FOR PUBLICATION

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

KENNETH RAWSON, an individual, *Plaintiff-Appellant,* v. RECOVERY INNOVATIONS, INC., a corporation; SAMI FRENCH, an individual; JENNIFER CLINGENPEEL, an individual; VASANT HALARNAKAR, M.D., an individual, *Defendants-Appellees.*	No. 19-35520 D.C. No. 3:17-cv-05342-BHS OPINION

Appeal from the United States District Court
for the Western District of Washington
Benjamin H. Settle, District Judge, Presiding

Argued and Submitted July 8, 2020
Seattle, Washington

Filed September 9, 2020

Before: RICHARD R. CLIFTON, D. MICHAEL FISHER,* AND MILAN D. SMITH, JR., Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

COUNSEL

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Benjamin R. Justus (argued) and Lory R. Lybeck, Lybeck Pedreira & Justus PLLC, Mercer Island, Washington, for Defendants-Appellees.

OPINION

M. SMITH, Circuit Judge:

Kenneth Rawson appeals the district court's dismissal of his 42 U.S.C. § 1983 claims against Recovery Innovations, Inc. (RII) and its current and former employees Dr. Vasant Halarnakar, Advanced Registered Nurse Practitioner Jennifer Clingenpeel, and Mental Health Professional Sami French (collectively, Defendants). Rawson alleges that Defendants violated his Fourth and Fourteenth Amendment rights by wrongfully detaining him, forcibly injecting him with antipsychotic medications, and misleading a court into extending his period of involuntary commitment for a total of 55 days. On summary judgment, the district court dismissed Rawson's claims because it concluded that Defendants did not act under color of state law. We conclude to the contrary, and therefore reverse.

Facts and Prior Proceedings

On March 4, 2015, Rawson allegedly made comments about automatic weapons and mass murder to a bank teller in Clark County, Washington. When Rawson re-entered the same bank the next day, the bank employees called the sheriffs. Upon their arrival, the sheriffs immediately detained Rawson, who did not physically resist but yelled that he had a gun and that his rights were being violated. Rawson had a valid concealed carry permit and was a veteran; the sheriffs confiscated and unloaded Rawson's handgun without incident. After Rawson allegedly made statements to the sheriffs about "how people are against him," the sheriffs took Rawson into protective custody, placed him on a mental hold, and transported him by ambulance to a general hospital. The sheriffs' actions triggered a series of events generally governed by Washington's Involuntary Treatment Act (ITA), Wash. Rev. Code (RCW) Ch. 71.05. *See* RCW § 71.05.153(2)–(3).[1]

At the hospital, a Clark County Designated Mental Health Professional (DMHP) evaluated Rawson and filed a petition in state court for a 72-hour involuntary commitment. *See* RCW §§ 71.05.153(4), .020(11). The DMHP arranged for Rawson to be taken to RII's Lakewood facility in neighboring Pierce County.[2] RII is

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[1] Unless otherwise noted, citations herein to RCW Ch. 71.05 are to the 2014 edition in effect at the time of Rawson's commitment.

[2] The following year, the Washington Court of Appeals concluded that Rawson's detention had been improper because the DMHP did not consult with an examining physician before

a private nonprofit corporation. It leases its Lakewood evaluation and treatment facility from the State of Washington on the grounds of one of the State's main psychiatric hospitals, Western State Hospital. RII's Medical Director at Lakewood, Dr. Halarnakar, is a full-time physician at Western State Hospital.

Once at RII, Rawson was evaluated by Clingenpeel and French, who prescribed medication and completed a petition for an additional 14 days of intensive treatment, certifying that Rawson was both "gravely disabled" and "presents a likelihood of serious harm to others." *See* RCW §§ 71.05.170, .210, .230. They based these conclusions on their evaluations of Rawson and information in the police report. The petition also stated that Rawson "den[ied] [having] any problem other than the bank and police misunderstanding." The court held a probable cause hearing and granted the 14-day petition on March 10.

During the 14-day commitment, Dr. Halarnakar met with Rawson. Dr. Halarnakar's notes indicate that Rawson was calm, cooperative, and polite, but had pressured speech. Though Rawson reported no symptoms of schizophrenia, Dr. Halarnakar wrote that Rawson needed to keep taking his medication. In his second evaluation of Rawson, Dr. Halarnakar documented only that Rawson was argumentative and denied having a mental illness, denied needing antipsychotic medications, and denied having suicidal or homicidal

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initiating commitment. *In re Det. of K.R.*, 381 P.3d 158, 159 (Wash. Ct. App. 2016).

ideations. Dr. Halarnakar nevertheless concluded that Rawson was paranoid, had no insight, and needed further treatment.

Dr. Halarnakar and French then petitioned for an additional 90-day commitment, alleging that Rawson had "threatened, attempted, or inflicted physical harm" upon a person or property "during the period in custody." *See* RCW §§ 71.05.230(8), .290. They recommended that the court involuntarily commit Rawson to Western State Hospital. In response to a later request for the specific statements that were threatening, French conceded Rawson had made no "threatening statements."

Rawson exercised his right to request a jury trial, which was continued multiple times while he remained involuntarily committed at RII. *See* RCW § 71.05.300. In preparation for the trial, Dr. Halarnakar and French communicated extensively with the Pierce County Deputy Prosecuting Attorney regarding discharge possibilities, current treatment methods, the strength of the evidence against Rawson, and the theory to argue to the jury. *See* RCW § 71.05.130. Meanwhile, a court-appointed expert psychiatrist evaluated Rawson and concluded that he was not dangerous, his frustrations were not unreasonable, and he had no symptoms related to psychosis or a mood disorder.

On April 29, almost two months after Rawson's arrival, RH finally released Rawson pursuant to an attorney-negotiated agreement. Rawson later brought

this § 1983 action against RH and many of the individuals involved in his commitment.

On summary judgment, the district court dismissed Rawson's claims against Defendants based on the conclusion that they were not acting under color of state law. The court found that the "public function" test was not satisfied because Rawson did not establish "that involuntary commitments are both traditionally and exclusively governmental." The court found that the "joint action" / "close nexus" test was not satisfied because Rawson did not establish "government involvement sufficient to override the purely medical judgment of the private individual."

Rawson timely appealed.

Jurisdiction and Standard of Review

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review a grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party. *Anderson v. Warner*, 451 F.3d 1063, 1067 (9th Cir. 2006) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). "[W]e must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.*

Analysis

I.

Pursuant to § 1983, a defendant may be liable for violating a plaintiff's constitutional rights only if the defendant committed the alleged deprivation while acting under color of state law. *See Jensen v. Lane Cty.*, 222 F.3d 570, 574 (9th Cir. 2000). Similarly, a violation of the plaintiff's constitutional rights cognizable under the Fourteenth Amendment can occur only by way of state action. *Id.* Thus, the color of law and state action inquiries are the same. *Id.*

Before we can answer the question of whether Defendants acted under color of law, we must identify the "specific conduct of which the plaintiff complains." *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 812 (9th Cir. 2010) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 51 (1999)). Here, Rawson seeks to hold Defendants liable for certain actions relating to the 14-day and 90-day petitions, as well as his detention and forcible medication pursuant to the authority provided by those petitions. The specific alleged conduct Rawson challenges includes involuntarily committing him without legal justification, knowingly providing false information to the court, and forcibly injecting him with antipsychotic medications without his consent.[3] The relevant inquiry is

[3] Rawson does not seek to hold Defendants liable for their actions relating to his initial 72-hour commitment for evaluation. Thus, neither Defendants' acceptance of Rawson from the County DMHP, their detention of Rawson for the initial 72 hours, nor their treatment of Rawson during that time, are at issue.

therefore whether Defendants' role as custodians, as litigants, or as medical professionals constituted state action. *See id.*

II.

The determination of whether a nominally private person or corporation acts under color of state law "is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001). "[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." *Id.*

We have recognized at least four different general tests that may aid us in identifying state action: "(1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus." *Kirtley v. Rainey*, 326 F.3d 1088, 1092 (9th Cir. 2003) (citation omitted). "Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists." *Id.* "Whether these different tests are actually different in operation or simply different ways of characterizing the necessarily fact-bound inquiry that confronts the Court in such a situation need not be resolved here." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 939 (1982).

"The public function test is satisfied only on a showing that the function at issue is 'both traditionally

and exclusively governmental." *Kirtley*, 326 F.3d at 1093 (quoting *Lee v. Katz*, 276 F.3d 550, 555 (9th Cir. 2002)). The close nexus and joint action tests may be satisfied where the court finds "a sufficiently close nexus between the state and the private actor 'so that the action of the latter may be fairly treated as that of the State itself,' or where the State has "so far insinuated into a position of interdependence with the [private party] that it was a joint participant in the enterprise." *Jensen*, 222 F.3d at 575-58 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350, 357-58 (1974)). Governmental compulsion or coercion may exist where the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

At bottom, the inquiry is always whether the defendant has "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' *West v. Atkins*, 487 U.S. 42, 49 (1988) (quoting *United States v. Classic*, 313 U.S. 299, 326 (1941)).

III.

Before we proceed with our full analysis, it is appropriate to explain why we do not apply the color of law test as articulated by the district court. The district court analyzed the issue before us under a species of the close nexus/joint action test purportedly

applicable specifically to medical professionals. Derived from language in *Jensen*, 222 F.3d at 575, the district court's test asked whether state actors overrode the independent professional medical judgment of the Defendants. The district court analyzed the communications between Defendants and the County prosecutor and concluded that none of the prosecutor's statements were the cause of any decisions made by Defendants relating to treatment or detention. Accordingly, the district court concluded that the prosecutor did not override the Defendants' medical judgment, and that Defendants therefore did not act under color of state law.

A.

The origins of the district court's analysis lie in the Supreme Court's decision in *Blum v. Yaretsky*, 457 U.S. 991 (1982). In *Blum*, the Supreme Court held that state Medicaid administrators were not liable under § 1983 for decisions made by privately owned and operated nursing homes to discharge Medicaid patients without notice or hearing. *Id.* at 993,1003. The Court noted that the case before it was "obviously different" from cases where (as in our case) the defendant is the nominally private party, but found that such cases nevertheless "shed light upon the analysis necessary to resolve the present case." *Id.* at 1003-04. The Court interpreted such cases as "assur[ing] that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Id.* at 1004.

The Court concluded that the state Medicaid administrators were not "responsible" for the nursing homes' discharge decisions. *Id.* at 1005.[4] While the state administrators responded to the discharges by adjusting Medicaid benefits, the discharge decisions themselves were made by the physicians and nursing home administrators alone. *Id.* There was "no suggestion that those decisions were influenced in any degree by the State's obligation to adjust benefits." *Id.* The Court rejected the argument that the State's requirement that nursing homes fill out placement forms should change its analysis. *Id.* at 1008. The relevant regulations did "not require the nursing homes to rely on the forms" in making discharge decisions. *Id.* Rather, the discharge decisions "ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State." *Id.* The Court noted that if it had been the case that the state "affirmatively commands" the summary discharge or transfer of Medicaid patients who are thought to be inappropriately placed in the nursing facilities, "we would have a different question before us." *Id.* at 1005.

A few years later, the Court clarified the reach of *Blum's* professional judgment analysis in *West v. Atkins*, 487 U.S. 42 (1988). *West* involved a private contract physician rendering treatment services for

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[4] The Court held that state subsidization of a private facility is insufficient to convert that facility's actions into state action, even though in this case Medicaid was paying the expenses of more than 90% of the patients. *Id.* at 1011.

inmates at a state prison, whom the Court ultimately concluded was acting under color of state law. *Id.* at 43, 57. Reviewing a Fourth Circuit decision that had concluded that the physician did not act under color of state law because he applied his independent professional medical judgment, the Court clarified that 'the exercise of . . . independent professional judgment,' is not, as the Court of Appeals suggested, 'the primary test.'" *Id.* at 52 n.10 (alteration, internal quotation marks, and citation omitted); *see also id.* at 52 ("Defendants are not removed from the purview of § 1983 simply because they are professionals acting in accordance with professional discretion and judgment."). Instead, the Court looked to factors such as the State's constitutional duty to provide adequate medical care to those it has incarcerated, *id.* at 54, the physician's reliance on state authority to treat the plaintiff, *id.* at 55, the necessity of the physician cooperating with prison management, *id.* at 51, and the inability of the incarcerated plaintiff to access other medical care of his own choosing, *id.* at 55. The Court concluded that neither *Blum*, nor the then-recent decision in *Rendell-Baker v. Kohn*,[5] dictated that a physician who otherwise should be found to be acting under color of state law "does not act under color of state law merely because he renders medical care in accordance with professional obligations." *Id.* at 52 n.10.

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[5] 457 U.S. 830 (1982). In *Rendell-Baker*, the Court concluded that the discharge decisions of a privately owned and operated school for maladjusted high school students were not state action. *Id.* at 842.

We previously considered the application of *Blum* in the context of involuntary civil commitment in *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000). *Jensen* concerned a private contract psychiatrist in Oregon who participated in the initial emergency detention of the plaintiff for mental health evaluation, and whom we ultimately concluded was acting under color of state law under the close nexus/joint action test. *Id.* at 575-76. The plaintiff's detention had been initiated by police and was first reviewed by a county mental health specialist, who forwarded the case to the defendant contract psychiatrist (Dr. Robbins) and a second county mental health specialist. *Id.* at 572-73. Without personally examining the plaintiff, Dr. Robbins signed an order authorizing up to five days of detention for evaluation. *Id.* at 573. The plaintiff would be held at the county psychiatric hospital, for which Dr. Robbins' private practice group helped develop the mental health policies. *Id.* at 573, 575. Based on his subsequent personal examinations, Dr. Robbins would have released the plaintiff by day three. *Id.* at 573. However, the plaintiff was held the maximum five days until the second county mental health specialist completed his investigation and concluded that there was insufficient evidence upon which to pursue further detention. *Id.*

We found *Blum* to be "instructive in this case, but not controlling." *Id.* at 575. We acknowledged that in Dr. Robbins' circumstances, "by contract and in practice," the committing physician must exercise "medical judgment." *Id.* However, we concluded that "[t]he real

issue here is whether the state's involvement in the decision-making process rises to a level that overrides the 'purely medical judgment' rationale of *Blum*." *Id.* We concluded that "[t]he record is clear that Dr. Robbins and the County through its employees have undertaken a complex and deeply intertwined process of evaluating and detaining individuals who are believed to be mentally ill and a danger to themselves or others." *Id.* We thus concluded that "the state has so deeply insinuated itself into this process" that "Dr. Robbins' conduct constituted state action" under the close nexus/joint action test. *Id.* at 575-76. The fact that Dr. Robbins may have applied his independent medical judgment to any particular decision did not insulate him from a finding of state action.

B.

The district court here applied a specific interpretation of our *Jensen* opinion articulated by another district court in *Hood v. King Cty.*, No. C15-828RSL, 2017 WL 979024 (W.D. Wash. Mar. 14, 2017), *aff'd sub nom. Hood v. Cty. of King*, 743 F. App'x 79 (9th Cir. 2018). As here, *Hood* involved nominally private institutions involved in the involuntary commitment process pursuant to Washington's ITA.[6] The district court in *Hood* interpreted *Jensen* as premised on the conclusion that "the state's involvement in the decision-making

[6] However, *Hood* concerned actions taken during an initial 72-hour commitment for emergency evaluation, which distinguishes it from the case before us. *See* 2017 WL 979024, at *3.

process *overrode the private provider's purely medical judgment*.'" *Id.* at *12 (emphasis added). The court concluded that "[t]he facts here reveal sustained and routine cooperation between King County and the hospitals, but they do not show that the county's involvement overrode the hospital staff's medical judgment such that the hospitals' actions can fairly be treated as those of the government." *Id.* at *13.[7]

The parties dispute whether *Hood*'s test is a fair interpretation of *Jensen* or *Blum*. We observe first that neither *Jensen* nor *Blum* suggested that the exercise of independent medical judgment is dispositive of the color of state law inquiry. Both cases undertook a close, fact-intensive analysis in which the exercise of professional judgment was only one factor. This approach was consistent with Supreme Court precedents telling us that the color of state law "criteria lack rigid simplicity," and "no one fact can function as a necessary condition across the board." *Brentwood Acad.*, 531 U.S. at 295-96. Moreover, *West* held that 'the exercise of . . . independent professional judgment,' is not . . . 'the

[7] We affirmed *Hood* in an unpublished memorandum disposition, but we did not expressly endorse the district court's "overrode the . . . medical judgment" test. 2017 WL 979024 at *12; *see* 743 F. App'x at 81. We agreed with the district court that the private hospital's employees had "evaluated Hood and developed a course of action based on their 'medical judgments' and 'according to professional standards,'" *id.* (quoting *Blum*, 457 U.S. at 1008), but we also relied more generally on *Jensen*'s language that the defendant and the county had engaged in a "complex and deeply intertwined process of evaluating and detaining individuals," *id.* (quoting *Jensen*, 222 F.3d at 575), which we found lacking in *Hood*.

primary test.' " 487 U.S. at 52 n.10 (alteration and citation omitted).

Additionally, we did not actually ask in *Jensen* whether state actors "overrode" the defendant's "purely medical judgment." Our exact language was: "The real issue here is whether the state's involvement in the decision-making process rises to a level that overrides the 'purely medical judgment' *rationale of Blum*." *Jensen*, 222 F.3d at 575 (emphasis added). Essentially, our question was whether the state's involvement in the conduct at issue provided sufficient reason to find state action, notwithstanding the "countervailing reason" of some purely medical judgment. *Brentwood Acad.*, 531 U.S. at 295-96.

A finding that individual state actors or other state requirements literally "overrode" a nominally private defendant's independent judgment might very well provide relevant information. But it is a mistake to focus too narrowly on this question.

IV.

With the foregoing clarification, we consider the full factual context of this case, paying particular attention to the facts that played a material role in previous decisions. We conclude that the facts in this case show that the Defendants acted under color of state law.[8]

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[8] Rawson argues that Defendants acted under color of law under the "public function" test, contending that the relevant

A.

The Supreme Court has recognized that private parties may act under color of state law when they exercise powers traditionally held by the state. As noted above, the Supreme Court in *West v. Atkins*, 487 U.S. 42 (1988) held that a private contract physician rendering treatment services for prisoners at a state prison acted under color of law. *Id.* at 57. Part of the Court's reasoning was that any deprivation effected by the private contract physician would be necessarily "caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to punish [the plaintiff] by incarceration and to deny him a venue independent of the State to obtain needed medical care." *Id.* at 55.

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provisions of the Washington Code of 1881 and 1915 demonstrate that involuntary commitment was an exclusively governmental function in Washington prior to the passage of the ITA in 1973. "While many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the *State.*'" *Flagg Bros.*, 436 U.S. at 158 (quoting *Jackson*, 419 U.S. at 352). We have not previously addressed whether nominally private medical professionals involved in longer term, court-ordered involuntary commitment perform a public function, either in general terms or specifically in the State of Washington. *See Jensen*, 222 F.3d at 574-75 (discussing courts' application of the public function test to the initial phase of committing someone for no more than a few days for emergency evaluation) (citing *Doe v. Rosenberg*, 996 F. Supp. 343, 349 (S.D.N.Y. 1998) (collecting cases)). However, given that the historical evidence was not directly evaluated by the district court, and that the remainder of our analysis is sufficient to support a judgment in Rawson's favor, we decline to resolve the historical exclusivity question.

As in *West*, any deprivation effected by Defendants here was in some sense caused by the State's exercise of its right, pursuant to both its police powers and *parens patriae* powers, to deprive Rawson of his liberty for an extended period of involuntary civil commitment. *See* RCW § 71.05.010 (2020) ("The provisions of this chapter . . . are intended by the legislature . . . [t]o protect the health and safety of persons suffering from behavioral health disorders and to protect public safety through use of the parens patriae and police powers of the state."); *Addington v. Texas*, 441 U.S. 418, 426 (1979) ("The state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable because of emotional disorders to care for themselves; the state also has authority under its police power to protect the community from the dangerous tendencies of some who are mentally ill.").[9]

In that sense, Defendants were "clothed with the authority of state law" when they detained and forcibly treated Rawson beyond the initial 72-hour emergency evaluation period. *West*, 487 U.S. at 49 (quoting *Classic*, 313 U.S. at 326). Thus, under *West*, if Defendants "misused [their] power by demonstrating deliberate indifference to" Rawson's rights to liberty, refusal of treatment, and/or due process, "the resultant

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[9] *See also Beltran-Serrano v. City of Tacoma*, 442 P.3d 608, 614 n.9 (Wash. 2019) (referring to the "detention of a person suffering from mental illness" as a "law enforcement related activit[y]"); Developments in the Law, *Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1207-12, 1222-23 (1974) (describing the origins of the *parens patriae* and police powers relating to the mentally ill).

deprivation was caused, in the sense relevant for state-action inquiry, by the State's exercise of its right to" civilly commit Rawson for purposes of protecting both the public and Rawson himself. *Id.* at 55.[10] These facts, in light of *West*, weigh in favor of finding that Defendants acted under color of state law.

B.

