDE, United States District Judge

**OPINIONBY:** JOHN McBRYDE

**OPINION: MEMORANDUM OPINION AND ORDER**

Came on for consideration the motions of plaintiff, Christina Mae Romaine, f/k/a Christina Mae Mundy, for reconsideration and for new trial. Defendants, Charter Medical Corporation ("Charter Medical") and Charter-Provo School, Inc., d/b/a Provo Canyon School ("Provo Canyon"), have filed a response in opposition.

**I. Procedural History**

Defendants moved for summary judgment on the grounds that plaintiff's claims are barred by the applicable statutes of limitations. Plaintiff responded that her claims were not barred, because the applicable limitations periods were tolled on the basis of at least one of four theories: (1) mental incompetence or unsound mind, (2) fraudulent concealment, (3) duress, and (4) discovery [*2] rule. On December 27, 1995, the court granted defendants' motion for summary judgment. Plaintiff now files motions for reconsideration of that decision and for a new trial. She requests, and the court agrees, n1 that both such motions should be considered a motion to alter or amend the judgment under Rule 59(e) of the Federal Rules of Civil Procedure; accordingly, both motions will be referenced collectively hereinafter as "motion to alter." She claims that defendants are not entitled to summary judgment on the basis of statute of limitations because defendants have not met their burden of proof as to mental incompetence and because fact issues exist as to one or more of the other three theories raised.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n1 See Teal v. Eagle Fleet, Inc., 933 F.2d 341, 347 (5th Cir. 1991); Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167 (5th Cir. 1990), cert. denied, 126 L. Ed. 2d 131, 114 S. Ct. 171 (1993); see also Jones v. Western Geophysical Co. of Am., 669 F.2d 280, 281 n.1 (5th Cir. 1982).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - -

**II. New Evidence** [*3]

Plaintiff submits with her motion to alter the following new evidence: (1) supplemental affidavit of Jerry Howle, M.D., ("Howle") (2) supplemental affidavit of Christina Mundy-Romaine, and (3) declaration of Robert F. Andrews ("Andrews"), with attached exhibits A, B, C, and D. Defendants urge the court not to consider such evidence, inasmuch as it is untimely.

In deciding whether to consider late-filed evidence submitted with a motion under rule 59(e), the court must strike a balance between two competing interests: "the need to bring litigation to an end and the need to render just decisions on the basis of all the facts." Ford v. Elsbury, 32 F.3d 931, 937 (5th Cir. 1994) (quoting Lavespere v. Niagara Mach. & Tool Works, Inc., 910 F.2d 167, 174 (5th Cir. 1990), cert. denied, 126 L. Ed. 2d 131, 114 S. Ct. 171 (1993)). In striking the proper balance, the court should consider, among other things, (1) the reasons for the plaintiff's default, (2) the importance of the evidence to the plaintiff's case, (3) whether the evidence was available to plaintiff before she responded to the summary judgment motion, and (4) the likelihood that the defendants will suffer unfair prejudice if the case [*4] is reopened. 32 F.3d at 937-38; see, e.g., Lavespere, 910 F.2d at 172-75; Russ v. International Paper Co., 943 F.2d 589, 592-93 (5th Cir. 1991), cert. denied, 503 U.S. 987, 118 L. Ed. 2d 393, 112 S. Ct. 1675 (1992). Although a plaintiff need not establish that her failure to timely submit the evidence was due to excusable neglect, a court may take into account a plaintiff's failure to provide any explanation at all in determining whether to consider the new evidence. Lavespere, 910 F.2d at 175.

Upon a weighing of the circumstances in this case, the court concludes that plaintiff's supplemental affidavits of herself and Howle should not be considered in evaluating her motion to alter. Previously, in response to defendants' motion for summary judgment, plaintiff offered as evidence affidavits of her and of Howle. The supplemental affidavits of plaintiff and Howle appear to be little more than elaborations of those initial affidavits. Plaintiff does not explain why, when responding to defendants' motion for summary judgment, she was then unable to offer affidavits that were complete, nor why she now needs to offer affidavits that "further explain the bases of the factual statements and opinions in their [*5] initial affidavits." Motion to Alter, at 7. Furthermore, it is

apparent that the evidence offered in the supplemental affidavits was available to plaintiff and Howle at the time they made their earlier affidavits. Although the supplemental affidavits might be of some importance to plaintiff's case, the court will not permit plaintiff to manipulate the evidence to achieve the result she desires.

As for the declaration of Andrews, the court finds that it should be considered in deciding plaintiff's motion to alter. Plaintiff offers sound explanation for her inability to offer such evidence earlier, and it is apparent that such evidence was not available to plaintiff before the court granted defendants' motion for summary judgment. Although the court does not find that Andrews's declaration is particularly important to plaintiff's case, the court is willing to consider such declaration.

**III. Burden of Proof**

Contrary to the court's order granting defendants' motion for summary judgment, plaintiff contends that she did not have the burden to adduce evidence in support of her theory that the statute of limitations was tolled because she was of unsound mind. Under Texas law, [*6] it is true that, once a plaintiff pleads tolling on the basis of unsound mind, the defendant has the summary judgment burden of proving that plaintiff was not of unsound mind. See, e.g., Zale Corp. v. Rosenbaum, 520 S.W.2d 889, 891 (Tex. 1975); Smith v. Erhard, 715 S.W.2d 707, 708-09 (Tex. App.--Austin 1986, writ ref'd n.r.e.). However, as the court explained in its memorandum opinion and order of December 27, 1995, federal summary judgment principles control in this case. Thus, plaintiff had the burden "to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof." Celotex v. Catrett, 477 U.S. 317, 323, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). Plaintiff would have had the burden at trial to prove that she was of unsound mind, see Weaver v. Witt, 561 S.W.2d 792, 794 n.2 (Tex. 1977), and, hence, plaintiff had the summary judgment burden to adduce sufficient evidence to create a genuine issue of fact as to whether she was of unsound mind, see Helton v. Clements, 832 F.2d 332, 336 (5th Cir. 1987); Nelson v. Reddy, 898 F. Supp. 409, 410-11 (N.D. Tex. 1995). The summary judgment burden was not on defendants to prove that plaintiff was not of sound [*7] mind. Therefore, the court rejects plaintiff's contention that defendants' motion for summary judgment should have been denied due to defendants' failure to prove that she was not of unsound mind.

**IV. Tolling Theories**

Upon review of the original summary judgment evidence in light of the arguments asserted by plaintiff in her motion to alter, the court remains convinced that plaintiff has failed to adduce sufficient evidence to create a genuine issue of fact as to all elements of at least one of plaintiff's tolling theories. The court further believes that the basis for this conclusion is fully explained in its memorandum opinion and order of December 27, 1995, and that further elaboration here is unnecessary. Therefore, the court will grant plaintiff's motion to alter only if it finds that the admissible new summary judgment evidence, which is solely Andrews's declaration, creates a genuine issue of fact as to all elements of at least one of plaintiff's tolling theories.

