No. _____

In the Supreme Court of the United States

Catherine Brennan,

Petitioner,

v.

Cass County Health, Human and Veteran Services, Marsha McMillen, Essentia Health, St. Joseph's Medical Center, PSJ Acquisitions, d/b/a Prairie St. John's Hospital,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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2024 – Bachman Legal Printing ■ (612) 339-9518

QUESTIONS PRESENTED

1. Is *Heck v. Humphrey* precedent to require persons subject to civil commitment proceedings not related to a criminal proceeding to vacate the commitment order of a non-criminal patient prior to commencing a section 1983 action?

2. Does due process require that "willful indifference" be proven when government officials and medical personnel involved in civil commitment proceedings inject a non-consenting person with psychotropic drugs in direct violation of a state statute?

PARTIES TO THE PROCEEDINGS

The following individuals and entities were parties to the proceedings in the court below:

Catherine Brennan

Cass County Health Human, and Veteran Services

Marsha McMillen

Essentia Health, St. Joseph's Medical Center

PSJ Acquisitions, d/b/a Prairie St. John's Hospital

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PETITION FOR WRIT OF CERTIORARI

The petitioner Catherine Brennan respectfully prays that a writ of certiorari issue to review the Order of the Eighth Circuit Court of Appeals entered in the above-entitled action on February 26, 2024.

OPINIONS BELOW

The denial of the Eighth Circuit Court of Appeals Petition for Rehearing En Banc and by the Panel, is reprinted in the Appendix hereto. A-1.

The opinion of the Eighth Circuit Court of Appeals is unpublished and reprinted in the Appendix hereto. A-2-8.

The opinion and Order of the United States District Court, District of Minnesota dated January 6, 2023, is unpublished and reprinted in the Appendix hereto, A-9-35.

The opinion and Order of the United States District Court, District of Minnesota dated April 11, 2022, is unpublished and reprinted in the appendix hereto, A-37-56.

JURISDICTION

The jurisdiction of the Court to review the Order of the Eighth Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Eighth Amendment to the United States Constitution provides as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

The Fourteenth Amendment to the United States Constitution provides as follows:

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

FEDERAL STATUTES

U.S. Const. Amend. XIV(1).

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. §1997(a)

(a) Applicability of Administrative Remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison., or other correctional facility until such administrative remedies as are available are exhausted.

MINNESOTA STATUTES

Minn. Stat. 253B.07 Judicial Commitment; Preliminary Procedures.

Subdivision 1. Prepetition screening. (a) Prior to filing a petition of a proposed patient, an interested person shall apply to the designated agency in the county of financial responsibility or the county here the proposed patient is present for conduct of a preliminary investigation as provided in section 253B.23 subdivision 1b, except where the proposed patient has been acquitted of a crime under section 611.026 and the county attorney is required to file a petition for commitment. The designated agency shall appoint a screening team to conduct an investigation. The petitioner may not be a member of the screening team. The investigation must include:

(1) an interview with the proposed patient and other individuals who appear to have knowledge of the condition of the proposed patient, if practicable. In-person interview with the proposed patient are preferred. If the proposed patient is not interviewed, specific reasons must be documented.

(2) identification and investigation of specific alleged conduct which is the basis for application;

(3) identification, exploration, and listing of the specific reasons for rejecting or recommending alternatives to involuntary placement;

(4) in the case of a commitment based on mental illness, information that may be relevant to the administration of neuroleptic medications, including the existence of a declaration under section 253B.03, subdivision 6d, or a health care directive under chapter 145C or a guardian, conservator, proxy or agent with authority to make health care decisions for the proposed patient, information regarding the capacity of the proposed patient to make decisions regarding administration of neuroleptic medication, and whether the proposed patient is likely to consent or refuse consent to administration of the medication.

(5) Seeking input from the proposed patient's health plan company to provide the court with information about the patient's relevant treatment history, and current treatment providers; and

(6) In the case of a commitment based on mental illness, information listed in clause (4) for other purposes relevant to treatment.

(b) In conducting the investigation required by this subdivision, the screening team shall have access to all relevant medical records of proposed patients currently in treatment facilities, state-operated treatment programs, or community-based treatment programs. The interviewer shall inform the proposed patient that any information provided by the proposed patient may be included in the prepetition

screening report and may be considered in the commitment proceedings. Data collected pursuant to this clause shall be considered private data on individuals. The prepetition screening report is not admissible as evidence except by agreement of counsel or as permitted by this chapter or the rules of court and is not admissible in any court proceedings unrelated to the commitment proceedings.

(c) The prepetition screening team shall provide a notice, written in easily understood language, to the proposed patient, the petitioner, persons named in a declaration under chapter 145C or section 253B.03 subdivision 6d, and, with the proposed patient's consent, other interested parties. The team shall ask the patient if the patient wants the notice read and shall read the notice to the patient upon request. The notice must contain information regarding the process, purpose, and legal effects of civil commitment. The notice must inform the proposed patient that:

(1) If a petition is filed, the patient has certain rights, including the right to a court-appointed attorney, the right to request a second court examiner, the right to attend hearings, and the right to oppose the proceeding and to present and contest evidence; and

(2) If the proposed patient is committed to a state-operated treatment program, the patient may be billed for the cost of care and the state has the right to make a claim against the patient's estate for this cost.

(d) When the prepetition screening team recommends commitment, a written report shall be sent to the county attorney for the county in which the petition is to be filed. The statement of facts contained in the written report must meet the requirements of subdivision 2, paragraph (b).

(e) The prepetition screening team shall refuse to support a petition if the investigation does not disclose evidence sufficient to support commitment. Notice of the prepetition screening team's decision shall be provided to the prospective petitioner, any specific individuals identified in the examiner's statement, and to the proposed patient.

(f) If the interested person wishes to proceed with a petition contrary to the recommendation of the prepetition screening teams, application may be made directly to the county attorney, who shall determine whether or not to proceed with the petition. Notice of the county attorney's determination shall be provided to the interested party.

(g) If the proposed patient has been acquitted of a crime under 611.026, the county attorney shall apply to the designated county agency in the county in which the acquittal took place for a preliminary investigation unless substantially the same information relevant to the proposed patient's current mental condition, as could be obtained by a preliminary investigation, is part of the court record in the criminal proceeding or is contained in the report of a mental examination conducted in connection with the criminal proceeding. If a court petitions for commitment pursuant to the Rules of Criminal

or Juvenile Procedure or a county attorney petitions pursuant to acquittal of a criminal charge under 611.026, the prepetition investigation, if required by this section, shall be completed within seven days after the filing of the petition.

Subd. 2. **The petition**. (a) Any interested person, except a member of the prepetition screening team, may file a petition for commitment in the district court of the county of financial responsibility or the county where the proposed patient is present. If the head of the treatment facility, state-operated treatment program, or community-based treatment program believes that commitment is required and no petition has been filed, that person shall petition for the commitment of the proposed patient.

(b) The petition shall set forth the name and address of the proposed patient, the name and address of the proposed patient's nearest relatives, and the reasons for the petition. The petition must contain factual descriptions of the proposed patient's recent behavior, including a description of the behavior, where it occurred, and the time period over which it occurred. Each factual allegation must be supported by observations of witnesses named in the petition. Petitions shall be stated in behavioral terms and shall not contain judgmental or conclusory statements.

(c) The petition shall be accompanied by a written statement from an examiner stating that the examiner has examined the proposed patient within the 15 days preceding the filing of the petition and is of the opinion that the proposed patient has a designated disability and should be committed to a treatment facility, state-operated treatment program, or a community-based

treatment program. The statement shall include the reasons for the opinion. In the case of a commitment based on mental illness, the petition and the examiner's statement shall include a statement and opinion regarding the proposed patient's need for treatment with neuroleptic medication and the patient's capacity to make decisions regarding the administration of neuroleptic medications, and the reasons for the opinion. If use of neuroleptic medications is recommended by the treating medical practitioner or other qualified medical provider, the petition for commitment must, if applicable, include or be accompanied by a request for proceedings under 253B.092. Failure to include the required information regarding neuroleptic medications in the examiner's statement, or to include a request for an order regarding neuroleptic medications with the commitment petition, is not a basis for dismissing the commitment petition. If a petitioner had been unable to secure a statement from an examiner, the petition shall include documentation that a reasonable effort has been made to secure the supporting statement.

Subd. 2a. **Petition originating from criminal proceedings**.

(a) If criminal charges are pending against a defendant, the court shall order simultaneous competency and civil commitment examinations in accordance with Minnesota rules of Criminal Procedure, rule 20.04, when the following conditions are met:

(1) The prosecutor or defense counsel doubts the defendant's competency and a motion is made challenging competency, or the court on its initiative raises the issue under section 611.42

or Minnesota Rules of Criminal Procedure, Rule 20.01; and

(2) The prosecutor and defense counsel agree simultaneous examinations are appropriate.

No additional examination under subdivision 3 is required in a subsequent civil commitment proceeding unless a second examination is requested by defense counsel appointed following the filing of any petition for commitment.

(b) Only a court examiner may conduct an assessment as described in section 611.43 or Minnesota Rules of Criminal Procedure, rules 20.01, subdivision 4, and 20.02, subdivision 2.

(c) Where a county is ordered to consider civil commitment following a determination of incompetency under 611.45 or Minnesota Rules of Criminal Procedure rule 20.01, the county in which the original matter is pending is responsible to conduct prepetition screening and, if statutory conditions for commitment are satisfied, to file the commitment petition in that county. By agreement between county attorneys, prepetition screening and filing the petition may be handled in the county of financial responsibility or the county where the proposed patient is present.

(d) Following an acquittal of a person of a person of a criminal charge under 611.1026, the petition shall be filed by the county attorney of the county in which the acquittal took place, and that court shall be the committing court for purposes of this chapter. When a petition is filed pursuant to subdivision 2 with the court in which acquittal of a criminal charge took place, the court shall assign the judge before whom the

acquittal took place to hear the commitment proceedings unless that judge is unavailable.

Subd. 2b. **Apprehend and hold orders.**

(a) The court may order the treatment facility or state-operated treatment program to hold the proposed patient or direct a health officer, peace officer, or other person to take the proposed patient into custody and transport the proposed patient to a treatment facility or state-operated treatment program for observation, evaluation, diagnosis, care, treatment, and, if necessary, confinement, when:

(1) There has been a particularized showing by the petitioner that serious physical harm to the proposed patient or others is likely unless the proposed patient is immediately apprehended;

(2) The proposed patient has not voluntarily appeared for the examination or the commitment hearing pursuant to the summons; or

(3) A person is held pursuant to section 253B.051 and a request for a petition for commitment has been filed.

(b) The order of the court may be executed on any day and at any time by the use of all necessary means including the imposition of necessary restraint upon the proposed patient. Where possible, a peace office taking the proposed patient into custody pursuant to this subdivision shall not be in uniform and shall not use a vehicle visibly marked as a law enforcement vehicle. Except as provided in section 253D.19, subdivision 2, in the case of an individual on a judicial hold due to a petition for civil commitment under

chapter 253D, assignment of custody during the hold is to the commissioner. The commissioner is responsible for determining the appropriate placement within a secure treatment facility under the authority of the commissioner.

(c) A proposed patient must not be allowed or required to consent to nor participate in a clinical drug trial while an order is in effect under this subdivision. A consent given while an order is in effect is void and unenforceable. This paragraph does not prohibit a patient from continuing participation in a clinical drug trial if the patient was participating in the clinical drug trial at the time the order was issued under this subdivision.

Subd. 2c. **Right to counsel**. A patient has the right to be represented by counsel at any proceeding under this chapter. The court shall appoint a qualified attorney to represent the proposed patient if neither the proposed patient nor others provide counsel. The attorney shall be appointed at the time a petition for commitment is filed or when simultaneous competence and civil commitment exanimations are ordered under subdivision 2a, whichever is sooner. In all proceedings under this chapter, the attorney shall:

(1) consult with the person prior to the hearing;

(2) be given adequate time and access to records to prepare for all hearings;

(3) continue to represent the person throughout any proceedings under this chapter unless released as counsel by the court; and

(4) be a vigorous advocate on behalf of the person.

Minn. Stat. 253B.092 **Administration of Neuroleptic Medication**.

Subd. 1. **General**. Neuroleptic medications may be administered, only as provided in this section, to patients subject to civil commitment under this chapter or chapter 253D. For purposes of this section, "patient" includes a proposed patient who is the subject of a petition for commitment and a committed person as defined in section 253D.02, subdivision 4.

Subd.2. **Administration without judicial review**.(a) Neuroleptic medications may be administered without judicial review in the following circumstances:

(1) The patient has the capacity to make an informed decision under subdivision 4.

(2) The patient does not have the present capacity to consent to the administration of neuroleptic medication, but prepared a health care power of attorney, a health care directive under 145C, or a declaration under section 253B.03, subdivision 6d, requesting treatment or authorizing an agent or proxy to request treatment, and the agent or proxy has requested the treatment.

(3) The patient has been prescribed neuroleptic medication prior to admission to a treatment facility, but lacks the present capacity to continue to the administration of that neuroleptic medication, continued administration of the medication is in the patient's best interest; and the patient does not refuse administration of the medication. In this situation, the previously prescribed neuroleptic

medication may be continued for up to 14 days while the treating medical practitioner:

(i) Is obtaining a substitute decision-maker appointed by the court under subdivision 6; or

(ii) Is requesting a court order authorizing administering neuroleptic medications or an amendment to a current court order authorizing administration of neuroleptic medications;

(4) A substitute decision-maker appointed by the court consents to the administration of the neuroleptic mediation and the patient does not refuse administration of the medication; or

(5) the substitute decision-maker does not consent or the patient is refusing medication, and the patient is in an emergency situation.

(b) For the purposes of paragraph (a), clause (3), if a person requests a substitute decision-maker or requests a court order administering neuroleptic medication within 14 days, the treating medical practitioner may continue administering the medication to the patient through the hearing date or until the court otherwise issues an order.

Subd. 3. **Emergency administration**. A treating medical practitioner may administer neuroleptic medication to a patient who does not have capacity to make a decision regarding administration of the medication if the patient is in an emergency situation. Medication may be administered for so long as the emergency continues to exist, up to 14 days, if the treating medical practitioner determines that the

medication is necessary to prevent serious, immediate physical harm to the patient or to others. If a request for authorization to administer medication is made to the court within 14 days, the treating medical practitioner may continue the medication through the date of the first court hearing, if the emergency continues to exist. If the request for authorization to administer medication is made to the court in conjunction with a petition for commitment and the court makes a determination at the preliminary hearing under section 253B.07, subdivision 7, that there is a sufficient cause to continue the medical practitioner's order until the hearing under section 253B.05, the treating medical practitioner may continue the medication until that hearing, if the emergency continues to exist. The treatment facility, state-operated treatment program, or community-based treatment program shall document the emergency in the patient's medical record in specific behavioral terms.

Subd. 4. **Patients with capacity to make informed decision**. A patient who has the capacity to make an informed decision regarding the administration of neuroleptic medication may consent or refuse consent to administration of the medication. The informed consent of a patient may be in writing.

Subd. 5. **Determination of capacity**. (a) There is a rebuttable presumption that a patient has the capacity to make decisions regarding administration of neuroleptic medication.

(b) A patient has the capacity to make decisions regarding the administration of neuroleptic medication if the patient:

(1) has an awareness of the patient's situation, including the reasons for hospitalization, and the

possible consequences of refusing treatment with neuroleptic medications,

(2) has an understanding of treatment with neuroleptic medications and the risks, benefits, and alternatives; and

(3) communicates verbally and nonverbally a clear choice regarding treatment with neuroleptic medications that is a reasoned one not based on a symptom of the patient's mental illness, even though it may not be in the patient's best interests.

(c) Disagreement with the medical practitioner's recommendation alone is not evidence of an unreasonable decision.