The Supreme Court has also held that private parties may act under color of state law when they perform actions under which the state owes constitutional

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[10] *West* did not articulate which of the four color of law "tests," if any, its reasoning pertained to. *Cf. Lugar*, 457 U.S. at 939 (observing that it remains unclear "[w]hether these different tests are actually different"). In a now-vacated opinion, we previously assumed that *West* was decided under the "public function" test. *Pollard v. The GEO Grp., Inc.*, 629 F.3d 843, 856 (9th Cir. 2010), *rev'd sub nom. Minneci v. Pollard*, 565 U.S. 118 (2012). However, that test as traditionally formulated requires close scrutiny of historical exclusivity, *see Flagg Bros. v. Brooks*, 436 U.S. 149, 158 (1978), and *West* did not analyze historical exclusivity at all. Indeed, the Court later observed that private contractors "were heavily involved in prison management during the 19th century." *Richardson v. McKnight*, 521 U.S. 399, 405 (1997). *But see Pollard*, 629 F.3d at 857 (reasoning that the power of incarceration was exclusively governmental even if prison management was not). For purposes of this opinion, we find it unnecessary to peg *West* to one of our four recognized tests. Whether understood as undertaking a "public function" analysis, or a more open-ended "close nexus" inquiry with the greater the role of state authority (and/or state duties, as discussed in the subsequent subsection), the greater the nexus with the State, subject to countervailing considerations, *see Brentwood Acad.*, 531 U.S. at 29596, *West* unquestionably supports a finding of state action here.

obligations to those affected. The Court reasoned in *West* that the State has an Eighth Amendment obligation "to provide adequate medical care to those whom it has incarcerated," and that the State employs private contract physicians, and relies on their professional judgment, to fulfill this obligation. *Id.* at 54–55.[11]

Similarly here, the State has a Fourteenth Amendment obligation toward those whom it has ordered involuntarily committed. *See Addington*, 441 U.S. at 425 ("This Court repeatedly has recognized that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection."). In the now-vacated *Pollard* opinion, where we held that employees of a privately-operated prison acted under color of state law, we rejected the notion that "by adding an additional layer, the government can contract away its constitutional duties" by having private actors rather than state actors perform some of the work. *See Pollard*, 629 F.3d at 856 (quoting *Holly v. Scott*, 434 F.3d 287, 299 n.1 (4th Cir. 2006)

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[11] Both *Blum* and *Jackson* also recognized the relevance of state duties regarding the care or service at issue. In *Blum*, the Court noted that although the relevant state constitutional provisions "authorize[d] the legislature to provide funds for the care of the needy," the state constitution did not "mandate the provision of any particular care, much less long-term nursing care." 457 U.S. at 1011. In *Jackson*, the Court noted that while the state had imposed a duty on regulated utilities to furnish service, the state itself had no duty to furnish service. 419 U.S. at 353. In both cases, the Court made these observations in the context of rejecting a "public function" theory of state action. In accordance with the preceding footnote, we find the Court's concern with state duties relevant to the "close nexus" inquiry as well.

(Motz, J., concurring in the judgment)). Accordingly, the State's particular Fourteenth Amendment duties toward persons involuntarily committed weighs toward a finding of state action in this case.

C.

We have recognized that private parties may act under color of state law when the state significantly involves itself in the private parties' actions and decisionmaking at issue. In *Jensen*, the defendant private physician was part of a team of mental health professionals that included individuals acting in their capacity as county employees. 222 F.3d at 575. That team was jointly responsible for making the medical determinations relevant to the duration of the plaintiff's emergency detention. *Id.* We concluded that the defendant and the county employees were together involved in a "complex and deeply intertwined process" that satisfied *Jackson*'s standard for whether the State has "so far insinuated into a position of interdependence with the [private party] that it was a joint participant in the enterprise." *Id.* (quoting *Jackson*, 419 U.S. at 357-58); *see also id.* ("We are convinced that the state has so deeply insinuated itself into this process that there is 'a sufficiently close nexus between the State and the challenged action of the [defendant] so that the action of the latter may be fairly treated as that of the State itself.'" (quoting *Jackson*, 419 U.S. at 350)).

With respect to the conduct challenged here, Defendants did not work in coordination with mental health professionals acting in their capacity as county or state employees.[12] However, mental health professionals were not the only relevant actors. Here, the county prosecutor played an outsized role in the duration of Rawson's detention, particularly during the pendency of Rawson's jury trial on the 90-day petition.

In preparation for the jury trial, Dr. Halarnakar and French communicated extensively with the prosecutor regarding discharge possibilities, current treatment methods, the strength of the evidence against Rawson, and the theory to argue to the jury. The evidence even suggests that the prosecutor altered Dr. Halarnakar's medical diagnosis—from "likelihood of serious harm" to "gravely disabled"—after exposing Defendants' lack of evidence for the former and proposing the latter. Regardless of whether the prosecutor "overrode" any particular decision Dr. Halarnakar otherwise would have made, the evidence at minimum shows that the prosecutor was heavily involved in the decisionmaking process regarding Rawson's detention, diagnosis, and treatment.

Defendants attempt to explain away their coordination with the prosecutor by arguing that the ITA

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[12] However, we note that RII's medical director at Lakewood, Dr. Halarnakar, was a full-time state employee at Western State Hospital. The record before us does not reveal whether or the extent to which Western State Hospital, through Dr. Halarnakar, may therefore have been involved in the administration of RII's Lakewood facility.

gives them no choice. This argument is unavailing. The ITA' s mandate that civil commitment petitions be argued only by the county prosecutor (or state attorney general), *see* RCW § 71.05.130, only strengthens the conclusion that the State is a joint participant in this enterprise. The ITA itself insinuates the State into the process of involuntary civil commitment at issue here, regardless of whether the treatment facility is nominally public or private. To conclude that Defendants act under color of state law within this process does not cast blame on them. It simply charges Defendants with meeting the constitutional standards applicable to those whose actions are "made possible only because [they are] clothed with the authority of state law." *West*, 487 U.S. at 49 (quoting *Classic*, 313 U.S. at 326).

Defendants also argue that the prosecutor's role here is analogous to the public defender in *Polk County v. Dodson*, 454 U.S. 312 (1981), and therefore that the prosecutor is not a state actor when prosecuting commitment petitions. We disagree. The prosecutor here is not advocating for the private interests of the hospital or mental health professionals. Neither the prosecutor's nor Defendants' "professional and ethical obligation[s] . . . set [them] in conflict with the State." *West*, 487 U.S. at 51. Instead, Defendants cooperate with the executive arm of the State to further the *State*'s interest in protecting both the public and the patient. *See id.*

Accordingly, the role played by the county prosecutor here, in practice and by statute, supports a finding of state action by the Defendants.

D.

The Supreme Court has also recognized that private parties may act under color of state law when the state authorized or approved the private parties' actions. In *Jackson v. Metropolitan Edison Company*, 419 U.S. 345 (1974), the Court held that a privately owned and operated utility, despite extensive state regulation and a state-protected monopoly, did not commit state action when it terminated electrical service to the plaintiff without notice or hearing. *Id.* at 346, 358-59. The Court explained that extensive state regulation is not enough to create state action, but rather that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." *Id.* at 351, 358.

The Court devoted particular attention to rejecting the argument that the State had "specifically authorized and approved" the challenged termination practice. *Id.* at 354. The Court observed that while the utility was required to file its general tariff with the public utility commission, which included a provision reserving the right to terminate service for nonpayment, it was unclear whether the commission actually had the power to disapprove that provision. *Id.* at 355. In addition, the tariff became effective when the commission took no action to disapprove it, rather than after a hearing and commission approval. *Id.* at 355, 357. The Court distinguished *Public Utilities Commission v. Pollak*, 343 U.S. 451 (1952), where the public utilities

commission had commenced its own investigation of a practice and given its imprimatur to the practice after a full hearing. *Jackson*, 419 U.S. at 356-57. In the case at hand, "there was no such imprimatur placed on the practice" by the State. *Id.* at 357.

Here, much of the challenged activity received clear state imprimatur. Medical providers in Washington can neither detain nor forcibly treat a mental health patient past an initial 72-hour emergency evaluation period without a court order. *See* RCW §§ 71.05.153, .210. In contrast to the public utilities commission in *Jackson*, the reviewing state court here unquestionably has the power to disapprove a petition for involuntary commitment and treatment. *See id.* § 71.05.237. In fact, the state court approved the 14-day petition in this case.

Accordingly, the role of state authorization and approval weighs in favor of a finding of state action in this case.

E.

The Supreme Court has also reasoned that state action may lie in private conduct that is "affirmatively commanded" by state protocols. In *Blum*, for example, the Supreme Court highlighted that if it had been the case that the State "affirmatively commands" nursing homes to summarily discharge or transfer Medicaid patients thought to be inappropriately placed there, "we would have a different question before us." 457 U.S.

at 1005. Here, in multiple respects, we have that different question.

Defendants are charged with applying state protocols and criteria in making evaluation and commitment recommendations, and are "affirmatively command[ed]" by the state to render treatment without informed consent in many circumstances. *Id*.; *see* RCW §§ 71.05.210, .214.[13] These state requirements and protocols that command private action weigh in favor of finding that Defendants acted under color of state law in this case.

F.

The Supreme Court has also found state action may exist when private parties operate on public property or in public facilities. In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), the Supreme Court found that a privately owned and operated restaurant that leased its premises from a municipal parking authority committed state action when it refused service to the plaintiff because he was a "Negro."

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[13] RCW § 71.05.210 provides that a detained individual "shall receive such treatment and care as his or her condition requires," regardless of whether that individual consents to treatment, except in some circumstances regarding antipsychotic medications within 24 hours of a trial or hearing. RCW § 71.05.214 provides that "[t]he department shall develop statewide protocols to be utilized by professional persons and [DMHPs] in administration of this chapter . . . The protocols shall provide uniform development and application of criteria in evaluation and commitment recommendations, of persons who have, or are alleged to have, mental disorders and are subject to this chapter."

Id. at 716-17. The Court noted that the parking authority provided the premises, the utilities, and the repair work to the restaurant, as well as tax-exempt status. *Id.* at 720. The Court also noted that the building was clearly marked as a public building. *Id.* In addition, the Court noted that the financial success of the restaurant, which was purportedly enhanced by segregation, was essential to the financing of the public parking structure. *Id.* at 723-24.

The Court concluded that, by its "inaction" of failing to require nondiscriminatory service as a term of the lease, the parking authority had "not only made itself a party to the refusal of service, but ha[d] elected to place its power, property and prestige behind the admitted discrimination." *Id.* at 725. The parking authority, "and through it the State," had "so far insinuated itself into a position of interdependence" with the restaurant that the restaurant's discrimination constituted state action under a "joint participant" theory. *Id.* Highlighting the factually bound nature of its decision, the Court limited its holding to cases where "a State leases public property in the manner and for the purpose shown to have been the case here." *Id.* at 726.

This case resembles *Burton* in that RII was leasing its Lakewood premises from the State on the grounds of Western State Hospital, which was not only clearly marked as a state hospital but was also historic and recognizable. *See Burton*, 365 U.S. at 726; *see also Jackson*, 419 U.S. at 358 (finding that a particularly salient aspect of *Burton* was that the nominally

private defendant paid money to the State not just as a common taxpayer, but as a "lessee[] of public property"). Unlike in *Burton*, the record here does not indicate whether Western State Hospital is in any sense financially dependent upon the business of RII's Lakewood facility. *See Burton*, 365 U.S. at 723-24. Presumably, however, the State receives some rent from its lessee. While it is unclear how closely the facts of a particular case must match *Burton* to find state action on that basis alone,[14] *Burton* remains instructive and there are enough similarities here to consider the leasing of state property as a factor weighing in favor of finding state action.

Conclusion

Although Defendants were nominally private actors, exercised professional medical judgment, and were not statutorily required to petition for additional

[14] Some courts have described the Supreme Court's later *American Manufacturers Mutual Insurance v. Sullivan* decision as casting doubt on *Burton*, noting that the Court referred to *Burton as* an "early" case that promulgated a "vague" standard. 526 U.S. 40, 57 (1999); *see, e.g.*, *Crissman v. Dover Downs Ent. Inc.*, 289 F.3d 231 (3d Cir. 2002) (en banc) (limiting the reach of *Burton* to cases that replicate *Burton*'s facts, rejecting broad "symbiotic relationship" test). However, *Burton* remains good law, and is relevant here because RII is in fact a "lessee[] of public property." *Jackson*, 419 U.S. at 358.

commitment,[15] on balance, the facts weigh toward a conclusion that they were nevertheless state actors.

As in *Jensen*, the State here has "undertaken a complex and deeply intertwined process [with private actors] of evaluating and detaining individuals" for long-term commitments, and therefore, "the state has so deeply insinuated itself into this process" that "[the private actors'] conduct constituted state action." *See Jensen*, 222 F.3d at 575. Just as *West* found state action with private contract physicians rendering treatment services for prisoners at a state prison, we hold the same under the arrangement the State has devised for involving private actors in long-term involuntary commitments. Defendants were not merely subject to extensive regulation or subsidized by state funds. *See Blum*, 457 U.S. at 1011; *Jackson*, 419 U.S. at 358.

Given the necessity of state imprimatur to continue detention, the affirmative statutory command to render involuntary treatment, the reliance on the State's police and *parens patriae* powers, the applicable constitutional duties, the extensive involvement of the county prosecutor, and the leasing of their premises from the state hospital, we conclude that "a sufficiently close nexus between the state and the private actor" existed here "so that the action of the latter may be fairly treated as that of the State itself."

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[15] *See Blum*, 457 U.S. at 1006 ("[T]he physicians, and not the forms, make the decision."). However, Defendants were required to apply state-promulgated criteria. *See* RCW § 71.05.214.

See Jensen, 222 F.3d at 575 (quoting *Jackson*, 419 U.S. at 350).

We therefore conclude that Defendants were acting under color of state law with respect to the actions for which Rawson attempts to hold them liable. We reverse the district court's grant of summary judgment to the contrary and remand for further proceedings.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KENNETH RAWSON, Plaintiff, v. RECOVERY INNOVATIONS, INC., et al., Defendants.	CASE NO. C17-5342 BHS ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT, GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, STRIKING THE PRETRIAL CONFERENCE AND THE TRIAL DATE, AND REQUESTING A JOINT STATUS REPORT (Filed Nov. 27, 2018)

This matter comes before the Court on Defendants Jennifer Clingenpeel ("Clingenpeel"), Sami French ("French"), Vasant Halarnakar ("Halarnakar"), and Recovery Innovations, Inc.'s ("RI") (collectively "Defendants") motion for summary judgment, Dkt. 63, and Plaintiff Kenneth Rawson's ("Rawson") motion for partial summary judgment, Dkt. 58. The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

I. PROCEDURAL HISTORY

On May 8, 2017, Rawson filed a complaint against Defendants asserting numerous claims stemming from his involuntary commitment and treatment by Defendants. Dkt. 1. On June 8, 2017, Rawson filed an amended complaint against Defendants asserting that Defendants acted under color of law for purposes of 42 U.S.C. § 1983 and nine substantive claims as follows: (1) violation of his Fourth Amendment rights, (2) violation of his substantive due process rights under the Fourteenth Amendment, (3) violation of his procedural due process rights under the Fourteenth Amendment, (4) violations of the ADA, 42 U.S.C. § 12132, (5) outrage, (6) false imprisonment, (7) medical malpractice, (8) violations of the Washington Law Against Discrimination ("WLAD"), RCW Chapter 49.60, and (9) violations of the Washington Consumer Protection Act ("CPA"), RCW Chapter 19.86. Dkt. 5.

On July 20, 2017, Defendants filed a motion to dismiss arguing that (1) Rawson's § 1983 claims should be dismissed because Defendants are not state actors, (2) Rawson's ADA claim fails as a matter of law, and (3) Defendants are entitled to immunity from Rawson's state law claims. Dkt. 9. On October 25, 2017, the Court denied the motion concluding that (1) Rawson had asserted sufficient allegations to support a "government nexus" between Defendants and state actors and (2) Rawson has asserted sufficient allegations to support a theory that Defendants acted with gross negligence or bad faith, which overcomes the asserted

immunity defense. Dkt. 17. The Court did not address Rawson's ADA claim.

On April 13, 2018, Rawson filed a second amended complaint. Dkt. 35. Rawson asserted 66 paragraphs of factual allegations, a claim that Defendants acted under color of law, and ten substantive claims for relief. *Id.* ¶¶ 4.4-4.66, 5.1-5.11. Rawson's substantive claims are as follows: (1) violation of his Fourth Amendment rights, (2) violation of his substantive due process rights under the Fourteenth Amendment, (3) violation of his procedural due process rights under the Fourteenth Amendment, (4) violations of the ADA, 42 U.S.C. § 12132, (5) outrage, (6) false imprisonment, (7) medical malpractice, (8) violations the WLAD, (9) violations of the CPA, and (10) a claim for excessive detention in violation of Washington's Involuntary Treatment Act ("ITA"), RCW 71.05.510. *Id.* ¶¶ 5.2-5.11.

On May 8, 2018, Defendants answered and asserted eleven affirmative defenses. Dkt. 36. Relevant to the instant motions, Defendants asserted that Rawson failed to join one or more indispensable parties and Rawson's damages were caused "by the acts or omissions of third parties over whom Defendants had no control." *Id.* at 8.

On September 5, 2018, Rawson filed a motion for partial summary judgment and Defendants filed a motion for summary judgment. Dkts. 58, 63. On September 24, 2018, the parties responded. Dkts. 73, 76. On

September 28, 2018, the parties replied. Dkts. 83, 90. On October 1, 2018, Rawson filed a surreply. Dkt. 93.[1]

II. FACTUAL BACKGROUND

A. RI

RI is a non-profit corporation incorporated in Arizona that is registered and licensed to do business in Washington. French, Clingenpeel and Halarnakar were employees of RI during the relevant period. In 2014, RI contracted with Optum Pierce Regional Support Network ("Optum") to open and operate a facility in Lakewood, Washington that provides evaluation and treatment ("E&T") services. The Lakewood facility is licensed to confine individuals who are involuntarily committed on an emergency basis under the ITA.

RI's facility was located on the grounds of one of Washington State's main mental hospitals, Western State Hospital. Dkt. 60-5 at 3. Halarnakar, RI's medical director, also worked full-time as a doctor at Western State Hospital and part-time as medical director of another E&T service. Dkt. 77-4 at 5.

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[1] The Court grants Rawson's motion to strike Defendants' arguments relating to the *Noerr-Pennington* doctrine and the litigation privilege because they were raised for the first time in Defendants' reply. *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010) ("arguments raised for the first time in a reply brief are waived."). The Court also grants Rawson's motion to strike Defendants' submission of evidence with their reply. *Proven v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996). The remainder of Rawson's surreply is improper argument, which the Court will not consider. Local Rules W.D. Wash. LCR 7(g).

B. Rawson

On March 5, 2015, Clark County Sheriff Officer Chris Nicholls detained Rawson and ordered a medical transport to Legacy Salmon Creek Hospital for a mental evaluation. The incident report provides as follows:

> While working patrol I responded with other deputies to the Bank of America in Hazel Dell. While en route, I was advised that Kenneth Rawson had come back to the bank today after being at the bank the day before. While there the previous day, he had made statements about getting guns and committing mass murder in order for the police to take him seriously. Upon arrival I went in with Deputies O'Dell and Mike Johnson Jr. We made contact with Kenneth and I immediately placed my hands on his forearms and told him not to move. He stated that he had a gun on him and he would comply. I placed him in handcuffs and advised him that he was being detained and not under arrest. Although he did not physically resist me, he began to yell to everyone in the bank that he had a gun and that his rights were being violated. It was about 11:00 am at the time and there were numerous employees and customers in the building. Deputy Johnson stated that he had taken possession of Ken's loaded handgun and cleared it safely. A loaded Glock magazine was also found in his briefcase.
>
> Ken was taken outside and interviewed by other deputies while I went in and spoke with both Dejanira (DJ) and Jason, who are

the Assistant Manager and Manager, respectively. DJ advised that she sat down with Ken yesterday and he began to talk about all the evil people who are against him. He told her that he would sit in front of his TV and "they" would talk to him through his TV. He told her "they" were doing this because of his gun. He asked her if she knew what an AK-47 was but she did not. He explained that an AK-47 was used to shoot all the people in the theater in Colorado. Ken explained to DJ that he was having issues with his banks and his credit and he felt it was a conspiracy against him. He told DJ that all the evil people were making him crazy and that he might have to commit mass murder in order for the police to take him seriously and look at all the evidence he had. He explained again to DJ that all of his phone conversations are being monitored and his Veteran's Affairs (VA) paperwork is being intercepted.

Ken did have a valid concealed weapons permit issued by the Clark County Sheriff's Office. I recommend that this license be reviewed.

When I went outside, I could see and hear that Ken was talking to the other deputies about the same topics of how people are against him and how we all were going to pay. He had several pieces of printed out materials stapled together that he carried in his briefcase that he was concerned about. Per Sgt. Trimble's request, Kenneth was placed on a mental hold and transported to Legacy

> Salmon Creek Hospital via AMR ambulance. I followed the ambulance there and assisted in checking him in and advising the staff, to include the doctor on duty, of the situation and his statements. I completed a hold form.

Dkt. 57-11 at 4-5.

After Rawson's transport to the hospital, Clark County Designated Mental Health Professional ("DMHP") Al Padilla ("Padilla") evaluated Rawson. On March 6, 2018, Padilla filed a petition in state court for the involuntary commitment of Rawson and a 72-hour mental health evaluation. Dkt. 61-9.[2] Padilla arranged for Rawson to be evaluated at RI. Dkt. 61-10. When he arrived at RI, French, a Mental Health Professionals, and Clingenpeel, an Advanced Registered Nurse Practitioner, evaluated him. Dkt. 61-11. After the evaluation, Clingenpeel prescribed some medication to address Rawson's "thoughts." *Id.* at 4. Rawson refused the medication. *Id.*

Based on their evaluation of Rawson, Clingenpeel and French completed a petition to involuntarily commit Rawson for fourteen days following the expiration of the initial 72-hour commitment. The petition states that Rawson is "gravely disabled" and "presents a likelihood of serious harm to others" and that he requires "intensive, supervised, 24-hour care." Dkt. 61-13. These conclusions were based on the information in the police

[2] The parties have redacted a significant amount of information that is publicly available. For example, this allegation appears in Rawson's complaint yet is redacted in his motion.

report that people were talking to Rawson through the television and the bank employee's comment that Rawson stated he would have to commit mass murder so the police would listen to him. *Id.* Regarding actual treatment at RI, the petition states that Rawson "continues to deny any problem other than the bank and police misunderstanding" and that he "continues to focus on being a victim and is passive in his participation in treatment." *Id.* On March 10, 2015, the court granted the petition and Rawson was involuntarily committed for the additional fourteen days.

