NO. 17-2279

In the United States Court of Appeals for the Eighth Circuit

ANMARIE CALGARO,

Plaintiff-Appellant,

V.

ST. LOUIS COUNTY; LINNEA MIRSCH, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS INTERIM DIRECTOR OF ST. LOUIS COUNTY PUBLIC HEALTH AND HUMAN SERVICES; FAIRVIEW HEALTH SERVICES, A MINNESOTA NONPROFIT CORPORATION; PARK NICOLLET HEALTH SERVICES, A NONPROFIT CORPORATION; ST. LOUIS COUNTY SCHOOL DISTRICT; MICHAEL JOHNSON, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS PRINCIPAL OF THE CHERRY SCHOOL, ST. LOUIS SCHOOL DISTRICT; AND E.J.K.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
The Honorable Paul A. Magnuson, Presiding

BRIEF OF APPELLEE PARK NICOLLET HEALTH SERVICES

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

Park Nicollet Health Services ("Park Nicollet") is a non-profit corporation that provides medical services. E.J.K. is Anmarie Calgaro's now 18-year old child. Calgaro sued Park Nicollet and the Appellees other than E.J.K. claiming that they deprived her of constitutionally-protected parenting rights in violation of the 14th Amendment by emancipating E.J.K. Calgaro failed to provide a home or financial support to E.J.K. for an extended period of time while E.J.K. was a minor. Under Minnesota law, E.J.K. was therefore permitted to consent to her own medical care.

By Order dated May 23, 2017, the Honorable Paul A. Magnuson dismissed Calgaro's lawsuit. The district court found that Park Nicollet was not a state actor under 42 U.S.C. § 1983, and that Park Nicollet did not participate in any joint activity with the state. As such, Calgaro's claim against Park Nicollet failed as a matter of law.

Park Nicollet joins Calgaro's request for oral argument and requests 30 minutes per side.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1A, Appellee Park Nicollet Health Services, states the following:

1. Park Nicollet is a non-public, non-profit corporation.
2. No publicly-held corporation owns 10% or more of Park Nicollet.
3. Park Nicollet is part of the HealthPartners, Inc. family of organizations.
4. HealthPartners has no parent corporation and no publicly-held corporation owns 10% or more of HealthPartners.

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JURISDICTIONAL STATEMENT

By Verified Complaint dated November 16, 2016, Appellant Anmarie Calgaro filed this lawsuit alleging that the district court had jurisdiction under 28 U.S.C. § 1331 and 42 U.S.C. § 1983. The district court entered Judgment on May 23, 2017, dismissing Calgaro's entire lawsuit. On June 6, 2017, Calgaro filed a timely Notice of Appeal. The Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly held that Park Nicollet, a Minnesota non-profit corporation that provides medical services, was not a state actor under 42 U.S.C. § 1983.

   Apposite Cases

   - *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40 (1999).
   - *Alexander v. Pathfinder, Inc.*, 189 F.3d 735 (8th Cir. 1999).
   - *Nicols v. Metro Ctr. for Indep. Living, Inc.*, 50 F.3d 514 (8th Cir. 1995).

2. Whether Calgaro's claim against Park Nicollet would fail, regardless of whether Park Nicollet is a state actor, because Park Nicollet did not deprive Calgaro of any constitutionally-protected parental rights.

   Apposite Cases

   - *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52 (1976).
   - *Schmidt v. Des Moines Pub. Schs.*, 655 F.3d 811 (8th Cir. 2011).
   - *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980).

3. Whether the Court should decline to order summary judgment for Calgaro because the record contains disputes of material fact and because Calgaro is not entitled to judgment as a matter of law.

   Apposite Cases

   - *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).
   - *Handeen v. Lemaire*, 112 F. 3d 1339 (8th Cir. 1997).

CONCISE STATEMENT OF THE CASE

Anmarie Calgaro ("Calgaro") sued E.J.K., then a minor, along with Park Nicollet and others for allegedly violating her constitutional rights. E.J.K., who turned 18 years old on July 6, 2017, was assigned the male gender at birth, but identifies as female. Therefore, Park Nicollet uses female pronouns or the word "daughter" when referring to E.J.K. *See Hunter v. United Parcel Serv., Inc.*, 697 F.3d 697, 700 (8th Cir. 2012) (using male pronouns to refer to party who was born female but identified as male). Calgaro claims that Park Nicollet interfered with her parental rights in violation of 42 U.S.C. § 1983, by complying with Minnesota state law concerning consent for medical care and the release of medical records.

A. The Parties.

Calgaro is the biological mother of E.J.K. (Verified Complaint at ¶ 3.)[1] E.J.K. was born on July 6, 1999, and turned 18 on July 6, 2017. (*Id.*) While E.J.K. was a minor, Calgaro had sole physical custody and joint legal custody of E.J.K. (*Id.* at ¶ 44.)

Park Nicollet is a Minnesota non-profit corporation that provides medical services. (*Id.* at ¶ 10.) It operates a Gender Services Clinic in Minneapolis, Minnesota. (*Id.*) Park Nicollet is required to comply with federal and state law.

[1] Appellant's Verified Complaint is attached to Appellant's Appendix at pp. App. 11 to App. 57, hereinafter referred to as "Verified Complaint."

(*Id.*) Calgaro asserts that Park Nicollet operates "under the color of state law," but alleged no facts to support that belief. (*Id.* at ¶ 11.)