Fraudulent concealment is an equitable doctrine that estops a defendant who concealed his wrongful conduct, either by lying about it or by failing to disclose it when under a duty to disclose, from asserting [*8] the statute of limitations. Borderlon v. Peck, 661 S.W.2d 907, 908 (Tex. 1983). "The estoppel effect of fraudulent concealment ends when a party learns of facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to discovery of the concealed cause of action." Id. at 909. "Knowledge of such facts is in law equivalent to knowledge of the cause of action." Id.; e.g., Thames v. Dennison, 821 S.W.2d 380, 384 (Tex. App.--Austin 1991, writ denied). A plaintiff who alleges fraudulent concealment must show that defendants had (1) knowledge of a wrong done to plaintiff, (2) a duty to disclose, and (3) a fixed purpose in concealing the wrong. Borderlon v. Peck, 661 S.W.2d 907, 908-09 (Tex. 1983); Carrell v. Denton, 138 Tex. 145, 157 S.W.2d 878, 879 (Tex. 1942), overruled on other grounds by Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967).

Plaintiff asserts that Andrews's declaration establishes that she was prevented, by defendants' failure to timely produce certain documents, and by defendants' failure to produce at all other documents, from obtaining evidence showing that defendants had knowledge of wrongs done to [*9] plaintiff and that defendants had a fixed purpose to conceal such wrongs. Specifically, Andrews's declaration states that plaintiff has been prevented from obtaining documents within the following categories: (1) settlement agreements between Charter Medical Corporation or any subsidiary thereof and any insurance company with respect to the care to patients at Charter facilities, and (2) sales plans or sales documents for Charter Medical and Provo Canyon. Andrews further states that the sales documents should include the following information:

> A. Facts reflecting or relevant to a showing that Defendants exalted financial concerns and profit over the importance of patient care.
>
> B. Facts showing Defendants set up a referral network which included other health care providers, schools, and judicial sources for patient referrals, similar to what Plaintiff believes lead to her admission through Nevada authorities, and that this referral network was used as a source for placement and treatment without regard [to] the best interest of the patient.
>
> C. The relative profitability of Provo Canyon within the Charter network of facilities.

Andrews Declaration P 7, at [*10] 2-3.

The court does not find that the documents which plaintiff claims she sought and was unable to obtain would create a fact issue as to plaintiff's fraudulent concealment theory.

It is conceivable that such documents might establish that defendants fraudulently concealed wrongs done to plaintiff. However, such documents would not be of the sort that could establish that after June 21, 1989, and more than four years before this action was filed, plaintiff did not discover facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to discovery of the concealed causes of action. Therefore, taking as true Andrews's declaration regarding defendants' failure to produce documents properly, the court finds no basis for changing its earlier conclusion that plaintiff has not adduced sufficient evidence to raise a genuine issue of fact as to her fraudulent concealment theory.

Andrews's declaration also asserts that on January 7, 1996, he discovered that defendant Provo Canyon is subject to a permanent injunction granted by the United States District Court for the District of Utah, Central Division, on December 27, 1982, [*11] and that the injunction "is relevant to show the knowledge of the wrong and the fixed purpose of the concealment." Andrews Declaration P 15, at 4. Even if the injunction is relevant in this regard, its existence does not establish that after June 21, 1989, and more than four years before this action was filed, plaintiff did not discover facts, conditions, or circumstances which would cause a reasonably prudent person to make inquiry, which, if pursued, would lead to discovery of the concealed causes of action. Thus, the court also rejects this argument for altering its earlier judgment in favor of defendants.

Plaintiff also argues that the court should reopen the case because she has discovered that Provo Canyon's monitoring of her mail was in violation of the 1982 permanent injunction issued against Provo Canyon. Whether Provo Canyon's conduct was in violation of an injunction issued by another court is entirely irrelevant to the issue of limitations. Hence, the court is not persuaded by this argument that defendants' motion for summary judgment on the basis of limitations should be altered.

## V. ORDER

For the foregoing reasons, the court ORDERS that plaintiff's motions [*12] be, and are hereby, denied.

SIGNED February 16, 1996.

JOHN McBRYDE

United States District Judge

**957 F.Supp. 1427**

**Steven Spencer PORTER, Plaintiff,**

**v.**

**CHARTER MEDICAL CORPORATION, et al., Defendants.**

**No. 4:96-CV-382-A.**

**United States District Court, N.D. Texas, Fort Worth Division.**

**March 20, 1997.**

**Order Denying Amendment April 28, 1997.**

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Robert Franklin Andrews, Martin Jay Cirkiel, Andrews & Cirkiel, Fort Worth, TX, for Steven Spencer Porter.

Walter Andrew Herring, Fulbright & Jaworski, Dallas, TX, for Charter Medical Corp., Robert H. Crist, Gary Barton and Charter-Provo School Inc.

*MEMORANDUM OPINION and ORDER*

McBRYDE, District Judge.

Came on for consideration the motion of defendant Charter-Provo School, Inc., d/b/a Provo Canyon School ("Charter-Provo") for summary judgment ("Motion") on the grounds that the claims of plaintiff, Steven Spencer Porter ("Porter"), are barred by applicable limitations periods. Upon consideration of the motion, the various responses and replies, the record, the summary judgment evidence, and applicable authorities, the court finds that the Motion should be granted.

I.
*History and Nature of the Action*

This action was instituted by Porter on May 30, 1996, by the filing of his original complaint complaining of the conduct of Charter-Provo in causing him to be admitted to its health care facility in Provo, Utah, and the care and treatment he received while in that facility. He also named as defendants Charter-Provo's parent corporation, Charter Medical Corporation, and two employees of Charter-Provo, Robert H. Crist, M.D., ("Crist") and Gary Barton, Ph.D., ("Barton"). Subject matter jurisdiction is based upon the federal claims made by Porter pursuant to 18 U.S.C. § 1964 ("RICO") and 42 U.S.C.

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§ 1983.[1] State law claims also were asserted. By an order and final judgment dated September 27, 1996, this court dismissed claims Porter had made against Charter Medical Corporation. By an order and final judgment dated December 31, 1996, Porter's claims against Crist and Barton were dismissed for lack of personal jurisdiction.

With leave of court, Porter filed his first amended complaint on March 5, 1997, in which he made the federal and state law claims against Charter-Provo that are described below.

