

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELIZABETH MORT and ALEX)	
RODRIGUEZ,)	
)	C.A. No.: 10-01438
Plaintiffs,)	
)	
v.)	
)	
LAWRENCE COUNTY CHILDREN)	
AND YOUTH SERVICES; LAWRENCE)	
COUNTY, CHRISSY MONTAGUE, Lawrence)	
County Children and Youth Services)	
Caseworker; and JAMESON HEALTH)	
SYSTEM, INC.)	
)	
Defendants.)	

MOTION TO DISMISS PURSUANT TO RULE 12(b)(6)

AND NOW comes one of the defendants, Jameson Health System, Inc., by and through its attorneys, Dickie McCamey & Chilcote, P.C., John C. Conti, Esquire, Richard J. Kabbert, Esquire, and J. Brian Lynn, Esquire, and hereby submits the following Motion to Dismiss Pursuant to Rule 12(b)(6):

I. BACKGROUND

1. Plaintiffs' case revolves around Jameson Health System, Inc.'s (hereinafter Jameson) reporting of a pregnant mother's (plaintiff Elizabeth Mort) positive drug test result for opiates to Lawrence County Children and Youth Services ("CYS"), and the subsequent decision of CYS to seek to have the plaintiffs' child temporarily taken into protective custody.

2. On April 26, 2010, plaintiff Mort was admitted to Jameson for the delivery of her child. (Amended Complaint at ¶35.)¹

3. Shortly after admission, plaintiff Mort voluntarily submitted a urine sample for drug testing, pursuant to the policy of Jameson. (Amended Complaint at ¶36.)

4. The initial urine drug screen, and the confirmatory drug test, were both positive for opiates, a known narcotic. (Amended Complaint at ¶38.)

5. Jameson informed CYS that plaintiff tested positive for opiates. (Amended Complaint at ¶45.)

6. Plaintiff Mort was discharged from Jameson on April 29, 2010, and plaintiffs and their child returned to their home.

7. On April 30, 2010, CYS petitioned the Court of Common Pleas of Lawrence County for an order permitting the child to be taken into emergency protective custody. (Amended Complaint at ¶54.)

8. The Court issued an order allowing the child to be taken into protective custody. (Amended Complaint at ¶60.) Accordingly, on April 30, 2010, plaintiffs' child was removed from plaintiffs' home. (Amended Complaint at ¶61.) Sometime after plaintiffs' child was taken into protective custody, plaintiff Mort alleged that she failed the drug test at Jameson because she consumed a bagel containing poppy seeds before her drug test.

9. On May 5, 2010, CYS indicated its intent to dismiss its petition for emergency custody, and plaintiffs' child was returned to their home. (Amended Complaint at ¶86.)

10. On December 1, 2010, plaintiffs filed a four (4) count Amended Complaint, which directs three (3) counts against Jameson: (1) conspiracy to violate plaintiffs' Fourteenth

¹ Defendant neither admits nor denies the allegations in plaintiffs' Amended Complaint, and they are merely set forth in order for the Court to determine whether or not plaintiffs' claims are subject to dismissal pursuant to Rule 12(b)(6).

Amendment rights; (2) negligence; and (3) false light invasion of privacy. For the reasons that follow, all of plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6).

II. STANDARD OF REVIEW

11. A Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) challenges the sufficiency of the allegations in the Complaint.

12. Under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), a claim must be dismissed pursuant to Rule 12(b)(6) if the plaintiff fails to allege "enough facts to state a claim to relief that is plausible on its face." *See also Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir. 2008).

13. A Court will not accept bald assertions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations. *See In re Rockefeller Ctr. Props., Inc. Secs. Litig.*, 311 F.3d 198, 215 (3d Cir. 2002); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 n. 8 (3d Cir. 1997). Nor must the court accept legal conclusions set forth as factual allegations. *Twombly*, 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265 (1986)).

14. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* "Factual allegations must be enough to raise a right to relief above the speculative level." *Id.*

III. ARGUMENT

A. Plaintiffs' federal conspiracy claim should be dismissed because plaintiffs fail to plead the requisite elements of this claim.

15. In Count II, plaintiffs assert a claim of "Conspiracy to Violate Plaintiffs' Fourteenth Amendment Rights."

16. Plaintiffs' Amended Complaint alleges that defendants, including Jameson, "entered into a combination, agreement or understanding to violate plaintiffs' constitutional rights under the Fourteenth Amendment by carrying out, through Jameson, a policy of drug-testing all obstetrical patients, which resulted in the removal of plaintiffs' child from their custody without reasonable suspicion that she had been abused or was in imminent danger of abuse." (Amended Complaint at ¶101.)