On March 14, 2015, Medical Director Halarnakar met Rawson for the first time. Dkt. 61-6 at 8-9. Halarnakar's notes of this interaction state that Rawson was calm, cooperative, and polite but that his speech was pressured. Dkt. 61-12 at 6. Rawson told Halarnakar that he felt like his freedom had been taken away, that he didn't have any symptoms of schizophrenia, and that he didn't hear any voices. *Id.* Halarnakar wrote that Rawson needed to keep taking his medications after discharge and that the issue of Rawson's weapon with the Clark County Sheriff needed to be resolved before Rawson could be discharged. *Id.*

On March 15, 2015, RI fired Clingenpeel because her charting practices were not meeting the appropriate standard. Dkt. 61-15. With Clingenpeel gone, Halarnakar became Rawson's attending provider. Dkt. 61-6 at 13. On March 19, 2015, Halarnakar met with Rawson for a second time. In the notes from this meeting, Halarnakar documented two objective observations: (1) that Rawson became argumentative

and denied having a mental illness or needing antipsychotic medications and (2) that he denied suicidal or homicidal ideations. Ex. 12 at 7. Based on these observations, Halarnakar concluded that Rawson had pressured speech, was very paranoid, had no insight, and needed further stabilization. *Id.* Halarnakar prescribed another medication and discussed with French the need to file a petition for an additional 90-day detention. *Id.*

Pursuant to Halarnakar's request, French drafted a petition that day. The petition requested an additional 90 days of involuntary treatment at RI. Dkt. 61-16. The petition alleged that Rawson had "threatened, attempted, or inflicted physical harm upon the person of another or him/herself, or substantial damage to property of another during the period in custody for evaluation and treatment, and presents a likelihood of serious harm." *Id.* Halarnakar and French declared that

> [Rawson], continues to display signs of paranoia and delusions with guarded interactions with others. He lacks any connection to the reality of his situation and the reasons that brought him to the evaluation and treatment center.
>
> ***
>
> [Rawson] attends groups and interacts occasionally outside of group time. He spends much of his time isolating in his room. At other times has threatened other guests when he does not believe he is being observed.

> [Rawson] does not acknowledge his mental illness and continues to blame his detainment on his clothing that he wore to the bank.

Id. They claimed that Rawson required "intensive, supervised, 24-hour care" and that the court should involuntarily commit him to Western State Hospital. *Id.*

On March 23, 2015, Rawson requested a jury trial on the petition. Dkt. 61-17. On March 24, 2015, the 14-day detention order expired, but RI detained Rawson while he awaited trial on the extended petition. On March 25, 2018, French emailed Pierce County Deputy Prosecuting Attorney Ken Nichols ("Nichols") informing him that the VA had a bed available for Rawson. Dkt. 61-19 at 2. Nichols replied as follows:

> By all means end [sic] him to the VA and get him off our radar!
>
> I don't really want to try this case.
>
> I'm not sure there is enough to convince a jury by clear cogent and convincing evidence that he needs to be at Western State.

Id. Despite this communication, Rawson remained at RI.

On April 9, 2015, Nichols informed French that Dr. James Manly ("Dr. Manly"), an expert psychiatrist, would come to RI to evaluate Rawson for trial. *Id.* at 46. The next day, Dr. Manly met with Rawson for three and a half hours. Dr. Manly's report provides as follows:

Mr. Rawson presented for his appointment with good hygiene and grooming. His responses to the interview questions were cogent, detailed, lineal, and on topic. He accurately described the events that led to his first psychiatric admission. He did not become defensive during the interview. He did report a minor level of frustration about why he continued to be hospitalized. Given the facts to this matter, his lack of current psychiatric symptoms, and his lack of mental health history, his expressed frustration did not strike me as unreasonable.

Mr. Rawson did not evidence pressured speech, tangential thinking, or obvious thinking errors. He did not evidence or report symptoms related to psychosis or a mood disorder. He did not report or evidence anger. In fact, throughout the interview Mr. Rawson maintained his composure and did not evidence or report thoughts of suicide or self harm. He did not report or evidence a plan or desire to hurt another person.

As part of the interview, I administered the Personality Assessment Inventory (PAD. The validity indicators noted a mild level of defensiveness. His level of defensiveness is quite typical within forensic settings and not surprising in this situation. He reported some concern about his health, which coincided with his self-report of a spinal injury and bilateral sciatica. The resulting profile PAI was within normal limits. The scales related to

> mood, psychosis, and impulsivity were not significantly elevated.
>
> I have also spoken to his father who has traveled from Mr. Rawson's home state of Texas. Mr. Rawson reported his son had no mental health history or history of violence to others.
>
> In summary, I do not find Mr. Rawson presently at risk to harm himself or being a danger to others.

Id.

On April 16, 2015, Nichols emailed Dr. Manly's report to Halarnaker and French. Dkt. 61-19 at 32. Nichols followed up with an email providing the statutory grounds for involuntary commitment and requesting that Halarnaker and French provide specific statements that Rawson made at RI that were threatening. *Id.* at 10. Halarnaker replied that Rawson "has refused to talk lately." *Id.* at 9. Nichols's response requested clarification that Halarnaker was forcefully medicating Rawson every night and, if so, that could explain why Rawson presented so well to Dr. Manly. *Id.* Halarnaker confirmed the nightly injections and stated that they did not have any "threatening statements." *Id.* Halarnaker also wrote that Rawson told them that "he won't hurt anyone." *Id.* Nichols wrote that he knew Rawson's "symptoms have subsided because he's been on meds, but without them maybe he would be gravely disabled quickly." *Id.* at 11. Halarnaker replied "[t]hat is the only argument we have." *Id.*

On April 27, 2015, Halarnakar wrote to Nichols informing him of a mutual resolution to the situation. Halarnakar stated that Rawson had agreed to sign a voluntary commitment form, and, in return, RI was going to transport Rawson to the Portland VA so that he could be evaluated and, if necessary, treated at that inpatient facility. Dkt. 6112 at 9-10. Halarnaker stated that if Nichols agreed with the plan, then RI would transport Rawson the following day. *Id.* at 10. On April 29, 2015, RI discharged Rawson.

On August 16, 2016, the Washington Court of Appeals held that Rawson's "detention was improper because [Padilla] did not consult with an examining physician as required by RCW 71.05.154." *In re Det. of K.R.*, 195 Wn. App. 843, 846 (2016).

In support of his claims, Rawson has submitted the expert report of Dr. Jeffrey Geller ("Dr. Geller"). Dkt. 78. In short, Dr. Geller opines that RI's records do not support the decisions to involuntarily commit Rawson, RI's records do not support the medical decision to forcibly medicate Rawson, less restrictive alternatives existed, and RI's staff was not qualified to evaluate and treat Rawson. *Id.* at 81-82.

On the other hand, Defendants have submitted the expert report of Dr. Mark R. McClung ("Dr. McClung"). Dkt. 48-1. Dr. McClung opines that "[t]he length of time Mr. Rawson remained at Recovery Innovations was not related to any deficits in his psychiatric treatment." *Id.* at 4. He also opines that Rawson's

entire period of involuntary commitment was medically justified. *Id.* For example, he declares that

> The Petition for 90-day commitment (completed by clinicians at Recovery Innovations) provides information to meet one of the two possible requirements for a 90-day commitment (threatened violence), as well as providing a relevant diagnosis and an opinion that [a least restrictive alternative] is not recommended.

Id.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical

doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. 42 U.S.C. § 1983

To prevail under § 1983, a plaintiff must show (1) that defendants deprived him of a right secured by

the Constitution or laws of the United States and (2) that, in doing so, Defendants acted under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978).

In this case, the parties dispute whether Defendants acted under color of law. As a general rule, it is presumed that actions by private parties are not taken under color of state law. *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011) ("We start with the presumption that conduct by private actors is not state action."). However, "[i]f the [Constitution] is not to be displaced, . . . its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

In the Court's order denying Defendants' motion to dismiss on this issue, the Court discussed the various tests courts implement when considering state action and concluded that Rawson has asserted sufficient factual allegations to state a plausible claim. Dkt. 17 at 2-7. That order, however, dealt with this issue at a high level of generality, which has caused significant problems with the current round of motions and pretrial filings. In retrospect, the Court should probably have granted Defendants' motion, dismissed Rawson's claims without prejudice, and granted Rawson leave to amend because the state action "inquiry 'begins by identifying the specific conduct of which the plaintiff

complains.'" *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 814 (9th Cir. 2010) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999) (internal quotation marks omitted)); *see also Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982) ("Faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint.").

Turning to Rawson's complaint, each claim is a single sentence based on the factual allegations asserted above. *See, e.g.*, Dkt. 35, ¶ 5.2 ("The facts described above constitute violations of Mr. Rawson's Fourth Amendment rights by Recovery Innovations, Ms. French, Ms. Clingenpeel, and Dr. Halarnakar."). Such general claims has resulted in confusion as to the gravamen of Rawson's complaint as to each claim against each defendant. *See, e.g.*, Dkt. 90 at 3 ("Plaintiff finally identified his 'gross negligence' claims [in his response brief.]"). Likewise, the disputed jury instructions are the functional equivalent of mini-motions for summary judgment. *See, e.g.*, Dkt. 126 at 12 ("Plaintiff's Fourth Amendment claim cannot be reconciled with the Washington Supreme Court's opinion in *In re McLaughlin*, 100 Wn.2d 832 (1984), which considered the technical sufficiency of two petitions for 90-day involuntary commitments. Rather than creating a duty to withdraw a defective petition, the Supreme Court recognized that petitions could be re-drafted, modified and amended before, during or even after trial. However, if the Court disagrees, Defendants propose the instruction below.").

In light of the existing record, the Court finds that numerous legal issues exist within Rawson's § 1983 claims. The Court will highlight some of these issues below in addressing Rawson's two theories of state action: (1) government nexus and (2) public function. Dkt. 35, ¶ 5.1. The Court will address the latter theory first.

1. Public Function

"The public function test is satisfied only on a showing that the function at issue is 'both traditionally and exclusively governmental.'" *Kirtley v. Rainey*, 326 F.3d 1088, 1093 (9th Cir. 2003) (quoting *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002)).

In this case, Rawson argues that "RI and it employees perform a function historically performed exclusively by state actors." Dkt. 58 at 14. Rawson relies on *In re Det. of S.E.*, 199 Wn. App. 609 (2017), *review denied*, 189 Wn.2d 1032 (2018), to support his position, but that court only considered whether an individual has a right to a jury trial at the 14-day petition hearing, *id.* at 617-18. The court concluded that "the probable cause hearing set forth by RCW 71.05.240 features an adversarial proceeding wherein a judge—rather than a jury—decides whether, by a preponderance of the evidence, a person's mental illness justifies a cumulative detention period of up to 17 days." *Id.* at 619. The court also concluded that "[t]here is no indication in our territorial or early statehood authority that a jury was required to decide whether a person's

suspected insanity justified detaining the person for up to 17 days." *Id.* Rawson fails to show how this authority stands for the proposition that involuntary commitments are both traditionally and exclusively governmental. Therefore, the Court grants Defendants' motion and denies Rawson's motion on the issue of state action under the public function test.

2. Government Nexus

"In order to be considered state action, when a private actor participates in a governmental act, the court must find a sufficiently close nexus between the state and the private actor 'so that the action of the latter may be fairly treated as that of the State itself.'" *Jensen v. Lane Cty.*, 222 F.3d 570, 575 (9th Cir. 2000) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974)).

In this case, Rawson has failed to fully articulate his claims and the parties approach this test from a high level of generality. Based on Rawson's proposed jury instructions and proposed verdict form, it appears that Rawson asserts § 1983 claims as follows: (1) all four Defendants improperly seized Rawson in violation of the Fourth Amendment, (2) all four Defendants wrongfully detained Rawson through the use of deliberately fabricated evidence in violation of the Fourteenth Amendment, (3) all four Defendants violated Rawson's bodily integrity in violation of the Fourteenth Amendment, and (4) Halarnakar violated Rawson's Fourth and Fourteenth Amendment rights by

failing to supervise the act or omissions of RI's employees. Dkts. 126 at 12-26, 126-1 at 1-4. Defendants have not challenged the propriety of these claims or whether Rawson has evidence to support each element of each claim. This is fatal to the Court's ability to properly consider whether Defendants acted under color of law because "[f]aithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." *Blum*, 457 U.S. at 1003. Regardless, the Court will address as much of the dispute as possible based on the briefs and the current record.

The parties seem to implicitly agree that the facts of this case fall somewhere between the facts of *Jensen*, 222 F.3d 570, and the facts of *Hood v. King Cty.*, C15-828RSL, 2017 WL 979024, at *13 (W.D. Wash. Mar. 14, 2017), *aff'd sub nom. Hood v. Cty. of King*, 17-35320, 2018 WL 3462496 (9th Cir. July 18, 2018). In *Jensen*, the plaintiff was arrested after pointing his gun out a car window at a pedestrian. 222 F.3d at 572. Based on this incident and other information regarding plaintiff's threatening behavior, a public mental health specialist consulted with another public mental health specialist and Jeffrey M. Robbins, M.D. ("Dr. Robbins"), a private specialist under contract with the county. *Id.* at 572-73. After these consultations, the public mental health specialist recommended that plaintiff be detained at a public mental health hospital for evaluation. *Id.* at 573. Dr. Robbins signed an order detaining plaintiff without personally evaluating the plaintiff and based his decision entirely on the police reports

and information gained from the public doctors. *Id.* Dr. Robbins briefly met with plaintiff over the course of the next three days of plaintiff's detention, but the plaintiff "did not cooperate in the examination, so Dr. Robbins again relied heavily on police reports and information obtained from [the public doctors] in deciding to continue [plaintiff's] detention." *Id.* On the fourth day of detention, a public doctor evaluated plaintiff and concluded that there was insufficient evidence to proceed with requesting a court order for additional detention. *Id.* Dr. Robbins agreed with this conclusion, and the plaintiff was released. *Id.*

Dr. Robbins moved for summary judgment on the plaintiff's § 1983 claim arguing that he did not act under color of law. *Id.* The district court granted the motion but the Ninth Circuit reversed. *Id.* at 573, 575-76. The Ninth Circuit found and concluded as follows:

> The record is clear that Dr. Robbins and the County through its employees have undertaken a complex and deeply intertwined process of evaluating and detaining individuals who are believed to be mentally ill and a danger to themselves or others. County employees initiate the evaluation process, there is significant consultation with and among the various mental health professionals (including both [private] psychiatrists and county crisis workers), and [the private employer] helps to develop and maintain the mental health policies of [the public mental health hospital]. We are convinced that the state has so deeply insinuated itself into this process

> that there is "a sufficiently close nexus between the State and the challenged action of the [defendant] so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 350.

Jensen, 222 F.3d at 575.

On the other hand, in *Hood*, this Court concluded that the private actors did not act under color of law. Plaintiff Luci Hood was detained by deputies after they observed her approach other individuals in a threatening way. *Hood*, 2017 WL 979024 at *3. The deputies called an ambulance, which transported Ms. Hood to a private hospital for an evaluation under the ITA. *Id.* Although the facts regarding the origination of Ms. Hood's detention do not appear in the published order, in the public, redacted version of the motion for summary judgment, the defendants assert that a team of two public DMHPs personally evaluated Ms. Hood at the private hospital and then filed a petition for a 72-hour involuntary hold. *Hood*, C15-828RSL, Dkt. 68 at 6-7. Once that hold was in place, Ms. Hood was transferred to another private hospital for treatment and evaluation. Ms. Hood alleged that the new hospital failed to provide an independent assessment of her mental health and continued the involuntary hold based purely on the DMHP's petition. *Id.*, Dkt. 1-1 at 10-11. Based on these facts, the Court found and concluded as follows:

> A sufficiently close nexus does not exist in this case. In *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000), the Ninth Circuit held

that where a private medical provider and a county through its employees "have undertaken a complex and deeply intertwined process of evaluating and detaining individuals who are believed to be mentally ill and a danger to themselves or others," the government has "so deeply insinuated itself into this process that there is 'a sufficiently close nexus between the State and the challenged action of the defendant so that the action of the latter may fairly be treated as that of the State itself.'" *Jensen*, 222 F.3d at 575 (quoting *Jackson*, 419 U.S. at 350). Ms. Hood argues that *Jensen* controls here, but the Court disagrees.

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the U.S. Supreme Court found no state action where the challenged medical determinations were "made by private parties according to professional standards that are not established by the State." *Blum*, 457 U.S. at 1008. In *Jensen*, the Ninth Circuit distinguished *Blum* on the grounds that in *Jensen*, though the committing physician made the medical judgment under which the plaintiff was detained, "[c]ounty employees initiate[d] the evaluation process, [and] there [was] significant consultation with and among the various mental health professionals (including both [private] psychiatrists and county crisis workers)," such that the state's involvement in the decision-making process overrode the private provider's "purely medical judgment." *Jensen*, 222 F.3d at 575.

> Such is not the case here. It is true that county law enforcement initiated Ms. Hood's ITA process; that county DMHPs relied significantly on the reports of hospital staff in conducting the assessment that led to Ms. Hood's 72-hour detention; that the hospital boarded Ms. Hood after the county DMHPs initiated the 72-hour detention; and that a hospital psychiatrist declined to release Ms. Hood apparently out of deference to the county DMHPs' detention recommendation. But unlike in *Jensen*, where the private practitioner was operating under contract with the county, 222 F.3d at 573, the private hospitals in this case were fulfilling their own statutory responsibilities under the ITA rather than a contractual responsibility to King County. Moreover, the plaintiff in *Jensen* was detained in a county psychiatric hospital, then discharged to the county jail, *id.*, while in this case Ms. Hood was detained exclusively at private hospitals and then released.
>
> The facts here reveal sustained and routine cooperation between King County and the hospitals, but they do not show that the county's involvement overrode the hospital staff's medical judgment such that the hospitals' actions can fairly be treated as those of the government. Accordingly, the hospitals were not acting under color of law, and Ms. Hood's constitutional claims against the hospitals for deprivation of liberty and privacy must be dismissed.

Hood, 2017 WL 979024 at *12-13.

While these authorities provide principles to evaluate Rawson's claims, the parties deal only in generalities that all four Defendants were or were not acting under color of law at all times. This approach seems unworkable because Rawson's initial involuntary commitment is similar to Ms. Hood's and later commitment is similar to the facts considered in *Jensen*. For example, Padilla, the county DMHP, ordered Rawson's initial 72-hour detention. After that, Clingenpeel and French evaluated Rawson and submitted the 14-day petition. Although Rawson alleges that they based the petition mostly on information contained in the police reports, Rawson fails to cite facts establishing that their independent medical judgment was improperly influenced by state actors. This is unlike *Jensen* where the private doctor failed to personally interview the detainee and based his detention decision purely on the police reports and information provided by public doctors. Thus, it is hard to reach the conclusion that "the state has so deeply insinuated itself into this process" that Clingenpeel and French's actions should be considered those of the state itself. *Jensen*, 222 F.3d at 575. Instead, it is a much more reasonable conclusion that Rawson has failed to establish "that the county's involvement overrode the hospital staff's medical judgment such that the hospitals' actions can fairly be treated as those of the government." *Hood*, 2017 WL 979024 at *13. This would be a simpler matter if Rawson's ordeal ended at this point.

This is the point when the circumstances move toward those encountered in *Jensen*. The state court

granted the petition for an additional fourteen days of detention, and RI fired Clingenpeel. Halarnakar became Rawson's treating physician, and he worked with Nichols to pursue a 90-day involuntary commitment order. While Defendants assert that this was "routine cooperation," the emails evidence persuasion and a joint effort to continue Rawson's detention. Nichols even proposed a new theory for the detention, which could establish state action that overrode Halarnakar and/or French's independent medical judgment. Thus, it would be easy to conclude that Halarnakar and/or French engaged in a complex and intertwined process with Nichols, similar to the individuals in *Jensen*.

The main problem, however, is that the Court can only address these issues as hypotheticals because Rawson has failed to explain the gravamen of his complaint with these detentions and what defendant violated his rights at what point during these detentions. He also seems to claim that his rights were violated because one or more defendants failed to release him but doesn't explain at what point he should have been released. So many possibilities exist that it is impossible for the Court to evaluate when "the county's involvement overrode the hospital staff's medical judgment such that the hospitals' actions can fairly be treated as those of the government." *Hood*, 2017 WL 979024 at *12-13. Moreover, Rawson fails to show how RI, as the employer, would be responsible under respondeat superior for the individual actions of its staff. *See, e.g.*, *Austen v. Cty. of Los Angeles*, 15-07372 DDP (FFMX), 2018 WL 501552, at *9 (C.D. Cal. Jan. 19,

2018) (considering § 1983 liability of hospital based only on its policies, practices, or customs). Issues also exist regarding how the Court should address underlying factual disputes that are pertinent to the state action inquiry. Therefore, the Court denies without prejudice the parties' motions on the issue of state action because the facts, claims, and issues are not amenable to consideration at this point.

C. ADA

Rawson asserts a claim for a violation of § 12132 of the ADA. Dkt. 35, ¶ 5.5. Title II of the ADA prohibits a public entity from discriminating against a qualified individual with a disability on the basis of that disability. 42 U.S.C. § 12132. To state a claim of disability discrimination under Title II, the plaintiff must allege four elements: (1) the plaintiff is an individual with a disability; (2) the plaintiff is otherwise qualified to participate in or receive the benefit of some public entity's services, programs, or activities; (3) the plaintiff was either excluded from participation in or denied the benefits of the public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability. *Thompson v. Davis*, 295 F.3d 890, 895 (9th Cir. 2002).

In this case, Defendants move for summary judgment on Rawson's ADA claim. Rawson fails to identify a single fact to support any of the elements of his claim.

Instead, he argues that the Court rejected Defendants' arguments in denying their motion to dismiss the complaint. Dkt. 76 at 23. The Court, however, denied Defendants' motion without specifically addressing the merits of this claim. *See* Dkt. 17. Thus, Rawson is relying on an implicit rejection of these arguments, which is not a very persuasive position.

