UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Anmarie Calgaro,

Plaintiff,

vs.

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 County School District; and J.D.K.,

Defendants.

Court File No.: 0-16-cv-03919-PAM-LIB

REPLY IN FURTHER SUPPORT OF PARK NICOLLET HEALTH SERVICES' MOTION TO DISMISS

INTRODUCTION

Plaintiff's claim against Park Nicollet Health Services ("Park Nicollet") fails first because Park Nicollet is not a state actor and may not be sued under 42 U.S.C. § 1983. Beyond that, Park Nicollet has not deprived Plaintiff of any liberty interest she has in being E.J.K.'s parent because Park Nicollet is not preventing or requiring anything from E.J.K.

Plaintiff has manufactured a constitutional attack on Minn. Stat. § 144.341 and on E.J.K.'s ability to make her own medical decisions. A more appropriate action by

Plaintiff would be to provide shelter or financial support to E.J.K. (so that Section 144.341 no longer applies) or for Plaintiff to invoke one of a variety of state law processes to resolve her questions about E.J.K.'s consent for medical care. The Court should decline Plaintiff's invitation to create a new constitutional right that would allow a parent who no longer supports a minor to interfere with that minor's medical care.

ARGUMENT

To state a claim under Section 1983, Plaintiff must allege violation of a right secured by the Constitution and must show that the violation was committed by a state actor. *Magee v. Trustees of Hamline Univ., Minn.*, 747 F.3d 532, 535 (8th Cir. 2014). Private conduct, "no matter how . . . wrongful," is outside the reach of Section 1983. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999).

A. Park Nicollet Is Not A State Actor.

Absent state action, Plaintiff's claim against Park Nicollet fails as a matter of law and must be dismissed. *Youngblood v. Hy-Vee Food Stores, Inc.*, 266 F.3d 851, 855 (8th Cir. 2001). Alleging that Park Nicollet is highly regulated by the government, or that it receives government funding, does not change this conclusion. *Nicols v. Metro. Ctr. for Indep. Living, Inc.*, 50 F.3d 514, 518 (8th Cir. 1995). Plaintiff admits this. (Court Docket No. 65 at 43). If the Court concludes that Park Nicollet is not a state actor, then it lacks jurisdiction to hear Plaintiff's case. *Alexander v. Pathfinder, Inc.*, 189 F.3d 735, 740 (8th Cir. 1999).

In an effort to transform Park Nicollet into a state actor, Plaintiff contends that Park Nicollet performed a traditional public function when it provided medical care to

E.J.K. (Court Docket No. 65 at 34-35.) Drawing on cases about volunteer firefighters, private investigators and prison physicians,[1] Plaintiff asserts that Park Nicollet has, by providing medical care to E.J.K., performed the "traditional public function of determining emancipation for the purposes of terminating parental rights over health care decisions." (*Id.* at 39.)

Park Nicollet did no such thing. To the contrary, it merely provided medical treatment to a minor who is living independently from Plaintiff and who receives no financial support from Plaintiff. (Court Docket No. 48 at ¶¶ 12, 31.) Under Minnesota law, such a minor is permitted to make her own medical decisions and may provide consent for medical care. Minn. Stat. § 144.341 (2016). That does not mean that Park Nicollet has "emancipated" E.J.K. or "terminated [Plaintiff's] parental rights." No other healthcare provider is bound by Park Nicollet's application of Section 144.341, or required to permit E.J.K. to consent to medical care at another provider's facility, and E.J.K. has not been "emancipated" concerning healthcare decisions. Indeed, Park Nicollet itself would decline to permit E.J.K. to consent to her own medical treatment if Plaintiff provided E.J.K. with shelter or financial support such that Section 144.341 no longer applied.

Plaintiff, herself, has control over whether E.J.K. gained the ability -- and continues to have the ability -- to consent to medical care. Plaintiff, herself, permitted E.J.K. to live on her own without financial support and had a hand in creating the circumstance under which Section 144.341 applies. That decision by Plaintiff, not

[1] Court Docket No. 65 at 34-36.

anything that Park Nicollet has done, resulted in E.J.K. making -- and being permitted to make -- her own medical decisions.

Plaintiff is simply wrong when she asserts that obtaining valid consent for care constitutes a traditional public function. Healthcare providers -- not government -- are typically responsible for providing information to patients about treatment options and obtaining informed consent from patients. *See Cornfeldt v. Tongen*, 295 N.W.2d 638, 640 (Minn. 1980). Plaintiff offers no support for the notion that obtaining informed consent from a patient is a traditional government function. *Gallegos v. Slidell Police Dep't*, 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).