Subd. 6. **Patients without capacity to make informed decisions; substitute decision-maker**. (a) Upon request of any person, and upon a showing that neuroleptic medications may be recommended and that the patient may lack capacity to make decisions regarding the administration of neuroleptic medication, the court shall appoint a substitute decision-maker with authority to consent to the administration of neuroleptic medication as provided in this section. A hearing is not required for an appointment under this paragraph. The substitute decision-maker must be an individual or a community or institutional multidisciplinary panel designated by the local mental health authority. In appointing a substitute decision-maker, the court shall give preference to a guardian, a proxy, or health care agent with authority to make health care decisions for the patient. The court may provide for the payment of a reasonable fee to the substitute decision-maker for services under this section or may appoint a volunteer.

(b) If the patient's treating medical practitioner recommends treatment with neuroleptic medication, the substitute decision-maker may give or withhold consent to the administration of the medication, based upon the standards under subdivision 7. If the substitute decision-maker gives informed consent, to the treatment and the patient does not refuse, the substitute decision-maker shall provide written consent to the treating medical practitioner and the medication may be administered. The substitute decision-maker shall also notify the court that consent has been given. If the substitute decision-maker refuses or withdraws consent or the patient refuses the medication, neuroleptic medication must not be administered to the patient except with a court order or in an emergency.

(c) A substitute decision-maker appointed under this section has access to the relevant sections of the patient's health records on the past or present administration of medication. The designated agency or a person involved in the patient's physical or mental health care may disclose information to the substitute decision-maker, and if the substitute decision-maker for the sole purpose of performing the responsibilities under this section. The substitute decision-maker may not disclose health records obtained under this paragraph except to the extent necessary to carry out the duties under this section.

(d) At a hearing under section 253B.08, the petitioner has the burden of proving incapacity by a preponderance of the evidence. If a substitute decision-maker has been appointed by the court, the court shall make findings regarding the patient's incapacity to make decisions regarding the administration of neuroleptic medications and affirm or reverse its

appointment of a substitute decision-maker. If the court affirms the appointment of the substitute decision-maker, and if the substitute decision-maker has consented to the administration of the mediation and the patient has not refused, the court shall make findings that the substitute decision-maker has consented and the treatment is authorized. If a substitute decision-maker has not yet been appointed, upon request the court shall make findings regarding the patient's incapacity and appoint a substitute decision-maker if appropriate.

(e) If an order for civil commitment did not provide for the appointment of a substitute decision-maker or for the administration of neuroleptic medication, a treatment facility, state-operated treatment program, or community-based treatment program may later request the appointment of a substitute decision-maker upon a showing that neuroleptic medications is recommended and that the patient lacks capacity to make decisions regarding neuroleptic medications. A hearing is not required in order to administer the neuroleptic medication unless under subdivision 10 or if the substitute decision-maker withholds or refuses consent or the patient refuses the medication.

(f) The substitute decision-maker's authority to consent to treatment lasts for the duration of the court's order of appointment or until modified by the court.

(g) If there is no hearing after the preliminary hearing, then the court shall, upon the request of an interested party, review the reasonableness of the substitute decision -maker's decision based on the standards under subdivision 7. The court shall enter an order upholding or reversing the decision within seven days.

Subdivision 7. **When patient lacks capacity to make decisions** about **medication**. (a) When a patient lacks capacity to make decisions regarding the administration of neuroleptic medication, the substitute decision-maker or the court shall use the standards in this subdivision in making a decision regarding administration of the medication.

(b) If the patient clearly stated what the patient would choose to do in this situation when the patient had the capacity to make a reasoned decision, the patient's wishes must be followed. Evidence of the patient's wishes may include written instruments, including a durable power of attorney for health care under 145C or a declaration under section 253B.03, subdivision6d.

(c) If evidence of the patient's wishes regarding the administration of neuroleptic medications is conflicting or lacking, the decision must be made on what a reasonable person would do, taking into consideration:

(1) the patient's family, community, moral, religious, and social values;

(2) the medical risks, benefits, and alternatives to the proposed treatment;

(3) past efficacy and any extenuating circumstances of past use of neuroleptic medications; and

(4) any other relevant factors.

Subdivision 8. **Procedure when patient refuses neuroleptic medications**.

(a) If the substitute decision-maker or the patient refuses to consent to treatment with neuroleptic

medications, and absent an emergency as set forth in subdivision 3, neuroleptic medications may not be administered without a court order. Upon receiving a written request for a hearing, the court shall schedule the hearing within 14 days of the request. The matter may be heard as part of any other district court proceeding under this chapter. By agreement of the parties, or for good cause shown, the court may extend the time of hearing an additional 30 days.

(b) The patient must be examined by a court examiner prior to the hearing. If the patient refuses to participate in an examination, the court examiner may rely on the patient's medical records to reach as an opinion as to the appropriateness of neuroleptic medication, the patient is entitled to counsel and a second court examiner, if requested by the patient or patient's counsel.

(c) The court may base its decision on relevant and admissible evidence, including the testimony of a treating medical practitioner or other qualified physician, a member of the patient's treatment team, a court examiner, written testimony, or the patient's medical records.

(d) If the court finds that the patient has the capacity to decide whether to take neuroleptic medication or that the lacks capacity to decide and the standards for making a decision to administer the medications under subdivision 7e are not met, the treatment facility, state-operated treatment program, or community-based treatment program may not administer medication without the patient's informed written consent or without the declaration of an emergency, or until further review by the court.

(e) If the court finds that the patient lacks capacity to decide whether to take neuroleptic medication and has applied the standards set forth in subdivision 7, the court may authorize the treatment facility, state-operated treatment program, or community-based treatment program and any other facility or program to which the patient may be transferred or provisionally discharged, to involuntarily administer the medication to the patient. A copy of the order must be given to the patient, the patient's attorney, the county attorney, and the treatment facility, state-operated treatment program, or community-based program. The treatment facility, state-operated treatment program, or community-based program may not begin administration of the neuroleptic medication until it notifies the patient of the court's order authorizing the treatment.

(f) A finding of lack of capacity under this section must not be construed to determine the patient's competence for any other purpose.

(g) The court may authorize the administration of neuroleptic medication until the termination of a determinate commitment. If the patient is committed for an indeterminate period, the court may authorize treatment of neuroleptic medication for not more than two years, subject to the patient's right to petition the court for review of the order. The treatment facility, state-operated treatment program, or community-based treatment program must submit annual reports to the court, which shall provide copies to the patient and the respective attorneys.

(h) The court may limit the maximum dosage of neuroleptic medication that may be administered.

(i) If physical force is required to administer the neuroleptic medication, the facility or program may only use injectable medications. If physical force is needed to administer the medication, medication can only be administered in a setting where the person's condition can be reassessed and medical personnel qualified to administer mediation are available, including in the community, a county jail, or a correctional facility. The facility or program or not use a nasogastric tube to administer neuroleptic medication involuntarily.

Subd. 9. **Immunity**. A substitute decision-maker who consents to treatment is not civilly or criminally liable for the performance of or the manner of performing the treatment. A person is not liable for performing treatment without consent if the substitute decision-maker has given written consent. This procedure does not affect any other liability that may result from the manner in which the treatment is performed.

Subd. 10. **Review**. A patient or other person may petition the court under section 253B.17 for review of any determination under this section or for a decision regarding the administration of neuroleptic medications, appointment of a substitute decision-maker, or the patient's capacity to make decisions regarding administration of neuroleptic medications.

STATEMENT OF THE CASE

The plaintiff brought the underlying action pursuant to 42 U.S.C. § 1983 alleging that the defendants wrongfully confined and committed the plaintiff in violation of the procedures and restrictions contained in Minnesota's statutes. This action also alleged that the defendants repeatedly forcibly injected the plaintiff with neuroleptic drugs medically documented as harmful to her, over her objections and without checking her medical records, also in violation of the strict procedures and restrictions in Minnesota's statutes. These allegations of statutory violations violated her rights under the Eighth and Fourteenth Amendments to the United States Constitution. Plaintiff sought declaratory and injunctive relief in addition to damages incurred by the permanent and irreversible harm caused by the injections and subsequent aggravation of her medical condition of akathisia.

A. **Facts**.

On August 24, 2019, Catherine Brennan was taken to Essentia Health Center in Brainerd, Minnesota, suffering from an adverse reaction to prescribed medication for akathisia, a physical illness. Despite the restrictions imposed by Minnesota statutes enacted to protect persons proposed as patients in civil commitment proceedings and the involuntary injection of neuroleptic medications, she was transported to Prairie St. John's Hospital in Fargo, North Dakota, a distance of approximately 140 miles and a two and a half hour drive, where she was immediately injected with neuroleptic medications, over her repeated objections. Brennan was already suffering from akathisia. The injections, given to her

for the succeeding six months, seriously aggravated her preexisting illness.

An order for civil commitment was not entered until September 24, 2019. She had been confined at Prairie St. John's, without her consent and without notification of her whereabouts to her family. Dr. Eric Johnson, her treating physician, who was aware of her mental health misdiagnosis and difficulties with medications, was not consulted. Brennan appeared at the hearing but has little recollection of what occurred, as she was drugged at the time. She does recall requesting her own counsel, but was denied her request. Rather, she was represented by a court-ordered attorney, who did not defend her.

The proceedings were held with numerous violations of Minnesota statutes, principally Minn. Stat. § 253B.07, set forth in this petition. The violations included serious statutory violations by the failure to adequately investigate the proposed patient's medical history, the denial of her right to choose her own legal counsel, and, most seriously, by holding her in the hospital without a finding that she posed a danger to herself or the community. And the hospitals disregarded the requirement to consider the least restrictive alternative.

An order authorizing the administration of neuroleptic medications was not given until October 1, 2019. By that time, she had been injected with numerous psychotropic drugs, over her objections, which both interfered with her ability to defend herself and also worsened her akathisia.

The injections forced on her violated numerous sections of the governing statute, including Minn. Stat. § 253B.07, but more specifically Minn. Stat. § 253B.092, also cited above. The most obvious and egregious violation was that she was drugged

immediately when transferred to North Dakota, which was an apparent attempt to circumnavigate Minnesota's statute, which clearly required a hearing prior to injecting her with the drugs. Brennan was involuntarily drugged at the time of her commitment hearing and, ironically, at the hearing to determine whether drugs could be administered.

B. Proceedings below.

The United States District Court of Minnesota.

This case was commenced by the filing of the complaint on August 23, 2021. An Amended Complaint was filed on September 21, 2021. Defendant Minnesota Department of Human Services was dismissed as a defendant by a Stipulation dated October 21, 2021. Defendant Dr. David Anderholm, d/b/a Northern Psychiatric Associates was dismissed as a defendant by a stipulation dated July 19, 2022.

A motion for partial dismissal was filed by PSJ Acquisition, LLC, d/b/a Prairie St. John's Hospital, located in Fargo, North Dakota, on October 4, 2021. A motion to dismiss was also filed by Essentia Health, operator of the Essentia St. Joseph's Medical Center, located in Brainerd, Minnesota, on October 4, 2021. A hearing was held on January 10, 2022. An Opinion granting the motions was filed on April 11, 2022. (A.-35).

The district court rejected the plaintiff's wrongful commitment claim, basing his decision on the precedent of *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994). The district court rejected the plaintiff's argument, relying on the Eighth Circuit precedent of *Thomas v. Eschen,* 928 F.3d 709 (8th Cir. 2019), ruling that *Heck v. Humphrey*

extended to civil commitment cases that did not involve a criminal defendant.

The district court also rejected the plaintiff's invasion of privacy claim, relating to the involuntary administration of neuroleptic medications. The district court held that the Amended Complaint did not set forth facts to establish that the defendants' conduct established a "willful and deliberate" indifference to the plaintiff's Eighth Amendment constitutional right to protection from cruel and unusual punishment. The Amended Complaint alleged that the defendants' violation of statute was sufficient to establish a standard of care that did not require a showing of willful and deliberate indifference.

The defendants Cass County and Marsha McMillen had filed an Answer on October 21, 2021. Both brought a motion to dismiss on Jul 18, 2022. Prairie St. John's Hospital filed a motion for summary judgment as to Count 3. Both motions were heard on August 29, 2022. An Opinion and Order granting both motions was entered on January 6, 2023. (A-8).

The court reiterated its understanding that *Thomas v. Eschen* extended *Heck v. Humphrey* to civil commitments involving non-criminal patients. The district court also ruled on issues involving qualified immunity, but those arguments were dismissed without prejudice based on the *Heck v. Humphrey* jurisdictional dismissal.

The Eighth Circuit Court of Appeals decision.

A Notice of Appeal of the Opinion and Order dated April 11, 2022, and the part of the Opinion and Order dismissing Cass County and Marsha McMillen was timely filed on April 1, 2023. Oral arguments were

heard on December 12, 2023. The decision was entered on February 27, 2024. (A-1).

In its opinion, the Eighth Circuit panel rejected the argument that *Heck v. Humphrey* should not be applied to civil commitment proceedings of non-criminal patients. In its opinion, the panel stated that the petitioner's argument raises a "distinction without a difference". The text of *Heck v. Humphrey* and federal and state statutes disagree.

The Eighth Circuit also misapplied precedent in upholding the dismissal of the invasion of privacy claim. Citing prior Eighth Circuit precedent, the court held that cases based on the Eighth Amendment require proof of "willful and deliberate indifference" when bringing Fourteenth Amendment claims. The opinion and analysis are in conflict with the text and history of 42 U.S.C. § 1983. Count 2 was based on a violation of multiple Minnesota precedents. Requiring a higher standard of care, protecting the state actors, in a case involving violations of procedures mandated by statute, is inappropriate.

A petition for Rehearing En Banc was filed on March 11, 2024. On April 1, 2024, the Petition for Rehearing En Banc was denied.

REASONS FOR GRANTING THE WRIT

This case presents the court with an opportunity to clarify whether the so-called "Heck Doctrine," from the precedent of *Heck v. Humphrey*, applies to civil commitment proceedings arising from non-criminal medical situations. The Petitioner has argued below that the so-called "Heck Doctrine" is really a very limited "Heck Exception" to the "Patsy Doctrine," from the precedent of *Patsy v. Board of Regents,* 457 U.S. 496, 172 S.Ct. 2557, 73 L.Ed.2d 102 (1982*)*. This case also presents the court with an opportunity to clarify that, in a civil rights action based on violations of statutes by participants in a civil commitment proceeding, an additional burden to establish that the participants conduct was willfully indifferent, rather than simply illegal, is an unwarranted pleading and proof requirement which is inconsistent from the plain language and court precedents interpreting civil rights cases.

Petitioner Catherine Brennan was not a criminal nor is she diagnosed by any of her treating healthcare professionals as having the mental illness justifying her civil commitment. She has a history of akathisia and other adverse reactions to prescription drugs. In this case, she was a patient hospitalized because of an adverse reaction to a drug prescribed to relieve symptoms related to akathisia, a very serious and debilitating neurological condition. She was not a danger to herself or to others. Minnesota statutes are clear and applicable in this case, regulating the procedures and requirements of those involved in the civil commitment proceedings and administration of drugs, the parties named as defendants in this lawsuit.

The decision below is an unwarranted extension of *Heck v. Humphrey*, 512 U.S. 477 (1994), which by its language is narrowly applied to civil commitment proceedings involving incarcerated prisoners, as a narrow exception to the "exhaustion of administrative remedies" standard set forth in *Patsy v. Board of Regents*, 457 U.S. 496 (1982). *Patsy v. Board of Regents*, not *Heck v. Humphrey*, should be the appropriate precedent in these proceedings. The decision of the Eighth Circuit departs from that and extends *Heck v. Humphrey* beyond this Court's intent. This case cannot establish a new precedent departing from the previous *Heck* and *Patsy* precedents. Clarification is necessary.

The court should also clarify that the principles expressed in *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975), *Zinernon v. Burch*, 494 U.S. 113 (1990) and *Youngberg v. Romeo*, 457 U.S. 307 (1982), which carefully protect the liberties of patients, mandate against imposing additional pleading and proof requirements in civil rights actions based on the Fourteenth Amendment. 42 U.S.C. § 1983 addresses violations of statutes. Imposing an additional requirement to prove that the conduct also violates the Eighth Amendment is inconsistent with §1983 and this court's prior and clear precedents which mandate the protection of the hospitalized patients, rather than the government and hospital personnel who rush to initiate commitment and coerced drug injection procedures.

