No. 19-

IN THE

Supreme Court of the United States

LLOYD N. JOHNSON,

Petitioner,

v.

KAREN RIMMER, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition poses two questions: first, whether the "professional judgment standard" this court articulated in *Youngberg* can be reduced to "whether the worst doctor in America would say ok"?; second, whether state defendants can be immune from suit for civil rights violations when the plaintiff knows a state defendant violated his civil rights, but not which one amongst several implicated by the evidence? Both questions split the Circuits. Both questions involve issues of nationwide scope and exceptional importance to one of the most vulnerable populations in the country – the state institutionalized mentally ill.

1. Is the "professional judgment" standard articulated by this Court in *Youngberg v. Romeo* governing medical care of the institutionalized mentally ill indistinguishable from the deliberate indifference standard governing medical care of convicted criminals to such a degree that even gross negligence or criminal recklessness is consistent with the exercise of "professional judgment"?

2. When evidence points to several possible different suspects for civil rights violations, does the fact of several different suspects preclude a plaintiff from asking the jury to determine which one is responsible?

PARTIES TO THE PROCEEDINGS

Petitioner in this proceeding is Lloyd N. Johnson

Respondents in this proceeding are as follows: Thomas Harding, David Macherey; Remedics Azecuta; Tony Thrasher; and Ade George.

RELATED CASES

Johnson v. Rimmer, et al., No. 14-cv-1408, U.S. District Court for the Eastern District of Wisconsin. Judgment entered August 18, 2018.

Johnson v. Rimmer, et al., No. 18-1321, U.S. Court of Appeals for the Seventh Circuit. Judgment entered August 30, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lloyd Johnson ("Johnson") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit

OPINIONS BELOW

The Seventh Circuit opinion below is published at 936 F. 3d 695 attached at Appendix 1a-32a. The district court's opinion is unpublished attached at Appendix 33a-51a.

JURISDICTION

The Federal Circuit entered judgment on August 30, 2019. The Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

On March 18, 2012, the Appellant, Lloyd Johnson, a mental health patient in state custody solely for the purpose to protect himself from self-harm, was left alone, unsupervised, unobserved, and given the very means to harm himself that led him to being institutionalized by a court to prevent: Johnson severed his penis with scissors, the very injury he was institutionalized to prevent from occurring. The District Court and Court of Appeals dismissed Johnson's §1983 claims on two grounds: first, by imposing the highest burden on plaintiffs to prove unprofessional judgment ("if the worst doctor in America might do it, then it is Constitutionally competent care" standard of due process); and, secondly, if a plaintiff does

not know which state defendant injured him amongst several defendants, then the plaintiff is not allowed to ask a jury to make that determination from the available evidence, even where evidence implicates one defendant in particular.

Lloyd Johnson (Johnson) voluntarily committed himself to MHC on February 28, 2012 for depression, delusional thoughts, auditory hallucinations, and suicidal ideations. App., *infra*, 3a. MHC released him in short order. On March 3, 2012, Johnson used a pair of scissors to sever his testicles, cut off both of his earlobes, and remove a portion of skin from his penis. *Ibid.* He was rushed to Froedtert Hospital where he remained under close supervision. *Ibid.* Pursuant to Wis. Stat., §51.15(1)(ar)(4), Johnson was involuntarily committed to MHC on March 8, 2012. App., *infra*, 33a. Johnson was placed under 24/7 1:1 supervision (1:1), which the MHC doctors determined was necessary to ensure Johnson's safety until he demonstrated clear, reality-based thinking for seven days. App., *infra*, 37a.

In contravention of the treatment plan, defendant Doctor Machery removed Johnson from 1:1 supervision and observation. *Ibid.* During the following week, Johnson attempted to hide a metal object in his pants (presumably for self-mutilation), and stated he "wanted to die," and "it hurts,"; was in a near constant state of depression, anxiety, and delusional thoughts; did not show any regret for his previous acts of self-mutilation; expressed his desire to finish removing his genitals while at MHC; and continued to have auditory hallucinations. App., *infra*, 5a, 6a, 11a, 35a, 38a. Nevertheless, Dr. Macherey (Johnson's treating psychologist) abandoned his treatment plan and the

precautionary measures he instituted to ensure Johnson's safety, removing Johnson from 1:1 on a Friday before the weekend – even though no doctor would be on site. App., *infra*, 8a, 37a.

On March 16, Johnson suffered from depression, anxiety, decreased energy, and disorganized thoughts. App., *infra*, 8a, 36a. Inexplicably, Dr. Macherey suggested that Johnson's thinking had become organized for almost 48 hours when the medial chart indicated the exact opposite. App., *infra*, 36a-37a. MHC's nursing staff documented less than three hours later (on March 16 at 9:30 p.m.) that Johnson's thought process was marred with "loose associations." App., *infra*, 8a, 27a.

Dr. Macherey's decision to remove Johnson from 1:1 was not based on professional judgment, because it was directly contradicted by his own treatment plan. Forty-five hours after being removed form 1:1, Johnson approached a nurse and handed her a blood-soaked towel, stating "I cut my dick" – and indeed he had severed his penis. App., *infra*, 12a. An investigation revealed that Johnson committed self-harm with the same type of surgical scissors used at MHC. App., *infra*, 12a-13a. The medical chart revealed Nurse George (George) had been in Johnson's room just prior to the incident using surgical scissors to replace Johnson's wound dressing – against policy. App., *infra*, 11a, 43a. Johnson testified that Nurse George subsequently entered his room, used scissors to remove his dressings while in his bathroom. *Ibid.*

REASONS FOR GRANTING THE PETITION

I. The circuits are split over the "professional judgment" standard, with wide disparities between the circuits, and a glaring need for clarity from this court

How can a court order someone institutionalized solely to protect them from self-harm, then courts also say the state has no responsibility when the state facilitates precisely that self-harm to that person? One Flew Over The Cuckoo's Nest, indeed.

This court rejected such a low standard in such cases on multiple occasions. *Youngberg v. Romeo*, 457 U.S. 307, 321-322 (1982) ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish"); *County of Sacramento v. Lewis*, 523 U.S. 833, 852 n.12 (1998) (noting that "combination of a patient's involuntary commitment and his total dependence on his custodians obliges the government to take thought and make reasonable provision for the patient's welfare"); *Jackson v. Indiana*, 406 U.S. 715, 738 (1972) ("At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed"); Concurring justices equally noted "that due process might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals." *Youngberg v. Romeo*, 457 U.S. 307, 326 (1982) (Blackmun, J., concurring)

The need for clarity by this court in this area is manifest by the widely varying standards imposed by the differing Circuits.

The Third Circuit interprets the professional judgment standard to require something more than negligence, but less than gross negligence. *Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1145-1146 (3d Cir. 1990) ("professional judgment more closely approximates—although, as we have discussed, remains somewhat less deferential than—a recklessness or gross negligence standard").

The Ninth Circuit interprets the professional judgment standard in the medical context to require medical professionals "take adequate steps in accordance with professional standards to prevent harm from occurring" against a known risk. *Ammons v. Washington Dept. of Social and Health Services*, 648 F.3d 1020, 1030 (9th Cir. 2011)

The Second Circuit interprets the professional judgment standard to require "gross negligence." *Doe v. New York City Dep't of Soc. Servcs.*, 709 F.2d 782, 790 (2d Cir. 1983) ("the Court adopted what is essentially a gross negligence standard" in *Youngberg*).

The Seventh Circuit rejects the substantial deviance language of *Youngberg*, the "less deferential" than gross negligence standard of the Third Circuit, the "professional standards" analysis of the Ninth Circuit, and the "gross negligence" standard of the Second Circuit. Instead, the Seventh Circuit interprets the professional judgment standard as functionally the same

as deliberate indifference, requiring, in the opinion below, that an injured party prove that "no minimally competent professional would have so responded under those circumstances." *Johnson v. Rimmer*, 936 F.3d 695, 707 (7th Cir. 2019). The Seventh Circuit basically adopted the "might the worst doctor in America do it too" standard of Constitutionally competent "professional judgment" for the care of the mentally ill in state custody, even as to people in state custody for no reason other than their mental illness where the state's sole custodial purpose is the prevention of their self-harm.

The Seventh Circuit's "no minimally competent doctor" degrades the Constitutional standard this court set requiring "professional judgment" be exercised in cases of state custodial care of a mentally ill individual where the state's only purpose is protecting the involuntarily institutionalized from the worst effects of their mental illness. Instead of the substantial deviance standard articulated by this Court, or the gross negligence standard imposed by fellow federal circuits, the Seventh Circuit demands more than substantial deviance and more than gross negligence. The Seventh Circuit asks: could the worst doctor in America have possibly made the same decision? If so, then the Seventh Circuit calls that "professional judgment." This effectively negates the reason for *Youngberg*'s higher standard of "professional judgment" in cases of care for the mentally ill or handicapped in the first place.

Worse yet, the Seventh Circuit joined the Fifth Circuit in equating the professional judgment standard for custodial care of the mentally ill and mentally handicapped as analytically indistinguishable from the

deliberate indifference standard applied to criminal convicts, despite this Court warning against precisely that in *Youngberg*. *See Sain v. Wood*, 512 F.3d 886, 894-895 (7th Cir. 2008) (equating deliberate indifference standard to professional judgment standard as functionally identical); *Collignon v. Milwaukee Cnty.*, 163 F.3d 982, 988 (7th Cir. 1998) (concluding that "there is minimal difference in what the two standards require of state actors"); *see also Yvonne L. v. New Mexico Dep't of Human Servs.*, 959 F.2d 883, 894 (10th Cir. 1992) (doubting whether "there is much difference" between deliberate indifference and professional judgment).

The Fourth Circuit sharply disagreed, noting this Court's own judgments expressly disagreed with equating deliberate indifference and professional judgment. "Applying the deliberate indifference standard to the Estate's claim would be giving involuntarily committed patients the same treatment as that afforded to convicted prisoners, a result the Youngberg Court specifically condemned." *Patten v. Nichols*, 274 F.3d 829, 838 (4th Cir. 2001).