Plaintiff's reliance on *West v. Aikens*, 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 and 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. (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.

Next, Plaintiff relies on *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), for the notion that state action will 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. Ass'n.*, 713 F.2d 414, 416 (8th Cir. 1984) (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.*, 526 U.S. at 57. Plaintiff 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, Plaintiff's reliance on *Brentwood Acad. 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, Plaintiff concedes that Park Nicollet is a private, non-profit organization. (Verified Complaint at ¶ 10; Court 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 Legislature's determination that, under certain circumstances that happen to 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 v. Edmondson Oil Co.*, 457 U.S. 922, 939 n.21 (1982) (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. This would be an absurd result.

Plaintiff also suggests that Park Nicollet may be a state actor by virtue of "joint participation" with government officials in the deprivation of a right or privilege. Plaintiff relies on *Lugar* for this proposition. (Court Docket No. 65 at 38.) *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.), *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 Plaintiff does not allege that Park Nicollet invoked the aid of state officials to deprive Plaintiff of any rights or to compel E.J.K. to receive medical treatment. Plaintiff cannot meet her burden to demonstrate that Park Nicollet is a state actor as a matter of law.

Plaintiff 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 relied on the minor's consent acted in good faith. Minn. Stat. § 144.345. Far from "immunity," this statute merely facilitates medical care for minor patients. Plaintiff should not be permitted to mischaracterize Section 144.345 as an immunity statute in order to bolster her sagging state actor argument.

B. Plaintiff Has Not Been Deprived Of A Constitutional Right.

Even if Plaintiff could show that Park Nicollet was a state actor, her claim would still fail because she has not been deprived of a constitutional right. The age of majority is a matter of state law, and is not set in the United States Constitution. *See Stanton v.*

Stanton, 421 U.S. 7, 17-18 (1975). As recently as 1973, the age of majority in Minnesota was 21. (Minn. Stat. § 645.45 (1971)).[2] The age of majority is currently 18 unless otherwise provided by law. Minn. Stat. § 645.451, subd. 3. But, for example, consuming alcohol is not permitted until age 21, despite the age of majority. Minn. Stat. § 120A.22, subd. 8, (2016). Minnesota law requires child support payments until age 20 in some circumstances. Minn. Stat. § 518A.26 (2016). Nothing prevents Minnesota from selecting (or changing) its age of majority, or from determining that minors of certain ages may consent to sexual activity, drive motor vehicles or obtain abortions under certain circumstances. (*See generally* Court Docket No. 42 at 11-12 and Court Docket No. 40 at 11-13.)

Minnesota has also determined that minors may provide consent for their own care when they no longer live with a parent and are responsible for their own finances. Minn. Stat. § 144.341 (2016). This policy judgment is in keeping with 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).

Plaintiff has presented no authority for the notion that she has a constitutional right to control the medical decisions of a nearly 18 year old minor for whom she no longer provides housing or financial support. Plaintiff seems to rely on Minnesota's general age of majority statute for the idea that, absent a court order of emancipation, a minor may

[2] The 1971 historical version of Minn. Stat. § 645.45 is available at: https://www.revisor.mn.gov/data/revisor/statute/1971/1971-645.pdf.
The 1973 amendments to the statute are available at:
https://www.revisor.mn.gov/laws/?id=725&year=1973&type=0

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). Plaintiff has no constitutional right to interfere with the state's determination regarding medical consent or with E.J.K.'s medical decision.

Significantly, Plaintiff does not take issue with Park Nicollet's conclusion that E.J.K. lives separate and apart from Plaintiff or that E.J.K. is managing her own financial affairs. She does not claim that conclusion required any additional process. Instead, Plaintiff questions only whether E.J.K. has provided "effective consent" for medical care. (Court 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 Plaintiff, 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. Plaintiff contends 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. (Court Docket No. 65 at 21.)

As an initial matter, 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 Plaintiff 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, that 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. Plaintiff has no constitutional right to interfere with another person's medical care.

Plaintiff'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 v. Midland Cmty. Sch.*, 814 F. Supp.2d 754, 770 (E.D. Mich. 2011) ("[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.

C. Plaintiff Has Statutory Means To Obtain The Relief That She Supposedly Seeks.

The Court can dismiss Plaintiff's claim without even reaching the question of whether Park Nicollet is a state actor and whether Plaintiff has a constitutional right to interfere with another's medical care. At the heart of Plaintiff's Complaint is the idea that Plaintiff is entitled to a process to determine whether E.J.K. consented to the medical care she is receiving, even if that process must occur after E.J.K. has already received treatment. (Court Docket No. 65 at 17-18.)