I. The decision below conflicts squarely with the language and purpose of this court's opinion and decision in *Heck v. Humphrey*.

The *Heck v. Humphrey* decision was applied to this case based on the previous Eighth Circuit case of *Thomas v. Eschen,* 928 F.3d 709 (8th Cir. 1996). *Thomas v. Eschen* was admittedly an extension of *Heck v. Humphrey*. But the *Thomas v. Eschen* case still involved a duly convicted criminal. The *Thomas v. Eschen* precedent admittedly extended the *Heck v. Humphrey* precedent to civil commitment proceedings of criminals. In this case, the Eighth Circuit has expanded their interpretation of *Heck v. Humphrey* even further. In the present case, the Eighth Circuit has extended *Thomas v. Eschen* to civil commitment proceedings for individuals who are not criminals. There is nothing in *Heck v. Humphrey* to justify the extension of that precedent to non-criminals. *Heck v. Humphrey* specified that the court was not overruling *Patsy v. Board of Regents*. The *Patsy v. Board of Regents* principle should be followed in this case. The principle of *Heck v. Humphrey* needs to be restricted. The principle of *Patsy v. Board of Regents* needs to be reestablished.

In *Heck v. Humphrey*, the Supreme Court stated that: "we see no need to abandon . . . our teaching that §1983 contains no exhaustion requirement beyond what Congress has provided." *Id*. at 2364. The analysis and language in *Heck v. Humphrey* does not support the application of the "exhaustion of administrative remedies" requirement in civil commitment proceedings to non-criminals. It is a distinction that is significantly different. *Heck v. Humphrey* analyzed the connection between civil rights actions with the

federal habeas corpus statute available for criminal defendants. In *Heck v. Humphrey*, the Supreme Court expressed as the basis for its analysis, that "[t]his case lies at the intersection of the two most fertile sources of federal-court prisoner litigation - the Civil Rights Act of 1871 . . . 42 U.S.C. § 1983, and the federal habeas corpus statute, 28 U.S.C. § 2254." Brennan was drugged to a level of incapacity that left her so impaired she has limited memory of her hearings. The drugs were forced on her for the entire period of her confinement and commitment. Habeas corpus is an unnecessary and an illusory remedy for a patient who is drugged and denied her right to her own counsel.

An even more important distinction from the present case is that *Heck v. Humphrey*'s holding was expressly based on the finding that the civil rights action was analogous to a malicious prosecution case. Civil commitment cases not brought within the context of a criminal proceeding are not prosecutions. Petitioners in commitment proceedings are not prosecutors. The only considerations are whether the patient is mentally ill, and not suffering from drugs or alcohol, and whether the patient is a danger to herself or the community. These are medical issues. Shifting the focus from what should be purely medical decisions to a criminal procedures discussion is not warranted and causes a result that places too much of a burden on patients who must be able to rely on the enforcement of statutes enacted for their protection.

Congress is in alignment with *Heck v. Humphrey*. *See*, 42 U.S.C. § 1997(a). Prisoner's lawsuits are its own category. The Eighth Circuit's "distinction without a difference" standard is out of alignment with Congressional findings and United States Supreme Court precedents. A correction is needed.

II. The Eighth Circuit's requirement that a Civil Rights Act plaintiff plead "willful and deliberate indifference" as the standard of care in an action alleging the violation of a statute is an unnecessary and unwarranted departure from precedent.

The Eighth Circuit opinion in this case was based upon a requirement that a plaintiff must plead that the defendants' conduct showed a willful and deliberate indifference. The analysis does not address or discuss the allegations that the defendants' conduct was in violation of the procedures mandated by statute. Basing the standard of care on professional judgment rather than statutory compliance should have allowed the allegations of negligence to be sufficient.

The opinion states as follows:

> We review whether a complaint states a cause of action *de novo*. Buckley v. Hennepin Cnty., 9 F. 4th 757, 760 (8th Cir. 2021). Courts apply the deliberate indifference standard from the Eighth Amendment when analyzing a civilly committed individual's Fourteenth Amendment claim of constitutionally deficient medical care. Mead v. Palmer, 794 F.3d 932, 936 (8th Cir. 2015) (citation omitted); see, id. at 764 (explaining that the Eighth Amendment deliberate indifference standard applies when the state restrains an individual's liberty such that it renders her unable to care for herself and fails to provide her adequate medical care). This standard requires a plaintiff to show an objectively serious medical need, which the defendants

> knew of, but deliberately disregarded. Mead, 794 F. 3d at 936. Deliberate indifference is "more than negligence, more than even gross negligence, but less than purposefully causing or knowingly bringing about a substantial risk of serious harm." Hall v. Higgins, 771 F. 4th 1171, 179 (8th Cir. 2023) (cleaned up). Whether a defendant acted with deliberate indifference is measured by the defendant's knowledge at the time in question, not by perfect vision of hindsight. Schaub v. Von Wald, 638 F.3d 905, 915 (8th Cir. 2011).

These decisions violate the letter and spirit of prior United States Supreme Court precedents. The Eighth Circuit needs to be redirected in civil commitment and forceable and nonconsensual drug injection cases as in this case. Statutes have been enacted specifically to address civil commitments and forced injections of potentially harmful drugs against a person's will and without the person's consent. The victim should not be required to prove that state actors who violate state statutes must also show that the state actors were willfully and knowingly indifferent to the statutes when they did so. The violation itself is all that is required. State actors should not be held to a different standard.

The drugs forced on the petitioner aggravated her physical illness of akathisia. At one point, the continued injections almost killed her. The petitioner informed the hospitals that she could not take certain drugs, but they were forced on her anyway. These injections were unlawfully forced on her prior to the required hearing required before the injections were allowed. The statute and a Minnesota Supreme Court precedent required what is now known as a *Jarvis*

hearing. *See*, Minn. Stat. § 253B.92; *Jarvis v. Levine*, 408 N.W.2d 139 (Minn. 1983).

Although "willful and deliberate indifference" may ultimately be established in this case, knowing of and pleading such is not necessary at that preliminary stage. Placing the burden on the plaintiff to know nothing more than that the statutes were violated should be enough. The Eighth Circuit requirement to plead "willful and deliberate indifference" is not found in and is inconsistent with prior United States Supreme Court precedents. In *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the rights of the individual were considered more than the burdens placed on the state actors. In that case, the issues regarding compliance with state law were placed on the defendant state actor. In *Addington v. Texas*, 441 U.S. 418 (1979), the higher burden of proof requirement was placed on the state, not the patient. The opinion in this case, and the Eighth Circuit precedents cited, are inconsistent with *O'Connor v. Donaldson* and *Addington v. Texas*. The United States Supreme Court needs to correct a dangerous standard applicable to citizens residing within the boundaries of the Eighth Circuit.

The United States Supreme Court has taken care to acknowledge the complexity and fact intensive needs when discussing mental health issues and the type of medical care mandated for patients that may be imposed by healthcare professionals as a constitutional minimum. The discussion regarding what treatment should be given as an incident of confinement, *see*, *O'Connor v. Donaldson*, relevant to petitioner's Count 1, as contrasted with the right to refuse treatment, as relevant to petitioner's Count 2, raise serious constitutional issues regarding the protections that should be given to involuntarily restrained hospitalized patients. *See*, *Rennie v. Klein*,

653 F.2d 836 (3rd Circuit 1981), The deference to be given to a healthcare professional's judgment as to what treatment should be provided, as opposed to simply ignoring the well-reasoned objection of the patient, should be considered.

Minnesota statutes have been enacted specifically to regulate civil commitment proceedings, Minn. Stat. § 253B.07, and the administration of neuroleptic medications. Minn. Stat. § 253B.92. These statutes were enacted to protect people like the petitioner. Both of those statutes were violated numerous times by the county social worker named in the caption and the healthcare facility defendants.

Minn. Stat. § 253B.07 was violated in the following particulars:

1. During the pre-petition process it was found that the patient was not a danger to herself or to others.
2. The petition did not disclose that the patient was drugged prior to the hearing.
3. The patient was denied her right to her own counsel.
4. The patient was not given notice of the hearing.
5. The court-appointed attorney did not present any evidence on behalf of the patient.

Minn. Stat. § 253B.92 was violated in the following particulars.

1. The hospitals did not document an emergency prior to the administration of neuroleptic medications.

2. The hospitals failed to consult her medical records or patient's doctor regarding the potential harm from the administration of neuroleptic medications.

3. The hospitals violated the statutory procedures when they ignored the patient's objections to the administration of neuroleptic medications that she knew were harmful to her.

The district court applied the "willful and deliberate disregard" standard of care as taken from Eighth Amendment treatment cases. The Eighth Circuit affirmed that standard. Both courts disregarded the argument that the Amended Complaint did not rely on a violation of the Eighth Amendment, though violations of the Eighth Amendment did occur. The Amended Complaint cited to and relied on the violations of specific statutes as the basis for the § 1983 remedy. The Eighth Amendment standard of care should not be applied when the state actors, responsible to follow state law, violate those laws when taking actions in commitment proceedings and forcible injection proceedings against involuntary patients who are incapable of protecting themselves.

In *Zinernon v. Burch*, liability was found based on the Supreme Court's determination that the hospital personnel should have known that consent, when actually given, was made by a person with questionable capacity. The standard of care required by the Eighth Circuit was not imposed on the patient in *Zinernon,* whose consent was questioned by the court, then rejected.

In this case, consent was not given, but knowingly and repeatedly objections were made by

Ms. Brennan because of her knowledge regarding the drugs that she was given and the harmfulness of those drugs. She knew that based on her knowledge of her medical history. The hospitals never reviewed her medical history.

The precedent of *Zinernon v. Burch* should have protected her. The hospital personnel at Essentia Health and Prairie St. John's should have known better. They disregarded her protests and injected her anyway. The results were devastating.

State actors are as responsible to know and abide by the law as much as citizens. If state actors are to be treated differently, the remedy is to seek qualified immunity. Setting a higher standard of care, which the Eighth Circuit has done, is an unconstitutional bar that is set too high. It is repugnant to §1983. The United States Supreme Court has addressed the Eighth Circuit's proclivity to fail to protect individuals from being subjected to forced injections of potentially harmful drugs over their objections by an overbroad delegation of power to state actors to do so. *Sell v. United States*, 539 U.S. 166, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003). The Eighth Circuit standard applied in this case needs to be rejected and corrected.

CONCLUSION

Mental illness, as noted by former Chief Justice Warren Burger in his concurring opinion in *O'Connor v. Donaldson*, is a complex and largely misunderstood subject. The trauma and stigma of commitment to persons wrongfully held hostage and drugged by proceedings in which their statutory rights are casually disregarded needs a remedy. The unwarranted refusal of the Eighth Circuit to acknowledge the distinction between criminals and

hospital patients needs to be corrected. For now, the dangerous precedent created by the Eighth circuit stands.

Respectfully submitted,

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APPENDIX INDEX

United States Court of Appeals
for the Eighth Circuit

No. 23-1209

Catherine Brennan

Appellant

v.

Cass County Health, Human and Veteran Services, et al.

Appellees

Appeal from U.S. District Court
for the District of Minnesota
(0:21-cv-01900-ECT)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 01, 2024

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Michael E. Gans

United States Court of Appeals
for the Eighth Circuit

No. 23-1209

Catherine Brennan
Plaintiff- Appellant

v.

Cass County Health, Human and Veteran Services;
Marsha McMillen, in her official capacity;
Essentia Health St. Joseph's Medical Center;
Essentia Health; PSJ Acquisition, LLC, doing
business as Prairie St. John's Hospital
Defendants - Appellees

Appeal from United States District Court
for the District of Minnesota

Submitted: December 12, 2023
Filed: February 26, 2024

Before ERICKSON, MELLOY, and STRAS,
Circuit Judges.

ERICKSON, Circuit Judge.

Catherine Brennan commenced this action under 42 U.S.C. § 1983, alleging federal and state claims arising out of Minnesota civil commitment proceedings. More specifically, Brennan alleged she was wrongfully committed and unlawfully forcibly

medicated because the defendants failed to recognize she was experiencing side effects from psychotropic medications, which were mistaken for psychosis and mania. Brennan appeals the district court's[1] dismissal of her claims. We affirm.

I. BACKGROUND

In 2014, Brennan took a new job and almost immediately had regrets about the job change. At an appointment for an allergy shot, Brennan told a nurse practitioner about the stressful job transition. The nurse practitioner prescribed Ambien, Prozac, and Ativan. After taking these medications, Brennan asserts she began experiencing symptoms of akathisia.[2] In her amended complaint, Brennan alleged that before this time she had no history of mental illness and had never taken psychotropic medications.

From September 2015 through January 2018, Brennan was treated by multiple providers and hospitalized several times. She was diagnosed with bipolar disorder, depression, and generalized anxiety disorder. During this timeframe, her medical records document four suicide attempts, resulting in Brennan twice being committed as mentally ill. Brennan's

[1] The Honorable Eric C. Tostrud, United States District Judge for the District of Minnesota.

[2] Akathisia is a neuropsychiatric syndrome associated with psychomotor restlessness. It is a movement disorder that may be associated with the use of antipsychotic medications. An individual with akathisia may experience an intense sensation of unease or an inner restlessness usually involving the lower extremities. https://www.ncbi.nlm.nih.gov/books/NBK5l9543/ (last visited January 9, 2024).

second civil commitment ended on January 24, 2018.

On August 17, 2019, Brennan displayed signs that her mental health was decompensating. She called 911 three times in one evening, reporting that she was being threatened by her husband. After the third report, officers arrested Brennan for making a false 911 report. Two days later, officers received reports that Brennan was making comments that raised concerns in the City of Pequot Lakes. Several days later, Brennan's brother unsuccessfully sought to have Brennan committed.

The following day, on August 24, 2019, Brennan's husband called 911 requesting assistance because Brennan had been making suicidal comments all night. Based on their observations and interactions with Brennan, responding officers believed Brennan should be taken to the hospital for an evaluation. Then Brennan refused to get into the ambulance, she was transported by a deputy to the emergency room at St. Joseph's Medical Center. The evaluating doctor noted that Brennan was acting "extremely tangential, paranoid, delusional, agitated and with labile affect," had pressured/rapid speech, and was expressing impulsivity along with suicidal ideation. The doctor signed an emergency hold, noting that Brennan had made suicidal statements and had a history of mental illness with prior psychiatric admissions. Brennan was transported that day to Prairie St. John's Hospital where she was confined for a month. While at Prairie St. John's Hospital, Brennan was diagnosed with bipolar disorder involving current manic episodes with psychotic features; suicidal ideations; and medication noncompliance.

A petition for commitment was filed in Cass County (Minnesota) state court on August 28, 2019, by Marsha McMillen, an employee of Cass County Health, Human and Veterans Services. The petition was supported by a doctor's statement diagnosing Brennan with bipolar disorder, unspecified, manic, and indicating Brennan was currently delusional and confused. The doctor recommended inpatient treatment. The petition further detailed information contained in progress notes from Prairie St. John's Hospital, which demonstrated Brennan continued to struggle with her mental health even when hospitalized. A preliminary commitment hearing was held the next day, and the state court ordered Brennan confined pending a final commitment hearing.

A commitment hearing was held on September 23, 2019, during which Brennan testified and was represented by court-appointed counsel. Two medical examiners appointed by the court-the second one at Brennan's request-testified via video. After considering the evidence presented, the state court found that Brennan was a person who met Minnesota's statutory criteria for civil commitment as mentally ill. Brennan was committed for a period of six months. Her commitment order expired on March 24, 2020.

Brennan chose not to appeal the commitment order or otherwise challenge its validity. Rather, she commenced this federal action seeking expungement of all prior commitment-related proceedings, declaratory and injunctive relief, monetary damages, and attorney's fees and costs for violations of Minnesota law and her constitutional rights arising

out of the alleged wrongful commitment in 2019 and the improper administration of neuroleptic medications. Brennan alleged in her amended complaint that she was first diagnosed with akathisia during her hospitalizations in late 2015 and early 2016 but she was neither informed of this diagnosis at the time nor did other treating professionals recognize that she was not mentally ill but was experiencing adverse reactions to neuroleptic medications. Brennan also pointed to a letter that Dr. Eric Johnson wrote on July 28, 2022, which stated that Brennan's mental condition had been misdiagnosed and she should not be given antipsychotic medications or mood stabilizers.