Rawson also asserts that Defendants "provide no new facts so the Court's prior ruling applies to this Motion." Dkt. 76 at 23. Rawson is incorrect because it is not Defendants' burden to provide facts. It is Defendants' duty, as the moving party, to "demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323. Once that is established, Rawson must submit actual evidence on the contested elements of his claim. *Id.* ("One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims"). Rawson has failed to meet his burden and merely rests on the Court's previous order. "It is not our task, or that of the district court, to scour the record in search of a genuine issue of triable fact. We rely on the nonmoving party to identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). In the absence of identified evidence establishing every element of his claim, the Court grants Defendants' motion for summary judgment on Rawson's ADA claim.[3]

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[3] If Rawson intends to assert a claim under *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 598 (1999), 28 C.F.R. § 35.130(d), or

D. ITA

Defendants move for summary judgment on the issue of immunity under the ITA, Dkt. 63 at 18-21. Rawson moves for summary judgment on at least a portion of his claim that Defendants violated the ITA. Dkt. 58 at 18-19. The Court will address the immunity issue first and then the merits of Rawson's claim.

1. Immunity

Under the ITA, Defendants are immune from liability for performing their duties as long as the "duties were performed in good faith and without gross negligence." RCW 71.05.120(1). "Gross negligence is that which is substantially and appreciably greater than ordinary negligence." *Estate of Davis v. State, Dep't of Corr.*, 127 Wn. App. 833, 840 (2005), *as amended* (June 2, 2005), *publication ordered* (June 2, 2005).

In this case, Defendants request immunity because Rawson's only evidence supporting gross negligence should be disregarded. Dkt. 63 at 19. For example, Defendants have essentially filed a motion to exclude Dr. Geller asserting that the Court is "obligated to disregard his facially erroneous and baseless opinions." Dkt. 63 at 19. The Court declines Defendants' invitation to convert a portion of their summary judgment motion into a motion to exclude. Similarly, Defendants argue that Rawson's "absurd testimony . . .

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28 CFR § 41.51(d), as set forth in his trial brief, he must file a motion to amend his complaint because he specifically limited his claim to a violation of 42 U.S.C. § 12132. Dkt. 35, ¶ 5.5.

is not credible and need not be considered for purposes of summary judgment." Dkt. 90 at 3 n.6. While the Court may disregard evidence in certain circumstances, *see Scott v. Harris*, 550 U.S. 372, 380 (2007), Defendants have failed to show that Rawson's testimony is "blatantly contradicted by the record," *id.* If a juror believes Rawson such that Clingenpeel filed the 14-day petition for Rawson's continued involuntary detention after an evaluation that lasted less than 15 seconds, then the jury could find that Clingenpeel was grossly negligent in performing her duties. Regardless, Defendants' motion is based entirely on the Court disregarding Rawson's evidence, which the Court refuses to do. Therefore, the Court denies Defendants' motion on this issue.

2. ITA Liability

Rawson moves for partial summary judgment on his claim for excessive detention in violation of the ITA. Dkt. 58 at 18-19. Regarding the burden of proof on this issue, "*where the moving party has the burden*—the plaintiff on a claim for relief or the defendant on an affirmative defense—*his showing must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party*." *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986) (citation omitted; emphasis in original); *see also Southern Calif. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003).

The civil commitment statute requires that "providers act in good faith" and can "be held civilly liable for . . . detaining a person for more than the allowable number of days." *In re Det. of June Johnson*, 179 Wn. App. 579, 589 (2014) (citing RCW 71.05.510). The 14-day involuntary commitment shall terminate during the commitment when "in the opinion of the professional person in charge of the facility or his or her professional designee, (a) the person no longer constitutes a likelihood of serious harm, or (b) no longer is gravely disabled, or (c) is prepared to accept voluntary treatment upon referral, or (d) is to remain in the facility providing intensive treatment on a voluntary basis." RCW 71.05.260.

In this case, Defendants have submitted evidence that at most establishes the existence of material question of facts on this issue and at least establishes that a reasonable trier of fact could find other than for Rawson. Dr. McClung opines that Rawson's detention was medically justified, which, taken in the light most favorable to Defendants, establishes a question of fact whether Rawson no longer constituted a likelihood of serious harm. Therefore, the Court denies Rawson's motion on this issue.

E. RCW Chapter 7.70

Defendants argue that, "[u]nder Washington law, claims arising out of healthcare, regardless of the type of claim, are governed by Chapter 7.70 RCW." Dkt. 63 at 22. Defendants rely on *Ewing v. Good Samaritan*

Hosp., C07-5709 FDB, 2009 WL 2855623 (W.D. Wash. Aug. 31, 2009), to support their position. Dkt. 63 at 22. In *Ewing*, the Court considered an unopposed motion for summary judgment based on the hospital and child protective services removing a drug addicted newborn from its parents. *Ewing*, 2009 WL 2855623 at *3. Defendants rely on the *Ewing* Court's conclusion that the plaintiff's claims were strictly limited to medical malpractice because the plaintiff failed to produce any evidence of assault, battery, or false imprisonment. Dkt. 63 at 22. Defendants' reliance, however, is misplaced because unlike the plaintiff in *Ewing*, Rawson has submitted sufficient evidence to support his other state law claims. Therefore, the Court denies Defendants' motion on this issue.

F. CPA

The CPA prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. To prevail in a private CPA claim, the plaintiff must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person's business or property, and (5) causation. *Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784 (1986).

In this case, Defendants move for summary judgment on Rawson's CPA claim. Rawson contends that Defendants "held themselves out to the public as qualified and capable of evaluating and treating patients

. . . but they were not." Dkt. 76 at 25. Rawson fails to identify how each defendant individually accomplished this deception, which is sufficient reason alone to grant Defendants' motion. Moreover, Rawson fails to cite any fact that establishes deception in obtaining or retaining patients at RI. This is fatal to any claim based on the entrepreneurial activities of these medical professionals. *See Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 603 (2009) ("Entrepreneurial aspects do not include a doctor's skills in examining, diagnosing, treating, or caring for a patient.") (citing *Wright v. Jeckle*, 104 Wn. App. 478, 485 (2001)).

Defendants also argue that Rawson has failed to establish any damage to his business or property. Dkt. 63 at 24. Rawson contends that his payment to Dr. Geller to investigate his claims constitutes a prelitigation injury. Dkt. 76 at 25. None of the cases Rawson cites stands for the proposition that hiring a medical expert to provide an opinion that can be used to establish medical malpractice or similar claims is an injury sufficient to establish a CPA claim. If this were the law, then every plaintiff that hired an expert prior to filing a complaint could include a CPA claim seeking treble damages and attorney's fees. This is an absurd proposition. Therefore, the Court grants Defendants' motion on Rawson's CPA claim.

G. False Imprisonment

Rawson moves for partial summary judgment on his claim for false imprisonment for his detention after

April 16, 2015. Dkt. 58 at 19. "Unlawful imprisonment is the intentional confinement of another's person, unjustified under the circumstances." *Kellogg v. State*, 94 Wn.2d 851, 856 (1980).

Similar to Rawson's claim for excessive detention under the ITA, Rawson fails to establish that no reasonable juror could find other than for him. Dr. McClung's opinion at least creates a question of fact whether Rawson's confinement was unjustified under the circumstances. Therefore, the Court denies Rawson's motion on this issue.

H. Affirmative Defenses

Rawson moves for summary judgment on Defendants' affirmative defenses that Rawson failed to join indispensable parties and that his damages were caused by third parties. Dkt. 58 at 21-25. Regarding the former, Defendants failed to directly respond or provide any authority in support of their position. At most, Defendants argue that dismissal of this defense "is not appropriate at this stage." Dkt. 73 at 23. Contrary to Defendants' position, dismissal is appropriate at this stage if they, as the non-moving party, fail to establish that material questions of fact exist for trial. *See* Fed. R. Civ. P. 56. Turning to the merits, a party is "required" only if (1) complete relief cannot be accorded among the existing parties, or (2) the party has a legal interest in the subject of the suit or could, through its absence, subject an existing party to multiple or inconsistent legal obligations. Fed. R. Civ. P. 19(a).

During discovery, Defendants identified Clark County Sherriff s Office, Clark County Crisis Services, and Legacy Salmon Creek Medical Center as indispensable parties. Regarding the first two entities, it is unlikely that they could even be parties because they are entities operated by Clark County, which would be the real party in interest. *Bradford v. City of Seattle*, 557 F. Supp. 2d 1189, 1207 (W.D. Wash. 2008) ("In order to bring an appropriate action challenging the actions, policies or customs of a local governmental unit, a plaintiff must name the county or city itself as a party to the action, and not the particular municipal department or facility where the alleged violation occurred.") (citing *Nolan v. Snohomish County*, 59 Wn. App. 876, 883 (1990)). Despite this probable error, Defendants have failed to submit any fact establishing that either the sheriff's office or the crisis service is "indispensable." Therefore, the Court grants Rawson's motion as to these parties.

Likewise, Defendants fail to submit any fact establishing that Legacy Salmon Creek Medical Center is indispensable. Therefore, the Court grants Rawson's motion on Defendants' affirmative defense of failure to add an indispensable party.

Regarding the defense that Rawson's damages were cause by third parties, such a defense is an attack on the sufficiency of Rawson's claims and "is not a proper affirmative defense." *Moore v. King Cty. Fire Prot. Dist. No. 26*, C05-442JLR, 2006 WL 2061196, at *14 (W.D. Wash. July 21, 2006), *aff'd in part*, 327 Fed. Appx. 5 (9th Cir. 2009). For example, the question of

fact whether Rawson suffered damages caused by Defendants' actions is for the jury to decide based on the evidence presented. Defendants may present evidence of intervening or superseding causes of Rawson's alleged damages, but such evidence would not establish a proper affirmative defense. *Id*.; *see also Hernandez v. Cty. of Monterey*, 306 F.R.D. 279, 283 (N.D. Cal. 2015) ("An affirmative defense, under the meaning of Federal Rule of Civil Procedure 8(c), is a defense that does not negate the elements of the plaintiff's claim, but instead precludes liability even if all of the elements of the plaintiff's claim are proven."). Therefore, the Court grants Rawson's motion on this affirmative defense.

I. Trial

The Court finds that this matter is not currently ready for trial. Because of the uncertainty of Rawson's § 1983 claims and upon review of the pretrial filings, this matter is unmanageable in its current state and the Court has serious doubts as to the reliability of any jury verdict. Therefore, the Court *sua sponte* strikes the current trial date and pretrial conference. The Court does not reach this conclusion lightly, and the undersigned has never continued a trial due to manageability concerns. The Court has considered reasonable alternatives to moving trial at this late date but is unable to find an alternative that alleviates the concerns stated herein. This matter presents unique problems, identified above, that necessitates further narrowing of the issues before convening a jury to decide the issues. The parties shall file a joint status

report setting a proposed briefing schedule on the remaining issues, specifically Rawson's § 1983 claims, and a proposed trial date. The report shall be filed no later than December 14, 2018.

IV. ORDER

Therefore, it is hereby **ORDERED** that Defendants' motion for summary judgment, Dkt. 63, and Rawson's motion for partial summary judgment, Dkt. 58, are **GRANTED in part** and **DENIED in part** as stated herein. The pretrial conference and trial are **STRICKEN**. The parties shall file a joint status report no later than December 14, 2018.

Dated this 27th day of November, 2018.

/s/ Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KENNETH RAWSON, Plaintiff, v. RECOVERY INNOVATIONS, INC., et al., Defendants.	CASE NO. C17-5342 BHS ORDER DENYING IN PART AND RESERVING RULING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART AND RESERVING RULING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed May 2, 2019)

This matter comes before the Court on Defendants Jennifer Clingenpeel ("Clingenpeel"), Sami French ("French"), Vasant Halarnakar ("Halarnakar"), and Recovery Innovations, Inc.'s ("RI") (collectively "Defendants") motion for summary judgment, Dkt. 140, and Plaintiff Kenneth Rawson's ("Rawson") motion for partial summary judgment, Dkt. 136. The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

I. PROCEDURAL HISTORY

On May 8, 2017, Rawson filed a complaint against Defendants asserting numerous claims stemming from his involuntary commitment and treatment by Defendants. Dkt. 1. On June 8, 2017, Rawson filed an amended complaint against Defendants asserting that Defendants acted under color of law for purposes of 42 U.S.C. § 1983 and nine substantive claims as follows: (1) violation of his Fourth Amendment rights, (2) violation of his substantive due process rights under the Fourteenth Amendment, (3) violation of his procedural due process rights under the Fourteenth Amendment, (4) violations of the American with Disabilities Act ("ADA"), 42 U.S.C. § 12132, (5) outrage, (6) false imprisonment, (7) medical malpractice, (8) violations of the Washington Law Against Discrimination ("WLAD"), RCW Chapter 49.60, and (9) violations of the Washington Consumer Protection Act ("CPA"), RCW Chapter 19.86. Dkt. 5.

On July 20, 2017, Defendants filed a motion to dismiss arguing that (1) Rawson's § 1983 claims should be dismissed because Defendants are not state actors, (2) Rawson's ADA claim fails as a matter of law, and (3) Defendants are entitled to immunity from Rawson's state law claims. Dkt. 9. On October 25, 2017, the Court denied the motion concluding that (1) Rawson had asserted sufficient allegations to support a "government nexus" between Defendants and state actors and (2) Rawson has asserted sufficient allegations to support a theory that Defendants acted with gross negligence or bad faith, which overcomes the asserted

immunity defense. Dkt. 17. The Court did not address Rawson's ADA claim.

On April 13, 2018, Rawson filed a second amended complaint. Dkt. 35. Rawson asserted 66 paragraphs of factual allegations, a claim that Defendants acted under color of law, and ten substantive claims for relief. *Id.* §§ 4.4-4.66, 5.1-5.11. Rawson's substantive claims are as follows: (1) violation of his Fourth Amendment rights, (2) violation of his substantive due process rights under the Fourteenth Amendment, (3) violation of his procedural due process rights under the Fourteenth Amendment, (4) violations of the ADA, 42 U.S.C. § 12132, (5) outrage, (6) false imprisonment, (7) medical malpractice, (8) violations the WLAD, (9) violations of the CPA, and (10) a claim for excessive detention in violation of Washington's Involuntary Treatment Act ("ITA"), RCW 71.05.510. *Id.* §§ 5.2-5.11.

On September 5, 2018, Rawson filed a motion for partial summary judgment and Defendants filed a motion for summary judgment. Dkts. 58, 63. On November 27, 2018, the Court granted the motions in part and denied the motions in part, struck the impending trial, and requested a joint status report on further proceedings regarding Rawson's § 1983 claims. Dkt. 128.

Relevant to the instant motion, the Court found that it was unable to address Rawson's § 1983 claims "because Rawson has failed to explain the gravamen of his complaint with these detentions and what defendant violated his rights at what point during these detentions." Dkt. 128 at 20-21.

On January 31, 2019, Rawson filed a supplemental opening brief and Defendants filed a motion for partial summary judgment. Dkts. 136, 140. On February 19, 2019, the parties responded. Dkts. 144, 146. On February 22, 2019, the parties replied. Dkt. 148, 150.

II. FACTUAL BACKGROUND

A. RI

RI is a non-profit corporation incorporated in Arizona that is registered and licensed to do business in Washington. French, Clingenpeel and Halarnakar were employees of RI during the relevant period. In 2014, RI contracted with Optum Pierce Regional Support Network ("Optum") to open and operate a facility in Lakewood, Washington that provides evaluation and treatment ("E&T") services. The Lakewood facility is licensed to confine individuals who are involuntarily committed on an emergency basis under the ITA.

RI's facility was located on the grounds of one of Washington State's main mental hospitals, Western State Hospital. Dkt. 60-5 at 3. Halarnakar, RI's medical director, also worked full-time as a doctor at Western State Hospital and part-time as medical director of another E&T service. Dkt. 77-4 at 5.

B. Rawson

On March 5, 2015, Clark County Sheriff Officer Chris Nicholls detained Rawson and ordered a medical

transport to Legacy Salmon Creek Hospital for a mental evaluation. The incident report provides as follows:

> While working patrol I responded with other deputies to the Bank of America in Hazel Dell. While en route, I was advised that Kenneth Rawson had come back to the bank today after being at the bank the day before. While there the previous day, he had made statements about getting guns and committing mass murder in order for the police to take him seriously. Upon arrival I went in with Deputies O'Dell and Mike Johnson Jr. We made contact with Kenneth and I immediately placed my hands on his forearms and told him not to move. He stated that he had a gun on him and he would comply. I placed him in handcuffs and advised him that he was being detained and not under arrest. Although he did not physically resist me, he began to yell to everyone in the bank that he had a gun and that his rights were being violated. It was about 11:00 am at the time and there were numerous employees and customers in the building. Deputy Johnson stated that he had taken possession of Ken's loaded handgun and cleared it safely. A loaded Glock magazine was also found in his briefcase.
>
> Ken was taken outside and interviewed by other deputies while I went in and spoke with both Dejanira (DJ) and Jason, who are the Assistant Manager and Manager, respectively. DJ advised that she sat down with Ken yesterday and he began to talk about all the evil people who are against him. He told her

that he would sit in front of his TV and "they" would talk to him through his TV. He told her "they" were doing this because of his gun. He asked her if she knew what an AK-47 was but she did not. He explained that an AK-47 was used to shoot all the people in the theater in Colorado. Ken explained to DJ that he was having issues with his banks and his credit and he felt it was a conspiracy against him. He told DJ that all the evil people were making him crazy and that he might have to commit mass murder in order for the police to take him seriously and look at all the evidence he had. He explained again to DJ that all of his phone conversations are being monitored and his Veteran's Affairs (VA) paperwork is being intercepted.

Ken did have a valid concealed weapons permit issued by the Clark County Sheriff's Office. I recommend that this license be reviewed.

When I went outside, I could see and hear that Ken was talking to the other deputies about the same topics of how people are against him and how we all were going to pay. He had several pieces of printed out materials stapled together that he carried in his briefcase that he was concerned about. Per Sgt. Trimble's request, Kenneth was placed on a mental hold and transported to Legacy Salmon Creek Hospital via AMR ambulance. I followed the ambulance there and assisted in checking him in and advising the staff, to

> include the doctor on duty, of the situation and his statements. I completed a hold form.

Dkt. 57-11 at 4-5.

After Rawson's transport to the hospital, Clark County Designated Mental Health Professional ("DMHP") Al Padilla ("Padilla") evaluated Rawson. On March 6, 2018, Padilla filed a petition in state court for the involuntary commitment of Rawson and a 72-hour mental health evaluation. Dkt. 61-9.[1] Padilla arranged for Rawson to be evaluated at RI. Dkt. 61-10. When he arrived at RI, French, a Mental Health Professional, and Clingenpeel, an Advanced Registered Nurse Practitioner, evaluated him. Dkt. 61-11. After the evaluation, Clingenpeel prescribed some medication to address Rawson's "thoughts." *Id.* at 4. Rawson refused the medication. *Id.*

Based on their evaluation of Rawson, Clingenpeel and French completed a petition to involuntarily commit Rawson for fourteen days following the expiration of the initial 72-hour commitment. The petition states that Rawson is "gravely disabled" and "presents a likelihood of serious harm to others" and that he requires "intensive, supervised, 24-hour care." Dkt. 61-13. These conclusions were based on the information in the police report that people were talking to Rawson through the television and the bank employee's comment that Rawson stated he would have to commit mass murder, so

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[1] The parties have redacted a significant amount of information that is publicly available. For example, this allegation appears in Rawson's complaint yet is redacted in his motion.

the police would listen to him. *Id.* Regarding actual treatment at RI, the petition states that Rawson "continues to deny any problem other than the bank and police misunderstanding" and that he "continues to focus on being a victim and is passive in his participation in treatment." *Id.* On March 10, 2015, the court granted the petition and Rawson was involuntarily committed for the additional fourteen days.

On March 14, 2015, Medical Director Halarnakar met Rawson for the first time. Dkt. 61-6 at 8-9. Halarnakar's notes of this interaction state that Rawson was calm, cooperative and polite, but that his speech was pressured. Dkt. 61-12 at 6. Rawson told Halarnakar that he felt like his freedom had been taken away, that he didn't have any symptoms of schizophrenia, and that he didn't hear any voices. *Id.* Halarnakar wrote that Rawson needed to keep taking his medications after discharge and that the issue of Rawson's weapon with the Clark County Sheriff needed to be resolved before Rawson could be discharged. *Id.*

On March 15, 2015, RI fired Clingenpeel because her charting practices were not meeting the appropriate standard. Dkt. 61-15. With Clingenpeel gone, Halarnakar became Rawson's attending provider. Dkt. 61-6 at 13. On March 19, 2015, Halarnakar met with Rawson for a second time. In the notes from this meeting, Halarnakar documented two objective observations: (1) that Rawson became argumentative and denied having a mental illness or needing antipsychotic medications and (2) that he denied suicidal or homicidal ideations. Dkt. 61-12 at 7. Based on these

observations, Halarnakar concluded that Rawson had pressured speech, was very paranoid, had no insight, and needed further stabilization. *Id.* Halarnakar prescribed another medication and discussed with French the need to file a petition for an additional 90-day detention. *Id.*

Pursuant to Halarnakar's request, French drafted a petition that day. The petition requested an additional 90 days of involuntary treatment at RI. Dkt. 61-16. The petition alleged that Rawson had "threatened, attempted, or inflicted physical harm upon the person of another or him/herself, or substantial damage to property of another during the period in custody for evaluation and treatment, and presents a likelihood of serious harm." *Id.* Halarnakar and French declared that

> [Rawson], continues to display signs of paranoia and delusions with guarded interactions with others. He lacks any connection to the reality of his situation and the reasons that brought him to the evaluation and treatment center.
>
> ***
>
> [Rawson] attends groups and interacts occasionally outside of group time. He spends much of his time isolating in his room. At other times has threatened other guests when he does not believe he is being observed. [Rawson] does not acknowledge his mental illness and continues to blame his detainment on his clothing that he wore to the bank.