B. E.J.K. Lives Apart From Calgaro.

Calgaro attached to her Verified Complaint a June 29, 2015 letter from a legal aid attorney noting that E.J.K. had lived apart from Calgaro since approximately the beginning of 2015. (Docket No. 1-1, at pp. 1-2.) The letter explained that E.J.K. had been supporting herself financially since at least the beginning of 2015. (*Id.*) According to the letter, Calgaro knew where E.J.K. lived but took no legal action to return E.J.K. to Calgaro's home. (*Id.*)

Calgaro asserted in her lawsuit that the letter "does not accurately reflect" her relationship with E.J.K., but did not identify any factual inaccuracies in the letter. (Verified Complaint at ¶ 58.) For example, Calgaro did not allege that E.J.K. actually lived with Calgaro or that Calgaro managed E.J.K.'s financial affairs at any time relevant to this case. In fact, Calgaro expressly alleged that she did not provide for her daughter financially and that "St. Louis County provided . . . funds and/or approved funding for medical services and other living expenses." (*Id.* at ¶ 6.) Calgaro also admitted that E.J.K. did not live with her when she filed this case. (*Id.* at ¶ 53.)

C. E.J.K. Seeks Medical Care.

Beginning no later than January 15, 2016, E.J.K. received care from Park Nicollet's Gender Services Clinic. (Docket No. 1-1 at p. 8.) She apparently received medically necessary treatment consistent with guidelines established by the World Professional Association for Transgender Health. (*Id.*) This included gender transition care. (*Id.*)

Under Minnesota law, Park Nicollet was not required to obtain Calgaro's consent to treat E.J.K. because E.J.K. was responsible for her own medical decisions. Minn. Stat. § 144.341 (2016). Under one of Minnesota's "consent of minors for health services" statutes, a minor may give consent for her own non-emergency medical care if she lives apart from her parents and is "managing [her] personal financial affairs." *Id.* Calgaro appears to concede that when E.J.K. received care from Park Nicollet, E.J.K. did not live with and was financially independent from Calgaro. Thus, Calgaro has conceded that E.J.K. met the requirements under Minnesota law to consent to her own non-emergency medical care.

At some point during 2016, Calgaro learned that E.J.K. has been receiving medical care from Park Nicollet. (Verified Complaint at ¶ 78.) Calgaro did not thereafter provide for E.J.K. financially or return E.J.K. to Calgaro's home. As a

result, E.J.K. continued to consent to her own medical care under Minn. Stat. § 144.341.

D. Calgaro Contacts Park Nicollet.

In 2016, Calgaro requested E.J.K.'s medical records from Park Nicollet and asked to participate in E.J.K.'s medical decisions. (Verified Complaint at ¶ 113.) Calgaro has not challenged whether E.J.K. was permitted to make her own medical decisions under Minnesota law. Nor has Calgaro alleged that Park Nicollet ignored any efforts to correct Park Nicollet's understanding about E.J.K.'s housing or financial situation. The reason for this glaring omission is obvious: Calgaro has no factual basis to contest the application of Minn. Stat. § 144.341 because E.J.K. really did live independently from Calgaro at all times relevant to this case. In any event, Calgaro was not provided E.J.K.'s Park Nicollet medical records. (Verified Complaint at ¶ 78.)

Despite admitting that she never received E.J.K.'s medical records, Calgaro suggests that E.J.K. has consented to a sex change procedure. (*Id*. at ¶¶ 101, 104, 108.) The *Amicus Curiae* brief goes even further and asserts repeatedly that Park Nicollet performed surgery on E.J.K. (Amicus Brief at 7, 8, 9.) The Court need not assume those allegations are true, even when reviewing a motion to dismiss,

because Calgaro has no foundation to make such assertions.[2] Beyond that, Calgaro's counsel conceded at the district court that Calgaro did not object to any surgical procedures in this case and E.J.K.'s counsel explained that "there are no surgical procedures that she is currently seeking or that are contemplated." (Docket No. 93, Transcript at 39, 41.)

E. Calgaro's Motion for Summary Judgment.

Calgaro moved for summary judgment prior to Park Nicollet filing any response to the Verified Complaint. In support of her motion, Calgaro conceded the following:

- In 2015, E.J.K. moved out of Calgaro's home and has not lived there since. (Docket No. 48 at ¶ 12.)
- Calgaro is not paying for E.J.K.'s medical care or otherwise providing for E.J.K. financially. (*Id.* at ¶ 31; Docket No. 47-1 at 4 of 12, ¶ 3.)
- Beginning no later than January 15, 2016, E.J.K. received treatment at Park Nicollet for gender dysphoria. (Docket No. 47 at Exhibit C.)
- Park Nicollet provided treatment to E.J.K. in accordance with World Professional Association for Transgender Health ("WPATH") guidelines. (*Id.*)

Beyond these facts, Calgaro relied on speculation to support her motion. For example, Calgaro submitted a letter that was purportedly written by Dr. Kenneth W. Crabb. (Docket No. 47-1 at 9-12 of 12.) Dr. Crabb has not reviewed

[2] *Taxi Connection v. Dakota, Minnesota & Eastern R.R. Corp.*, 513 F.3d 823, 826 (8th Cir. 2008) (court is not required to assume that conclusory assertions are true when considering motion to dismiss).

E.J.K.'s medical records. (*Id.* at 9 of 12.) While he was "unable to determine" whether and on what basis Park Nicollet obtained informed consent from E.J.K., Dr. Crabb stated that Park Nicollet did not violate any standard of care in treating E.J.K. (*Id.* at 10-11 of 12.)

Calgaro provided a Declaration in support of her motion in which she speculated about E.J.K.'s consent for medical treatment. (Docket No. 48.) Calgaro wondered whether E.J.K. "may have been subject to undue influence" by medical providers and whether E.J.K. provided effective consent. (*Id.* at ¶ 43.) Calgaro offered no evidence for either assertion. (*See generally* Docket No. 48.)