The district court granted Marsha McMillen and Cass County Health, Human and Veteran Services' motion to dismiss for lack of subject matter jurisdiction; granted PSJ Acquisition, LLC d/b/a Prairie St. John's Hospital's motion for summa1y judgment for failure to comply with an expert disclosure requirement for medical malpractice claims; and granted Essentia Health, St. Joseph's Medical Center (the "Essentia defendants), and Prairie St. John's Hospital's motions under Federal Rule of Civil Procedure l2(b)(6) for failure to plausibly allege a claim against any of the defendants.

II. DISCUSSION

Brennan's amended complaint alleged three claims: (1) wrongful confinement arising out of her 2019 civil commitment; (2) invasion of privacy arising out of the forcible administration of neuroleptic drugs without due process of law; and (3) medical malpractice. Brennan specifically stated in her opening

brief that she is not appealing the grant of summary judgment as to the medical malpractice claim against Prairie St. John's Hospital. Her position regarding her medical malpractice claim against the Essentia Health defendants is less clear. Even so, she has waived any relief as to the district court's dismissal of her medical malpractice claim against the Essentia Health defendants by failing to meaningfully argue how the district court erred in dismissing this claim. See Lawn Managers, Inc. v. Progressive Lawn Managers, Inc., 959 F.3d 903, 914 n.7 (8th Cir. 2020) (stating a party who does not meaningfully argue an issue in its opening brief, waives it).

1. Wrongful Commitment

Brennan's predominant claim in this action is that she was civilly committed in 2019 in violation of her constitutional rights and Minnesota law. Because Brennan's civil commitment order stands, she cannot proceed in this Court with a wrongful commitment claim. See Heck v. Humphrey, 512 U.S. 477, 486-87 (1994); Thomas v. Eschen, 928 F.3d 709, 711-713 (8th Cir. 2019).

This Court has determined Heck, which barred claims challenging the validity of still-valid criminal judgments, applies to constitutional claims challenging a civil commitment order. Thomas, 928 F.3d at 711-713. Brennan's attempt to distinguish Thomas on the ground that she was a patient in a hospital while Thomas was a state prisoner is a distinction without a difference. The pertinent inquiry turns not on the status of the person being committed but rather on the nature of the underlying proceeding. Because Brennan's state civil commitment order remains valid, we dismiss her wrongful commitment claim without

prejudice. Id.

2. Forcible Administration of Neuroleptic Medications

Brennan next claims the failure to accurately diagnose her medical condition and forcibly administering neuroleptic medications violated her constitutional rights and Minnesota law. She alleged the defendants ignored her medical information and history, injected her with medications that aggravated her existing medical condition, ignored her continuous objections, and failed to obtain her consent prior to the treatment. She contends the defendants, either negligently or intentionally, disregarded the distinction between a person who is "mentally ill" from a person having an adverse reaction to neuroleptic drugs.

We review whether a complaint states a cause of action *de nova.* Buckley v. Hennepin Cnty., 9 F.4th 757, 760 (8th Cir. 2021). Courts apply the deliberate indifference standard from the Eighth Amendment when analyzing a civilly committed individual's Fourteenth Amendment claim of constitutionally deficient medical care. Mead v. Palmer, 794 F.3d 932, 936 (8th Cir. 2015) (citation omitted); see id. at 764 (explaining that the Eighth Amendment deliberate indifference standard applies when the state restrains an individual's liberty such that it renders her unable to care for herself and fails to provide her adequate medical care). This standard requires a plaintiff to show an objectively serious medical need, which the defendants knew of, but deliberately disregarded. Mead, 794 F.3d at 936. Deliberate indifference is "more than negligence, more even than gross negligence, but less than purposefully causing or knowingly bringing

about a substantial risk of serious harm." Hall v. Higgins, 77 F.4th 1171, 1179 (8th Cir. 2023) (cleaned up). Whether a defendant acted with deliberate indifference is measured by the defendant's knowledge at the time in question, not by perfect vision of hindsight. Schaub v. VonWald, 638 F.3d 905, 915 (8th Cir. 2011).

The amended complaint does not plead allegations plausibly showing deliberate indifference. There are no allegations identifying how Brennan's care or treatment exceeded gross negligence. There are no allegations showing which defendant knew or should have known that Brennan was not suffering from a mental illness but akathisia. Nor are there allegations that demonstrate when the defendants knew or should have known that Brennan's apparent psychiatric problems were the result of akathisia and not mental illness. Although Brennan has alleged a series of unfortunate and adverse consequences from the administration of neuroleptic medications, these allegations are inadequate to show a defendant acted with deliberate indifference. Given Brennan's failure to adequately plead deliberate indifference as to any of the named defendants, the district court did not err in dismissing Brennan's forcible administration of medication claim.

III. CONCLUSION

Because the district court did not err by dismissing Brennan's wrongful commitment claim without prejudice or by dismissing her forcible administration of medication claim with prejudice, we affirm the district court's judgment.

UNITED STATES DISTRJCT COURT
DISTRICT OF MINNESOTA

Catherine Brennan,

Plaintiff,

v.

Cass County Health, Human and Veteran Services; Marsha McMillen, *in her official capacity;* Community Behavioral Health Hospital; Essentia Health St. Joseph's Medical Center; Essentia Health; Dr. David Anderholm, *doing business as Northern Psychiatric Associates;* and PSJ Acquisition. LLC, *doing business as Prairie St. John's Hospital,*

Defendants.

File No. 21-cv-1900 (ECT/LIB)

OPINION AND ORDER

Wayne B. Holstad, St. Paul, MN, for Plaintiff Catherine Brennan.

James R. Andreen, Erstad & Riemer, P.A., Minneapolis, MN, for Defendants Cass County Health, Human and Veteran Services and Marsha McMillen.

Cally R. Kjellberg-Nelson and Dyan J. Ebert, Quinlivan & Hughes, PA, St. Cloud, MN, for Defendants Essentia Health St. Joseph's Medical Center and Essentia Health.

Kevin McCarthy, Mark A. Solheim, and Taylor R. McKenney, Larson King LLP, St. Paul, MN, for Defendant Dr. David Anderholm.

Christopher G. Angell and Richard J. Thomas, Burke & Thomas, P.L.L.P., Arden Hills, MN, for Defendant PSJ Acquisition, LLC.

Plaintiff Catherine Brennan alleges that Defendants violated her rights under the federal Constitution and committed medical malpractice under Minnesota law in connection with her 2019 civil commitment. She seeks damages, expungement of "all prior commitment related proceedings involving [her]," injunctive and declaratory relief concerning possible future commitment proceedings against her, and attorneys' fees. Three Defendants-Essentia Health St. Joseph's Medical Center, Essentia Health, and PSJ Acquisition, LLC-have filed motions to dismiss Brennan's operative Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). All three of these Defendants challenge Brennan's claims under 42 U.S.C. § 1983. St. Joseph's Medical Center and Essentia Health also seek dismissal of Brennan's state-law medical malpractice claim. The motions will be granted because Brennan's Amended Complaint lacks factual allegations plausibly establishing essential elements of these claims with respect to these Defendants.[1]

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[1] Brennan's assertion of§ 1983 claims means there is subject-matter jurisdiction over this case under 28 U.S.C. *§§* 1331 and 1343. And Brennan's§ 1983 and state-law medical- malpractice claims plausibly arise out of a common factual nucleus, making the exercise of supplemental jurisdiction over the medical-malpractice claim appropriate. Brennan alleges there is also

I[2]

The parties. Brennan is a resident of Pequot Lakes, Minnesota. Am. Compl. [ECF No. 6] ¶ 5. Until 2015, Brennan was employed as an English teacher in Pine River, Minnesota. *Id.* ¶ 13. Essentia Health St. Joseph's Medical Center is a corporation doing business as St. Joseph's Medical Center in Brainerd, Minnesota. *Id.* ¶ 9. Essentia Health is a corporation headquartered in Duluth, Minnesota, that operates St. Joseph's Medical Center. *Id.* PSJ Acquisition, LLC does business as Prairie St. John's Hospital, a psychiatric hospital in Fargo, North Dakota. *Id.* ¶ 10.

Brennan's 2019 civil commitment. Brennan has a history of being civilly committed due to mental illness. *See id.* ¶¶ 15-18 (describing a series of civil

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diversity jurisdiction. Am. Compl. 13. This is not correct. Brennan is alleged to be a citizen of Minnesota, as are some Defendants. *See Strawbridge v. Curtiss,* 3 Cranch 267, 2 L. Ed. 435 (1806).

[2] In accordance with the standards governing a Rule 12(b)(6) motion, the facts are drawn entirely from Brennan's Amended Complaint. *Gorog* v. *Best Buy Co.,* 760 F.3d 787, 792 (8th Cir. 2014). Brennan asserts that her opposition brief "incorporates the facts set forth in her Complaint and additional facts found in the plaintiff's commitment proceedings prior to the proceeding upon which this action is based and the medical records found in the prior proceedings on the principal of judicial notice." Pl.'s Mem. in Opp'n [ECF No. 43] at 1. Through a declaration. Brennan's counsel filed 99 pages of documents concerning Brennan's civil commitments and medical care. *See* Holstad Decl. [ECF No. 44]. Several of these documents are publicly filed court orders and related court filings alluded to in the Amended Complaint. No Party objects to the consideration of these documents and considering them seems appropriate. *See Greene v. Osborne-Leivian,* No. 19-cv-533 (ECT/TNL), 2021 WL 949754, at *2 n.3 (D. Minn. Mar. 12, 2021).

commitments occurring from September 2015 through January 2018). On August 24, 2019, Brennan was transported to St. Joseph's Medical Center in Brainerd out of concerns for her mental health and safety. *id.* ¶¶ 20, 29; *see also* Holstad Decl. [ECF No. 44J at 73-74 (alleging circumstances leading to hospital admission). Later that day, Brennan was transported from St. Joseph's Medical Center to Prairie St. John's Hospital in Fargo. Am. Compl. ¶ 21. On August 28, Marsha McMillen, a social worker with Cass County Health, Human and Veterans Services, filed a Petition for Judicial Commitment in Cass County District Court. *Id.* ¶ 20; Holstad Decl. at 71-76.[3] That same day, a Cass County District Judge ordered that Brennan be confined at Prairie St. John's Hospital "for observation, evaluation, diagnosis, treatment and care" and scheduled a preliminary commitment hearing for the next day, August 29. Holstad Decl. at 77-78. Following the August 29 preliminary commitment hearing, the Cass County District Judge determined that Brennan was likely to suffer "serious physical harm" if she was not confined and ordered her "confined at Prairie St. John's or an appropriate facility" pending a commitment hearing the judge scheduled for September 10. *Id.* at 80. On September 24, a Cass County District Judge entered an order civilly committing Brennan for six months beginning

[3] In the Amended Complaint, Brennan alleges that the Petition for Judicial Commitment was filed the "same day" she was admitted to St. Joseph's Medical Center, or August 24. Am. Compl. ¶ 20. Not that it really matters, but the Petition itself-in a header on every page and in the signature block-shows it was filed August 28. *See* Holstad Decl. at 71-76. According to the Petition, a physician with St. Joseph's Medical Center, Dr. Rebecca L. Holcomb, authorized an "Emergency Hold" on Brennan. *Id.* at 73. Brennan was then transferred to Prairie St. John's Hospital. *Id.* at 74.

September 23. *Id.* at 84-86. Brennan was confined at Prairie St. John's Hospital until September 23, 2019. Am. Compl. ¶ 21. She "was then sent to the Community Behavioral Health Hospital in Alexandria, Minnesota." *Id.* ¶ 22.

Brennan's allegations concerning St. Joseph's Medical Center. Brennan describes St. Joseph's Medical Center's corporate structure and location. *Id.* ii 9. Brennan alleges she was brought there on August 24 and transferred to another facility the same day. *Id.* ¶¶ 20-21. She alleges that when she arrived at St. Joseph's Medical Center, she was "suffering from withdrawal symptoms caused by [her] voluntary discontinuance of...Ativan, previously prescribed for anxiety" and that her "family disclosed that opinion at the time of admittance." *Id* 129. Brennan also alleges that her "family disclosed that [she] was not suicidal and ... gave no outward indications that she was suicidal." *Id.*[4]

Brennan's allegations concerning Prairie St. John's Hospital. Brennan describes Prairie St. John's Hospital's corporate structure and location. *Id.* ¶ 10. Brennan alleges that "prior to the time that [she] as formally committed and any hearing or order authorizing any of the Defendants to administer neuroleptic drugs," she was admitted to Prairie St. John's and confined there until September 23, 2019. *Id.* ¶ 21. She alleges that her "primary psychiatrist there was Dr. Ryan Greene, whose diagnosis was akathisia,

[4] Apart from its corporate identity and corporate relationship to St. Joseph's Medical Center, Brennan alleges no facts regarding Essentia Health. *See generally* Am. Compl.

brought on by Haldol injections." *Id.*[5] And Brennan alleges again later in her Amended Complaint that she "was immediately sent to Prairie St. John's Hospital…where [she] was confined form August 24, 2019 until September 25, 2019 even though no commitment order was in effect." *Id.* ¶ 32. She includes similar allegations several paragraphs later:

> Plaintiff was sent, without her permission, and prior to court order, to Prairie St. John's Hospital in Fargo, North Dakota. During Plaintiff's hospitalization at Prairie St. John's Hospital in Fargo, North Dakota, she was treated by Dr. Ryan Greene, the primary psychiatrist there. As soon as Plaintiff arrived at the hospital, she was injected with Halidon, Ativan, and Benadryl, commonly called "B-52." The injection was given over Plaintiff's continuous objections. The injections aggravated Plaintiff's akathisia.

Id. ¶ 41.

Brennan's claims. The Amended Complaint includes three counts, and every count seems to be asserted against every Defendant. In Count I,

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[5] "Akathisia" is "[a] syndrome characterized by an inability to remain seated, with motor restlessness and a feeling of muscular quivering; [it] may appear as a side effect of antipsychotic and neuroleptic medication." *Stedman's Medical Dictionary 42* (28th ed. 2006). Brennan alleges that she was hospitalized at the Community Behavioral Health Hospital in Baxter, Minnesota, from November to December 2015, and then again from January to March 2016. Am. Compl. ¶ 16. She alleges on information and belief that she was first diagnosed with akathisia during these hospitalizations, though she alleges that she was not informed of that diagnosis. *Id.*

entitled "CIVIL RIGHTS WRONGFUL CONFINEMENT," Brennan alleges:

> The Fourteenth Amendment (Art. XIV, U.S. Constitution) guarantees the liberty of mental health patients procedural due process preventing confinement by judicial commitments under the laws of the State of Minnesota without the application of a correct medical diagnosis requiring that a correct medical diagnosis based on a review of the patient's medical records supports a finding that the patient is either in danger to themselves or others.

Am. Compl. ¶ 27 (grammar and punctuation errors in original). Brennan quotes from a Minnesota statute, Minn. Stat. § 253B.02, subd. 17a, which she alleges "defines what is required to confine an individual" who is alleged to pose a risk of harm due to mental illness. Am. Compl. ¶ 28. She then repeats the circumstances of her 2019 commitment and alleges it was "wrongful." *Id.* ¶¶ 29-35.

In Count II, entitled "CIVIL RIGHTS INVASION OF PRIVACY," Brennan alleges:

> The Fourteenth Amendment (Art. XIV, U.S. Constitution) guarantees the liberty and protection of individuals with mental health conditions to be free of restraints and the freedom to choose not to be forced to take neuroleptic drugs without due process of law.