17. Plaintiffs further allege that "[t]he aforementioned conspiracy violates 42 U.S.C. § 1983." (Amended Complaint at ¶105.) Plaintiffs, however, fail to sufficiently plead a claim under § 1983, and as such, this claim must be dismissed.²

18. It is well established that in order to state a claim under § 1983, a plaintiff must allege that the defendant was acting "under color of state law" with respect to the allegedly unconstitutional deprivation. *Great Western Mining & Mineral Company v. Fox Rothschild, LLP*, 615 F.3d 159 (3d Cir. 2010).

19. Under specific circumstances, a private party can be deemed a state actor. "[A] private party's joint participation with state officials in the seizure of disputed property is sufficient to characterize that party as a 'state actor' for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (U.S. 1982).

20. Under these circumstances, the conduct may be characterized as a conspiracy to violate a plaintiff's rights under 42 U.S.C. § 1983. However, "[a] private action is not converted into one under color of state law merely by some tenuous connection to state action." *Growman v. Township of Manalpan*, 47 F.3d 628, 638 (3d Cir. 1995).

² To the extent plaintiffs claim, in the alternative, that they are asserting a conspiracy under 42 U.S.C. § 1985, this claim also fails because plaintiffs are required to plead that the defendants' conspiracy was "motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons of the equal protection of the laws." *Slater v. Susquehanna Cnty.*, 613 F.Supp.2d 653, 661 (M.D. Pa. 2009); *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). Plaintiffs fail to make any such allegation.

21. In order to plead conspiracy under § 1983, a plaintiff must allege sufficient facts **suggesting that there was a mutual understanding among the conspirators to take actions directed toward an unconstitutional end.** *DiNicola v. DiPaolo*, 945 F.Supp. 848, 856 (W.D. Pa. 1996) (emphasis added). “[A] bare assertion of conspiracy will not suffice.” *Twombly*, 550 U.S. at 556.

22. Moreover, in order to plead conspiracy adequately, “**a plaintiff must set forth allegations that address the period of the conspiracy, the object of the conspiracy, and the certain actions of the alleged conspirators taken to achieve that purpose.**” *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1166 (3d Cir. 1989), *abrogated on other grounds by Beck v. Prupis*, 529 U.S. 494 (2000).

23. In the instant matter, plaintiffs fail to meet the requisite requirements for pleading a conspiracy.

24. Plaintiffs do not allege that the drug testing of plaintiff Mort violated her constitutional rights. Indeed, plaintiffs concede that plaintiff Mort voluntarily submitted a urine sample for drug testing. (Amended Complaint at ¶36.)

25. The entire basis for plaintiffs’ Fourteenth Amendment claim is the temporary taking of plaintiffs’ child into protective custody. There are no factual allegations, however, regarding the object of a conspiracy between these defendants and the deprivation of plaintiffs’ rights, i.e., no allegations that Jameson conspired with CYS for the purpose of having plaintiffs’ baby taken into protective custody.

26. Moreover, there are no allegations that Jameson’s drug testing policy was done for the purpose of a conspiracy between defendants to have plaintiffs’ child taken into protective

custody. In fact, Jameson's involvement was reporting the results of the test. Jameson did not participate in any manner with any decision as to how those results were to be used by CYS.

27. Again, the only underlying factual allegations are that Jameson had a policy of drug testing pregnant mothers and a policy of reporting positive drug test results to CYS.

28. These allegations are entirely insufficient to demonstrate that these defendants conspired to take plaintiffs' child into protective custody, and accordingly, plaintiffs' Fourteenth Amendment claim (Count II) must be dismissed.

WHEREFORE, defendant, Jameson Health System, Inc., respectfully requests that this Honorable Court dismiss Count II of plaintiffs' Amended Complaint as to Jameson Health System, Inc.

B. The state law claims should be dismissed because Jameson is immune from liability under 23 P.S. § 6318 of the Child Protective Services Law.

29. In Count III of plaintiffs' Amended Complaint, plaintiff Mort asserts a "negligence" claim against Jameson.

30. In Count IV, plaintiff Mort asserts a "false light invasion of privacy" claim based on the reporting of the drug test results.

31. These state law claims must be dismissed, because Jameson is immune from liability for state law claims based on the immunity provision of the Child Protective Services Law. *See* 23 P.S. § 6318.

32. "[T]he purpose of the Child Protective Services Law is to bring about quick and effective reporting of suspected child abuse . . . and to prevent further abuse of the children . . ." *In the Interest of J.R.W.*, 631 A.2d 1019, 1021 (Pa. Super. 1993).