In *Youngberg*, this Court unequivocally declared that those "who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Id. at 321-322. The Second Circuit agreed with the Fourth Circuit, in disagreement with the Seventh Circuit. The professional judgment standard "requires more than simple negligence on the part of the doctor but less than deliberate indifference." *Kulak v. City of New York*, 88 F.3d 63, 75 (2d Cir. 1996). The Third Circuit agreed with the Fourth

Circuit, in disagreement with the Seventh Circuit. *Shaw by Strain v. Strackhouse*, 920 F.2d 1135, 1145-1146 (3d Cir. 1990) (describing Youngberg's holding as an "unambiguous rejection of the deliberate indifference standard in the context of involuntarily institutionalized.")

If the mentally ill, judicially incarcerated across America every day for the sole purpose of protecting themselves from self-harm, can then be given the tools and means of that self-harm while in state custody by state officers' gravest derelictions of duty, then states should have no right to institutionalize them against their will in the first place. Once the state voluntarily took that responsibility on, the Constitution compels more than a "could the worst doctor in America possibly do it too" standard of professional judgment to safeguard the care of such a vulnerable, dependent population. Grant certiorari.

II. The circuits are split over whether a jury can determine culpability amongst several different suspects when the very nature of the civil rights violations precludes a plaintiff from excluding all other suspects for the civil rights violations

The Seventh Circuit adopted another novel position: if you want to get away with civil rights violations, just make sure you can point to at least one other potential culprit, and then you are as free as you want to violate anyone's civil rights anytime you want, even injure the most vulnerable population in state care, and even where the only duty of the state officer is to protect that individual's safety.

Courts within both the Tenth Circuit and the Ninth Circuit disagree. *See Rutherford v. City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986) (holding where facts surrounding the alleged beating are disputed and the plaintiff cannot identify any specific officer who beat him, the very presence of a particular officer at the scene may constitute sufficient evidence to infer that the officer participated in the beating);, and districts within the Tenth Circuit, disagree with the Seventh Circuit, holding "the court notes the remaining defendants cannot escape liability merely because plaintiff is unable, at this stage of the proceedings, to positively identify which deputies beat him." *Davis v. Hill*, 173 F.Supp.2d 1136, 1144 (D. Kans. 2001); *Smith v. Delamaid*, 842 F.Supp. 453, 459 (D. Kan. 1994) (rejecting argument officers could not be liable because the plaintiff was unable to identify which officer abused him).

While §1983 claims require the petitioner to specifically plead the individual who violated their rights, as was done here, most Circuits allow claims to proceed as long as the specific Defendant was possibly culpable. The Ninth Circuit tackled a similar issue in *Segal v. Los Angeles County*. There, a District Court dismissed the Plaintiff's excessive force claim. The Ninth Circuit reversed even though "no evidence existed to show that any of the defendants personally participated in the assault." That Court held "the very presence of the officers at the scene may constitute sufficient evidence for a jury to infer that the officers participated in an illegal beating that was shown to have occurred. *Segal v. Los Angeles Cty.*, 852 F.2d 1290 (9th Cir. 1988); *and see Rutherford v. City of Berkeley*, 780 F.2d 1444, 1448 (9th Cir. 1986) ("[The] three [defendant] officers agreed that they were among the

five or six officers who detained, arrested and handcuffed Rutherford, but denied punching or kicking Rutherford. From this evidence, a jury could reasonably infer that the named officers were participants in punching or kicking Rutherford. By declining to give Rutherford the benefit of this inference, the district court improperly took this case from the jury. We express no opinion whether a jury would have made that inference; that decision is one for the trier of fact.")

Adopting the Ninth Circuit's approach, which allows the jury to appropriately determine who was involved and to what extent, is in accord with congressional intent, long established jurisprudence and protects claimants while not placing an undue burden on the state. Violating someone's rights in a way that hides your identity is not a license to immunity from civil rights liability when a jury could reasonably infer that defendant is the one culpable. Restore the civil rights of the protected. Don't authorize a finger-pointing excuse for not even facing a jury. Grant certiorari.

III. This decision is of exceptional importance and nationwide scope as it will shape the future of Constitutionally competent care for the involuntarily institutionalized mentally ill in state custody in America and make sure civil rights violators cannot be immune from suit by hiding behind their lack of self-identification and the nature of their violation when they are one amongst several possible culprits the evidence implicates

While sadly long overlooked by the courts after its establishment in the second half of the 19th century, the

power of the civil rights law awoke this century "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161, 112 S. Ct. 1827, 1830, 118 L. Ed. 2d 504 (1992).

This court protected inmates where state actors failed to "act reasonably" to prevent a known risk of harm to an inmate. *Farmer v. Brennan*, 511 U.S. 825, 845 (1994). This requires state officials are liable to harm suffered by an inmate whenever they fail "to take reasonable measures to abate" a known risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). The extension of these protections, with a lower level of culpable intent concomitant to the particular responsibilities of the state actors involved and the known peculiar risks to the individual in cases of those involuntarily institutionalized mentally infirm to protect them from self-harm, animated the "professional judgment" standard of *Youngberg*. Several Circuit followed suit, imposing gross negligence or their functional equivalent, to hold state actors accountable. The Seventh Circuit obliterated that standard, reducing it to another bad meme of state custodial care, a place where, even at the mental hospital for the mentally ill where the state's sole goal is to prevent self-harm, getting "Epsteined" is "just normal," even in cases where the sole reason for judicially imposed involuntary institutionalization was not to get "Epsteined."

Imagine someone institutionalized to prevent them from hanging themselves, then being found hanging, with a noose, a ceiling ring, and a chair being "left" in their room while they were unsupervised, despite a doctor's own

medical plan to prevent just that, and nursing orders to prevent just that? That is almost precisely what occurred here. That is not the standard for Constitutionally competent care. Grant cert.

CONCLUSION

If no reasonable jury could find the doctor ignoring his own orders in this case as Constitutionally incompetent care, then the standard for Constitutionally competent care for the mentally ill in state custody is a cruel joke. Johnson's custodians other excuse is no one can prove who individually left the injurious weapon in the room, and thus claim no civil rights suit can be brought against anyone, ever. This cannot be Constitutionally adequate custodial care for the mentally ill in state custody, or the mentally ill in state custody have no remedial civil rights in state custody in America.

For the reasons stated herein this Court should grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED AUGUST 30, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 18-1321

LLOYD N. JOHNSON,

Plaintiff-Appellant,

v.

KAREN RIMMER, *et al.*,

Defendants-Appellees.

February 22, 2019, Argued
August 30, 2019, Decided

Appeal from the United States District Court
for the Eastern District of Wisconsin.
No. 2:14-cv-01408-LA — **Lynn Adelman**, *Judge.*

Before RIPPLE, MANION, and BRENNAN, *Circuit Judges.*

RIPPLE, *Circuit Judge.* Lloyd Johnson brought this action under 42 U.S.C. § 1983 against various employees and officials of the Milwaukee County Medical Health Complex ("MHC"), MHC itself, Milwaukee County, and the County's Department of Health and Human Services. His claims center on an incident of substantial

self-mutilation that occurred while he was in the care of MHC. Mr. Johnson alleged that the defendants violated his Fourteenth Amendment rights by providing constitutionally inadequate medical care, which led to his self-mutilation. Mr. Johnson also brought claims under *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), in which he alleged that the institutional defendants maintained unconstitutional policies, procedures, and customs that caused his injuries. He further maintained that defendants engaged in a conspiracy to cover up the constitutionally inadequate care. In addition to these federal claims, Mr. Johnson brought associated state-law claims.

The defendants moved for summary judgment, and the district court granted the motion in favor of all defendants on all of Mr. Johnson's federal claims. It declined to retain jurisdiction over the state-law claims. Mr. Johnson now brings this appeal, challenging only the district court's decision in favor of two individual defendants: Dr. David Macherey and Nurse Ade George. For reasons set forth in the following opinion, we affirm the judgment of the district court.

I.

BACKGROUND

A.

Mr. Johnson suffers from a variety of mental ailments, including paranoid schizophrenia, major depressive

disorder recurrent, obsessive compulsive disorder, and borderline personality disorder. Starting in mid-2011, he had been admitted intermittently to MHC for treatment. During one of these stays, on March 18, 2012, Mr. Johnson substantially harmed himself, leading to this present suit.

The relevant sequence of events began on February 28, 2012, when Mr. Johnson voluntarily admitted himself to MHC with complaints of depression, delusional thoughts, auditory hallucinations, and suicidal ideations. Mr. Johnson's intake records at that admission reflect that he previously had attempted suicide or self-harm and that he told the intake nurse that "his ears are in the shape that they are in (keloids) because he pulled on his penis in the past and after that, they grew the keloids."[1] He was diagnosed with a psychotic disorder but was released twenty-two hours after admission. MHC discharged Mr. Johnson because his condition had improved; he had asked to be released; and the attending physician had determined there were no grounds to detain him at MHC against his will.

On March 3, 2012, while staying at his stepmother's house, Mr. Johnson used a pair of scissors to sever his testicles, cut off both his earlobes, and remove a portion of skin from his penis. Milwaukee Police took him to Froedtert Hospital for treatment. He remained there until March 8, when he was transferred to MHC pursuant

1. R.78-1 at 2. A keloid is a type of raised scar that can occur where the skin has healed after an injury.

to a petition for emergency detention.[2] At MHC, he was assigned a private bedroom with a private bathroom in the Intensive Treatment Unit ("ITU"), a locked area reserved for the highest-risk patients.[3] Upon admission, he was placed on 1:1 observation status, which required that he never be left alone or out of sight of an assigned nurse.[4]

On March 9, Mr. Johnson met with Dr. David Macherey for an incoming assessment. At the time, Dr. Macherey was the psychologist and treatment director in the ITU. He diagnosed Mr. Johnson with bipolar disorder[5]

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2. *See* Wis. Stat. § 51.15(1)(ar)(4) (providing that the state may take a person into temporary custody if the individual is mentally ill and evinces a substantial probability of physical harm to himself).

3. All patients and visitors are searched before entering the ITU. They are prohibited from having any sort of sharp objects on their persons while in the ITU.

4. This regimen includes when the patient is asleep or using the bathroom. Policies provide that while either a nurse or doctor may initiate 1:1 observation, a physician must review and confirm a nurse-initiated observation. Further, any 1:1 observation must be reevaluated every twenty-four hours to determine whether the heightened observation should continue.