In response, E.J.K. submitted an undisputed Declaration. (Docket No. 63.) EJ.K. explained that she received medical care for gender dysphoria after discussing various treatment options, including risks and benefits, with her physicians. (Docket No. 63 at ¶¶ 5-7.) E.J.K. was not pressured or unduly influenced by any medical provider. (*Id.* at ¶ 8.)

SUMMARY OF THE ARGUMENT

The district court properly dismissed Calgaro's Verified Complaint against Park Nicollet. Calgaro's allegation under 42 U.S.C. § 1983 that Park Nicollet violated the 14th Amendment fails because Park Nicollet is not a state actor. While Calgaro is free to challenge Minn. Stat. § 144.341, she cannot assert her constitutional challenge against Park Nicollet, a private party. Therefore, the

district court lacked subject matter jurisdiction over Calgaro's claim against Park Nicollet and properly dismissed the Verified Complaint with prejudice.

Alternatively, Calgaro's claim against Park Nicollet fails because Calgaro has not been deprived of any rights secured by the 14th Amendment. The Verified Complaint fails to allege a plausible violation of the 14th Amendment because it does not allege that the state has required or prohibited Calgaro from doing anything. And, because E.J.K. has recently turned 18, Calgaro's requests for declaratory and injunctive relief are now moot. The Court should affirm the district court even if it declines to reach the state actor issue.

Calgaro would not, in any event, be entitled to summary judgment on this record. She has not presented undisputed evidence that Minn. Stat. § 144.341 was misapplied or that E.J.K. failed to give effective consent for medical care. As such, if the Court declines to affirm the district court, it should reject Calgaro's assertion that she is entitled to judgment as a matter of law and remand the case for further proceedings.

ARGUMENT

A. The District Court Properly Dismissed The Verified Complaint.

1. Standard of Review.

Under Federal Rule of Civil Procedure 12, a district court "must" dismiss an action when it lacks subject matter jurisdiction. Fed. R. Civ. P. 12(h)(3). A district court may weigh evidence to determine whether it has jurisdiction to hear a case. *Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990). A plaintiff has the burden of proof to establish that jurisdiction exists. *Id.*

In addition, a district court must dismiss a Complaint that fails to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). While the court "accept[s] the factual allegations of the complaint as true," those "allegations must supply sufficient 'facts to state a claim to relief that is plausible on its face.'" *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009). The Court reviews Rule 12 dismissals *de novo*. *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016).

2. Calgaro's 14th Amendment Due Process Clause Claim Fails Because Park Nicollet Is Not a State Actor.

Calgaro claims that Park Nicollet violated the 14th Amendment. (Verified Complaint at ¶¶ 172-221.) Specifically, Calgaro alleges that Park Nicollet made a "determination of . . . emancipation" that supposedly "terminated [her] protected constitutional parental rights." (*Id.* at ¶ 179.)

"Only state actors can be liable under Section 1983." *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001) (affirming summary judgment in case against store that detained shoplifting suspect). The state actor requirement of Section 1983 "excludes from its reach merely private conduct, no matter how . . . wrongful." *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). If Park Nicollet is not a state actor, then the Court lacks jurisdiction to hear Calgaro's Section 1983 claim. *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 740 (8th Cir. 1999); *Smith v. Univ. of Minnesota Med. Center – Fairview Riverside*, No. CIV 09-0293 JRT-JSM, 2010 WL 3893902, at *9 (D. Minn. July 14, 2010) (report and recommendation), report and recommendation adopted, No. CIV 09-0293 JRT-JSM, 2010 WL 3893849 (D. Minn. Sept. 30, 2010).

While Calgaro makes conclusory assertions about "government-authorized entities" and "government-authorized service provider[s]," Judge Magnuson correctly concluded that Park Nicollet was not a state actor. (*See* Appellant's Brief at 4, 30; Appellant's Addendum at 5-6.) As Calgaro's Verified Complaint makes

clear, Park Nicollet "is a Minnesota non-profit corporation which provides medical services to members of the public." (Verified Complaint at ¶ 10; *see also* Docket No. 14 (Park Nicollet's Rule 7.1 Disclosure).) Because Park Nicollet is a private actor, not a state actor, Calgaro's Section 1983 claim was properly dismissed. *Hoyt v. St. Mary's Rehab. Ctr.*, 711 F.2d 864, 865 (8th Cir. 1983) ("We agree with the District Court that there is no state action, so that [plaintiff's] constitutional and § 1983 claims must fail"); *Lubin v. Crittenden Hosp. Assoc.*, 713 F.2d 414, 415 (8th Cir. 1983).

Calgaro initially attempted to avoid this result by alleging that Park Nicollet "receives state funding to provide medical services to the public." (Verified Complaint at ¶ 10.) But the mere receipt of state funds does not transform Park Nicollet into a state actor. *Alexander*, 189 F.3d at 740 ("Pathfinder is a private corporation and the fact that it receives Medicaid funds does not convert it into a state actor"); *see also Smith* 2010 WL 3893902, at *10.

Nor does the fact that Park Nicollet is subject to extensive government regulation make Park Nicollet a state actor. A private party does not become a state actor simply "because it is subject to extensive governmental regulation and licensing." *Nichols v. Metro. Ctr. for Indep. Living, Inc.*, 50 F.3d 514, 518 (8th Cir. 1995); *see also Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). As such, Calgaro's allegation that "Park Nicollet is responsible for adhering to . . . state law

and federal law," (Verified Complaint at ¶ 10), does nothing to support the notion that Park Nicollet is a state actor. *Nichols*, 50 F.3d at 518 (private corporation not state actor even though "it depends upon government for nearly all its funding; . . . it performs uniquely public functions; and . . . it is subject to extensive governmental regulations and licensing").