A. Federal law claims:

1. Violations of 18 U.S.C. § 1964 ("RICO") (Count I); and

2. Pursuant to 42 U.S.C. § 1983 (Count II).

B. State law claims:

1. False imprisonment (Count III);

2. Invasion of privacy-intrusion upon seclusion (Count IV);

3. Medical negligence (Count V);

4. Fraud (Count VI);

5. Intentional infliction of emotional distress (Count VII);

6. Civil conspiracy (Count VIII);

7. Loss of parental consortium (Count IX); and

8. Battery (Count X).

II.
*The Motion*

Charter-Provo contends that the summary judgment record establishes without dispute that Porter's claims are barred by either a two-year limitations period or a four-year limitations period. It acknowledges that, because of a Texas tolling statute, the running of limitations was tolled so long as Porter was under eighteen years of age. However, it asserts, as to each of Porter's claims, that the applicable limitations period ran after Porter became 18 years of age and before this action was filed. The dates relevant to Charter's motion are: May 30, 1974, Porter's date of birth; September 18, 1988, date of Porter's admission to Charter-Provo; June 23, 1989, date of Porter's discharge from Charter-Provo; May 30, 1992, Porter's eighteenth birthday; and, May 30, 1996, date when Porter instituted this action. Charter-Provo maintains that the summary judgment evidence does not raise any material issue of fact as to any of Porter's theories that tolling caused the limitations period not to start running when Porter became eighteen.

III.
*Response to the Motion*

Porter does not dispute that he brought his claims more than four years after Charter-Provo allegedly injured him. Nor does he dispute the relevant dates upon which Charter-Provo relies. Porter asserts, however, that the summary judgment evidence raises issues of material fact as to his contention that none of his claims are barred because all statutes of limitations were tolled as to him based on his minority, unsound mind, fraudulent concealment, the discovery rule, duress, and coercion. Porter also contends that Charter-Provo is equitably estopped from saying that limitations has run on his claims. Finally, Porter maintains that the claims that are governed by a four-year limitations period were timely filed even if the only tolling was the one related to his minority.

IV.
*Applicable Summary Judgment Principles*

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. *Anderson,* 477 U.S. at



256, 106 S.Ct. at 2514. The movant may discharge this burden by pointing out the absence of evidence to support one or more essential elements the non-moving party's claim "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S.Ct. 2548, 2552-54, 91 L.Ed.2d 265 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. *Anderson,* 477 U.S. at 248, 256, 106 S.Ct. at 2510, 2514. To meet this burden, the nonmovant must "identify specific evidence in the record and articulate the `precise manner' in which that evidence support[s][its] claim[s]." *Forsyth v. Barr,* 19 F.3d 1527, 1537 (5th Cir.), *cert. denied,* 513 U.S. 871, 115 S.Ct. 195, 130 L.Ed.2d 127 (1994). An issue is material only if its resolution could affect the outcome of the action. *Anderson,* 477 U.S. at 248, 106 S.Ct.

at 2510. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. *Simmons v. Lyons,* 746 F.2d 265, 269 (5th Cir.1984).

The standard for granting a summary judgment is the same as the standard for a directed verdict. *Celotex Corp.,* 477 U.S. at 323, 106 S.Ct. at 2552-53. If the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. *Matsushita,* 475 U.S. at 597, 106 S.Ct. at 1361-62.

V.
*Analysis*

A. *Applicable Limitations Periods.*[2]

1. *State Law Claims Other Than Fraud.*

Health care liability claims are subject to a two-year limitations period under Texas law:

Sec. 10.01. Notwithstanding any other law, no health care liability claim may be commenced unless the action is filed within two years from the occurrence of the breach or tort or from the date the medical or health care treatment that is subject of the claim or the hospitalization for which the claim is made is completed; provided that, minors under the age of 12 years shall have until their 14th birthday in which to file, or have filed on their behalf, the claim. Except as herein provided, this subchapter applies to all persons regardless of minority or other legal disability.[3]

Tex.Rev.Civ. Stat. Ann. art. 4590i, § 10.01 (Vernon Supp.1997). A "health care liability claim" is defined as follows:

(4) "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety which proximately results in injury to or death of the patient, where the patient's claim or cause of action sounds in tort or contract.

*Id.* § 1.03(a)(4).

Despite the labels Porter attaches to his claims for false imprisonment, invasion of privacy-intrusion upon seclusion, medical negligence, intentional infliction of emotional



distress, civil conspiracy, loss of parental consortium, and battery, the fact is that all such claims stem from the allegations that Charter-Provo treated Porter improperly, failed to provide him with the necessary and appropriate treatment, and departed from accepted standards of health care, with the proximate result that Porter was injured. As a result, all such claims of Porter are health care liability claims that are governed by the two-year limitations period prescribed by § 10.01 of art. 4590i. *See Waters ex rel Walton v. Del-Ky, Inc.,* 844 S.W.2d 250, 259 (Tex.App. — Dallas 1992, no writ).

Porter argues that art. 4590i does not apply to intentional torts, relying on the Texas Supreme Court's ruling that claims that a health care provider was negligent may not be recast as DTPA actions to avoid the standards set forth in the Medical Liability & Insurance Improvement Act. *Sorokolit v. Rhodes,* 889 S.W.2d 239, 242 (Tex.1994). However, the court does not read *Sorokolit* to mean that the two-year limitations period applicable to health care liability claims applies only to negligence claims, or that health care liability claims otherwise labeled are not subject to art. 4590i.

Moreover, even if Porter's claims for false imprisonment, invasion of privacy, intentional infliction of emotional distress, civil conspiracy, breach of fiduciary duty, loss of parental consortium, and battery were not properly classified as health care liability claims, the statute of limitations for each of these claims nevertheless would be two years. *See* Tex. Civ. Prac. & Rem.Code § 16.003 (Vernon 1986 & Supp.1997); *see, also, Wood v. Hustler Magazine, Inc.,* 736 F.2d 1084, 1088 (5th Cir.1984), *cert. denied,* 469 U.S. 1107, 105 S.Ct. 783, 83 L.Ed.2d 777 (1985) (holding that invasion of privacy is governed by the two-year statute of limitations); *Polly v. Houston Lighting & Power Co.,* 803 F.Supp. 1, 7 (S.D.Tex.1992), *adopted*