5. Dr. Macherey described bipolar disorder as

> tend[ing] to follow a pattern where typically a person becomes manic, the mania runs its course, and quite often, without treatment, a person might enter a depressive episode following the mania. And then there can also be periods of fairly stable behavior where the person, for all intents and purposes, doesn't appear to have a mental illness.

and noted that the most recent episode was mixed,[6] severe, and psychotic. Dr. Macherey concluded that Mr. Johnson's explanations for his self-mutilation were various and delusional. He also determined that Mr. Johnson had auditory hallucinations, difficulty concentrating, poor self-esteem, and impaired judgment. He specifically noted Mr. Johnson's lack of concern about his recent behavior. As a result of these conclusions, Dr. Macherey determined that Mr. Johnson was at significant risk of self-harm. He ordered that Mr. Johnson remain on 1:1 observation to ensure against further self-mutilating behavior.

That same day, Dr. Thomas Harding, the Medical Director of MHC, also examined Mr. Johnson. He concurred with Dr. Macherey's assessment and prescribed a variety of drugs to treat Mr. Johnson's mental ailments. Dr. Harding and Dr. Macherey then established a goal for Mr. Johnson to "report freedom from [auditory hallucinations] and demonstrate clear[,] reality[-]based thinking within 7 days."[7]

R.69-2 at 11-12 (Macherey Dep. 40:18-41:13). He also asserted that, with treatment, people with bipolar disorder could stay stable indefinitely.

6. A mixed state occurs when a bipolar individual experiences both mania and depression at the same time. Persons in a mixed state are at a higher risk of self-harm. *Id.* at 12 (Macherey Dep. 41:17-42:09).

7. R.78-7 at 1. The defendants assert that this goal referred to conditions that must be met prior to discharge from MHC; Mr. Johnson contends that this goal refers to conditions that must be met before he could be removed from 1:1 observation status.

Later that day, Mr. Johnson found a metal object and inserted the object into his pants. Mr. Johnson could have used this object to harm himself, but the staff quickly noticed his action and took the object from him. Nurse Remedios Azcueta testified that when Mr. Johnson hid the metal object, he said that "he wanted to die" and that "[i]t hurts."[8]

Over the next five days,[9] Mr. Johnson continued to be on the 1:1 observation protocol. He remained in a state of anxiousness, and had disorganized and tangential thoughts, delusions, and auditory hallucinations. Mr. Johnson reported that he did not regret his act of self-harm. Further, although the records indicate that such thoughts became more sporadic over time, Mr. Johnson continued to express that he wished to remove his genitals. For example, on the morning of March 14, he told a nurse that he still wanted to harm himself by removing his genitals and, if he could, he would do it at MHC. That same day, Mr. Johnson reported that his medications were not working.

On March 15, Mr. Johnson's treatment team, which included Dr. Macherey, Dr. Harding, Nurse Mary Holtz, psychiatric social worker Candace Coates, and occupational therapist Sue Erato, met with Mr. Johnson to determine the next steps in his treatment. The record

8. R.69-6 at 13-14 (Azcueta Dep. 48:11-49:11).

9. On March 13, the petition for Mr. Johnson's emergency detention was withdrawn, and he signed an agreement voluntarily admitting himself to MHC.

reflects that Mr. Johnson participated cooperatively in this conference, reported that the medication was helping, and indicated that the auditory hallucinations that he had been experiencing had become cloudy and less troublesome. Dr. Harding determined that Mr. Johnson was improving because he articulated a desire for therapy, was able to identify personal strengths and goals, slept better, denied having suicidal thoughts, and was future-oriented. Both physicians, however, noted that Mr. Johnson's thought process still was disorganized. Mr. Johnson's medical records reflect that the treatment goal for "absence of plan for self harm x3 days was extended."[10] Mr. Johnson remained on 1:1 observation following the meeting.

Prior to the March 15 meeting, Nurse Holtz noted during her morning shift that Mr. Johnson continued to have bizarre thoughts, although he reported that his ongoing auditory hallucinations had become background noise. She also documented that Mr. Johnson denied having ideations of suicide or self-harm. She noted that Mr. Johnson told her that he could not believe that he had harmed himself on March 3. That night, Nurse Azcueta documented that Mr. Johnson was depressed.[11] She also noted that Mr. Johnson's "thought[s] [we]re improving [with] medications" and that he "stated no thoughts of self[-]harm."[12] Further, her notes reflect that Mr. Johnson interacted with other patients in the ITU and cooperated during his dressing change.

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10. R.70-8 at 2.

11. *See* R.70-12 at 29.

12. *Id.* at 30; *see also* R.69-6 at 22 (Azcueta Dep. 82:12-83:15).

Dr. Macherey next examined Mr. Johnson on March 16.[13] He documented that, although Mr. Johnson remained depressed, his thinking had been organized for almost forty-eight hours and he denied any thoughts of self-harm.[14] Dr. Macherey's notes also reflect that Mr. Johnson still demonstrated loose associations and had not yet met the treatment plan's goal of showing reality-based thinking for seven days without auditory hallucinations.[15]

During her morning shift that day, Nurse Holtz noted that Mr. Johnson's "thoughts [we]re reality[-]based" and that he "denie[d] any thoughts of self-harm."[16] She also documented that Mr. Johnson was "depressed" about the harm he had done to himself and was "overwhelmed" by

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13. March 16 was the last day that Dr. Macherey and Dr. Harding saw Mr. Johnson prior to Mr. Johnson's incident of self-mutilation. Citing his medical records, Mr. Johnson notes that no medical doctor saw him over the weekend on March 17 and March 18. Relying on the same records, Mr. Johnson asserts that Dr. Macherey did not provide any instructions for Mr. Johnson's ongoing care and safety during the weekend. The defendants respond that there was an onsite physician who was aware of Mr. Johnson's needs.

14. Mr. Johnson denies that forty-eight hours had passed since he had any thoughts of self-harm. He calculates the time as closer to thirty-six hours.

15. Defendants argue that this seven-day plan reflected goals that must be met prior to discharge from the MHC. *See supra* note 7.

16. R.70-12 at 32.

his medical problems.[17] Around 3:00 p.m., Dr. Macherey removed Mr. Johnson from 1:1 observation status. He testified that he believed Mr. Johnson's condition was improving because Mr. Johnson was no longer ignoring his medical problems, showed an appreciation for his acts of self-harm, and had stopped expressing an intent to harm himself. Dr. Harding concurred with Dr. Macherey's assessment, and the rest of his treatment team did not object to the decision to remove Mr. Johnson from 1:1 observation.[18]

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17. *Id.*

18. Nurse Karen Rimmer testified that, during a debriefing following Mr. Johnson's later act of self-mutilation, she did not agree with the decision to remove Mr. Johnson from 1:1 observation at the time the order was made and that other nurses thought similarly. She further testified that, when she made those statements at the debriefing, a supervisor said that the physicians had concerns about the costs of too many 1:1 observations. Nurse Rimmer was not part of Mr. Johnson's treatment team but was assigned to his 1:1 care at different points. The defendants note that Nurse Rimmer did not work on March 16. Nurse Ade George also testified that it was not normal for patients to be removed from 1:1 observation status on Fridays going into weekends; March 16, 2012 was a Friday.

Additionally, Dr. Mitchell Dunn, Mr. Johnson's expert, opined that it was "premature" to remove Mr. Johnson from 1:1 observation and that Mr. Johnson should have remained on that level of observation for "another couple of weeks" and not "a matter of a couple of days." R.79-11 at 34, 35 (Dunn Dep. 118:05-07, 120:10-13). Dr. Dunn suggested that

At MHC, the nursing staff conducted rounds every fifteen minutes to check on the whereabouts and well-being of each patient.[19] Once removed from 1:1 observation, Mr. Johnson was subject to these well-being checks. Further, nurses conducted "change of shift rounds" at the start of each shift; the nurses observed the whereabouts and well-

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> [t]he fact that Mr. Johnson had already made a significant attempt to cut off his penis and had already cut off his testicles and cut his earlobes indicated a desire and awareness to engage—and a willingness to engage in significant self-harmful behavior that ... was not fully appreciated by either Dr. Macherey or Dr. Harding.

Id. at 26 (Dunn Dep. 87:12-18). Dr. Dunn noted that Mr. Johnson hurt himself just sixty hours after previously being discharged from MHC following his brief February visit; in Dr. Dunn's opinion, Mr. Johnson's behavior was unpredictable. *Id.* at 27 (Dunn Dep. 89:03-91:10).

The defendants note that Dr. Dunn also testified that removal of a patient from 1:1 observation is a legitimate course of treatment and a matter of clinical judgment, and that there are no established standards in the field of psychiatry for the use of 1:1 observation. Additionally, Dr. Dunn stated that the length of time a patient should be under 1:1 observation varies based on specifics to the patient. Dr. Dunn further noted that 1:1 observation can be harmful to the patient because it is very intrusive. The defendant's expert, Dr. Kenneth Robbins, opined that Dr. Macherey's decision was reasonable.

19. Additionally, at the relevant time, the ITU was divided into three "zones" for additional monitoring: one nursing staff member continuously roamed two of the zones while a second nurse did the same with the third zone. An additional nurse was assigned to assist the other two.

being of each patient and checked the safety of each patient room, each bathroom, the common area, the treatment room, and all other areas of the ITU. Also, twice per shift, a staff member conducted environmental rounds, which involved a tour of the entire ITU with an emphasis on finding any safety hazards.[20]

On March 18, Nurse George evaluated Mr. Johnson on her morning shift. She noted that, although he presented a flat affect, he communicated better, continued to express regret for the harm he had caused himself, and denied having any hallucinations or harmful ideations. Sometime before 12:30 p.m., Nurse George changed the dressing on Mr. Johnson's wound.[21] Mr. Johnson testified that she changed his dressing in his bathroom and used bandage scissors to cut the yellow, gauze-like bandages while doing so. Nurse George testified that she changed Mr. Johnson's dressing in the treatment room, that she never used scissors during his treatment, and that she never carried scissors on her person.[22]

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20. Mr. Johnson asserts that the nurses did not always conduct their rounds as required by MHC policy.

21. The time of the chart entry that recorded the dressing change was 12:30 p.m. *See* R.79-12 at 46-47 (George Dep. 45:15-46:17). Consequently, the dressing must have been changed before that time.

22. In records from an investigation conducted following Mr. Johnson's incident of self-harm, Nurse Steven Ellison recounts that, in an interview on March 28, Nurse George claimed that she changed Mr. Johnson's dressing in the treatment room and did not use scissors because the bandages were precut four-inch

At approximately 4:00 p.m. on March 18, Mr. Johnson approached the nursing station of the ITU. He handed the nursing staff a pair of bandage scissors and towels soaked in blood. He stated, "I cut my dick."[23] His penis was completely severed from his body. Mr. Johnson was rushed to Froedtert Hospital, where his penis was surgically reattached.

