UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Anmarie Calgaro,

Plaintiff,

vs.

St. Louis County; Linnea Mirsch, individually and in her 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 County School District; and J.D.K.,

Defendants.

Civil Action No.: 0:16-cv-03919-PAM-LIB

FAIRVIEW HEALTH SERVICES' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendant Fairview Health Services ("Fairview") submits this memorandum of law in opposition to Plaintiff Anmarie Calgaro's motion for summary judgment. In her haste to reach the constitutional question she claims is implicated in this matter, Plaintiff bypasses the threshold question of subject-matter jurisdiction.

Specifically, Plaintiff assumes without reliance on authority, that the alleged[1] use of public funds to pay for some of E.J.K. f.k.a. J.D.K.'s ("E.J.K.") treatment renders Fairview a state actor. This is simply not the case.

Moreover, summary judgment is inappropriate because the evidence is that Fairview's discretionary decisions to provide treatment are not controlled by the source of the funds that a patient uses to pay for treatment—whether those funds are obtained through public assistance, through private insurance, or through the patient's own funds.

Finally, summary judgment in this case is premature because the facts that will establish Fairview's good faith compliance with the statute that is the target of Plaintiff's constitutional argument need to be developed through testimony to which Fairview does not have access. Specifically, Fairview cannot put forward an affidavit or declaration addressing the family circumstances of Plaintiff and E.J.K. because it does not control either of those parties. Even if Fairview had obtained any such evidence as to its provision of hypothetical medical services, medical privacy would constrain it from disclosing such evidence. Instead, deposition

[1] For medical privacy reasons, Fairview has and will continue to treat the allegation that it provided medical services to E.J.K. as purely hypothetical. Although Fairview was required to accept the allegation that it provided hypothetical medical services for purposes of its motion to dismiss, it does not do so for purposes of Plaintiff's motion for summary judgment. Fairview does not concede that it provided the hypothetical medical services to E.J.K., what documents it may have relied on when deciding to provide such hypothetical medical services, the nature of any hypothetical medical services provided, or the source of any payments made for any hypothetical medical services.

testimony and discovery is required for Fairview to develop those facts. The Federal Rules of Civil Procedure do not permit Plaintiff to simply declare that there are no factual issues barring relief when the purported absence of factual questions arises because the parties have not yet engaged in discovery.

UNDISPUTED FACTS

There are no undisputed facts; both because Plaintiff fails to establish *any* facts with respect to Fairview for purposes of her motion for summary judgment and because Plaintiff's motion is premature as to Fairview.

Plaintiff alleges three factual predicates for her claim against Fairview: (1) that Fairview has treated E.J.K. and prescribed medication to her, (2) that Fairview based its determination to treat E.J.K. on a letter from Mid-Minnesota Legal Aid, and (3) that the treatment was paid for by St. Louis County Human Services. These "facts" are supported by Plaintiff's so-called verified complaint, [*see* Doc. 46, at 13 & nn.44–45 (citing Doc. 1, ¶¶ 6–12)], and her declaration's recitation of a hearsay statement from E.J.K. [Doc. 46, at 29 & n.83 (citing Doc. 48, ¶ 31)].

The facts used to support or oppose a motion for summary judgment must be based "on personal knowledge," be admissible in evidence, and be made by a witness "competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). Plaintiff offers no facts as to Fairview meeting this standard. Plaintiff's assertions in the so-called verified complaint and her declaration are not based on Plaintiff's personal knowledge. E.J.K.'s out-of-court statements are not admissible against Fairview. Fed. R. Evid. 802. Therefore, they do not provide a basis for granting the

motion for summary judgment. Fed. R. Civ. P. 56(c)(4). Plaintiff has failed to meet her burden of supporting her factual positions. *See* Fed. R. Evid. 56(c)(1). Therefore, there are no facts before the Court on which to grant summary judgment against Fairview.

ANALYSIS

I. SUMMARY JUDGMENT STANDARD.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories . . . together with the affidavits . . . show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The "mere existence of *some* alleged factual dispute" is insufficient to defeat a motion for summary judgment because this standard requires a "genuine" dispute over facts that are "material." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). A fact is material if its resolution affects the outcome of a case. *Id*. at 248. A factual dispute is "genuine" if "a reasonable jury could return a verdict for the nonmoving party." *Id*.