Id. ¶ 37. Brennan quotes at length from two Minnesota statutes, Minn. Stat. § 253B.02, subd. 17a, and § 253B.092, that regulate the civil commitment

process. Am. Compl. ¶¶ 39-40. Brennan then alleges that the forced administration of neuroleptic medications during her commitment. was "caused by the unauthorized and unlawfully obtained court orders requiring Plaintiff to receive harmful neuroleptic medications." *Id.* ¶ 47. Though neither Count I nor Count II refers to § 1983, Brennan alleges earlier in the Amended Complaint that these constitutional violations "giv[e] rise to a cause of action under 42 U.S.C. § 1983." *Id.* ¶ 1. In their submissions, the moving Defendants treat Counts I and II as arising under § 1983, and Brennan does not dispute that characterization. In Count III, called "MEDICAL MALPRACTICE MISDIAGNOSIS/ HARMFUL PRESCRIPTIONS," Brennan alleges that "the defendant physicians and hospitals failed to adhere to appropriate medical practice" in prescribing and forcing her to ingest neuroleptic drugs. *Id.* ¶ 51.

II

A

In reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *Gorog v. Best Buy Co.,* 760 F.3d 787, 792 (8th Cir. 2014) (citation omitted). Although the factual allegations need not be detailed, they must be sufficient "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (citation omitted). The complaint must "state a claim to relief that is plausible on its face." *Id.* at 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court

to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Allegations establishing "a sheer possibility that a defendant has acted unlawfully" are not sufficient. *Blomker v. Jewell,* 831 F.3d 1051, 1055 (8th Cir. 2016*)(quoting Iqbal,* 556 U.S. at 678). As our Eighth Circuit Court of Appeals explained in *Gregory v. Dillard's, Inc.:*

> [A] plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims..., rather than facts that are merely consistent with such a light. While a plaintiff need not set forth detailed factual allegations or specific facts that describe the evidence to be presented, the complaint must include sufficient factual allegations to provide the grounds on which the claim rests. A district court, therefore, is not required to divine the litigant's intent and create claims that are not clearly raised, and it need not conjure up unpled allegations to save a complaint.

565 F.3d 464, 473 (8th Cir. 2009) (en banc) (cleaned up).[6]

B

The moving Defendants first argue that

[6] Brennan cites *Conley* v. *Gibson,* 355 U.S. 41 (1957). Pl.'s Mem. in Opp'n at 10. But *Twombly,* 550 U.S. at 561-63, overruled *Conley* and its "no set of facts" standard. *Horras* v. *Am. Cap. Strategies, Ltd.,* 729 F.3d 798, 806 (2013) (Colloton, J. concurring in part and dissenting in part).

Brennan's § 1983 claims in Counts I and II must be dismissed (regardless of what constitutional violation they implicate) because Brennan has failed to allege facts plausibly showing that they are state actors. "The essential elements of a § 1983 claim are (1) that the defendant(s) acted under color of state law, and (2) that the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right." *Schmidt v. City of Bella Villa,* 557 F.3d 564,571 (8th Cir. 2009). "Only state actors can be held liable under Section 1983." *Youngblood* v. *Hy-Vee Food Stores, Inc.,* 266 F.3d 851, 855 (8th Cir. 2001). "Under [the Supreme] Court's cases, a private entity can qualify as a state actor in a few limited circumstances-including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity." *Manhattan Cmty. Access Corp. v. Halleck,* 139 S. Ct. 1921, 1928 (2019) (citations omitted); *see Dennis v. Sparks,* 449 U.S. 24, 27-28 (1980) ("Private persons, jointly engaged with state officials in the challenged action, are acting [ ] 'under color' of [state] law for purposes of § 1983 actions.").

Regarding the exclusive-public-function category, in *Doe v. North Homes, Inc.,* the Eighth Circuit addressed whether a § 1983 plaintiff (Doe) alleged facts plausibly showing that a private entity (North Homes) that owned and operated juvenile correctional and rehabilitation facilities in Northern Minnesota qualified as a state actor. 11 F.4th 633, 635 (8th Cir. 2021). To answer that question, the court analyzed whether Doe "plausibly alleged that North Homes performed a public function-that is, a function

traditionally and exclusively performed by the state-when it detained her." *Id.* at 637. The court determined that Doe had plausibly alleged North Homes performed a public function in detaining her. *Id.* at 637-39. Several allegations seem to have been essential to this determination. Doe didn't just allege that "North Homes cared for juveniles whose liberties the state (counties) decided to restrict." *Id.* at 638.

> She also alleged that the state (agencies) agreed to empower North Homes to run two units, through which North Homes could deprive residents of their liberties. And she alleged that the state (legislatures, agencies, and courts) gave North Homes the power to detain residents in a correctional facility whenever it wanted and for whatever reason it saw fit.

Id at 638. In a concluding paragraph, the court summarized its holding by emphasizing the significance of Doe's plausible allegation that North Homes "caused her involuntary commitment in a *corrections* unit." *Id* at 639.

Regarding the joint-action category, the Eighth Circuit has explained that "[a] private party who willfully participates in joint activity with the State or its agents is considered a state actor." *Youngblood,* 266 F.3d at 855 (citing *Adickes v. SH Kress & Co.,* 398 U.S. 144, 152 (1970)). "In construing that test in terms of the allegations necessary to survive a motion to dismiss," the Eighth Circuit "has held that a plaintiff seeking to hold a private party liable under § 1983 must allege, at the very least, that there was a mutual understanding, or a meeting of the minds, between

the private party and the state actor." *Mershon v. Beasley,* 994 F.2d 449, 451 (8th Cir. 1993).

The Amended Complaint's factual allegations do not plausibly show that St. Joseph's Medical Center, Essentia Health, or Prairie St. John's Hospital were state actors in connection with her 2019 civil commitment. Brennan addresses § 1983's state-action element explicitly twice in the Amended Complaint. First, she alleges:

> The order for commitment in Case No. 11-PR-19-1477 was obtained under color of state law by government employees or others acting under the government['s] appointment or supervision who unlawfully obtained an order for her commitment without regard to the statutory requirements or protocols.

Am. Compl. ¶ 31. This allegation is not sufficient. It identifies none of the "others acting under the government's appointment or supervision." If the "others" this paragraph references are intended to be St. Joseph's Medical Center, Essentia Health, or Prairie St. John's Hospital, that allegation would seem inconsistent with other allegations in the Amended Complaint to the effect that Cass County social worker McMillen filed the Petition for Judicial Commitment. Am. Compl. ¶¶ 20, 30. Regardless, "others" is too vague in this context to give any one Defendant (of the multiple Defendants) notice of what that Defendant is alleged to have done to qualify as a state actor in connection with Brennan's civil commitment. Second, Brennan alleges:

> The coerced injections of Haldol and other neuroleptics, over the Plaintiffs continued objections, were forcibly administered under "color of state law", first without a court order and later under a court order that did not consider the medical history of the Plaintiff available to the Defendants prior to seeking the court orders.

Id. ¶ 45. This allegation too is insufficient. It seems to convey that a private-entity Defendant or Defendants administered neuroleptic medications as state actor. But no facts are alleged to show how or why this is so. This allegation also suffers from the same group-pleading problem as the first, meaning it does not give any one Defendant notice of what made it a state actor.

There is more. (a) Regarding St. Joseph's Medical Center, Brennan alleges she was brought there and transferred out the same day, and court documents show that civil commitment proceedings did not occur until after that transfer. *See id.* 1120-21 (alleging that Brennan was transferred from St. Joseph's to Prairie St. John's "[p]rior to the time that [she] was formally committed and any hearing or order authorizing any of the Defendants to administer neuroleptic drugs"); Holstad Decl. at 71-76. It is difficult to understand how any Defendant might have been a state actor with respect to care provided before Brennan was civilly committed. (b) Beyond its corporate relationship to St. Joseph's Medical Center, Brennan alleges no facts hinting at how Essentia Health might have been involved in her care, much more a state actor. (c) The Amended Complaint

includes no allegations like those in *North Homes, Inc.* showing that the state gave any private-entity Defendant the power to detain Brennan "whenever it wanted to and for whatever reason it saw fit." 11 F.4th at 638. Judged against the Amended Complaint's allegations, *North Homes, Inc.* is materially different from this case. (d) Nor does the Amended Complaint include allegations hinting at a shared understanding between any private-entity Defendant and a state agent. (e) Finally, Brennan cites no authority for the proposition that health care providers are state actors whenever they provide care to civil detainees. Though Brennan argues in her opposition brief that her lawsuit "attacks the decision made by [Essentia]" to commence commitment proceedings based on a negligent diagnosis, Pl.'s Mem. in Opp'n at 6, the weight of authority does not support the conclusion that physicians who participate in civil commitment proceedings in this way are state actors. *See Jones v. Diner,* No. 4:09CV00204 JMM, 2009 WL 1285842, at *2 (E.D. Ark. May 5, 2009) (collecting cases). Because Brennan has not alleged facts plausibly showing that St. Joseph's Medical Center, Essentia Health, or Prairie St. John's Hospital were state actors in connection with her 2019 civil commitment, her § 1983 claims in Counts I and II must be dismissed.

2

If they were state actors, the moving Defendants argue, Brennan's § 1983 "wrongful confinement" claim in Count I nonetheless should be dismissed because Brennan has not alleged that any relevant civil commitment order has been invalidated, reversed, or expunged, a prerequisite to claiming wrongful confinement. This argument has its foundations in

Heck v. Humphrey, 512 U.S. 477 (1994), and its progeny. Heck was a prisoner who brought a § 1983 claim for damages while the appeal of his conviction was pending, alleging that officials involved in his conviction had conducted an unlawful investigation, destroyed exculpatory evidence, and introduced illegal evidence at trial. *Id.* at 479. Analogizing to a malicious prosecution claim, the Supreme Court recognized that requiring "termination of the prior criminal proceeding in favor of the accused" would "avoid[] parallel litigation" and preclude the possibility of conflicting resolutions, thus serving the interests of "finality and consistency." *Id.* at 484-85 (quotation omitted). The Supreme Court held that a § 1983 claim for wrongful conviction is not cognizable unless the conviction has been reversed, invalidated, expunged, or called into question by a writ of habeas corpus. *Id.* at 486-87.

The Eighth Circuit has extended *Heck* to civil-commitment challenges. In *Thomas v. Eschen,* the Eighth Circuit affirmed a district court's determination that a civil detainee lacked a cognizable § 1983 wrongful commitment claim because the civil commitment had not been invalidated in any way identified by *Heck.* 928 F.3d 709, 711-13 (8th Cir. 2019); *see also McHorse v. Minnesota,* No. 13-cv-837 (MJD/LIB), 2013 WL 2383603, at *3 (D. Minn. May 30, 2013) ("Plaintiff cannot maintain a civil action seeking release from custody, *or any other relief that would necessarily cast doubt on the validity of his confinement,* without first securing a court order specifically invalidating his civil commitment. In other words, Plaintiff must successfully challenge the civil commitment itself, in a legally appropriate forum and manner, (i.e., a state court action or appeal, or a federal habeas corpus action), before he can seek a civil

judgment based on any allegedly wrongful acts or omissions that may have precipitated or prolonged his civil commitment.").

Brennan's Amended Complaint does not meet this rule. Though Brennan asserts a § 1983 wrongful confinement claim, she has not alleged that any relevant civil commitment order has been invalidated. Seemingly to the contrary, she asks to have "all prior commitment proceedings involving [her]" expunged. Am. Compl. at 15, ¶ 5. Therefore, if the moving Defendants were state actors, Brennan's§ 1983 wrongful confinement claim in Count I would fail under *Heck* and binding Eighth Circuit authorities.

3

The moving Defendants also argue that if they were state actors, Brennan's § 1983 "invasion-of-privacy" claim in Count II still would fail. This argument proceeds in two steps. First, Defendants argue that Brennan's Fourteenth Amendment invasion-of-privacy claim must be construed as an Eighth Amendment claim alleging deliberate indifference to medical needs. Second, Defendants argue that Brennan does not allege facts plausibly showing that any of them were deliberately indifferent to her medical needs.

A civilly committed individual's right to medical care "arises under the Due Process Clause of the Fourteenth Amendment." *Scott v. Benson,* 742 F.3d 335,339 (8th Cir. 2014) (citation omitted); *see* U.S. Const. amend. XIV, § 1. When a person who is civilly committed alleges a Fourteenth Amendment claim of constitutionally deficient medical care, courts "apply the deliberate indifference standard from the Eighth

Amendment." *Mead v. Palmer,* 794 F.3d 932, 936 (8th Cir. 2015) (quoting *Scott,* 742 F.3d at 339); *see Estelle v. Gamble,* 429 U.S. 97, 104-05 (1976); *Ferch v. Jett,* No. 14-cv-1961(SRN/TNL), 2016 WL 11394991, at *15-22 (D. Minn. Jan. 28, 2016) (applying deliberate indifference standard to civilly-committed individual's claim for improper administration of medication), *adopted as modified,* 2016 WL 916416, at *3 (D. Minn. March 10, 2016).

There really isn't much question that Count II of Brennan's Amended Complaint asserts this kind of claim. In support of the claim, Brennan alleges that Defendants ignored her relevant medical information and history, Am. Compl. ¶¶ 39, 45, injected her with medications that aggravated existing medical conditions, *id.* ¶ 41, and improperly failed to obtain Brennan's consent prior to treatment, *id.* ¶¶ 41, 45, 46. Given these allegations, Count II is best understood to allege a claim for constitutionally deficient medical care and, under binding precedent, must be analyzed under the Eighth Amendment's deliberate indifference standard.

"Whether an official was deliberately indifferent entails both an objective and a subjective analysis," and the application of the standard is a "factually-intensive inquiry." *Scott,* 742 F.3d at 339-40 (quotation omitted); *see Schaub v. VonWald,* 638 F.3d 905, 915 (8th Cir. 2011). To prove deliberate indifference, a plaintiff must show that "(l) he suffered from objectively serious medical needs, and (2) the defendants actually knew of but deliberately disregarded, those needs." *Mead,* 794 F.3d at 936 (citation omitted). "[M]ere disagreement with treatment decisions does not rise to the level of a constitutional violation." *Fourte v. Faulkner Cnty.,*

746 F.3d 384, 387 (8th Cir. 2014) (quoting *Jolly v. Knudsen,* 205 F.3d 1094, 1096 (8th Cir. 2000)); *see Long v. Nix,* 86 F.3d 761, 765 (8th Cir. 1996) ("Prison officials do not violate the Eighth Amendment when, in the exercise of their professional judgment, they refuse to implement a prisoner's requested course of treatment.").

Begin with the second element. "Deliberate indifference is more than negligence, more even than gross negligence…" *Fourte,* 746 F.3d at 387 (cleaned up); *see Smith v. Clarke,* 458 F.3d 720, 724 (8th Cir. 2006) ("Malpractice alone is not actionable under the Eighth [A]mendment."). The requisite mental state is "akin to criminal recklessness: disregarding a known risk to the inmate's health." *Gordon ex rel. Gordon v. Frank,* 454 F.3d 858,862 (8th Cir. 2006); *see Farmer v. Brennan,* 511 U.S. 825, 839-40 (1970). A plaintiff must show both that the defendant had actual knowledge that the plaintiff's medical condition created a substantial risk of serious harm and that the defendant failed to act to abate that risk. *See Coleman v. Rahija,* 114 F.3d 778, 784 (8th Cir. 1997); *Long,* 86 F.3d at 765 ("[T]he failure to treat a medical condition does not constitute punishment within the meaning of the Eighth Amendment unless prison officials knew that the condition created an excessive risk to the inmate's health and then failed to act on that knowledge."). "Deliberate indifference may be demonstrated by [those] who intentionally deny or delay access to medical care or intentionally interfere with prescribed treatment, or by [] doctors who fail to respond to ... serious medical needs." *Dulany v. Carnahan,* 132 F.3d 1235, 1239 (8th Cir. 1997). However, "[a]s long as this threshold is not crossed, [civilly committed individuals] have no constitutional

right to receive a particular or requested course of treatment, and [] doctors remain free to exercise their independent medical judgment." *Id.*

The Amended Complaint does not include allegations plausibly showing that St. Joseph's Medical Center, Essentia Health, or Prairie St. John's Hospital were deliberately indifferent. Brennan seems to allege that her medical treatment was deficient because she was forcibly injected with neuroleptic medications without her consent, aggravating a pre-existing condition. Am. Compl. ¶¶ 38, 41, 44, 45. But Brennan does not allege any facts plausibly showing how this aspect of her care exceeded gross negligence. Missing from the Amended Complaint are, for example, allegations showing which Defendant knew what about Brennan's medical condition that, in tum, meant a Defendant or Defendants knowingly created a substantial risk of harm by administering neuroleptic medications to Brennan. In addition to this problem, Count II suffers from the same problems described earlier in connection with the state-actor issue. Brennan alleges no claim-specific facts regarding Essentia Health. Count II includes no apparent mention of St. Joseph's Medical Center. And Count II at times references "Defendants" generally, *see id.* ¶ 45, at least making it impracticable for some Defendants to know what Brennan alleges they did that shows deliberate indifference.