In the immediate aftermath of the incident, multiple MHC employees reported that Mr. Johnson said that he found the scissors in his bathroom.[24] He testified that

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by four-inch squares and she could tear the tape with her hands. Other nurses testified that the bandages used were precut and that Mr. Johnson's dressing changes did not require scissors.

There is evidence that other nurses carried scissors on their persons and had used scissors during Mr. Johnson's dressing changes on days prior to March 18. At the time, MHC did not have a specific policy regarding the use and inventory of scissors beyond the "safeguards on [sic] a psychiatric hospital." R.69-13 at 5 (Bergersen Dep. 14:20). Additionally, though Nurse George testified that MHC policy required all dressing changes be done in the treatment room, other nurses, including supervisors, testified that dressing changes could be done in either the treatment room or the bathroom.

23. R.78-4 at 18.

24. In Nurse Steve Ellison's documentation from his investigation, he recounts his own movements on that day and records that, immediately after the incident, Mr. Johnson told him, "Don't be mad at no body [sic], they didn't give them to me. They were in my room, a bathroom. It was a blessing they were left. I had to do it." R.78-18 at 6. Nurse Suprina Gunn-Hayes, who was with Nurse Ellison at the time, wrote a memo recounting

the scissors were "[u]nder a pair of dry napkins, like hand towel napkins" in his bathroom and that he harmed himself shortly after finding them.[25] The scissors that he used were metal-handled medical scissors manufactured by a company from which MHC had purchased that type of scissors. In his deposition, Mr. Johnson was unable to identify how the scissors got to the bathroom and how long they had been there.[26]

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that Mr. Johnson said, "I cut my dick off it had to go, no one gave me the scissors I found them in the bathroom." *Id.* at 8. Nurse Mike Sonney-Kamanski wrote an email to Jennifer Bergerson, then the director of acute services, around midnight on the day of the incident, recounting that the nursing assistant who had accompanied Mr. Johnson to the hospital reported that "[t]he patient told the ER DOC that he found the scissors in a bathroom." *Id.* at 9. Nurse Azcueta also testified that Mr. Johnson said he had found the scissors in the bathroom; Nurse Azceuta does not recall when Mr. Johnson made this statement. Finally, Dr. Sara Coleman visited Mr. Johnson at Froedtert Hospital on March 19 to determine whether Mr. Johnson should be involuntarily committed to MHC following his physical treatment for his injury. She testified that Mr. Johnson told her that he found the scissors in the bathroom.

25. R.69-1 at 18 (Johnson Dep. 65:03-09, 66:04-08).

26. Mr. Johnson testified that he was asleep in his room from about 9:00 or 10:00 a.m. until he woke at about 3:30 or 3:45 p.m. *Id.* at 17 (Johnson Dep. 62:08-64:14). He stated that, when he woke, he cleaned his room, found the scissors, and injured himself. *Id.* at 17-18 (Johnson Dep. 64:18-66:08). Mr. Johnson responded "I don't remember" or "I don't recall" to the following questions: "Were there people that would come and clean your room or your bathroom during the time you were a patient?" *Id.* at 17 (Johnson Dep. 64:01-02); "[D]o you know whether any staff checked in on

According to the record evidence, no one saw scissors in Mr. Johnson's bathroom prior to the incident. During the post-incident investigation, the housekeeping contractor who cleaned Mr. Johnson's bathroom in the morning of March 18 reported that he did not observe any unusual items and that he did not have scissors on his cleaning cart or on his person.[27] The daily documentation of nurse rounds "indicates that the bathroom had been checked for safety at 7 AM and at 3 PM on 3/18 as part of the shift to shift handoff."[28] Nurse Azcueta testified that she checked the bathroom at the start of the afternoon shift on March 18 and that she did not find any contraband. The defendants admit, in their response to Mr. Johnson's proposed findings of fact, that a nursing assistant conducted a well-being check just fifteen minutes prior to the incident.[29]

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you while you were sleeping that day?" *Id.* (Johnson Dep. 64:15-16); "And did you see any staff members between when you woke up and when you injured yourself?" *Id.* at 18 (Johnson Dep. 66:01-03).

27. The contractor also affirmed that the cleaning cart was always within his control or locked.

28. R.78-2 at 9. The Root Cause Analysis and Improvement Plan, developed by MHC following the incident, notes that "interviews with staff ... suggested that while the sheets may be initialed, the checks are not always done." *Id.* Bergerson testified that this statement referred to finding that rounds were not done in a standardized way and not that rounds were not done at all.

29. Nurse Azcueta testified that she checked the bathroom during the well-being check in question. Later, she testified that a nursing assistant might have been the individual who did the well-being check. Nurse Rimmer testified that such was the case. The nursing assistant was not deposed.

The record contains testimony that Mr. Johnson might have obtained scissors from somewhere other than his bathroom. Nurse Karen Rimmer testified that, when Mr. Johnson returned to MHC, he told her first that he found the scissors at Froedtert Hospital before he altered his story and said that he had found them in his bathroom.[30] Mr. Johnson testified that he did not remember this conversation.[31] Others stated that rubberized office scissors were kept in an electrical-type box located inside the nurse's office; although the box was inside a locked or otherwise nurse- supervised office, the box itself was unlocked. Nurses also testified that metal-handled medical scissors were kept in a box or drawer in the treatment room. There also is evidence that, beyond patient treatment, the exam room was used at times as an "overflow interview room[], for patient phone calls and for lab draws."[32] MHC staff testified that patients always were supervised while in the treatment room and that the room was locked when not in use. Finally, Nurse Ellison, charged with the initial investigation into the incident, reported that he had observed Mr. Johnson talking to a housekeeping contractor around 1:45 p.m.

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30. *See* R.69-10 at 8 (Rimmer Dep. 27:04-06). Nurse Rimmer also testified that she had been told that Mr. Johnson went to Froedtert Hospital at some point prior to March 18. According to the Root Cause Analysis and Improvement Plan, "[t]he patient did not leave the unit during his stay." R.78-2 at 8. Nurse Azcueta testified that Mr. Johnson had an appointment scheduled on March 12 but that the appointment was rescheduled to March 19.

31. *See* R.69-1 at 19 (Johnson Dep. 72:04-07).

32. R.78-2 at 9.

on March 18.[33] During Nurse Ellison's investigation, this contractor explained that he knew Mr. Johnson, but had not seen him for a few years. The contractor recounted that Mr. Johnson "was smiling" and said, "I have to tell you something," but that the contractor told him he could not talk at that time.[34] According to the contractor, the exchange lasted no more than five minutes. MHC's entire investigation into the incident was unable to determine the source of the scissors.

B.

On November 5, 2014, Mr. Johnson brought this action against the MHC, its employees and officials, Milwaukee County, and the Milwaukee County Department of Health and Human Services seeking damages for the injuries he suffered while in the care of MHC. In the first of his two federal claims under 42 U.S.C. § 1983, Mr. Johnson alleged that the defendants' inadequate medical care deprived him of his right to substantive due process. According to Mr. Johnson, the defendants' care was constitutionally inadequate because removing him from 1:1 observation status and allowing him to possess scissors created the circumstances that permitted him to injure himself. Second, relying on *Monell v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), Mr. Johnson alleged that MHC, Milwaukee County, and its Department of Health and Human

33. The housekeeping contractor estimated this conversation occurred at 3:00 p.m.

34. R.78-18 at 10.

Services maintained unconstitutional policies, procedures, and customs that had caused his injuries. Relatedly, Mr. Johnson claimed that the defendants conspired to cover up their constitutionally inadequate care. Mr. Johnson also brought state-law claims arising out of the same event.

In due course, the defendants moved for summary judgment. They contended that, because Mr. Johnson voluntarily had committed himself to MHC, he had no substantive due process rights under the Fourteenth Amendment. Moreover, they continued, any such claims failed on the merits. Removing Mr. Johnson from 1:1 observation, they submitted, was simply a matter of professional judgment. Under our decision in *Collignon v. Milwaukee County*, 163 F.3d 982 (7th Cir. 1998), they submitted, removing him from such close observation was not such a serious departure from accepted practice as to constitute a constitutional deprivation. With respect to access to the scissors, the defendants contended that Mr. Johnson could not "cite to any evidence to suggest that the scissors he used to sever his penis were deliberately left for him to find."[35] Consequently, they argued, he was "left with nothing more than a claim that the scissors were accidentally or inadvertently left behind," and "inadvertence [wa]s insufficient to sustain a § 1983 claim."[36]

In his opposition to the motion for summary judgment, Mr. Johnson contended that there was sufficient evidence

35. R.67 at 15.

36. *Id.*

to permit a jury to conclude that, by removing him from 1:1 observation, the defendants were deliberately indifferent to his serious medical condition. With respect to access to the scissors, Mr. Johnson contended that he was "entitled to the reasonable inference that *a* nurse left her bandage scissors in his bathroom."[37] "At a minimum," Mr. Johnson continued, "there [wa]s a reasonable inference ... that the *three* nurses identified as conducting bandage changes in [his] room, George, Azcueta and Plum were deliberately indifferent or recklessly disregarded [his] needs."[38] Other than noting that Nurse George's bandage change was closest in time to his incident of self-harm, Mr. Johnson did not suggest how a jury might conclude that it was more likely than not that *a particular nurse* left the scissors in the bathroom.

The district court granted the defendants' motion. It held that Mr. Johnson could not sustain his claim regarding his removal from 1:1 care because no jury could find, on the record made by the parties, that the medical staff's decision was a substantial departure from accepted professional norms. The court concluded that, at most, the facts showed that removing Mr. Johnson from 1:1 care was negligent, and mere negligence is not sufficient to sustain a constitutional claim. The district court also held that Mr. Johnson could not go forward with his claim that the defendants deprived him of substantive due process by exposing him to the scissors. It reasoned that mistakenly

37. R.76 at 19 (emphasis added) (capitalization and bold removed).

38. *Id.* at 21 (emphasis added).

leaving scissors in the bathroom was only negligence. The court also noted that, regardless, Mr. Johnson failed to submit sufficient proof that any individual defendant was personally responsible for the scissors ending up in his possession.[39]

The district court also rejected Mr. Johnson's *Monell* claim and conspiracy claim. With no other federal claims remaining, the district court declined to exercise supplemental jurisdiction over Mr. Johnson's state-law claims. Mr. Johnson timely appealed. He only challenges the district court's decision in favor of two individual defendants: Dr. David Macherey and Nurse Ade George.