Id. They claimed that Rawson required "intensive, supervised, 24-hour care" and that the court should involuntarily commit him to Western State Hospital. *Id.*

On March 23, 2015, Rawson requested a jury trial on the petition. Dkt. 61-17. On March 24, 2015, the 14-day detention order expired, but RI detained Rawson while he awaited trial on the extended petition. On March 25, 2018, French emailed Pierce County Deputy Prosecuting Attorney Ken Nichols ("Nichols") informing him that the VA had a bed available for Rawson. Dkt. 61-19 at 2. Nichols replied as follows:

> By all means end [sic] him to the VA and get him off our radar!
>
> I don't really want to try this case.
>
> I'm not sure there is enough to convince a jury by clear cogent and convincing evidence that he needs to be at Western State.

Id. Despite this communication, Rawson remained at RI.

On April 9, 2015, Nichols informed French that Dr. James Manly ("Dr. Manly"), an expert psychiatrist, would come to RI to evaluate Rawson for trial. *Id.* at 46. The next day, Dr. Manly met with Rawson for three and a half hours. Dr. Manly's report provides as follows:

> Mr. Rawson presented for his appointment with good hygiene and grooming. His responses to the interview questions were cogent, detailed, lineal, and on topic. He

accurately described the events that led to his first psychiatric admission. He did not become defensive during the interview. He did report a minor level of frustration about why he continued to be hospitalized. Given the facts to this matter, his lack of current psychiatric symptoms, and his lack of mental health history, his expressed frustration did not strike me as unreasonable.

Mr. Rawson did not evidence pressured speech, tangential thinking, or obvious thinking errors. He did not evidence or report symptoms related to psychosis or a mood disorder. He did not report or evidence anger. In fact, throughout the interview Mr. Rawson maintained his composure and did not evidence or report thoughts of suicide or self-harm. He did not report or evidence a plan or desire to hurt another person.

As part of the interview, I administered the Personality Assessment Inventory (PAD. The validity indicators noted a mild level of defensiveness. His level of defensiveness is quite typical within forensic settings and not surprising in this situation. He reported some concern about his health, which coincided with his self-report of a spinal injury and bilateral sciatica. The resulting profile PAI was within normal limits. The scales related to mood, psychosis, and impulsivity were not significantly elevated.

I have also spoken to his father who has traveled from Mr. Rawson's home state of

> Texas. Mr. Rawson reported his son had no mental health history or history of violence to others.
>
> In summary, I do not find Mr. Rawson presently at risk to harm himself or being a danger to others.

Id.

On April 16, 2015, Nichols emailed Dr. Manly's report to Halarnakar and French. Dkt. 61-19 at 32. Nichols followed up with an email providing the statutory grounds for involuntary commitment and requesting that Halarnakar and French provide specific statements that Rawson made at RI that were threatening. *Id.* at 10. Halarnakar replied that Rawson "has refused to talk lately." *Id.* at 9. Nichols's response requested clarification that Halarnakar was forcefully medicating Rawson every night and, if so, that could explain why Rawson presented so well to Dr. Manly. *Id.* Halarnakar confirmed the nightly injections and stated that they did not have any "threatening statements." *Id.* Halarnakar also wrote that Rawson told them that "he won't hurt anyone." *Id.* Nichols wrote that he knew Rawson's "symptoms have subsided because he's been on meds, but without them maybe he would be gravely disabled quickly." *Id.* at 11. Halarnakar replied "[t]hat is the only argument we have." *Id.*

On April 27, 2015, Halarnakar wrote to Nichols informing him of a mutual resolution to the situation. Halarnakar stated that Rawson had agreed to sign a voluntary commitment form, and, in return, RI was

going to transport Rawson to the Portland VA so that he could be evaluated and, if necessary, treated at that inpatient facility. Dkt. 6112 at 9-10. Halarnakar stated that if Nichols agreed with the plan, then RI would transport Rawson the following day. *Id.* at 10. On April 29, 2015, RI discharged Rawson.

On August 16, 2016, the Washington Court of Appeals held that Rawson's "detention was improper because [Padilla] did not consult with an examining physician as required by RCW 71.05.154." *In re Det. of K.R.*, 195 Wn. App. 843, 846 (2016).

In support of his claims, Rawson has submitted the expert report of Dr. Jeffrey Geller ("Dr. Geller"). Dkt. 78. In short, Dr. Geller opines that RI's records do not support the decisions to involuntarily commit Rawson, RI's records do not support the medical decision to forcibly medicate Rawson, less restrictive alternatives existed, and RI's staff was not qualified to evaluate and treat Rawson. *Id.* at 81-82.

On the other hand, Defendants have submitted the expert report of Dr. Mark R. McClung ("Dr. McClung"). Dkt. 48-1. Dr. McClung opines that "[t]he length of time Mr. Rawson remained at Recovery Innovations was not related to any deficits in his psychiatric treatment." *Id.* at 4. He also opines that Rawson's entire period of involuntary commitment was medically justified. *Id.* For example, he declares that

> The Petition for 90-day commitment (completed by clinicians at Recovery Innovations) provides information to meet one of the two

> possible requirements for a 90-day commitment (threatened violence), as well as providing a relevant diagnosis and an opinion that [a least restrictive alternative] is not recommended.

Id.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*,

477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. 42 U.S.C. § 1983

To prevail under § 1983, a plaintiff must show (1) that defendants deprived him of a right secured by the Constitution or laws of the United States and (2) that, in doing so, Defendants acted under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 156-57 (1978).

In this case, the parties dispute whether Defendants acted under color of law and Defendants challenge the merits of Rawson's civil rights claims. Based on the extended discovery, Rawson has specifically identified three claims as follows: (1) a violation of his Fourteenth Amendment substantive due process rights when Defendants involuntarily committed him without legal justification, Dkt. 141 at 2-5, (2) a violation of his Fourth Amendment right to be free from an unreasonable seizure "[w]hen the Defendants knowingly, intentionally, or with a reckless disregard for the truth provided false information to the Superior Court," *id.* at 6-7, and (3) a violation of his Fourteenth Amendment substantive due process rights when Halarnakar ordered forced medication, *id.* at 7-8. The Court will address the color of law issues first and then proceed to the merits.

1. Under Color of Law

As a general rule, it is presumed that actions by private parties are not taken under color of state law. *Florer v. Congregation Pidyon Shevuyim, N.A.*, 639 F.3d 916, 922 (9th Cir. 2011) ("We start with the presumption that conduct by private actors is not state action."). However, "[i]f the [Constitution] is not to be displaced, . . . its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed."

Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001).

In this case, Rawson asserted state action under two theories: (1) government nexus and (2) public function. Dkt. 35, ¶ 5.1. The Court granted Defendants' previous summary judgment motion on the public function test. Dkt. 128 at 14-15. Thus, the Court turns to the government nexus test. "In order to be considered state action, when a private actor participates in a governmental act, the court must find a sufficiently close nexus between the state and the private actor 'so that the action of the latter may be fairly treated as that of the State itself.'" *Jensen v. Lane Cty.*, 222 F.3d 570, 575 (9th Cir. 2000) (quoting *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974)). "Faithful adherence to the 'state action' requirement . . . requires careful attention to the gravamen of the plaintiff's complaint." *Blum v. Yaretsky*, 457 U.S. 991, 1003 (1982). The Court will address state action as to each of Rawson's claims.

a. Involuntary Commitment

In its previous order, the Court stated "[t]he parties seem to implicitly agree that the facts of this case fall somewhere between the facts of *Jensen*, 222 F.3d 570, and the facts of *Hood v. King Cty.*, C15-828RSL, 2017 WL 979024, at *13 (W.D. Wash. Mar. 14, 2017), *aff'd sub nom. Hood v. Cty. of King*, 17-35320, 2018 WL 3462496 (9th Cir. July 18, 2018)." Dkt. 128 at 16. Rawson "does not agree at all" with this statement, and

instead contends that "*Jensen*, not *Hood* or *Jackson*, and not somewhere in between, provides the standard by which this case should be evaluated." Dkt. 136 at 4, 6. The Court will first summarize the authorities and then apply them to the facts of this matter.

In *Jensen*, the plaintiff was arrested after pointing his gun out a car window at a pedestrian. 222 F.3d at 572. Based on this incident and other information regarding plaintiff's threatening behavior, a public mental health specialist consulted with another public mental health specialist and Jeffrey M. Robbins, M.D. ("Dr. Robbins"), a private specialist under contract with the county. *Id.* at 572-73. After these consultations, the public mental health specialist recommended that plaintiff be detained for evaluation at a public mental health hospital. *Id.* at 573. Dr. Robbins signed an order detaining plaintiff without personally evaluating the plaintiff and based his decision entirely on the police reports and information gained from the public doctors. *Id.* Dr. Robbins briefly met with plaintiff over the course of the next three days of plaintiff's detention, but the plaintiff "did not cooperate in the examination, so Dr. Robbins again relied heavily on police reports and information obtained from [the public doctors] in deciding to continue [plaintiff's] detention." *Id.* On the fourth day of detention, a public doctor evaluated plaintiff and concluded that there was insufficient evidence to proceed with requesting a court order for additional detention. *Id.* Dr. Robbins agreed with this conclusion, and the plaintiff was released. *Id.*

Dr. Robbins moved for summary judgment on the plaintiff's § 1983 claim arguing that he did not act under color of law. *Id.* The district court granted the motion, but the Ninth Circuit reversed. *Id.* at 573, 575-76. The Ninth Circuit found and concluded as follows:

> The record is clear that Dr. Robbins and the County through its employees have undertaken a complex and deeply intertwined process of evaluating and detaining individuals who are believed to be mentally ill and a danger to themselves or others. County employees initiate the evaluation process, there is significant consultation with and among the various mental health professionals (including both [private] psychiatrists and county crisis workers), and [the private employer] helps to develop and maintain the mental health policies of [the public mental health hospital]. We are convinced that the state has so deeply insinuated itself into this process that there is "a sufficiently close nexus between the State and the challenged action of the [defendant] so that the action of the latter may be fairly treated as that of the State itself." *Jackson*, 419 U.S. at 350.

Jensen, 222 F.3d at 575.

On the other hand, in *Hood*, this Court concluded that the private actors did not act under color of law. Plaintiff Luci Hood was detained by deputies after they observed her approach other individuals in a threatening way. *Hood*, 2017 WL 979024 at *3. The deputies called an ambulance, which transported Ms.

Hood to a private hospital for an evaluation under the ITA. *Id.* Although the facts regarding the origination of Ms. Hood's detention do not appear in the published order, in the public, redacted version of the motion for summary judgment, the defendants assert that a team of two public DMHPs personally evaluated Ms. Hood at the private hospital and then filed a petition for a 72-hour involuntary hold. *Hood*, C15-828RSL, Dkt. 68 at 6-7. Once that hold was in place, Ms. Hood was transferred to another private hospital for treatment and evaluation. Ms. Hood alleged that the new hospital failed to provide an independent assessment of her mental health and continued the involuntary hold based purely on the DMHP's petition. *Id.*, Dkt. 1-1 at 10-11. Based on these facts, the Court found and concluded as follows:

> A sufficiently close nexus does not exist in this case. In *Jensen v. Lane County*, 222 F.3d 570 (9th Cir. 2000), the Ninth Circuit held that where a private medical provider and a county through its employees "have undertaken a complex and deeply intertwined process of evaluating and detaining individuals who are believed to be mentally ill and a danger to themselves or others," the government has "so deeply insinuated itself into this process that there is 'a sufficiently close nexus between the State and the challenged action of the defendant so that the action of the latter may fairly be treated as that of the State itself.'" *Jensen*, 222 F.3d at 575 (quoting *Jackson*, 419 U.S. at 350). Ms. Hood argues that *Jensen* controls here, but the Court disagrees.

In *Blum v. Yaretsky*, 457 U.S. 991 (1982), the U.S. Supreme Court found no state action where the challenged medical determinations were "made by private parties according to professional standards that are not established by the State." *Blum*, 457 U.S. at 1008. In *Jensen*, the Ninth Circuit distinguished *Blum* on the grounds that in *Jensen*, though the committing physician made the medical judgment under which the plaintiff was detained, "[c]ounty employees initiate[d] the evaluation process, [and] there [was] significant consultation with and among the various mental health professionals (including both [private] psychiatrists and county crisis workers)," such that the state's involvement in the decision-making process overrode the private provider's "purely medical judgment." *Jensen*, 222 F.3d at 575.

Such is not the case here. It is true that county law enforcement initiated Ms. Hood's ITA process; that county DMHPs relied significantly on the reports of hospital staff in conducting the assessment that led to Ms. Hood's 72-hour detention; that the hospital boarded Ms. Hood after the county DMHPs initiated the 72-hour detention; and that a hospital psychiatrist declined to release Ms. Hood apparently out of deference to the county DMHPs' detention recommendation. But unlike in *Jensen*, where the private practitioner was operating under contract with the county, 222 F.3d at 573, the private hospitals in this case were fulfilling their own statutory responsibilities under the ITA rather than a

> contractual responsibility to King County. Moreover, the plaintiff in *Jensen* was detained in a county psychiatric hospital, then discharged to the county jail, *id.*, while in this case Ms. Hood was detained exclusively at private hospitals and then released.
>
> The facts here reveal sustained and routine cooperation between King County and the hospitals, but they do not show that the county's involvement overrode the hospital staff's medical judgment such that the hospitals' actions can fairly be treated as those of the government. Accordingly, the hospitals were not acting under color of law, and Ms. Hood's constitutional claims against the hospitals for deprivation of liberty and privacy must be dismissed.

Hood, 2017 WL 979024 at *12-13.

Under these authorities, the Court disagrees with Rawson that Defendants were state actors at all times relevant to the complaint. Although Rawson presents very persuasive arguments to the contrary, the Court finds that the ITA's grant of authority to private parties to provide medical care and to petition courts for extended involuntary detention does not, in and of itself, create a sufficient nexus such that the private actors can be fairly treated as state actors. Rawson provides a chart comparing and contrasting the duties of an E&T facility versus a private hospital. Dkt. 136 at 5. While the chart and the accompanying discussion are persuasive, the Court has concluded that neither the medical care of involuntary detainees nor

petitioning the government to involuntarily detain a person are "both traditionally and exclusively governmental." Dkt. 128 at 15. The medical care aspect is fairly clear in that the ITA and numerous published authorities provide that private parties may care for such detainees with no connection to state action other than the state agent presented the patient to the private entity. *See, e.g.*, *Hood*, 2017 WL 979024 at *12-13. Similarly, the ITA provides that immediate family members may also petition the courts for involuntary commitment. RCW 71.05.201. Thus, in the absence of what may be aptly characterized as a facial finding of state action, the Court considers the specific factual circumstances presented under the standard of *Blum* and *Jensen*.

Under those authorities, the Court agrees with the analysis in *Hood* that *Jackson* and *Blum* set the standard for a sufficient nexus and that *Jensen* provides an exception. The Court must "start with the presumption that conduct by private actors is not state action." *Florer*, 639 F.3d at 922. In *Blum*, the plaintiffs failed to overcome this presumption because the challenged actions "ultimately turn on medical judgments made by private parties according to professional standards that are not established by the State." 457 U.S. at 1008. Similarly, in *Jackson*, the Court stated that the "State [must be] so far insinuated into a position of interdependence with the [private party] that it was a joint participant in the enterprise." 419 U.S. at 357-58. The *Jensen* court held that the "real issue . . . is whether the state's involvement in the decision-making process

rises to a level that overrides the 'purely medical judgment' rationale of *Blum.*" 222 F.3d at 575. Thus, Defendants are presumed to not be state actors unless and until Rawson establishes government involvement sufficient to override the purely medical judgment of the private individual.

In this case, Rawson alleges that his rights were violated for the duration of his entire 55-day detention. Dkt. 141 at 2. The Court disagrees for two reasons. First, the facts do not establish that RI is a government agent regardless of the patient or circumstance of admission. The Court agrees with Rawson that the fact that RI is under contract with the County and the fact that RI is located on State owned property are facts in favor of RI's dependence on the government. At most, however, these facts establish what entity pays the bills and what entity provides the location for the facility. They do not in and of themselves indicate coercion sufficient to overcome the medical personnel's independent medical judgment. The Court finds that there must be something more. *See, e.g.*, *Hood*, 2017 WL 979024, at *13 ("The facts here reveal sustained and routine cooperation between King County and the hospitals, but they do not show that the county's involvement overrode the hospital staff's medical judgment such that the hospitals' actions can fairly be treated as those of the government.").

Second, the facts surrounding Rawson's admission and initial detention at RI also fail to establish a sufficient nexus for state action. Rawson argues that the "violation of his constitutional rights began when

Clingenpeel concluded her purported evaluation but did not release him." Dkt. 136 at 8. While Rawson might show that Clingenpeel's judgment fell below the applicable standard of care, Rawson fails to establish that her decisions were in any way overridden by a state actor. At most, she relied on the police reports and DHMP Padilla's reports, but such reliance does not establish coercive conduct by those state actors. In fact, Rawson fails to submit any evidence to establish that RI's staff consulted or interacted with Padilla after Rawson was admitted to RI. There can be no "joint-enterprise" if the private actor is making medical decisions without contemporaneous involvement by a state actor. Therefore, the Court grants Defendants' motion on the portion of Rawson's claim relating to his initial detention at RI.

The next period of detention was pursuant to the 14-day petition Clingenpeel and French sent to Nichols. Similar to the initial detention, Rawson has failed to submit evidence to establish that either Clingenpeel or French's medical judgment were coerced or overridden by any state actor. Even if they relied only on the reports from state actors instead of personal evaluations of Rawson, such evidence does not establish that their medical judgments were overridden by the involvement of state actors. A subsequent abdication of a medical duty may not be imputed to the government based solely on previous government reports, no matter how damning those reports may be. Moreover, Rawson fails to identify any evidence establishing that Padilla interacted with RI's staff regarding the 14-day

petition, let alone to a level that overrode Clingenpeel or French's medical judgment. The Court also finds that Rawson's evidence of RI's policy or practice does not create a sufficient nexus to support state action. Rawson has submitted evidence that it was RI's policy or practice to file a 14-day petition for every patient. Dkt. 77-2 at 31. Although troubling and strong evidence of a failure to allow independent medical judgment, Rawson has failed to submit any evidence to establish that the County or any state actor mandated or influenced RI's alleged policy or practice. Thus, Rawson has failed to establish a nexus between the 14-day petition and a state actor, and the Court grants Defendants' motion on the portion of Rawson's claim relating to the 14-day petition.

Towards the end of the 14-day petition, Halarnakar concluded that Rawson required further detention. The Court notes that "[w]hether a private party engaged in state action is a highly factual question." *Brunette v. Humane Soc'y of Ventura Cty.*, 294 F.3d 1205, 1209 (9th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (Aug. 23, 2002) (citing *Howerton v. Gabica*, 708 F.2d 380, 383 (9th Cir. 1983)). As applied to this case, the Court questions whether any reasonable juror could conclude that Nichols involvement overrode Halarnakar's independent medical judgment after Halarnakar filed the 90-day petition. On March 19, 2015, French drafted a petition for an additional 90 days of confinement at Western State Hospital and sent it to Nichols. Halarnakar and French declared under penalty of perjury that Rawson

"present[ed] a likelihood of serious harm." Dkt. 61-16. They did not conclude that Rawson was gravely disabled, which is a separate ground to move for additional involuntary confinement. *Id.*; RCW 71.05.280(4). On March 23, 2015, after Nichols filed the petition in court, Rawson requested a jury trial on the petition. Dkt. 61-17. Two days later, French emailed Nichols informing him that the VA in Oregon had a bed available for Rawson, which was an alternative solution for Rawson to receive further treatment. Dkt. 61-19 at 2. Nichols replied that he "didn't really want to try [the] case" because he was "not sure there [was] enough to convince a jury by clear cogent and convincing evidence that he needs to be at Western State." *Id.* Despite the prosecutor's equivocation as to the strength of the evidence supporting Rawson's confinement, Rawson remained involuntarily committed.

On April 10, 2015, Rawson met with Dr. Manly, an expert retained by Rawson's attorney. After meeting with Rawson for a number of hours, Dr. Manly concluded that he did not "find Mr. Rawson presently at risk to harm himself or being a danger to others." *Id.* at 33.

After Dr. Manly's report, Nichols began a chain of communication with Halarnakar and French that evidences an increased interaction between the state and private actors. Nichols emailed Halarnakar and French requesting specific information regarding the threatening statements Rawson made while detained at RI. *Id.* at 10. Halarnakar wrote back that Rawson had "refused to talk lately." *Id.* at 9. Nichols responded

that the daily forced medical injections would explain why Rawson was able to "present well" to Dr. Manly and asked French for any documented threatening statements. *Id.* Halarnakar responded that RI did not have any threatening statements. *Id.* In a separate email, Nichols wrote as follows:

> We didn't allege grave disability
>
> Perhaps we should?
>
> I know his symptoms have subsided because he's been on meds, but without them maybe he would be gravely disabled quickly.
>
> It's always better to have a couple of theories, as opposed to all our eggs in one basket.

Id. at 11. It seems possible that a reasonable juror could read that email and reach the conclusion that Nichols offered the medical diagnosis of "grave disability" and provided the underlying medical reasoning for that diagnosis. In reply, Halarnakar wrote "Yes. That is the only argument we have." *Id.* In sum, Nichols initially questioned the medical evidence to continue Rawson's involuntary detention, Nichols suggested an alternative diagnosis with supporting reasons, and Halarnakar agreed to that diagnosis. These facts appear to favor Rawson's argument that state action was present.