II. THE HYPOTHETICAL PAYMENT OF FAIRVIEW WITH PUBLIC FUNDS DOES NOT RENDER FAIRVIEW A STATE ACTOR.

Plaintiff's lawsuit assumes subject-matter jurisdiction without meeting her burden of showing its existence. At the outset of her analysis of Fairview's alleged constitutional violation, Plaintiff takes a moment to "remind this Court" of her unsupported allegation that "government approved payments are made or have

been made to both Fairview and Park Nicollet." [Doc. 46, at 29.] However, Plaintiff offers no argument or explanation as to why this allegation would be relevant, even if supported by admissible evidence. Rather, Plaintiff asserts the "fact" as evocative of subject-matter jurisdiction. It is not.

As Fairview explained in its memorandum of law supporting its motion to dismiss, the mere receipt of federal funds does not convert the actions of a private healthcare provider into state actions. *See generally* Doc. 36, at 7–10. Instead, Fairview "is a private corporation and the fact that it receives Medicaid funds does not convert it into a state actor." *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 740 (8th Cir. 1999). Simply put, a healthcare provider is not a state actor even when the state extensively regulates a healthcare provider and uses public funds to compensate the provider for the services that it rendered. *Blum v. Yaretsky*, 457 U.S. 991, 1004, 1010–11, 102 S. Ct. 2777, 2786, 2789 (1982) (holding that a nursing home that received 90% of its income from public funds was nevertheless not a state actor); *accord Sabri v. Whittier Alliance*, 833 F.3d 995, 1000 (8th Cir. 2016) (applying the same rule in construing a Section 1983 claim against an incorporated neighborhood organization funded with public money). This Court has previously dismissed a different lawsuit against Fairview on the same grounds, concluding that Fairview's receipt of federal medical assistance funds was not sufficient to convert its actions into state actions. *Smith v. Univ. of Minn. Med. Ctr.-Fairview Riverside*, Civil No. 09-293 (JRT/JSM), 2010 WL 3893902, at *9–*10 (D. Minn. July 14, 2010). Plaintiff has offered no authority or argument to the contrary.

Because state action is an essential element of her claim*, see Am. Mfgrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50, 119 S. Ct. 977, 985 (1999) (stating that Section 1983 does not impose liability on private actors), Plaintiff has failed to show a legal basis entitling her to summary judgment against Fairview and her motion should be denied.

III. FAIRVIEW'S HYPOTHETICAL DISCRETIONARY DECISION TO TREAT A PATIENT IS NOT CONTROLLED BY THE SOURCE OF THE FUNDS THAT PAYS FOR THE TREATMENT.

Even if the receipt of public funding could be used to justify treating a healthcare provider as a state actor, a material fact dispute precludes granting Plaintiff's motion for summary judgment. For a private entity to have its acts converted into state actions, there must be a sufficiently close nexus between the State and the private entity, as evidenced by the State's exercise of coercive power or "such significant encouragement" that the decisions of the private actor must be deemed the decisions of the State itself. *Am. Mfgrs. Mut. Ins. Co.*, 526 U.S. at 52, 119 S. Ct. at 986. Merely providing or withholding public funds does not rise to the requisite level of coercion. *Sabri*, 833 F.3d at 1000.

Here, Plaintiff has failed to produce admissible evidence supporting the conclusion that the alleged public funds paid to Fairview coerced it into providing the hypothetical medical services to E.J.K. Such an allegation, even if made, would be unfounded.

Instead, the source of the funds allegedly secured by E.J.K. to receive hypothetical medical services from Fairview would not affect Fairview's

determination as to whether the care ought to be provided. Specifically, Fairview would pursue the same procedures for determining whether to provide treatment whether the funds come from public assistance programs, private insurance, or from the patient herself. (*See generally* Fink Decl.)