II.

DISCUSSION

We review the district court's decision on summary judgment de novo. *E.T. Prods., LLC v. D.E. Miller Holdings, Inc.*, 872 F.3d 464, 467 (7th Cir. 2017). Summary judgment is proper when the moving party demonstrates that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists when the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Carmody v. Bd. of Trs. of Univ. of Ill.*, 893 F.3d 397, 401 (7th Cir. 2018) (internal quotation marks omitted). "[A] court may

39. Because the district court found there was no violation of Mr. Johnson's rights, it did not address whether he had substantive due process rights as a voluntarily admitted patient in the first place.

not make credibility determinations, weigh the evidence, or decide which inferences to draw from the facts; these are jobs for a factfinder." *Payne v. Pauley*, 337 F.3d 767, 770 (7th Cir. 2003). When ruling on a motion for summary judgment, we, like the district court, view the record in the light most favorable to the nonmoving party. *Id.* However, "inferences that are supported by only speculation or conjecture will not defeat a summary judgment motion." *Carmody*, 893 F.3d at 401 (internal quotation marks omitted).

A.

Before we address the merits of Mr. Johnson's specific substantive due process claims,[40] we first outline the general contours of the constitutional protections he asserts. In *DeShaney v. Winnebago County Social Services Department*, 489 U.S. 189, 109 S. Ct. 998, 103 L. Ed. 2d 249 (1989), the Supreme Court determined that the Due Process Clause of the Fourteenth Amendment

40. In his reply brief, Mr. Johnson argues that the State violated his rights to procedural due process because it did not follow its procedures when committing him. Mr. Johnson forfeited this argument by raising it for the first time on appeal and in his reply brief. *See Williams v. Dieball*, 724 F.3d 957, 961 (7th Cir. 2013) ("[A] party may not raise an issue for the first time on appeal.") (quoting *Fednav Int'l Ltd. v. Cont'l Ins. Co.*, 624 F.3d 834, 841 (7th Cir. 2010)). Mr. Johnson's attempt to shoehorn this argument into the voluntariness analysis, *see* Reply Br. 2 ("Johnson's confinement was not voluntary because he was denied all procedural due process rights" (bold omitted)), does not affect the result: as discussed above, the voluntary nature of Mr. Johnson's commitment is not a question we need to decide.

"generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196. "[N]othing in the language of the Due Process Clause," said the Court, "requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. Instead, "[t]he Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *Id.*

DeShaney does note, however, that "in certain limited circumstances[,] the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals." *Id.* at 198. First, due process rights arise when there is a special relationship between the government and the individual. Second, the state is constitutionally obligated to provide aid where it has created the danger. Mr. Johnson submits that both exceptions apply. He contends that Dr. Macherey and Nurse George can be liable under the special relationship exception because he was "not free to leave MHC's custody."[41] Moreover, he argues that Nurse George affirmatively placed him in a danger he otherwise would not have faced.

1.

"When a state actor ... deprives a person of his ability to care for himself by incarcerating him, detaining him,

41. Appellant's Br. 34.

or involuntarily committing him, it assumes an obligation to provide some minimum level of well-being and safety." *Collignon v. Milwaukee Cty.*, 163 F.3d 982, 987 (7th Cir. 1998) (citations omitted). This obligation includes meeting the person's medical needs while he is in custody. *Id.* at 988-89.

To determine whether the state provided adequate care, the Supreme Court requires that we "make certain that professional judgment in fact was exercised." *Youngberg v. Romeo*, 457 U.S. 307, 321, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982) (internal quotation marks omitted). This review is deferential: a professional's decision[42] "is presumptively valid" and "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323.

In a medical context, the *Youngberg* professional judgment standard first requires that the plaintiff show that his medical need was objectively serious. *Collignon*, 163 F.3d at 989. Then, the plaintiff must prove that the treatment decision was a *substantial* departure from

42. The Court defined a professional as "a person competent, whether by education, training or experience, to make the particular decision at issue" and contemplated that someone with a degree in medicine or nursing was such a person in the case of treatment decisions. *Youngberg v. Romeo*, 457 U.S. 307, 323 n.30, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982).

the accepted professional standard.[43] *Id.* A plaintiff does so by establishing "(1) that the professional knew of the serious medical need, and (2) disregarded that need." *Id.* Knowledge can be proved if the trier of fact can conclude the plaintiff's medical need was "obvious." *Id.* Disregard of that need can be proved "only if the professional's subjective response was so inadequate that it demonstrated an absence of professional judgment, that is, that no minimally competent professional would have so responded under those circumstances." *Id.*[44]

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43. Mr. Johnson submits that the professional judgment standard "requires a showing of something more than negligent wrongdoing but something less than intentional wrongdoing—something akin to criminal recklessness." Appellant's Br. 31. Although we have used this language when describing the deliberate indifference standard, *see Collignon*, 163 F.3d at 988, determining that Dr. Macherey or Nurse George violated Mr. Johnson's substantive due process rights requires the more specific professional judgment standard, which applies to professionals like "physicians, psychiatrists, and nurses within their area of professional expertise." *Id.* at 989. We have been clear that this standard asks whether the medical professional substantially departed from accepted professional standards. *See King v. Kramer*, 680 F.3d 1013, 1018-19 (7th Cir. 2012).

44. Dr. Macherey and Nurse George argue that we need not consider whether the evidence establishes the special relationship exception to *DeShaney*'s general rule. According to Dr. Macherey and Nurse George, Mr. Johnson voluntarily committed himself to MHC and, therefore, the special relationship exception is inapplicable here. Courts generally agree that individuals who voluntarily admit themselves to a state-run mental health facility do not have substantive due process rights simply because they are in the state's custody. *See, e.g., Campbell v. State of Washington*

2.

The state-created danger exception to the rule in *DeShaney* is also well established.

We have established a three-part test for such claims. *King ex. rel King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 817-18 (7th Cir. 2007).[45] First, "the state, by its

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DSHS, 671 F.3d 837, 843 (9th Cir. 2011) ("Mere custody, however, will not support a special relationship claim where a person *voluntarily resides* in a state facility under its custodial rules." (internal quotation marks omitted)); *Torisky v. Schweiker*, 446 F.3d 438, 446 (3d Cir. 2006) ("[A] custodial relationship created merely by an individual's voluntary submission to state custody is not a 'deprivation of liberty' sufficient to trigger the protections of *Youngberg.*"); *Brooks v. Giuliani*, 84 F.3d 1454, 1466-67 (2d Cir. 1996) (holding there was no "duty to exercise professional judgment" because the plaintiffs were not under a "state-imposed restraint" (internal quotation marks omitted)).

We have not addressed directly the extent to which the voluntariness of one's committal to the state's custody bears on due process rights under *DeShaney*. Like the district court, we do not need to determine whether a voluntary commitment can be de facto involuntary for the purposes of the Due Process Clause or whether Mr. Johnson's commitment was functionally involuntary. As we will discuss later, even if Mr. Johnson has due process rights under the special relationship exception, he cannot show that Dr. Macherey and Nurse George deprived him of those rights.

45. In *King ex. rel King v. E. St. Louis Sch. Dist. 189*, 496 F.3d 812, 817 n.3 (7th Cir. 2007), we noted that the circuits apply the state-created danger doctrine differently. We determined that the variations among the circuits did not "reflect fundamental doctrinal differences" because all approaches limit liability to

affirmative acts, must create or increase a danger faced by an individual." *Id.* at 818. Second, "the failure on the part of the state to protect an individual from such a danger must be the proximate cause of the injury to the individual." *Id.* Third, "the state's failure to protect the individual must shock the conscience." *Id.* "Only 'the most egregious official conduct' will satisfy this stringent inquiry. Making a bad decision, or even acting negligently, does not suffice to establish the type of conscience-shocking behavior that results in a constitutional violation." *Jackson v. Indian Prairie Sch. Dist. 204*, 653 F.3d 647, 654-55 (7th Cir. 2011) (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)) (citation omitted). Unlike the special relationship exception, custody or lack thereof plays no role in the state-created danger analysis. *See Martin v. Shawano-Gresham Sch. Dist.*, 295 F.3d 701, 708 (7th Cir. 2002).

B.

Turning to Mr. Johnson's claims against Dr. Macherey, Mr. Johnson contends that Dr. Macherey provided inadequate medical care, in violation of his due process rights, by removing him from 1:1 observation status. Analyzed under either of the exceptions to the *DeShaney* rule, our inquiry is basically the same: whether Dr. Macherey knew that Mr. Johnson suffered from an objectively serious condition and whether Dr. Macherey responded to that knowledge in a way "no

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"conduct that violates an individual's substantive due process rights" by being "arbitrary in the constitutional sense, i.e., shocks the conscience." *Id.*

minimally competent" medical professional "would have so responded under those circumstances." *Collignon*, 163 F.3d at 989 (reviewing actions under professional judgment exception); *Jackson*, 653 F.3d at 654-55 (observing that a "bad decision" does not suffice to show a state-created danger; instead, when "public officials have time for reasoned deliberation in their decisions, the officials' conduct will only be deemed conscience shocking when it 'evinces a deliberate indifference to the rights of the individual'" (quoting *King ex rel. King*, 496 F.3d at 819)).[46] No one disputes that Mr. Johnson's medical condition was objectively serious or that Dr. Macherey knew of Mr. Johnson's condition. Thus, we focus on whether no minimally competent medical professional would have removed Mr. Johnson from 1:1 care. We conclude that no reasonable fact finder could find that Dr. Macherey's decision was outside the bounds of a competent medical professional's judgment.