On the other hand, Nichols declares that his role was limited. He states that his interactions with RI's staff "properly included discussions about the standards of proof that would apply at the trial, the kind of

evidence that would be useful at trial, and the hypothetical outcomes of the trial." Dkt. 72, ¶ 5. He also declares that he never "intended to influence Dr. Halarnakar's professional judgment regarding whether Mr. Rawson was a danger to others, whether he was gravely disabled. . . ." *Id.* ¶ 6. The Court recognizes Defendants' concern that a finding of state action in this case could hamper prosecutor's interactions with private medical providers in the future. However, the facts of this case appear to be sufficiently unique in that the prosecutor acknowledged he had a weak case based on the filed petition and was seeking additional grounds to present at trial. Regardless, the parties should be prepared to address this issue at oral argument.

Furthermore, the Court has identified two outstanding issues of law that the parties should be prepared to address. First, it is unclear whether the state actor's involvement *actually* overrode a medical judgment or whether the involvement must rise to a level sufficient to conclude that the coercion would overcome an independent judgment.

Second, Defendants dance around the issue of causation but never squarely address it with applicable authorities. The question becomes even if Nichols overrode Halamakar's professional judgment by coercing Halamakar to agree to a diagnosis of Rawson being gravely disabled, how did this result in violations of Rawson's rights? As far as the Court can tell, the 90-day petition was not amended. Similarly, it only appears that Nichols and Halarnakar had a plan to

present the gravely disabled theory at an upcoming trial but never actually presented or relied on that theory to Rawson's detriment. In other words, even if all the facts establish state action in preparing for the trial, how did this hypothetical state action result in a violation of Rawson's due process rights? The parties should be prepared to address these questions. Based on the outstanding questions, the Court reserves ruling on the parties' motions on this aspect of Rawson's claim.

b. Deliberate Fabrication of Evidence

Rawson alleges that French and Clingenpeel violated his rights when they "knowingly, intentionally, or with reckless disregard for the truth, presented false information to the Superior Court in support of their 14-day petition." Dkt. 141 at 6. Rawson, however, fails to submit any evidence to establish that French or Clingenpeel was acting under color of law when they submitted the 14-day petition. At most, they relied on Padilla's report and the police report to support the petition. The Court finds that reliance on such reports does not establish a sufficient nexus to overcome the presumption that private parties are not state actors. Therefore, the Court grants Defendants' motion and denies Rawson's motion on this claim.

c. Forced Medication

Rawson alleges that "Halarnakar's decision to have [Rawson] forcibly injected with powerful antipsychotic

medications every night for nearly one month constituted conscious indifference in violation of his Substantive Due Process rights under the Fourteenth Amendment." Dkt. 141 at 7. Rawson, however, fails to establish that Halarnakar's decision to force medicate was in any way influenced by a state actor or that his independent medical judgment was overborn by a state actor. Although Rawson asserts that Nichols knew that Halarnakar ordered Rawson to be forcefully medicated and supported that decision, there is no evidence to establish that Nichols's actions overcame Halarnakar's medical judgment. Dkt. 136 at 18-19. Instead, Halarnakar had issued the order to force medicate before Nichols became deeply involved in the matter. Therefore, the Court grants Defendants' motion and denies Rawson's motion on this claim.

2. Merits

A civil commitment constitutes a significant deprivation of liberty that requires due process protection. *Addington v. Texas*, 441 U.S. 418, 425 (1979). Substantive due process requires "that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Jackson v. Indiana*, 406 U.S. 715, 738 (1972).

In this case, Defendants do not challenge the underlying merits of Rawson's remaining due process claim or whether he has sufficient evidence on each element of the claim. Instead, Defendants argue that Rawson fails to establish a claim against RI as an

entity or Halarnakar as a supervisor based on the conduct of RI's employees and that Rawson's claims are barred by the *Noerr–Pennington* doctrine and the Washington litigation privilege. Dkt. 140 at 9–16. Regarding the claimed immunities, Defendants fail to show that either applies to the facts of this case. No doctrine immunizing filings with the Court seems applicable to the actions forming the basis of Rawson's remaining due process claim. Therefore, the Court denies Defendants' motion on these asserted immunities.

Regarding Rawson's supervisor liability claim against Halarnakar, a supervisor may "be liable in his individual capacity for his own culpable action or inaction in the training, supervision, or control of his subordinates; for his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous indifference to the rights of others." *Keates v. Koile*, 883 F.3d 1228, 1243 (9th Cir. 2018) (quoting *Starr v. Baca*, 652 F.3d 1202, 1208 (9th Cir. 2011)). If the Court finds state action in relation to the 90-day petition, Rawson has submitted evidence that at least establishes a question of fact whether Halarnakar is liable for the actions of French in drafting the 90-day petition as well as continuing Rawson's confinement despite medical evidence suggesting that it was not medically necessary to continue Rawson's involuntary confinement. Therefore, the Court reserves ruling on this issue.

Regarding RI's liability, Rawson's claim is based on RI's custom or policy and RI's failure to train. Dkt. 141 at 4-5. Rawson's policy or custom claim is focused

on the allegations and evidence that RI directs its staff to file a 14-day petition for every patient admitted to its facility. Dkt. 146 at 13-18. The Court grants Defendants' motion on this issue because the Court has found that RI's staff was not acting under color of law when it filed the 14-day petition to involuntary commit Rawson.

As to the failure to train, Rawson must show that (1) he was deprived of a constitutional right, (2) RI had a training policy that amounts to deliberate indifference to the constitutional rights of the persons with whom RI's staff are likely to come into contact; and (3) Rawson's constitutional injury would have been avoided had the RI properly trained those staff members. *Blankenhorn v. City of Orange*, 485 F.3d 463, 484 (9th Cir. 2007). If the Court finds state action, then Rawson has submitted evidence on each element of this claim. Rawson has established a question of fact as to the deprivation of his due process right. Dr. Geller opines that RI failed to properly train staff to document or treat the patients that they come into contact with, which results in a deprivation of due process rights. Dkt. 78 at 80 ("The notes in Rawson's chart were written almost exclusively by staff not licensed to prescribe medication or conduct psychiatric evaluations. [Medical health providers] were mostly social workers and lacked prescribing authority and an adequate educational background in psychiatry"). Finally, if RI had properly trained its staff, Rawson's prolonged detention could have been avoided because the staff would have been focused on the medical diagnosis of Rawson instead of RI's liability if they released Rawson.

See, e.g., Dkt. 61-19 at 20 ("I just talked with Dr. [Halarnakar] he wants to go through with the Jury Trial. Kenneth is not taking his medications or participating in treatment in any meaningful way. He, like me is worried that if Kenneth is released and shoots someone we do not want to be held liable.") (email from RI's non-medical management staff to Nichols). Therefore, the Court reserves ruling on Rawson's claim against RI for entity liability in the deprivation of his due process rights.

IV. ORDER

Therefore, it is hereby **ORDERED** that Defendants' motion for summary judgment, Dkt. 140, is **GRANTED in part** and Rawson's motion for partial summary judgment, Dkt. 136, is **DENIED in part**. Rawson's fabrication of evidence and forced injection claims are dismissed with prejudice for failure to establish state action. Rawson's due process claim based on wrongful detention is dismissed to the extent the claim is based on his original 72-hour detention and his detention pursuant to the 14-day petition. The Court **RESERVES** ruling on Rawson's due process claim for detention past the expiration of the 14-day petition.

Dated this 2nd day of May, 2019.

/s/ Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KENNETH RAWSON, Plaintiff, v. RECOVERY INNOVATIONS, INC., et al., Defendants.	CASE NO. C17-5342 BHS ORDER DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND GRANTING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (Filed May 9, 2019)

This matter comes before the Court on Defendants Jennifer Clingenpeel ("Clingenpeel"), Sami French ("French"), Vasant Halarnakar ("Halarnakar"), and Recovery Innovations, Inc.'s ("RI") (collectively "Defendants") motion for summary judgment, Dkt. 140, and Plaintiff Kenneth Rawson's ("Rawson") motion for partial summary judgment, Dkt. 136. The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

I. PROCEDURAL AND FACTUAL BACKGROUND

The parties and the Court are very familiar with the procedural history and the facts of this matter. Thus, the Court will only state some of the facts

relevant to the remaining portions of the parties' cross-motions.

On March 19, 2015, Halarnakar and French submitted a 90-day petition to continue Rawson's involuntary confinement. Dkt. 61-16. On March 23, 2015, Rawson requested a jury trial on the petition. Dkt. 61-17. On March 24, 2015, the 14-day detention order expired, but RI detained Rawson while he awaited trial on the extended petition. On March 25, 2018, French emailed Pierce County Deputy Prosecuting Attorney Ken Nichols ("Nichols") informing him that the VA had a bed available for Rawson. Dkt. 61-19 at 2. Nichols replied as follows:

> By all means end [sic] him to the VA and get him off our radar!
>
> I don't really want to try this case.
>
> I'm not sure there is enough to convince a jury by clear cogent and convincing evidence that he needs to be at Western State.

Id. Despite this communication, Rawson remained at RI.

On April 6, 2019, Christina Lutz ("Lutz"), a non-medical employee at RI, emailed Nichols regarding Rawson's continued detention. She stated that "I just talked with Dr. [Halarnakar] he wants to go through with the Jury Trial. Kenneth is not taking his medications or participating in treatment in any meaningful way." Dkt. 61-19 at 20. After this email, Nichols became more actively involved in preparation for the jury trial

on the 90-day petition. In the previous order, the Court cites Nichols's interactions with Halarnakar and French. *See* Dkt. 157 at 7-10.

On May 7, 2019, the Court heard oral argument on the remaining aspects of the parties' motions: (1) whether Nichols's involvement was sufficient to find state action and, (2) even if he was so involved, whether it caused any additional unconstitutional detention.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is

sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

B. 42 U.S.C. § 1983

The Court has adequately laid out what it considers the appropriate standard for state action in this matter. Dkt. 157 at 13-19. In sum, Rawson must establish that a state actor's involvement was sufficient to

overcome the purely medical judgment of the private actors. *Id.* After oral argument, the Court concludes that there was no state action in this matter and, even if there was, Rawson has failed to establish a triable issue of fact that Nichols's involvement caused any violation of his rights.

First, the evidence establishes that Halarnakar was going to proceed to trial on the 90-day petition regardless of any advice from Nichols. On March 25, 2019, Nichols stated that he was "not sure there is enough to convince a jury by clear cogent and convincing evidence that he needs to be at Western State." Dkt. 61-19 at 2. After that statement, Lutz stated that Halarnakar wanted to go to trial on the 90-day petition. Dkt. 61-19 at 20. Rawson has failed to submit any evidence to establish that Halarnakar ever changed his mind about either releasing Rawson or withdrawing the petition. Thus, there is no evidence to establish that Nichols's involvement overbore Halarnakar's medical judgment as to Rawson's detention. Under the Court's standard, there can be no state action if there is no favorable medical judgment to be overborne.

Second, the same evidence establishes that Nichols's involvement did not cause any constitutional violation. During oral argument, Defendants cited *Crumpton v. Gates*, 947 F.2d 1418 (9th Cir. 1991), for the proposition that Rawson must establish that the violation of his rights were proximately caused by conduct of a person acting under color of state law. *Id.* at 1420. Because the evidence establishes that Halarnakar was committed to trial on the 90-day petition,

Rawson fails to show that Nichols could have been the proximate cause of any unconstitutional detention. Therefore, the Court grants Defendants' motion as to state action and as to the merits and denies Rawson's motion.

III. ORDER

Therefore, it is hereby **ORDERED** that the remaining portion of Defendants' motion for summary judgment, Dkt. 140, is **GRANTED** and the remaining portion of Rawson's motion for partial summary judgment, Dkt. 136, is **DENIED**.

The parties are directed to submit a joint status report as to whether this order or the Court's previous order, Dkt. 157, moot any portion of their motions in limine, Dkts. 152, 154.

Dated this 9th day of May, 2019.

/s/ Benjamin H. Settle
BENJAMIN H. SETTLE
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KENNETH RAWSON, an individual, Plaintiff-Appellant, v. RECOVERY INNOVATIONS, INC., a corporation; SAMI FRENCH, an individual; JENNIFER CLINGENPEEL, an individual; VASANT HALARNAKAR, M.D., an individual, Defendants-Appellees.	No. 19-35520 D.C. No. 3:17-cv-05342-BHS Western District of Washington, Tacoma ORDER (Filed Oct. 15, 2020)

Before: CLIFTON, D.M. FISHER,* and M. SMITH, Circuit Judges.

The panel unanimously voted to deny the petition for panel rehearing. Judge M. Smith voted to deny the petition for rehearing en banc, and Judges Clifton and Fisher so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35.

* The Honorable D. Michael Fisher, United States Circuit Judge for the U.S. Court of Appeals for the Third Circuit, sitting by designation.

The petition for panel rehearing and the petition for rehearing en banc are **DENIED**.

RELEVANT STATUTORY PROVISIONS

RCW 71.05.010

Legislative intent.

(1) The provisions of this chapter apply to persons who are eighteen years of age or older and are intended by the legislature:

(a) To protect the health and safety of persons suffering from behavioral health disorders and to protect public safety through use of the parens patriae and police powers of the state;

(b) To prevent inappropriate, indefinite commitment of persons living with behavioral health disorders and to eliminate legal disabilities that arise from such commitment;

(c) To provide prompt evaluation and timely and appropriate treatment of persons with serious behavioral health disorders;

(d) To safeguard individual rights;

(e) To provide continuity of care for persons with serious behavioral health disorders;

(f) To encourage the full use of all existing agencies, professional personnel, and public funds to prevent duplication of services and unnecessary expenditures; and

(g) To encourage, whenever appropriate, that services be provided within the community.

(2) When construing the requirements of this chapter the court must focus on the merits of the petition, except where requirements have been totally disregarded, as provided in *In re C.W.*, 147 Wn.2d 259, 281 (2002). A presumption in favor of deciding petitions on their merits furthers both public and private interests because the mental and physical well-being of individuals as well as public safety may be implicated by the decision to release an individual and discontinue his or her treatment.

RCW 71.05.020

Definitions. ***(Effective until July 1, 2022.)***

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Admission" or "admit" means a decision by a physician, physician assistant, or psychiatric advanced registered nurse practitioner that a person should be examined or treated as a patient in a hospital;

(2) "Alcoholism" means a disease, characterized by a dependency on alcoholic beverages, loss of control over the amount and circumstances of use, symptoms of tolerance, physiological or psychological withdrawal, or both, if use is reduced or discontinued, and impairment of health or disruption of social or economic functioning;

(3) "Antipsychotic medications" means that class of drugs primarily used to treat serious manifestations of mental illness associated with thought disorders, which includes, but is not limited to atypical antipsychotic medications;

(4) "Approved substance use disorder treatment program" means a program for persons with a substance use disorder provided by a treatment program certified by the department as meeting standards adopted under chapter 71.24 RCW;

(5) "Attending staff" means any person on the staff of a public or private agency having responsibility for the care and treatment of a patient;

(6) "Authority" means the Washington state health care authority;

(7) "Behavioral health disorder" means either a mental disorder as defined in this section, a substance use disorder as defined in this section, or a co-occurring mental disorder and substance use disorder;

(8) "Behavioral health service provider" means a public or private agency that provides mental health, substance use disorder, or co-occurring disorder services to persons with behavioral health disorders as defined under this section and receives funding from public sources. This includes, but is not limited to, hospitals licensed under chapter 70.41 RCW, evaluation and treatment facilities as defined in this section, community mental health service delivery systems or community behavioral health programs as defined in RCW

71.24.025, facilities conducting competency evaluations and restoration under chapter 10.77 RCW, approved substance use disorder treatment programs as defined in this section, secure withdrawal management and stabilization facilities as defined in this section, and correctional facilities operated by state and local governments;

(9) "Co-occurring disorder specialist" means an individual possessing an enhancement granted by the department of health under chapter 18.205 RCW that certifies the individual to provide substance use disorder counseling subject to the practice limitations under RCW 18.205.105;

(10) "Commitment" means the determination by a court that a person should be detained for a period of either evaluation or treatment, or both, in an inpatient or a less restrictive setting;

(11) "Conditional release" means a revocable modification of a commitment, which may be revoked upon violation of any of its terms;

(12) "Crisis stabilization unit" means a short-term facility or a portion of a facility licensed or certified by the department, such as an evaluation and treatment facility or a hospital, which has been designed to assess, diagnose, and treat individuals experiencing an acute crisis without the use of long-term hospitalization;

(13) "Custody" means involuntary detention under the provisions of this chapter or chapter 10.77

RCW, uninterrupted by any period of unconditional release from commitment from a facility providing involuntary care and treatment;

(14) "Department" means the department of health;

(15) "Designated crisis responder" means a mental health professional appointed by the county, by an entity appointed by the county, or by the authority in consultation with a federally recognized Indian tribe or after meeting and conferring with an Indian health care provider, to perform the duties specified in this chapter;

(16) "Detention" or "detain" means the lawful confinement of a person, under the provisions of this chapter;

(17) "Developmental disabilities professional" means a person who has specialized training and three years of experience in directly treating or working with persons with developmental disabilities and is a psychiatrist, physician assistant working with a supervising psychiatrist, psychologist, psychiatric advanced registered nurse practitioner, or social worker, and such other developmental disabilities professionals as may be defined by rules adopted by the secretary of the department of social and health services;

(18) "Developmental disability" means that condition defined in RCW 71A.10.020(5);

(19) "Director" means the director of the authority;

(20) "Discharge" means the termination of hospital medical authority. The commitment may remain in place, be terminated, or be amended by court order;

(21) "Drug addiction" means a disease, characterized by a dependency on psychoactive chemicals, loss of control over the amount and circumstances of use, symptoms of tolerance, physiological or psychological withdrawal, or both, if use is reduced or discontinued, and impairment of health or disruption of social or economic functioning;

(22) "Evaluation and treatment facility" means any facility which can provide directly, or by direct arrangement with other public or private agencies, emergency evaluation and treatment, outpatient care, and timely and appropriate inpatient care to persons suffering from a mental disorder, and which is licensed or certified as such by the department. The authority may certify single beds as temporary evaluation and treatment beds under RCW 71.05.745. A physically separate and separately operated portion of a state hospital may be designated as an evaluation and treatment facility. A facility which is part of, or operated by, the department of social and health services or any federal agency will not require certification. No correctional institution or facility, or jail, shall be an evaluation and treatment facility within the meaning of this chapter;

(23) "Gravely disabled" means a condition in which a person, as a result of a behavioral health disorder: (a) Is in danger of serious physical harm resulting from a failure to provide for his or her essential

human needs of health or safety; or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety;

(24) "Habilitative services" means those services provided by program personnel to assist persons in acquiring and maintaining life skills and in raising their levels of physical, mental, social, and vocational functioning. Habilitative services include education, training for employment, and therapy. The habilitative process shall be undertaken with recognition of the risk to the public safety presented by the person being assisted as manifested by prior charged criminal conduct;

(25) "Hearing" means any proceeding conducted in open court that conforms to the requirements of RCW 71.05.820;

(26) "History of one or more violent acts" refers to the period of time ten years prior to the filing of a petition under this chapter, excluding any time spent, but not any violent acts committed, in a behavioral health facility, or in confinement as a result of a criminal conviction;

(27) "Imminent" means the state or condition of being likely to occur at any moment or near at hand, rather than distant or remote;

(28) "In need of assisted outpatient behavioral health treatment" means that a person, as a result of

a behavioral health disorder: (a) Has been committed by a court to detention for involuntary behavioral health treatment during the preceding thirty-six months; (b) is unlikely to voluntarily participate in outpatient treatment without an order for less restrictive alternative treatment, based on a history of nonadherence with treatment or in view of the person's current behavior; (c) is likely to benefit from less restrictive alternative treatment; and (d) requires less restrictive alternative treatment to prevent a relapse, decompensation, or deterioration that is likely to result in the person presenting a likelihood of serious harm or the person becoming gravely disabled within a reasonably short period of time;

(29) "Individualized service plan" means a plan prepared by a developmental disabilities professional with other professionals as a team, for a person with developmental disabilities, which shall state:

(a) The nature of the person's specific problems, prior charged criminal behavior, and habilitation needs;

(b) The conditions and strategies necessary to achieve the purposes of habilitation;

(c) The intermediate and long-range goals of the habilitation program, with a projected timetable for the attainment;

(d) The rationale for using this plan of habilitation to achieve those intermediate and long-range goals;

(e) The staff responsible for carrying out the plan;

(f) Where relevant in light of past criminal behavior and due consideration for public safety, the criteria for proposed movement to less-restrictive settings, criteria for proposed eventual discharge or release, and a projected possible date for discharge or release; and

(g) The type of residence immediately anticipated for the person and possible future types of residences;

(30) "Intoxicated person" means a person whose mental or physical functioning is substantially impaired as a result of the use of alcohol or other psychoactive chemicals;

(31) "Judicial commitment" means a commitment by a court pursuant to the provisions of this chapter;

(32) "Legal counsel" means attorneys and staff employed by county prosecutor offices or the state attorney general acting in their capacity as legal representatives of public behavioral health service providers under RCW 71.05.130;

(33) "Less restrictive alternative treatment" means a program of individualized treatment in a less restrictive setting than inpatient treatment that includes the services described in RCW 71.05.585;

(34) "Licensed physician" means a person licensed to practice medicine or osteopathic medicine and surgery in the state of Washington;

(35) "Likelihood of serious harm" means:

(a) A substantial risk that: (i) Physical harm will be inflicted by a person upon his or her own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on oneself; (ii) physical harm will be inflicted by a person upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm; or (iii) physical harm will be inflicted by a person upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others; or

(b) The person has threatened the physical safety of another and has a history of one or more violent acts;

(36) "Medical clearance" means a physician or other health care provider has determined that a person is medically stable and ready for referral to the designated crisis responder;

(37) "Mental disorder" means any organic, mental, or emotional impairment which has substantial adverse effects on a person's cognitive or volitional functions;

(38) "Mental health professional" means a psychiatrist, psychologist, physician assistant working with a supervising psychiatrist, psychiatric advanced

registered nurse practitioner, psychiatric nurse, or social worker, and such other mental health professionals as may be defined by rules adopted by the secretary pursuant to the provisions of this chapter;