C

St. Joseph's Medical Center and Essentia Health also seek dismissal of Brennan's medical-malpractice claim (Count III). "Under Minnesota law, the elements of a medical malpractice claim are that:

(1) the defendant owed a duty to the plaintiff to act with the applicable standard of care; (2) the defendant departed from that standard of care; and (3) the departure caused the plaintiff injury." *Preston v. Sumstad,* No. 20-cv-2103 (NEB/DTS), 2021 WL 1116400, at *3 (D. Minn. March 24, 2021) (citing *Smits as Tr. for Short v. Park Nicollet Health Servs.,* 955 N.W.2d 671,678 (Minn. Ct. App. 2021), review granted (May 18, 2021)).

The Amended Complaint does not include allegations plausibly showing these elements with respect to St. Joseph's Medical Center or Essentia Health. Brennan alleges that she suffered "brain damage, permanent injury and economic losses" and "physical and emotional damages." Am. Comp, ¶¶ 152-53. Though there is room for misunderstanding, Brennan seems to allege that "defendant physicians and hospitals failed to adhere to appropriate medical practice" when they (1) prescribed and forcibly administered neuroleptic medications, and (2) "failed to institute appropriate therapy and treatment to resolve the medical condition of akathisia." *See id.* ¶ 51(a)-(f). Brennan seems to allege that the prescription and administration of neuroleptic medications were negligent because they were based on an incorrect diagnosis of "bipolar disease" and worsened Brennan's health. *See id.* The main problem with these allegations is that they lump all Defendants together. Brennan doesn't allege which Defendant or Defendants did what. In the context of this multi-Defendant case, that doesn't give St. Joseph's Medical Center or Essentia Health notice of the claims against them. In addition to that problem, Brennan does not allege that Essentia Health ever treated her. (Again, beyond its corporate identity and

relationship to St. Joseph's Medical Center, the Amended Complaint includes no allegations concerning Essentia Health.) Though it is true that Brennan alleges she spent less than one day in the care of St. Joseph's Medical Center, she does not allege facts describing her care there in a way that fits her malpractice theories. She does not allege, for example, that physicians associated with St. Joseph's Medical Center misdiagnosed any condition or prescribed and forcibly administered neuroleptic medications. Without those allegations, Brennan has no basis to- and does not-allege any facts plausibly showing why that kind of care might have departed from the relevant standard. For these reasons, Brennan's medical malpractice claims against St. Joseph's Medical Center and Essentia Health must be dismissed.

*

Brennan amended her Complaint once as a matter of right before these motions were filed. She chose to stand by the Amended Complaint in its present form. She did not seek Defendants' agreement to amend a second time, and she did not request permission in the alternative to amend her Amended Complaint should these motions (or any one of them) be granted. For these reasons, Brennan's claims that are the subject of this motion will be dismissed with prejudice. *See Mell* v. *Minn. State Ag. Soc'y,* __ F.Supp. 3d__, No. 21- cv-1040 (ECT/KMM), 2021 WL 3862435, at *13-14 (D. Minn. Aug. 30, 2021).

ORDER[7]

Based on the foregoing, and all the files, records, and proceedings herein, **IT IS ORDERED THAT:**

1. Defendants Essentia Health St. Joseph's Medical Center and Essentia Health's Motion to Dismiss [ECF No. 25) is **GRANTED,** and the Amended Complaint is **DISMISSED WITH PREJUDICE** as to Defendants Essentia Health St. Joseph's Medical Center and Essentia Health;

2. Defendant PSJ Acquisition, LLC's Motion for Partial Dismissal [ECF No. 21] is **GRANTED,** and Counts I and II are **DISMISSED WITH PREJUDICE** as to Defendant PSJ Acquisition, LLC; and

3. Pursuant to the parties' joint stipulation for dismissal [ECF No. 39], the action is **DISMISSED WITH PREJUDICE** as to Defendant Community Behavioral Health Hospital.

Dated: April 11, 2022

s/ Eric C. Tostrud
Eric C. Tostrud
United States District Court

[7] Defendant Minnesota Department of Human Services was dismissed previously from the action pursuant to a joint Stipulation of Dismissal. *See* ECF Nos. 39, 42. That Stipulation also included the dismissal of "allegations against ... Community Behavioral Health Hospitals." ECF No. 39. Though Defendant Community Behavioral Health Hospital was not included in the Proposed Order submitted with that Stipulation for Dismissal, *see* ECF No. 40, it seems clear that Community Behavioral Health Hospital should have been dismissed pursuant to the Stipulation. *See* ECF No. 39. That oversight will be corrected in this Order.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Catherine Brennan,

File No. 21-cv-1900 (ECT/LIB)

Plaintiff,

v. **OPINION AND ORDER**

Cass County Health, Human and Veteran Services; Marsha McMillen, *in her official capacity;* and PSJ Acquisition, LLC, *doing business as Prairie St. John 's Hospital,*

Defendants.

Wayne B. Holstad, St. Paul, MN, for Plaintiff Catherine Brennan.

James R. Andreen and Samantha R. Alsadi, Erstad & Riemer, P.A., Minneapolis, MN, for Defendants Cass County Health, Human and Veteran Services and Marsha McMillen.

Christopher G. Angell and Richard J. Thomas, Burke & Thomas, P.L.L.P., Arden Hills, MN, for Defendant PSJ Acquisition, LLC.

Plaintiff Catherine Brennan alleges that Defendants violated her rights under the federal Constitution and committed medical malpractice under Minnesota law in connection with her 2019 civil commitment. She seeks damages, expungement of "all

prior commitment related proceedings involving [her]," injunctive and declaratory relief concerning possible future commitment proceedings against her, and attorneys' fees. Brennan originally sued eight Defendants, but a series of dismissal stipulations and an earlier round of dispositive motions leave just three Defendants remaining. The previous round of dispositive motions was addressed in *Brennan v. Cass Cnty. Health, Human and Veteran Servs.,* No. 21-cv-1900 (ECT/LIB), 2022 WL 1090604 (D. Minn. Apr. 11, 2022), and familiarity with that order is presumed here.

Two motions require adjudication: (1) Defendants Cass County Health, Human and Veteran Services (the "Department") and Marsha McMillen, a Cass County social worker, seek dismissal of Brennan's operative Amended Complaint on jurisdictional and merits grounds. Their motion will be granted. The *Rooker-Feldman* doctrine precludes the exercise of subject-matter jurisdiction over Brennan's claims against these Defendants. If that weren't correct, these claims would fail on multiple merits grounds. (2) Defendant PSJ Acquisition, which does business as Prairie St. John's Hospital in Fargo, North Dakota, seeks summary judgment against Brennan's medical-malpractice claim[1] on the ground that Brennan failed to comply with a North Dakota medical-malpractice expert-disclosure statute. The motion will be granted. The better answer is that the North Dakota statute applies, and there is no dispute Brennan did not comply with it.

[1] Brennan also asserted § 1983 claims against PSJ, but those claims were dismissed in the first round of dispositive motions. *Brennan,* 2022 WL 1090604, at *4- 7.

I

A

One might reasonably ask whether the dismissal motion filed by the Department and McMillen is procedurally proper. These two Defendants answered on October 20, 2021, ECF No. 38, and filed their motion roughly nine months later, ECF No. 87, relying in part on Rule 12(6)(6). "Technically, however, a Rule 12(b)(6) motion cannot be filed after an answer has been submitted." *Westcott v. City of Omaha,* 901 F.2d 1486, 1488 (8th Cir. 1990); Fed. R. Civ. P. 12(b) ("A motion asserting any of these defenses [including a motion under (b)(6)] must be made before pleading if a responsive pleading is allowed.").

The motion is nonetheless proper for essentially two reasons. First, it raises an issue of subject-matter jurisdiction (under the *Rooker-Feldman* doctrine), and that issue may be raised "at any time." Fed. R. Civ. P. 12(h)(3). Second, insofar as the merits are concerned, the motion relies on Rule 12(c) in addition to Rule 12(b)(6). Even if a Rule 12(b)(6) motion is untimely, the failure-to-state-a-claim defense may be raised in a later-filed Rule 12(c) motion. Fed. R. Civ. P. 12(h)(l), (2); *see CRST Expedited, Inc. v. TransAm Trucking, Inc.,* No. C16-52-LTS, 2018 WL 2016273, at *4 (N.D. Iowa Mar. 30, 2018).

B

Both the jurisdictional and merits aspects of the Department and McMillen's dismissal motion are evaluated under the Rule 12(b)(6) standards. The jurisdictional challenge is appropriately evaluated

under Rule 12(b)(1), but this distinction makes no difference here. The Department and McMillen challenge only the Amended Complaint's sufficiency and rely only on materials embraced by the pleadings, making theirs a "facial" challenge to subject-matter jurisdiction. *Branson Label, Inc. v. City of Branson,* 793 F.3d 910, 914 (8th Cir. 2015). In analyzing a facial challenge, a court "restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6)." *Osborn v. United States,* 918 F.2d 724, 729 n.6 (8th Cir. 1990) (citations omitted). And a motion for judgment on the pleadings under Rule 12(c) is assessed under the same standard as a motion to dismiss under Rule 12(b)(6). *Ashley Cnty. v. Pfizer, Inc.,* 552 F.3d 659, 665 (8th Cir. 2009).

In reviewing a motion to dismiss for failure to state a claim under Rule 12(b)(6), a court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *Gorog v. Best Buy Co.,* 760 F.3d 787, 792 (8th Cir. 2014) (citation omitted). Although the factual allegations need not be detailed, they must be sufficient to "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). The complaint must "state a claim to relief that is plausible on its face." *Id.* at 570.

"A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). Allegations establishing "a sheer possibility that a defendant has acted unlawfully" are not sufficient. *Blomker v. Jewell,* 831 F.3d 1051, 1055

(8th Cir. 2016) (quotation omitted). As our Eighth Circuit Court of Appeals explained in *Gregory v. Dillard's, Inc.:*

> [A] plaintiff must assert facts that affirmatively and plausibly suggest that the pleader has the right he claims ..., rather than facts that are merely consistent with such a right. While a plaintiff need not set forth detailed factual allegations or specific facts that describe the evidence to be presented, the complaint must include sufficient factual allegations to provide the grounds on which the claim rests. A district court, therefore, is not required to divine the litigant's intent and create claims that are not clearly raised, and it need not conjure up unpled allegations to save a complaint.

565 F.3d 464, 473 (8th Cir. 2009) (en banc) (cleaned up).

C

The Department and McMillen seek dismissal on a jurisdictional ground: they argue that the *Rooker-Feldman* doctrine bars Brennan's claims against them. "In the two decisions for which the doctrine is named, *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923), and *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), the Court established the narrow proposition that with the exception of habeas corpus proceedings, the inferior federal courts lack subject-matter jurisdiction over 'cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court

proceedings commenced and inviting review and rejection of those judgments.'" *In re Athens/Alpha Gas C01p.,* 715 F.3d 230, 234 (8th Cir. 2013) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280, 284 (2005)). "This conclusion follows from 28 U.S.C. § 1257, which grants to the Supreme Court exclusive jurisdiction over appeals from state-court judgments." *Id.* at 234; *see also Exxon Mobil,* 544 U.S. at 283 ("Federal district courts ... are empowered to exercise original, not appellate, jurisdiction."). In *Exxon Mobil,* the Supreme Court noted that inferior federal courts had sometimes applied the *Rooker-Feldman* doctrine too broadly, "overriding Congress' conferral of federal-court jurisdiction concurrent with jurisdiction exercised by state courts, and superseding the ordinary application of preclusion law pursuant to 28 U.S.C. § 1738," the Full Faith and Credit Act. *Exxon Mobil,* 544 U.S. at 283. To check the lower federal courts' enthusiasm for the *Rooker-Feldman* doctrine, the Supreme Court made clear that the doctrine applies only to cases filed in federal court by the losing party in state court "complaining of an injury caused by the state-court judgment" that "call[ ] upon the District Court to overturn an injurious state-court judgment." *Id.* at 291-92. Importantly, the Court also explained that § 1257 does not "stop a district court from exercising subject-matter jurisdiction simply because a party attempts to litigate in federal court a matter previously litigated in state court. If a federal plaintiff 'present[s] some independent claim, albeit one that denies a legal conclusion that a state court has reached in a case to which he was a party..., then there is jurisdiction and state law determines whether the defendant prevails under principles of preclusion.'" *Id.* at 293 (quoting *GASH Assocs. v. Rosemont,* 995 F.2d 726, 728 (7th Cir. 1993)).

Some cases present straightforward *Rooker-Feldman* questions while others are more difficult. *See Athens/Alpha,* 715 F.3d at 234 (observing that "the scope of the *Rooker- Feldman* doctrine, even as narrowly described in *Exxon Mobil,* is sometimes fuzzy on the margins"); *Dodson v. Univ. of Ark. for Med. Scis.,* 601 F.3d 750, 756 (8th Cir. 2010) (Melloy, J. concurring) ("Indirect appeals from state-comi judgments have been more controversial."). Examples are instructive. Consider *Caldwell v. DeWoskin,* 831 F.3d 1005 (8th Cir.2016). There, the plaintiff, Caldwell, sued his ex-wife (Lavender) and her attorney (DeWoskin) in a federal district court alleging they had violated the automatic stay by continuing to seek enforcement of a judgment of dissolution against Caldwell, including contempt sanctions, in Missouri state court after Caldwell had filed for bankruptcy. *Id.* at 1006-08. The Missouri state court "decided the automatic stay did not prevent it from holding Caldwell in contempt, and so held." *Id.* at 1007. The Missouri Court of Appeals later reversed the contempt judgment on grounds other than the automatic stay. *Id.* The federal district court entered summary judgment against Caldwell, determining that it lacked subject-matter jurisdiction under the *Rooker-Feldman* doctrine, *id.* at 1008, and the Eighth Circuit reversed, *id.* at 1008-09. The Eighth Circuit explained: "Whether the doctrine applies depends on whether a federal plaintiff seeks relief from a state court judgment based on an allegedly erroneous decision by a state court-in which case the doctrine would apply-or seeks relief from the allegedly illegal act or omission of an adverse party." *Id.* at 1008 (citing *Hageman v. Barton,* 817 F.3d 611, 615 (8th Cir. 2016)). Caldwell sought only "compensation for injuries he allege[d] were caused by

the actions DeWoskin and Lavender took to enforce the state court's [judgment] after the automatic stay was in place." *Id.* at 1009. The Eighth Circuit concluded that "Caldwell's claims are not barred by *Rooker-Feldman* because they challenge the actions taken by DeWoskin and Lavender 'in seeking and executing the [state contempt orders],' rather than the state court orders themselves." *Id.* (quoting *Riehm v. Engelking,* 538 F.3d 952, 965 (8th Cir. 2008); *see also Hageman v. Barton,* 817 F.3d 611, 614 (8th Cir. 2016) (recognizing that the *Rooker-Feldman* doctrine "is limited in scope and does not bar jurisdiction over actions alleging independent claims arising from conduct m underlying state proceedings"); *Robins v. Ritchie,* 631 F.3d 919, 925 (8th Cir. 2011.) (recognizing that *Rooker-Feldman* applies "if the federal claims can succeed only to the extent the state court wrongly decided the issues before it").