Mr. Johnson points to several facts that, in his view, would support a jury's determination that Dr. Macherey failed to exercise the constitutionally required level of professional judgment. First, Mr. Johnson expressed his wish to harm himself at least six to eight times while at MHC, including two days prior to his removal from 1:1 observation. Second, on the day after his arrival at MHC, Mr. Johnson managed to find a metal object and briefly insert it into his pants, stating that "he wanted to die"

46. *See* Appellant's Br. 30 (noting that "[u]nder either standard, a claim against a health care provider acting within his or her area of expertise requires a showing that the provider failed to exercise 'professional judgment'" and citing *Collignon*).

and that "[i]t hurts."[47] Third, at the time he was removed from 1:1 care, Mr. Johnson's nurses documented that he was depressed, was overwhelmed, and still demonstrated loose associations. Similarly, Mr. Johnson had not yet met his treatment plan's goal of showing reality-based thinking without auditory hallucinations when he was removed from 1:1 care. Fourth, one of Mr. Johnson's caregivers at MHC, Nurse Rimmer, testified that she disagreed with the decision to remove Mr. Johnson from 1:1 care but was not asked her opinion prior to the decision. Likewise, Mr. Johnson's expert opined that it was "premature" to remove Mr. Johnson from 1:1 observation and that Mr. Johnson should have remained on that status for "another couple of weeks" and not a "matter of a couple of days."[48] Fifth, Nurse Rimmer testified that, after the incident, one of her supervisors said that the physicians had concerns about the cost of 1:1 observations.[49] Sixth, Dr. Macherey described in his own testimony that people with bipolar disorder can have periods of fairly stable behavior. Finally,

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47. R.69-6 at 14 (Azcueta Dep. 48:11-49:11).

48. R.79-11 at 34-35 (Dunn Dep. 118:05-07, 120:10-13).

49. This is an out of court statement offered for the truth of the matter asserted. We do not need to determine whether it falls outside of the definition of hearsay or within an exception to the hearsay rule because, even accepting that costs were a consideration, Mr. Johnson cannot show that no minimally competent medical professional would have removed him from 1:1 care. *See Petties v. Carter*, 836 F.3d 722, 730 (7th Cir. 2016) (noting that "cost of treatment is a factor in determining what constitutes adequate, minimum-level care" as long as medical personnel do not "simply resort to an easier course of treatment that they know is ineffective").

Mr. Johnson first harmed himself just sixty hours after being discharged from his prior voluntary stay at MHC in February.

We must assess the record in the light most favorable to Mr. Johnson, the nonmovant. We therefore accept the facts proffered by Mr. Johnson and make all reasonable inferences from those facts. But we do not ignore the other evidence suggesting that at least some minimally competent doctors would have, like Dr. Macherey, removed Mr. Johnson from 1:1 observation status. Over the course of his care at MHC, Mr. Johnson underwent frequent assessments, and his medical team noted several facts indicating an improving condition, including that (1) after stating that he still wished to remove his genitals on the morning of March 14, Mr. Johnson stopped mentioning that he intended to harm himself and denied, on multiple occasions to different MHC staff, that he had any harmful ideations; (2) during a March 15 treatment meeting with his treatment team, Mr. Johnson was cooperative, articulated a desire for therapy, was future-oriented, exhibited organized thinking, and identified personal strengths and goals; (3) starting on March 15, Mr. Johnson reported multiple times that his hallucinations were becoming cloudy and less troublesome; (4) on the night of March 15, Mr. Johnson reported that his medications were working; (5) on the day he was removed from 1:1 care, March 16, Mr. Johnson had denied any ideations of self-harm for almost two days; (6) over time, Mr. Johnson began to show a brighter affect and engage positively with other patients in the unit; and (7) Mr. Johnson had started sleeping better and eating more.

Dr. Macherey, moreover, did not make the decision to remove Mr. Johnson from 1:1 observation unilaterally; Dr. Harding concurred with Dr. Macherey's assessment that Mr. Johnson had improved enough to be removed from 1:1 observation and other members of Mr. Johnson's treatment team did not object to Dr. Macherey's decision. Mr. Johnson's own expert, despite his ultimate conclusion that removing Mr. Johnson from 1:1 care was premature, also testified that the intrusive nature of 1:1 observation can be harmful to the patient, that there are no established standards in the field of psychiatry for the use of 1:1 observation, and that removing a person from 1:1 care is a legitimate course of treatment. Finally, Dr. Macherey's expert opined that the decision to remove Mr. Johnson from 1:1 care was reasonable.

Dr. Macherey testified that he believed that Mr. Johnson's condition had improved sufficiently to justify his removal from 1:1 observation. Specifically, Dr. Macherey noted that Mr. Johnson was no longer ignoring his medical problems, that he had showed an appreciation for his prior actions, and that he had stopped expressing an intent to harm himself.

Considering Mr. Johnson's documented improvement, the consensus of his treatment team that removing him from 1:1 observation was appropriate, and the recognition that, at some point, 1:1 care is too restrictive for the patient, a reasonable factfinder could not find that *no minimally competent* doctor would have made the same decision. As we have said, "evidence that *some* medical professionals would have chosen a different course of

treatment is insufficient to make out a constitutional claim." *Petties v. Carter*, 836 F.3d 722, 729 (7th Cir. 2016). We make no determination as to whether Dr. Macherey was negligent; the Due Process Clause requires that Mr. Johnson demonstrate a more egregious lapse of professional performance. *See Pyles v. Fahim*, 771 F.3d 403, 409 (7th Cir. 2014); *Jackson*, 653 F.3d at 654-55. The district court correctly granted summary judgment in favor of Dr. Macherey on Mr. Johnson's constitutional claim.

C.

We next examine Mr. Johnson's constitutional claim against Nurse George. He submits two theories of liability. First, he argues that Nurse George violated his due process rights by providing inadequate medical care. Second, he contends that Nurse George affirmatively placed him in a position of danger in which he otherwise would not have been.[50] Both theories require, in the end, that Mr. Johnson establish that Nurse George left the scissors used by Mr. Johnson to harm himself in his bathroom, despite her being aware of the specific risks that sharp objects posed to him. However, *on the basis of the record made in the district court*, no reasonable factfinder could determine that Nurse George, as opposed to another treating nurse, left the scissors that Mr. Johnson eventually used.

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50. Mr. Johnson did not make this argument before the district court. The defendants, however, do not argue that Mr. Johnson forfeited his state-created danger theory by failing to raise it in the district court. Further, they have fully briefed the issue before us and presented defenses at oral argument. Consequently, we will address the argument on appeal.

In an action under § 1983, the plaintiff must establish individual liability. *See Estate of Perry v. Wenzel*, 872 F.3d 439, 459 (7th Cir. 2017). Thus, Mr. Johnson must be able to establish Nurse George's "*personal involvement* in the alleged constitutional deprivation." *Colbert v. City of Chicago*, 851 F.3d 649, 657 (7th Cir. 2017). Before the district court, however, Mr. Johnson did not argue that there was sufficient evidence from which a jury could conclude by a preponderance of the evidence that Nurse George was the nurse who left the scissors in his bathroom. Rather, he simply argued that the district court should make a "reasonable inference that *a* nurse left her bandage scissors in his bathroom" and maintained, simultaneously, that Nurse George *or* Nurse Azcueta *or* Nurse Plum left the scissors.[51] Mr. Johnson did not point to any evidence that would allow the jury to winnow the field from three to one, nor did he otherwise explain how a jury could choose from among these three possible tortfeasors. We agree with the district court's conclusion: the fact "[t]hat one of three individuals (only two of whom are defendants) may have left scissors in Johnson's bathroom is not enough to establish individual liability."[52]

Mr. Johnson did not submit sufficient evidence to establish that a jury could find by a preponderance of the evidence that Nurse George left scissors in his bathroom. Accordingly, we must affirm the grant of summary judgment.

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51. R.76 at 18, 20 (emphasis added) (capitalization and bold removed).

52. R.88 at 9-10.

CONCLUSION

The district court correctly granted the defendants' motion for summary judgment. Its judgment is therefore affirmed.

AFFIRMED

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN, FILED AUGUST 18, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 14-C-1408

LLOYD JOHNSON,

Plaintiff,

v.

KAREN RIMMER, *et al.*,

Defendants.

DECISION AND ORDER

In 2012, plaintiff Lloyd Johnson was involuntarily committed for inpatient psychiatric treatment through the Behavioral Health Division (BHD) of the Milwaukee County Department of Health and Human Services (DHHS). Johnson was treated at the Milwaukee County Mental Health Complex (MHC), and while there, obtained a scissors and used it to sever his penis. He brings this suit under 42 U.S.C. § 1983 against various MHC officials and employees, Milwaukee County, DHHS, and MHC alleging personal and municipal liability for deprivations of his Fourteenth Amendment rights. He also alleges violations of state constitutional, statutory, and common

law. Defendants move for summary judgment on Johnson's federal claims and ask that, if summary judgment is granted, I decline to exercise jurisdiction over his state claims.

I. BACKGROUND

Johnson started suffering from mental illness, including paranoid schizophrenia and recurrent depression, in 2011, though he has had obsessive thoughts about his genitals since childhood. Johnson was voluntarily admitted or involuntarily committed to MHC from July 8 to July 10, 2011, with complaints of paranoia and auditory hallucinations; from July 23 to July 24, 2011, due to suicidal statements; and from February 28 to February 29, 2012, with complaints of depression and suicidal thoughts.

On March 3, 2012, while staying at his step-mother's house, Johnson used a scissors to cut off his testicles, earlobes, and a portion of the skin on his penis. Johnson was admitted to Froedtert Hospital in Milwaukee County. His wounds required daily care, including regular dressing (bandage) changes.

On March 8, Johnson was involuntarily admitted to MHC under a petition for emergency detention. *See* Wis. Stat. § 51.15. He was transferred from Froedtert to MHC the next morning and assigned a private room with a bathroom on MHC's Intensive Treatment Unit (ITU), an inpatient unit where high-risk patients are treated. Johnson was placed on a one-to-one observation status (or simply, "1:1"). Patients on 1:1 are continuously watched

by a member of MHC's nursing staff, even when they are asleep or using the bathroom.

On March 9, defendant David Macherey, a psychologist and ITU's treatment director, saw Johnson for an initial assessment. Macherey determined that Johnson was experiencing delusional thoughts, auditory hallucinations, poor sleep, difficulty with concentration and attention, poor self-esteem, and impaired judgment. He concluded that Johnson was at significant risk for self-harm. Defendant Thomas Harding, a psychiatrist and MHC's medical director, also saw Johnson that day. Macherey and Harding decided to keep Johnson on 1:1. Harding prescribed Johnson medication, including Zyprexa, an antipsychotic used to treat conditions like schizophrenia and bipolar disorder, and Ativan, an antianxiety drug.