*in part,* 825 F.Supp. 135 (S.D.Tex.1993) (holding that state law claims of assault, battery, and intentional infliction of emotional distress are governed by the two-year statute of limitations for intentional torts); *Hanley v. First Investors Corp.,* 793 F.Supp. 719, 721 (E.D.Tex.1992) (holding that the Texas two-year statute of limitations for torts governs claims for breach of fiduciary duty); *Trapnell v. Sysco Food Servs., Inc.,* 850 S.W.2d 529, 551 (Tex. App. — Corpus Christi 1992), *aff'd,* 890 S.W.2d 796 (Tex.1994) (holding that a cause of action for loss of consortium is governed by § 16.003, the two-year limitations statute); *White v. Cole,* 880 S.W.2d 292, 295 (Tex. App. — Beaumont 1994, writ denied) (holding that false imprisonment is governed by the two-year statute of limitation); *Stevenson v. Koutzarov,* 795 S.W.2d 313, 318-19 (Tex. App. — Houston [1st Dist.] 1990, writ denied) (holding that claims for civil conspiracy, invasion of privacy, and intentional infliction of emotional distress are governed by the two-year statute of limitations); *Redman Indus., Inc. v. Couch,* 613 S.W.2d 787, 789 (Tex.Civ. App. — Houston (14th Dist.) 1981, writ ref'd n.r.e.) (holding that the Texas two-year statute of limitations for torts governs claims for breach of fiduciary duty); *Marburger v. Jackson,* 513 S.W.2d 652, 655 (Tex.App. — Corpus Christi 1974, writ ref'd n.r.e.) (holding that the two-year statute of limitations applies to the tort of battery).

2. *Fraud Claims.*

The allegedly fraudulent conduct of Charter-Provo consists of representations to, or failure to inform, plaintiff or his parents concerning his need for treatment, the treatment alternatives, the characteristics and capabilities of Charter-Provo's staff, the characteristics of the Charter-Provo facility, and the type of treatment he would receive or did receive. Also, Porter complains that Charter-Provo did not make full disclosure concerning the cost of care and billing practices.

The court is inclined to agree With Charter-Provo's argument that Porter's fraud claims are really health care liability claims. Despite the fraud label plaintiff attaches to those claims, the fact is that all the claims are but ways of saying that plaintiff failed to receive proper medical treatment, that Charter failed to provide plaintiff with the necessary and appropriate treatment, and that Charter departed from accepted standards of health care, with the proximate result that plaintiff was injured. The court finds helpful the Texas intermediate appellate court decision



in *Waters ex rel. Walton,* 844 S.W.2d 250. In *Waters,* the survivor of a patient asserted claims against a health care provider, including causes of action for breach of fiduciary duty and breach of good faith and fair dealing. The plaintiff alleged that the health care provider placed its own monetary interest over the health and well-being of her deceased brother (the patient); and, she asserted that, therefore, her claims did not come within the definition of a "health care liability claim," as that term is used in § 1.03(a)(4) of article 4590i. In rejecting the plaintiff's contention, the *Waters* court noted that the allegations of the plaintiff presented another circumstance of "trying to recast a health care liability claim in the language of another cause of action," *id.* at 259, and went on to explain:

Water's claims of breach of fiduciary duty and breach of good faith and fair dealing are claims for lack of treatment or other claimed departure from accepted standards of medical care, health care, or safety that resulted in injury and death to her brother. These claims are "health care liability claims."

*Id.* Here, plaintiff's fraud claims appear to present yet another circumstance of a plaintiff "trying to recast a health care liability claim in the language of another cause of action." Id. However, the court does not need to decide whether the two-year limitations period prescribed by art. 4590i applies because the fraud claims are subject to a limitations bar even if it does not.

If the conclusion were to be reached that the fraud claims are not the equivalent of health care liability claims, they would be governed by the Texas four-year statute of limitations, found at § 16.004, Tex. Civ. Prac. & Rem.Code.

3. *RICO Claims.*

Civil RICO claims are subject to a federal four-year statute of limitations. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.,* 483 U.S. 143, 156, 107 S.Ct. 2759, 2767, 97 L.Ed.2d 121 (1987); *Longden v. Sunderman,* 737 F.Supp. 968, 971 (N.D.Tex.1990).

4. *Claims Under 42 U.S.C. § 1983.*

Porter's § 1983 claims are subject to Texas's two-year limitations period for personal injury. Tex. Civ. Prac. & Rem.Code Ann. § 16.003 (Vernon 1986 & Supp.1997). *Owens v. Okure,* 488 U.S. 235, 249-50, 109 S.Ct. 573, 581-82, 102 L.Ed.2d 594 (1989); *Burrell v. Newsome,* 883 F.2d 416, 418 (5th Cir.1989).

B. *"Accrual" of Porter's Causes of action.*

Generally speaking, under Texas law a cause of action accrues "at the time when facts come into existence which authorize a claimant to seek a judicial remedy." *Robinson v. Weaver,* 550 S.W.2d 18, 19 (Tex. 1977). *Moreno v. Sterling Drug. Inc.,* 787 S.W.2d 348, 351 (Tex.1990) (where the Texas Supreme Court said that "[f]or purposes of the application of limitation statutes, a cause of action can generally be said to accrue when the wrongful act effects an injury, regardless of when the plaintiff learned of such injury"). In a fraud action, the plaintiff is entitled to seek a judicial remedy as soon as the fraud is perpetrated. *Woods v. William M. Mercer. Inc.,* 769 S.W.2d 515, 517 (Tex.1988). The general rule "obtains notwithstanding the fact that the damages, or their extent, are not ascertainable until a later date." *Atkins v. Crosland,* 417 S.W.2d 150, 153 (Tex.1967). All of Porter's state law claims are subject to this general rule.[4]

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The statute of limitations began to run as to Porter's § 1983 claims the moment he became aware that he had suffered an injury or had sufficient information to know that he had suffered an injury. *Helton v. Clements,* 832 F.2d 332, 335 (5th Cir.1987). The burden is on the plaintiff to prove applicability of the tolling feature of the federal rule. *Cathedral of Joy Baptist Church v. Village of Hazel Crest,* 22 F.3d 713 (7th Cir.), *cert. denied,* 513 U.S. 872, 115 S.Ct. 197, 130 L.Ed.2d 129 (1994).

As has recently been noted, the Fifth Circuit has yet to address the question of when a RICO cause of action accrues. *Crowe v. Smith,* 856 F.Supp. 1178, 1181 (W.D.La.1994), *rev'd on other grounds without published opinion,* 81 F.3d 155 (5th Cir. 1996).[5] Each of the circuits that has addressed the issue "has incorporated the principle of discovery into the accrual rule governing civil RICO actions in the particular circuit." *Granite Falls Bank v. Henrikson,* 924 F.2d 150, 153 (8th Cir.1991). However, the circuits differ on "the question of what the plaintiff must actually or constructively know before the limitations period will start to run." *Id.* As the district court in *Crowe* noted,

The First, Second, Fourth, Seventh and Ninth Circuits employ an injury-based accrual rule. Under this method, a civil RICO cause of action accrues at the time plaintiff discovered or should have discovered his injury. The Third, Eighth, Tenth and Eleventh Circuits have, on the other hand, adopted an accrual rule which applies the general discovery rule to both the pattern element and the injury element of RICO. In other words, these courts find that a civil RICO cause of action does not accrue until the plaintiff discovers or should have discovered the source of his injury and that the injury is part of a pattern.