IV. ALTERNATIVELY, PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT IS PREMATURE BECAUSE DISCOVERY IS NEEDED TO DETERMINE WHETHER PLAINTIFF EMANCIPATED E.J.K. AND WHETHER E.J.K. MET THE FACTUAL PREDICATES OF MINN. STAT. § 144.341.

As shown by the complete absence of admissible evidence to support Plaintiff's motion, her request for summary judgment against Fairview is premature. Neither Fairview nor any of the parties have had an opportunity to explore the factual basis for Plaintiff's claims through discovery. This Court may deny a motion for summary judgment as premature when the nonmoving party shows that "it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d). The purpose of this Rule is to provide a safeguard against premature requests for summary judgment, and the Rule is applied "with a spirit of liberality." *U.S. ex rel. Bernard v. Casino Magic Corp.*, 293 F.3d 419, 426 (8th Cir. 2002) (quoting 10B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FED. PRAC. & PROC.: CIVIL 3D § 2740 (1998)). Specifically, discovery is needed into the status of the relationship between Plaintiff and E.J.K.

The absence of this discovery has not been the result of any delay by Fairview. The Complaint was served on Fairview on November 17, 2016, and the motion for summary judgment was served less than one month later, on December

15, 2016. (Decl. Davidson.) The parties have not yet engaged in a Rule 26(f) scheduling conference or exchanged initial disclosures. *Id.* As a result, discovery has not yet commenced. *Id.*; Fed. R. Civ. P. 26(d)(1).

If the Court determines it has subject matter jurisdiction to address the merits of Plaintiff's claim, the evidence of the familial relationship between the parties will be outcome determinative because it will address (1) whether Plaintiff emancipated E.J.K. before E.J.K. allegedly sought treatment from Fairview, and (2) whether E.J.K. satisfies the factual predicates of Minn. Stat. § 144.341 (2016). If either of these questions are answered in the affirmative, then Plaintiff's constitutional rights will not have been violated.

Plaintiff's claim is based on an alleged violation of her substantive due process rights as a parent. [*See* Doc. 46, at 18 (citing *Troxel v. Glanville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 2059–60 (2000) (plurality opinion) (stating that the parental liberty interest, such as it is, arises under the substantive component of the Due Process Clause of the Fourteenth Amendment)).] This is a significant obstacle to Plaintiff's recovery, because to the extent that Plaintiff claims an actual violation of her substantive due process rights, Plaintiff has no compensable injury under Section 1983 unless her rights were violated and the violation was unjustified. *See Carey v. Piphus*, 435 U.S. 247, 263, 98 S. Ct. 1042, 1052 (1978) ("[T]he injury caused by a justified deprivation . . . is not properly compensable under § 1983.").

Plaintiff attempts to avoid this problem by characterizing Fairview's alleged provision of medical services to E.J.K. as a termination of her parental rights without procedural due process, thereby entitling Plaintiff to nominal damages. [*See*, *e.g.*, Doc. 46, at 37.] *See generally Carey*, 435 U.S. at 266, 98 S. Ct. at 1053 (holding that nominal damages may be awarded for violations of procedural due process). A procedural due process violation occurs where the State deprives a person of life, liberty, or property without following constitutionally sufficient procedures. *Swarthout v. Cooke*, 562 U.S. 216, 219, 131 S. Ct. 859, 861 (2011). Plaintiff's reliance on this rubric is misplaced because under Minnesota law, the facts rendering Fairview's treatment of E.J.K. lawful or unlawful—whether on the grounds of emancipation or of Minn. Stat. § 144.341—would *predate* Fairview's hypothetical decision to treat because the facts were created by Plaintiff and E.J.K.

In other words, the lawfulness or unlawfulness of the hypothetical medical services would not be determined by the process allegedly followed by Fairview. It would be determined by substantive law. And if Fairview's treatment of E.J.K. did not harm Plaintiff's substantive due process rights, then Plaintiff has no claim under Section 1983. *Carey*, 435 U.S. at 263, 98 S. Ct. at 1052. In sum, even if Fairview were a state actor for purposes of Section 1983, then determining whether Fairview violated Plaintiff's rights would require considering the legal status of E.J.K. under Minnesota law.