On March 12, Macherey assessed Johnson again. He noted that Johnson showed no insight into the dangerousness of his behavior and should remain on 1:1. On March 13, Macherey again assessed Johnson. Macherey noted that Johnson's affect was brighter, his thinking was increasingly organized, and he expressed disappointment in himself for acting on his thoughts of self-harm. However, Macherey also noted that Johnson was still having intermittent thoughts about cutting off his genitals. Macherey kept Johnson on 1:1. That day, the petition for Johnson's emergency detention was withdrawn, and Johnson signed an application for voluntary admission to MHC, which Macherey approved. On March 14, Macherey learned that Johnson had said that morning that he was still thinking about "finishing

the job" (that is, further mutilating his genitals). Due to Johnson's statement, Macherey kept him on 1:1. That evening, Johnson told a nurse that his medications were not helping him but declined to answer her questions about whether he was having auditory hallucinations.

On March 15, Johnson met with his entire treatment team, including Macherey and Harding, a registered nurse named Mary Holtz, a psychiatric social worker named Candace Coates, and an occupational therapist named Sue Erato.[1] Johnson was noted as cooperative with his treatment, he said that his medications were helpful and that his auditory hallucinations had become "cloudy" and less troublesome, and he denied having had thoughts of self-harm since the day before. Harding observed that Johnson seemed to be doing better and was future-oriented and noted that Johnson articulated a desire for therapy to address his self-esteem issues, denied suicidal ideations, was able to articulate personal strengths and goals, and was sleeping better, though he also found that Johnson's thoughts were still somewhat disorganized. Holtz noted that Johnson had expressed disbelief to her about what he had done to himself on March 3 and stated that Johnson was still reporting "bizarre thoughts" as of that day but that he also said that he was experiencing far less "background noise," his thinking was "not so cloudy," and he was not having any thoughts of self-harm or suicide.

On March 16, Macherey again assessed Johnson. Macherey noted that Johnson remained depressed but

1. Holtz, Coates, and Erato are not defendants.

that he continued to deny any suicidal ideation or thoughts of self-harm. Macherey observed what he believed to be a consistent decrease in Johnson's symptoms and overall improvement of his mental condition. Holtz, who cared for Johnson that day, noted that Johnson was feeling depressed about the harm that he had done to himself and overwhelmed at the extent of his medical problems but that he stated that his thoughts were reality-based and that he was not having any thoughts of self-harm. Macherey believed that Johnson's concerns about the extent of his medical problems indicated improvement in his condition. He felt that Johnson had demonstrated sufficient improvement in his condition to show that he no longer needed 1:1. The other members of Johnson's treatment team agreed. That afternoon, Macherey ordered Johnson to be removed from 1:1. From that point, Johnson was not constantly monitored but instead was subject to checks by ITU staff every 15–30 minutes.

Neither Macherey nor Harding saw Johnson over the weekend of March 17–18, 2012, but the registered nurses assigned to care for him documented his mood, behavior, and condition. That Friday, Paul Saeger (who is not a defendant) noted no unsafe behavior. That Saturday, defendant Ade George noted that Johnson denied any suicidal ideation or need to mutilate his genitals and that she did not observe any self-harm or other behavioral issues, defendant Remedios Azcueta noted that Johnson was depressed and his mood was blunted, and defendant Leslie Roberts noted that his mood was pleasant early in her shift but that he was tearful and anxious later on.

That Sunday, March 18, George noted that Johnson's affect was flat but better than the day before and that Johnson continued to express regret about the harm he had caused himself. She also noted that Johnson denied having any auditory hallucinations, suicidal ideation, or thoughts of self-harm. Defendant Rebecca Brame (now Rebecca Hoey) noted that she spoke with Johnson, who talked about basketball and his mother and indicated that he could not go home because his mother was afraid of him. About their conversation, Hoey also wrote, "Regrets. 'I can't have thoughts like this. It's not good for me.'" *See* Hoey Dep., ECF No. 69-8, at 41:20–42:3.

Azcueta was assigned to care for Johnson starting at 2:45 that afternoon. During the first hour of her shift, Azcueta went to Johnson's room to check in on him at least twice. He was in bed both times but said that he was "okay" and "fine," when asked. Around 3:45, Johnson was in bed with his eyes closed, but Azcueta entered his room and asked him how he was. Johnson opened his eyes but did not respond. She checked his bathroom and the surrounding area but did not see anything unusual. During that shift, defendant Nii Adamah, a certified nursing assistant, was assigned to monitor the "zone" within the ITU that included Johnson's room and documented Johnson's location at 15-minute intervals throughout the shift.

At 4:00, Johnson approached the ITU's nursing station, bleeding, holding a scissors and his severed penis. Staff called for an emergency response team and paramedics, who transferred Johnson back to Froedtert, where his penis was surgically reattached.

MHC officials conducted a root cause analysis and found that "the exact circumstances of how [Johnson] obtained the scissors could not be determined." *See* ECF No. 78-2, at 8. The written report from that investigation notes that "[Johnson] stated after the event that he 'found' the scissors in his bathroom [but] had no idea how they got there." *Id.* at 9. Johnson said much the same thing during his deposition in this case, testifying that right before he harmed himself, he "found some scissors . . . [u]nder a pair of dry . . . hand towel napkins" in his "[b]athroom" but that he did not know how long they had been there, how they got there, or who left them there. Johnson Dep., ECF No. 69-1, at 65:3–:9, 91:17–92:1.

II. DISCUSSION

Defendants move for summary judgment on Johnson's constitutional claims under § 1983 arguing that he cannot show that "he was deprived of a right secured by the Constitution . . . of the United States." *See Buchanan-Moore v. Cty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). I must grant a party's motion for summary judgment on "each claim . . . on which summary judgment is sought," "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

Appendix B

A. Reasonable Care and Safety

Johnson argues that defendants deprived him of his rights under the Fourteenth Amendment when they removed him from 1:1, allowed him access to scissors, and failed to properly verify his safety and the safety of his environment. "When a state actor such as Milwaukee County deprives a person of his ability to care for himself by . . . involuntarily committing him, it assumes an obligation to provide some minimum level of well-being and safety." *Collignon v. Milwaukee Cty.*, 163 F.3d 982, 987 (7th Cir. 1998). Thus, state actors must provide "conditions of reasonable care and safety" for "the involuntarily committed." *Youngberg v. Romeo*, 457 U.S. 307, 321, 324 (1982).

As an initial matter, defendants argue that Johnson was not entitled to conditions of reasonable care and safety under the Fourteenth Amendment when he harmed himself because he was voluntarily admitted, not involuntarily committed, at the time. Johnson argues, to the contrary, that due to his mental illness and condition, he was a "de facto involuntary patient," despite his formal status. I need not address this dispute because, as discussed below, Johnson cannot show that he suffered a constitutional deprivation under the Fourteenth Amendment, even if he was involuntarily committed.

1. Removal from 1:1

Johnson argues that a reasonable jury could find that the decision to remove him from 1:1 violated the Fourteenth

Amendment, but I disagree. When an appropriate professional makes a decision about the treatment or conditions of confinement of an involuntarily committed patient, the professional "is entitled to deference . . . unless 'no minimally competent professional'" would have made the same decision under the circumstances. *Sain v. Wood*, 512 F.3d 886, 894–95 (7th Cir. 2008) (quoting *Collignon*, 163 F.3d at 988). A professional's decision is unconstitutional "only if it is such 'a substantial departure from accepted professional judgment, practice or standards as to demonstrate' that it was not, in fact, based on professional judgment." *Lane v. Williams*, 689 F.3d 879, 882 (7th Cir. 2012) (quoting *Youngberg*, 457 U.S. at 323).

Here, a team of mental-health professionals—including a psychologist, a psychiatrist, a registered nurse, a psychiatric social worker, and an occupational therapist—agreed that it was appropriate to remove Johnson from 1:1 after a week of observation and treatment. Johnson does not dispute that the decision to remove him from 1:1 was "made by . . . appropriate professional[s]," *id.*, but he does dispute whether their decision was a legitimate exercise of professional judgment.

First, Johnson argues that he was removed from 1:1 due to budgetary and staffing concerns, rather than for legitimate clinical reasons. No reasonable jury could infer that from the available evidence, though, as Johnson offers nothing in support of this argument but unsubstantiated rumors and inadmissible hearsay. *See, e.g.*, ECF No. 85, Defs.' Resp. to Pl.'s Proposed Findings of Fact, ¶ 47. Moreover, administrative factors, including

"convenience and cost," are "*permissible factors* . . . to consider in making treatment decisions," as long as they are not "considered *to the exclusion of reasonable medical judgment*." *Roe v. Elyea*, 631 F.3d 843, 863 (7th Cir. 2011). Nothing here suggests that the decision to remove Johnson from 1:1 was made to the exclusion of reasonable medical judgment.

Second, Johnson argues that the decision was a substantial departure from accepted professional judgment, practice, or standards. But the record does not support such a conclusion. At most, a reasonable jury could agree with Johnson's proffered expert witness, Dr. Mitchell Dunn, that the decision was negligent under the circumstances. *See* Dunn Report, ECF No. 60-1, at 5–7. Professional negligence is, by definition, a departure from accepted professional practice or standards. *See, e.g.*, *Medical Malpractice*, *in* Black's Law Dictionary (10th ed. 2014). But mere negligence is not a substantial enough departure to render a professional's decision unconstitutional. Rather, liability under the Fourteenth Amendment requires deliberate indifference, "essentially a criminal recklessness standard, that is, ignoring a known risk." *See Collignon*, 163 F.3d at 988. Nothing here suggests deliberate indifference.

For the foregoing reasons, no reasonable jury could find defendants liable under § 1983 for removing Johnson from 1:1. Therefore, I will grant their motion for summary judgment on Johnson's claim that the decision violated the Fourteenth Amendment.

2. Access to Scissors

Johnson next argues that a reasonable jury could find that a nurse left scissors in his bathroom in violation of the Fourteenth Amendment. Johnson's argument reduces to the following: the scissors he used must have come from somewhere, nurses on the ITU have access to scissors, some nurses used scissors when changing dressings, and some nurses changed Johnson's dressing in his bathroom, so a nurse probably left the scissors in his bathroom after using them to change his dressing. He argues that George, Azcueta, and a nurse practitioner named Barbara Plum (who is not a defendant) are the most likely culprits.