*Crowe,* 856 F.Supp. at 1181-81. The Third Circuit adds an additional element to the accrual equation, adding what is referred to as the "last predicate act" rule:

[T]he limitations period for a civil RICO claim runs from the date the plaintiff knew or should have known that the elements of the civil RICO cause of action existed *unless, as a part of the same pattern of racketeering activity there is further injury to the plaintiff or further predicate acts occur which are part of the same pattern, in which case the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity.*

*Keystone Ins. Co. v. Houghton,* 863 F.2d 1125, 1130 (3d Cir.1988) (emphasis added).

After lengthy analysis, the *Crowe* court decided that, in absence of guidance from the Fifth Circuit, the appropriate accrual rule was the one articulated by the Third Circuit in *Keystone. Crowe,* 856 F.Supp. at 1184. That rule (1) mandates that the limitations period will not start to run on a civil RICO action until the plaintiff knew or should have known, not just of her injury, but of the elements of her RICO action, and (2) incorporates the "last predicate act" rule as to further predicate acts that are part of the same pattern.

Having considered the arguments in favor of the various accrual rules, and being particularly impressed with the reasoning employed by the First and Second Circuits, the court concludes that it agrees with what has been termed the majority view, which ties accrual to the time a plaintiff knew or should have known of his injury. *McCool v. Strata Oil Co.,* 972 F.2d 1452, 1463-66 (7th Cir. 1992); *Rodriguez v. Banco Cent.,* 917 F.2d 664, 665-68 (1st Cir.1990); *Bankers Trust Co. v. Rhoades,* 859 F.2d 1096, 1102-05 (2d Cir.1988), *cert. denied,* 490 U.S. 1007, 109



S.Ct. 1642, 104 L.Ed.2d 158 (1989); *Beneficial Standard Life Ins. Co. v. Madariaga,* 851 F.2d 271, 274-76 (9th Cir.1988); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.,* 828 F.2d 211, 220 (4th Cir.1987). The court notes that this accrual rule is consistent with the Fifth Circuit's description of the general accrual rule for federal claims. *Helton,* 832 F.2d at 335. Furthermore, the court has concluded that the burden of proof is on the plaintiffs as to the "discovery" feature of this accrual rule. The reasoning of *Cathedral of Joy* on this general subject is persuasive. *Cathedral of Joy,* 22 F.3d at 717.

The summary judgment evidence makes clear that the injuries of which Porter complains occurred before his discharge from the Provo Canyon facility in June 1989 and that he knew, or should have known, no later than when he was discharged from the facility that he had suffered those injuries. Certainly, the summary judgment record establishes without dispute that by the time Porter reached his 18th birthday he knew of all injuries about which he complains. Therefore, the court concludes that all of Porter's causes of action accrued sometime before he reached his 18th birthday.

C. *Tolling Based on Minority of Porter.*

Even though Porter's "causes of action" accrued before he became 18 years of age, he enjoys the benefit of a tolling provision in Texas statutory law that prevents the running of limitations while a person is "[y]ounger than 18 years of age." Tex. Civ. Prac. & Rem.Code § 16.001. The parties agree that this tolling statute applies, but there is disagreement as to when the tolling period ends, a subject to which the court returns at a later point in the memorandum opinion.

D. *Porter's Other Tolling Theories.*

1. *General Rules on the Subject of Tolling:*

Under Texas law, the burden of proof at trial with respect to all of the theories urged by a plaintiff for the suspending or tolling the running of limitations is on the plaintiff. The Texas Supreme Court said in *Weaver v. Witt* that "in a conventional trial on the merits, proof of facts suspending operation of a statute of limitations is the burden of the party pleading suspension." 561 S.W.2d 792, 794, n. 2 (Tex.1977). *See also Woods,* 769 S.W.2d at 518; *Willis v. Maverick,* 760 S.W.2d 642, 647 (Tex.1988); *Wise v. Anderson,* 163 Tex. 608, 359 S.W.2d 876, 880 (1962); *National Resort Communities v. Short,* 712 S.W.2d 200, 201-02 (Tex.App. — Austin 1986, writ ref'd n.r.e.); *Helton,* 832 F.2d at 336.

Texas procedural law requires a summary judgment movant relying on limitations to negate the discovery rule, when invoked, by showing by undisputed summary judgment evidence that the plaintiff discovered, or should have discovered, the facts giving rise to his claim. *Woods,* 769 S.W.2d at 518 n. 2. However, under federal practice the burden of adducing evidence at the summary judgment stage parallels the burden of proof that would exist at the trial stage. *See FDIC v. Shrader & York,* 991 F.2d 216, 220 (5th Cir.1993), *cert. denied,* 512 U.S. 1219, 114 S.Ct. 2704, 129 L.Ed.2d 832 (1994). Thus, the summary judgment burden is on Porter as to all his tolling theories.

As a general rule, the limitations period established by art. 4590i is absolute and cannot be tolled except as expressly provided by the statute. *See. e.g., Morrison v. Chan,* 699 S.W.2d 205, 208 (Tex.1985) (holding that the two-year limitations period cannot be tolled by the discovery rule); *Waters ex rel Walton,* 844 S.W.2d at 255-56 (agreeing that tolling on the basis of unsound mind is not an option). However, art. 4590i does not abolish fraudulent concealment as an equitable estoppel to the affirmative defense of limitations under that statute. *Borderlon v. Peck,* 661 S.W.2d 907, 908-09 (Tex. 1983).

2. *Porter's Unsound Mind Tolling Theory.*

Porter relies on the parts of § 16.001, Tex. Civ. Prac. & Rem.Code, that provide that a person of unsound mind is under a legal disability and that "[i]f a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the



time of the disability is not included in the limitations period."

The purpose of the "unsound mind" tolling serves to protect persons without access to the courts and who are unable to participate in, control, or understand the progression and disposition of their lawsuit. *Hargraves v. Armco Foods, Inc.,* 894 S.W.2d 546, 548 (Tex.App. — Austin 1995, no writ); *Ruiz v. Conoco, Inc.,* 868 S.W.2d 752, 755 (Tex.1993).

Porter seeks to sustain his summary judgment burden by his own declaration, his discharge summary from Charter-Provo (which is proved up by the declaration of Porter's attorney), and the declaration of Rosemonde Maloney, a clinical social worker from California. The court has concluded that Porter has not borne his summary judgment burden on the unsound mind issue.