At common law, infancy is a "disability" that imposes "limitations on the legal capacity of infants, not for the defeat of their rights, but to shield and protect them

from the acts of their own improvidence, as well as from the acts of others." *In re Davidson's Will*, 223 Minn. 268, 272, 26 N.W.2d 223, 225 (1947). Achieving the age of majority removes such disabilities. *Id.* at 272, 26 N.W.2d at 225. But there is nothing immutable about the age of majority or any other circumstances that would remove such disabilities. Instead, the legislative power may be used to modify when such disabilities are wholly or partially removed. *Id.* at 275, 26 N.W.2d at 227 (Minnesota Legislature); *accord Morrissey v. Perry*, 137 U.S. 157, 159, 11 S. Ct. 57, 57 (1890) (Congress). "In short, Majority or Minority is a Status and not a fixed or vested right." *In re Davidson's Will*, 223 Minn. at 272, 26 N.W. at 225.

Emancipation, likewise, is a status affecting the disabilities of a minor and is not a granting or rescinding of vested rights by a court. It is a common law doctrine that developed in the States, even though unknown in England. *Lufkin v. Harvey*, 131 Minn. 238, 240–41, 154 N.W. 1097, 1098 (1915). Emancipation is an act of the parent, which act need not be in writing or in express words, but may be implied from the parent's conduct. *In re Fiihr*, 289 Minn. 322, 326, 184 N.W.2d 22, 25 (1971) (citing *City of Minneapolis v. Town of Orono*, 212 Minn. 7, 9, 2 N.W.2d 149, 150 (1942)). The parent emancipates the minor where the parent (1) waives the right to the services and earnings of the minor, and (2) surrenders the parent's control over the minor. *Taubert v. Taubert*, 103 Minn. 247, 248–49, 114 N.W.763, 764 (1908) (citing EDWIN A. JAGGARD, 1 HAND-BOOK ON THE LAW OF TORTS 462

(1895)).[2] The right of control is, itself, a reciprocal benefit to the parent arising from the parental obligation to provide the child with food, lodging, and an education. *See* 1 JAGGARD, HAND-BOOK ON THE LAW OF TORTS 462 (noting that the familial bonds exist for purposes of common law "[s]o long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid, comfort, and obey"); WILLIAM BLACKSTONE, 1 COMMENTARIES *452 ("The power of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it."); *cf. Hodgson v. Minnesota*, 497 U.S. 417, 445–46, 110 S. Ct. 2926, 2942–43 (1990) (Stevens, J.) (stating that biological parentage generally offers only an opportunity to develop a relationship with the child, "[b]ut the demonstration of commitment to the child through the assumption of personal, financial, or custodial responsibility may give the natural parent a stake in the relationship with the child rising to the level of a liberty interest.").

Thus, cases touching on emancipation merely recognize an already-existing change of status. They do not judicially enact the emancipation of the minor. By the time the issue of emancipation comes before a court, the emancipation itself is a fait accompli, and whether it occurred is a question of fact—not a question of

[2] Edwin A. Jaggard was a member of the Minnesota Supreme Court at the time *Taubert* was decided. *See In re Justice Jaggard*, 113 Minn. xix, xix (1911) (noting his election to the Minnesota Supreme Court in 1904 and reelection to the Court in 1910).

judicial discretion. *See City of Minneapolis*, 212 Minn. at 9, 2 N.W.2d at 150 (stating that emancipation is a "fact issue"); *Taubert*, 103 Minn. at 249, 114 N.W. at 764 (same).

With respect to the application of Minn. Stat. § 144.341 (2016), Plaintiff also fundamentally misconstrues the role of consent in medical treatment. Under Minnesota law, unconsented-to medical treatment constitutes a battery in tort. *Kohoutek v. Hafner*, 383 N.W.2d 295, 298 (Minn. 1986) (citing *Mohr v. Williams*, 95 Minn. 261, 271, 104 N.W. 12, 16 (1905)). Consent takes the treatment out of the realm of tort because "battery consists of an unpermitted touching" and "[t]he touching is permitted if the patient consents to it." *Id.* at 299. Minn. Stat. § 144.341 (2016) relieves any common-law disability of a minor to consent to medical treatment when the minor lives independently and is self-supporting. It was within the Minnesota legislature's prerogative to enact a statute relieving minors of such a disability. *Morrissey*, 137 U.S. at 159, 11 S. Ct. at 57; *In re Davidson's Will*, 223 Minn. at 275, 26 N.W. at 227.