Because Calgaro cannot rely on the receipt of state funds or the existence of state regulations to transform Park Nicollet into a state actor, she asserts that Park Nicollet became a state actor by complying with Minn. Stat. § 144.341. That argument fails because a private party's invocation of state legal procedures does not satisfy the state actor requirement of Section 1983. *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 n.21 (1982).

As alleged in the Verified Complaint, Park Nicollet merely complied with Minnesota law in determining that E.J.K. was permitted to provide consent for her own medical care. Minn. Stat. § 144.341 (2016). The Verified Complaint does not remotely suggest that E.J.K. lived with Calgaro or was provided for financially by Calgaro. In fact, Calgaro seems to agree that Park Nicollet followed Minn. Stat. § 144.341 and correctly concluded that E.J.K. had the ability to consent to her own medical care. Because following the law does not convert a private corporation into a state actor, Calgaro's 14th Amendment claim fails and was properly dismissed. *Lugar*, 457 U.S. at 939 n.21.

Calgaro asserted before the district court that Park Nicollet was a state actor because it determined emancipation, a traditional public function. To the contrary, Park Nicollet merely followed Minn. Stat. § 144.341 and determined that E.J.K. was permitted to consent to her own medical care. No other healthcare provider -- or anyone else -- is bound by Park Nicollet's conclusion and E.J.K. was not, in any way, emancipated by any decision that Park Nicollet made concerning consent.

Healthcare providers -- not government -- are typically responsible for providing information to patients about treatment options and for obtaining informed consent from patients. *See Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980). There is no support for the notion that obtaining informed consent from a patient constitutes a traditional government function. *Gallegos v. Slidell Police Dept.*, No. 07-6636, 2008 WL 1794170, at *4 (E.D. La. Apr. 18, 2008) ("The provision of medical services . . . is certainly not the exclusive prerogative of the state"); *Henderson v. Pollack*, No. CIV. 1:CV-07-1365, 2008 WL 282372, at *4 (M.D. Pa. Jan. 31, 2008) (providing medical care "plainly is not, and never was," a traditional exclusive governmental function).

Calgaro's reliance on *West v. Atkins*, 487 U.S. 42 (1988), does nothing to change this. In that case, the state contracted with a private physician to provide services to inmates at a state prison. The state required the inmates to receive medical care from a physician selected and paid by the state. *Id.* at 43-45.

Providing medical care to prison inmates is a traditional state function with constitutional implications. *Id.* at 54-55. As such, the private physician in *West* was a state actor for purposes of an inmate's Eighth Amendment claim. *Id.* at 55.

West is easily distinguishable from this case. Park Nicollet is a private non-profit corporation, not a government-mandated healthcare provider. (Verified Complaint at ¶ 10.) Plaintiff does not allege that Park Nicollet is under any contractual obligation to provide medical care to E.J.K., or that E.J.K. was required by any governmental entity to obtain care from Park Nicollet.

Calgaro also relied below (but now seems to have abandoned) *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), for the notion that state action may be found when a private party enters into a "symbiotic relationship" with the government. (Court Docket No. 65 at 37.) "Use of the symbiotic relationship test is limited generally to cases involving racial discrimination." *Lubin v. Crittenden Hosp. Assoc.*, 713 F.2d 414, 416 (8th Cir. 1983) (affirming dismissal of complaint). The Supreme Court has noted that the Burton decision "was quite narrow" and "limited its actual holding to lessees of public property." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 409 (1995). It has also made clear "that privately owned enterprises providing services that the State would not necessarily provide, even though they are extensively regulated, do not fall within the ambit of *Burton*." *Am. Mfrs. Mut. Ins. v. Sullivan*, 526 U.S. 40, 57 (1999). Calgaro does

not allege that Park Nicollet is a lessee to public property, or that Park Nicollet provides services ordinarily provided by the state. Therefore, the symbiotic relationship test does not apply in this case.

Likewise, Calgaro's reliance on *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), is misplaced. That case involved a state interscholastic association that was sued by a private high school under Section 1983. *Id.* at 290-91. Because 84 percent of the association's members were public schools represented by school officials acting in their official capacities and the public school officials controlled the association, the association was a state actor. *Id.* at 299-300. This case, in sharp contrast, involves no allegation that Park Nicollet is controlled by or operated by a governmental authority. In fact, Calgaro concedes that Park Nicollet is a private, non-profit organization. (Verified Complaint at ¶ 10; Docket No. 14 (Park Nicollet's Rule 7.1 Disclosure).)

Nor is there any indication that Park Nicollet is performing a service the state would otherwise provide. To the contrary, Park Nicollet is merely complying with the Minnesota Legislature's determination that, under certain circumstances that exist in this case, a minor who is not supported by her parent may make her own medical decisions. Simply following state law does not transform a private company into a state actor or establish a symbiotic relationship. *Lugar*, 457 U.S. at

939 n.21 (rejecting idea that invocation of state legal procedures constitutes joint participation with state officials). If complying with state law converts a private company into a state actor, then the state actor requirement is meaningless because every company in the state would be a state actor. The Court should reject this absurd result.

Calgaro also relies on *Lugar* to suggest that Park Nicollet may be a state actor by virtue of "joint activity" with government officials in the deprivation of a right or privilege. (Appellant's Brief, n.73.) *Lugar* concerned a private party's ex parte application of a legal process that resulted in state officials attaching the plaintiff's property in order to satisfy a debt. 457 U.S. at 924. Although a private party was responsible for initiating the attachment proceeding, it acted in close concert with state officials and therefore acted under color of state law because it "invoke[ed] the aid of state officials to take advantage of state-created attachment procedures." *Id.* at 942.