There is nothing in the discharge summary, which is dated June 23, 1989, that would remotely suggest that in June 1989 Porter was suffering from any condition that would have prevented him at that time from cooperating with an attorney, or participating in, controlling, or understanding the progression and disposition of a lawsuit. Porter's condition at discharge was described as follows:

*CONDITION AT DISCHARGE*

Student was very positive, very open, and very responsive to the therapeutic intervention, verbalizing positive regards in relationship to remaining drug-free and attending school and doing well. He was a very positive individual as he left the program.

Plaintiff's Response and Brief in Support Thereof to Defendant Charter-Provo School, Inc. d/b/a Provo Canyon School's Motion for Summary Judgment and Motion for Continuance Under Rule 56(f), Ex. B, tab 1 at 3. Much less is there any summary judgment evidence that would support a finding that, by the time Porter became 18 years of age in May 1992, he did not have enough mental capacity to participate in, control, or understand the progression and disposition of a lawsuit. Porter's declaration makes clear that he had full awareness as they were occurring of the facts upon which he bases his claims in this action. The circumstances that his self-image was worsened and he became moodier and more depressed and turned into an alcoholic is not evidence that he did not have the capacity to properly participate in litigation. Moreover, Porter seldom defines in his declaration the date or dates of the existence of the conditions he describes. When he does use a date, such as the date used in paragraph 17 of the declaration, it often is the date of an event prior to the time he became 18 years of age. Conclusions, such as the one expressed in paragraph 17 of Porter's declaration, that "[e]ven with this legal warning I was not able to completely control or manage my legal affairs," do not get the job done for Porter. They are so broad and general as to be meaningless in the context of the applicable test.

The most pointed statement Porter makes in support of his unsound mind tolling theory is in paragraph 20 of his declaration, which says:

20. Due to the extreme abuse I experienced, in concert with my severe emotional disturbances, exacerbated by substance abuse, it was impossible for me [to] participate in, manage and control a lawsuit like this one.

*Id.,* Ex. A at 5. Conclusory statements of this kind "will not suffice to require a trial." *Travelers Ins. Co. v. Liljeberg Enter., Inc.,* 7 F.3d 1203, 1207 (5th Cir.1993) (citing *Shaffer v. Williams,* 794 F.2d 1030, 1033 (5th Cir. 1986)). Moreover, Porter's statement is in the nature of an expert medical opinion, which has no probative effect given by a witness who is not shown to have the requisite expertise. While the Fifth Circuit has approved reliance in support of a motion for summary judgment on an expert opinion affidavit of a party, it did so because the party was shown to have expertise on the subject of the expert opinion given in the affidavit. *Rodriguez v. Pacificare of Tex., Inc.,* 980 F.2d 1014, 1019 (5th Cir.), *cert. denied,* 508 U.S. 956, 113 S.Ct. 2456, 124 L.Ed.2d 671 (1993). The court has found no case authority that approves of reliance on an opinion affidavit of a party if the party is not shown

to have the requisite expertise to form the opinion or, if it is in the nature of a lay opinion, the party fails to provide factual support for the opinion. *See Pedraza v. Jones,* 71 F.3d 194, 197 (5th Cir.1995) (holding that a party's affidavit purporting to give his "lay opinion" did not raise an issue of fact when the affidavit contained only conclusory statements). Porter does not provide a sufficient factual basis for the opinion he states in paragraph 20, nor is there any summary judgment evidence that he is qualified to render such an opinion.

For Porter to prevail on his unsound mind tolling theory, he would have to adduce at least either evidence of specific facts that would enable the court to find that when he became 18 years of age he did not have the mental capacity to pursue litigation or a fact-based expert opinion to that effect. He has failed to do either. The declaration of Ms. Maloney does not serve as such an opinion. Rather, she speaks in generalities, and never makes reference to Porter. She acknowledges in her affidavit that her professional opinion is that "each person who experiences abuse, like those persons at the Provo Canyon School, are affected differently." *Id.,* Ex. C at 8. But, she renders no opinion on the subject of how Porter was affected by the treatment he received.

The court does not consider the article from *Archives of Psychiatric Nursing,* which is a part of Exhibit D to Plaintiff's Response to Charter-Provo's Motion for Summary Judgment, to have any probative effect. First, the court does not take judicial notice of the article, as Porter has requested. Second, the article deals only in generalities, and would not provide the basis for a fact-finder to make any fact finding applicable to Porter's mental capacity to pursue litigation.

There simply is no summary judgment evidence that would permit a reasonable factfinder to find that Porter did not have the requisite mental capacity when he became 18 years of age. If at the end of trial the record were to be the same as it is at this summary judgment stage, the court would be required to direct a verdict in favor of Charter-Provo on the unsound mind tolling theory.

3. *Porter's Discovery Rule Tolling Theory.*

As previously noted, the discovery rule does not apply to the statute of limitations applicable to Porter's health care liability claims. However, even if it did, Porter would not benefit in this case. In *Willis,* the Texas Supreme Court explained that:

The discovery rule is the legal principle which, when applicable, provides that limitations run from the date the plaintiff discovers or should have discovered, in the exercise of reasonable care and diligence, the nature of the injury.

760 S.W.2d at 644. "The discovery rule expressly mandates the [plaintiff] to exercise reasonable diligence to discover facts of negligence or omission." *Id.* n. 2. It is an exception to the general rule that the accrual period is measured from the time of the injury. *Timberlake v. A.H. Robins Co., Inc.,* 727 F.2d 1363, 1364 (5th Cir.1984). This discovery rule exception applies to federal law claims as to which a state statute of limitations is borrowed. *Cathedral of Joy,* 22 F.3d at 717. The rule is viewed, at least under Texas law, to be a plea in confession and avoidance. *Woods,* 769 S.W.2d at 517.[6]

The discovery rule does not suspend the running of the statutory period "until the plaintiff learns that the defendant's conduct may be wrongful." *Timberlake,* 727 F.2d at 1365. In other words, the discovery rule contemplates discovery of the injury and does not suspend the running of the limitations period until the plaintiff discovers all the elements of a cause of action. *Moreno,* 787 S.W.2d at 357. Nor does the discovery rule suspend the running of limitations until the date of discovery of the responsible party. *Id.* Notwithstanding the discovery rule, "[t]he accrual of the cause of action does not await the plaintiff's recognition that he has grounds for a lawsuit," *Arabian Shield Dev. Co. v. Hunt,* 808 S.W.2d 577, 583 (Tex.App. — Dallas 1991, writ denied), or discovery that



the defendant behaved tortiously, *id.* at 584, or recognition that the plaintiff might have a winning lawsuit, *id.* at 585.

The court concludes that there is no summary judgment evidence that would support findings in favor of Porter on all facts essential to his discovery rule theory. No reasonable fact-finder could make a finding from the summary judgment evidence that Porter had not discovered the nature of his injury before he became 18 years of age, much less that he should not have discovered, in the exercise of reasonable care and diligence, the nature of his injury before that date.