33. There are various issues that require reporting to an appropriate county agency, including reporting of an infant who is born and identified as being affected by illegal substance

abuse, and circumstances in which it is suspected that a child is a victim of child abuse. 23 P.S. §§ 6311 & 6386. There are potential criminal penalties for failing to report. 23 P.S. § 6319.

34. In order to promote the goals of the CPSL, it provides immunity for various persons and entities, including hospitals, under a broad array of circumstances:

(a) GENERAL RULE.-- **A person, hospital, institution, school, facility, agency or agency employee that participates in good faith in the making of a report, whether required or not, cooperating with an investigation,** including providing information to a child fatality or near fatality review team, testifying in a proceeding arising out of an instance of suspected child abuse, the taking of photographs or the removal or keeping of a child pursuant to section 6315 (relating to taking child into protective custody), and any official or employee of a county agency who refers a report of suspected abuse to law enforcement authorities or provides services under this chapter, **shall have immunity from civil and criminal liability that might otherwise result by reason of those actions.**

(b) PRESUMPTION OF GOOD FAITH.-- For the purpose of any civil or criminal proceeding, the good faith of a person required to report pursuant to section 6311 (relating to persons required to report suspected child abuse) and of any person required to make a referral to law enforcement officers under this chapter shall be presumed.

23 P.S. § 6318.

35. Importantly, the statute provides immunity for “the making of a report, whether required or not.” 23 P.S. § 6318 (emphasis added).

36. The state law claims revolve solely around Jameson’s reporting of plaintiff Mort’s drug test results regarding opiates.

37. By providing a good faith report to CYS related to the welfare of a child, Jameson is immune from the state law claims under 23 P.S. § 6318.

38. Moreover, plaintiffs’ Amended Complaint concedes that the drug test results demonstrated that they were positive for opiates. (Amended Complaint at ¶42.)

39. Claims barred by immunity may be properly dismissed on a Rule 12(b)(6) motion. *Wallace v. Abell*, 318 Fed. Appx. 96, 99 (3d Cir. 2009) (affirming dismissal of claims under Rule 12(b)(6) based on immunity); *Williams v. City of Phila.*, 2010 U.S. Dist. LEXIS 76164 (E.D. Pa. 2010) (“Dismissal under Rule 12(b)(6) is proper when a doctrine of immunity . . . bars the suit.”); *Whitfield v. City of Philadelphia*, 587 F. Supp. 2d 657, 668 n.17 (E.D. Pa. 2008) (stating that immunity may be raised in a Rule 12(b)(6) motion). Moreover, claims regarding immunity under the CPSL have been dismissed at the pleadings stage. *See Fewell v. Besner*, 664 A.2d 577 (Pa. Super. 1995) (affirming dismissal of state law claim on preliminary objections based on the CPSL immunity provision); *Heinrich v. Conemaugh Valley Memorial Hospital*, 648 A.2d 53 (Pa. Super. 1994) (same).

40. For the reasons set forth above, Jameson is immune from liability on the state law claims of negligence and false light invasion of privacy (Counts III and IV), and as such, these claims should be dismissed.

WHEREFORE, defendant, Jameson Health System, Inc., respectfully requests that this Honorable Court dismiss Counts III and IV of plaintiffs’ Amended Complaint.

C. The negligence claim should be dismissed because plaintiffs are not entitled to recover emotional damages in the absence of physical injury.

41. In the negligence claim (Count III) plaintiffs allege that plaintiff Mort “suffered harm, including but not limited to, emotional and psychological pain and suffering and injury to her reputation.” (Amended Complaint at ¶113.)

42. There are no allegations, however, regarding physical injuries suffered by plaintiff Mort.

43. “In an action for negligence there can be no recovery for mental suffering except it be founded upon physical injury . . .” *Corcoran v. McNeal*, 161 A.2d 367, 373 (Pa. 1960) (emphasis added).

44. Because there are no allegations of physical injury, the negligence claim must be dismissed.

45. In the alternative, even if the “negligence” count is treated as a negligent infliction of emotional distress claim, plaintiffs’ claim must be dismissed.

46. In order to sustain a cause of action for negligent infliction of emotional distress, again, a plaintiff must demonstrate some type of physical injury. *Banyas v. Lower Bucks Hospital*, 437 A.2d 1236, 1239-40 (Pa. Super. 1981); *Abadie v. Riddle Memorial Hospital*, 589 A.2d 1143 (Pa. Super. 1991). Plaintiffs’ claim fails in this regard.

47. For the reasons set forth above, the negligence claim (Count III) must be dismissed.

WHEREFORE, defendant, Jameson Health System, Inc., respectfully requests that this Honorable Court dismiss Count III of plaintiffs’ Amended Complaint.