Many courts have declined to apply *Lugar* outside of pre-judgment attachment proceedings. *See, e.g., Deal v. Newport Datsun Ltd.*, 706 F.2d 141, 142 (4th Cir. 1983); *Dahlberg v. Becker*, 581 F. Supp. 855 (N.D.N.Y. 1984), aff'd, 748 F.2d 85 (2d Cir. 1984); *Wilson v. Pfeiffer*, 565 F. Supp. 115, 118 (S.D.N.Y. 1983); *Lee v. Patel*, 564 F. Supp. 755, 759 (E.D. Va. 1983); *Long v. Citizen's Bank & Trust Co. of Manhattan, Kan.*, 563 F. Supp. 1203, 1214-15 (D. Kan. 1983). That

aside, *Lugar* obviously does not apply here because even Calgaro did not allege that Park Nicollet invoked the aid of state officials to deprive her of any rights or to compel E.J.K. to receive medical treatment.

Calgaro also contends that Park Nicollet is acting in concert with the state because it has received immunity under Minn. Stat. § 144.345. In fact, Section 144.345 merely provides that consent by a minor who claims to be able to provide consent will be deemed effective so long as the medical provider who relies on it acts in good faith. Minn. Stat. § 144.345. Far from providing "immunity," this statute merely facilitates medical care for patients whom providers reasonably believe are capable of giving consent. Calgaro should not be permitted to mischaracterize Section 144.345 as an immunity statute in order to bolster her failing state actor argument.

Park Nicollet is not a state actor, and therefore the Court lacks subject matter jurisdiction over Calgaro's 14th Amendment claim against Park Nicollet. Because Count I fails for lack of subject matter jurisdiction, Count II (declaratory relief) and Count III (injunctive relief) also fail. *Parkhurst v. Tabor*, 569 F.3d 861, 864-65 (8th Cir. 2009) (affirming dismissal of claims for declaratory and injunctive

relief in case where Section 1983 claim failed).[3] The Court should affirm dismissal of Calgaro's claims against Park Nicollet.

3. Calgaro's Due Process Claim Against Park Nicollet Fails Because Calgaro's Constitutional Rights Have Not Been Violated.

The Court can affirm dismissal of Park Nicollet without even addressing the state actor requirement. "To set forth a procedural due process violation, a plaintiff, first must establish that [her] protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprived [her] of such an interest without due process of law." *Schmidt v. Des Moines Pub. Schs.*, 655 F.3d 811, 817 (8th Cir. 2011) (internal quotation omitted). "Due process is a flexible concept, requiring only such procedural protections as the particular situation demands." *Id.* (internal quotation omitted).

Here, Calgaro had a process under which she could control whether E.J.K. was able to consent to her own medical procedures. Specifically, while E.J.K. was still a minor, Calgaro could have compelled E.J.K. to return to her home and/or could have provided for E.J.K. financially. If either of those things were to happen, Minn. Stat. § 144.341 would not have applied. Park Nicollet would then have been required to obtain Calgaro's consent for medical care. Calgaro's failure to exercise these options does not give rise to a due process claim. *See Schmidt*,

[3] As discussed below at pages 29-31, Calgargo's claims for declaratory and injunctive relief are also moot.

655 F. 3d at 815, 818 (where sufficient remedies are available under state law, there is no procedural due process violation).

Significantly, Calgaro does not claim that E.J.K. provided false information relating to her living situation and, more importantly, that Park Nicollet knew E.J.K. had provided false information. Nor does Calgaro claim to have disputed the underlying facts relevant to an inquiry under Minn. Stat. § 144.341. If Calgaro were to be granted some sort of "process" to evaluate whether the elements of Minn. Stat. § 144.341 were met, that process would only have confirmed that E.J.K. had the ability to consent to her own medical care.

Minn. Stat. § 144.341 properly balances three constitutional interests. First, E.J.K. has a right to privacy even though she was 17 years old at the time this case was filed. *See Carey v. Population Servs. Int'l*, 431 U.S. 678, 707 (1977). Second, the State of Minnesota has a substantial interest in the health and welfare of its inhabitants, including its minor inhabitants. *Ginsberg v. State of N.Y.*, 390 U.S. 629, 640 (1968). Third, Calgaro had a right to be free of undue government interference in the care of her children, particularly young children who are living with her. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). But a parent's interests are "no more weighty" than a competent minor's interests. *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

Minnesota Statute § 144.341 does not conflict with these constitutional interests. It merely establishes who may provide consent for certain medical care when a patient is a minor and the patient is providing for herself financially and living on her own. A parent or guardian is ordinarily responsible for consenting to medical care, but minors may themselves provide consent under the narrow circumstances described in the statute.

Under Minn. Stat. § 144.341, a minor who is not living with a parent or guardian and is not being supported financially by a parent may provide consent for her own medical care. This does not mean that the minor has been "emancipated," as Calgaro alleges, just that the medical provider may rely in good faith on the patient's consent for medical treatment. Minn. Stat. § 144.345 (2016).

Minn. Stat. § 144.341 does not deprive parents of their right to care for their children. It merely recognizes that, in those situations where a parent is no longer providing a home or financial support, the parent is also not required for consent. This logic is easily in keeping with parental rights. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (discussing parent rights for "those who nurture [a child] and direct his destiny"). Parents who are no longer providing a home or managing financial resources are not permitted to claim that the state has deprived them of parental rights when their child takes responsibility for medical decisions. *See,*

e.g., id.; Meyer, 262 U.S. at 400 (recognizing that duties of parents correspond to right of control).

"Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Danforth*, 428 U.S. at 75. The State of Minnesota has determined that the age of majority for certain privileges and rights is 18, but as recently as 1973, the age of majority was 21. Minn. Stat. § 645.45 (1971). And the state has determined that different ages govern certain privileges and rights. For example, Minnesota law permits those under age 18 to drive motor vehicles (Minn. Stat. § 171.055) or to consent to sexual contact in certain instances (Minn. Stat. § 609.345), but does not permit adults between the ages of 18 and 21 to consume alcohol (Minn. Stat. § 120A.22, subd. 8). *See, e.g., Stanton v. Stanton*, 421 U.S. 7, 15 (1975) (describing discrepancies in state statutes regarding age of majority). In contrast, Minnesota law also imposes a duty to provide child support after age 18 in some circumstances. Minn. Stat. § 518A.26 (for purposes of child support, defining child as an "individual under 18 years of age" or "an individual under age 20 who is still attending secondary school."). Minn. Stat. § 144.341 balances rights in the unique situation where a parent is no longer providing a home or financial support to a minor child who needs non-emergency medical care. This policy judgment

recognizes the privacy rights of minors and the rights of minors to certain kinds of medical care. *See Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 75 (1976).

No formal legal proceeding is necessary for a parent to notify a medical provider that a minor is not permitted to give consent for medical treatment. Rather, a parent may simply notify a provider that the minor continues to live with the parent, or that the parent provides for the minor financially. If Calgaro believed that E.J.K. should not have been permitted to make her own medical decisions, then Calgaro could have arranged to have E.J.K. returned to Calgaro's home so that Minn. Stat. § 144.341 would no longer apply. But Calgaro cannot allow E.J.K. to live on her own and support herself financially and then assert that she has a right to interfere with E.J.K.'s medical decisions. *See M.S. v. Werners*, 557 F.2d 170, 178 (8th Cir. 1977) (Henley, J., dissenting) ("The right to custody and control over a minor child accrues to parents in reciprocation for their duty to support, educate and protect that child").

Calgaro's view about Minn. Stat. § 144.341 would prevent medical providers from obtaining informed consent for non-emergency care. Providers may be forced to withhold treatment simply because a parent who does not provide a home or financial support for a minor has refused to consent to medically necessary care or who cannot be located to provide consent to medically necessary

care. Minn. Stat. § 144.341 provides a more sensible solution: the individual who is providing housing for the minor and who is managing the minor's financial affairs is empowered to consent to the minor's medical treatment.

Once a medical provider has determined in good faith that a minor may consent to medical care under Minn. Stat. § 144.341, the patient's medical records are private under state and federal law, and may not generally be released without the patient's authorization. Minn. Stat. §§ 144.291(h) & 144.293; 42 C.F.R. § 164.502(g)(3). However, the health professional remains free to notify a parent concerning medical matters if failure to do so would jeopardize the patient's health. Minn. Stat. § 144.346; *Hodgson v. Minnesota*, 497 U.S. 417, 423 n.1 (1990).

Calgaro did not attempt to reassert any right to make medical decisions for E.J.K. Rather, Calgaro allowed E.J.K. to live on her own and support herself financially, but nevertheless requested that the district court prevent E.J.K. from providing consent for her own treatment. *See Benitez v. Gresham-Barlow Sch. Dist.*, No. 3:12-CIV-1003-ST, 2012 WL 3878419, *7 (D. Or. Sept. 6, 2012) ("The facts alleged in the Second Amended Complaint essentially boil down to plaintiffs' inability to communicate with their daughter in order to resolve a family conflict").

Even more importantly, Minn. Stat. § 144.341 does not require or prohibit any activity by Calgaro or E.J.K. *See Doe v. Irwin*, 615 F.2d 1162, 1168 (6th Cir.

1980) (discussing Supreme Court parenting cases as either "requiring or prohibiting some activity"). Courts have found unconstitutional laws that forbid the teaching of foreign languages to minors or required children ages eight to 16 to attend public schools. *Meyer*, 262 U.S. at 403 (foreign languages); *Pierce v. Society of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534-35 (1925) (public schools). Likewise, a state may not interfere with a parent's decision to regulate the amount of time a child spends with grandparents, absent some special circumstances that justify state interference. *Troxel v. Granville*, 530 U.S. 57, 68 (2000). Indeed, "[e]very Supreme Court case discussing fundamental rights of parents with respect to their children addresses a state law or regulation that requires children to engage in an activity their parents do not want them to engage in, or prohibits children from engaging in an activity their parents do want them to engage in." *Reardon v. Midland Cmty. Schs.*, 814 F. Supp.2d 754, 770 (E.D. Mich. 2011). Minn. Stat. § 144.341 does not require or prevent E.J.K. from engaging in any activity.

In short, Minnesota has established a voluntary procedure under which a minor who is living separate and apart from her parents, and who is managing her own personal financial affairs, may give effective consent to medical services. Here, E.J.K. is living separate and apart from her mother, and Calgaro elected not to bring E.J.K. back into her home or to provide for her financially. As a result,

E.J.K. was able to give consent for her own non-emergency medical care, even before she turned 18.

Calgaro offers no authority for the notion that she had a constitutional right to control the medical decisions of a nearly 18 year old minor for whom she no longer provided housing or financial support. Calgaro seems to rely on Minnesota's general age of majority statute for the idea that, absent a court order of emancipation, a minor may not make her own medical decisions. But the same state government that selected 18 as the age of majority has determined that, in certain circumstances, minors may give consent for their own care. Minn. Stat. § 144.341 (2016). Calgaro had no constitutional right to interfere with the state's determination regarding medical consent or with E.J.K.'s medical decision.