Federal courts usually avoid deciding constitutional claims when possible. *Cochenour v. Cochenour*, 888 F.2d 1244, 1245-46 (8th Cir. 1989) ("We need not reach constitutional issues unless required to do so to decide the case"). "It is a fundamental rule of judicial restraint . . . that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 158 (1984). Therefore, if some process already exists that would address Plaintiff's concern about consent, then Plaintiff's constitutional claim should be dismissed.

Minnesota law provides a variety of avenues for Plaintiff to attempt to participate in or even control E.J.K.'s medical decisions. The most obvious is for Plaintiff to provide a home or provide financially for E.J.K. *See Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (discussing parental rights for "those who nurture [a child] and direct his destiny"). If Plaintiff did so, then Section 144.341 would not apply and E.J.K. could no longer make her own medical decisions or consent to her own medical care.

If Plaintiff believes that E.J.K. is "absent from the home of the parent . . . without the consent of the parent," or is in danger, she could seek assistance from a government welfare agency or with a juvenile court under Minn. Stat. § 260C.141. A juvenile court could then adjudicate Plaintiff's claim and could order E.J.K. to return to Plaintiff's home or could permit E.J.K. to live independently but under restrictions determined by the juvenile court. Minn. Stat. § 260C.201, subd. 1. Plaintiff certainly could have used such a process to litigate her contention about "effective consent" and even to obtain an order precluding further treatment until July 2017, when E.J.K. turns 18.

Only Plaintiff can explain why she did not utilize an existing state process to resolve her purported concerns over E.J.K.'s effective consent to medical care. Rather than utilize existing state law, Plaintiff has attempted to create a new constitutional right. Because the Court can decide this case without addressing Plaintiff's constitutional claims, it should dismiss the case so that Plaintiff can address her concerns about E.J.K.'s consent for medical treatment with an appropriate state government agency.

CONCLUSION

This case is about Plaintiff's effort to interfere with the medical decisions of a minor who no longer lives with Plaintiff and is not be supported financially by Plaintiff. While Plaintiff contends she has a constitutional right to do that, her effort against Park Nicollet fails because Park Nicollet is not a state actor and did not deprive Plaintiff of any rights. Moreover, any concerns that Plaintiff has about E.J.K.'s effective consent for medical care may be addressed under state law and, as a result, the Court should decline to reach Plaintiff's constitutional claim because it is unnecessary to do so. For each of

the reasons set forth above, and in its Opening Memorandum, Park Nicollet respectfully requests that the Court dismiss Plaintiff's Verified Complaint with prejudice.

Date: January 12, 2017

LARSON • KING, LLP

By: *s/ David M. Wilk*
David M. Wilk (#222860)
Stephanie Chandler (#0395303)
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, Minnesota 55101
Telephone: (651) 312-6500
dwilk@larsonking.com
schandler@larsonking.com

ATTORNEYS FOR DEFENDANT PARK NICOLLET HEALTH SERVICES

1580328

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Anmarie Calgaro,

Plaintiff,

vs.

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 County School District; and J.D.K.,

Defendants.

Court File No.: 0-16-cv-03919-PAM-LIB

LR 7.1(f) and (h) WORD COUNT COMPLIANCE CERTIFICATE REGARDING REPLY IN FURTHER SUPPORT OF PARK NICOLLET HEALTH SERVICES' MOTION TO DISMISS

I, David M. Wilk, certify that the Reply in Further Support of Park Nicollet Health Services' Motion to Dismiss complies with Local Rule 7.1(f) and (h).

I further certify that, in preparation of this memorandum, I used Microsoft Word 2010, and that this word processing program has been applied specifically to include all text, including headings, footnotes, and quotations in the following word count and I also certify that this Memorandum has been prepared in 13 pt. font.

I further certify that the above-referenced Memorandum contains 3,203 words.

Date: January 12, 2017

LARSON • KING, LLP

By: *s/ David M. Wilk*
David M. Wilk (#222860)
Stephanie Chandler (#0395303)
2800 Wells Fargo Place
30 East Seventh Street
St. Paul, Minnesota 55101
Telephone: (651) 312-6500
dwilk@larsonking.com
schandler@larsonking.com

ATTORNEYS FOR DEFENDANT PARK NICOLLET HEALTH SERVICES

1580499