Informative here, the Seventh Circuit has held in a series of persuasive decisions that "[t]he claim that a defendant in a [federal] civil rights suit 'so far succeeded in com1pting the state judicial process as to obtain a favorable judgment' is not barred by the *Rooker-Feldman* doctrine." *Loubser v. Thacker,* 440 F.3d 439, 441 (7th Cir. 2006) (quoting *Nesses v. Shepard,* 68 F.3d 1003, 1005 (7th Cir. 1995)); *see also Newman v. State of Ind.,* 129 F.3d 937, 940-41 (7th Cir. 1997); *Jackson* v. *Gardner,* 42 F.3d 1391 (7th Cir. 1994) (table); *cf. Dennis v. Sparks,* 449 U.S. 24 (1980). As that court explained in *Nesses:*

> Were [the plaintiff] merely claiming that the decision of the state court was incorrect, even that it denied him some constitutional tight, the doctrine would

> indeed bar his claim. But if he claims, as he does, that people involved in the decision violated some independent right of his, such as the right (if it is a right) to be judged by a tribunal that is uncontaminated by politics, then he can, without being blocked by the *Rooker-Feldman* doctrine, sue to vindicate that right and show as part of his claim for damages that the violation caused the decision to be adverse to him and thus did him harm. Otherwise there would be no federal remedy for a violation of federal rights whenever the violator so far succeeded in corrupting the state judicial process as to obtain a favorable judgment[.]

68 F.3d at 1005 (internal citations omitted).

The claims Brennan asserts against the Department and McMillen are entirely barred by *Rooker-Feldman.* Brennan's only discernable claim against the Department and McMillen is for wrongful confinement under 42 U.S.C. § 1983 and the Fourteenth Amendment. Am. Compl. [ECF No. 6] ¶¶ 1, 26-35. She alleges no facts connecting the Department or McMillen to her claims that she was wrongfully prescribed and forcibly administered neuroleptic medication, *see id.* ¶¶ 36-47, or for medical malpractice, *see id.* ¶¶ 48-53. With respect to her wrongful confinement claim, Brennan alleges only that McMillen, while employed by the Department, filed the initial Petition for Judicial Commitment in Cass County District Court on August 24, 2019, *id.* ¶ 20, and that the Cass County District Court's resulting

commitment orders were "unlawfully obtained...without regard to the statutory requirements or protocols[,]" *id.* ¶ 31. Alleging that McMillen's Petition did not give the Cass County District Court a legally sufficient "statutory" basis to enter its commitment orders seems the same thing as saying the Cass County District Court should have denied the Petition and that the court's commitment decisions were incorrect under Minnesota law. Importantly, Brennan alleges no facts suggesting that the Department or McMillen did anything in the state court that might have violated some independent right belonging to Brennan. Brennan does not allege, for instance, that McMillen acted in some way before the state district court that might independently (and plausibly) have violated Brennan's constitutional rights. Thus alleged, Brennan's constitutional claims here "succeed only to the extent the state court wrongly decided the issues before it[,]" *Robins,* 631 F.3d at 925, which means they can't get past *Rooker-Feldman.*[2]

Brennan advances two arguments against application of the *Rooker-Feldman* doctrine, but neither is persuasive. Brennan first argues that she lacked a meaningful opportunity in the state court "to defend herself from the allegations made against her." Pl.'s Mem. in Opp'n [ECF No. 94] at 10. This expresses

[2] The relief Brennan requests confirms the understanding that Brennan merely claims the Cass County District Court's decisions were incorrect. Apart from damages for wrongful confinement, Brennan seeks expungement of "all prior commitment related proceedings involving [her,]" *id.* at 15, 5 (following request for relief), including the 2019 commitment. By definition, a request for expungement seeks to undo some prior, official action. *See Expunge,* Black's Law Dictionary (11th ed. 2019). Here, that could only occur by reversing or somehow undoing the state-court commitment orders.

a procedural due process concern, but Brennan here neither asserts a procedural due process claim nor alleges facts suggesting such a theory in her Amended Complaint. Second, relying on *Simes v. Huckabee,* 354 F.3d 823 (8th Cir. 2004), Brennan argues that her failure to pursue federal claims in the state court means that *Rooker-Feldman* cannot prevent her from pursuing federal claims in this case. Pl.'s Mem. in Opp'n at 10. Brennan is correct in one sense: the court in *Simes* held that "the *Rooker-Feldman* doctrine does not bar federal claims brought in federal court when a state court previously presented with the same claims declined to reach their merits." 354 F.3d at 830. The record here does not show that Brennan presented her federal claims to the state court. Regardless, what distinguishes *Simes* from this case is the presence there of claims alleging that various defendants took actions in the state court process that allegedly violated the plaintiffs' rights under "a host of federal statutory and constitutional" provisions. *Id.* at 826. The *Simes* plaintiffs, in other words, alleged violations of their independent rights. Brennan doesn't do that here.

Because *Rooker-Feldman* bars them, Brennan's claims against the Department and McMillen will be dismissed without prejudice. *See Roiger v. Veterans Affs. Health Care Sys.,* No. 18-cv-591 (ECT/TNL), 2019 WL 572655, at *4 (D. Minn. Feb. 12, 2019) (collecting authorities for proposition that a dismissal for lack of subject-matter jurisdiction is without prejudice).

D

If *Rooker-Feldman* did not bar Brennan's wrongful-confinement claim against the Department

and McMillen, the claim would be barred under *Heck v. Humphrey,* 512 U.S. 477 (1994), and binding Eighth Circuit authorities construing the *Heck* bar. This is so for the same reasons discussed in the prior opinion. *See Brennan,* 2022 WL l090604, at *6. Brennan argues only that *Heck* does not apply to civil commitment proceedings. Pl.'s Mem. in Opp'n at 11-12. This is not correct. *See Thomas v. Eschen,* 928 F.3d 709, 711-13 (8th Cir. 2019).[3]

E

If neither *Rooker-Feldman* nor *Heck* barred Brennan's claims, they would fail on their merits for at least three alternative reasons.

First, Cass County Health, Human and Veteran Services is not an entity that may be sued. Under Federal Rule of Civil Procedure 17(b)(3), parties that are not individuals or corporations may be sued depending on "the law of the state where the court is located." Thus, this Court looks to Minnesota state law to determine whether a municipal entity may be sued. Under Minnesota state law, "every municipality is subject to liability for its torts and those of its officers, employees and agents acting within the scope of their employment or duties whether arising out of a governmental or proprietary function." Minn. Stat. §466.02 (2014). A "county" is a "municipality" and thus may be sued. *See* Minn. Stat. §466.01, subdiv. l (2014)

[3] The prior opinion analyzed the *Heck* bar as a merits – that is, a non-jurisdictional – question. Whether *Heck* poses a jurisdictional bar remains an open question in the Eighth Circuit, however. *See Baca v. City of Parkville,* No. 5:19-cv-06057-RK., 2022 WL 1477445, at *5-6 (W.D. Mo. May 10, 2022) (citing competing authorities and concluding that the *Heck* bar is jurisdictional).

("municipality means ... any county"); Minn. Stat. § 373.01, subdiv. l(a)(l) (2014) ("[e]ach county is a body politic and corporate and may sue and be sued"). But courts in this District have repeatedly held that under Minnesota law, county human services departments are not entities that may be sued. *See Doe v. Mower Cnty. Health & Hum. Servs. Off Child Support,* l 8-cv-3221 (WMW/KMM), 2019 WL 3570870, at *3 (D. Minn. May 13, 2019), *R. & R. adopted,* 18-cv-3221 (WMW/KMM), 2019 WL 3824256 (D. Minn. Aug. 15, 2019) ("[C]ourts consistently hold that arms of local governments, such as county departments or county agencies, are not subject to suit."); *Simon v. Anoka Cnty. Soc. Servs.,* No. 12-cv-2754 (SRN/JSM), 2014 WL 6633077, at *7 (D. Minn. Nov. 21, 2014) ("Although the actions of a county department or commission 'may subject the county itself to liability, [a county department or commission] itself is not a proper defendant subject to suit in a section 1983 lawsuit.'"); *Jones v. Brown Cnty. Fam. Servs.,* No. ll-cv-568 (SRN/FLN), 2011 WL 3165052, at *I (D. Minn. June 30, 2011), *R. & R. adopted,* No. l 1-cv-568 (SRN/FLN), 2011 WL 3163308 (D. Minn. July 27, 2011) (holding that Brown County Family Services Department is not an entity that may be sued); *Follis v. Minn. Atty. Gen.,* No. 08-cv-1348 (JRT/RLE), 2010 WL 3399674, at *7 (D. Minn. Feb. 16, 2010), *R. & R. adopted,* No. 08-cv-1348 (JRT/RLE), 2010 WL 3399958 (D. Minn. Aug. 26, 2010); *Neudeck.er v. Shakopee Police Dep 't,* No. 07-cv-3506 (PJS/JJG), 2008 WL 4151838, at* 11 (D. Minn. Sept. 3, 2008), *aff'd,* 355 Fed. Appx. 973 (8th Cir. 2009); *see also Hyatt v. Anoka Police Dep't,* 700 N.W.2d 502, 505 (Minn. Ct. App. 2005) ("While a municipal corporation such as the city has the authority to sue and be sued, its departments have not been given that specific authority."). Under these authorities, Cass

County Health, Human and Veteran Services is not an entity subject to suit, and the claims against it would have to be dismissed on this ground.[4]

Second, to the extent she is named in her individual capacity, McMillen enjoys absolute immunity from claims arising from her initiation of the commitment proceedings against Brennan. As discussed earlier, the sole basis for Brennan's claims against the Department and McMillen appears to be the initiation of commitment proceedings against Brennan, her resulting confinement, and Brennan's assertion that this violated her constitutional rights. McMillen's actions in this regard are protected by absolute immunity, which stems from the absolute prosecutorial immunity that protects county attorneys and their assistants when they are acting within the scope of their prosecutorial authority. *See McCuen v. Polk Cnty.,* 893 F.2d 172, 174 (8th Cir. 1990). This "immunity[] extend[s] to cover all acts undertaken in the role of advocate in the judicial phase of criminal proceedings." *Williams v. Hartje,* 827 F.2d 1203, 1208 (8th Cir. 1987). The specific conduct which Brennan appears to contend violated her rights occurred in McMillen's role as a social worker initiating commitment proceedings. In this regard, McMillen 's role is "functionally comparable to that of a prosecutor." *See Charnesky v. Welsh,* No. l 8-cv- 2748 (ECT/KMM), 2019 WL 6464143, at *4 (D. Minn. Dec. 2, 2019) (quoting *Thomason v. SCAN Volunteer Servs., Inc.,* 85 F.3d 1365, 1373 (8th Cir. 1996) (other citations omitted)); *Abdouch v. Burger,* 426 F.3d 982, 986 (8th Cir. 2005) (affirming that "social workers [are] analogous to prosecutors and therefore entitled to

[4] Brennan does not address this issue in her opposition brief.

absolute immunity for their initiation of judicial proceedings"). Brennan argues that a "social worker is not a prosecutor." Pl.'s Mem. in Opp'n at 8. But she does not address the cited authorities saying that social workers in this context share the same absolute immunity as prosecutors.

Third, if Brennan means to assert a *Monell* claim against Cass County, she has not alleged facts plausibly showing the County has a relevant custom, policy, or practice. Brennan at times indicates that she intends to sue McMillen under § 1983 in her official capacity. "A suit against a government official in his or her official capacity is 'another way of pleading an action against an entity of which an officer is an agent.'" *Baker v. Chisom,* 501 F.3d 920, 925 (8th Cir. 2007) (quoting *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 690 n.55 (1978)). "Official-capacity liability under 42 U.S.C. *§* 1983 occurs only when a constitutional injury is caused by 'a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.'" *Gladden v. Richbourg,* 759 F.3d 960, 968 (8th Cir. 2014) (quoting *Monell,* 436 U.S. at 694). The Amended Complaint includes no allegations suggesting that the County's legal violations in civil-commitment proceedings resulted from a custom, policy, or practice. Brennan confirms this in her opposition brief. There, she makes clear that her claims depend only on actions taken in her commitment proceeding, not on some broader policy or practice:

> The plaintiff is claiming in her Complaint that the defendants Cass County and Marsha McMillan [sic], a social worker

> employed by Cass County Social Services, a department of Cass County, had the plaintiff wrongfully confined and transported without her consent to Prairie St. John's Hospital in Fargo, North Dakota, where she was administered harmful, neuroleptic drugs against her consent. The commitment proceedings brought by Marsha McMillan [sic] were in violation of the governing Minnesota statute which requires a finding that a person must be ham1ful to oneself or to others.

Pl.'s Mem. in Opp'n at 4; *see also id.* at 7 (arguing that McMillen departed from statutory guidelines). *See, e.g., Gutierrez v. Hoffman,* No. 19-cv-2857 (ECT/ECW), 2020 WL 5249566, at *2 (D. Minn. Sept. 3, 2020) ("Gutierrez's Complaint fails to state a claim against Defendants in their official capacities because he pleads only that Defendants did *not* follow official policy when he was removed from the vocational work program. ...Gutierrez alleges no facts 'plausibly suggesting that the alleged failure to follow the Vocational Programming Policy was the result of any such policy or custom.'"); *see also Slaven v. Engstrom,* 848 F. Supp. 2d 994, 1009 (D. Minn. 2012), *aff'd* 710 F.3d 772 (8th Cir. 2013) (on summary judgment, plaintiffs failed to show county policy or custom was the "moving force" behind a constitutional violation where they had "not adduced any evidence that any arguable constitutional violation caused by Hennepin County, as opposed to the State of Minnesota, was anything more than a single and isolated incident of what may have been zealous prosecution and overstatement of facts, rather than a policy or custom

of such conduct"). Having alleged (at most) a single incident, Brennan has not plausibly alleged a *Monell* claim.

II

PSJ Acquisition's summary-judgment motion against Brennan's medical-malpractice claim raises one primary issue: Do Minnesota's choice-of-law factors favor applying a North Dakota statute that required Brennan to serve "an affidavit containing an admissible expert opinion to support a prima facie case of professional negligence within three months of the commencement of the action"? N.D. Cent. Code§ 28-01-46. Brennan does not argue that she complied with the statute, so if the answer to this question is "yes," PSJ's summary-judgment motion must be granted. I conclude that the North Dakota statute applies here based on essentially the same analysis applied in *Perry, Tr. for Sherrell* v. *Beltrami Cnty.,* 520 F. Supp. 3d 1115 (D. Minn. 2021). Therefore, PSJ's summary- judgment motion will be granted, and, in accord with the statute, Brennan's medical-malpractice claim against PSJ will be dismissed without prejudice.

Summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" only if its resolution might affect the outcome of the suit under the governing substantive law. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). A dispute over a fact is "genuine" only if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "The evidence of the non-movant is to be believed, and all justifiable

inferences are to be drawn in his favor." *Id.* at 255.

The facts regarding Brennan's admission to, and treatment at, Prairie St. John's Hospital in Fargo, North Dakota, are described in the prior order, and familiarity with them is presumed here. *See Brennan,* 2022 WL 1090604 at *2. Brennan's medical malpractice claim against PSJ is based on this treatment. *See* Am. Compl. ¶¶ 50-51. Brennan commenced this action by filing her original Complaint on August 23, 2021. ECF No. 1; Fed. R. Civ. P. 3. To her Complaint, Brennan attached an "Affidavit of Expert Review" signed under penalty of perjury by her attorney, stating in relevant part:

> Pursuant to Minn. Stat. § 145.682 Subd. 3(a), I have reviewed the facts of this case with an expert with over twenty years of experience in psychiatric diagnosis and treatment. The expert that I consulted has the qualifications which provide a reasonable expectation that her opinion will be admissible at trial. In her expert opinion, the defendants deviated from the applicable standard of care by those actions that have caused injury to the plaintiff.

ECF No. 1-2 if 3. The record does not show, and Brennan seems to acknowledge, that she neither served nor filed any other affidavit describing proffered expert testimony. *See* Angell Decl. [ECF No. 68] ¶ 2 ("As of the date of this Declaration, Plaintiff Catherine Brennan has not served an affidavit containing an admissible expert opinion to support a prima facie case of medical malpractice against PSJ, identifying the name and business address of the

expert, indicating the expert's field of expertise, and containing a brief summary of the basis for the expert's opinion."). Nor has Brennan requested an extension of time in which to do so.