Before the district court, Calgaro questioned whether E.J.K. provided "effective consent" for medical care. (Docket No. 65 at 19 ("This is the stage of the decision-making process Ms. Calgaro identifies as the violation of her right to due process").) According to Calgaro, even minors who are living apart from their parents and who are providing for themselves financially are not able to consent to their own care absent a finding (of some kind) concerning "effective consent" by a court. Calgaro argued at the district court that she was entitled to challenge whether "effective consent" occurred and entitled to "a process to assert her

parental rights as to [E.J.K.'s] capacity to receive" medical care. (Docket No. 65 at 21.)

The "may give effective consent" provision of Section 144.341 does not create an additional requirement for permitting a minor to consent to their own care. That provision simply makes clear that minors who are not living with their parents and who manage their own finances are among those who are permitted ("may give") to consent for their own care and whose consent is binding ("effective consent"). *See also* Minn. Stat. § 144.345 (making clear that "effective consent" simply means consent "deemed effective without the consent of the minor's parent or legal guardian"). Nothing in the statute even remotely suggests that some legal process is necessary for determining consent much less that Calgaro or anyone else is entitled to challenge another's ability to consent to medical care.

All interactions with care providers require consent. Each time a patient interacts with a provider, the provider must ensure that he or she has explained the patient's medical options and that the patient has consented to the care. *Kohoutek v. Hafner*, 383 N.W.2d 295, 299 (Minn. 1986). This occurs without an adjudication or adversarial proceeding, and is a matter between the provider and the patient. If a provider fails to obtain effective consent, then the patient -- not a

third-party -- may bring a claim. Calgaro has no constitutional right to interfere with another person's medical care.

Calgaro's constitutional attack would fail in any event because nothing under Minn. Stat. § 144.341 -- and certainly nothing done by Park Nicollet -- prohibits or requires anything of E.J.K. *Reardon*, 814 F. Supp.2d at 770 ("[e]very Supreme Court case discussing fundamental rights of parents with respect to their children addresses a state law or regulation that requires children to engage in an activity their parents do not want them to engage in, or prohibits children from engaging in an activity their parents do want them to engage in"). Far from preventing or requiring anything of E.J.K., Park Nicollet merely followed Minnesota law and accepted E.J.K.'s consent for medical care. Accordingly, the district court properly dismissed Calgaro's claim against Park Nicollet.

Calgaro's argument fairs no better when cast in terms of substantive due process. As discussed above, Calgaro and E.J.K. both have substantive due process rights. *Danforth*, 428 U.S. at 75. E.J.K.'s rights are no less protected under the constitution simply because she was 17 years old when this case was filed. *Carey*, 431 U.S. at 707. And, Park Nicollet did not weigh Calgaro's rights against E.J.K's rights. Rather, Calgaro concedes that she was not providing for E.J.K. and, as a result, E.J.K. was permitted to consent to her own care. Minn. Stat. § 144.341. Because Calgaro and E.J.K. do not disagree about whether Minn.

Stat. § 144.341 applies, Park Nicollet did not make any decision to deprive Calgaro of substantive due process rights.

Put differently, Park Nicollet made no determination about whether Calgaro was a "fit parent." It did not, for instance, determine that E.J.K. could consent to her own care despite living with Calgaro because Calgaro was not fit to interfere with E.J.K.'s medical decisions. Rather, according to the Verified Complaint, Park Nicollet simply followed Minn. Stat. § 144.341, which requires no determination regarding Calgaro's fitness as a parent. Calgaro at all times remained free to provide for E.J.K. financially and to thereby prevent E.J.K. from consenting to her own medical care. Because Calgaro was not deprived of her rights as a parent, her substantive due process claim fails.

4 Calgaro's Claims For Injunctive And Declaratory Relief Are Moot.

"In order for a federal court to hear a case, there must be a definite and concrete controversy involving adverse legal interests at every stage in the litigation." *McFarlin v. Newport Special School Dist.*, 980 F.2d 1208, 1210 (8th Cir. 1991). "Through the passage of time and the occurrence of irrevocable events, disputes may disappear so that federal courts no longer can grant effective relief." *Id.*

In this case, Calgaro's requests for injunctive and declaratory relief are moot. While this case has been pending, E.J.K. reached the age of majority.

(Verified Complaint at ¶ 23.) Even under Calgaro's view of the law, Calgaro no longer has the right to participate in E.J.K.'s medical care. And, because E.J.K. will never again be a minor, there is no live controversy regarding Calgaro's right to participate in E.J.K.'s medical care. Accordingly, Calgaro's requests for injunctive and declaratory relief are now moot, regardless of whether Park Nicollet is a state actor and regardless of whether Calgaro was deprived of a constitutional right. *McFarlin*, 980 F.2d at 1210.

A narrow exception exists for moot claims that are "capable of repetition, yet evading review," *Roe v. Wade*, 410 U.S. 113, 125 (1973), but that doctrine does not apply here. That doctrine applies if "(1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam). In other words, "the plaintiff must demonstrate a reasonable expectation that the event complained of will recur." *McFarlin*, 980 F.2d at 1211.

Calgaro has no reasonable expectation that her alleged parental rights may be violated by Park Nicollet. While the Verified Complaint mentions that Calgaro has other minor children, nothing suggests that those minor children have sought or would qualify to consent to their own medical care under Minn. Stat. § 144.341. Nor may Calgaro rely on a mere "theoretical possibility" that Minn. Stat.

§ 144.341 may apply to another of her children: "a 'demonstrated probability' must be shown." *McFarlin*, 980 F.2d at 1211 (*quoting Murphy*, 455 U.S. at 478). Calgaro has alleged no facts to support a "demonstrated probability," and her requests for injunctive and declaratory relief are moot, regardless of whether Park Nicollet is a state actor and regardless of whether Calgaro's rights were violated.