4. *Porter's Fraudulent Concealment Tolling Theory.*

Fraudulent concealment is an equitable doctrine that estops a defendant who concealed his wrongful conduct, either by lying about it or by failing to disclose it when under a duty to disclose, from asserting the statute of limitations. *Borderlon,* 661 S.W.2d at 908. The doctrine tolls the statute of limitations until the plaintiff "learns of the right of action or should have learned thereof through the exercise of reasonable diligence." *Id.* Fraudulent concealment requires "first, actual knowledge of the fact that a wrong has occurred, and, second, a fixed purpose to conceal the wrong from the patient." *Carrell v. Denton,* 138 Tex. 145, 157 S.W.2d 878, 879 (1942), *overruled on other grounds, Gaddis v. Smith,* 417 S.W.2d 577, 580 (Tex.1967). *Accord Leeds v. Cooley,* 702 S.W.2d 213, 215 (Tex.App. — Houston [1st Dist.] 1985, writ ref'd n.r.e.); In cases involving medical negligence claims subject to § 10.01 of art. 4590i, Texas courts have held that the duty to disclose ends when the physician-patient relationship ends. *See Thames v. Dennison,* 821 S.W.2d 380, 384 (Tex.App. — Austin 1991, writ denied); *Evans,* 741 S.W.2d at 508; *c.f. Russell v. Campbell,* 725 S.W.2d 739, 748 (Tex.App. — Houston [14th Dist.] 1987, writ ref'd n.r.e.); *McClung v. Johnson,* 620 S.W.2d 644, 647 (Tex.App. — Dallas 1981, writ ref'd n.r.e.). There is no reason to believe that the same rules would not apply to Porter's federal claims.

To the extent Porter might have had a basis for a fraudulent concealment avoidance as to Charter-Provo, it ended no later than June 23, 1989, the date Porter was discharged from Charter-Provo. Therefore, the court concludes that Porter's reliance on the fraudulent concealment doctrine in avoidance of the limitations defense is unfounded as to all his claims. There is no summary judgment evidence upon which a finding to the contrary could be based. Because Porter's equitable estoppel theory stands or falls with his fraudulent concealment theory, his estoppel theory likewise is not supported by the summary judgment record.

5. *Porter's Duress and Coercion Theories.*

Though there is a question as to whether the duress avoidance theory urged by Porter could apply to any of the claims asserted in this case, the court has considered Porter's duress theory and has concluded that, even if it could apply, it would not benefit Porter.

The test for duress is whether in reasonable probability an ordinary person would have lost his free will to bring an action under the circumstances. *Pierce v. Estate of Haverlah,* 428 S.W.2d 422, 428 (Tex.Civ.App. — Tyler 1968, writ ref'd n.r.e.). Porter does not present any evidence that he was threatened or intimidated by any actions of Charter-Provo subsequent to his release from Charter-Provo. He contends, however, that he remained intimidated following his release from Charter-Provo. But, the evidence does not support those contentions. The only reasonable finding that can be made from the undisputed summary judgment evidence would be that by the time Porter was released from Charter-Provo he had sufficient information that he should have discovered the facts establishing his causes of action. Bearing in mind that the appropriate standard is an objective rather than subjective one, the court concludes that there is no summary judgment evidence that any duress would have prevented a person of ordinary prudence from exercising his own free will and judgment in filing suit. Certainly, there is no evidence that when Porter became 18 years of age he was suffering



from any duress, or any coercion, related to the possibility of taking legal action against Charter-Provo, much less is there summary judgment evidence that, at that point in time, a person of ordinary prudence would have been prevented from exercising his own free will and judgment in filing suit.

E. *All Claims Are Barred By Limitations.*

Apparently the parties are in disagreement when the tolling based on Porter's minority ended. Porter seems to maintain that it ended on his 18th birthday, May 30, 1992. Provo maintains that it ended the day before Porter reached age 18, May 29, 1992. In either event, all claims asserted by Porter that are subject to a two-year statute of limitations quite clearly are barred under the facts of this case.

If Porter is correct on the ending date of his minority tolling, the filing of his suit on May 30, 1996, would have been timely as to any claim governed by a four-year statute of limitations. If Charter-Provo is correct, the institution of the action on May 30, 1996, was one day too late. The key statutory provisions are §§ 16.001 and 16.004 of the Texas Civil Practice & Remedies Code. In pertinent part, § 16.001 reads:

(a) For purposes of this subchapter, a person is under a legal disability if the person is:

(1) younger than 18 years of age, regardless of whether the person is married;

. . . . .

(b) If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in a limitations period.

Tex. Civ. Prac. & Rem.Code § 16.001 (Vernon 1986 & Supp.1997).

The operative part of § 16.004, the Texas four-year statute of limitations, reads:

(a) A person must bring suit on the following actions not later than four years after the day the cause of action accrues:

*Id.* § 16.004 (Vernon 1986).

In *Weiner v. Wasson,* which presented the question of when minority tolling ended in a case controlled by the two-year statute of limitations, the Texas Supreme Court said and held:

Sections 16.001 and 16.003 of the Texas Civil Practice and Remedies Code together provide a general statute of limitations for minors' personal injury claims. Section 16.003 establishes a two-year limitations period, but section 16.001 tolls this period until the minor reaches age eighteen. Taken together, these sections require a minor to file a claim *before reaching age twenty* for personal injuries sustained during the period of minority.

. . . . .

We therefore hold that *Wasson* had two years after attaining age eighteen to bring suit for the acts of medical malpractice allegedly committed during his minority.

900 S.W.2d 316, 321 (Tex.1995) (emphasis added).

The holding of the *Weiner* court is compelled by the statutory language. Minority tolling applies only so long as the minor is under the disability of minority. He is under the disability of minority only so long as he is "younger than 18 years of age." Thus, there is no tolling on the date when he becomes 18 years of age. Instead, on that date the applicable statute of limitations has started to run. Porter's reliance on Rule 6(a) of the Federal Rules of Civil Procedure as extending the limitations period by one day is ill-placed. The issue is one of tolling of limitations, which does not fit within the Rule 6(a) scheme of things. Tolling defines when limitations is not running on an already-accrued cause of action. In the "tolling" context, there is no "day of [] act, event, or default from which the designated period of time begins to run." Rule 6(a), Fed.R.Civ.P. Rather, the determination to be made is when the tolling period ends.