"A federal court exercising supplemental jurisdiction over state law claims in a federal question action must apply the substantive law of the forum state, including its choice-of-law rules." *CPI Card Grp., Inc. v. Dwyer,* 294 F. Supp. 3d 791, 813 (D. Minn. 2018) (citing *MRO Commc'ns, Inc. v. Am. Tel. & Tel. Co.,* 197 F.3d 1276, 1282 (9th Cir. 1999) ("In a federal question action where the federal court is exercising supplemental jurisdiction over state claims, the federal court applies the choice-of-law rules of the forum state...."). Courts in Minnesota follow a three-step process to answer choice-of-law questions. "[T]he first consideration is whether the choice of one state's law over another's creates an actual conflict." *Jepson v. Gen. Cas. Co. of Wis.,* 513 N.W.2d 467, 469 (Minn. 1994). If a conflict exists, the next question is "whether the law of both states can be constitutionally applied"-i.e., whether each state has "a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair." *Id.* at 469- 70 (quoting *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 312-13 (1981)). If the answer to both of these threshold questions is "yes," then the court applies five "choice influencing factors" to determine which state's law should apply: "(1) predictability of result; (2) maintenance of interstate and international order; (3) simplification of the judicial task; (4) advancement of the forum's governmental interest; and (5) application of the better rule of law." *Id.* at 470 (citing *Milkovich v. Saari,* 203 N.W.2d 408, 412 (1973)).

Minnesota and North Dakota law on expert affidavits in medical malpractice actions conflict in relevant and substantive ways. Though both states require medical malpractice plaintiffs to provide expert support for a claim during the litigation process, the two states' laws differ as to substance and timing of that support. Minnesota law states, in relevant part:

> Subd. 2. **Requirement.** In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must: (1) unless otherwise provided in subdivision 3, clause (2), serve upon defendant with the summons and complaint an affidavit as provided in subdivision 3; and (2) serve upon defendant within 180 days after commencement of discovery under the Rules of Civil Procedure, rule 26.04(a) an affidavit as provided by subdivision 4.
>
> Subd. 3. **Affidavit of expert review.** The affidavit required by subdivision 2, clause (1), must be by the plaintiff's attorney and state that:
>
> (1) the facts of the case have been reviewed by the plaintiff's attorney with an expert whose qualifications provide a reasonable expectation that the expert's

opinions could be admissible at trial and that, in the opinion of this expert, one or more defendants deviated from the applicable standard of care and by that action caused injury to the plaintiff; or

(2) the expert review required by clause (1) could not reasonably be obtained before the action was commenced because of the applicable statute of limitations. If an affidavit is executed pursuant to this paragraph, the affidavit in clause (1) must be served on defendant or the defendant's counsel within 90 days after service of the summons and complaint.

Subd. 4. **Identification of experts to be called.** (a) The affidavit required by subdivision 2, clause (2), must be signed by each expert listed in the affidavit and by the plaintiff's attorney and state the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expe1t is expected to testify, and a summary of the grounds for each opinion. Answers to interrogatories that state the information required by this subdivision satisfy the requirements of this subdivision if they are signed by the plaintiff's attorney and by each expert listed in the answers to interrogatories and served upon the defendant within

> 180 days after commencement of discove1y under the Rules of Civil Procedure, rule 26.04(a).

Minn. Stat. § 145.682 subds. 2-4. Failure to comply with the affidavit requirement in subdivision 2, clause (1) results in "mandatory dismissal with prejudice," but only if the plaintiff has not provided the expert review affidavit "within 60 days after demand for the affidavit." *Id.* § 145.682, subd. 6(a); *Judah v. Ovsak,* 550 F. Supp. 3d 687, 706-07 (D. Minn. 2021) (citations omitted). North Dakota law provides a tighter timeframe for a slightly different affidavit:

> Any action for injury or death alleging professional negligence by a physician, nurse, hospital, or nursing, basic, or assisted living facility licensed by this state or by any other health care organization, including an ambulatory surgery center or group of physicians operating a clinic or outpatient care facility, must be dismissed without prejudice on motion unless the plaintiff serves upon the defendant an affidavit containing an admissible expert opinion to support a prima facie case of professional negligence within three months of the commencement of the action. The court may set a later date for serving the affidavit for good cause shown by the plaintiff if the plaintiff's request for an extension of time is made before the expiration of the three-month period following commencement of the action. The expert's affidavit must

> identify the name and business address of the expert, indicate the expert's field of expertise, and contain a brief summary of the basis for the expert's opinion. This section does not apply to unintentional failure to remove a foreign substance from within the body of a patient, or performance of a medical procedure upon the wrong patient, organ, limb, or other part of the patient's body, or other obvious occurrence.

N.D. Cent. Code § 28-01-46. These statutes obviously conflict in ways that are relevant here.

There is no realistic question that both states' laws could be constitutionally applied. Minnesota and North Dakota possess significant contacts with the facts giving rise to Brennan's claim. Brennan seems to argue that North Dakota law may not constitutionally be applied because her transfer to North Dakota was either unnecessary or improper. Brennan asserts that she was sent "across state lines to bypass the state statutes enacted to protect persons like her," that "Prairie St. John's Hospital consented to the jurisdiction of Minnesota courts, state and federal, by accepting her as a patient with knowledge that she was transferred from a Minnesota hospital," and that "[b]ecause [Brennan's] stay was against her will as part of a confinement ostensibly authorized by Minnesota statute, the injections of neuroleptic medications were also governed by Minnesota law." ECF No. 73 at 5-6. Brennan cites no authority that might support her position, and none of these assertions undermines the extent of the Minnesota

and North Dakota contacts associated with her claim. In other words, leaving aside the choice influencing factors, Brennan's assertions give no reason to think that application of North Dakota law to a malpractice claim against a North Dakota healthcare provider for treatment given in a North Dakota hospital would be arbitrary or fundamentally unfair.

The next step, then, is to apply Minnesota's choice-influencing factors. *See Jepson,* 513 N.W.2d at 470. *Perry* applied North Dakota's statutory cap on non-economic damages to a medical malpractice / wrongful death claim brought against Sanford Medical Center after a Beltrami County (Minnesota) inmate was treated at Sanford in Fargo, North Dakota, and later died from "untreated Guillian-Barre Syndrome." 520 F. Supp. 3d at 1122-26. The following analysis, derived largely from *Perry,* results in a like conclusion here.

As in *Perry,* the first, third, and fifth factors are largely irrelevant in the present analysis. *See id.* at 1122. "The first factor, predictability of results, applies primarily to consensual transactions, and not to torts." *Strohn v. Xcel Energy Inc.,* 353 F. Supp. 3d 828, 833 (D. Minn. 2018) *(citing Nesladek v. Ford Motor Co.,* 876 F. Supp. 1061, 1068 (D. Minn. 1994)). This is because "[t]he objective of the predictability factor is to fulfill the parties' justified expectations," and tort actions, which generally "stem from unplanned accidents," do not implicate those expectations. *Lommen v. City of East Grand Forks,* 522 N.W.2d 148, 150 (Minn. Ct. App. 1994). The third factor, "simplification of the judicial task," is also rarely significant in tort cases, at least when, as here, "the law of either state [can] be applied without

difficulty." *Jepson,* 513 N.W.2d at 472; *see also Burk<; v. Abbott Labs.,* 639 F. Supp. 2d 1006, 1013 (D. Minn. 2009); *NodakMut. Ins. Co. v. Am. Fam. Mut. Ins. Co.,* 604 N.W.2d 91, 95 (Minn. 2000) (stating that this factor "has not been given much weight in" Minnesota Supreme Court precedent).[5] The fifth factor, the "better rule of law," does not apply at all when a court can resolve a choice-of-law question using the other four factors, and in any event, it is less significant when the conflict at issue involves state statutes, rather than common law. *See Whitney v. Guys, Inc.,* 700 F.3d 1118, 1124 (8th Cir. 2012) (addressing competing statutes of limitations and noting that "[l]egislatures rather than courts are best positioned to assess the comparative merits of the competing policy concerns" involved). The analysis depends on the second and fourth factors.

The second factor, "maintenance of interstate order," concerns "whether the application of Minnesota law would manifest disrespect for North Dakota's sovereignty or impede the interstate movement of people and goods." *Jepson,* 513 N.W.2d at 471. The primary focus is on the contacts that each competing state has with the dispute. "[W]here a state 'has little or no contact with a case and nearly all of the significant contacts are with a sister state, the factor suggests that a state should not apply its own law to the dispute.'" *Burks,* 639 F. Supp. 2d at 1013

[5] Minnesota courts have said "that the judicial task is obviously simplified when a Minnesota court applies Minnesota law," *Jacobson v. Universal Underwriters Ins. Grp.,* 645 N.W. 2d 741, 746 (Minn. Ct. App. 2002) (citation omitted), but because the conflict here is straightforward, applying Minnesota law would not be any simpler. *See Nesladek v. Ford Motor Co.,* 46 F.3d 734, 739 (8th Cir. 1995).

(quoting *Hughes v. Wal-Mart Stores, Inc.,* 250 F.3d 618, 620-21 (8th Cir. 2001)); *accord Johnson v. Parrish Tire Co.,* No. 06-cv-2267 (MJD/SRN), 2009 WL 10677525, at *5 (D. Minn. Mar. 30, 2009) ("[M]aintenance of interstate order weighs in favor of the state that has the most significant contacts with the facts relevant to the litigation."). In tort cases, the location of the accident may be an especially relevant contact, *see Strohn,* 353 F. Supp. 3d at 833 (applying Minnesota law because the defendant company provided a product in Minnesota and the product "caused significant personal injury and property damage in Minnesota"), but "the mere fortuity of an accident's location is not necessarily dispositive," *Sportsman v. California Overland, Ltd.,* No. 17-cv-1064 (DWF/KMM), 2018 WL 1865930, at *4 (D. Minn. Apr. 18, 2018).[6]

Minnesota and North Dakota both have somewhat significant contacts with Brennan's medical malpractice claim against PSJ, though North Dakota's contacts are stronger. True, Brennan is a Minnesota resident. She first visited a healthcare provider in Minnesota, but she alleges that she suffered injuries resulting from PSJ's malpractice in North Dakota. To the extent that Brennan alleged medical malpractice against any other health care provider, those claims have been extinguished. *See* ECF Nos. 48, 93. PSJ is a North Dakota resident, and all of PSJ's alleged wrongful conduct occurred in North Dakota. Under these circumstances, this factor supports applying North Dakota law.

[6] Courts applying the interstate-order factor also consider whether there is evidence of forum shopping. *See Jepson,* 513 N.W.2d at 471. There is no indication of forum shopping here.

The fourth factor asks "which choice of law most advances a significant interest of the forum." *Nodak Mut. Ins. Co.,* 604 N.W.2d at 95 (citation omitted). "It 'requires analysis not only of Minnesota's governmental interest, but also of [North Dakota's] public policy.'" *Murray v. Cirrus Design C01p.,* 2019 WL 1086345, at *3 (quoting *Blake Marine Grp. v. CarVal lnvs. LLC,* 829 F.3d 592, 596 (8th Cir. 2016); *see also Lommen,* 522 N.W.2d at 152 (considering "the relative policy interests of the two states"). "When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, ... clearly the law of the interested state should be applied." *NodakMut. Ins. Co. v. Am. Fam. Mut. Jns. Co.,* 590 N.W.2d 670,674 (Minn. Ct. App. 1999) (citation omitted). But in a tort case in which multiple states have a legitimate interest and there is no clear winner, "the state where the accident occurred has the strongest governmental interest." *Burks,* 639 F. Supp. 2d at 1013-14 (citation omitted).

Minnesota and North Dakota both have significant interests at play here. The parties agree that the legislative purpose of the expert-affidavit requirement is to eliminate frivolous or nuisance lawsuits. *See* Def.'s Mem. in Supp. [ECF No. 66] at 12; Pl.'s Mem. in Opp'n [ECF No. 73] at 4. Both Minnesota and North Dakota, in regulating their health care industry, have an interest in eliminating frivolous medical malpractice suits at an early stage of the proceedings. But PSJ resides in North Dakota, and any damages award would mainly affect that state's health care system. North Dakota and Minnesota have just prescribed different timeframes for complying with the expert-affidavit requirement. That the alleged medical malpractice occurred in

North Dakota also slightly favors applying that state's law, even if the fortuitous nature of the conduct's location would not independently require that result. *See Burks,* 639 F. Supp. 2d at 1013-14. Considering these factors, North Dakota has the stronger interest.

Brennan raises three counterarguments, all of which are unavailing. First, as noted above, Brennan argues that her stay in North Dakota was against her will and "part of a continuous course of treatment that began in the emergency room of a Minnesota hospital" that was "part of a confinement ostensibly authorized by Minnesota statute," and thus Minnesota law governs the medical malpractice claim. ECF No. 73 at 5-6. Brennan cites no case to support this argument. *Perry* rejected a comparable argument. 520 F. Supp. 3d at 1126 (explaining that "[w]hen a court is resolving a conflict of laws, however, state interests take on greater importance"). Second, Brennan argues that Minnesota's expert-affidavit statute should apply because "procedural rules of the forum state govern." ECF No. 73 at 6. This is not correct. Federal, not state, procedural rules govern federal cases, and numerous corn1s have determined that North Dakota and Minnesota's expert-affidavit requirements apply in federal court under *Erie. See LaFromboise v. Leavitt,* 439 F.3d 792, 793, 796 (8th Cir. 2006) (applying North Dakota statute); *Weasel v. St. Alexius Med. Ctr.,* 230 F.3d 348, 350-51 (8th Cir. 2000) (same); *Christianson v. McLean Cnty.,* No. 1:21-cv- 073, 2022 WL 888454, at *1-2 (D.N.D. Mar. 25, 2022) (same); *Moore v. Cass Cnty. Jail Med. Dep't,* No. 3:08-cv-124, 2009 WL I 0707085, at *2 (D.N.D. Jan. 9, 2009) (same); *Vogel v. Turner,* No. l 1-cv-0446 (PJS/JJG), 2012 WL 5381788, at *3 (D. Minn. Nov. 1, 2012) ("Other judges in this district have found-and this Court agrees-that the

affidavit- of-expert-review requirement of § 145.682 is a substantive, not a procedural, requirement.") (citing *Ellingson v. Walgreen Co.,*78 F. Supp. 2d 965, 968 (D. Minn. 1999); *Oslund v. United States,* 701 F. Supp. 710, 712-14 (D. Minn. 1988); *cf Flores v. United States,* 689 F.3d 894, 899-900 (8th Cir. 2012)). Finally, Brennan argues that she complied with the Minnesota statute. In view of the determination that the North Dakota statute applies, this argument misses the mark.

To summarize, Minnesota's choice-of-law factors favor applying North Dakota's expert-affidavit requirement to Brennan's medical malpractice claim against PSJ. Brennan has not complied with that statute. She has filed no "affidavit containing an admissible expert opinion to support a prima facie case of professional negligence within three months of the commencement of the action." N.D. Cent. Code § 28-01-46. She has made no request for an extension of time to do so, much more a "request ... before the expiration of the three-month period following commencement of the action." *Id.* In accord with the statute, Brennan's claim against PSJ will be dismissed without prejudice.

ORDER

Based on the foregoing, and on all the files, records, and proceedings herein, **IT IS ORDERED THAT:**

1. Defendant Cass County Health, Human and Veteran Services and Marsha McMillen's motion to dismiss [ECF No. 87] is **GRANTED** for lack of subject-matter jurisdiction. Plaintiff's claims against Cass County Health, Human and Veteran Services

and Marsha McMillen are **DISMISSED WITHOUT PREJUDICE.**

2. Defendant PSJ Acquisition, LLC's motion for summary judgment [ECF No. 64] is **GRANTED.** Plaintiff's medical malpractice claim against PSJ Acquisition, LLC (Count 3) is **DISMISSED WITHOUT PREJUDICE.**

3. In light of the stipulation and related Order, filed at ECF Nos. 85 and 93, Defendant Dr. David Anderholm's motion to dismiss [ECF No. 70] is **DENIED** as moot.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: January 6, 2023 s/ Eric C. Tostrud
Eric C. Tostrud
United States District Court