B. Calgaro Is Not Entitled To Summary Judgment.

In the event the Court disagrees with the district court's dismissal of Calgaro's claims against Park Nicollet, it should remand the matter for further proceedings. It should not grant Calgaro's request for summary judgment because Calgaro has not and cannot present undisputed evidence that she is entitled to judgment as a matter of law.

1. Summary Judgment Standard.

Summary judgment is not appropriate unless "there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A party may avoid summary judgment merely by submitting admissible evidence showing that a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A moving party cannot rely on speculation or conjecture, but must present admissible evidence. *Banks v. Deere*, 829 F.3d 661, 666 (8th Cir. 2016) ("mere allegations, unsupported by specific facts

or evidence" beyond a party's "own conclusions" are insufficient at summary judgment stage).

2. Calgaro Is Not Entitled To Summary Judgment On Appeal.

If the Court reverses the district court's dismissal of Calgaro's Verified Complaint against Park Nicollet, it should remand the case for further proceedings, not enter summary judgment in favor of Calgaro. The record shows that Park Nicollet was not a "state actor" for purposes of Section 1983. *Hoyt*, 711 F.2d at 865. Nor is there evidence showing that, as a matter of law, Park Nicollet deprived Calgaro of a constitutional right. *Doe*, 615 F.2d at 1168. As such, the Court should reject Calgaro's request for summary judgment prior to formal discovery.

The district court denied Calgaro's motion for summary judgment because it was meritless. (Appellant's Addendum at 13.) The Court only has jurisdiction over final orders and a narrow category of collateral orders. 28 U.S.C. §§ 1291, 1292. A denial of a motion for summary judgment is not a final order on the merits and is usually not appealable. *Shannon v. Koehler*, 616 F.3d 855, 861 (8th Cir. 2010). Because the district court dismissed Calgaro's Verified Complaint prior to any discovery, and because the denial of Calgaro's motion for summary judgment is not itself appealable, the Court should deny Calgaro's request for summary judgment for lack of jurisdiction.

Beyond that, summary judgment is only appropriate when "there can be but one reasonable conclusion as to the verdict." *Anderson*, 477 U.S. at 250. "If reasonable minds could differ as to the import of the evidence," summary judgment is not appropriate. *Id.*

Here, Calgaro concedes that E.J.K. is able to consent to her own medical treatment but questions whether E.J.K. has provided "effective consent" in this case. (Docket No. 48 at ¶ 42.) Calgaro offers no evidence that E.J.K. failed to provide effective consent. Instead, she simply expresses concern that Park Nicollet may have provided care without first obtaining effective consent. (*Id.*) Calgaro's speculation about E.J.K.'s consent does not begin to meet her burden to present admissible evidence sufficient to require judgment as a matter of law. Fed. R. Civ. P. 56(c); *Handeen v. Lemaire*, 112 F.3d 1339, 1346 (8th Cir. 1997) (moving party must meet "prefatory burden contemplated by Rule 56" before burden shifts to non-moving party to identify disputes regarding material facts).

Calgaro's summary judgment record included a letter from a physician who admits that he has never reviewed E.J.K.'s medical records and does not know the circumstances under which E.J.K. received medical care. (Docket No. 47-1 at pp. 9-10 of 12.) That letter is not admissible evidence and should not be considered by the Court. *Bloom v. Metro Heart Group of St. Louis, Inc.*, 440 F.3d 1025, 1028 (8th Cir. 2006). That aside, the physician concludes that Park Nicollet appears to

have complied with Minn. Stat. § 144.341. (*Id.* at p. 11 of 12.) The inadmissible letter offered by Calgaro does nothing to advance her request for summary judgment.

In addition, Calgaro offers no evidence that E.J.K. failed to provide valid consent for medical care. Before the district court, Calgaro suggested that E.J.K. may not have provided "effective consent" for medical care. (Docket No. 48 at p. 7 of 7, ¶ 42.) Calgaro's speculation is not evidence and cannot support a request for summary judgment. *Bloom*, 440 F.3d at 1028 (8th Cir. 2006). A summary judgment record must consist of admissible evidence, not speculation and conjecture.

E.J.K., in sharp contrast, has provided undisputed evidence that she gave effective consent for medical treatment. (Docket No. 63.) Specifically, she spoke with her medical providers about treatment options, including short-term and long-term effects and risks and benefits. (*Id.* at pp. 2-3 of 3, ¶ 7.) E.J.K. relied on that medical advice to make her decisions and to consent to care. (*Id.*) At a minimum, this demonstrates that Calgaro is not entitled to judgment as a matter of law.

CONCLUSION

The district court correctly dismissed Calgaro's Verified Complaint against Park Nicollet because Park Nicollet is not a state actor. In addition, Park Nicollet did not deprive Calgaro of any constitutionally-protected rights. Park Nicollet

respectfully requests that the Court affirm the district court. In the event the Court does not affirm, the Court should deny Calgaro's request for summary judgment and remand the case for further proceedings.

Date: October 2, 2017

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CERTIFICATE OF COMPLIANCE

Certificate of compliance with the type-volume limitation, the typeface requirements, and the type style requirements of Fed. R. App. P. 32(a) and with the technical requirements of 8th Cir. R. 28A(h):

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,436 words, excluding portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) (table of contents, table of authorities, statement with respect to oral argument and certificates of counsel).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been produced using a proportionally spaced typeface using 14-point Times New Roman font, using Microsoft Word, 2010 Version.

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Date: October 2, 2017

By: *s/ David M. Wilk*
DAVID M. WILK

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I hereby certify that on October 2, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

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