(39) "Peace officer" means a law enforcement official of a public agency or governmental unit, and includes persons specifically given peace officer powers by any state law, local ordinance, or judicial order of appointment;

(40) "Physician assistant" means a person licensed as a physician assistant under chapter *18.57A or 18.71A RCW;

(41) "Private agency" means any person, partnership, corporation, or association that is not a public agency, whether or not financed in whole or in part by public funds, which constitutes an evaluation and treatment facility or private institution, or hospital, or approved substance use disorder treatment program, which is conducted for, or includes a department or ward conducted for, the care and treatment of persons with behavioral health disorders;

(42) "Professional person" means a mental health professional, substance use disorder professional, or designated crisis responder and shall also mean a physician, physician assistant, psychiatric advanced registered nurse practitioner, registered nurse, and such others as may be defined by rules adopted by the secretary pursuant to the provisions of this chapter;

(43) "Psychiatric advanced registered nurse practitioner" means a person who is licensed as an advanced registered nurse practitioner pursuant to chapter 18.79 RCW; and who is board certified in advanced practice psychiatric and mental health nursing;

(44) "Psychiatrist" means a person having a license as a physician and surgeon in this state who has in addition completed three years of graduate training in psychiatry in a program approved by the American medical association or the American osteopathic association and is certified or eligible to be certified by the American board of psychiatry and neurology;

(45) "Psychologist" means a person who has been licensed as a psychologist pursuant to chapter 18.83 RCW;

(46) "Public agency" means any evaluation and treatment facility or institution, secure withdrawal management and stabilization facility, approved substance use disorder treatment program, or hospital which is conducted for, or includes a department or ward conducted for, the care and treatment of persons with behavioral health disorders, if the agency is operated directly by federal, state, county, or municipal government, or a combination of such governments;

(47) "Release" means legal termination of the commitment under the provisions of this chapter;

(48) "Resource management services" has the meaning given in chapter RCW;

(49) "Secretary" means the secretary of the department of health, or his or her designee;

(50) "Secure withdrawal management and stabilization facility" means a facility operated by either a public or private agency or by the program of an agency which provides care to voluntary individuals and individuals involuntarily detained and committed under this chapter for whom there is a likelihood of serious harm or who are gravely disabled due to the presence of a substance use disorder. Secure withdrawal management and stabilization facilities must:

(a) Provide the following services:

(i) Assessment and treatment, provided by certified substance use disorder professionals or co-occurring disorder specialists;

(ii) Clinical stabilization services;

(iii) Acute or subacute detoxification services for intoxicated individuals; and

(iv) Discharge assistance provided by certified substance use disorder professionals or co-occurring disorder specialists, including facilitating transitions to appropriate voluntary or involuntary inpatient services or to less restrictive alternatives as appropriate for the individual;

(b) Include security measures sufficient to protect the patients, staff, and community; and

(c) Be licensed or certified as such by the department of health;

(51) "Social worker" means a person with a master's or further advanced degree from a social work educational program accredited and approved as provided in RCW 18.320.010;

(52) "Substance use disorder" means a cluster of cognitive, behavioral, and physiological symptoms indicating that an individual continues using the substance despite significant substance-related problems. The diagnosis of a substance use disorder is based on a pathological pattern of behaviors related to the use of the substances;

(53) "Substance use disorder professional" means a person certified as a substance use disorder professional by the department of health under chapter 18.205 RCW;

(54) "Therapeutic court personnel" means the staff of a mental health court or other therapeutic court which has jurisdiction over defendants who are dually diagnosed with mental disorders, including court personnel, probation officers, a court monitor, prosecuting attorney, or defense counsel acting within the scope of therapeutic court duties;

(55) "Treatment records" include registration and all other records concerning persons who are receiving or who at any time have received services for behavioral health disorders, which are maintained by the department of social and health services, the department, the authority, behavioral health administrative services organizations and their staffs, managed care organizations and their staffs, and by treatment

facilities. Treatment records include mental health information contained in a medical bill including but not limited to mental health drugs, a mental health diagnosis, provider name, and dates of service stemming from a medical service. Treatment records do not include notes or records maintained for personal use by a person providing treatment services for the department of social and health services, the department, the authority, behavioral health administrative services organizations, managed care organizations, or a treatment facility if the notes or records are not available to others;

(56) "Triage facility" means a short-term facility or a portion of a facility licensed or certified by the department, which is designed as a facility to assess and stabilize an individual or determine the need for involuntary commitment of an individual, and must meet department residential treatment facility standards. A triage facility may be structured as a voluntary or involuntary placement facility;

(57) "Video," unless the context clearly indicates otherwise, means the delivery of behavioral health services through the use of interactive audio and video technology, permitting real-time communication between a person and a designated crisis responder, for the purpose of evaluation. "Video" does not include the use of audio-only telephone, facsimile, email, or store and forward technology. "Store and forward technology" means use of an asynchronous transmission of a person's medical information from a mental health service provider to the designated crisis responder which

results in medical diagnosis, consultation, or treatment;

(58) "Violent act" means behavior that resulted in homicide, attempted suicide, injury, or substantial loss or damage to property;

(59) "Written order of apprehension" means an order of the court for a peace officer to deliver the named person in the order to a facility or emergency room as determined by the designated crisis responder. Such orders shall be entered into the Washington crime information center database.

RCW 71.05.153

Emergency detention of persons with behavioral health disorders—Procedure. ***(Effective until January 1, 2021.)***

(1) When a designated crisis responder receives information alleging that a person, as the result of a behavioral health disorder, presents an imminent likelihood of serious harm, or is in imminent danger because of being gravely disabled, after investigation and evaluation of the specific facts alleged and of the reliability and credibility of the person or persons providing the information if any, the designated crisis responder may take such person, or cause by oral or written order such person to be taken into emergency custody in an evaluation and treatment facility, secure withdrawal management and stabilization facility if available with adequate space for the person, or approved substance

use disorder treatment program if available with adequate space for the person, for not more than seventy-two hours as described in RCW 71.05.180.

(2)(a) Subject to (b) of this subsection, a peace officer may take or cause such person to be taken into custody and immediately delivered to a triage facility, crisis stabilization unit, evaluation and treatment facility, secure withdrawal management and stabilization facility, approved substance use disorder treatment program, or the emergency department of a local hospital under the following circumstances:

(i) Pursuant to subsection (1) of this section; or

(ii) When he or she has reasonable cause to believe that such person is suffering from a behavioral health disorder and presents an imminent likelihood of serious harm or is in imminent danger because of being gravely disabled.

(b) A peace officer's delivery of a person, to a secure withdrawal management and stabilization facility or approved substance use disorder treatment program is subject to the availability of a secure withdrawal management and stabilization facility or approved substance use disorder treatment program with adequate space for the person.

(3) Persons delivered to a crisis stabilization unit, evaluation and treatment facility, emergency department of a local hospital, triage facility that has elected to operate as an involuntary facility, secure withdrawal management and stabilization facility, or

approved substance use disorder treatment program by peace officers pursuant to subsection (2) of this section may be held by the facility for a period of up to twelve hours, not counting time periods prior to medical clearance.

(4) Within three hours after arrival, not counting time periods prior to medical clearance, the person must be examined by a mental health professional or substance use disorder professional. Within twelve hours of notice of the need for evaluation, not counting time periods prior to medical clearance, the designated crisis responder must determine whether the individual meets detention criteria. The interview performed by the designated crisis responder may be conducted by video provided that a licensed health care professional or professional person who can adequately and accurately assist with obtaining any necessary information is present with the person at the time of the interview. If the individual is detained, the designated crisis responder shall file a petition for detention or a supplemental petition as appropriate and commence service on the designated attorney for the detained person. If the individual is released to the community, the behavioral health service provider shall inform the peace officer of the release within a reasonable period of time after the release if the peace officer has specifically requested notification and provided contact information to the provider.

(5) Dismissal of a commitment petition is not the appropriate remedy for a violation of the timeliness requirements of this section based on the intent of this

chapter under RCW 71.05.010 except in the few cases where the facility staff or designated crisis responder has totally disregarded the requirements of this section.

RCW 71.05.170

Acceptance of petition—Notice—Duty of state hospital. ***(Effective until January 1, 2021.)***

Whenever the designated crisis responder petitions for detention of a person whose actions constitute a likelihood of serious harm, or who is gravely disabled, the facility providing seventy-two hour evaluation and treatment must immediately accept on a provisional basis the petition and the person. The facility shall then evaluate the person's condition and admit, detain, transfer, or discharge such person in accordance with RCW 71.05.210. The facility shall notify in writing the court and the designated crisis responder of the date and time of the initial detention of each person involuntarily detained in order that a probable cause hearing shall be held no later than seventy-two hours after detention.

The duty of a state hospital to accept persons for evaluation and treatment under this section shall be limited by chapter 71.24 RCW.

RCW 71.05.210

Evaluation—Treatment and care—Release or other disposition. ***(Effective until January 1, 2021.)***

(1) Each person involuntarily detained and accepted or admitted at an evaluation and treatment facility, secure withdrawal management and stabilization facility, or approved substance use disorder treatment program:

(a) Shall, within twenty-four hours of his or her admission or acceptance at the facility, not counting time periods prior to medical clearance, be examined and evaluated by:

(i) One physician, physician assistant, or advanced registered nurse practitioner; and

(ii) One mental health professional. If the person is detained for substance use disorder evaluation and treatment, the person may be examined by a substance use disorder professional instead of a mental health professional; and

(b) Shall receive such treatment and care as his or her condition requires including treatment on an outpatient basis for the period that he or she is detained, except that, beginning twenty-four hours prior to a trial or hearing pursuant to RCW 71.05.215, 71.05.240, 71.05.310, 71.05.320, 71.05.590, or 71.05.217, the individual may refuse psychiatric medications, but may not refuse: (i) Any other medication previously prescribed by a person licensed under Title 18 RCW; or

(ii) emergency lifesaving treatment, and the individual shall be informed at an appropriate time of his or her right of such refusal. The person shall be detained up to seventy-two hours, if, in the opinion of the professional person in charge of the facility, or his or her professional designee, the person presents a likelihood of serious harm, or is gravely disabled. A person who has been detained for seventy-two hours shall no later than the end of such period be released, unless referred for further care on a voluntary basis, or detained pursuant to court order for further treatment as provided in this chapter.

(2) If, after examination and evaluation, the mental health professional or substance use disorder professional and licensed physician, physician assistant, or psychiatric advanced registered nurse practitioner determine that the initial needs of the person, if detained to an evaluation and treatment facility, would be better served by placement in a substance use disorder treatment program, or, if detained to a secure withdrawal management and stabilization facility or approved substance use disorder treatment program, would be better served in an evaluation and treatment facility then the person shall be referred to the more appropriate placement; however, a person may only be referred to a secure withdrawal management and stabilization facility or approved substance use disorder treatment program if there is an available secure withdrawal management and stabilization facility or approved substance use disorder treatment program with adequate space for the person.

(3) An evaluation and treatment center, secure withdrawal management and stabilization facility, or approved substance use disorder treatment program admitting or accepting any person pursuant to this chapter whose physical condition reveals the need for hospitalization shall assure that such person is transferred to an appropriate hospital for evaluation or admission for treatment. Notice of such fact shall be given to the court, the designated attorney, and the designated crisis responder and the court shall order such continuance in proceedings under this chapter as may be necessary, but in no event may this continuance be more than fourteen days.

RCW 71.05.230

Commitment beyond initial seventy-two hour evaluation and treatment period—Petition for fourteen day involuntary treatment or ninety days of less restrictive alternative treatment—Procedure. ***(Effective until January 1, 2021.)***

A person detained for seventy-two hour evaluation and treatment may be committed for not more than fourteen additional days of involuntary intensive treatment or ninety additional days of a less restrictive alternative treatment. A petition may only be filed if the following conditions are met:

(1) The professional staff of the facility providing evaluation services has analyzed the person's condition and finds that the condition is caused by a

behavioral health disorder and results in: (a) A likelihood of serious harm; (b) the person being gravely disabled; or (c) the person being in need of assisted outpatient behavioral health treatment; and are prepared to testify those conditions are met; and

(2) The person has been advised of the need for voluntary treatment and the professional staff of the facility has evidence that he or she has not in good faith volunteered; and

(3) The facility providing intensive treatment is certified to provide such treatment by the department or under RCW 71.05.745; and

(4)(a)(i) The professional staff of the facility or the designated crisis responder has filed a petition with the court for a fourteen day involuntary detention or a ninety day less restrictive alternative. The petition must be signed by:

(A) One physician, physician assistant, or psychiatric advanced registered nurse practitioner; and

(B) One physician, physician assistant, psychiatric advanced registered nurse practitioner, or mental health professional.

(ii) If the petition is for substance use disorder treatment, the petition may be signed by a substance use disorder professional instead of a mental health professional and by an advanced registered nurse practitioner instead of a psychiatric advanced registered nurse practitioner. The persons signing the petition must have examined the person.

(b) If involuntary detention is sought the petition shall state facts that support the finding that such person, as a result of a behavioral health disorder, presents a likelihood of serious harm, or is gravely disabled and that there are no less restrictive alternatives to detention in the best interest of such person or others. The petition shall state specifically that less restrictive alternative treatment was considered and specify why treatment less restrictive than detention is not appropriate. If an involuntary less restrictive alternative is sought, the petition shall state facts that support the finding that such person, as a result of a behavioral health disorder, presents a likelihood of serious harm, is gravely disabled, or is in need of assisted outpatient behavioral health treatment, and shall set forth any recommendations for less restrictive alternative treatment services; and

(5) A copy of the petition has been served on the detained person, his or her attorney and his or her guardian or conservator, if any, prior to the probable cause hearing; and

(6) The court at the time the petition was filed and before the probable cause hearing has appointed counsel to represent such person if no other counsel has appeared; and

(7) The petition reflects that the person was informed of the loss of firearm rights if involuntarily committed for mental health treatment; and

(8) At the conclusion of the initial commitment period, the professional staff of the agency or facility or

the designated crisis responder may petition for an additional period of either ninety days of less restrictive alternative treatment or ninety days of involuntary intensive treatment as provided in RCW 71.05.290; and

(9) If the hospital or facility designated to provide less restrictive alternative treatment is other than the facility providing involuntary treatment, the outpatient facility so designated to provide less restrictive alternative treatment has agreed to assume such responsibility.

RCW 71.05.280

Additional commitment—Grounds.

At the expiration of the fourteen-day period of intensive treatment, a person may be committed for further treatment pursuant to RCW 71.05.320 if:

(1) Such person after having been taken into custody for evaluation and treatment has threatened, attempted, or inflicted: (a) Physical harm upon the person of another or himself or herself, or substantial damage upon the property of another, and (b) as a result of a behavioral health disorder presents a likelihood of serious harm; or

(2) Such person was taken into custody as a result of conduct in which he or she attempted or inflicted physical harm upon the person of another or himself or herself, or substantial damage upon the property of others, and continues to present, as a result

of a behavioral health disorder, a likelihood of serious harm; or

(3) Such person has been determined to be incompetent and criminal charges have been dismissed pursuant to RCW 10.77.086(4), and has committed acts constituting a felony, and as a result of a behavioral health disorder, presents a substantial likelihood of repeating similar acts.

(a) In any proceeding pursuant to this subsection it shall not be necessary to show intent, willfulness, or state of mind as an element of the crime;

(b) For any person subject to commitment under this subsection where the charge underlying the finding of incompetence is for a felony classified as violent under RCW 9.94A.030, the court shall determine whether the acts the person committed constitute a violent offense under RCW 9.94A.030; or

(4) Such person is gravely disabled; or

(5) Such person is in need of assisted outpatient behavioral health treatment.

RCW 71.05.290

Petition for additional commitment—Affidavit.

(1) At any time during a person's fourteen day intensive treatment period, the professional person in charge of a treatment facility or his or her professional designee or the designated crisis responder may

petition the superior court for an order requiring such person to undergo an additional period of treatment. Such petition must be based on one or more of the grounds set forth in RCW 71.05.280.

(2)(a)(i) The petition shall summarize the facts which support the need for further commitment and shall be supported by affidavits based on an examination of the patient and signed by:

(A) One physician, physician assistant, or psychiatric advanced registered nurse practitioner; and

(B) One physician, physician assistant, psychiatric advanced registered nurse practitioner, or mental health professional.

(ii) If the petition is for substance use disorder treatment, the petition may be signed by a substance use disorder professional instead of a mental health professional and by an advanced registered nurse practitioner instead of a psychiatric advanced registered nurse practitioner.

(b) The affidavits shall describe in detail the behavior of the detained person which supports the petition and shall explain what, if any, less restrictive treatments which are alternatives to detention are available to such person, and shall state the willingness of the affiant to testify to such facts in subsequent judicial proceedings under this chapter. If less restrictive alternative treatment is sought, the petition shall set forth any recommendations for less restrictive alternative treatment services.

(3) If a person has been determined to be incompetent pursuant to RCW 10.77.086(4), then the professional person in charge of the treatment facility or his or her professional designee or the designated crisis responder may directly file a petition for one hundred eighty-day treatment under RCW 71.05.280(3), or for ninety-day treatment under RCW 71.05.280(1), (2), (4), or (5). No petition for initial detention or fourteen day detention is required before such a petition may be filed.

RCW 71.05.310

Time for hearing—Due process—Jury trial Continuation of treatment.

The court shall set a hearing on the petition for ninety-day or one hundred eighty-day treatment within five judicial days of the trial setting hearing, or within ten judicial days for a petition filed under RCW 71.05.280(3). The court may continue the hearing in accordance with RCW 71.05.236. If the person named in the petition requests a jury trial, the trial must be set within ten judicial days of the next judicial day after the date of filing the petition. The burden of proof shall be by clear, cogent, and convincing evidence and shall be upon the petitioner. The person has the right to be present at such proceeding, which shall in all respects accord with the constitutional guarantees of due process of law and the rules of evidence under RCW 71.05.217.

During the proceeding, the person named in the petition shall continue to be treated until released by order of the superior court or discharged by the behavioral health service provider. If the hearing has not commenced within thirty days after the filing of the petition, not including extensions of time ordered under RCW 71.05.236, the detained person shall be released.

RCW 71.05.320

Remand for additional treatment—Less restrictive alternatives—Duration—Grounds—Hearing. (Effective until July 1, 2026.)

(1)(a) Subject to (b) of this subsection, if the court or jury finds that grounds set forth in RCW 71.05.280 have been proven and that the best interests of the person or others will not be served by a less restrictive treatment which is an alternative to detention, the court shall remand him or her to the custody of the department of social and health services or to a facility certified for ninety day treatment by the department for a further period of intensive treatment not to exceed ninety days from the date of judgment.

(b) If the order for inpatient treatment is based on a substance use disorder, treatment must take place at an approved substance use disorder treatment program. The court may only enter an order for commitment based on a substance use disorder if there is an

available approved substance use disorder treatment program with adequate space for the person.

(c) If the grounds set forth in RCW 71.05.280(3) are the basis of commitment, then the period of treatment may be up to but not exceed one hundred eighty days from the date of judgment to the custody of the department of social and health services or to a facility certified for one hundred eighty-day treatment by the department or under RCW 71.05.745.

(2) If the court or jury finds that grounds set forth in RCW 71.05.280 have been proven, but finds that treatment less restrictive than detention will be in the best interest of the person or others, then the court shall remand him or her to the custody of the department of social and health services or to a facility certified for ninety day treatment by the department or to a less restrictive alternative for a further period of less restrictive treatment not to exceed ninety days from the date of judgment. If the grounds set forth in RCW 71.05.280(3) are the basis of commitment, then the period of treatment may be up to but not exceed one hundred eighty days from the date of judgment. If the court or jury finds that the grounds set forth in RCW 71.05.280(5) have been proven, and provide the only basis for commitment, the court must enter an order for less restrictive alternative treatment for up to ninety days from the date of judgment and may not order inpatient treatment.

(3) An order for less restrictive alternative treatment entered under subsection (2) of this section must

name the behavioral health service provider responsible for identifying the services the person will receive in accordance with RCW 71.05.585, and must include a requirement that the person cooperate with the services planned by the behavioral health service provider.

(4) The person shall be released from involuntary treatment at the expiration of the period of commitment imposed under subsection (1) or (2) of this section unless the superintendent or professional person in charge of the facility in which he or she is confined, or in the event of a less restrictive alternative, the designated crisis responder, files a new petition for involuntary treatment on the grounds that the committed person:

(a) During the current period of court ordered treatment: (i) Has threatened, attempted, or inflicted physical harm upon the person of another, or substantial damage upon the property of another, and (ii) as a result of a behavioral health disorder or developmental disability presents a likelihood of serious harm; or

(b) Was taken into custody as a result of conduct in which he or she attempted or inflicted serious physical harm upon the person of another, and continues to present, as a result of a behavioral health disorder or developmental disability, a likelihood of serious harm; or

(c)(i) Is in custody pursuant to RCW 71.05.280(3) and as a result of a behavioral health disorder or

developmental disability continues to present a substantial likelihood of repeating acts similar to the charged criminal behavior, when considering the person's life history, progress in treatment, and the public safety.

(ii) In cases under this subsection where the court has made an affirmative special finding under RCW 71.05.280(3)(b), the commitment shall continue for up to an additional one hundred eighty-day period whenever the petition presents prima facie evidence that the person continues to suffer from a behavioral health disorder or developmental disability that results in a substantial likelihood of committing acts similar to the charged criminal behavior, unless the person presents proof through an admissible expert opinion that the person's condition has so changed such that the behavioral health disorder or developmental disability no longer presents a substantial likelihood of the person committing acts similar to the charged criminal behavior. The initial or additional commitment period may include transfer to a specialized program of intensive support and treatment, which may be initiated prior to or after discharge from the state hospital; or

(d) Continues to be gravely disabled; or

(e) Is in need of assisted outpatient behavioral health treatment.