Johnson's argument fails for several reasons. First, "[i]nferences that rely upon speculation or conjecture are insufficient." *Armato v. Grounds*, 766 F.3d 713, 719 (7th Cir. 2014). Second, to prevail on a claim under § 1983, a plaintiff must show that each defendant was personally responsible for the claimed constitutional deprivation. *See Estate of Perry v. Wenzel*, 872 F.3d 439, 459 (7th Cir. 2017). That one of three individuals (only two of whom are defendants) may have left scissors in Johnson's bathroom is not enough to establish individual liability. Third, even if one of these defendants did leave scissors in Johnson's bathroom, he hasn't shown that her conduct was anything more than negligent. As stated above, the Fourteenth Amendment "is violated by acts or omissions that exhibit deliberate indifference; mere negligence is insufficient." *Aguilar v. Gaston-Camara*, 861 F.3d 626, 633 (7th Cir. 2017).

For the foregoing reasons, no reasonable jury could find defendants liable under § 1983 for leaving scissors in Johnson's bathroom. Therefore, I will grant their motion for summary judgment on Johnson's claim that defendants allowed him access to scissors in violation of the Fourteenth Amendment.

3. Patient and Environmental Safety Checks

Johnson also argues that a reasonable jury could find that defendants failed, in violation of the Fourteenth Amendment, to either perform adequate safety checks or to properly search his room for contraband. At the time, BHD policy provided for three basic types of "rounds," during which staff were to perform such checks. First, at the beginning of each shift, a licensed nurse was required to "participate in . . . change of shift rounds," which included personally verifying "the whereabouts and well-being of each patient" and checking that each patient room and bathroom, among other areas, was "safe and orderly." *See* ECF No. 70-1, at 1. Second, every 15 minutes throughout each shift (but every 30 minutes during night shifts), staff were required to conduct rounds, verifying the location and well-being of each patient and documenting each patient's whereabouts. *Id.* at 1–2. Third, twice per shift at specified times, staff were required to conduct "environmental safety rounds," which included "checking unit bathrooms, bedrooms and showers for safety." ECF No. 70-2, at 5.

The record suggests that staff conducted their rounds, as relevant to Johnson's claims, before he harmed himself.

Azcueta testified during her deposition that she personally verified Johnson's whereabouts and well-being at least 3 times during the first hour of her shift on March 18, 2012—including at 3:45 p.m., no more than 15 minutes before he harmed himself—and that she checked his bathroom but did not find anything unusual there. *See* Azcueta Dep., ECF No. 79-7, at 23:18–:23, 29:2–:4. The record also contains Adamah's documentation of Johnson's whereabouts at 15-minute intervals throughout that shift. *See* ECF No. 70-13.

Johnson argues that Azcueta did not conduct her rounds on March 18, 2012, citing Rimmer's deposition testimony that "the nurse didn't do her rounds." Rimmer Dep., ECF No. 79-5, at 36:3. But this vague testimony does not clearly refer to Azcueta or specify what "rounds" she supposedly did not do. Moreover, Johnson concedes that Azcueta personally checked on him at 3:45 p.m. on March 18, 2012, shortly before he harmed himself. *See* Pl.'s Proposed Findings of Fact, ECF No. 77, ¶ 54.

Johnson also broadly disputes that staff conducted rounds as required, citing the report of the root cause analysis of the incident, which found that, despite facility policies about rounds and checks, "[i]nterviews with staff . . . suggested that while" they may document that they completed checks, "the checks are not always done." *See* ECF No. 78-2, at 9. Without more, there is no way to know whether or to what extent this finding is relevant to Johnson's claims. And, as discussed above, personal liability under § 1983 requires proof of individual misconduct, not the mere possibility of misconduct.

Even assuming Azcueta, Adamah, or others failed to conduct checks that could have prevented Johnson's injuries, he hasn't shown anything more than negligence. Again, liability under the Fourteenth Amendment requires more than mere negligence. *Aguilar*, 861 F.3d at 633.

No reasonable jury could find defendants liable under § 1983 for failing, in violation of the Fourteenth Amendment, to either perform adequate safety checks or to properly search Johnson's room for contraband. Therefore, I will grant their motion for summary judgment on his claim that they failed to properly verify his safety and the safety of his environment.

B. Official Investigation and Root Cause Analysis

Johnson argues that defendants conspired to cover up the truth about what happened to him and why by conducting a "sham" investigation. Federal law "imposes liability on two or more persons who 'conspire . . . for the purpose of depriving . . . any person'" of his or her federal rights. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1866 (2017) (omissions in original) (quoting 42 U.S.C. § 1985(3)).

Yet, as "there is no independent cause of action for § 1983 conspiracy," "[w]ithout a viable federal constitutional claim, [a] conspiracy claim under § 1983 necessarily fails." *Katz-Crank v. Haskett*, 843 F.3d 641, 650 (7th Cir. 2016). The claims discussed above, even if they could survive summary judgment, cannot provide a basis for Johnson's conspiracy claim because the asserted

deprivations all occurred before defendants supposedly formed their conspiracy. Accordingly, Johnson must show that he has some other viable constitutional claim on which his conspiracy claim can rest.

Johnson argues that defendants' conspiracy deprived him of his constitutional right to seek judicial relief for his injury. The Fourteenth Amendment protects "[t]he right of individuals to pursue legal redress for claims which have a reasonable basis in law and fact." *Vasquez v. Hernandez*, 60 F.3d 325, 328 (7th Cir. 1995). Thus, a plaintiff has a viable claim where he can show that "state action hindered his . . . efforts to pursue a nonfrivolous legal claim and that consequently [he] suffered some actual concrete injury." *May v. Sheahan*, 226 F.3d 876, 883 (7th Cir. 2000).

However, Johnson's claim amounts to little more than that perceived deficiencies and omissions in the root cause analysis, records, and report—e.g., failure to sufficiently investigate and accurately explain why he was removed from 1:1—show that defendants' investigation was plainly, even deliberately, deficient. Whether that's true, it's not enough: Johnson "does not have a constitutional right to have [state actors] investigate his case at all, still less to do so to his level of satisfaction." *Rossi v. City of Chicago*, 790 F.3d 729, 735 (7th Cir. 2015).

That Johnson's case might have "been better" if defendants had conducted a more thorough investigation is insufficient to support a claim for denial of the right to pursue judicial relief. *Id.* Instead, Johnson must show that

defendants "prevented a full and open disclosure of facts crucial to the cause of action, rendering hollow [his] right of access" to the courts. *Vasquez*, 60 F.3d at 329. Here, Johnson has not shown that any facts, much less facts crucial to his claims, were kept from him or otherwise concealed. Thus, his claim for denial of access to the courts necessarily fails.

Even if Johnson had a viable underlying constitutional claim, though, his conspiracy claim would still fail because he has not shown "that the defendants conspired—that is, reached an agreement—with one another." *Ziglar*, 137 S. Ct. at 1868. The only evidence of conspiracy that Johnson offers is Rimmer's deposition testimony that she heard "rumors . . . about a cover-up" by "the supervisors and the nurses." *See* Rimmer Dep., ECF No. 79-5, 30:7–31:5. Rimmer does not identify the source of these rumors, provide any specifics about the supposed cover-up, or so much as hint at the membership of this apparent cabal of supervisors and nurses. Without more, Johnson's conspiracy claim necessarily fails.

No reasonable jury could find that defendants conspired to hide the truth about what happened to Johnson and why or that they prevented him from seeking relief for claims with a reasonable basis in law and fact. Therefore, I will grant their motion for summary judgment on Johnson's claim that they conspired to and did deprive him of his constitutional right of meaningful access to the courts.

C. Municipal Liability

Finally, Johnson argues that Milwaukee County, DHHS, and MHC are liable under § 1983 and *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), for his injuries. *See Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010) (discussing proper grounds for municipal liability under *Monell*). "But a municipality cannot be liable under *Monell* when there is no underlying constitutional violation by a municipal employee." *Sallenger v. City of Springfield*, 630 F.3d 499, 504 (7th Cir. 2010).

As discussed above, not only has Johnson failed to show that a reasonable jury could find any of the individual defendants personally liable under § 1983, he has also failed to show that any municipal employee committed any constitutional violation for which he could be entitled to relief under § 1983. Accordingly, I must grant defendants' motion for summary judgment on Johnson's § 1983 claims, including his *Monell* claims.

D. State-Law Claims

Defendants ask that, after granting them summary judgment on Johnson's federal claims, I decline to exercise supplemental jurisdiction over his state-law claims. *See* 28 U.S.C. § 1367(c)(3). "When federal claims drop out of [a] case, leaving only state-law claims, the district court has broad discretion to decide whether to keep the case or relinquish supplemental jurisdiction over the state-law claims." *RWJ Mgmt. Co. v. BP Prod. N. Am., Inc.*, 672 F.3d 476, 478 (7th Cir. 2012).

"Although the decision is discretionary, '[w]hen all federal claims in a suit in federal court are dismissed before trial, the presumption is that the court will relinquish federal jurisdiction over any supplemental state-law claims.'" *Id.* at 479 (quoting *Al's Serv. Ctr. v. BP Prod. N. Am., Inc.*, 599 F.3d 720, 727 (7th Cir. 2010)). "The presumption is rebuttable, 'but it should not be lightly abandoned, as it is based on a legitimate and substantial concern with minimizing federal intrusion into areas of purely state law.'" *Id.* (quoting *Khan v. State Oil Co.*, 93 F.3d 1358, 1366 (7th Cir. 1996)). Johnson has not rebutted the presumption in favor of declining to exercise federal jurisdiction over his remaining claims.

Further, although "certain circumstances . . . may displace the presumption," *id.* at 480 (listing "case-specific factors," including whether "the statute of limitations has run" or "substantial judicial resources have already been committed" (quoting *Sharp Elecs. Corp. v. Metro. Life Ins. Co.*, 578 F.3d 505, 514–15 (7th Cir. 2009))), defendants argue and Johnson does not dispute that no such circumstances exist here. Accordingly, I will grant defendants' request and decline to exercise supplemental jurisdiction over Johnson's state-law claims.

III. CONCLUSION

For the foregoing reasons, **IT IS ORDERED** that defendants' motion for summary judgment on Johnson's federal claims and request that the court relinquish supplemental jurisdiction over his state-law claims (ECF No. 66) are **GRANTED**. The Clerk of Court shall enter final judgment accordingly.

Dated at Milwaukee, Wisconsin, this 17th day of January, 2018.

/s Lynn Adelman
LYNN ADELMAN
District Judge