D. The false light invasion of privacy claim should be dismissed because there was no “publicity,” a requisite element for a false light claim.

48. In Count IV of plaintiffs’ Amended Complaint, plaintiff Mort asserts a “false light invasion of privacy” claim against Jameson.

49. Importantly, one of the requirements that must be met for a false light claim, and any invasion of privacy claim, is that the false information be given “publicity”:

The interest protected by this Section is the interest of the individual in not being made to appear before the public in an objectionable false light or false position. . . .” Restatement (Second) of Torts § 652E, comment b. **The rule is also limited by the requirement that the false information be given**

"publicity." This "publicity" differs from the "publication" which is required in connection with liability for defamation. **"Publicity," as an element of the tort of invasion of privacy, "means that the matter is made public, by communicating it to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge."** Restatement (Second) of Torts, § 652D, comment a.

Curran v. Children's Service Center, Inc., 578 A.2d 8, 12 (Pa. Super. 1990) (emphasis added); *see also Vogel v. W. T. Grant Co.*, 327 A.2d 133 (Pa. 1974) (citing W. Prosser, Handbook of the Law of Torts § 117, at 810 (4th ed. 1971)) ("The disclosure . . . must be a public disclosure, and not a private one; there must be, in other words, publicity. It is an invasion of his rights to publish in a newspaper that the plaintiff does not pay his debts, or to post a notice to that effect in a window on the public street, or to cry it aloud in the highway, but not to communicate the fact to the plaintiff's employer or to any other individual, or even to a small group . . .").

50. Where publicity is lacking (or is insufficiently alleged), a plaintiff's false light claim is subject to dismissal. *Vogel v. W. T. Grant Co.*, 327 A.2d 133 (Pa. 1974); *Burger v. Blair Medical Associates*, 964 A.2d 374, 379 (Pa. 2009).

51. **There was no publication of the drug test results to the public at large, or to so many persons that the matter must be regarded as substantially certain to become one of public knowledge.**

52. Indeed, plaintiffs' Amended Complaint avers that the drug test results were merely communicated by Jameson to CYS. (Amended Complaint at ¶115.)

53. Jameson's communication of these results solely to CYS, rather than the public at large, renders dismissal of the false light claim appropriate. *See Burger, supra; Vogel, supra.*

WHEREFORE, defendant, Jameson Health System, Inc., respectfully requests that this Honorable Court dismiss Count IV of plaintiffs' Amended Complaint.

E. **The false light invasion of privacy claim should be dismissed because no false information was reported.**

54. In addition to the lack of publicity, no false information was publicized.

55. Plaintiffs concede that the drug test results were positive and that “[t]he confirmation test indicated the presence of morphine at a level of 501 ng/mL . . .” (Amended Complaint at ¶42.)

56. Accordingly, the information reported to CYS, i.e., a drug test indicating the presence of opiates was true and cannot be deemed “false” information.

WHEREFORE, defendant, Jameson Health System, Inc., respectfully requests that this Honorable Court dismiss Count IV of plaintiffs’ Amended Complaint.

s/ Richard J. Kabbert

John C. Conti
PA I.D. # 28071

Richard J. Kabbert
PA I.D. # 85521

J. Brian Lynn
PA I.D. # 204086

DICKIE, MCCAMEY & CHILCOTE, P.C.
Firm #067
Two PPG Place, Suite 400
Pittsburgh, PA 15222-5402
(412) 281-7272

Attorneys for Defendant,
Jameson Health System, Inc.

CERTIFICATE OF SERVICE

I, Richard J. Kabbert, Esquire, hereby certify that a true and correct copy of the foregoing Motion to Dismiss has been filed this 30th day of December, 2010, by electronic filing through the Court's CM/ECF electronic filing system, to be served by operation of the Court's electronic system upon the following:

Antoinette C. Oliver, Esquire
Patricia L. Dodge, Esquire
Quinn A. Johnson, Esquire
Meyer, Unkovic & Scott, LLP
1300 Oliver Building
Pittsburgh, PA 15222
Attorney for Plaintiffs

Sara Rose, Esquire
ACLU
313 Atwood Street
Pittsburgh, PA 15214
Attorney for Plaintiffs

Marie Milie Jones, Esquire
Meyer, Darragh, Buckler, Bebenek & Eck
600 Grant Street
U.S. Steel Tower, Suite 4850
Pittsburgh, PA 15219
Attorney for Lawrence County Children and Youth Services; Lawrence County; and Chrissy Montague

DICKIE, MCCAMEY & CHILCOTE, P.C.

s/ Richard J. Kabbert

Richard J. Kabbert

Attorneys for Defendant,
Jameson Health System, Inc.