If the conduct required to be proven in (b) and (c) of this subsection was found by a judge or jury in a

prior trial under this chapter, it shall not be necessary to prove such conduct again.

If less restrictive alternative treatment is sought, the petition shall set forth any recommendations for less restrictive alternative treatment services.

(5) A new petition for involuntary treatment filed under subsection (4) of this section shall be filed and heard in the superior court of the county of the facility which is filing the new petition for involuntary treatment unless good cause is shown for a change of venue. The cost of the proceedings shall be borne by the state.

(6)(a) The hearing shall be held as provided in RCW 71.05.310, and if the court or jury finds that the grounds for additional confinement as set forth in this section are present, subject to subsection (1)(b) of this section, the court may order the committed person returned for an additional period of treatment not to exceed one hundred eighty days from the date of judgment, except as provided in subsection (7) of this section. If the court's order is based solely on the grounds identified in subsection (4)(e) of this section, the court may enter an order for less restrictive alternative treatment not to exceed one hundred eighty days from the date of judgment, and may not enter an order for inpatient treatment. An order for less restrictive alternative treatment must name the behavioral health service provider responsible for identifying the services the person will receive in accordance with RCW 71.05.585, and must include a

requirement that the person cooperate with the services planned by the behavioral health service provider.

(b) At the end of the one hundred eighty-day period of commitment, or one-year period of commitment if subsection (7) of this section applies, the committed person shall be released unless a petition for an additional one hundred eighty-day period of continued treatment is filed and heard in the same manner as provided in this section. Successive one hundred eighty-day commitments are permissible on the same grounds and pursuant to the same procedures as the original one hundred eighty-day commitment.

(7) An order for less restrictive treatment entered under subsection (6) of this section may be for up to one year when the person's previous commitment term was for intensive inpatient treatment in a state hospital.

(8) No person committed as provided in this section may be detained unless a valid order of commitment is in effect. No order of commitment can exceed one hundred eighty days in length except as provided in subsection (7) of this section.

RCW 71.05.510

Damages for excessive detention.

Any individual who knowingly, willfully or through gross negligence violates the provisions of this chapter by detaining a person for more than the allowable number of days shall be liable to the person detained in civil damages. It shall not be a prerequisite to an action under this section that the plaintiff shall have suffered or be threatened with special, as contrasted with general damages.

Hon. Benjamin H. Settle

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

KENNETH RAWSON, an individual, Plaintiff, v. RECOVERY INNOVATIONS, INC., a corporation, SAMI FRENCH, an individual, JENNIFER CLINGENPEEL, an individual, VASANT HALARNAKAR, M.D., an individual, Defendant.	No. 3:17–cv–05342–BHS SECOND AMENDED COMPLAINT DEMAND FOR JURY (Filed Apr. 13, 2018)

I. NATURE OF CASE

1.1 This is a case for damages and declaratory and injunctive relief against Recovery Innovations, Inc., and three of its employees for illegally and unconstitutionally detaining Kenneth Rawson for more than 50 days, during which time it unconstitutionally forced on him medical treatment, including psychotropic medication, that was not medically necessary. The State had outsourced to Recovery Innovations the provision of some emergency mental health services in Pierce County, Washington. As a result, Recovery Innovations acted under color of state law with near total authority to evaluate, detain, and treat individuals

such as Mr. Rawson who Recovery Innovations claimed suffer from a mental illness that makes them a danger to themselves or others, or who have a grave disability.

II. PARTIES

2.1 Plaintiff Kenneth Rawson is an individual residing in Texas. Mr. Rawson formerly resided in Clark County, Washington, during which time he was detained and committed.

2.2 Defendant Recovery Innovations, Inc. is a corporation incorporated in Arizona that is registered and licensed to do business in Washington. It does business under the name, Recovery Innovations. Recovery Innovations has multiple locations in Washington, including the location at issue in this case, which is at 9601 Steilacoom Blvd SW #27, Lakewood, WA 98498, on the grounds of Western State Hospital.

2.3 Defendant Sami French is an individual who worked for Recovery Innovations at its 9601 Steilacoom Blvd SW #27, Lakewood, WA 98498 at all times relevant to this case. On information and belief, Ms. French resides in Washington.

2.4 Defendant Jennifer Clingenpeel is an individual who worked for Recovery Innovations at its 9601 Steilacoom Blvd SW #27, Lakewood, WA 98498 at times relevant to this case. On information and belief, Ms. Clingenpeel resides in Washington.

2.5 Defendant Vasant Halarnakar is an individual who worked for Recovery Innovations at its 9601

Steilacoom Blvd SW #27, Lakewood, WA 98498 at times relevant to this case. On information and belief, Dr. Halarnakar resides in Washington.

III. JURISDICTION AND VENUE

3.1 This Court has jurisdiction over Plaintiff's claims and over Defendants.

3.2 Venue is appropriate in this court because the acts and omissions at issue in this case took place in this judicial district, and Defendants reside in or do business here.

3.3 Plaintiff has filed a notice of claim with Recovery Innovations, and more than 60 days have elapsed since that filing. Plaintiff has therefore exhausted administrative remedies as required under RCW 4.96.

IV. FACTS

A. *Recovery Innovations Provides Mental Health Evaluation and Treatment Services to the State*

4.1 Recovery Innovations is a licensed "evaluation and treatment" provider under RCW 71.05.020.

4.2 Recovery Innovations operates a facility that it rents from the State on the campus of Western State Hospital (9601 Steilacoom Blvd SW #27, Lakewood, WA 98498) to confine individuals who are involuntarily

committed on an emergency basis and to provide them mental health evaluation and treatment.

4.3 Emergency mental health evaluation and treatment constitutes a public function of the State of Washington.

4.4 Recovery Innovations engages in trade and commerce that directly and indirectly affects the people of the State of Washington.

4.5 The State licenses, regulates, and oversees the operations of Recovery Innovations's mental health and evaluation treatment facility.

4.6 The Recovery Innovations facility where Defendants detained Mr. Rawson was substantially below the standard generally accepted in the medical community for an emergency mental health evaluation and treatment facility. It was too small to accommodate the number of patients it treated, was unsanitary, and did not have space for important treatments and services. This remains true.

B. *Recovery Innovations's Initial Evaluation of Mr. Rawson*

4.7 Clark County Designated Mental Health Professional Al Padilla entered an emergency order to involuntary commit Kenneth Rawson on March 6, 2015.

4.8 Mr. Padilla based his opinion on the need to commit Mr. Rawson on his own evaluation of him, as

well as the reports of the Clark County Sheriff's Office regarding Mr. Rawson's non-violent behavior at a bank in Vancouver, Washington.

4.9 That same day (March 6, 2015), Mr. Padilla transferred Mr. Rawson to the custody and control of Recovery Innovations for up to 72 hours of evaluation and treatment.

4.10 When he arrived at the facility, the staff at Recovery Innovations, led by Nurse Practitioner Jennifer Clingenpeel and Mental Health Counselor Sami French, performed only a cursory mental health evaluation of Mr. Rawson.

4.11 Ms. Clingenpeel, Ms. French, and the rest of the Recovery Innovations staff documented no observations that Mr. Rawson presented a danger to himself or others when he arrived at the facility, or that he was gravely disabled.

4.12 Ms. Clingenpeel and Ms. French relied entirely on the opinions of Mr. Padilla and the Clark County Sheriff's Office. Ms. Clingenpeel and Ms. French's purported evaluations of Mr. Rawson merely repeated hearsay statements about Mr. Rawson's alleged behaviors that those public officials had documented.

4.13 Mr. Rawson, a registered nurse who had experience working with mentally ill patients, observed that Recovery Innovations fell short of the standard of care for people in emergency mental health situations.

He shared his observations and concerns with Ms. French.

4.14 In response to his criticisms, Ms. French acted annoyed at Mr. Rawson.

4.15 Ms. French, Ms. Clingenpeel, and Recovery Innovations knew that Mr. Rawson had never previously been diagnosed with or treated for mental illness, had no history of violent behavior, and had cared for himself without assistance for his entire adult life.

4.16 Recovery Innovations improperly authorized Ms. French to dictate the detention and treatment of vulnerable individuals with virtually no checks on her authority. Ms. French lacked the requisite qualifications or experience to exercise such authority, but her superiors, namely Jennifer Clingenpeel and Dr. Vasant Halarnakar chose to abdicate decision-making authority to her.

C. *14-Day Petition for Involuntary Commitment*

4.17 Despite having not personally observed that Mr. Rawson presented a danger to himself or anyone else, or that he was gravely disabled, Ms. French and Ms. Clingenpeel and Recovery Innovations did not release Mr. Rawson. Instead, on March 9, 2015, they petitioned Pierce County Superior Court to commit Mr. Rawson involuntarily for an additional 14 days.

4.18 Their petition identified two grounds for Mr. Rawson's continued detention: he was a danger to himself or others, and he was gravely disabled.

4.19 Through Ms. Clingenpeel and Ms. French, Recovery Innovations made false statements in the 14-day petition with deliberate indifference to Mr. Rawson's rights.

4.20 Through Ms. Clingenpeel and Ms. French, Recovery Innovations knowingly misled Pierce County Prosecutor Ken Nichols with their false statements to advocate for an additional 14-day involuntary commitment of Mr. Rawson.

4.21 Recovery Innovations's staff forced Mr. Rawson to take 300 mg of the drug Seroquel within 24 hours of the hearing on the 14-day petition, despite the fact that he had exercised his legal right to decline all psychiatric medications during that 24-hour period.

4.22 During the hearing on the petition to commit Mr. Rawson for an additional 14 days, Mr. Rawson's attorney questioned Ms. French aggressively.

4.23 Ms. French took umbrage at the questioning of her authority and resented Mr. Rawson and his attorney for it.

4.24 Through Ms. French, Recovery Innovations denied Mr. Rawson's attorney access to his medical records and files throughout his detention.

4.25 Based on the false, inadequate, unsupported, and exaggerated observations and opinions of Ms.

French, Ms. Clingenpeel, and Recovery Innovations, the Pierce County Superior Court approved the 14-day commitment petition on March 10, 2015.

D. *Recovery Innovations's Continued Detention and Mistreatment of Mr. Rawson*

4.26 After the court issued its order, Ms. French continued to document her purported observations of Mr. Rawson, as did other members of the Recovery Innovations staff.

4.27 The vast majority of the purported observations documented in Mr. Rawson's medical records came from Recovery Innovations staff members who lacked the qualifications to make clinical assessments of his mental health, of whether he presented danger to himself or others, or whether he was gravely disabled.

4.28 Ms. French, for example, was not licensed to provide clinical assessments without the supervision of a licensed psychiatrist.

4.29 No licensed psychiatrist supervised Ms. French's assessment of Mr. Rawson.

4.30 Thus on several occasions, Recovery Innovations exercised no professional judgment at all when making decisions about Mr. Rawson's continued detention and treatment.

4.31 Recovery Innovations and the individual defendants based their conclusions regarding Mr.

Rawson's mental health on what they heard about his words and actions prior to his involuntary commitment, his refusal to admit he was mentally ill, and his refusal to take antipsychotic medications. Ms. French and other Recovery Innovations staff concluded that Mr. Rawson's denials of being mentally ill proved he was mentally ill. These were illegitimate bases for confining Mr. Rawson and providing him involuntary mental health treatment.

4.32 Mr. Rawson never acted in a violent or threatening manner at any point during his detention at Recovery Innovations.

E. *90-Day Petition for Involuntary Commitment and Prolonged Detention of Mr. Rawson*

4.33 Despite lacking any basis for believing Mr. Rawson presented a danger to himself or anyone else, Defendants did not release Mr. Rawson. Instead, on March 19, 2015, through Ms. French and Vasant Halarnakar, MD, who had by then taken over as head psychiatrist at Recovery Innovations, Recovery Innovations petitioned the court to involuntarily commit Mr. Rawson for 90 days.

4.34 In their petition, Defendants alleged as grounds for Mr. Rawson's continued involuntary detention that he "had threatened, attempted, or inflicted physical harm upon the person of another or him/herself, or substantial damage to property of another

during the period in custody for evaluation and treatment, and presents a likelihood of serious harm."

4.35 Defendants' allegation was false. Recovery Innovations and the individual defendants never observed Mr. Rawson threaten, attempt, or inflict physical harm on any person or property during the period of his detention. Mr. Rawson never engaged in such behavior during the period of his detention.

4.36 Dr. Halarnakar and Ms. French made false statements in the 90-day petition with deliberate indifference to Mr. Rawson's rights.

4.37 Defendants' 90-day petition included assertions that implied that Mr. Rawson's condition had worsened while at Recovery Innovations. These statements were false, and Defendants made them with deliberate indifference to Mr. Rawson's rights.

4.38 Despite implying that Mr. Rawson's condition had worsened, Recovery Innovations never adjusted its treatment plan for him.

4.39 Dr. Halarnakar observed Mr. Rawson on just two occasions before filing Recovery Innovations's petition, and Dr. Halarnakar documented few observations in Mr. Rawson's mental health records.

4.40 Dr. Halarnakar wrote that he had concluded Mr. Rawson was paranoid because he denied being mentally ill and because he refused to take antipsychotic medication. Dr. Halarnakar documented no observations that Mr. Rawson acted violently, made

threats, behaved in a way that presented a danger to himself or to others, or had a grave disability.

4.41 Dr. Halarnakar spoke to Mr. Rawson's parents, who informed him that Mr. Rawson had no history of mental illness or violent behavior, and that his behavior at the time conformed to his normal behavior.

4.42 When evaluating Mr. Rawson, Dr. Halarnakar, Ms. Clingenpeel, Ms. French, and other Recovery Innovations staff did not speak to anybody who knew Mr. Rawson other than his parents.

4.43 Mr. Rawson requested a jury trial to challenge the 90-day involuntary commitment petition. Recovery Innovations continued to hold him and planned to do so until the trial date.

4.44 After he requested the jury trial, Recovery Innovations provided virtually no treatment to Mr. Rawson apart from forcing him to take powerful antipsychotic medication, Seroquel.

4.45 On several occasions during his detention at Recovery Innovations, Mr. Rawson exercised his right to refuse antipsychotic medications but Recovery Innovations staff overrode his refusal, injecting him against his will, even though he presented no danger to himself or others, and was not gravely disabled. Forcible medication was not in Mr. Rawson's medical interests at the time of the injections and was not medically necessary.

4.46 Mr. Rawson suffered numerous negative side effects from the drugs that Recovery Innovations

involuntarily administered to him, including cardiac arrhythmia. He continues to suffer negative effects that those medications had on him.

4.47 Recovery Innovations continued to falsely state in Mr. Rawson's medical records that he presented a danger to himself and others.

4.48 Ms. French or another Recovery Innovations staff person created an entry in Mr. Rawson's medical file each day that they detained him that documented the opinion that he presented a danger to himself or others and thus required continued detention. They did so without engaging in any meaningful evaluation of Mr. Rawson and without providing him an opportunity to dispute and correct the conclusion entered into his medical records.

4.49 Ms. French and other Recovery Innovations staff also documented falsely, and only inconsistently, that Mr. Rawson had a grave disability.

4.50 Recovery Innovations never altered its treatment plan for Mr. Rawson despite concluding on a daily basis that he had made no improvements.

4.51 On April 10, 2015, after evaluating Mr. Rawson at the request of his lawyer, independent psychologist Dr. James Manley concluded that he presented no risk to himself or others, and did not find him gravely disabled.

4.52 Mr. Rawson's attorney informed Ms. French and Dr. Halarnakar of Dr Manley's assessment. But

Recovery Innovations declined to dismiss its petition to continue his involuntary commitment outright.

4.53 Through Ms. French, Recovery Innovations told Mr. Rawson's attorney she would only agree to discharge him if he agreed to continue to take the antipsychotic mediation that it had been administering to him against his will, and accept a less restrictive alternative to commitment that would require him admitting he was rightfully committed.

4.54 Mr. Rawson rejected this offer.

4.55 Later, through Dr. Halarnakar and Ms. French, Recovery Innovations met with Mr. Rawson and his attorney to discuss conditions of his release. Dr. Halarnakar agreed to release Mr. Rawson if he promised to visit the VA hospital to speak to a psychiatrist there after he was released.

4.56 Although Mr. Rawson disagreed with the condition, to end his illegitimate confinement, he agreed to visit a therapist at the VA after he returned to his home.

4.57 Despite having repeatedly asserted that he was a danger to himself and to others and gravely disabled, Dr. Halarnakar, Ms. French, and Recovery Innovations agreed to release Mr. Rawson if he agreed to visit the Veterans Administration Hospital in Portland, Oregon upon his release.

4.58 For the final time, on April 25, 2015, Ms. French documented in his medical records her opinion

that Mr. Rawson presented a danger to himself and others.

4.59 Four days later, with no change in his condition, on April 29, 2015, Recovery Innovations—having documented the opinion that Mr. Rawson presented a danger to himself and others just a few days before—withdrew its petition to commit him for 90 days, and put him in a taxicab to the train station.

4.60 The evaluation and treatment and involuntary confinement of Mr. Rawson by Recovery Innovations and the individual defendants fell so substantially below the standards generally accepted in the medical community for emergency mental health evaluation and treatment that it was committed with deliberate indifference to Mr. Rawson's rights.

4.61 The evaluation and treatment of Mr. Rawson by Recovery Innovations and the individual defendants was illegitimate and not medically necessary, and undertaken with deliberate indifference to his rights. Defendants provided no realistic opportunity for him to be cured of his alleged condition, and thus to be released from detention.

4.62 Recovery Innovations and the individual defendants subjected Mr. Rawson to continued detention and forcible medication in a manner that amounted to constitutionally impermissible punishment for his unwillingness to take antipsychotic medications, his refusal to admit he was mentally ill or dangerous, his critique of the care provided at the facility, and his attorney's aggressive questioning of

Ms. French during the hearing on the 14-day commitment petition.

4.63 Recovery Innovations, Ms. French, Ms. Clingenpeel, and Dr. Halarnakar performed their duties as mental health professionals treating Mr. Rawson in bad faith and with deliberate indifference to Mr. Rawson's rights.

4.64 Recovery Innovations and the individual defendants failed to make a reasonable assessment of whether Mr. Rawson's perceived disability could be evaluated and treated in a community setting, or other less intrusive alternative to involuntary detention, and did not afford him treatment in the least restrictive environment.

4.65 The acts and omissions of Recovery Innovations and the individual defendants inflicted severe emotional distress and injuries due to involuntary medication on Mr. Rawson from which he continues to suffer today.

4.66 Recovery Innovations and the individual defendants engaged in unfair and deceptive acts or practices in the conduct of trade or commerce through the detention and forced medical treatment of Mr. Rawson. These actions harmed Mr. Rawson, and injured the public interest.

V. LEGAL CLAIMS

5.1 State Action: The facts described above constitute violations of several the rights guaranteed to

Mr. Rawson by the United States Constitution. These violations are actionable under 42 U.S.C. § 1983 because the Defendants acted under color of state law. Recovery Innovations and the individual defendants acted under color of state law by so closely collaborating with state actors in the detention, evaluation, treatment, and petition to continue the detention of Mr. Rawson as to make their actions indistinguishable from the State's, and by serving the public functions of confining involuntarily committed individuals and providing them mental health evaluation and treatment services.

5.2 Fourth Amendment: The facts described above constitute violations of Mr. Rawson's Fourth Amendment rights by Recovery Innovations, Ms. French, Ms. Clingenpeel, and Dr. Halarnakar.

5.3 Substantive Due Process: The facts described above constitute violations of Mr. Rawson's Substantive Due Process rights under the Fourteenth Amendment by the Defendants.

5.4 Procedural Due Process: The facts described above constitute violations of Mr. Rawson's Procedural Due Process rights under the Fourteenth Amendment by the Defendants.

5.5 Americans with Disabilities Act: The facts described above constitute violations of Mr. Rawson's rights under Title II of the American's with Disabilities Act, 42 U.S.C. § 12132, by the Defendants.

5.6 Outrage: The facts and the Defendants' conduct committed with gross negligence, reckless, bad faith, or intent, described above give rise to a claim of Outrage under the common law of the State of Washington against by the Defendants.

5.7 False Imprisonment: The facts and the Defendants' conduct committed with gross negligence, recklessness, bad faith, or intent, described above give rise to a claim of False Imprisonment under the common law of the State of Washington against by the Defendants.

5.8 Medical Malpractice: The facts and the Defendants' conduct committed with gross negligence, recklessness, bad faith, or intent, described above give rise to a claim of medical malpractice under the law of the State of Washington, RCW 7.70 *et seq*.

5.9 Washington Law Against Discrimination: The facts and the Defendants' conduct committed with gross negligence, recklessness, bad faith, or intent, described above constitute violations of Mr. Rawson's rights under the Washington Law Against Discrimination, RCW 49.60 *et seq*.

5.10 Washington Consumer Protection Act: The facts and the Defendants' conduct committed with gross negligence, recklessness, bad faith, or intent, described above constitute violations of Mr. Rawson's rights under the Washington Consumer Protection Act, RCW 19.86 *et seq.*, in a manner that is injurious to the public interest.

5.11 <u>Damages for Excessive Detention</u>: The facts and the Defendants' conduct committed knowingly, wilfully, or through gross negligence described above constitute violations of Mr. Rawson's rights under RCW 71.05.510.

VI. REQUEST FOR RELIEF

WHEREFORE Plaintiff requests that the Court enter judgment and other relief against Defendants awarding Plaintiff:

6.1 A trial by jury;

6.2 General and special damages, in an amount to be proven at trial;

6.3 Declaratory and injunctive relief;

6.4 Punitive damages as available under federal law;

6.5 His reasonable attorney's fees and costs of litigation;

6.6 The right to confirm the pleadings to the evidence presented at trial;

6.7 Post judgment interest on any amounts recovered from the time of the judgment to the time of satisfaction of judgment; and

6.8 Such other and further relief as the Court deems just and equitable.

DATED this 13 day of April, 2018.

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[Certificate Of Service Omitted]