Porter suggests that the actual holding in *Weiner* conflicts with the earlier statement in the *Weiner* opinion, which was unnecessary for the *Weiner* holding, that "these sections require a minor to file a claim *before reaching age twenty* ...." *Id.* at 321 (emphasis added). The court agrees that the holding in



*Weiner* could be ambiguous, and that the more specific language that preceded it was not necessary to the *Weiner* opinion. However, a reading of the *Weiner* holding, in context with the language of the statutes and the more specific language of the *Weiner* opinion, has caused the court to conclude that when the Texas Supreme Court is required to make a direct holding on the issue it will hold that when a cause of

action possessed by a person accrues during the person's minority, and assuming that the only tolling is the tolling based on the disability of minority, the claim must be brought by that person before reaching the age 20 (if a two-year statute applies) or before reaching the age 22 (if a four-year statute applies).

In support of his argument that his institution of this action on his 22nd birthday was timely as to the claims governed by a four-year statute of limitations, Porter has called the court's attention to language used by the Texas Supreme Court in its 1996 decision in *S.V. v. R.V.,* as follows:

The enactment of statutes of limitations is, of course, the prerogative of the Legislature. At the time this case was filed and tried, the applicable statute was the one governing personal injury actions generally, which provided: "A person must bring suit for ... personal injury ... not later than two years after the day the cause of action accrues." Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3252, *formerly codified as* Tex. Civ. Prac. & Rem.Code § 16.003(a). The code contains two other provisions relevant to this case. One is: "If a person entitled to bring a personal action is under a legal disability when the cause of action accrues, the time of the disability is not included in the limitations period." Tex. Civ. Prac. & Rem.Code § 16.001(b). The other is: "For the purposes of this subchapter, a person is under a legal disability if the person is (1) younger than 18 years of age...." *Id.* § 16.001(a). Thus, *a person has until his or her twentieth birthday (or the next business day. id. § 16.072) to bring suit for personal injury from sexual assault if — ... — the cause of action "accrued" while the person was a minor.*

933 S.W.2d 1, 3 (Tex.1996) (emphasis added). The emphasized language matches the holding of the Texas Supreme Court in *Weiner* for ambiguity. But, again, the language must be read in context with the more specific language used in *Weiner* and the wording of the statutes themselves. When thus read, the proper conclusion to be reached is that the suit must be brought before the plaintiff has reached age 20, in the case of a two-year statute, or age 22, in the case of a four-year statute.

The court concludes that this action was instituted more than four years after the minority tolling ended, with the consequence that all of Porter's claims are barred by limitations.

VI.
*ORDER*

The court ORDERS that Charter-Provo's motion for summary judgment be, and is hereby, granted.

The court further ORDERS that all of Porter's claims against Charter-Provo be, and are hereby, dismissed with prejudice.

The court further ORDERS that all costs of court be, and are hereby, taxed against Porter.

*ORDER*

Came on for consideration the motion of plaintiff, Steven Spencer Porter, ("Porter") to alter or amend judgment and for new trial. Defendant Charter-Provo School, Inc., d/b/a Provo Canyon School ("Charter-Provo") has filed a response to plaintiff's motion. The court, having considered the motion, Charter-Provo's response, the record, and applicable authorities, finds that the motion should be denied.

As his first point of error, Porter argues that this court incorrectly applied the statute of limitations provided in the Medical Liability and Improvement Act, Tex. Rev. Civ. Stat. Ann. art. 4590i (Vernon Supp. 1997), to his supplemental claims. Specifically, Porter contends for the first time that Charter-Provo is not a health care provider as defined by Art. 4590i, § 1.03(a)(3). Even should the



court accept plaintiff's belatedly presented contention, all of his supplemental claims would still be subject to a two-year statute of limitations.

Therefore, the court ORDERS that the motion of plaintiff, Steven Spencer Porter, to alter or amend judgment and for new trial be, and is hereby, denied.

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Notes:

1. Diversity jurisdiction appears to exist as well, but it was not alleged as a basis for subject matter jurisdiction.

2. For procedural matters, such as statutes of limitations, Texas, generally speaking, applies the law of the forum state. *Hollander v. Capon,* 853 S.W.2d 723, 727 (Tex.App. — Houston [1st Dist.] 1993, writ denied); *Slack v. Carpenter,* 7 F.3d 418, 419 (5th Cir.1993); *FDIC v. Dawson,* 4 F.3d 1303, 1308-09 (5th Cir.1993), *cert. denied,* 512 U.S. 1205, 114 S.Ct. 2673, 129 L.Ed.2d 809 (1994); *Gartrell v. Gaylor,* 981 F.2d 254, 257 (5th Cir.1993); *Adams v. Gates Learjet Corp.,* 711 F.Supp. 1377, 1379 (N.D.Tex.1989). The court also will apply Texas law with respect to the tolling provisions as to both Porter's state law claims and federal law claims. *Rodriguez v. Holmes,* 963 F.2d 799, 803 (5th Cir.1992).

3. The Texas Supreme Court has held that § 10.01 of art. 4590i is unconstitutional under the open courts provision of the Texas Constitution to the extent that it does not allow tolling of limitations on a minor's claims until his 18th birthday. *Weiner v. Wasson,* 900 S.W.2d 316, 318-19, 321 (Tex.1995).

4. There is uncertainly whether concepts such as "discovery rule" and "fraudulent concealment" define date of "accrual" or whether they should be treated as providing "tolling" following accrual. For example, in *Moreno v. Sterling Drug, Inc.,* the Texas Supreme Court in consecutive sentences said, first, that the discovery rule "is used to determine when the plaintiff's cause of action accrued" and, in the next, that the discovery rule "operates to toll the running of.the period of limitations until the time when the plaintiff discovers, or through the exercise of reasonable care and diligence should discover, the nature of his injury." 787 S.W.2d 348, 351 (Tex.1990). *See also S.V. v. R.V.,* 933 S.W.2d 1, 4-5 (Tex. 1996) (where a discussion of Texas appellate court decisions dealing with the "discovery rule" and "fraudulent concealment" theories discloses that in some cases one or the other is said to toll limitations and in others one or the other is referred to as a factor in determining when the cause of action accrued). Texas case authorities suggest that the plaintiff has the burden of proof in either event. Because the same result is reached in this case whether the discovery rule and fraudulent concealment concepts are treated as tolling theories or as date of accrual theories, for convenience the court, somewhat arbitrarily, is discussing them in this memorandum opinion as tolling theories.

5. The Fifth Circuit's unpublished opinion in *Crowe* discloses that the Fifth Circuit's reversal was based on its conclusion that plaintiffs' RICO claims were precluded by prior litigation between one of the plaintiffs and one of the defendants.

6. In *Woods,* the Texas Supreme Court rejected, *sub silentio,* its statement *Weaver v. Witt,* 561 S.W.2d 792, 794 (Tex.1977), that the discovery rule is not a plea of confession and avoidance.

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