Here, discovery is required to determine whether Plaintiff's conduct has, in fact, already emancipated E.J.K. Moreover, the facts related to this issue appear to be in conflict, which reinforces the need for discovery. Plaintiff urges that she has always offered a residence to E.J.K., that she has made efforts to preserve her emotional connection to E.J.K., and that she has never given up her control over E.J.K. [Doc. 46, at 5–6.] However, the preamble to E.J.K.'s memorandum of law in support of her motion to dismiss portrays a significantly conflicting account

of the family relationship and calls into question Plaintiff's account. [Doc. 40, at 2–4.] E.J.K.'s position appears to be substantiated by the evidence put forward by Plaintiff in support of her motion for summary judgment suggesting that Plaintiff emancipated E.J.K. Specifically, Plaintiff appears to have waived her right to E.J.K.'s earnings. [*See* Doc. 48, ¶ 15 (stating that E.J.K. purchased a car with wages that E.J.K. earned).] *See generally* Minn. Stat. § 181.01 (2016) ("Any parent or guardian claiming the wages of a minor in service shall so notify the employer and, if failing to do so, payment to the minor of wages so earned shall be valid.") In addition, although more ambiguous, the evidence suggests that discovery may show that Plaintiff waived her right to require E.J.K. to live with her and abdicated her duty to house E.J.K. [*See* Doc. 48, ¶¶ 12–15 (indicating E.J.K. left Plaintiff's home in 2015 and "refused to come back home" since then, but claiming to have provided occasional financial support to E.J.K.).] Fairview is not in control of either Plaintiff or E.J.K., and therefore requires an opportunity to explore these facts through discovery.[3]

[3] Due to medical privacy laws, Fairview itself would not be able to provide the Court with evidence that could have come into its possession if it provided hypothetical medical services to E.J.K. 45 C.F.R. §§ 164.502(a), 164.512(e) (limiting the ability of healthcare providers to disclose the protected health information of patients in court proceedings); *accord* Minn. Stat. § 595.02, subd. 1(d) (2016). Therefore, Fairview has no ability to introduce affidavit testimony of its own as to the specifics of any treatment it may or may not have provided E.J.K. These constraints also restrict Fairview's ability to directly disclose the representations, if any, by E.J.K. upon which Minnesota law would permit it to rely in good faith. Minn. Stat. § 144.345 (2016). Plaintiff has not offered any admissible evidence indicating that it would have been a bad faith act for Fairview to rely on E.J.K.'s hypothetical representations to Fairview.

CONCLUSION

The Court should deny Plaintiff's motion for summary judgment against Fairview. Plaintiff's speculation and bare assertions, unsupported as they are by personal knowledge, are simply insufficient to support her request for summary judgment against Fairview. Plaintiff has failed to state a claim against Fairview under Section 1983. And even if this Court determines that it has jurisdiction to hear the Section 1983 claim, summary judgment against Fairview is premature because discovery has not yet commenced and the admissible evidence that would support Fairview's defenses are in the possession of Plaintiff and E.J.K.

Accordingly, Fairview respectfully requests that the Court deny Plaintiff's motion for summary judgment against Fairview.

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Dated: January 5, 2017

/s/ William L. Davidson

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I, William L. Davidson, certify that Defendant Fairview Health Services' Memorandum of Law in Opposition to Plaintiff's Motion for Summary Judgment Pursuant to Fed. R. Civ. P. 12(b)(1) and Fed. R. Civ. P. 12(b)(6) complies with the word limits Local Rule 7.1(f) and with the type-size limit of LR 7.1(h). I further certify that, in the preparation of this memorandum, I used Microsoft Word's Office 2013, and that this work processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count. I further certify that the above-referenced memoranda contains 3,471 words, and is set in a proportional font.

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Dated: January 5, 2017

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